

BOOK REVIEWS

LEGISLATIVE DRAFTING. By G.C. THORNTON. Second Edition.
[London: Butterworths. 1970. xxxviii+350 pp. £25.00]

Once upon a time, in the days of long ago, the present writer was appointed as Assistant Attorney General in the then Crown Colony of Sarawak. Having been pitchforked into the duties of a deputy public prosecutor, he was then called upon to do some legislative drafting; after all, if a lecturer in law of any degree of competence can be called upon to lecture on contract, tort, divorce, crime, revenue law and so on, why should not a law officer be equally competent in all aspects of law? Indeed, at an early stage in my career I discovered that this illusion extends to everyone — as Reed Dickerson says somewhere, “There is one thing upon which almost everyone prides himself, and that is his writing.” Anyone can draft better than a legislative draftsman.

No comment is necessary on such a proposition. All lawyers are supposedly polymaths. My file indicated that a Bill was to be drafted, for presentation to the Supreme Council (or Cabinet) of the State, and then to the Council Negri: two bodies that have survived the vicissitudes of Crown rule and independence as a State of Malaysia. Yet how was a Bill to be drafted? What were the principles of such a measure? Where could the tyro draftsman look for guidance?

Fortunately for the apprentice draftsman, there was in those days a book on legislative drafting by Sir Alison Russell, a lawyer still remembered by reason of a useful little booklet on disciplinary proceedings against public officers. Russell brought a practical mind to the problems of drafting: and he lived in an age of (in the legislative sense) Arcadian innocence. His book was (alas, I can trace no copy in the Law Library of the University, although I am prepared to take a small bet that there is one in that of the Attorney-General) a splendid work, based on bitter experience. “We need a land reform Act,” says the politician, “come on, get on with it. Let us have a draft by next Saturday.” In such a fashion, (if Don Marquis is to be believed) did Burbage order a play from Shakespeare.

Sarawak in those days had no radio, still less any television. It was a happy, apolitical society. In such a society there is everything to be said for a simplicity of style combined with an understanding of the mind of the reader. Especially was this true in the area of legislative drafting. *All wooden shophouses shall be brick*: so ran (the Chief Justice told me) one of the Orders of His Highness the Rajah. I remember another of the Rajah’s laws (I write again from memory) whose penal section provided that *Anyone offending this Order will be severely dealt with*. Such a provision — absurd as no doubt it is in the eyes of the modern draftsman — worked well.

It is reminiscent of that famous story of the young articled clerk who, asked to write a letter seeking payment of outstanding costs from a recalcitrant client, wrote that immortal and successful demand:

Dear Sir,

Unless we receive payment of our outstanding costs by return of post, we shall take such proceedings as will astonish you.

Uncertainty, that useful element of imprecision, has its place, in all legal writing.

They arrange things differently, these days. An anxiety to trust no one makes for complex legislation. What, then, is the technique of the contemporary legislative draftsman? "Legal drafting," says Gowers,¹ "must... be unambiguous, precise, comprehensive and largely conventional. If it is readily intelligible," he continues, in hope, "so much the better": a proposition with which I cannot but agree. However, he then goes on to state that "it is far more important that it should yield its meaning accurately than that it should yield it on first reading." Here we enter into a fog, unusual in the work of Gowers: and he finally sells the pass by abandoning the layman to the devices of the legal draftsman:

All this means that his [the legal draftsman's] drafting is not to be judged by normal standards of good writing, and that he is not really included among ... 'those who use words as tools of their trade, in administration or business.'

Ah well, I always suspected that legal draftsmen considered themselves a cut above tradesmen and the rest: but they might, sometime, try to write the sort of good, plain English that tradesmen use. Gowers' foundation for his extraordinary proposition is that "Acts of Parliament, statutory rules and other legal instruments have a special purpose, to which their language has to be specially adapted," for, he notes, the legal draftsman "has to be constantly aware, not only of the natural meaning which his words convey to the ordinary reader, but also of the special meaning (*sic*) which they have acquired by legal convention and by previous decisions of the Courts" (capital "C" for Courts, let me add). I can only suppose that Gowers and his latest editor, Sir Bruce Fraser, have been so brainwashed by legislative draftsmen, that they really do believe such rubbish. It is time to consider draftsmen as those who use words as tools of their trade, and to lump them with the rest of us poor folk who seek to understand what others write. Macaulay had the right idea. In his letter to Lord Auckland, prefixed to the draft Indian Penal Code,² he wrote:

There are two things which a legislator should always have in view while he is framing laws: the one is, that they should be as far as possible precise; the other, that they should be easily understood. To unite precision and simplicity ... will often be utterly impossible.... If it appeared to us that our language was likely to perplex an *ordinary reader*, we added as many illustrations as we thought necessary for the purpose of explaining it.

The italics are mine. The courtesies of illustrations are now almost unknown — and a great pity, too: although there are signs of a change for the better, in England at any rate. There is much to be said for explanations by way of illustration.

¹ *The Complete Plain Words* (sec. ed.), 23.

² Quoted in *The Anglo-Indian Codes* ed. by Whitley Stokes (Oxford, 1887) I, xxv.

Mr. Thornton's book is in effect a modern version of earlier texts on legislative drafting, but is written in more lengthy and didactic a style than that of the old masters. Ilbert,³ for example, offers us some of the best advice on the subject, although less than half his book is concerned with the mechanics of drafting. As he writes (I quote a few of his comments, at random):

The rules of good drafting are simply the rules of literary composition, as applied to cases where precision of language is required.

Lastly, the draftsman of a public Act of Parliament has to be guided by rules, not only of logic, but of rhetoric.

The language of a Bill should be precise, but not too technical. An Act of Parliament has to be interpreted, in cases of difficulty, by legal experts, but it must be passed by laymen, be administered by laymen, and operate on laymen. Therefore it should be expressed in language intelligible by the lay folk.

Ilbert tells us that "before beginning to prepare a Bill it is essential to master the subject-matter." This is, obviously, a counsel of perfection, demanding as it does a detailed knowledge of the bureaucracy most new laws require. Once, I was irritated by the hostility of elder, senior civil servants to any proposed new legislation: now, I see that their instincts were sound; however attractive a contemplated measure may be, it may well lead to even more red tape. A New Zealand writer, N.J. Jamieson, makes a good point in an entertaining article,⁵ when he suggests that:

The emphasis on adjectival law by a textual system of drafting might be examined to see whether it gives rise to a needless, wasteful, and confusing proliferation of statutory corporations, bodies, committees, officers, inspectors and other bureaucratic persons.

There are dangers in legislation by circular, as we know in Singapore: but a government circular is a document capable of easy amendment or cancellation, and this imparts a useful flexibility. Legislation is all too often invoked for political reasons, rather than those founded in expediency or the public good: and an efficient civil servant can prevent much nonsense from choking a growing statute book.

I commend Ilbert's last, splendid requirement, that a law be "intelligible by the lay folk" — how different from our modern Gowers, our contemporary draftsmen! Not even experienced lawyers can now understand a statute:⁶ indeed, the condition of the English statute book, that source of so many of Mr. Thornton's models, is a disgrace that can be attributed to a number of melancholy factors. Laws are one of the basic instruments of politics, and for the politician there is virtue in the obscure, the oblique, the ambiguous. Instead of codification, of any massive revision of statute law, there have been piecemeal overhauls prompted by political expediency rather than commonsensical necessity; those hybrid creatures of law and Parliament, Parliamentary Counsel, have become invested with an authority apparently denied to Bench and law maker; and because political

³ *Legislative Methods and Forms* (1901).

⁴ *Op. cit.*, 242.

⁵ 'Two Ways of Drafting Statutes', by N.J. Jamieson [1979] NZLJ 308.

⁶ An English solicitor I know, one of great experience, had to refer a simple problem on redundancy payments to counsel: after repeated readings, he could not understand the Redundancy Payments Act of 1965 — a law presumably designed for employers and employees.

pressures are what they are, Parliament seems never to have had time (in spite of its armies of lawyer members) to understand the nature of law reform, to conceive an overhaul of the statute book, and to recruit the Bentham and Macaulays necessary to carry it through. The result is a legislative chaos, in which light is offered only by the private enterprise of the publishers of *Halsbury's Statutes*.⁷ Singapore has its 1970 edition, the latest of a number of consolidated editions, and one presumably shortly due for replacement; England has none, and its absence is another measure of that country's decline. Not for nothing is the word *Reform* missing from the title of the Law Commission.

It is difficult to look into any part of the English statute book without experiencing a sense of the hopelessness and futility of human endeavour. Pick up any recent volume of the Public General Acts, and try to understand even one of them. Without the editors of *Halsbury's Statutes* the reader would be lost: and even with this necessary work, he will find it difficult to obtain enlightenment. If a civilisation is to be judged by its law, then we are in the final stages of decay: stages in which words lose meaning, meaning is subordinate to formality, and formalities are the ceremonies of a pomp that has become pomposity. The language of Shakespeare is debased to such pretentious tosh as well—look at, say, the Criminal Law Act 1977. God bless us all! The tortured drafting, the varied objectives, the agonised methods of amendment, the apparent illiteracy of the draftsman (often a brilliant scholar whose work illustrates Voltaire's observation that the better is the enemy of the good) all these mark a legal system in its dying days.

The contemporary English statute book, the matrix from which most of Mr. Thornton's book is derived, resembles nothing more than the barnacle-encrusted hull of an old ship, slowing down the progress of an elderly matriarch as she wallows in the troughs of political and economic storms. One of the wisest acts of any English government would be to transfer the present establishment of Parliamentary Counsel, lock, stock and barrel, to some such comparatively harmless drudgery as drafting rules of Court,⁸ and to engage a team of youthful solicitors, recruited from private practice, neighbourhood law centres and the like, who could try and, with a certain amount of luck, succeed in restoring common sense to the statute book: with a resultant saving of energies all round. As it is, the outlook is gloomy indeed. It may seem strange that the advocates of law reform seldom if ever address their radical views to a reform of the statute book. But on reflection, it is not so strange, after all. Reformers such as socialists, communists and other enemies of democracy want the statute book kept in its present incomprehensible state, as a weapon of future control; those content with its present condition assure themselves that it follows a tried and trusty model, preserving existing interests. In this respect, therefore, radicals and reactionaries agree, if in nothing else: for in the confusion of laws lies the suppression

⁷ For the diligent, however, Her Majesty's Stationery Office in the United Kingdom has issued in some sixty or so sturdy (and expensive) binders the "Statutes in Force Official Revised Edition", collected under subject headings.

⁸ Although (*pace* the recent letters of Mr. Weir, the Lord Chancellor and others in *The Times* newspaper of December 1979) rules of Court are not without their own hazards.

of liberty, the decline of the spirit. The debasement of the statute book reflects the slavery of a people.

Of the Ten Commandments of Moses, the President of the Law Society of England and Wales recently said:⁹

What a very remarkable and comprehensive piece of draftsmanship they were — an example indeed to our modern draftsmen.

He continued, in an address to the National Conference of the Law Society, and echoing the sentiments of this reviewer upon the English condition:

... unless we are absolute specialists in the given subject, we can scarcely imagine what was in the mind of the statutory draftsman. This must stop. It must be realised by those who are set in authority over us that positive law must be clear and its intention unambiguous. The present attitude towards parliamentary draftsmanship cannot fail to bring the law into the depths of contempt and ultimately into a state of disregard by the public.

Such were the views of the President of the Law Society in October 1979, as reported in the Society's *Gazette*: an issue in which Mr. Thornton's book was favourably reviewed by a writer (Peter Clayton) who thought, however, that for "the general practitioner" the price of £25 "would be better spent on a small library of paperbacks, including *Gowers*, *Fowler* and Eric Partridge's *Usage and Abuse*."

Bearing in mind the title of Mr. Thornton's book, and its didactic nature, it seems that everything can be learnt from the draftsmen of England, Australia, Canada, Hong Kong, Tanzania and New Zealand (the inspired prose of section 27 of the Singapore Public Utilities Act 1963 also gets a reference), and nothing from the abilities of legislative draftsmen in non-Commonwealth countries. In what seems to be (unfortunately for the world) a growth industry, it is a pity that enlightenment is not to be found from those wild acres of our law libraries where the legislation of the United States, Japan, Korea, the Philippines, the Peoples' Republic of China, the Republic of China and Thailand and so on — to say nothing of India and Pakistan — are to be found (well, on reflection, omit the reference to the United States: I find their laws complex indeed). All the same, models from other jurisdictions would be useful: for what is apparent, at least to this reader, is the pedestrian nature of modern legislative drafting. Reading model after model of English, Australian, Hong Kong, Tanzanian, New Zealand and other legislation, a picture of the future of the common law man emerges: a man buffeted by rules, badgered by corporations, victimized by Ministers, a-wash in a sea of rules and regulations bursting with preliminary provisions, substantive provisions, administrative provisions, supplementary provisions, penal provisions and final provisions, fortified by those penalties and presumptions relevant to the State's intrusion into our personal lives. The pattern of the 1980's has been set.

Mr. Thornton lays out his work well, working his way up from chapters on "words", "Syntax" and "Style" to those on the drafting process itself. There are some useful tips for the tyro draftsman. What of this provision, offered by Mr. Thornton as "a handy face-saver" on "Powers and Duties", from New Zealand:

⁹ *The Law Society's Gazette*, 11 October 1979, p. 978.

Power given to do any act or thing, or to make any appointment, is capable of being exercised as often as is necessary to correct any error or omission in any previous exercise of the power, notwithstanding that the power is not in general capable of being exercised from time to time.

Handy face-saver indeed! The doctrine of *functus officio* gets no mention in Mr. Thornton's index. The moral is, Beware of Interpretation Acts.

One assumption that seems to run throughout the book is that of Lord Thring (quoted in the chapter on "the drafting process"), that "Bills are made to pass, as razors are made to sell;" so it is pleasant to note that the author touches on the responsibilities of the draftsman, albeit in the compass of only a few pages. The draftsman, writes Mr. Thornton, "has a clear duty to society to see that the freedom of the individual is interfered with no more than is absolutely demanded to achieve the desired purpose." Exactly what the extent of the "absolute demand" of a politician may be is anybody's guess. Mr. Thornton makes a nice effort to catalogue the danger areas — such as those of personal and private rights; retrospective legislation (he kindly omits any reference to the War Damage Act 1965 and the *Burmah Oil Company* case); and proposals offending against international law (when *The Rose Mary* might be helpful to the draftsman under pressure). He is also sensitive to bureaucracy, although he refers, ominously (is there no limit to power?) to "the need, indeed the duty, of the State to intrude into ... [the] personal lives [of most members of society] much more so than in days gone by." I fear that little comfort is derived by this reader from all these observations. Mr. Thornton's draftsman knows his place too well, and his study of vicarious liability, *mens rea* and the "shifting of the burden of proof" leaves much to be desired, in my view. Legislative drafting is too dangerous a subject to be left to legislative draftsmen.

Apart from useful, modern precedents culled from particular statute-books, Mr. Thornton offers us little that is new in the field of legislative drafting. It has all been said before — or most of it has — by others, dead and gone, their works now out of print. We have the usual whimsical reference to Humpty Dumpty, the customary good advice, the accepted rules of composition, and very nice it all is, too. As a book on such drafting it will serve as well as, indeed probably better than any other now available: and as it is a work likely to be purchased by departments and institutions, rather than by individuals, its high price is of little consequence. If you can afford it, *tant mieux*, if you can't there is always that modest but excellent book, Piessé's *Elements of Drafting*, last seen, I think, in its fourth edition, which will offer a more general view of legal drafting than this specialised work.

In all, I am a little nervous of such a book as this, the more so, as it is now in its second edition. That I believe it to be excellent as far as it goes should be clear from what I have written; it follows the usual pattern of books on good English and sound drafting, and has useful, up-to-date models of selected legislation.

Yet, for whose benefit are these provided? I fear that there is a growing number of legislative draftsmen (in the English-speaking part of the Third World, at least) and that their influence is increasing.

For laws are often seen as the weapons of politics — and many leaders of Third World countries, perhaps too many, are, after all, qualified as lawyers. They and their colleagues tend to suppose (as do many in the United Kingdom, where sexual and racial antagonisms are, I suspect, increased by reason of laws compelling people to think in sexist and racist terms) that laws offer major remedies to the human condition. They do not, and their limits are to be seen, wherever we look. The legislative draftsmen and his political masters may act, if they are well-trained, as reasonably good mechanics, but as social engineers their abilities are circumscribed indeed. “Is he a good printer?” I once asked an experienced Indian printer in a developing country, of his youthful successor. “He can take a piece of white paper, and make it black,” he replied, getting to the nub of the matter. Laws are but words on pieces of paper. Legislation alone cannot make a country prosperous, or its people happy. I suspect that Uganda under Idi Amin had an admirable set of laws.

This, then, is a guide to legislative rubbish, the sort of rubbish that contemporary politicians want, of the sort that now stuffs the statute books of the so-called Third World, where progress is measured by words. A few draftsmen — I can think of one or two, and not far from here, either — know this: but after all, a civil servant needs the money, and maybe a pension! Mr. Thornton perpetuates the sort of material that keeps the bureaucrats happy: and if the wretched judges make a hash of interpreting it all, why, it's their fault! At times, I have felt keenly for Mrs. Gandhi, frustrated in some of her basic policies by the adroit, lucid, skilful obtuseness of an Indian judiciary wrestling (with that especial kind of involuted cleverness peculiar to them) with yet another batch of “progressive” legislation. Ah, how wonderful it is, to be on the side of the angels! How admirable, to frustrate the policies of an elected government in the name of the majestic rule of law! Ah, how wonderful it is, to be on the side of the angels! Those outcasts living in the gutters, at the gates of those palatial houses in Bombay, Calcutta, Madras: what do they know of the beauties of legal drafting?

Well, such beauties are here, catalogued, ticketed and confined: like the mummies in the Cairo Museum, ancient, wonderful, and dead. So, what about a little piece of plain English? *‘There is no end to the writing of books, and too much study will wear you out.’* The words of the Philosopher, David's son who was King in Jerusalem, are true: and, how well drafted! Is it impossible to revise the statute book, when, after all, the Bible and the Book of Common Prayer have been dragged into the twentieth century? Have words lost their meanings, lawyers their senses?

Still, until the day when a new style of drafting overtakes us, here is Mr. Thornton's book. It lacks a bibliography, although one could be compiled from footnotes. Fortunately such a work is available in a publication of the Commonwealth Secretariat, *Bibliography of Materials on Legislative and Other Legal Drafting and Interpretation of Statutes* (Revised 1977) (the short title, it appears): a publication listing some 148 “monographs and official publications” and three hundred and more articles on the same subjects. The subject is now a growth industry: the outlook is grim, for the rest of us.

Mr. Thornton's book (first published in 1970) is, then, yet another to put on the shelf and, if you are a legislative draftsman, to consult as occasion requires. If you are not such a draftsman, but an ordinary reader, you can, instead of consulting it, meditate upon the words of Plowden, who in 1571 summed it all up with an accuracy unsurpassed by later commentators:

It is not the words of the law but the internal sense of it that makes the law, and our law (like all other) consists of two parts — *viz.*, namely of body and soul; the letter of the law is the body of the law, and the sense and reason is the soul of the law.

Let us hope that our draftsmen and our judges ever remember this distinction. "The letter killeth, but the spirit giveth life": and I had better stop, before this review embodies yet another quotation. It is the function of the legislative draftsman to recognise the imperishable spirit of man and, in burdening men and women with the social duties imposed by statute law, to preserve that element of freedom, to be found in a correct degree of imprecision and uncertainty, without which our lives are meaningless.