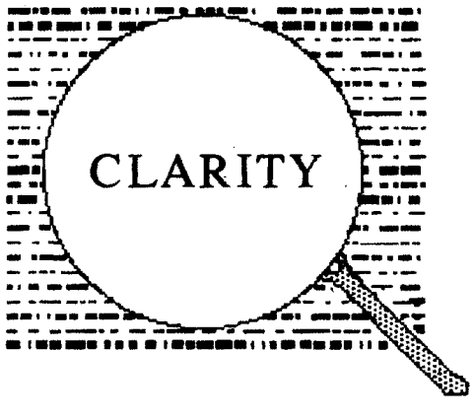

A MOVEMENT TO SIMPLIFY LEGAL ENGLISH

Patron: Lord Justice Staughton

No 19: December 1990

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The press date for the

MARCH 1991 ISSUE

is March 8th

The Times attacks legalese

Responding to the NCC's report *Plain Language — Plain Law*, *The Times* berated the use of legalese in a 30th November leader. Quoting one of the NCC's examples, it said:

> Such pompous clauses are drafted by lawyers, to make work for other lawyers and to keep laymen in the dark. They defend such gobbledegook by appealing to two fictions, neither of which belongs in the real world. The legal fiction, nostalgic for a Trollopian age, is that anybody offered a contract which has a steaming jungle of small print on the back has the right to run it under the nose of his family solicitor. The market fiction is that by choosing to deal with firms which use clear prose, consumers will oblige lawyers to draft their clients' documents accordingly.
>
> The theory is ingenious, but bears no relation to reality. The solicitors' word-processors spew forth an ever-increasing flood of garbage. A clearer case of a profession "conspiring against the public" is hard to imagine.

It is a pity that in composing this diatribe *The Times* ignored the contrary evidence supplied by CLARITY and The Law Society. The newspaper is aware of our activities. If the leader-writer was not, he (or she) was strangely ignorant of his subject, since our activities have been well publicised recently, and the report on which he was commenting said:

> An energetic group of lawyers have formed an organisation called Clarity, supported by the Law Society, to promote the use of plain English by lawyers.

Nevertheless, it might be thought that, if we overlook our pique at being ignored, the sentiments are those of CLARITY. But CLARITY does not suggest that most lawyers are rogues who defraud their clients by acting deliberately against their interests when retained to protect them. Customary legal language is a mess, but the misuse of language is the result of a want of skill, not the wickedness of 50,000 conspiring individuals.

Andrew Lockley, The Law Society's Director of Legal Practice, and Richard Oerton, have kindly sent CLARITY copies of their respective letters in reply. I understand that the latter has been published but that Mr Lockley's has not yet surfaced.

NEWS

ENGLAND

National Consumer Council

In 1983 the National Consumer Council published *Small Print*, a report written by Martin Cutts and Chrissie Maher on the language and layout of standard form contracts.

The Council's follow-up, *Plain Language - Plain Law*, was published on November 30th. This looks at most of the contracts criticised in *Small Print* and reports that:

> While there have been some small improvements, the contracts still fall short of what consumers have a right to expect.... Most (of the firms) ... have made an effort to improve. However, they were a very small sample of the whole field and are probably among the best intentioned because of their willingness to co-operate with us.

But the conclusion sounds more optimistic:

> The results ... are encouraging. Some progress has been achieved in rewriting and redesigning contracts to make them more accessible to customers. Many government departments have also improved and clarified their forms design, and some have even won Plain English Awards.

Plain Language - Plain Law looks again at the success of plain language legislation in North America and repeats the call for a similar initiative in England and Wales, if not in Europe. It invites comments on three options, not mutually exclusive:

- A law allowing courts to ignore any term in a pre-printed consumer contract which is either "unintelligible without advice" or "presented in such a way that, having regard to its importance, is not sufficiently clear or prominent".
- A law stipulating the minimum size of print and legibility of pre-printed consumer contracts.
- A law which gives power to some (or all?) the bodies regulating trade and the professions to promote plain language.

Meanwhile, the report gives advice to "the many reputable businesses who will want to improve the quality of their contracts now":

- Unexpected exlusions or limitations in standard contracts should be emphasised or highlighted.
- Draft standard contracts should be approved by the Office of Fair Trading under its *Fair Deal* scheme.
- A plain English test should be applied to drafts and expert help should be sought from organisations like the Plain English Campaign.

Plain Language - Plain Law is avaiable for £2.50 from:

National Consumer Council
20 Grosvenor Gardens
London SW1W 0DH
071-730 3469
Fax: 730 0191

Comments should be sent to John Ward at the NCC by 1st March.

The Law Society Conference 17th - 21st October 1990 Glasgow

The CLARITY stand at the conference exhibition attracted a lot of interest.

Our display included our promotional leaflet and membership application form, the October issue of *Clarity*, all the back issues, and several books and reports, mostly by members. A montage of John Walton's cartoons caught the eyes of many delegates, who moved on chortling. *Clarity for Lawyers* was available on our stand as well as at that of The Law Society, who gave it generous publicity.

The Law Society staged a plain English drafting competition, set and judged by CLARITY. This was won by Debra Bulmer who joined us at the conference and helped at the stand. Ms Bulmer is a lawyer with the Canadian Federal Government.

Six new members joined during the conference, and many other application forms were taken. As can be seen from the back page, recruitment has soared in the two months since what should have been the September issue went belatedly to press in October.

CLARITY's aims were endorsed by Tony Holland, the President of The Law Society, and John Hayes, the Secretary-General. The reference in Tamara Gorieli's speech wa curtailed under pressure of time, but we were favourably mentioned in the draft sent to delegates in advance.

Solicitors practice rules

The Law Society has expressed regret that the stylistic changes which we suggested could not be incorporated into the new rules (*Clarity* 18 [October 1990] p.2).

The Society is anxious to recast the entire range of rules in plain English. As this is a substantial task, it is to be done in-house, but CLARITY is to help with the preliminary staff training.

Clarity's Interpretation Bill

Ian McCulloch, a partner in Dyson Bell Martin & Co, parliamentary agents, has kindly offered to help CLARITY free of charge with the presentation of the Interpretation of Documents Bill.

Stylewriter version 2 launched

Editor Software has produced a better version of the *Stylewriter* programme which was favourably reviewed in *Clarity* 13 [June 1989], on p. 9.

The database against which the programme checks the user's style has been greatly expanded, particularly (and with CLARITY's help) the "legal jargon" category. Standard British hyphenation has also been added. But the main improvement has been the very useful addition of on-screen editing.

A full review will appear in our March issue if not earlier in The Law Society's *Gazette*.

Meanwhile, the programme can be obained from Editor Software Pty Ltd, The Old Malthouse, Paradise Street, Oxford OX1 1LD (0453 548409). A demonstration disc will be supplied free on request. A tutorial disc is also available.

Stylewriter was developed over 6 years by two Keele graduates, Nick Wright and Rosemary Tilley. Mr Wright was a journalist and editor, working for the Australian government on the improvement of civil service language; Ms Tilley was the research officer for a union. They now work full-time for Editor Software.

The price remains £195 (with discounts for CLARITY members and for bulk). Until the end of January extra copies are only £95 each. Those who bought version 1 this year (or earlier if they are CLARITY members) can upgrade for £10; otherwise the fee is £45. All prices are net of VAT.

Contacts with industry

British Telecom plc

The solicitor who heads BT's in-house legal department wants to clarify their forms. Informal contact has been made and a meeting is to be arranged to discuss CLARITY's role.

Rolls Royce plc

Rolls Royce has included clarity of communications in its *Total Quality* programme. Their *Language of Success* initiative has started with pilot projects in key areas.

The project is managed by an English specialist and is actively supported by the company secretary, Richard Henchley, a member of both CLARITY and the The Law Society Council.

Mr Henchley said: "We believe in plain English because it forces us to think clearly; it flushes out disagreements at a time when we can hope to deal with them."

AUSTRALIA

Centre for Plain Legal Language opens

The special graduation ceremony to mark the centenary of the Faculty of Law at the University of Sydney was used to announce the setting up of a Centre for Plain Legal Language. The initiative for the Centre came from the Law Foundation of New South Wales, which is providing a grant of $200,000 a year for the next 3 years for running costs, and $50,000 for establishment costs. It has been set up as a joint venture between the Department of English and the Faculty of Law to concentrate on the twin components of law and language. Co-directors of the Foundation are Professors Peter Butt, an expert in property law, and Robert Eagleson, an expert in English language. Both are members of CLARITY.

Among its activities the Centre will:

- rewrite legal documents and forms in plain language, concentrating on ones with wide community use;
- develop programmes of training in plain legal drafting;
- engage in research into the use of plain legal language, and especially the use of words and phrases to see which ones can be converted;
- provide advice and guidance for the profession.

It plans to have staff appointed and be under way with projects by 1st December. It has already been asked to collaborate in the preparation of a plain language version of the contract of sale of land by the Law Society, and to rewrite and design standard letters and forms by the Legal Aid Commission.

In announcing the Centre, John Dowd, the Attorney-General of New South Wales, observed:

> The profession worldwide is beginning to recognise that legal language must be improved if the profession is going to serve the community humanely as it desires to, and if our system of law is going to be honoured as it rightly deserves. People will end up disrespecting what they cannot understand .... What is so significant about this impressive grant is that it is coming from the profession itself. It is the legal profession through the Law Foundation that is making this substantial move for change and improvement....
>
> I am heartened that one of the objects of the Centre is to devise effective programmes in drafting and legal writing for undergraduates and practising lawyers. I would urge it particularly to look to the needs of the undergraduates. Set them on the right path of lucid drafting from the beginning and save them from developing bad habits and simply imitating styles of legal writing from the past which no longer serve the present.

During the graduation ceremony which preceded the announcement, Prof. David Williams, Vice-Chancellor of Cambridge University, was awarded an honorary doctorate of laws. In giving the address to the new graduates, he commented:

> One of the major tasks awaiting the new generation of British and American lawyers will be that of keeping legal literature within manageable limits, seeking clarification and simplification, and ensuring at the same time that the benefits ... extend to the lay client. Recently the New Law Journal in England spoke of the advice offered by leading counsel who, on being asked about the possibility of seeking judicial review of legal aid rates, said that the chances of success were

> "exiguous". The NLJ commented: "For those who aspire to the readable and more readily understandable use of the English language by lawyers this means they are zilch." In other words, we need plain legal language. It is important for lawyers both to assist in the simplification or clarification of our laws and to present those laws as clearly as possible. The new emphasis on legal skills in legal education is in part an overdue recognition of the importance of communication.

His timely remarks were all the more heartening as he had not realised that the Centre was to be launched at the function. His words set the tone brilliantly for what was to follow.

Members of CLARITY will also be encouraged to have this unsolicited support from a leading legal scholar in Great Britain.

Media coverage

The launch of the Plain Language Centre attracted considerable interest in the media. Talkback radio was particularly fascinating. After interviewing Robert Eagleson, the presenter invited listeners to phone in with their experiences of legalese.

The public perception of lawyers was particularly illuminating. The public see the use of legalese as a plot by lawyers to surround themselves with mystique, to wield power over their clients, and worst of all to make money. We may have heard these accusations before and tediously so; we may dispute them; and yet they persist as strongly as ever. But there is no denying, as this episode establishes again, that the poor image of lawyers is linked directly by the public to their love of legalese. To lose this image we need to change the language. It is only as we write plainly that the public will come to look more favourably on us. Then at least they will be able to recognise that our documents do contain good ideas.

The cost of justice

The Law Reform Commission of Victoria is reviewing the cost of justice. In May it published an issues paper, *Access to the Law: the Cost of Litigation*, as part of the review.

The paper calls for the consideration of the codification of the law and the use of plain English in legislation.

The Commission is currently redrafting the Road Traffic Regulations and the Penalties of Sentences Bill.

CANADA
Notes from David Elliott

Legislative Drafting Conference

Well over 100 judges, lawyers and academics attended the 3rd Conference on Legislative Drafting in Ottawa in November. It was organised by the Canadian Institute for the Administration of Justice. The conference provides a rare opportunity for those who create legal policy, those who write the law (the legislative counsel), those who interpret it (the judges) and those who write about it (the academics) to mix, exchange ideas and talk about common problems.

A common theme at the conference was the need for clarity in the law. Speaker after speaker repeated that lawyers must think of what they write as communication; they must go beyond technical accuracy to the clearest possible expression of the law, giving clarity and precision equal importance.

One of the best sessions showed some of the difficulties people have in understanding what they read. A better understanding of those difficulties, and of course knowledge of the possible aids to comprehension, enable writers to reduce the problems. We have much to learn from other professions about writing!

Other news

The Plain Language Institute in British Columbia has its first director, and expects to be operational soon. *[This news came as went to press and did not include the name of the director. - ed.]*

Professor Joe Kimble, who teaches legal writing at the Thomas M. Cooley School of Law in Michigan and who has long advocated plain language in the United States, was in Alberta recently to give a seminar on the use of plain language on business forms. A group of interested lawyers met Professor Kimble for dinner one evening to discuss plain language initiatives in Canada and the US.

The Alberta Law Reform Institute, the Alberta branch of the Canadian Law Reform Institute and the Legal Education Society have agreed to support an initiative involving a range of projects to demonstrate plain language and encourage its use. Funding is being sought. The projects will be guided by an advisory group composed of lawyers and other professionals.

The Plain Language Centre in Toronto recently completed a Farm Credit Corporation mortgage-rewriting project. The new form is now in use. The corporation's chairman is quoted as saying:

> The intent is for all legal agreements between FCC and its borrowers to be written in language designed for the convenience of the reader, not the writer.

In the Maritimes a discussion group has recently been formed to talk about possible plain language initiatives.

The Plain Language Centre hopes to invite all the Canadian groups involved in plain language activities to a meeting early in the new year to discuss ways of co-operating,. exchanging information and perhaps establishing some form of national strategy.

Summary

There has been an explosion of interest and activity in Canada in the last couple of years and yet the surface has not been scratched. But it has created the right environment.

I think we can look forward to less talk and more action in the next 12 months — or will it be more talk and more action?

CLARITY SUPPER

A record 26 people attended our annual supper, CLARITY's only social event of the year. This 3-course buffet was held on Friday, 26th October, as before at The Law Society's Hall in London.

We were particularly pleased to welcome our patron, Lord Justice Staughton, for the first time, as well as our other guest of honour, Patricia Hassett. Professor Hassett has kindly agreed to fill the gap on the committee left by Chris Elgey's resignation, although, as she returns to New York next August, she will serve only one year.

We recorded part of the evening and are therefore able to reproduce below the address of each guest speaker.

Lord Justice Staughton's talk

Well, I'm very pleased to be invited to your annual supper.

I'm also pleased to have been appointed your patron, although the office of patron is not always one of distinction. You remember what Dr Johnson wrote to Lord Triserdy?

> Is that a patron, My Lord, one who watches without concern while a man struggles for life in the water, and when he reaches ground, encumbers him with help?

It goes without saying, I hope, that I support the aims of CLARITY and wholly approve of what you are doing, or most of it. Like a political party, one doesn't necessarily have to agree with the whole programme in order to become a member. Otherwise there would be something like 50 million political parties in this country. What matters is to support the objectives generally.

I'm not sure it is one of your objectives, but if it is I'm afraid I don't support it. I thought it might be from one of the issues of your magazine. That is gender-neutral language. I try not to write "he or she", "him or her" or "his or hers", unless in the particular context it is desirable. I am prepared to die on the ramparts for that one — and it's quite likely I will.

The very object of this association is the economy of language, and if "he" means "he or she", as it does quite often, why write "he or she"? But I realise that many of you will not agree.

A Canadian lawyer told me recently that a convention that is being prepared relating to the liability of shipowners has no chance of being enacted as law by the Canadian legislature because it refers to the shipowner as "he". There certainly are some distinguished women shipowners, Mrs Eugenia Chandless for one. Although she used to eke out a meager living in the Palace Hotel de Ville, I daresay she's passed on now. The irony, of course, is that Canada also has French, and in the French text "le mateur" is necessarily and inevitably male because the French language says so. If, on the other hand, you have a crowd of shipowners ("une poole")or an assembly of them ("une assemblée"), or a congregation ("une assistance"), the whole lot become female.

I always read your journal with great admiration. I hope that the Flesch readability test (which, I think, counts the number of syllables in a word and the number of words in a sentence) doesn't always apply to editorial writing because short words and short sentences, to be quite honest, make a dull read if they go on too long. The style which I prefer is variety, some short and some long. It is very often the order of words which provides emphasis and lend colour to your style. But those comments only apply to editorial narrative and not, of course, to the legal documents with which you are concerned.

Of course, one must take care to use words in their proper sense. I don't know if you have heard the story about Dr Webster, the lexicographer. He was found by his wife in a somewhat compromising situation with the housemaid. In the idiom of those days, she said, "Dr Webster, I am surprised!" He replied, "Madam, it is I who am surprised. You are astonished."

Or there is the story of the distinguished barrister who was cross-examining a witness and said, "Madam, you say that you were alarmed by two dogs fighting." She said, "No, no. It was a single dog." He said, "Madam, all you can say is: it was one dog, whether single or married you were unable to tell.

Finally, I have here an extract from one of the traffic acts. You might like to work out what it means:

> An Act to resolve doubts as to the application of the Road Transport Lighting Act 1957 to reflecting material; ...
>
> Section 1: It is hereby declared for the avoidance of doubt that material designed primarily to reflect white light as light of that or another colour is, when reflecting light, to be treated for the purposes of the principal Act as showing a light and material capable of reflecting an image is not, when reflecting the image of a light, to be so treated.

Well, I think that just about takes up my six minutes. Thank you very much for the dinner and for an enjoyable evening.

Professor Patricia Hassett's talk

I would like to echo Lord Justice Staughton's comment that this has been a very enjoyable evening, and I am very pleased to be here.

I joined CLARITY because its mission of encouraging the use of plain language in law texts is one which I think we desparately need to pursue on both sides of the Atlantic. I hope that my affiliation with CLARITY while I am in England will give me some fresh ideas to take back to the States.

My assignment for this evening was to bring you up-to-date on the state of the plain language movement in the US.

This is a little harder to do than such a report about England would be. This is because there are so many movements there. With 50 states and the federal government it is hard to keep track of

what everyone is doing.

I have some good news and some bad news.

The good news is that the seeds of the plain language movement have been sown widely and well, and have started to flower. Before I tell you the bad news, I will mention a a few instances of the movement's success, in legal education, in the profession generally and in government.

In legal education

It is hard to generalise about law schools, as some 200 are accredited in the United States. The most that can be said about them in common is that they are struggling to have their students write anything coherent, much less something plain.

When I was teaching legal writing to first year students coming into Harvard Law School (which rightly prides itself on having a good share of the best), I had finally, in desparation, to say: "You may not write a sentence that has more than 25 words in it without getting written permission from me." They were incapable, all these bright and best, of writing a longer sentence that did not get hopelessly tangled up in itself. And if that is true of the Harvard intake, then the rest of the schools are struggling as well.

Nevertheless, considerable progress is being made. The struggle is continuing.

The Association of American Law Schools is helping. It is the main accreditation body for law schools in the States. It is sponsoring programmes and conferences for the improvement of writing generally and, occasionally, specifically plain drafting. It is also raising its accreditation requirements; this enables schools to go to their administrations for more money to meet the new conditions.

The American Bar Association is also of some help. It too is an accreditation agency for law schools. Most schools are accredited by both the AALS and the ABA. The two associations work together in this area. The Bar Association is also up-grading its requirements for the legal writing curriculum.

Some research is being done to address the concern of those who oppose plain language on the ground that the courts will not accept it. Two teachers from Loyola of Los Angeles School, Benson and Kessler, wrote an article which describes research involving a fairly large court of some 30 judges.

They divided the judges into two groups. One group was given a couple of writings that were taken from real court proceedings. The other was given a plain translation. The judges were asked to rate the documents against various characteristics, such as persuasiveness and effectiveness. The result was a statistically significant higher rating for the plain versions than for the gobbledegook which had actually been submitted in court. The conclusion was that you cannot claim that you have to write legalese because that is all that the judges will accept.

In the legal profession

The judges are able to influence the language of those who appear before them, and they do seem to be getting fed up with complex and verbose pleadings.

Some law firms are now hiring outsiders, as well as internal staff, to give writing instruction. Shearman & Sterling, on of the big Wall Street firms, hired a group to come in to give legal writing instruction to their Paris office. Plain language legal writing in their Paris office? I have a call in to a classmate of mine who is a partner there to find out: Did they think they didn't need it in the United States, or are they just having a trial run in Paris?

In the continuing education field, there is a lot of activity by the bar associations and by the Practising Law Institute (which is one of the best-known continuing legal educational organisations in America).

The New York Bar Association is, I think, typical in that it prepares and circulates a large number of pamphlets in plain language to tell potential clients what services are available and what they should expect from lawyers. One of the stated aims of these pamphlets is that they should be comprehensible to their audience.

In government

In the government, we find activity at many levels. *Clarity* has cited the executive order made by President Carter in 1978, in which he instructed federal officials to write regulations in plain English, "understandable to those who must comply" with them.

Of course, the people who followed Jimmy Carter in office did not have his common man's touch, so that regulation fell somewhat into disuse. Hopefully, there are still some beavering away in the bureaucracy who haven't heard the news that they can go back to legalese.

State governments have been quite a bit more active, and now over 40 states have statutes requiring the use of plain language in consumer contracts. Some of the statutes are wider than others. Some only cover commercial sales contracts or retail credit agreements; others deal with insurance and other kinds of sales (including land transactions) which may affect individual, as opposed to commercial, buyers.

The bad news

That is the good news. What is the bad news? I am going to make that short.

The bad news is that the profession is over 700,000 strong and they have all been trained the wrong way, even though we are struggling to do better. Even the law schools haven't got it right yet. So we haven't even reached the peak. We are still sending out more people who cannot write clearly and effectively. We are going to have to work on that.

I am reminded of a time I went to Maine on a winter wilderness survival training course. The organisers said, "You can go on this course until you are 65 or 75 — no problem. I show up at age 40 and everyone else in the group is 20 years younger. I look at the mountains I am supposed to climb at

Continued on page 9

HIGH COURT ORDER FOR ORAL EXAMINATION

Litigious readers may have deplored the High Court practice form of order for the oral examination of a judgment debtor. This long, clumsy block of text does it best to hide its meaning from the person on whom it is served, with the unsurprising result that it is invariably disobeyed. The debtor may appear for the appointment, if only after the threat of committal, but I have never known one bring the documents for which the order provides.

It is therefore worth knowing that the court will accept some clarifying amendment to the form. A draft in the form set out below was recently sealed and returned to me for service. It is by no means perfect, but I wanted to keep the amendments uncontroversial, and the only sweeping changes are to the layout and punctuation.

M.A.

UPON READING the affirmation of _____, the plaintiff's solicitor, filed the _____ November 1990

IT IS ORDERED that:

1. A.B. of _____, the judgment debtor:

(A) Attend and be orally examined before one of the officers of the _____ County Court, at such time as he may appoint, as to whether:

(a) Any and what debts are owing to the judgment debtor and

(b) He has any (and, if so, what) other property or means of satisfying the judgment signed on the _____ 1990; and

(B) Produce any books and documents in his possession or power (including relevant accounts) before that officer at the time of the examination;

2. The costs of this application and of the examination should be in the discretion of the Registrar in whose court the examination takes place.

Dated ____ November 1990.

SUPREME COURT RULES NOT OK

We recently received the following draft order for comment from the Lord Chancellor's Department:

Order 14A

DISPOSAL OF CASE ON POINT OF LAW

Determination of questions of law or construction

1. - (1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that -

(a) such question is suitable for determination without a full trial of the action, and

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have either -

(a) had an opportunity of being heard on the question, or

(b) consented to an order or judgment on such determination.

(4) The jurisdiction of the court under this Order may be exercised by a master.

(5) Nothing in this Order shall limit the powers of the Court under Order 18, rule 19 or any other provision of these rules.

Manner in which application under Rule 1 may be made

2. An application under rule 1 may be made by summons or motion or (notwithstanding Order 32, rule 1) may be made orally in the course of any interlocutory application to the Court.

Our suggested revision was:

Order 14 A

Disposal of case on point of law or construction

1. (1) The court may rule on a point of law or of construction of a document at any stage of proceedings if:

(a) The point is suitable for ruling without a full trial of the action; and

(b) The ruling will (subject to appeal) resolve the litigation or any part of it.

(2) On making the ruling the court may give judgment for either party or make such other order as it thinks fit.

2. An order under paragraph 1 may be made:

(1) On the initiative of the court or of either party:

(a) On motion;

(b) By summons; or

(c) (Despite Order 32, rule 1) orally in the course of any interlocutory application;

(2) Only if any party affected has consented or had the opportunity to be heard;

(3) By a master.

3. This order does not limit the powers of the court under any other rule.

The Lord Chancellor's Department replied:

> We have read with interest your alternative draft amendment but I am afraid that we cannot accept it. It is not a question of the draft's radicalism, but rather its lack of clarity to those who use the Supreme Court Practice on a regular basis and who are overwhelmingly members of the legal profession. Expressions in your draft such as "resolve the litigation" and "on the initiative of" are not used in a similar context in the rest of the Rules of the Supreme Court. Their precise meaning would therefore be unclear and would be likely to result in arguments in court. This would result in delay and expense to the litigants. It is an important feature of the Rules that as a single body of law they retain a uniformity of language and style. Only in this way can unnecessary procedural arguments be avoided.

The argument is that the language and style of the rules cannot be changed piecemeal. Until the Rules are revised from start to finish, it seems that amendments must retain the existing faults.

Clarity meeting: continued from page 6

20° below zero with a 70 pound pack on my back, and I shake my head. But the guide just tells a kid to walk behind me and keep saying, "Just keep putting one foot ahead of the other, Patricia; just keep putting one foot ahead of the other." That is the feeling I have about the plain language movement.

The end of the evening

In line with CLARITY tradition, the normal forms of meeting were ignored.

Mark Adler announced that he had been begged by the committee not to give a report, on the pretext that our activities over the year had been amply covered in this journal. However, he did make a few remarks about developments since the last issue (details of which are included in the "News" item on page 2).

We also dispensed with the treasurer's report, since details had also been published in the October *Clarity*.

Kelly's *Draftsman*

Roderick Ramage, the editor of Kelly's, called for suggestions from CLARITY members, to help him in the preparation of the forthcoming 16th edition for Butterworths. A letter setting out the gist of his remarks appears on page 11.

Extending the committee

The chairman reported that CLARITY work was being neglected because of a shortage of manpower. After a rebuke for sexism, a number of people offered to help. These are now being organised, and a fuller report will appear in the next issue.

Finances

In closing, Mark Adler also reported that funds were dwindling, but that the committee had considered the possibility of a 10% commission to CLARITY for any paying work which it introduced to a member. He was, however, concerned that there may be tax or insurance problems.

There was a useful discussion, leading to the conclusion that there was no problem provided the commission was a voluntary donation.

FROM THE NOVEMBER COMMITTEE MEETING

Subscriptions

To fund our extra activities, and to stave off the poverty which has been threatening, the subscription will go up to £15 in September 1991, except for those who have paid in advance by banker's order.

Corporate membership

The possibility of corporate membership was discussed some years ago when Mallesons Stephen Jaques raised the issue. At that time most of the committee were against the idea. Meanwhile, some members have joined willy-nilly in their firm name, although the single subscription buys only one copy of *Clarity*.

We have now decided to offer corporate membership. Firms will pay a basic £100, which will entitle any partner or employee to membership for only half the normal subscription. All the firm's copies of *Clarity* will be sent together to the firm. As this would not be a circular, we could send the package - at least to most inland firms - by Document Exchange. This will enable CLARITY to increase its income and reduce distribution costs, and could provide savings for medium-sized and larger firms.

Defaulters

If you are reading this, either you have paid your 1990 subscription or there has been an administrative error.

Seminars

We are offering in-house half-day drafting seminars at a fee of £350. They will be given by Mark Adler, who will charge £250, and CLARITY will receive the other £100. Patricia Hassett is attending to the administration.

We hope that the funds accumulated from this exercise will be used to give open seminars when the market is less depressed.

Meanwhile, Michael Arnheim is talking to Leicester Polytechnic about collaborating in a seminar along the lines of our earlier Trent seminars.

Recruiting the bar

Patricia Hassett and Michael Arnheim are sounding out contacts at the bar in the hope of drawing in more members.

The logo

It was agreed to keep the existing logo which, though criticised for its resemblance to a frying pan, was generally well-regarded. However, we would try to improve the artwork.

Ian Paulson, the original artist, who works in the Forms Unit at the Inland Revenue, has since produced a much-improved version. Unfortunately, a technical hitch has prevented its use on this issue, but we hope to overcome this.

CLARITY'S ACCOUNTS

1.9.90-30.11.90

Brought forward		£732.20
Income		
31 new members	£310.00	
175 renewals	£1,750.00	
Donations	£26.00	
Supper payments	£375.00	
Advertisements	£80.00	
Bank interest	£69.00	£2,730.00
		£3,462.20
Expenses		
Oct *Clarity* printing	£398.00	
postage	£121.23	
Annual meeting	£510.60	
Exhibition	£99.48	
Administration	£36.11	£1,165.42
Current balance		£2,296.78
Represented by		
Deposit account	£1,693.12	
Current account	£603.66	£2,296.78

PATRICIA HASSETT JOINS THE COMMITTEE

We are pleased to welcome Patricia Hassett to CLARITY's committee.

Her interest in plain legal language has grown out of her experiences in teaching legal writing at Harvard Law School and Syracuse College of Law. She hopes that her participation will help her to contribute to CLARITY's goals and to improve her own "plain language" skills.

She has been Professor of Law at Syracuse, in upstate New York, since 1980, and is presently doing an 18-month stint at the University's London Centre in

Notting Hill Gate. Her duties here include introducing Syracuse students to Legal London, and engaging in research. Her research goals include identifying ways to improve legal education (both before and after qualification), and harnessing computer technology to improve the quality of criminal justice.

While in London, Professor Hassett has spent a month as an intern with Mrs Lee Winetroube at the General Council of the Bar. She is also a member of the International Human Rights Consultative Group, an Association of Women Solicitors' working party (involved with legal training and part-time working) and the committee of the Association of Law Teachers.

Before her academic career, Patricia Hassett was in private practice, with part-time appointments first as assistant district attorney and later as assistant counsel to the municipality.

She is a member of the Bars of New York and the United States Supreme Court, and is an overseas member of The Law Society of England and Wales.

LETTERS

I owe an apology to a member who wrote criticising Clarity's *balance. He thought that too much space was given to developments in North America and Australia. I did intend to reply personally, but mislaid the letter, and regret that I do not have a note of the writer's name.*

I was going to say that it would be a pity to stifle interesting material because there were insufficient domestic contributions to match it. I would rather add English articles than subtract those from overseas.

There are two other reasons for the present policy. One is that English readers can learn from developments abroad; in particular, some readers may be outsiders unconvinced that plain legal English is viable, and they can be persuaded, and the rest of us encouraged, by news of success abroad. The other reason is that CLARITY is a single movement with members worldwide, and the country of origin of any piece is immaterial.

My selfish desire as editor is for as many contributions as possible, and I hope that the unintentionally anonymous correspondent will make more positive contributions. It is not easy to fill 16 pages each quarter, and the less I have to write myself the better, for editor and readers alike.

But perhaps the complaint at the beginning of the last sentence is not true. For two and a half months after each issue is sent, with enormous relief, to the printer, I wonder how the next can be filled in time. But in the last week, there is always frenzy and at the end it is a struggle to fit everything in.

Kelly's Draftsman

From R.W. Ramage
c/o Kent Jones & Done
47 Regent Road, Hanley,
Stoke-on-Trent ST1 3RQ

I am now starting work on the 16th edition of *Kelly's Draftsman* with a view to publication early in 1992 and, as I did at the start of my work on the 14th and 15th editions, I am writing to users and potential users for advice and suggestions.

I intend that *Kelly* will remain a wholly practical and useful work updated as necessary to reflect changes in law and practice, and that it will be made available on floppy disks as well as in print. I will be very grateful for suggestions of any kind about the book, whether pages of precedents and comments or two lines correcting some detail in the present edition.

I would also be interested to know how many practitioners would use the computer-based system themselves to search for material and do preliminary rough drafting, as opposed to using it to store the material on the WP system while they use the printed book as the "contents list".

The If-Trap in Wills

Justin Nelson wrote in the last issue:

"If X survives me by one month, I give him £Y" does not necessarily create a contingent gift vesting only if the beneficiary survives the testator by one month. According to the decision in *Phipps v. Ackers* (1842, 9 Cl and F 583), the wording creates a vested gift liable to be divested if the beneficiary dies within the month. This destroys much of the point of imposing the survivorship period ....

James Kessler replies:

Presumably the purpose of the "if" clause is that, should X die in the one-month period, his estate should not be taxed on £Y. This result is achieved whether the gift is a contingent one or a vested gift liable to be divested. See section 92 Inheritance Tax Act 1984 ("survivorship clauses"). So I do not think this is a problem.

Local Government Review

From Ian McLeod
School of Law, Leicester Polytechnic,
PO Box 143, Leicester LE1 9BH*

I shall shortly be taking over as editor of *Local Government Review*. As you may know, *LGR* already has a strong legal bias, and I intend to develop this still further.

I wonder whether any members might be interested in submitting articles for consideration? The normal range of length is 1,000 to 2,000 words, but consideration can always be given to flexibility at both ends.

* On 1st January I will be joining the Law Department of the City of London Polytechnic.

The editorial address of *LGR* is East Row, Little London, Chichester, PO19 1PG.

PERMIT THE CHILDREN TO COME HERE

by

Duke Maskell

In the June issue, Mark Adler said that clear writing was a skill, but not a difficult one. Of course, that is right. It can be practised as a skill, even as something a computer can be programmed for, systematically simplifying whatever comes before it, substituting familiar words for unfamiliar, short sentences for long, active verbs for passive, and so on; and then it's not difficult. It doesn't demand taste or critical judgment or any sense of style. At its crudest, as done by a computer or someone imitating a computer, it doesn't even demand any interest in meaning.

But then — the more of skill and less of art in our simplification — the more thoroughly, but unawares, will we cut ourselves off from the legal culture of the past. We will make the law more comprehensible, and to more people, but by diminishing what the language of the law comprehends. So that "simplifying legal English" may come to sound like "modernising the liturgy" or "developing city centres" or "road improvement schemes".

The March issue contained a disagreement between Richard Oerton and Mark Adler which illustrated, in little, what too automatic a simplifying bent will overlook. Richard Oerton spoke up for that stale old legal formula, "not to do or permit or suffer to be done", which in the Interpretation Bill has become "A duty not to do something includes a duty not to permit others to do it". He claimed that, because "permit" implies "authorise" and "suffer" does not, in dropping the latter word we have lost a subtle distinction. Mark Adler disagreed, because he thought the two words indistinguishable.

•

I think Richard Oerton is right, and that Mark Adler has missed something because he has too little patience with habits of expression which aren't modern — too little patience to recognise them as habits of thought.

I don't think anyone can deny that "suffer" can and often does mean something different from "permit". It does in the phrase "on sufferance" — used of what is tolerated but not encouraged — and it does in many places in the Bible where it means "bear with" (in something like the modern sense of "put up with"). When Christ says to His disciples, "Suffer little children to come unto me", "suffer" rebukes them as "permit" would not. He means, but more kindly and ironically, "Put up with it then, if that's the best you can do".

Whoever coined the formula was not verbose, any more than were those responsible for the King James Bible. He had an eye for the ways words converge and diverge in meaning, and for likely legal stumbling blocks too.

In distinguishing between "doing" and "permitting", he distinguished between two kinds of actions, one carrying more responsibility than the other; and he did so in order to prohibit both. But what is this first distinction if not a pointer towards a second where, in distinguishing between "permitting" and "suffering to be done", he distinguished between two kinds of permission, one carrying more responsibility than the other? And he did so in order to prohibit both, making - didn't he? - a like distinction for an identical reason.

To "permit" can be to do very different things. At one extreme it is unquestionably to do something, explicitly to authorise; at the other it is there merest tacit "letting be done", requiring not so much as a wink and a nod. But the formula takes account of this — in order to guard against it — not only by using "suffer" as well as "permit" but also by allowing us to read "permit" both as followed by "to be done" and as not. The formula reads both as "to do or permit or suffer to be done" and as "to do or permit to be done or suffer to be done". But the effect is to reduce, not create, uncertainty. By giving "permit" these two forms, the formula emphasises the distinction between "permit" and "suffer" by emphasising that the former has a sense in common with the "do" that precedes it as well as the "suffer to be done" that follows it. The formula makes "permit" intermediate in meaning as well as position. And it does so in order to prohibit all forms and degrees of permitting. It not only prohibits permitting but says — by not stating — what it means by it too.

When we simplify legal English we must distinguish between long-winded pretence, ancient or modern, and a form of the language which may not be plain in our sense but which has a clarity and integrity of its own. And our attitude towards the latter should have in it - shouldn't it? - something of that attitude towards out-dated ideas which John Stuart Mill attributed to Coleridge:

> The very fact that any doctrine had been believed by thoughtful men, and received by whole generations of mankind, was one of the phenomena to be accounted for .... The long or extensive prevalence of any opinion was a presumption that it was not altogether a fallacy ... that it was the result of a struggle to express in words something which had seemed a reality ... that the long duration of a belief was at least proof of an adaptation in it to some portion or other of the human mind ....

Duke Maskell was, until he took (very) early retirement last year, a polytechnic lecturer in English. Now, like Herbert Pocket in Great Expectations, *he is "looking about" him.*

"SUFFERING PERMISSIONS!"

said Justin Nelson

In *Clarity* 16 ([March 1990] p.20) Richard Oerton pointed out that in the draft Interpretation Bill, the distinction between "suffer" and "permit" had been ignored. Clause 8(c) of the draft read:

A duty not to do something includes a duty not to permit others to do it.

Richard felt that the wording should be "... not to suffer or permit others to do it."

In response, Mark Adler doubted the existence of the assumed distinction, and quoted Atkin LJ in support.

The debate is revived on page 54 of *Clarity for Lawyers*, where Mark cites "suffer or permit" as an example of a pair of words of identical meaning.

My own view is that there is a distinction —

Suffer means: permit to do
allow to do
put up with
tolerate.

The implication is of passive non-objection. This ties in with another meaning of the word, as in "to suffer pain".

Permit means: allow (which means "permit"!).

The implication is of active authorisation or agreement.

Let means: allow
cause
suffer
not interfere with.

This word seems to include both the active and the passive senses.

Perhaps, therefore, clause 8(c) should read:

A duty not to do something includes a duty not to let others do it.

SUFFER WHICH?
asks Richard Oerton

As to "permit" and "suffer", I fear there is no conclusive answer. It might be said that "permit" connotes some active giving of permission and so would not cover a case in which someone stood idly by while the forbidden thing took place and did nothing about it. "Suffer", on the other hand, would forbid idly standing by. "Thou shalt not suffer a witch to live" implies an active duty to ensure that witches do not live. It certainly seems to me that, if there is a difference, "suffer" must be the wider word. The trouble is that it is so archaic. One almost feels that it needs to be accompanied by the word "permit" in order to anchor it in the 20th century. And there seems to be no modern synonym for it. I have a feeling that one could probably jettison both words in favour of "allow", but I fear that "allow" savours more of "permit" than of "suffer". I am sorry I have no answer to this.

ALLOW ME
Mark Adler answers

I think the answer is that, whilst "suffer" and "permit" have different meanings in ordinary English, the judges have so restricted the interpretation of "suffer" that they have come to mean the same when imposing a legal obligation.

For instance, *Stroud's Judicial Dictionary* (4th edition) says (on page 2666): "There was no real distinction between "permit" and "suffer" in the Licensing Act 1872" (quoting *Bond v. Evans* (21 QBD 249) and *Somerset v. Wade* (1894 1QB 574). For example, I think (though I write from vague memory only), that a covenant not to suffer common parts to be used in a particular way will not be broken by a tenant just because he fails to prevent a trespasser from offending; he is not under a duty to litigate or to acquire a black eye.

However, since thinking of this means of wriggling out of criticism, I have not had a chance to research the point thoroughly, and comments from the scholarly would be welcome.

But I disagree more confidently with Mr Maskell's assertion that what he calls the "grammatical ambiguity" — the doubt as to whether "to be done" is linked both to "permit" and "suffer" or only to "suffer" — reduces uncertainty. Legal interpretation just does not work that way. Not only is the drafter risking litigation and (worse) a judge who disagrees with his interpretation, but he may fall foul of the maxim that any ambiguity is construed against the writer.

BOOK REVIEWS

by

Justin Nelson

A Lament for the Law Commission

by R.T. Oerton
Countrywide Press 1987
(but obtainable from the author)
117 page hardback: £1

The story behind this book is a tragedy: it is the story of an idealistic lawyer who joined the staff of the Law Commission to play his part in reforming the law, but was thwarted at every turn. Thus far, it is merely sad, not tragic. The tragedy is in the inevitability of the failure: controlled by the government of the day, the Commission's attempts at real reform of the law are bound to fail because of the lack of magisterial and civil service time, lack of resources generally, and a lack of political will.

The book is a plea for more independence, more resources and more respect for the Commission.

Over and above that, it is a personal account of one man's involvement with the Commission and the civil service, of his battle on behalf of one against the other, and of the loss of that battle. As Marcel Berlins said in his own review, the book "is fascinating, irritating and provocative: it is well worth reading."

Prospective law reformers (and surely that includes all CLARITY members) would do well to read it.

Copies are available at £1 each (postage included) from the author at 84 Burghley Road, London NW5 1UN.

Writing in Plain English

by Robert D. Eagleson, with Gloria Jones and Sue Hassall
Australian Government Publishing Service, 1990
(122-page A4 paperback: $16.95)

This book, intended mainly for civil servants in Australia, is a complete manual for clarifying one's writing.

Starting with an explanation of the reasons for using plain English, the book continues by explaining and demonstrating the steps to produce a clear document, including the need to organise one's thoughts and the structure of the document itself. 16 chapters on the language to be used are followed by chapters on document design, testing for clarity and the need for editing. The book finishes with practical exercises, a glossary of plain alternatives to cumbersome or archaic words and a useful list of further reading.

The book is definitely a practical tool, enabling its user to ensure clarity and precision in his or her documents.

In my view, the most interesting part is the chapter on testing. Various methods are suggested: focus groups, paraphrasing, protocol analysis and readability formulas (among others, the Flesch Readability Test, the Gunning Fog Index and the Cloze test). Cloze tests, by the way, involve deleting every 5th or 7th word and inviting a reader to fill in the blanks; readability is indicated by the percentage of correct words supplied. I must try this test on some leases!

This book is more a practical manual than Gowers' classic *Complete Plain Words*. As such it succeeds very well.

Clarity for Lawyers

by Mark Adler
The Law Society, 1990
(128-page paperback: £10)

A short "taster" for uncommitted lawyers on the merits of using plain language, this book is humorous, easy to read and packed with practical examples.

For the existing CLARITY member, it holds little that is new, but serves as a useful reminder of basic principles (or would make the perfect Christmas gift for any colleague who prefers "traditional" drafting).

Inevitably, the book will be treated by outsiders as a manifesto for CLARITY. Whilst it is not faultless, CLARITY will certainly benefit from this. If all lawyers adopted the book's recommendations, CLARITY would be redundant.

Enough! Further praise would swell the head of the Author - our illustrious Leader.

Practice and Precedents in Business Format Franchising

by J. N. Adams & K.V. Pritchard Jones
Butterworths: 3rd edition
(Hardback: £60)

This is a detailed monograph on the subject of business format franchising. It does not pretend to cover adjoining fields such as distributorship agreements or manufacturing licences, but concentrates solely upon the one specific topic.

As a result, it is excellent. It is precise, clear, definitive and comprehensive. Whether advising the Franchisor on the setting up of an operation from scratch or acting for a Franchisee in approving a draft scheme, this book seems to cover every point in sufficient detail, without being so academically exhaustive as to become laborious.

The chapter on precedents covers all of the basic documents involved from the covering letter for a franchise application form, through the franchise agreement itself, to the separate development agreement and a form of

Continued on page 15

REFERRALS REGISTER

The full list is published from time to time but copies are available from Mark Adler on request.
Please send stamped or DX addressed envelope.

The list is open to any member willing to accept referrals from other members.
All are solicitors unless indicated.
Please write in if you would like to be included.

New entries only are listed below.

Name	Area	Telephone	Field
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C.R. Broadie	Tunbridge Wells	0892 515121	Litigation (esp PI and insurance related)
Timothy Butler	Swindon, Wiltshire	0793 535421	Commercial property
Messrs Curtis	Plymouth, Devon	0752 660303	Private and corporate clients
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Diana Holtham	London EC2	071 638 2811	Insurance/construction
Malcolm Knott (barrister)	London EC4	071 583 6166	Professional (legal) negligence
A.E. Millson	London E1	071 488 1424	Private clients
B.J. Potter	Kidlington, Oxon	0865 841222	Company/commercial
Robert Swift	London EC2	071 606 7080	Intellectual property
Christopher Wallworth	Oxford	0865 794900	Probate, trusts, tax and computer law

BEST WISHES
to

Ian McLeod,on joining the Law Department at City of London Poly and becoming editor of *Local Government Review*
Rosemary Tilley and Nick Wright, developers of *Stylewriter*, on the birth of their daughter

Book reviews: continued from page 14

sales report for use by the Franchisee. Apart from the occasional use of "shall" (which many CLARITY members loathe), the precedents are written in a clear and straightforward style which is neither terse nor wordy. As the authors warned in the preface to the first (1981) edition, "precedents are things about which people tend to have strong views .... We do not imagine we will please everyone but we hope at any rate we have provided a useful basis from which people can work."

Only one precedent of each form is included, but each precedent fits exactly into the overall scheme and ties in with the other documents.

This book is excellent, and will repay its price many times over.

From a recent letter:

... as more particularly hereinbefore mentioned

BACK NUMBERS

of *Clarity* are available at the following prices:

Issues	1-4	£1	each
	5-11	£1.50	"
	12-15	£2	"
	16	£3	
	17-18	£2	each

Please add 20% for handling and postage

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Please contact

Justin Nelson about membership or finance
and
Mark Adler about this magazine