

Judges and Legislators Ancient and Modern

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In an imperfect world it is perhaps uncontroversial to assert that there is no such thing as a perfect statute. There are of course some very finely drafted statutes, which set out principles in a form that has required no revision for a considerable period. In the United Kingdom the three statutes principally drafted by Sir Mackenzie Chalmers in the late nineteenth and early twentieth centuries come to mind.¹ Although they have been amended, they have stood the test of time remarkably well. But perfection is elusive, not least because drafting involves an unavoidable tension. The difficulty is focused in the following quotation from the chapter “Of civill lawes” in Hobbes’s *Leviathan*:²

The written Laws, if they be short, are easily mis-interpreted, from the divers significations of a word, or two; if long, they be more obscure by the diverse significations of many words: in so much as no written Law, delivered in few, or many words, can be well understood, without a perfect understanding of the finall causes, for which the Law was made; the knowledge of which finall causes is in the Legislator.

As Hobbes recognizes, interpretation is always going to be necessary. The other side of the coin, however, is that the nature and extent of drafting that is needed in the first place depends crucially on how the courts approach the task of interpretation. In an Essay to celebrate Shael Herman’s contribution to legal scholarship, in areas ranging widely through modern law and legal history, civil law and common law, I hope it is appropriate to look at the drafting of legislation on the one hand and the interpretative approach adopted by the courts on the other through a range of examples from antiquity and the present.

To begin with some examples from Roman law. The first is from the mid-fifth century BC, the conventional date of the Twelve Tables. In his textbook of Roman law dating from the second century AD, the jurist Gaius gives an account of the *legis actio* procedure that was in use following the Twelve Tables, although it had fallen almost entirely into disuse in the course of the second century BC. The actions used in this

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1. Bills of Exchange Act 1882; Sale of Goods Act 1893; Marine Insurance Act 1906.
2. T. HOBBS, *LEVIATHAN* 143 (1651, repr. 1968).

procedure were, as Gaius explains, “as immutable as statutes. So it was held that a man who, in suing for the cutting down of his vines, used the word ‘vines’ lost his case: he ought to have used the word ‘trees’, since the law of the Twelve Tables, on which his action was based, spoke of cutting down trees in general.”³

Unfortunately there survives no reliable evidence of the precise text of this provision of the Twelve Tables.⁴ From other surviving material, however, it is entirely safe to conclude that the provision was spelled out in the most laconic form, almost certainly in a single sentence. While this makes it difficult to draw any very interesting conclusions about draftsmanship and interpretation, the text can at least be taken as exemplifying one model: economical, even spare drafting of the statute on the one hand, coupled with literal interpretation by the court on the other. The question what the legislator intended is not raised: what mattered was the words that he used.

A second example may be taken from a much later date, 42 BC. This is the so-called *lex de Gallia Cisalpina*. One of its provisions is concerned with *damnum infectum*. This was a procedure by means of which a person who was concerned that the dilapidated state of his neighbour’s house might cause damage to his own property could seek security from his neighbour, to cover the amount of the anticipated loss. Chapter 20 contains model pleadings for litigation in relation to *damnum infectum*, drafted using stock names. Here is a (non-literal) translation of the relevant part of chapter 20:

If, before the raising of the present action, Quintus Licinius had entered into a stipulation in favour of Lucius Seius in respect of threatened loss, in terms of the stipulation which the peregrine praetor at Rome has set out in his edict, then whatever Quintus Licinius would, according to that stipulation, have had to give to or do for Lucius Seius as a matter of good faith up to the sum of [. . .], in respect of that let the judge condemn Quintus Licinius if Quintus Licinius is unwilling to make a promise to Lucius Seius in respect of threatened loss according to the decree of the magistrate or prefect of Mutina, which that magistrate or prefect shall have decreed according to the *lex Rubria* or plebiscite; if it does not so appear, let him absolve him. . . . provided that the magistrate or prefect shall

3. GAIUS, INSTITUTES 4.11 (“[I]mmutabiles proinde atque leges observabuntur. Unde eum qui de vitibus succisis ita egisset ut in actione vites nominaret responsum est rem perdidisse, quia debuisset arbores nominare, eo quod lex XII tabularum, ex qua de vitibus succisis actio competeret, generaliter de arboribus succisis loqueretur.”).

4. For discussion, see 2 ROMAN STATUTES 608-09 (M. Crawford ed., 1996) (no. 40). A possible version, mentioned there at p. 578, is “If he shall have felled a productive tree, the penalty is 25.” (“si arborem felicem succiderit, XXV poenae sunt”).

administer justice in such a way . . . that the names which appear in the formulae written above and “Mutina” shall not be included or expressed in the formula for the action unless the action is between people who bear those names and unless proceedings take place at Mutina⁵

The statute is a typical example of Roman drafting. The complex formula is difficult to follow until it is appreciated that the opening clauses (down to the sum of money to be inserted into the formula) set out a fiction. The clauses that follow instruct the judge to find the defendant liable if he refuses to give a promise relating to *damnum infectum*; but the extent of his liability is measured by introducing the fiction that he had given such a promise. Fictions of this kind are extremely common in Roman legislative drafting.⁶

For present purposes, however, the remarkable feature is what might be thought an excessively cautious instruction to the magistrate not to include within the formula issued for a particular litigation the stock names or stock reference to the town of Mutina that appear in the statutory draft—unless, the statute is careful to add, the litigants happen to have those names and the litigation is taking place at Mutina. There would be no reason for the statute to go into this matter unless, as in the Twelve Tables, the formula would be invalid if the wrong names were used. Even so, the use of the wrong names or wrong place in a formula seems such an improbable eventuality that it is unsurprising that, from among many surviving Roman statutes, this is our only example of this kind of drafting. From the point of view of interpretation by the court, the present example also shows that there was expected to be no scope for explaining what the magistrate actually meant by granting the formula: the only matter to be considered was the literal wording of the

5. See ch. 20, ll. 22-31, 41, 46-50:

s(ei) ant<e>quam id iudicium q(ua) d(e) r(e) a(gitur) eam stipulationem quam is qui Romae inter peregrinos ius deicet in albo propositam habet L. Seio repromississet: tum quicquid eum Q. Licinium ex ea stipulatione L. Seio d(are) f(acere) opert<e>ret ex f(ide) b(ona) d(um)t(axat) (sestertium), e(ius) i(udex) Q. Licinium L. Seio, sei ex decreto Ilvir(ei) IIIIvir(ei) praefec(tei)ve Mutinensis, quod eius <is> Ilvir IIIIvir praefect(us)ve ex lege Rubria, seive id pl(ebei){ve}sc(itum) est decreverit, Q. Licinius eo nomine qua d(e) r(e) agitur L. Seio damnei infectei repromittere noluit, c(ondemnato); s(ei) n(on) p(arret), a(bsolvito). . . dum Iivir IIIIvir i(ure) d(eicundo) praefectus(ve) d(e) e(a) r(e) ius its deicat curetve, utei . . . neive ea nomina, qua(e) in earum qua formula quae s(upra) s(cripta) <est> s(unt) aut Mutina<m> in eo iudicio includei concipei curet nisei iei quos inter id iudicium accipietur leisve contestabitur ieiis nominibus fuerint quae in earum qua formula <quae> s(upra) s(cripta) est <s(unt)> et nisei sei Mutinae ea res agetur

Text, translation and commentary may be found in 1 ROMAN STATUTES, *supra* note 4 (no. 28).

6. See, e.g., P. Birks, *Fictions Ancient and Modern*, in THE LEGAL MIND 83, 95-99 (N. McCormick & P. Birks eds., 1986).

formula as it had been issued. In that respect the approach is along the same lines as discussed by Gaius. The most obvious difference, however, lies in the drafting of the statute; in this instance literal interpretation by the court is found alongside a style of statutory draftsmanship that is both lengthy and elaborate. Such drafting lends itself readily to the notion that what is said is meant to be exhaustive, so that a court should be unwilling to make up omissions by means of interpretation.

It would, however, be entirely wrong to think that Roman law was hide-bound by a formalistic or literal approach to statutory interpretation. A clear counter-example is provided by the *lex Aquilia* of about 287 BC. Chapter 3 of that *lex* provided: “In respect of all other things beside slaves or cattle killed, if anyone does damage to another by wrongfully burning, breaking or breaking off, whatever the matter in issue shall be worth in the nearest thirty days, so much let him be condemned to pay to the owner”.⁷ Ulpian’s commentary on chapter 3 of the *lex*, parts of which are preserved in Justinian’s *Digest*, provides numerous illustrations of how interpretation of the verb *rumpere*, whose core meaning is “breaking”, gradually extended the range of cases covered by the *lex* so as to apply (for instance) to spilling wine or turning it into vinegar. This extended notion was generalized in the proposition that *rumpere* covered any *corrumpere* (a cognate verb, of course); that is, any spoiling or corrupting.⁸ When a formula based on chapter 3 of the *lex* came before a judge, before pronouncing judgment he would need to hear legal submissions on the interpretation of *rumpere* in chapter 3.⁹ Although the discussion in the *Digest* is not explicit about this, in essence these submissions would be directed at saying that the intention underlying the statutory provision was that conduct which fell short of “breaking” but nonetheless amounted to “corrupting” should be covered by chapter 3 of the statute. The *lex Aquilia* was a plebiscite, and interpretation in accordance with the intention of the legislator can be no more than a legal fiction. In this instance once again we are faced with a rather spare style of drafting, but one of which the classical Roman jurists took full

7. “Ceterarum rerum praeter hominem et pecudem occisos, si quis alteri damnum faxit quod usserit fregerit ruperit iniuria, quanti ea res erit in diebus triginta proximis, tantum aes domino dare damnas esto.” Cf. 2 ROMAN STATUTES, *supra* note 4 no. 41.

8. DIGEST 9.2.27.13-15. In addition the range of the *lex Aquilia* was much extended by the awarding of actions “*in factum*”, in circumstances that were not strictly within the scope of chapter 3 but similar in type: for example, adulteration of crops in such a way that they were not themselves damaged but difficult to separate from the adulterating material: DIGEST 9.2.27.14, 20.

9. For discussion of the various formulae, see O. LENEL, DAS EDICTUM PERPETUUM 198 (3d ed. 1927).

advantage by developing an elaborate jurisprudence around the meaning of the various key words used in the statutory provision.

To turn to some modern examples. These are taken from the United Kingdom. They are, it should be stressed, no more than illustrations, since no exhaustive or even moderately comprehensive discussion of statutory interpretation is possible here. While there is no doubt that the courts have over the years had a variety of methods open to them, it is not without significance that it is still possible in a book on statutory interpretation to write: “The most frequent complaint concerning the contemporary approach of the courts to statutory interpretation is that it is excessively literal. All too frequently, it is urged, is the purpose of the legislature frustrated by an undue insistence on the part of the courts on applying the statutory words to the particular case in a strictly literal sense.”¹⁰ Nowadays there is somewhat less scope for this complaint than there was before. In particular, the approach to statutory interpretation adopted in the United Kingdom now necessarily takes account of the European dimension. Two instances may be mentioned.

The first is an employment case decided by the House of Lords.¹¹ Forth Dry Dock & Engineering Company Limited became insolvent and went into receivership. The receivers agreed to sell the assets of the business to Forth Estuary Engineering Limited. One hour before the transfer to Forth Estuary Engineering Limited twelve men who worked for Forth Dry Dock & Engineering Company Limited were informed that they were dismissed with immediate effect. The case was concerned with the applicability of the Transfer of Undertakings (Protection of Employment) Regulations 1981. By virtue of regulation 5(3) of those Regulations, the employees could claim to have been transferred to the employment of Forth Estuary Engineering Limited if they had been employed by Forth Dry Dock & Engineering Company Limited immediately before the transfer.¹²

As far as ordinary canons of U.K. statutory interpretation are concerned, the argument that men dismissed at 3.30 pm were not “employed immediately before the transfer” that took place at 4.30 pm is an entirely unremarkable one. The rationale is that at the time the

10. CROSS, STATUTORY INTERPRETATION 9 (J. Bell & G. Engle eds., 1987).

11. *Litster v. Forth Dry Dock & Eng'g Co.*, [1990] 1 AC 546.

12. Regulation 5(3):

Any reference . . . to a person employed in an undertaking or part of one transferred by a relevant transfer is a reference to a person so employed immediately before the transfer, including, where the transfer is effected by a series of two or more transactions, a person so employed immediately before any of those transactions.

dismissal took effect the contracts of employment no longer existed, so that the men were not employed immediately before the transfer. On a literal approach, therefore, regulation 5(3) did not apply.¹³

The 1981 Regulations had been made, however, in order to give effect to a European Community Directive.¹⁴ For that reason, and because the approach to statutory construction followed by the European Court of Justice is a purposive one,¹⁵ the House of Lords held that it was under a duty to construe regulation 5(3) in a purposive manner.¹⁶ Since the purpose of the regulations and the underlying Directive was to safeguard the rights of employees when a business was transferred, the House of Lords held that it was necessary to interpret regulation 5(3) as applying to an employee who would have been employed immediately before the transfer, had he not first been unfairly dismissed for a reason connected with the transfer. The result is that, although the 1981 regulations follow the abundant, would-be exhaustive style of draftsmanship traditional in the United Kingdom, the court was obliged to apply to it a purposive rather than literal construction.

The second illustration relates to the European Convention on Human Rights and Fundamental Freedoms (ECHR). Most of the ECHR rights were incorporated into United Kingdom domestic law by the Human Rights Act 1998. Prior to that ECHR had undergone about half a century of interpretation by the European Court of Human Rights. It is a guiding principle of ECHR that the rights enshrined within it must be “practical and effective”: this has been said in many contexts, from that of entitlement to representation before the courts to respect for property rights.¹⁷ From that it follows that, if they stand in the way of making a right practical or effective, arguments founded on literal or technical approaches to the meaning of language are not likely to succeed.

Two quite different examples of this approach may assist. The first relates to article 1 of the First Protocol to ECHR, which protects the peaceful enjoyment of possessions. It provides:

13. Earlier case law had supported this approach: see the speech given in the *Litster* case by Lord Oliver.

14. Council Directive 77/187/EEC.

15. See, e.g., *Von Colson & Kamann v. Land Nordrhein-Westfalen*, [1984] ECR 1891, 1909 “[I]n applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive . . ., national courts are required to interpret their national law in the light of the wording and the purpose of the Directive in order to achieve the result . . .”.

16. *Litster v. Forth Dry Dock & Eng’g Co.*, [1990] 1 AC 546, 554, 558.

17. See, e.g., *Airey v. Ireland*, (1979) 2 EHRR 305, para. 24; *Sporrong v. Lönnroth v. Sweden*, (1982) 5 EHRR 35, para. 63.

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The drafting of this provision is broad enough to leave a court with room for interpretative manoeuvre. The European Court has developed an approach to article 1 that involves first deciding which of the operative rules is engaged. It has on numerous occasions pointed out that article 1

comprises three distinct rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.¹⁸

Nonetheless the first rule is regarded as setting out a general principle, in the light of which the second and third rules have to be construed; and it is unusual for there to be an interference with property that does not fall within the second or third rule.¹⁹ This general principle has allowed the Court to develop the scope of the article to cover situations that do not quite amount either to deprivation or control of use; for example, in a Swedish case the applicants' properties were blighted for years by a series of permits which allowed them to be subject to expropriation in the future.²⁰ The permits did not actually deprive the applicants of their property or control the use they made of it. The Court found that the right to property had lost some of its substance, although it did not disappear. This was found to be an interference with the right to peaceful enjoyment of property under article 1.

Second, article 2 protects the right to life. It states:

Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

18. *Sporrong*, (1982) 5 EHRR para. 61.

19. *James v. UK*, (1986) 8 EHRR 123, para. 37.

20. *Sporrong*, (1982) 5 EHRR.

Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

The European Court has interpreted this to mean that, where there is a legitimate concern that there has been an infringement of article 2, the state is under an obligation to carry out an effective official investigation into the death. As the Court has pointed out: “The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility”.²¹ It is clear that the article contains no obligation to institute an inquiry or indeed any procedural obligations at all. But, in order to make the right practical and effective, the article needs to be interpreted so as to involve obligations of a procedural nature directed at securing that responsibility for any violation is brought home to those who ought to bear it.

It is worth noting, in concluding these brief observations about ECHR, the terms of section 3(1) of the Human Rights Act 1998, which provides as follows: “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.” In the context of ECHR, United Kingdom courts are therefore now obliged to construe statutes so that Convention rights will be practical and effective.²² It is clear that this approach may involve departing from a literal interpretation of statutory provisions. This too can be described as a purposive interpretation, by means of the fiction that Parliament always intends to legislate in such a way as to respect rights under ECHR.²³

In the ECHR examples the interpretation arrived at is possible because of the underlying philosophy that Convention rights must be practical and effective: in other words, their interpretation must be

21. *Jordan v. United Kingdom*, (2001) 37 EHRR 52, para. 105. For some recent examples of this aspect of article 2, see *Al Fayed v. Lord Advocate*, 2004 SC 568; *R v. Sec’y of State for the Home Dep’t, ex parte Amin*, [2003] UKHL 51.

22. They are obliged to take account (among other things) of judgments of the European Court of Human Rights: section 2 of the Human Rights Act 1998.

23. Since by virtue of section 19 of the Human Rights Act 1998 a minister must in the course of parliamentary proceedings make a statement that in his view the provisions of a bill are compatible with Convention rights, there is a statutory basis for a fiction of this kind, at least so far as legislation that postdates the commencement of the 1998 Act is concerned.

guided by the good that the articles were designed to serve or the harm that they were intended to prevent. The style of draftsmanship of the Convention is rather broad, just as it was in the *lex Aquilia*; and the interpretation is self-consciously purposive.

Regardless of the historical period, it is easy to be critical of a literal approach to statutory interpretation and to suppose that it is not conducive to attaining the results that the legislators desired. To some it may seem self-evident (for example) that a court document should not be invalidated by stating the wrong place name or describing a vine as a vine; equally, it may seem straightforward to reach the conclusion that in a particular context “immediately” is to be construed with some latitude. But this is too simple. There is a countervailing argument of legal certainty, which is undermined when the plain meaning of words is not adhered to. Clearly that matters when people may have shaped their transactions or guided their conduct by supposing that the statutory words meant exactly what they said. Since there is no easy answer, the best that can be done in an imperfect world is to place trust in the judges to adopt the interpretation that best does justice in the case. That is not too precarious a solution, as long as the judges live up to the things that make a good judge. These can hardly be expounded better than they were by Hobbes, with whose words we may conclude: “The things that make a good Judge, or good Interpreter of the Lawes, are, first, *A right understanding* of that principall Lawe of Nature called *Equity*; Secondly, *Contempt of unnecessary Riches*, and Preferments. Thirdly, *To be able in judgement to devest himselfe of all feare, anger, hatred, love, and compassion*. Fourthly, and lastly, *Patience to heare; diligent attention in hearing; and memory to retain, digest and apply what he hath heard*.”²⁴

24. HOBBS, *supra* note 2, at 146-47.