

‘A PALPABLE ABSURDITY ...’

By Tony Kelly

Lawyers are boring. Lawyers are pedantic. Lawyers thrive on disputes between peoples, organisations, bodies – indeed anyone and anything. If you want to quibble, law is your game and lawyers your gamesters. When disputes are formalised to the extent of instructing lawyers, those who employ lawyers are happy at the nit picking, boring, pedant they meet across a table. Aside from the context of litigation, however, the pedantry merely serves to exasperate the wider public.

Lawyers appear to thrive upon disputes. This is certainly the case when it concerns situations, exchanges or circumstances and competing accounts of these. In the criminal courts accused people dispute words, conduct and violence ascribed to them by witnesses. In the civil courts, in some commercial courts, business people argue about what they thought they had agreed. Agreements and contracts are pored over to find ambiguities that can pull apart what previous lawyers knitted together. Conveyancing deeds, so prolix in their regimented recitation of conditions, which attach to, or run with, property are meant to leave nothing to implication. The description of what properties consist of frequently lacks precision. In that lack of precision disputes are fostered and again lawyers pop up. Some say, to indulge a sense of grievance and to come down on either side of an argument about, for example, where a boundary lies.

Lawyers’ offices are full of paper. Lawyers were historically simply referred to as ‘Writers’. It was to a writer’s office that one attended to set forth a document which conveyed land; which reduced to writing an agreement; where a written statement of a case could be submitted to a Court. In the many offices where legal advice is dispensed (and some would say justice is dispensed with) lawyers take wildly differing approaches to the reckoning of what was said, what was written down, what was meant to be written down, and what is represented by the written word.

‘Canons’ of constructions have been developed which

assist the Courts in their now very commonplace task of trying to understand what was meant by Parliament when it enacted, in a certain form, statutory provisions about various things. The ‘canons of construction’ in relation to what statutes say are, themselves, heavily laden with jargon to trap the unwary. It is said by some that what the Court must do is ascertain the purpose of the legislation and construe the provisions accordingly, somewhat unimaginatively called a ‘purposive’ approach. For some this is a step too far. A literalist will not look beyond the four corners of the section or subsection to be construed. Debates have gone on long and weary before the Courts as to whether side notes and paragraph headings can be used as an aid to construction. Much under fire recently, the Human Rights Act 1998 enjoins the Courts to construe statutes in a manner compatible with ‘Convention Rights’. This has been described as

an ‘emphatic adjuration’.

That in itself can be said to be a *gloss* upon the precise words of the statute. And so it continues.

Humpty Dumpty:

When I use a word, it means just what I choose it to mean – neither more nor less.

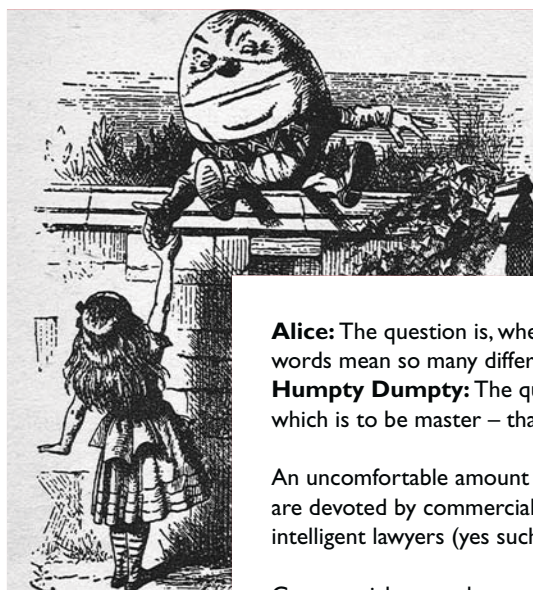
Alice: The question is, whether you can make words mean so many different things.

Humpty Dumpty: The question is: which is to be master – that’s all.

An uncomfortable amount of time and resources are devoted by commercial organisations to hire intelligent lawyers (yes such an entity does exist).

Commercial courts have now tried and tested the methods of analysing documents. There are well-worn rules of what can and cannot be done; of incursions permitted in, and some exceptions prohibiting, looking behind what the written agreement ‘really’ contains and to ‘rectify’ that agreement if it does not reflect the intention of the parties. It is forbidden in such tussles to look behind the written agreement to the ‘prior communings’ of the parties to ascertain precisely what their intention was and to define whether what was set forth in writing accurately reflects the agreement. One can see already the scope for litigation where a well-resourced party seeks to squirm out of its obligation.

Lawyers, the cynic – or non-lawyer – would say,



have it every way: in creating the form; in advising on its demise and carrying both into effect.

In the course of criminal prosecutions the written form has taken on an extremely important role. It is not difficult to see why. In the course of a criminal prosecution, or process, the State, in the form of the prosecution authority, sets down in writing what it says a citizen or subject has done and the way in which this transgresses the criminal law. To render that process fair there are certain prerequisites. The prosecutor must specify a date or dates upon which the conduct is said to have occurred. It must specify a place. Without these necessary engagements there is no proper basis to then go on to detail an allegation to answer. The specification of the conduct and the manner in which it is said to amount to a crime must be sufficiently set forth to give fair notice to an accused person. What is that I have done? Why does that amount to criminality? These propositions are self-evident; accepted in virtually all countries where prosecutions are maintained on a formalised footing before a Court constituted as an independent and impartial tribunal or trier of fact. Lawyers take these to extremes. Only recently an argument ensued before Edinburgh Sheriff Court contending that it could not be seised of a particular criminal prosecution as it was unclear from the terms of the criminal charge precisely where it was said to have occurred. The defence lawyer pleaded that no address had been given of the locus: 'Edinburgh Castle'. So, the argument went, one could not be sufficiently certain that the Sheriff in Edinburgh had jurisdiction to hear the case. At the other extreme the Courts, even the Superior Courts, have not been slow to recognise the importance of the necessary fundamentals. Charges that do not contain a statement of place, time and sufficient specification of what is said to be criminal have been simply thrown out and described as fundamentally lacking or so deficient as to amount to a fundamental nullity.

Over the years the laws adherence to these certain prerequisites, and accused persons' eagerness to take advantage of any failing in the prosecution, have led onlookers to describe these rules as 'procedural' or 'technical'. And so any decision which brings to an end the prosecution (or purported prosecution for a proper prosecution is not yet commenced) has evolved to come to be described as a 'technicality'. Accused persons acquitted on the basis of submissions which are longer than two sentences frequently describe their victory as

'a technicality' as if it were some badge of honour. On the other side, the ultimate badge of shame, as the tabloid press and ill-informed would have it, is for any judge who has thrown out a case on the basis of a breach of one of these basic rules, only to have his ruling described as a *technicality*.

The processing of criminal business through the Courts has grown immeasurably over the years. The rising tide of criminality is unfortunately not a myth created by the tabloid press. So rare was serious crime in Scotland that the High Court went out on circuit to find pockets of crime to punish and from time to time visited various towns and cities throughout Scotland. Historically, unfortunately, their visits to certain cities and towns became ever more frequent and then routine. The construction of permanent High Court buildings in our large cities is a depressing testimony to the inexorable rise of crime and an acceptance of the Courts of doing nothing other than coping with the rising tide.

Those who process criminal business, who record what happens on a day-to-day basis in the criminal courts, are civil servants. They are employees of the State clerking to judges in Courts throughout Scotland ensuring that various rules of procedure are attended to. It is their responsibility to make sure that the business of the courts is effectively and efficiently managed through the proper use of the State's resources. The Courts have always been certain that this was an important task. The Courts have never been slow to remark upon the importance of the Court forms being properly and fully prepared and written up. The Court 'minute', or record of what has occurred, requires to be an accurate statement. More importantly, however, Scottish criminal procedure enjoins the Clerk of Court to properly record adjournments, continuations, and the like, of the criminal process with what may appear to the uninformed onlooker as precision. This is because in the event of failure to attend to this properly, potentially far reaching and, some would say, catastrophic consequences can follow.

The Case of Fraser

In *HM Advocate-v-Fraser* (1852), a wife and son of the deceased were convicted of murder. In the course of the trial an objection had been stated which the presiding judges had repelled. Prior to sentencing the convicted murderers the judges decided to certify the case to the High Court of Justiciary for a number of judges to rule upon the correctness or



otherwise of their decision upon the objection. The case was continued for that purpose. No date was stated for the case to call again. The process or calling was not continued to a specified date. Objection to the competency of the proceedings was thereafter stated on the basis that the diet (or calling of the case) had been continued indefinitely and *sine die*. The contention of the Appellants was that the diet against them could never again be called and they were legally entitled to be liberated. The Lord Advocate and the Solicitor General for Scotland of the day, Scotland's Law Officers, appeared on behalf of the Crown. The report of the case leaves it beyond doubt that the Court had a full citation of authority and heard very full argument about the consequences of their decision. The importance of the point in issue was described by the Lord Justice-Clerk, Scotland's number two judicial figure, as 'The most important which has ever occurred in this Court since its institution in 1672'. He was firmly of the view that the rules which the Crown submission sought to subvert were long standing, 'of universal and unbroken usage'. He pointed up the importance of the observance of the rules as invaluable. Rather than an obstacle to justice he thought that adherence to what was always understood by the rule was an important protection for the citizen and for restraining the Court. To depart from the rules, regardless of the consequence, was regarded by the Lord Justice-Clerk as 'unseemly, unjudicial and dangerous'.

The Lord Justice-Clerk's opinion could not be misunderstood as lacking insight into the harsh consequence of maintaining the rule and not providing an excusal for any errors. He described the latter course as novel ('hitherto unheard of') and exposed the reasoning of the Crown submission: that the Court should act to secure the end of punishment. His Lordship was having none of it. He 'could not conceive any result more alarming ... more dangerous' when all of the inflexible and unbroken rules known to the Court about criminal procedure barred this course.

His Lordship was well aware that some assumed the rule, and its observance, had no value, no principal. He laid out, most clearly, the basis of, and rationale for, the rule. Firstly, he expounded, a limitation is placed upon the powers of the Court and, consequently, upon the procedure which could be directed against the accused. Next, it removes any possibility of uncertainty and with it arbitrary conduct in respect of those compared before the court. That, said the Lord Justice-Clerk, was designed to protect the accused from a great evil. Lastly, in this exegesis, it was pointed up that the



Court itself was restrained to 'clear, peremptory, and definite procedure'. This [the necessity of fixed diets] entailed a clear measure for the potential for delay in any criminal process and, consequently, would contribute to the monitoring of any process dragging out indefinitely. For the Lord Justice-Clerk this was connected with the Claim of Right, and, for him, demonstrated the importance and value of the rule.

The consequences of the Crown submissions were described as having the potential for wreaking havoc in criminal procedure. They were 'loose and dangerous' and would result in a dangerous diminution in the safeguards for the accused. The Lord Justice-Clerk concluded his opinion with a salutary warning and admonition to his judicial colleagues:

'Let us follow the course acted on by our grave and experienced predecessors – let us bow to the lesson which these statutes administer to us – and let us not set the example of disregarding the law of the Court in order to attain the end of punishment.'

For Lord Cockburn what was proposed by the Crown was acceptable:

'... there is no charm in always doing the thing in exactly the same way, and perpetuating the slavery of an awkward and often impracticable custom. It is not the duty of a Court to strain at a gnat of form, in order that it may swallow a whole camel of injustice.'

Lords Wood and Anderson concurred with the Lord Justice-Clerk. Lord Ivory – the other judge who presided over the trial – agreed with Lord Cockburn, as did Lord Cowan.

The final opinion, and ultimately the deciding vote, was that of the Lord Justice General. Of the view that what was in issue was fixed in practice from 1672 he was not for changing the position 'by reason of a change of times or customs, or of the convenience of the country'. As with a pumpkin, at midnight, when the case had not been properly adjourned to a fixed date, the diet, or instance, fell, incapable of resuscitation.

These judicial dicta were relied upon in many subsequent cases, giving them an authoritative aura which has been hard to shake off. But not so hard as to be impossible.

There followed various ingenious (and not so ingenious) attempts



to mark out a path away from this seemingly harsh rule. For example in 1892 the Burgh Police (Scotland) Act was passed and provided that want of formalities would not vitiate prosecutions. In the case of *Craig-v-Tarras* in 1897 it was argued that this operated to cure or overcome any defect. The judges were for broaching no watering down of the rule. The legislation was simply brushed aside by the Lord Justice-Clerk of the day:

‘... any Act of Parliament which sanctioned unrecorded adjournments would sanction a palpable absurdity in judicial procedure and one which might act most oppressively.’

One can see from the age of these cases that typewriters were probably, for those involved, a thing of the future. One can imagine that the Clerk’s Department of the various Courts would be labour intensive outfits. The resources involved in writing up the plethora of Court minutes for each case in each court and the need to do so accurately and precisely would have been a demanding request. The Court expressed itself in no uncertain terms regarding the need for accuracy and the consequences for breach. Given the salutary nature of the rulings it is perhaps no surprise that things quietened down (in the context of challenges and opportunities to restate the position) throughout the 19th century. Typewriters perhaps explain a part of that success.

The High Court of Justiciary revisited the matter when an appeal called before it in 1945. So surprised was it at the mess of the papers presented to it the court ‘called up’ the process. Upon taking delivery of all of the Court minutes, forms and records the judges were appalled. It took the opportunity to lay down in the clearest possible terms not only that adherence to the well settled rules of criminal procedure was to be expected but also explained the basis for the rule (as if that were required):

‘It is a cardinal rule of our criminal procedure that a criminal diet is, and must be made, peremptory, and that, if the diet is not called or duly adjourned or continued on the date in the citation, the instance falls (Hume, vol. ii. pp. 263, 264; Alison, vol. ii. pp. 343, 344; Macdonald, p. 471). The rule has again and again been rigorously enforced, its nonobservance being treated as involving a fundamental nullity requiring that any conviction which has followed should be quashed ...’

Referring to the wealth of case law on the subject the judge went on:

‘In face of this impressive array of precedents,

it would be impossible for us, even if we were disposed to do so, to treat the rule as a mere technicality. But it is not a mere technicality.’
(*Hull-v-HM Advocate*)

Given the unequivocal nature of that ruling, and what had gone before, it may come as no surprise to see things calm down even more: no one could have been in any doubt. Perhaps we have computers to thank for that success. Notwithstanding the clear expressions used by the judges, recent commentators had been unkind to that generation. The rule expounded in *Hull* has been described as a ‘mumbo jumbo rule’. It has been given that unfortunate description of ‘technical’; an illusion somehow depriving it of its value or its usefulness.

The law having been well settled in such a clear fashion, one would have expected only an occasional need to re-enforce. That is to say nothing of the ingenuity of lawyers or of the ignorance of law-makers. Intermediate Diets were an innovation in criminal procedure. A diet, or calling of a case, was supplanted prior to a trial to ascertain the preparedness of parties to the proceedings. The failure to properly adjourn or discharge diets was the subject of a number of challenges before the Appeal Courts. In 2004 the Court had had enough of distasteful and inconsistent practice about these diets. Going back to the 18th century authorities it restated the position. Given the state of the well settled authorities on the subject, and the occasional haughty response by the Courts, it could have come as no surprise to informed observers.

For only the second time since its inception the Scottish Parliament responded with emergency legislation. Its express intention was to overrule the Court’s ruling on Intermediate Diets. The debate that ensued focused on lawyers and their taking advantage, on behalf of clients, of those horrible – yes you’ve guessed it – technicalities. Some parliamentarians did not fully appreciate the contract of agent and principal:

‘No doubt the job of a lawyer is to represent the interests of their client, but we have to ask about the broader attitudes and culture that the issue that has arisen reflects and what it actually means to represent the best interests of a client.’
(*Johann Lamont MSP*)

In the course of the debate the Solicitor General described the exchanges as ‘constructive’, whereupon Phil Gaillie was prompted to ask her what was to be done about such ‘technical difficulties’. The Solicitor General replied:

‘Technicalities must not erode the possibility



of conviction when that is not in the interests of justice. I accept the point that it is important that we constantly review the law to ensure that such technicalities cannot corrode the system ... It is not in the interest of Scottish justice for convictions to be quashed or proceedings to be rendered null and void on such a technicality.'

As if that reversal did not go far enough the Executive is taking advantage of the ill-informed debate to roll back further what was always the accepted position under Scots criminal procedure.

In terms of Cause 32 of the Criminal Procedure etc (Reform) (Scotland) Bill, presently before the Scottish Parliament, the Courts will now have the power to excuse 'a procedural irregularity'. The Explanatory Notes and Memorandum to the Bill found upon the comment from the Solicitor General as a reason for taking forward further change. It also invokes efficiency:

'The proposed change is in keeping with the policy objective of ensuring that courts can deal effectively with business in the interests of justice.'

What the quill and ink could not thole the computer cannot cope with. And the Scottish Parliament, pointing a crooked finger at defence lawyers along the way, is happy to concur. Heaven help the parliamentarian who sticks his head above the parapet in defence of 'technicalities'.

From the 19th century, dealing with the most heinous of convicted criminals, the Scottish Courts have never shirked from adhering to well understood rules. Despite the derision of 'mumbo jumbo', of tabloid journalists, 'grave and experienced' judges have continued to restate the position. And not without good cause or justification. In its first foray into Scottish criminal procedure the Parliament is poised to drive a cart and horses through a well settled, understood and accepted rule. The 'grave and experienced' judges who at times bemoaned the absence of an independent legislature whilst having a separate legal structure must indeed be twitchy in their places of rest as the Parliament considers, in its second term, the destruction of a cardinal principal of Scots criminal procedure restated many times down the ages. What it proposes is either 'a palpable absurdity' or plain old 'unseemly, unjudicial and dangerous'.

