

Legislative Technique: Various Matters

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Even among lawyers there is widespread ignorance of the technique used in drafting and promulgating legislation. Lord Molson described it to the Renton Committee as 'an arcane art', and few would disagree. As an attempt to aid understanding, this article inaugurates an occasional series in which points of legislative technique (mainly raised by current cases) will be critically examined. My fellow-draftsmen should not object to this kind of scrutiny: our art is not perfect, and can always be improved. For statute users generally it might be instructive to see how and why a particular type of difficulty arises.

Two points should be stressed at the outset. The first is that the judge's view of statute law tends to be reminiscent of the medical man's view of human health or the policeman's view of morality. The specialist is called in only when something has gone wrong. Consequently he tends to have a jaundiced outlook.

The other preliminary point is that drafting errors should not necessarily be blamed on the draftsman. He ought to use his imagination to spot deficiencies in his draft; in particular to detect ways in which it will fail to provide adequately for foreseeable events. But where there is a deficiency it may be there not because the draftsman has failed to spot it but because he has not been allowed to correct it.

One Offence, One Section

Compression of language is one of the vices of statute law. It can cause especial difficulty when used in the drafting of offence-creating provisions on which juries have to be directed. One of the most troublesome of these compressed provisions was laid to rest by the Criminal Law Act 1977 after an active life of 47 years. It originally appeared as section 11(1) of the Road Traffic Act 1930, and provided that 'If a person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public....he shall be guilty of an offence'. Was this one offence or two - or even three? How far was *mens rea* required? Refreshingly free of such difficulties is the replacing provision (s 2 of the Criminal Law Act). In its entirety it reads: 'A person who drives a motor vehicle on a road recklessly shall be guilty of an offence'. It is safest for draftsmen to adopt the motto: one offence, one section (or subsection).

Asifism

A technique favoured by draftsmen wishing to extend a statutory rule relevant only to situation A so that it applies also to situation B is to say in the extending Act that situation B shall be treated 'as if' it were situation A.

An example of 'asifism' (as it might be called) came before the Court of Appeal in *R v Singh*, *The Times*, August 11, 1978. Section 6(1) of the Bail Act 1976 makes absconding from bail an offence 'punishable either on summary conviction or as if it were a criminal contempt of court'. The defence argued that the Crown Court judge had no power to impose a custodial sentence because the statutory hypothesis did not extend to a supposition that the notional contempt was committed *in the face of the court*. The Court of Appeal disagreed, but the

point would not have been arguable if the draftsman had roundly declared that unreasonable failure to surrender bail 'is a criminal contempt in the face of the court'.

It may be retorted that neither would the point have been arguable if the draftsman had said 'punishable....as if it were a criminal contempt committed in the face of the court'. This is true, but may the draftsman not have got confused by his own hypothesis? If the doctrine of criminal contempt of court is being extended is it not better to say so? The legal undergrowth is becoming populated by half-creatures who are neither one thing nor the other. Does the list of criminal contempts now include absconding from bail or does it not? Thanks to asifism no unqualified answer can be given.

Hide and Seek

The answer is in the legislation, but the court fails to find it, a not uncommon occurrence, which arose in two cases in November 1977. In *Lewis v Lewis*, *The Times* November 3, 1977 the Court of Appeal drew attention to what it believed to be a lacuna in the Domestic Violence and Matrimonial Proceedings Act 1976. No provision had been made spelling out the powers of a judge in relation to a person against whom an injunction coupled with a power of arrest had been granted under the Act. Failing that provision, the court drew such inferences about its implied powers as it was able and gave judgment accordingly. Two days later the court announced that it had been mistaken. The powers in question were spelt out in rules of court the existence of which the judges and counsel in the case had been unaware of. In particular the rules stressed the need for caution in attaching a power of arrest. The court undertook to revise its mistaken judgment 'in due course'.

In the other case, *Harper and North West Water Authority* [1978] ICR 844, the error was by an industrial tribunal. Mr Harper claimed compensation for not having been offered 'reasonably comparable' employment on the abolition of two part-time local government posts held by him in conjunction. One of them carried a salary of £6,555, the other of £1,103. The tribunal (by majority) regarded the relevant regulations (the Local Government (Compensation) Regulations 1974) as requiring them to disregard the lesser-paid of Mr Harper's two posts in deciding whether he had been offered reasonably comparable employment and found against him. On appeal, Forbes J pointed out that the tribunal had overlooked regulation 39. This provided, where one post was offered in exchange for two, that the salary of the new post should be treated as apportioned so that a proper comparison could be made. Application of regulation 39 clearly led to a finding in Mr Harper's favour and his appeal therefore succeeded.

Such incidents underline the need to improve methods of locating statutory provisions. If the court itself gets lost what chance has the hapless litigant?

Opportunity Missed

Where a statute confers a new power on the courts it is important for the draftsman to give as much guidance as possible on how the power is intended to be used. Is it to any extent in derogation of the court's existing powers, or are these to continue to be exercised exactly as before? Is the new power intended to be utilised wherever practicable, or only occasionally? Key questions such as this should not be left to be resolved only after much trial and error (a phrase particularly apt in this connection).

A recent case of lack of precision in creating a new power concerns criminal compensation orders. The general power to make compensation orders in criminal proceedings was introduced by the Criminal Justice Act 1972. This enables a court by or before which a person is convicted of an offence to order him to pay compensation to the victim for any personal injury, loss or damage resulting either from that offence or any other taken into consideration

when sentencing. The court is given this power to make an order against the criminal 'in addition to dealing with him in any other way'.

What difference (if any) was this new power intended to make to the quantification of fines? Take the case of a man guilty of criminal damage costing £20 to repair. Suppose that but for the 1972 Act (and s 8 of the Criminal Damage Act 1971, which on this point it replaced) a fine of £50 would be appropriate. Should the court now impose a fine of £30 and make a compensation order of £20? Or should the fine remain at £50, notwithstanding the making of the compensation order in addition (the compensation being regarded merely as a substitute for civil damages)?

Either view is arguable, but the point should not have been left to be argued. The 1972 Act should have made it clear (as it easily could have done) whether or not Parliament's intention was to treat the compensation order as a simple addition to the penal sanction.

As it is, the courts are in disarray over the true meaning of this provision. One commentator has gone so far as to suggest that the doubt has made courts reluctant to make compensation orders: see Martin Wasek, 'The Place of Compensation in the Legal System' [1978] Crim LR 599. He adds that 'there is a clear need to determine priorities'. For the 1972 Act has not merely left unclear the point just mentioned. It has also failed to guide the courts on whether they should regard compensation orders as desirable wherever practicable or only to be made occasionally. If there is competition between the state and the victim for the convict's limited funds, it has failed to indicate which of them is to be favoured.

Belt-and-Braces Phrases

Section 149(1) of the Companies Act 1948 requires company balance sheets and profit and loss accounts to give 'a true and fair view' of what they portray. This reflects the liking of earlier lawyers for the 'belt-and-braces' phrase. (What view can be true and unfair, or untrue and fair?) It survives, as many such phrases do, largely through inertia. Formerly it appeared also in the enactment requiring day-to-day books of accounts to be kept. Section 147 of the Companies Act 1948 stated that such books would not be deemed 'proper' if they did not give a 'true and fair view' of the company's affairs.

When in 1976 it was proposed to replace s 147 by more sophisticated provisions the antique phrase was at first retained (cl 12(1) of the Companies (No 2) Bill). An alert member of a working party set up by one of the professional bodies objected however. He pointed out that it was hard to see how the requirement in section 147 could ever have been met in practice. At any one moment of time books would not have complete entries, let alone adjustments necessary for consistency and fairness. He examined similar legislation in other countries, and found nothing corresponding to the phrase in question. The department yielded and s 12 of the Companies Act 1976 now requires current accounting records to be sufficient to 'show and explain' the company's transactions, and goes on to spell out the meaning of this in detail. The incident illustrates the contribution to legislative efficiency that can be made by outside interests.

Is 'show and explain' a newly minted belt-and-braces phrase? It is submitted not since the two words have different meanings. A strong flavour of tautology is an essential feature of this animal. Other specimens still in use are: fit and proper, harsh and unconscionable, cease and desist, just and equitable.

Humpty-Dumptyism

What is the difference between nullity and dissolution? Most people would say that a null thing is void from the outset, while a dissolved thing exists until its dissolution. That view

was departed from in the drafting of the Nullity of Marriage Act 1971 (re-enacted in ss 11 to 16 of the Matrimonial Causes Act 1973). Section 5 of the 1971 Act (now s 16 of the 1973 Act) provides that a decree in respect of a voidable marriage 'shall operate to annul the marriage only as respects any time after the decree has been made absolute and the marriage shall, notwithstanding the decree, be treated as if it had existed up to that time'. Thus was the distinction between nullity and dissolution abolished at a stroke.

In *Re Roberts decd* [1978] 1 WLR 653 The Court of Appeal held that this change in the law might very possibly give rise to anomalies, but that could not justify interpreting the statutory language otherwise than in accordance with its plain terms. One anomaly was that a will could now be automatically revoked by a 'marriage' of the testator to which he was mentally incapable of consenting. Buckley LJ said that whether that effect had been appreciated by Parliament was doubtful, but it was the inescapable effect of legislation. As we all know, when Humpty Dumpty used a word it meant what he chose it to mean. That should not apply to legislative draftsmen.

A Missed Consequential

One of the commonest drafting errors is the missed consequential. It is a principle of good drafting that the law should not be changed in a way which leaves the effect of the change on any existing rule uncertain. In a recent article, N.A.Bastin draws attention to a remarkable missed consequential in the Partnership Act 1890. The Act is usually regarded as a model of drafting, but s 3 contains a lacuna which should surely have been avoided. The section deals with the case where money is lent to the owner of a business under a contract whereby the lender is entitled to a rate of interest varying with the profits. If the owner becomes insolvent the section provides that the lender 'shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of other creditors...have been satisfied'.

But suppose the lender has taken security - for example a mortgage on land. If he forecloses to recoup his share of the profits, does this conflict with s 3? The point has given considerable trouble in practice, and the answer the courts have attempted to give is far from clear. To state the effect of s 3 on the general law of mortgages and security was a duty which surely should have been obvious to the draftsman. In parallel circumstances, the Consumer Credit Act 1974 makes it clear that the Act is not to be evaded by the use of security, and s 113 spells out exactly what this means.

Singular Includes the Plural

By s 1(1)(b) of the Interpretation Act 1889 (now s 6(c) of the Interpretation Act 1978), words in the singular include the plural, unless the contrary intention appears; a convenient rule for shortening Acts of Parliament. By Case 10 of Part II of Schedule 3 to the Rent Act 1968, a court has jurisdiction to make an order for possession of a dwelling-house where 'a person who occupied the dwelling-house as his residence (the 'owner-occupier') let it on a regulated tenancy and.....the court is satisfied that the dwelling-house is required *as a residence for the owner-occupier*'. (Emphasis added). It is not unknown for joint owners to occupy and let. It is not past imagining for one of them (but not the other) to wish later on to go back into residence. Did the draftsman of Case 10 give jurisdiction to make a possession order in such a case? Do you read Case 10 as saying 'where two persons who together occupied the dwelling-house as their residence let it on a regulated tenancy, and the court is satisfied that it is required as a residence for both of them' it can make an order, but not otherwise? In *Tilling v Whiteman* [1978] 3 WLR 137 two judges of the Court of Appeal answered yes to this question, while the third disagreed. The question turns on the meaning of 'the owner-occupier' in the passage italicised above. It is in the singular. The Interpretation Act says that unless the contrary intention appears the singular 'includes' the plural. Does that mean (where joint owner-occupiers originally let) that it should be read as *either plural or*

singular, whichever fits the facts? Is that not the natural meaning of includes? The majority in *Tilling v Whiteman* thought not, but did not explain why. Nor did they appear to think that 'the contrary intention' appeared. One more lesson for draftsmen. Only leave the Interpretation Act provision to operate unaided where the way it will operate is clear and obvious. Here it was not, and the intention in the case of joint owner-occupiers should have been spelt out.