Bennion on Statute Law – 2nd edition

Francis Bennion

Part II

Chapter Sixteen

Doubt-factor V: The Fallible Draftsman (1)

Statute law consists of words. The words are put together by an anonymous being called the draftsman. Under the British system there is usually one person who composes the text, and can be regarded as its author. Yet, as we have seen, the draftsman is far from being a free agent. Much constraint bears upon him before he begins to compose. Then his careful composition is liable to be distorted by various factors. Within the instructing Government department, administrators and their collaborating lawyers will intervene. Government ministers then have their say. In parliament, lobbyists exert pressure. Opposition members gain concessions, according to the magnitude of their political clout. The result may be a hotch-potch. The draftsman's original concept can be bent out of shape. The extent of this distortion depends on a number of considerations, including the political content of the measure, the degree of government control, and the force of the draftsman's own resolution. He can do much if determined to fight for the integrity of his contribution to the statute book; little if uninterested.

It is not widely understood that doubtful passages in statute law often owe their uncertainty to drafting errors. Books on statutory interpretation devote little space to this. Yet the truth is that if the meaning of a legislative text is obscure this is due either to one of the factors discussed in the four preceding chapters or to inadequate drafting. Here let it be made clear once and for all that in referring to drafting error we do not necessarily impute blame to the draftsman himself. Often he is helpless, overcome by forces which are, or seem to be, of greater strength. By drafting error we refer to all defects in the text which need not have been there.

Drafting errors are of many types. In this and the next two chapters we attempt to describe them, one by one. For convenience, the discussion is in

terms of *Acts,* though it applies equally to statutory instruments. As the exemplar of the legislative unit, we refer to a *section* (meaning one not broken into subsections; in other words a single proposition). Again, what is said about sections applies equally to subsections, or paragraphs in a Schedule, or any other legislative units. We are concerned with drafting errors that cause doubt as to meaning or application, and we aim to relate varieties of doubt to types of error. We begin with errors confined to the section itself. Later we discuss errors that involve another part of the Act. Finally we deal with errors related to other Acts.

Errors confined to the section itself

We consider first errors that make the text defective or garbled, including printing errors and punctuation mistakes. Next we deal with defects in meaning, including syntactic ambiguity. Logical defects follow, and then cases where the literal meaning fails to carry out the intention. Next we examine two common instances where the draftsman's intention itself is at fault, and his words go narrower or wider than the mischief or object. Following this we look at *the* problem of the incomplete text, where the draftsman has failed to say enough. Finally we consider cases where the project is misconceived through some mistake of fact, or the draftsman mounts a faulty hypothesis. (See further the section on *disorganized composition* at p 245 below.)

Garbled texts

Not infrequently, errors creep into the texts even of modern Acts. We saw in the previous chapter how there is doubt about the presence of the word 'not' in the Justices of the Peace Act 1361. In s 2 of the Justices Protection Act 1848 there is doubt about whether the words 'or order' have been omitted. The section gives certain rights where 'any conviction or order' is based on insufficient jurisdiction. The proviso states that 'no action shall be brought for anything done under such conviction or order until after such conviction shall have been quashed'. It seems obvious that 'or order' has been accidentally omitted after 'such conviction'. This view is strengthened by a later reference to a time 'after such conviction or order shall have been so quashed as aforesaid'. Yet in *O'Connor* v *Isaacs* [1956] 2 QB 288 at p 328 it was held that it could not be assumed the missing words were omitted in error, nor could they be implied.

A well-known example of a garbled text is s 8 of the Prescription Act 1832, where 'convenient' has crept in instead of 'easement' in the opening passage referring to 'any land or water upon, over or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed'. In *Laird* v *Briggs* (1881) 19 Ch D 22, 23, Jessel MR thought 'convenient' could be ignored as an absurdity.

Another familiar example occurs in s 6 of Lord Tenterden's Act, which is still in force (the Act is now called the Statute of Frauds Amendment Act 1828). The section requires production of a signed memorandum before an action can be brought 'to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character ... of any other person, to the intent or purpose that such other person may obtain credit, money or goods *upon"*. In *Lyde* v *Barnard* (1836) 1 M & W 101 the judges disagreed as to whether the italicized word should be rejected as nonsensical or the words 'such representation or assurance' should be implied as following it.

In *Green* v *Wood* (1845) 7 QB 178, 185, it was suggested that 'or execution issued' in s 2 of the Warrants of Attorney Act 1822 should be read as 'and execution levied' but the court declined to do this, preferring to say that the words had no meaning at all. On the other hand it was heldin./? \ *Oakes* [1959] 2 QB 350 that 'and' should be read as 'or' in a passage making it an offence where a person 'aids or abets *and* does any act preparatory to the commission' of another specified offence. Lord Parker CJ said that the passage as it stood was 'unintelligible'. In *Jubb* v *Hull Dock Co* (1846)9 QB 443, 455 the court found it necessary, in order to make sense of a section, to read in the words 'to the owner or party interested' between 'the sum of money to be paid' and 'for the injury done to the lands of any such party'.

Section 4(3) of the Criminal Appeal Act 1907 said: 'On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law *by the verdict* ... in substitution therefor as they think ought to have been passed . . . '. This did not allow for a plea of guilty by the accused. In *R* v *Davidson* (1909) W N 52 the court held that s 4(3) had no application to a plea of guilty and all they could do therefore was quash the sentence. This was overruled *InR* v *Ettridge* [1909] 2 KB 24, where the court held the italicized words should be treated as struck out:

> '. . . Parliament could hardly have intended that only those who should have been found guilty by a jury should be allowed to appeal against the sentence, which is not the act of the jury at all, but is fixed and awarded by the judge, whether the conviction follow on a plea of guilty or on a plea of not guilty and a verdict of guilty. We are of opinion that we may in reading this statute reject words, transpose them, or even imply words, if this be necessary to give effect to the intention and meaning of the Legislature; and this is to be ascertained from a careful reading of the entire statute' (p 28).

A similar omission occurred in s 33 of the Fines and Recoveries Act 1833, which provided that if the protector of a settlement should be convicted of felony or an infant, the Court of Chancery should be the protector 'in lieu of

the infant'. In *Re Wainwright* (1843) 1 Ph 258 the court supplied the omission by reading in a reference to the convict also. For cases where a section of an Act referred to a non-existent Schedule to the Act and, by way of converse, where a Schedule was included without its accompanying section see Craies 1971, p 514. In describing the former case *Craies* is itself in error. As Megarry VC pointed out in his book *MisceUany-at-Law* (p 342), the Act with the non-existent schedule was not the one cited by *Craies* but the Artizans and Labourers Dwellings Act (1868) Amendment Act 1879 (see s 22(3)). Megarry's book appeared in 1955, but the error was not picked up in the two subsequent editions of *Craies.* (For further examples of statutory texts garbled by the omission, insertion or displacement of words see Craies 1971 pp 86, 106-7, 110-1 and 514.)

A section may be garbled by punctuation errors. It is well-known that Sir Roger Casement was said to have been hanged by the last comma in the passage from the Treason Act 1351 quoted on p 163 *(R* v *Casement* [1917] 1 KB 98). A comma was omitted after 'justice' in s 10 of the Fugitive Offenders Act 1881. This authorized extradition to be refused if it would be unjust 'by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise'. By inserting the missing comma before 'or otherwise', the court in *R* v *Governor of Brixton Prison, Ex parte Naranjansingh* [1962] 1 QB2U greatly widened the stated grounds for refusal of extradition.

Other misplaced punctuation marks may cause difficulty. In a Canadian case the court was faced by an errant full stop which rendered the passage meaningless. They accordingly read ' . . .judicial district in this Province. The statement of claim may issue . . . ' as if it said ' . . .judicial district. In this Province the statement of claim may issue . . .' (cited Driedger 1974, p 112).

By garbling of the text we refer to mistakes which have crept in by some form of crude mishap, often a printer's error. They are not something the draftsman can ever have intended. We pass now to cases where the draftsman himself has gone wrong, and used a form of words inapt to convey his meaning.

Defects in meaning

Inefficient construction of the sentence is a prime cause of doubt. In particular, failure to make clear which words a modifier modifies and which it does not gives rise to ambiguous modification or syntactic ambiguity. Thornton gives the following examples, among others, in his book *Legislative Drafting:*

> *a public hospital or school* (is the school 'public'?)
> *a registered dentist or medical practitioner* (is the medical practitioner 'registered'?)
> *a teacher or student of mathematics* (is mathematics the teacher's subject too?)

> *an owner of gold bullion in New Zealand* (does 'in New Zealand' qualify 'owner' or 'bullion'?)

A famous syntactic ambiguity related to the words 'if need be' in the statute 4 Edw 3 c 14. By applying them to the whole sentence, instead of to the last part only, medieval kings constantly disregarded the law requiring annual parliaments to be held (see Erskine May 1976, p 57). For an alleged syntactic ambiguity in s 49(4)(fc) of the Race Relations Act 1976 see *R* v *Racial Equality Commission, ex parte Hillingdon London Borough Council* [1981] 3 WLR 520, 532; 126 Sol J 167. A remarkable example of *two* syntactic ambiguities in one phrase is to be found in rule 8(6) of the Industrial Tribunals (Labour Relations) Regulations 1974. This gives a tribunal chairman power to correct 'clerical mistakes or errors arising from accidental slip or omission'. If (which is denied) there is any difference between a 'mistake' and an 'error', does this require an error to be 'clerical'? Clearly an omission may be made otherwise than by accident (as where it is deliberate). Can the chairman correct it?

It is surprising that, despite the publicity given to the vice of syntactic ambiguity, draftsmen still fall into it so often. Section 20(1) of the Sexual Offences Act 1956 contains an elementary example. Replacing the provisions relating to abduction in s 55 of the Offences against the Person Act 1861 (which used the term 'unlawfully'), s 20(1) speaks of abduction 'without lawful authority or excuse'. Does the latter mean any excuse or only a 'lawful excuse'? It took the Court of Appeal decision *in R* v *Tegerdine* [1983] Crim LR 163 to give us the answer. It means a lawful excuse only. Even then, as Professor Smith remarks *(ibid),* the meaning remains obscure. What would amount to a lawful excuse that would not also be a lawful authority? No one has any idea.

Compression of language produced a difficult example of ambiguity in s 59(1) of the Local Government Act 1933, which came before the court in *Bishop* v *Deakin* [1936] Ch 409. The language is so convoluted that an understanding of the problem facing the court is greatly helped by presenting it as a selective comminution (see p 140 above). This reads:

> (1) A person shall be disqualified for
> (2) being elected a member of a local authority
> *or*
> (3) being a member of a local
> authority *if he has*
> (4) within five years before the day of election
> *or*
> (5) since his election
> (6) been convicted [of an offence].

The problem before the court concerned an elected councillor who had

been convicted before the day of election, but whose election was not challenged under clause (2) above. The time for such a challenge having passed. could he be treated as disqualified under clause (3)? The court returned a negative answer on the ground indicated by Clauson J in the following passage:

> 'If the section is read as providing that a person is disqualified from being a councillor if he was convicted within five years before his election, it may well be that he is so disqualified when he acts as a councillor at a date later than five years from the date of the conviction. In that case the effect of the disqualification operating would be that he would cease to be a councillor, but he would be eligible at once for the vacant office, the five years having expired before the new election. I cannot think that the legislature intended such a whimsical result.' (P 414.)

The case illustrates an important technique used by the courts, namely the construction of a complex provision *disjunctively.* Instead of applying the literal meaning, the court, to avoid the anomalous consequences of that meaning, treated the provision as if it were *two* separate provisions, which can be expressed as follows:

Provision I

(1) A person shall be disqualified for
(2) being elected a member of a local authority
(3) if he has within five years before the day of election
(4) been convicted [of an offence].

Provision II

(1) A person shall be disqualified for
(2) being a member of a local authority
(5) if he has since his election
(6) been convicted [of an offence].

Clauson J remarked (p 414) that

> 'All difficulty can be avoided by applying the well-known method of construction commonly known as *reddendo singula singulis,* and applying the first disqualification mentioned to the first case dealt with, and the second disqualification to the second case dealt with, a construction which, so far as I can see, infringes no rule of syntax or grammar'. (As to the principle *reddendo singula singulis* see p 96 above.)

Thornton quotes a remarkable example of faulty relation of a pronoun to its antecedent: 'And when they arose early in the morning, behold, they were all

dead corpses' (2 Kings 19, 35). As Thornton says, 'Ambiguity caused by faulty reference is almost always no more than the result of carelessness' (Thornton 1979, pp 29—32). Twining and Miers say the same: 'Syntactic ambiguity is almost always a defect that can and should be avoided at the formulatory/ drafting stage'. They give this description of the defect: 'within the framework of the sentence, a particular word or expression is capable of affecting two, or possibly more, other parts of the sentence, and this raises inconsistent or incompatible interpretations as to the effect of the rule as a whole'. They cite an example construed in ***Rukat*** v ***Rukat*** [1975] 1 All ER 343: 'grave financial or other hardship' (Twining and Miers 1982, p 212).

Another instance, frequently found, is misuse of the word 'any'. Section 50 of the Town Police Clauses Act 1847 gives power to revoke the licence of a hackney carriage proprietor or driver upon conviction for the second time for *any* offence under that Act or other specified legislation. This could either mean that the second conviction must be for the ***same offence*** as the first, or that it need merely be for an offence of the same class. In ***Bowers*** v ***Gloucester Corpn*** [1963] 1 All ER 437 the latter interpretation was preferred. On a similar point under different legislation, the court came to the opposite conclusion in ***R*** v ***South Shields Licensing Justices*** [1911] 2KB 1. (See also, on the use of 'any' in defining the crime of burglary, p 123 above.)

Such defects in meaning are due to sloppy construction, where the draftsman does not stop to consider whether he has been deluded by a spurious appearance of sense. Section 65 of the County Court Act 1888 gave power to send certain cases for trial in the court in which the action might have been commenced 'or in any court convenient thereto'. In ***Burkill*** v ***Thomas*** [1892] 1 QB 99 it was held that the draftsman had put down a phrase which may have seemed sense to him at first sight but was in fact meaningless. One court cannot be 'convenient' to another. Lord Coleridge CJ said (at p 102):

> 'If, therefore, no adequate meaning can be given to the word "thereto" by applying it to the last antecedent, "the court", which would give an absurd meaning, and if "convenient" and "adjacent" are not convertible terms, as in my opinion they are not, I think we may reject the word "thereto" as meaningless, unless we consider it as referring to the parties to the action.'

Mathew J agreed: T also think that the word "thereto" must be altogether rejected, as the word "convenient" must mean convenient to the parties to the action' (p 103).

Sometimes sloppy construction leads to downright contradiction within the section. Section 2(2) of the Married Women (Maintenance) Act 1949 gave the court power to extend certain child maintenance orders which would otherwise

expire when the child reached sixteen. In logic you cannot 'extend' an order which has already expired, so *in Norman* v *Norman* [1950] 1 All ER 1082 the court were prepared to reject an application initiated after the child had reached this age. It was then pointed out that the section gave power to extend if it appeared that the child *'is or* will be engaged' in a training course after attaining sixteen. The italicised words could only apply where the child was already sixteen at the date of the application (in other words when the order had already expired). Faced with this contradiction, the court held that Parliament must have intended that 'continuation' of the order could be granted after an interval had elapsed since its expiry.

Another case where the draftsman failed to ask himself whether words sounding plausible really made sense was *Walker* v *York Corp* [1906] 1 KB 724 This concerned a truly remarkable contradiction in s 89 of the Highway Act 1835. The section provided that an appeal against a footpath diversion order should be heard by a jury. They were to consider the following questions:

(1) Would the appellant be injured or aggrieved by the diversion of the footpath?

(2) Would the proposed new footpath be nearer or more commodious to the public?

The intention clearly was that the appellant should succeed if the answer to question (1) was yes *or* the answer to *both* questions was no. Otherwise he should fail. But the Act said in effect:

> If the answer to question (1) is no or the answer to question (2) is yes, the appeal shall be dismissed. If the answer to question (1) is yes or the answer to question (2) is no, the appeal shall be allowed.

This sounds reasonable, but a moment's thought reveals the danger. Suppose the jury return a negative to *both* questions — or indeed an affirmative? The jury in *Walker* v *York Corp* answered both questions in the affirmative. So the Act said that the appeal should be dismissed *and* that it should be allowed! The court held that since the two limbs were contradictory it was necessary to choose one. They allowed the appeal. As Darling J said: 'That is the only way in which the section can be read so as to do justice . . . ' (p 728).

Another example of defect in meaning concerns the case where the draftsman decides to flout an established definition. Since he is composing what is to be overriding law, he possesses a power denied to other authors. Occasionally this fact goes to his head. He employs a word with one meaning to denote something quite different. This may be called Humpty-Dumptyism, after the Lewis Carroll character who boasted: 'When / use a word, it means just what I choose it to mean - neither more nor less' *{Alice Through the Looking Glass,* ch6).

Misuse of homonyms. One cause of defective meaning is misuse of a homonym. This is a term applied by philologists to words with the same spelling but different meanings. The problem may arise in any language. Thus Latin has *grammatica* meaning the art of grammar and *grammatica* meaning a woman. There is an obvious risk of ambiguity when a draftsman uses a homonym without being careful to indicate which meaning of it is intended. The danger is increased when in the same text the draftsman alternates between different meanings of the homonym.

An example of such alternation came before the House of Lords in *Supplementary Benefits Commission* v *Jull* [1980] 3 All ER 65. The homonym in question was *requirements.* The two meanings with which the term is employed in the Supplementary Benefits Act 1976 are (1) physical needs such as housing, food and warmth (which for purposes of discussion we may call 'physical requirements') and (2) the amount of money needed to purchase the physical requirements (which we may call 'financial requirements').

Section 1(1) of the Act says that an adult is entitled to supplementary benefit if his or her resources are insufficient to meet his or her *requirements.* The context makes it clear that this means physical requirements. Schedule 1 says that the amount of benefit is to be the amount by which the claimant's resources fall short of his or her *requirements.* Clearly, since an arithmetical calculation is required, this must mean financial requirements. Schedule 1 goes on to quantify the amount of these for various types of beneficiary.

Jull concerned a mother who was separated from her husband. He paid her, under a court order, a sum for the maintenance of their six-year old child. This sum was more than enough to cover the figure specified in Sched 1 as the child's financial requirements. The problem of interpretation arose under para 3(2) of Sched 1. This says that a child's requirements are to be aggregated with, and treated as, those of the mother — but only where the mother *has to provide for the child's requirements.* Did the last word in this italicised phrase refer to the child's physical or financial requirements? In most contexts it did not matter which meaning was taken; here it was crucial. Since the child lived with the mother she was under a legal duty to provide for its physical requirements. The court order on the father meant that he was under a legal duty to provide for its financial requirements. If the word referred to the financial requirements there would be no aggregation and the mother would be £6.70 a week better off.

It is not often that one can quantify what a drafting error means in pounds and pence. Here it meant £350 a year to one poverty-stricken mother, and no doubt hundreds of thousands of pounds up and down the country. After much difference of opinion in the tribunals and courts which considered *Jull,* the House of Lords decided against the mother. Nowhere in their speeches however is there any discussion of (or even reference to) the cause of the ambiguity, namely the draftsman's misuse of the homonym *requirements.* Unfortunately

this is typical of the unscientific way in which our courts approach problems of statutory interpretation.

The technique of overlap Where an Act states a proposition in tautologous phrases there may be interpretation difficulties if the nature of the drafting process is not understood. With modern precision drafting the tautology is likely to be partial rather than complete. The purpose is to *build up* an enactment by overlapping expressions, each contributing its share to a rounded statement. One expression used alone may be doubtful, but with two or more used in conjunction the doubts as it were cancel each other out. A simple example is provided by the Motor Car Act 1903. This, the first of the Acts regulating the driving of motor vehicles, made it an offence to drive a car 'recklessly or negligently'. Here the draftsman took two imprecise terms with overlapping meanings and put them together. The overlap meant that at the centre the imprecision disappeared. There could be no argument that a piece of driving was 'reckless[1] rather than 'negligent' (or vice versa) because the same consequences followed either way. This advantage was lost when in a later more complex enactment, the Road Traffic Act 1930 s 11(1), the concept of recklessness was used on its own (see Bennion 1981(5)).

A more complex example of this technique of overlap is the crime of making off without payment, as stated in s 3 of the Theft Act 1978. Here there are no less than four partly tautologous expressions. A person who knows that payment on the spot for goods supplied, or a service done, is required or expected from him is guilty if he

(1) dishonestly
(2) makes off
(3) without having paid as required or expected
(4) with intent to avoid payment of the amount due.

This aims to catch the bilker who runs from a taxi without paying, or dodges out of a restaurant leaving his unpaid bill on the table. In such obvious cases it is safe to say that there would still be a conviction even if one of clauses (1), (3) and (4) had been omitted from the statutory description of the offence. Indeed there would probably be a conviction if all three were omitted. Standing by itself, 'makes off is sufficient. To make off is defined by the Shorter Oxford Dictionary as 'to depart suddenly, often with a disparaging implication; to hasten away; to decamp'.

It is to catch the less obvious or borderline cases that the draftsman employs tautology (cf the description of *peripheral drafting* at p 216 below). If for example the bilking taxi passenger, instead of bolting down the street, tells the driver he is going inside the building to fetch money for the fare and then leaves by a back exit, the other phrases used in the description of the offence assist towards a finding of guilt.

The degree of tautology employed here can be tested by reverse meanings. Could a person 'make off honestly? Could he make off dishonestly having paid as required or expected? Having so paid, could he intend to avoid payment of the amount due? And so on. But the draftsman does not mind this slight absurdity, for he feels it can do no practical harm. His tautology serves a useful purpose on the other hand. It saves the person who, let us say, decamps in haste with intent to avoid (immediate) payment yet is not a bilker. He has forgotten his wallet, or an urgent appointment. He will return and pay as soon as he can. If he can satisfy the jury of his intent, the word 'dishonestly' exculpates him. Another person (dishonest this time) is indeed a would-be bilker. He makes off with fraudulent intent, but unknown to him the meal is already paid for. He seeks to avoid payment of the amount due, but in fact no amount is due. Clause (4) rescues him. And so on. The draftsman has it all carefully worked out.

Interpreters do not always understand this technique of overlap. Such lack of understanding led to a controversy over whether the offence of making off is committed by a person who obtains the creditor's agreement to take a cheque but hands over one he knows will not be met (see Bennion 1981(2) and 1983(1)). Here it is surely clear that while clauses (1), (3) and (4) above may be satisfied, clause (2) is not. For other examples of overlap see Bennion 1979(1)and 1981(6).

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 established view was departed from in the drafting of the Nullity of Marriage Act 1971 (re-enacted in the Matrimonial Causes Act 1973 ss 11-16). 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. Humpty-Dump tyism asserted itself.

In *Re Roberts deed* [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 the legislation. This illustrates the danger of departing from established meaning. Humpty-Dumptyism by draftsmen is to be deprecated.

Having considered the garbled text, and the text defective in conveying the draftsman's meaning, we now turn to the case where the draftsman's proposition is logically deficient.

Logical flaws

Doubt is inevitably raised by a logical failure in the drafting of the section. An example is the leaving of a lacuna in a recital of alternatives. This breaks one of the logical rules of division, namely that the constituent species must together exhaust the genus. The division must not leave gaps, or 'make a leap' *(divisio non facit saltum).*

In *R* v *Secretary of State for the Home Department, ex parte Zamir* [1979] 2 All ER 849 the Divisional Court had to consider an immigration rule which provides that a passenger holding a current entry clearance duly issued to him is not to be refused leave to enter unless the Immigration Officer is satisfied that:

> *a)* false representations were employed or material facts were concealed . . . for the purpose of obtaining the clearance, or
> *(b)* a change of circumstances since it was issued has removed the basis of the holder's claim to admission.'

One circumstance which may remove the basis of the holder's claim to admission is his marriage, as occurred in this case. He married six weeks after the issue of the clearance, and the Court had no difficulty in applying the rule. But suppose he had married six weeks *before* the issue of the clearance, but after submitting an application for the clearance stating (correctly at the time) that he was unmarried. This might easily have happened, since nearly three years elapsed between the making of the application and the issue of the clearance.

Now the error made by the draftsman of the rule set out above becomes obvious. Paragraph *(a)* relates to what was said or omitted in the application. Paragraph *(b)* relates to what happens after the application is granted. There is a lacuna as to the period between the making and granting of the application. Instead of 'since it was issued' in paragraph *(b)* the draftsman ought to have written 'since it was applied for'.

Self-defeating text

Sometimes it is clear what the intention is, and equally clear that it has misfired. In 1965 JD Davies pointed out in the Law Quarterly Review that the draftsman of the Perpetuities and Accumulations Act 1964 (who was myself) had fallen into an elementary error over the repeal of s 163 of the Law of Property Act 1925 (81 LQR 346). Section 4 of the 1964 Act replaced s 163 by improved provisions, expressed in terms of what the position would be 'apart from this section'. This would have worked perfectly but for the fact that the consequential repeal of s 163 was placed in s 4 itself (as seemed natural to the draftsman). Apart from s4 therefore, s 163 would remain operative and this put the hypothesis wrong. The guilty draftsman managed to engineer a correc-

tion later by the insertion of a provision in another Act he was drafting (for fuller details see Bennion 1976(2)).

Another type of misfiring of intention is the erroneous reference to a related enactment. Section 66(2)(£>) of the War Damage Act 1943 was intended to authorize capital to be raised under s 30 of the Universities and College Estates Act 1925 for defraying war damage contributions. Instead of referring to s 30 however, it referred to s 31. This also deals with raising money on mortgage. The mistake passed unnoticed. It misled the draftsman of an Act passed nearly twenty years later into giving a similarly erroneous reference (see Town and Country Planning Act 1962, s 206(1)). Both errors were finally corrected by the Universities and College Estates Act 1964, s 4(1) and Schedule 3.

A parallel case arose *inR* v *Wilcock* (1845) 7 QB 317, which concerned a reference to an Act described as having been passed in 13 Geo 3. Lord Denman CJ said:

> 'A mistake has been committed by the Legislature; but, having regard to the subject matter, and looking to the mere contents of the Act itself, we cannot doubt that the intention was to repeal 17 Geo. 3, and that the incorrect year must be rejected' (p 338).

A similar error occurred in s 42 of the Stannaries Act 1869, which referred to 6 & 7 Vict c 106 instead of 6 & 7 Will IV c 106.

The mistakes we have so far dealt with can be described as slips, which do not go to the root of the legislative intention. Now we venture into deeper waters.

Error of law

The draftsman is not likely to produce a satisfactory text if he is mistaken about the law he is attempting to alter. Such mistakes are rendered more frequent by the chaotic state of our statute book. A famous example is *Commissioners of Inland Revenue* v *Ayrshire Employers' Mutual Insurance Assn. Ltd* [1946] 1 All ER 637. The intention of s 31 of the Finance Act 1933 was to subject mutual insurance companies to income tax on the surplus arising from transactions with contributors who were their members. The draftsman attempted to achieve this by saying that for tax purposes such a surplus was to be included in the company's profits or gains as if it arose from transactions with non-members. He failed to realise that in law the surplus was immune from tax for a different reason. Under the terms of the contracts with the contributors (which the Act did not deem to be altered) the surplus belonged not to the company but to the contributors. The House of Lords declined to alter the statutory language so as to remedy this error. As Lord Buckmaster had said in an earlier case, the subject ought not to be made liable to tax 'by an

elaborate process of hair-splitting arguments' *{Ormond Investment Co* v *Betts* [1928] AC 143,151).

Sir Rupert Cross records that Lord Diplock has criticized the *Ayrshire* decision by saying that if the courts can identify the target of legislation 'their proper function is to see that it is hit; not merely to record that it has been missed' (cited Cross 1976, p 93). The problem in such cases is that it is far from obvious what form the legislation would have taken if the draftsman had not misunderstood the existing law. Various courses would have been open, some involving a greater incidence of tax in certain cases than others. Courts may legislate, but they certainly cannot tax.

A case that went the opposite way is *Salmon* v *Duncombe* (1886) 11 App Cas 627. The judicial committee of the Privy Council held that the draftsman of a Natal Ordinance had clearly mistaken the relevant law. The preamble recited that it was expedient to exempt British-born settlers from the local law relating to testamentary dispositions of real and personal property. Section 1 said any such settler could exercise the rights given by English law 'as if [he] resided in England'. Under private international law, real property passes according to the *lex situs* and personal property according to the law of the domicil. In neither case is the place of residence material.

It was held that s 1 should be construed as if it had been worded on a correct understanding of the relevant law, in other words as if the hypothesis had not related to residence in England but to the location there of the real property devised and (in relation to personal property) the domicil there of the testator. The judicial committee said it would be 'a very serious matter to hold that when the main object of a statute is clear, it shall be reduced to a nullity by the draftsman's . . . ignorance of law' *(ibid,* p 634).

An error of law by the draftsman was revealed in *Watkins* v *Kidson* [1979] 2 All ER 1157. The draftsman of Sched 6, para 23 *(\)(b),* of the Finance Act 1965 appears not to have realised that the value of agricultural land may be enhanced by zoning for development as well as by the actual grant of planning permission (for details see Bennion 1980(1), p 57). I myself fell into error in drafting certain definitions in s 189(1) of the Consumer Credit Act 1974. These, when referring to assignors, speak of the person to whom rights *and duties* have passed by assignment. As Professor Goode justly remarked:

> 'Literally construed, this part of the definition would be largely nugatory, since as a matter of contract law an assignment transfers rights but does not relieve the assignor of his duties to the other contracting party or entitle that party to enforce such duties against the assignee. It is thought that this is a case where the court would construe "and" as "or", thus maintaining the sense of the definition as more accurately provided in s 58(1) of the Hire-Purchase Act 1965'(Goode 1974, p 31).

The draftsman of an important constitutional statute, the Parliament Act

1911, made a minor error of constitutional law. In ss 1(1) and 2(1) he speaks of a bill passed under the procedure laid down by the Act as becoming law 'on the Royal Assent being signified'. Yet bills become law not on the date when assent is signified but on the date (which could be later) when it is communicated to both Houses of Parliament (see Bennion 1981(11), p 137).

Draftsmen have occasionally perpetrated errors of law by not studying with sufficient care an Act they were engaged in amending. Thus the draftsman of the Nuisances Removal Act 1860 'must have forgotten that in the [Nuisances Removal Act 1855] there was power given not only to the local authority but to an inhabitant to initiate proceedings' *{Cocker* v *Cardwell* (1869) LR 5 QB 15,17 *per* Cockburn CJ, who remarked that this was 'one of the most remarkable specimens of legislative incuria of the many that are daily brought before us').

Sometimes draftsmen create dangers for themselves and everyone else by depositing booby-traps in the statute book. Section 33 of the Wills Act 1837 perpetrates an extraordinary piece of 'asifism' by stating that, where a devise or bequest is made to a child of the testator who predeceases him leaving issue, the gift does not lapse but the will (unless it states to the contrary) has effect *as if the child had died immediately after the testator.* This positively invites any later draftsman modifying the law of wills to get it wrong. One commentator remarked of this section, after calling it a trap for the unwary:

> 'Legislation, and especially conveyancing legislation, which serves little purpose, is ready for repeal. When that legislation rests upon a presumed intention of a testator which he rarely, if ever, is likely to possess, then the case for repeal is stronger. When the legislation is unknown to the large majority of our friends the home made will makers, and indeed to many solicitors, then repeal becomes a matter of some urgency. Parliament should be advised that when a will draftsman is making a gift in favour of a child, lapse of the gift is better than a lapse of memory' (Brooke 1981, p 370).

Mishandling of legal concepts

Akin to error of law by the draftsman is the mishandling of established legal concepts. The power of legislation to effect immediate legal changes of any kind has led to development of law through modifying doctrine in somewhat artificial ways. Unless the draftsman is remarkably clear-headed he can easily go astray here.

Landlord and tenant law. A remarkable, and exceedingly costly, example of the failure of draftsmen to pay attention to the legal doctrines they are interfering with concerns the inauguration of the Rent Act era by the Increase of Rent and Mortgage Interest (Restrictions) Acts 1919 and 1920. The draftsman

of the security of tenure provisions in the latter Act did not even begin to work out how his novel intrusion into the law of landlord and tenant was intended to modify its doctrines. All he said was that no order for possession must be made by the court. He omitted to specify, in the words of Scrutton LJ in *Remon's case,* 'what sort of legal interest the person who stayed in by permission of Parliament and against the will of the landlord should have' *(Remon* v *City of London Real Property Co Ltd* [1921] 1 KB 49, 57). The problems faced by the Court of Appeal in *Remon* were later described by Brandon LJ in these graphic terms:

> 'In *Remon's case* the Court of Appeal felt bound to give strained and unnatural meanings to perfectly ordinary words, such as 'tenant', 'tenancy', 'letting' and 'let'. It did so for one reason, and one reason only, namely that unless those words were given strained and unnatural meanings, the manifest purpose of the 1920 Act (to protect from eviction persons whose contractual tenancies had been brought or come to an end) would be defeated' *(London Borough of Hammersmith and Fulham* v *Harrison* [1981] 2 All ER 588, 598).

To give security of tenure by statute is to revolutionize the law of landlord and tenant. Many doctrines of that law are necessarily displaced, and careful surgery is required. Too often the technique employed in such cases by ignorant or careless parliamentary draftsmen has not been surgery but butchery. Mackin-non LJ said of the early Rent Acts that the language 'resembles that of popular journalism rather than the terms of the art of conveyancing' *(Salter* v *Lask No 2* [1925] 1 KB 584, 588).

After such a history one would suppose that present-day draftsmen would walk warily when they came to this field. Yet old errors are still repeated, as is shown by the House of Lords decision in *Landau* v *Shane* [1981] 1 AH ER 705. This concerned the resident landlord exception first introduced by the Rent Act 1974. If the landlord lives on the premises the tenancy is not a protected tenancy. It broadly remains a contractual tenancy, governed by the well-established rules (such as the landlord's right to serve notice to quit). But suppose the resident landlord dies?

The resident landlord exception is now contained in s 12 of the Rent Act 1977. Subsection (l)(c) of this says that, for the exception to apply, at all times since the grant of the tenancy (of part of the building) the landlord must be resident elsewhere in the building. An exception where the landlord dies is set out in para 1 of Sched 2. In determining whether the s 12(l)(c) condition is fulfilled, one was told by para 1 (as originally enacted) to disregard any period of not more than 12 months during which the ownership is held by personal representatives of the deceased landlord. If the Act had stopped there, the position would be straightforward. During the 'executor's year' the tenancy would remain a contractual one.

The Act did not stop there. With that deadly passion for complicating everything, our legislators decided that personal representatives should not be able to give the tenant notice to quit during the 'executor's year'. The landlord could have given notice to quit if he had lived. When the successor resident landlord moves in, he will be able to give notice to quit. But during the interregnum there must be a hiatus in this right. So para 3 of Sched 2 says that no order for possession shall be made (other than one which might be made in the ordinary case of a protected tenancy). Suddenly, we are moved back more than half a century. It is as if *Remon* had never been. We hear again the words of Scrutton LI reported above. What sort of legal interest does the tenant have during the interregnum? The draftsman has failed to tell us. The court must decide. In *Landau* v *Shane* the Court of Appeal disagreed with the trial judge, and the House of Lords disagreed with the Court of Appeal. (The case is now of academic interest only, in view of amendments made by the Housing Act 1980, s 65.)

Bodies corporate. Another area where there has been mishandling of legal concepts by draftsmen concerns that curious invention the body corporate. In its most common manifestation as a corporation aggregate, this is a highly-convenient legal fiction. For the law to treat human beings organized in a certain way as if they formed a *persona* separate from their own human identities is a constructive act of imagination. It is a legal game of let's pretend which has concrete advantages, particularly in commerce. The problem is to stop imagination running wild, and keep the law on coherent lines.

The idea of the body corporate arises from the phenomenon of human association for a specific purpose. If a group of workers in a certain trade agree to form themselves into a society to regulate relations between workers and employers in that trade they have the sense of creating an entity separate from themselves. If they agree on a constitution and a name for the society, and elect officers, that heightens the sense of there being a separate entity. So the process goes on. Funds are subscribed, an office is set up, and the organisation commences its activities. Already, we naturally speak of 'it'. There is really nothing but a number of people acting in common, but we feel that a separate entity exists. By pretending there is an entity, and acting up to the pretence, the organizers convince themselves and others. Even judges share in the illusion, well before any question of legal status arises. Denning LJ (as he then was) said in 1954 that 'as a simple matter of fact, not law, a trade union has a personality of its own distinct from its members' *(Bonsor* v *Musicians' Union* [1954] Ch 479, 507).

The law steps in and evolves rules for the treatment even of an unincorporated association. In the famous case of *Taff Vale Railway Co* v *Amalgamated Society of Railway Servants* [1901] AC 426, the House of Lords considered the position of a trade union which, while not incorporated, was registered under the Trade Union Act 1871. Seeing the various matters dealt with in the Act, the

Lords held that the trade union had a sufficient personality to be sued in its own name and have its funds charged in the action.

Thus did the law embark on a course fraught with problems. The concept of the body corporate is itself difficult enough. You pretend that a non-existent person in fact exists. You pretend that it posssesses the attributes of a live person, so far as practicable. But what exactly is meant by this limitation? Lord Thurlow said that you cannot expect a corporation to possess a conscience since it has no soul to be damned, and no body to be kicked. Lord Lindley remarked that to impute malice to corporations is 'to introduce metaphysical subtleties which are needless and fallacious' *{Citizens'Life Assurance Co Ltd* v *Brown* [1904] AC 423, 426). This is all very well, but once embarked on a fiction the law has to go through with it. The body corporate is a non-entity. It has no actual existence whatever, but the law can impute to it any human characteristics it fancies. If the law cared to say that a limited company should be deemed to marry if its chairman married, and to commit bigamy if its secretary then proceeded to marry also, it could do so. The law would have to go on to say which human being should then stand in the dock (since only human beings can stand in docks). Ingenuity would not be defeated even by this.

We see that the law imputes fictitious characteristics to groups of persons, whether corporate or unincorporate. The tendency is to treat the two in opposite ways. The body corporate is equated to a human being, except to the (disputable) extent that this is inappropriate. The unincorporated association is not treated as a separate entity, except for limited purposes such as those laid down in the *Taff Vale* case. The dangers of confusion are obvious.

In *EETPU* v *Times Newspapers Ltd* [1980] 1 All ER 1097, O'Connor Jhad to grapple with such confusion in an extreme form. Section 2 of the Trade Union and Labour Relations Act 1974 defines the status of trade unions which are not 'special register bodies' (that is bodies registered under s 84 of the Industrial Relations Act 1971). It begins:

> '(1) A trade union which is not a special register body shall not be, *or be treated as if it were,* a body corporate, but -
>
> *(a)* it shall be capable of making contracts . . . '(emphasissupplied).

The subsection goes on to list other attributes of a body corporate, such as the capacity to sue or be sued in its own name. It ends by saying that any judgment, order or award made against the trade union shall be enforceable against property held in trust for it 'to the like extent and in the like manner as if the union were a body corporate'.

So we have the truly remarkable position that having in one breath said that the trade union is *not* to be treated as if it were a body coporate, the draftsman continues with provisions that will ensure that it is treated that way! On a

superficial level this contradiction can be cured, with the aid of the maxim *generalia specialibus non derogant* (p 96) and the doctrine of ellipsis (chapter 12), by reading in the words 'Except as provided by this Act' at the beginning of the subsection.

This did not solve the problem in the *EETPU Case,* which was concerned with the question whether a trade union could sue for libel. The action for defamation is a personal matter said O'Connor J, 'because it is the reputation of the person which is defamed, and unless one can attach a personality to a body, it cannot sue for defamation' (p 1099). Hitherto a trade union, although not a body corporate, was able to sue for libel because the Trade Union Act 1871 'created a new entity in law, a new *persona'[1] (per* Birkett J in *National Union of General and Municipal Workers* v *Gillian* [1945] 2 All ER 593, 602). O'Connor J called this a 'quasi-corporate capacity', and ruled that it could no longer be treated as possessed by a trade union. To do so would be to do what is now forbidden and treat the union 'as if it were a body corporate'.

In the next section, the 1974 Act sets out the status of an employers' association. Where it is unincorporated it is to have exactly the same attributes as are given to a trade union by s 2, but there is no prohibition on its being treated as if it were a body corporate. The illogical result, according to O'Connor J, is that while an employers' association can sue for libel a trade union cannot. 'Parliament has deprived trade unions of the necessary personality on which an action for defamation depends . . . '. The learned judge confessed that he would not have reached this conclusion 'unless I was absolutely driven to it' (p 1104).

The fact is that it does not really make sense to speak of treating a body of persons 'as if' it were a body corporate. This is asifism (p 124) gone mad. It piles fiction upon fiction. A body corporate is itself a fictitious entity. To say that such an entity is not to exist, but we are to behave as if it did exist, is an absurdity. To create a body corporate is to engage in a pretence involving certain attributes. If some but not all the attributes are to be allocated this should be done by mentioning each explicitly. There is no room then for any resulting general impUcations, such as that the body is a 'quasi-corporation' and has sufficient personality to found an action for libel where this attribute is not expressly conferred.