THE SCRIVENER

WORD UP!

By Scott Moïse

I came home a week ago to find a happy surprise in the mail: a friend had sent a non-fiction book, titled *The Surgeon of Crowthorne: A Tale of Murder, Madness, and the Love of Words*, about the making of the Oxford English Dictionary. "The OED," as we dictionary nerds affectionately call it, took 50 years to amass, using the help of thousands of word-loving volunteers—including an American doctor who performed his word research while serving as an inmate in an English asylum for the criminally insane. Published in 1857, the original 10-volume OED was a labor-intensive project that traced the origin and meaning of every word in the English language *without having the benefit of the internet*. My word! (pun intended)

For the other word-loving members of the South Carolina Bar, see how many of the following words you can match up with their definitions.

1. "**Penny Dreadfuls**" are **(a) members of an all-female motorcycle gang based in Los Angeles who were accused of kidnapping a city councilman, (b) crime magazines or novels, (c) synthetic opioid medications developed as designer drugs**.

ANSWER: (b)

Penny dreadfuls, like today's video games, fall into the category of "violent entertainment." Several years ago, a California federal district court permanently enjoined a state law imposing restrictions and labeling requirements on the sale or rental of "violent video games" to minors. The Ninth Circuit upheld the injunction. In an opinion authored by Justice Antonin Scalia, the Supreme Court affirmed the lower courts' decisions, holding that video games qualified for First Amendment protection. The Court's opinion traced the history of violent entertainment (including *Grimm's Fairy Tales* and *The Odyssey*) and litigation resulting from violent entertainment such as comic books and movies. In so doing, the Court noted that "[i]n the 1800's, dime novels depicting crime and 'penny dreadfuls' (named for their price and content) were blamed in some quarters for juvenile delinquency." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 797 (2011).

The Supreme Court was likely referring to an 1895 case in England in which two teenaged boys stabbed their mother to death. In the family's parlor, police found some smoking guns: a collection of penny dreadfuls. When the coroner's jury delivered its verdict, it took the opportunity to place some blame on the penny dreadfuls: "We consider that the Legislature should take some steps to put a stop to the inflammable and shocking literature that is sold, which in our opinion leads to many a dreadful crime being carried out." The coroner agreed, saying that "[t]here can't be any difference of opinion about that." *See* Kate Summerscale, *Penny dreadfuls: the Victorian equivalent of video games*, The Guardian (Apr. 30, 2016), www.theguardian.com/books/2016/apr/30/penny-dreadfuls-victorian-equivalent-video-games-kate-summerscale-wicked-boy.

2. Cameron's client went **(a) Scot-free, (b) Scott-free, (c) scot-free, (d) scot free, (d) scott free after a store's video proved a case of mistaken identity**.

ANSWER: (c)

The term "scot-free" is defined as "being completely free from obligation, harm, or penalty." Merriam-Webster Online Dictionary ["Merriam Webster"], (Aug. 10, 2019, 12:44 PM), www.merriam-webster.com/dictionary/scot-free).

A common misconception is that the phrase is based on the landmark U.S. Supreme Court case *Dred Scott v. Sanford* or that it pertains to Scottish people, but according to the aforementioned OED, the word "scot" is actually an archaic definition meaning "tax or tribute paid by a feudal tenant to his or her lord or ruler in proportion to ability to pay; a similar tax paid to a sheriff or bailiff." Caroline Bologna, *This Is Why We Say "Scot-Free" (And Not "Scott Free")*, Huffington Post (Dec. 4, 2018), www.huffpost.com/entry/scot-free-scott-free-donald-trump_n_5c05a550e4b07aec57519c5f.

Notice that, according to the dictionary, scot-free is hyphenated.

3. Christopher filed an appeal within 10 days of the final **(a) judgement, (b) judgment**.

ANSWER: (b)

Actually, both spellings are correct, but—especially for legal writing—"judgment" without the "e" is preferred. *See* Bryan A. Garner, *Garner's Modern American Usage* 490 (3d ed. 2009). I could locate no court opinions that used the "e," and this may shock you, but *The Washington Post* says that using the "e" in the legal context "will make many readers think less of you." *See* Eugene Volokh, *Judgment or Judgement?*, Washington Post (Aug. 16, 2017), *www.washingtonpost.com/news/volokh-conspiracy/wp/2017/08/16/judgment-or-judgement/*. Simply unbearable.

4. Everything was going well until Judge Young began a barrage of questions, and then our argument

began **(a) floundering, (b) flounding, (c) foundering**.

ANSWER: (a)

Most people have no trouble with flounder (a fish) and founder (a person who establishes something) as nouns. Verbs, however, are a different story.

First of all, "flounding" is not a word. Deciding between the two remaining choices is difficult because the words sound alike, look alike, and—when describing your performance in court—you would prefer to use neither word. The difference is a matter of just how badly things went.

"Flounder" means to stumble or act clumsily, whereas "founder" connotes a complete failure. *See* Merriam Webster, Usage Notes, (Aug. 10, 2019, at 10:10 a.m.), www.merriam-webster.com/words-at-play/can-a-ship-flounder.

In other words, I can flounder around and then go on to completely founder, but not vice-versa. *Compare U.S. Dep't of Health & Human Servs. v. Smitley*, 347 F.3d 109, 128 (4th Cir. 2003) ("[D]espite reasonable efforts on his part, his chiropractic practice **floundered** for thirteen years and finally folded.") *with United States v. Hargas*, 908 F.2d 968, 968 (4th Cir. 1990) ("The enterprise **foundered**, however, when the two principals ran out of leasing companies to victimize.").

Getting back to my argument before Judge Young, I began to flounder (struggle) under his questioning, but at least in my hypothetical, we never completely foundered (failed).

5. Although the solicitor **(a) use to, (b) used to** take big notebooks into court for oral arguments, these days, she usually just takes her laptop or iPad.

ANSWER: (b)

"Used to" refers to something familiar or routine ("Mark is used to traveling to Seattle for his job with Boeing.") or something that happened repeatedly in the past ("Babs used to play golf a lot more before she got so busy."). *See* Merriam-Webster, Usage Notes, *Is It "Used To" or "Use To"?*, (Aug. 11, 2019 at 8:08 a.m.), www.merriam-webster.com/words-at-play/is-it-used-to-or-use-to.

"Use to" usually occurs with the word "did," describing something that occurred in the past but no longer happens anymore ("Did Elliot use to clerk with Judge Joe Anderson?"). *Id*.

6. You could tell that the judge felt **(a) bad, (b) badly** about sentencing the mother to a prison sentence, but the law left her no choice.

ANSWER: (a)

Use "bad" after a form of the verb "to feel" *unless* you are describing a situation in which you literally cannot feel an object, such as if your fingers were heavily bandaged or missing.

General rule: The general rule is to use an adverb ending in -ly to modify a verb. Use an adjective (no -ly) to modify a noun.

- The airport is a *bad* place to pre-

tend to have a weapon. ("Bad" modifies the noun "place.")
- The entire Advanced Legal Writing class performed *badly* on the Complaint assignment. ("Badly" modifies the verb "performed.")

Exception to the general rule: Generally, use an adjective with linking verbs. The main linking verbs are forms of to be, feel, seem, look, appear, smell, taste, and sound.
- Judge McCoy feels *bad* about sentencing the mother.
- The break room refrigerator smells *bad*.
- Chicken livers look *bad* and taste *bad*.
- The audio in the courtroom sounded *bad*.

7. "**Argle-bargle**" is **(a) a confused mixture, (b) an illegal imitation of other artistic works by combining parts of more than one work to make a new work, (c) an often noisy or angry expression of differing opinions**.

ANSWER: (c)

"Argle-bargle" gained notoriety when Justice Scalia included the term in a roaring dissent of the majority opinion upholding the Defense of Marriage Act:

> As I have said, the real rationale of today's opinion, whatever disappearing trail of its legalistic **argle-bargle** one chooses to follow, is that DOMA is motivated by " 'bare . . . desire to harm' " couples in same-sex marriages.

United States v. Windsor, 570 U.S. 744, 799 (2013) (Scalia, J., dissenting). In this context, Justice Scalia was referring to the other justices' different positions to support the Act, and he was not trying to be particularly polite about it.

Justice Scalia did not make up the word. It comes from the Scottish "argy-bargy," which means a "lively discussion" or "a relatively amicable, if somewhat heated argument." *See* Rebecca Greenfield, *The Brouhaha Behind "Argle Bargle": A Linguistic Explanation*, The Atlantic (June 26, 2013) (www.theatlantic.com/national/archive/2013/06/brouhaha-behind-argle-bargle-linguistic-explanation/313862/).

For logophiles (lover of words), "argle-bargle" is a "rhyming duplication," which is defined as "a word formation process by which some part of a base (a segment, syllable, morpheme) is repeated, either to the left, or to the right, or, occasionally, in the middle." *Id.* Other examples are helter-skelter, hokey-pokey, itsy-bitsy, and willy-nilly.

Justice Scalia was not the only judge to use the term in an opinion, as it appears in almost 30 published opinions, mostly in Texas, where apparently a lot of argle-bargling goes on.

8. I exercised my **(a) inalienable, (b) unalienable** right to embarrass my brother in front of a large group of people by telling a story from our childhood involving watermelons not belonging to my brother, a watermelon stand, and Sheriff I. Byrd Parnell.

ANSWER: Both (a) and (b)

Both words mean "incapable of being alienated, surrendered, or transferred."

The Declaration of Independence states, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." In Thomas Jefferson's early drafts of the Declaration, however, he had written that our rights were "inalienable," and the quotation inscribed on the Jefferson memorial also says "inalienable." *See* Valerie Strauss, *Are our rights "inalienable" or "unalienable"?*, Washington Post (July 4, 2015), www.washingtonpost.com/news/answer-sheet/wp/2015/07/04/are-our-rights-inalienable-or-unalienable/.

Although Bryan Garner's indispensable dictionary, *Garner's Modern American Usage*, relates that "inalienable" is the preferred word unless referring to the Declaration of Independence, both are correct and are used interchangeably by the courts. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2640 (2015) ("Our Nation was founded upon the principle that every person has the **unalienable** right to liberty, but liberty is a term of many meanings.") (Alito, J., dissenting) (emphasis added); *Jowers v. S.C. Dep't of Health & Envtl. Control*, 423 S.C. 343, 368–69, 815 S.E.2d 446, 459–60 (2018) ("In its current form, the public trust doctrine protects the public's '**inalienable** right to breathe clean air; to drink safe water; to fish and sail, and recreate upon the high seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks.' ") (emphasis added).

So, word up, everybody! And what does "word up" mean, other than being a major funk '80s song by Cameo that was later covered by the metal band Korn? You will need to go look it up in the *Urban Dictionary*, not the OED. Dictionaries can make you cool.