Bennion on Statute Law – 2nd edition

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Part II - The Need for Processing

CHAPTER EIGHTEEN

Doubt-factor V: The Fallible Draftsman (3)

Continuing this account of how doubt is raised by drafting errors, we turn first to the case where the legislative project is misconceived in whole or part.

Project misconceived

If the draftsman makes a mistake over the factual situation he is legislating about, the result will be a travesty. The mistake may relate to a single factual situation, or the *type* of situation his provision will encounter.

Where an Act legislates about a single factual situation, but gets it basically wrong, the Act is likely to be abortive. A nineteenth-century Act made detailed provision about the exploitation of a certain tract of land in Labrador. It was believed that the land was owned by the Labrador Company, and this was the basis on which the Act operated. It later appeared that this may have been mistaken, and that the land was not owned by the Labrador Company at all. (See *Labrador Company* v *The Queen* [1893] AC 104.) Of course the draftsman himself is unlikely to have been in any way to blame for this particular error.

More common is the case where the draftsman has failed to get into his head the true nature of the factual situations with which the Act will in future have to deal. His wording is therefore inappropriate. Here are some examples.

Section 1(1) of the Race Relations Act 1968 defined racial discrimination by reference to the grounds on which discriminatory treatment is based. It specified the grounds of 'colour, race, or ethnic or national *origins'*. Yet some discrimination of this type is based on the *current* nationahty of the victim, whether or not it is his nationahty of origin. In *Ealing Borough Council* v *Race Relations Board* [1972] AC 342 the Council gave priority to British subjects

when allocating housing. A Polish national resident in Ealing was not placed on the housing list for this reason. The House of Lords accepted that such discrimination was contrary to the object of the Act, but held that it was outside the wording. By misunderstanding the factual basis of the Act the draftsman had gone narrower than its object.

A common case of misconceiving the project is where the draftsman gives a discretion when he should have imposed a duty. If the factual situations with which the section will have to deal afford no basis for the exercise of discretion, they should all be treated in the same way.

In the 1960s there was much tax dodging in the building industry by the so-called lump[1]. Operatives nominally left their employment and set up individually as independent subcontractors (though in practice they went on working for the same main contractor). They thus became self-employed, and ceased to be liable to tax deduction at source under the PAYE scheme. To end this abuse, the Finance Act 1971 required main contractors to withhold thirty per cent of sums due to non-exempt subcontractors and pay over the amounts deducted to the collector of taxes. Regulation 6(3) of the Income Tax (Payments to Sub-Contractors in the Construction Industry) Regulations 1971, made under the Act, says that, where a contractor has under-deducted, the collector 'may' relieve him from liability if satisfied (1) that he took reasonable care to comply with the Act and (2) that the under-deduction was due to an error made in good faith.

The point here is that if the two stated conditions are satisfied there is no obvious ground for withholding relief. Certainly none is suggested by the regulation. As between two contractors who have each taken reasonable care and erred in good faith, why should one be relieved and the other not? It is a classic case for reading [k]may' as 'shall'. Yet when the point arose in *Slater* v *Richardson and Bottoms Ltd* [1979] 3 All ER 439 this way out does not appear to have been thought of.

Section 74 of the Harbours, Docks and Piers Clauses Act 1847 renders the owner of every vessel liable 'for any damage done by such vessel ... to the harbour, dock or pier'. But a ship is not capable in itself of 'doing' anything. Only the human beings controlling it can 'do' things, and the Act should have been worded accordingly. This would have saved much litigation, including the famous case of *River Wear Commissioners* v *Adamson* (1877) 2 App Cas 743 {in which strangely this point does not appear to have been raised). See further Holmes 1881, p 29.

Section 186 of the Customs Consolidation Act 1876 subjected a person who fraudulently harboured uncustomed goods to a penalty. It continued: 'and the *offender* may either be detained or proceeded against by summons[1]. This clearly operates upon a misunderstanding of the factual situation. At the arrest stage, it may not be known by the customs officer whether or not the person under suspicion is actually guilty. In *Barnard* v *Gorman* [1941] AC 378 a seaman

arrested on suspicion of offending against s 186 was tried and acquitted. He then sued for damages for assault on the ground that it was thus demonstrated that he did not fall within the description 'the offender'. The House of Lords, reversing the Court of Appeal, found for the defendants. Lord Romer said:

> That the ordinary meaning of the word "offender" is a person who has in fact offended must be conceded, but the context in which a word is found may be, and very often is, strong enough to show that it is intended to bear other than its ordinary meaning and such a context is in my opinion to be found in the present case for the section provides that the offender may be proceeded against by summons, and to give the word "offender" in this connection its ordinary meaning would be to render the provision nonsensical. It would mean that before issuing the summons the magistrate would have to decide that the offence had in fact been committed.'

A similar mistake was made by the draftsman of s 6(4) of the Road Traffic Act 1960, which dealt with drunken driving. It empowered a constable to arrest without warrant 'a person committing an offence under this section'. On a claim for damages for assault, the Court of Appeal held in *Wiltshire* v *Barrett* [1966] 1 QB 312 that this must be read as 'a person *apparently* committing an offence under this section'. It is remarkable that on the consolidation of these provisions in 1972 the opportunity was not taken of correcting the error (see now Road Traffic Act 1972, s 5(5)).

The Road Traffic Acts have since their inception been full of mistakes caused by draftsmen's inability to visualise the likely factual situation and provide properly for it. The breathalyzer provisions are a notorious example. What is now s 8 of the Road Traffic Act 1972 says: 'A constable in uniform may require any person *driving or attempting to drive* a motor vehicle on a road or other public place to provide a speciman of breath . . . '. The natural meaning of 'driving' suggests that the vehicle is in motion, but the mind boggles at the picture of a constable administering a breath test to a driver who is steering a moving car. Equally, as DJ Birch comments, it would undoubtedly seem odd to a layman to say that a person could be 'driving' a car with no ignition key and the steering locked. Yet it was so held in *Burgoyne* v*Phillips* [1983] Crim L R 265 (Birch's comment is at p 266). Since the word 'driving' plainly does not carry its normal meaning here, what exactly does it mean? The courts have spent much time, and litigants much money, in spelling it out. (See further on misconceiving the project, Bennion 1962, p 344.)

Defective deeming

The final type of drafting mistake we consider before going on to examine errors relating to multiple texts can be described as defective deeming, or

asifism gone wrong. As we have seen, common-law drafting makes extensive use of hypotheses. A certain situation is to be treated 'as if it were something else. Or, to be more precise, a certain legal rule (statutory or otherwise) is applied to a novel situation 'as if it were one to which the rule already applied directly. This technique has already been described, and its dangers illustrated (see p 124 on the 'application' of a set of statutory provisions with or without modification, and the treatment of bail-jumping 'as if it were contempt of court and p 184 on treatment of unincorporated body 'as if it were a corporation). Asifism has many advantages for the draftsman. It saves him spelling out again (usually with modifications) statutory provisions which may be lengthy and complicated. In his constant search for brevity he jumps at it. Yet it contains the dangers which lurk in any form of pretence. WA Wilson goes so far as to say that there is always doubt as to the extent of a statutory hypothesis (Wilson 1974, p 503). If asifism is to work properly it requires the draftsman to consider every aspect of the applied provisions and check that (with any modifications he may prescribe) they fit exactly. This task, which may be laborious, is often skipped.

Section 52 of the Licensing Act 1953 provided that for the purposes of the Act the City of London and the administrative county of London should each be deemed separate counties. The draftsman overlooked s 37 of, this, his own Act, which provided for costs to be paid 'out of the county fund'. The City of London has no county fund. (See report of the Joint Committee on the Licensing Act 1964, pp 15-17.)

Exparte Walton (1881) 17 Ch D 746, another example of defective deeming, has already been mentioned (pp 137—8). In that case James LJ stressed that 'when a statute enacts that something shall be deemed to have been done, which in fact and truth is not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to' (p 756). The court's intervention is only required where the draftsman has erred in his deeming. Courts are inclined to be impatient with this technique anyway. The judicial attitude showed through in the following words of Romer J in *Robert Batchellor and Sons Ltdv Batchellor* [1945] Ch 169, 176:

> 'It is, of course, quite permissible to "deem" a thing to have happened when it is not known whether it happened or not. It is an unusual but not an impossible conception to "deem" that a thing happened when it is known positively that it did not happen. To deem, however, that a thing happened when not only is it known that it did not happen, but it is positively known that precisely the opposite of it happened, is a conception which to my mind . . . amounts to a complete absurdity.'

Unfortunately for his robust common sense, Romer J was reversed on appeal.

Perhaps the last word should lie with AP Herbert's Lord Mildew, who said 'there is too much of this damned deeming[1] (cited Megarry 1955, p 361).

4 Multi-textual errors: (1) Conflicts within the same instrument

So far in the account given in this and the last two chapters we have dealt with drafting errors within a single proposition, taking a section of an Act as an exemplar. Now we move on to consider contradiction or disharmony between different parts of an Act or other instrument. A section may be clear and plain if taken by itself. Yet doubt must inevitably arise if elsewhere in the Act there is found a provision inconsistent with it. The interpreter is then forced to decide between the two.

If the contradiction is between two sections (treating as part of a section any Schedule induced by the section) the problem is most serious, since these are the operative provisions of an Act (sometimes misleadingly called the enacting provisions). Less difficult is a conflict between a section and a non-operative provision such as a preamble or heading. We take the former case first.

In *Curtis* v *Stovin* [1899] 22 QBD 513 the court ruled on a contradiction in the County Courts Act 1888. Section 65 allowed a contract claim not exceeding *one hundred pounds* brought in the High Court to be transferred to any county court 'in which the action might have been commenced'. But under another provision of the Act, only claims not exceeding *fifty pounds* could be commenced in the county court. The court resolved the logical contradiction in favour of the reading clearly intended by the legislature. Bowen LJ said: 'I think we must introduce some words to this effect, *"if it had been a county court action"' {ibid,* p 518).

A contradiction which has recently caused difference of opinion among lawyers engaged in the criminal courts is contained in the Criminal Law Act 1977. The story begins with s 1 of the Criminal Damage Act 1971. Subsection (1) creates the offence of destroying or damaging property belonging to another, while subs (2) creates a more serious offence where a person destroys or damages property belonging to himself or another *with intent to endanger life.* The 1971 Act made the latter offence punishable only on indictment, but the former punishable either on indictment or (with consent of the accused) summarily. Then along came the 1977 Act, with its concept of the offence 'triable either way'. Section 16 of that Act made offences under s 1(1) of the 1971 Act triable either way. It left untouched offences under s 1(2), which remained triable solely on indictment. This was in accordance with the original scheme of the 1971 Act, and with common sense. Unfortunately the 1977 Act then went on to contradict itself. Section 23 said that if an offence charged involved a sum not exceeding £200, and was mentioned in Sched 4, 'the court shall proceed as if the offence were triable only summarily'. Schedule 4 includes

offences 'under section 1 of the Criminal Damage Act 197T (excluding arson), and thus in terms includes the serious crime created by s 1 (2). For the confusion that resulted see [1979] Crim LR 266 and 607-8; and [1980] Crim LR 68-9. The controversy ended with an acknowledgment from Professor Glanville Williams that the contradiction had led him to state the law erroneously in his *Textbook of Criminal Law* (see [1980] Crim LR 69). It will not have escaped the reader that this is one more example of trouble involving asifism.

Another contradiction in a criminal Act is found in the Metropolitan Police Act 1839. Section 63 gives a general power of arrest for offences against the Act, but applies only where the offender's name and address are unknown and cannot be ascertained. A duplicate power of arrest, *without these words of limitation,* is contained in s 54 in relation only to the offence of obstruction created by that section. In *Gelberg* v*Miller* [1961] 1 All ER 291 the contradiction was resolved by reading the general words of s 63 as if they contained an exception for s 54.

Driedger mentions a contradiction in an Ontario byelaw directed against owners of wandering dogs. It prohibited 'the running at large' of any dog. This appears to contemplate the appearance in any place of a dog not under control. Another provision of the byelaw however said that 'a dog shall be deemed to be running at large when found in a street or other public place and not under the control of any person'. Did this mean that a stray dog *not* in a public place was excluded from the prohibition? The court observed that such a reading would have the result that:

> 'Being pursued on the road, he would, if he were a wise dog, dodge through the fence upon a farm and forthwith cease to be running at large ... A dog traversing the country would alternatively be, and not be, running at large, as he crossed the road or got through fences'.

It was held that the repugnancy between the two provisions should be resolved in favour of the wider one, the narrower being treated as intended only to deal with cases where the stray dog was in a public place (Driedger 1974, p 39).

A case of conflict between a preamble and an operative provision was adjudicated upon in *AG* v *Prince Ernest Augustus of Hanover* [1957] AC 436. The preamble to an Act of Anne stated that with the object that the Electress Sophia

> 'and the heirs of her body and all persons lineally descended from her may be encouraged to become acquainted with the laws and constitutions of this realm it is just and highly reasonable that they *in your Majesty's lifetime* should be naturalised'.

This wording suggests that the naturalising operation of the ensuing words is to be limited to persons born in the lifetime of Queen Anne. A moment's reflection

will show however that this is another example of ambiguous modification. The italicised phrase was intended to indicate that the naturalising operation (extending to descendants whenever born) was desirably to be effected while the Queen lived. This was demonstrated by the ensuing words. They naturalized descendants of the Electress 'born or hereafter to be born', without limit of time. The House of Lords confidently held that they should prevail. Lord Normand said (p 467):

> 'The courts are concerned with the practical business of deciding a *lis*, and when the plaintiff puts forward one construction of an enactment and the defendant another, it is the court's business . . . after informing itself of what I have called the legal and factual context including the preamble, to consider in the light of this knowledge whether the enacting words admit of both the rival constructions put forward. If they admit of only one construction, that construction will receive effect even if it is inconsistent with the preamble, but if the enacting words are capable of either of the constructions offered by the parties, the construction which fits the preamble may be preferred.'

These words apply to any discrepancy between operative words and other parts of an Act.

Such discrepancies often arise between a definition contained in the interpretation section and an operative provision in which the defined term occurs. Definitions are usually stated to apply only where the context does not otherwise require. Even this caveat may not be enough to avoid doubt, as occurred in *Old Grovebury Manor Farm Ltd* v *W Seymour Plant Sales and Hire Ltd (No 2)* [1979] 3 All ER 504. The draftsman of s 140 of the Law of Property Act 1925 broke the rule that the definite article is properly used only where the substantive to which it is attached is unique. He defined 'lessee' as including persons deriving title under a lessee. Then he said that a right of forfeiture for breach of covenant could not be enforced until the lessor served a notice on 'the lessee'. If the breach is of a covenant against assignment of the lease without the lessor's consent there must be at least two people who fall within the definition: the assignor and the assignee. Which of them is 'the lessee'?

The Court of Appeal found little difficulty in answering this question. They held in effect that the phrase 'the lessee' in s 146 is elliptical. Its full meaning is 'the current lessee'.

Where there are conflicts within an instrument, the rule as we have seen is to reconcile them by reference to the instrument read as a whole and its overall policy (see also *Nugent-Head* v *Jacob (Inspector of Taxes)* [1948] AC 321). In the very last resort, where this does not produce the answer, the courts will adopt the rule of thumb that a provision nearer the end of the instrument is taken to prevail over one nearer the beginning. Thus in *A-G* v *Chelsea Waterworks* (1731) Fitzg 195 it was laid down that a proviso should be taken to

repeal the purview (ie the words to which it is a proviso) 'as it speaks the last intention of the makers'. (A sounder ground, at least with the modern proviso, would be that the proviso is intended to contradict a part of the purview.) In *R* v *Ramsgate* (1829) 6 B & C 712, 717 Holroyd J said that the disputed words 'must be construed, according to their nature and import, *in the order in which they stand in the Act of Parliament*'

Multi-textual errors: (2) Conflicts between different instruments

If there is inconsistency between two Acts, the later prevails. This rule robs such inconsistencies of much of their difficulty. Nevertheless problems can still arise where the two Acts are by an express provision to be construed as one, or are otherwise *in pari materia.* Then, if it appears that the draftsman of the later Act intended not to contradict the earlier Act, but has nevertheless produced an inconsistent provision, the position may be very like that prevailing where there is inconsistency within the same instrument.

The Interpretation Act is to be read as one with every later Act, though it does not apply where the contrary intention is shown. The trouble is that it may be doubtful whether there is a contrary intention on the part of the draftsman of the later Act. Draftsmen are instructed to be constantly aware of the provisions of their Interpretation Act. Lord Thring went so far as to say 'it is the duty of every draftsman to know it by heart' (Thring 1902, p 14). Examples of difficulties caused by discrepancies between specific sections and Interpretation Act provisions have been given above|(p 195).

Another source of conflict is the amending Act. This may alter the wording of the earlier Act in ways which seem contrary to the basic intention of the amending Act. Thus it seemed that the purpose of an Act amending the County Courts Admiralty Jurisdiction Act 1868 was to confer on county courts certain powers corresponding to the jurisdiction of the High Court of Admiralty. One provision however conferred jurisdiction to try claims not exceeding £300 arising out of agreements for the use or hire of any ship. The Admiralty Court possessed no such jurisdiction. (See *Brown & Sons* v *The Russian Ship 'Alina'* (1880) 42 LT 517 and *The Queen* v *The Judge of City of London Court* [1892] 1 QB 273.)

Acts which make textual amendments sometimes leave the amended text in a defective condition. Driedger gives a good example from Canada, concerning an Act dealing with appeals from magistrates' decisions in small debt cases. Before amendment, the Act required an appellant to do the following:

> *(a)* serve notice of appeal on the magistrate within *five* days after the date of judgment, and then

> *(b)* serve a copy of the notice (on which the magistrate would have meanwhile endorsed the amount of security required) on the clerk of the district court within *ten* days after the date of judgment.

The amending Act changed 'five' to 'twenty' in paragraph *(a)* but left paragraph *(b)* untouched. In *Fleming* v *Luxton* (1968) 63 WWR 522, the judge treated this as a 'draftsman's error' and read 'ten' in paragraph *(b)* as 'thirty' (Driedger 1974, p 51).

In *R* v *Vasey* [1905] 2 KB 748 the court had to construe s 32 of the Malicious Damage Act 1861 as amended by s 13 of the Salmon Fishery Act 1873. The material part of s 32 originally read as follows (square brackets are inserted to indicate relevant passages):

> 'Whosoever shall unlawfully and maliciously cut through, break down or otherwise destroy the dam, floodgate or sluice of any fish-pond, or of any water ... in which there shall be any [private right of fishery], with intent thereby to take or destroy any of the fish ... or shall unlawfully and maliciously put any lime or other [noxious material in any such pond or water], with intent thereby to destroy any of the fish . . . shall be guilty of a misdemeanour . . .

Section 13 amended s 32 by saying that its provisions

> ' ... so far as they relate to poisoning any water with intent to kill or destroy fish, shall be extended and apply to salmon rivers, as if the words "or in any salmon river" were inserted ... [in lieu of the words "private rights of fishery"] after the words "noxious material in any such pond or water".'

The drafting of s 13 is clearly defective. It is obvious that the words in square brackets got in by mistake. The words 'private rights of fishery' do not occur in s 32. Although the words 'private right of fishery' do occur, the words 'or in any salmon river' could not both be substituted for them and at the same time inserted after 'noxious material in any such pond or water' because the locations are different. Moreover the substitution would garble the text. The court held, as was obviously the intention, that s 13 should be applied as if it did not contain the words in square brackets.

Conclusion

In these three chapters we have surveyed a considerable number of different types of drafting error, but we have merely scratched the surface. The truth is that it is extremely common for draftsmen to produce a text which raises doubt unnecessarily.

Lord Reid, who made a considerable contribution to elucidating problems of statutory interpretation, once said: 'Fortunately draftsmen do not often make mistakes but I cannot suppose that every draftsman is entirely free from that ordinary failing' {*Connaught Fur Trimmings Ltd* v *Cramas Properties Ltd* [1965] 1 WLR 892, 899). Lord Reid used the language of courtesy, as was his wont, but he was far too kind.

Sometimes, as we know in other connections, excessive kindness is harmful. The harm here is that, by treating drafting error as a rarity rather than a commonplace, the courts have inhibited the development of adequate techniques to deal with it.