

## Chapter 9

### 1

#### **Carlo, the lie-detecting dog**

*Did you ever hear of a healthy young dog dying suddenly of a heart attack? Can you imagine dog lovers feeling glad when it happened? These things did occur, or may possibly have done. The following story was told to me by an old friend, who had better be nameless.*

The law is in my family's blood, going back generations. The dog in this story belonged to my great-grandfather, who was a High Court Judge on the old Midland and Oxford Circuit. He was knighted by Queen Victoria and had a fiery temper, but in the family the judge was just known as Uncle Joshua. His pet dog, a fox terrier, was named Jack. Wherever Uncle Joshua went, Jack went too. This was all before my time, but I can remember being told by an elderly aunt of how Uncle Joshua was the Assize Judge when the fine new assize courts were opened at Oxford Castle way back towards the end of the nineteenth century. There was a lot of ceremony about the law in those days, and whenever Uncle Joshua came to Oxford they preached a special sermon in the university church of St. Mary the Virgin. He had trumpeters and pages to escort him to the courthouse. There was a lot of ceremonial, and the Red Judge (as he was known) was carried grandly to court in a splendid coach drawn by four grey horses. Their usual job was to pull the wagons laden with barrels of Morrell's beer. When the Red Judge came to the assizes, they had a change of occupation and pulled his coach to the courthouse.

Of course Uncle Joshua wasn't the only Red Judge who came to Oxford. But he was the only one who brought his dog with him. In the back of the grand coach as Uncle Joshua was drawn to the assize court by Morrell's Brewery horses sat Jack the fox terrier. He accompanied Uncle Joshua everywhere and was known to be extremely well behaved. Few had ever heard his bark. Certainly he never barked in court.

Yes, it may surprise you to know that Uncle Joshua even took Jack to court with him. The dog was carried in by his loving master, and put down at his feet on the high dais upon which the Red Judge was placed to do justice to the malefactors of Oxford and district. In those days the judge sat behind a kind of desk with two pedestal supports and an arch between. The people in the courtroom could look up through the arch and see the red robes of the judge and his black patent leather shoes with the silver buckles. The people could see that between the two shoes sheltered by the scarlet robes the fox terrier Jack sat quietly watching the proceedings.

There were murmurs about this procedure. Some people thought it was undignified for the Red Judge to bring his dog into court. However none of the eminent and bewhiskered Queen's Counsel were able to pluck up courage to mention the matter to my redoubtable ancestor. Word did however get around about the fact that a High Court Judge was bringing his pet dog into court. It reached the ear of the Lord Chancellor, who was then ultimately responsible for the behaviour of judges. The Lord Chancellor, advised by his officials, appears to have considered whether to administer some rebuke to Uncle Joshua. It seems however that no such rebuke was ever administered. My guess is that since Jack the fox terrier never interrupted the court proceedings and always behaved in an exemplary fashion the authorities felt they had little to go on.

Matters proceeded in this way for some years. Then, in the fullness of time Jack the fox terrier was gathered to his ancestors. Uncle Joshua was disconsolate at the loss of his daily

companion. Being however a practical man he lost no time in finding a replacement. It was another fox terrier, a puppy whom Uncle Joshua christened Carlo.

Now Uncle Joshua was a sensible man, and realised that he couldn't expect to take an untrained young puppy into court straight away. So he set about training him in deportment and behaviour. Finally he was satisfied that Carlo would not misbehave, and took him into court for the first time. The Midland and Oxford circuit extends of course to other cities. It so happened that the first time that Carlo was taken into court by my Uncle Joshua was shortly after the opening of the new Oxford assize building near the castle.

The first case was called on. It happened deal with fraud. The agent of a neighbouring wealthy landowner was accused of cheating his master. The case began, with Carlo sitting quietly between the feet of Uncle Joshua and surveying the proceedings. All went well until the accused man was called to give evidence in his defence (this having recently become allowed). His barrister happened to be one of the senior Queen's Counsel on the Midland and Oxford Circuit who had objected most strenuously (though always in private) to the judge's habit of bringing his dog into court. This gentleman had worked out most carefully the best way to examine his client. The first question was carefully phrased.

'Did you at any time defraud your master?'

The accused man adopted an air of aggrieved virtue.

'Never sir.'

At this, pandemonium broke out in court. It was caused by Carlo. Jumping out from between the folds of the judge's robes he began barking in a high-pitched hysterical fashion. The judge made efforts to silence the dog, but was unsuccessful. After an undignified scramble, which many in court felt did the cause of justice no good, the usher managed to capture the dog in his gown and remove him from the court.

I do not know what the verdict of the jury was in that particular case, and perhaps it doesn't matter. What became apparent during the next few weeks was that Carlo possessed a remarkable ability to tell when a witness in his master's court was telling lies. The dog would remain quiet for hours on end, and then suddenly, and always when a witness was giving evidence, launch into frantic barks. It did not take long for Uncle Joshua, who was an astute man, to realise that he had in Carlo an invaluable aid to administering justice in his court.

All might have gone well if the remarkable ability of Carlo to detect untruths had not gradually become known in the Oxford area, and indeed in the area of other towns on the Midland and Oxford Circuit. After a while it got to the point when even jurymen (in those days there were no jurywomen) were likely to be aware of the dog's gift. Instead of doing as juries normally do, and observing the demeanour and tone of voice of the witness in order to judge whether he was telling the truth or not, they waited to see if Carlo barked.

At that point, the leader of the circuit felt it his duty to communicate with the Lord Chancellor. There then took place an exchange of letters between Uncle Joshua and the Lord Chancellor, which remains a feature of the archives of my family. To put it very shortly, the Lord Chancellor required Uncle Joshua to cease forthwith to bring his dog into court. Uncle Joshua maintained that a judge was entitled to bring his dog into court with him provided it was well-behaved. He claimed moreover that custom (always a potent force in the law) was on his side, since he had brought his dog into court with him ever since being made a judge many years previously. Furthermore he insisted that his dog Carlo was an essential aid to the carrying out of justice in his court.

The position quickly reached a climax. The Lord Chancellor insisted, and Uncle Joshua insisted, and they were at loggerheads. The next step would have been for the Lord Chancellor to procure the putting down of a motion in each House of Parliament for the removal of Uncle Joshua from the High Court Bench. Whether the judge would really have allowed the matter to proceed to that point remains in doubt, because death stepped in to settle

the matter. One day when barking at his most hysterical at a particularly bad piece of lying from the witness box Carlo had a heart attack and died on the spot.

At least that was the story that was officially put about. Up till that point Carlo had appeared to be a perfectly healthy young dog. Why should he suddenly have heart failure? There were ugly rumours of poison. Whether the leader of the circuit, or any other responsible person concerned in the matter, had thought it necessary to remove what was becoming a painful embarrassment we shall never know.

I retain among the family heirlooms a leather dog collar with a metal label bearing the single word **CARLO**. It is mounted on a handsome Victorian silver stand. Carlo's sorrowing owner Uncle Joshua arranged for that to be done of course. The stand has the engraved inscription *Magna est veritas et prevalebit*. I retain enough of my school Latin to know that means 'Great is the truth and it shall prevail'.

## 2

### Garbled punctuation

By means of my computer I act as an agony aunt (unpaid) for all sorts of people who are in trouble over {statute law:interpretation}statutory interpretation. A trading standards officer recently wrote with a query under the Consumer Credit (Agreements) Regulations 1983 as amended. These say that a consumer credit agreement must set out, among other things, (I quote precisely):

“The rate of interest on the credit to be provided under the agreement or, where more than one such rate applies, all the rates in all cases quoted on a per annum basis with details of when each rate applies”.

The officer was not sure whether the annual rate had to be cited when only one rate applies. My reply may be of interest because it conjures up a new rule of statutory interpretation where the punctuation is garbled.

I said that if the regulation is accurately reproduced it is badly punctuated as well as badly worded and that I was inclined to agree with my correspondent's instinct that the requirement means that if there is only one rate of interest it must be quoted on a per annum basis. I said this for three reasons.

1. Common sense says that the same rule should apply in all cases.
2. If the rule does not apply to the single-rate case then nothing is said about that case, which would be inconsistent and inexplicable.
3. Where punctuation is obviously defective one should read the words without any punctuation, as used to be the old rule. My correspondent did not give the introductory words, but I suppose they were something like 'the following shall be stated'. The full wording without punctuation would then be:

‘The following shall be stated . . . the rate of interest on the credit to be provided under the agreement or where more than one such rate applies all the rates in all cases quoted on a per annum basis with details of when each rate applies.’

I would say there is a notional punctuation, so that it is meant to read:

‘The following shall be stated . . . the rate of interest on the credit to be provided under the agreement, or (where more than one such rate applies) all the rates; in all cases quoted on a per annum basis with details of when each rate applies.’

### Putting statutory interpretation on the map

In 2009 there was inaugurated the first-ever course in {statute law:interpretation} advanced statutory interpretation at any university in the common law world. This was the course devised and presented by Jeffrey Barnes, Senior Lecturer, and Director of Teaching and Learning at the School of Law, La Trobe University, Australia.

In a famous 1975 case Lord Simon of Glaisdale said:

‘. . . if the draftsman uses the tools of his trade correctly, the meaning of his words should actually represent what their promulgator meant to say. And the court of construction, retracing the same path in the opposite direction, should arrive, via the meaning of what was said, at what the promulgator meant to say.’<sup>1</sup>

In another famous 1975 case Lord Simon said that those tools of the trade (which I would point out are mainly the interpretative criteria) constitute ‘a code of communication’ between the drafter and the court of construction, adding:

‘Observing the code on his side, the draftsman will use language in such a way that its meaning represents what Parliament means to say; and it is only by observance of the code by the court on its own side that a divergence can be avoided between its interpretation of what the words mean from what Parliament meant to say.’<sup>2</sup>

Jeffrey Barnes has seized on those words and now presents an advanced course designed to train future lawyers and judges in the intricacies of the ‘code of communication’ referred to by Lord Simon. His course materials include the following quotations from Australian judges.

Justice M. Kirby said ‘The world of common law principle is in retreat. It now circles in the orbit of statute’.<sup>3</sup> He added: ‘[T]he construction of statutes is now, probably, the single most important aspect of legal and judicial work’.<sup>4</sup> Chief Justice Spigelman said:

‘The law of statutory interpretation has become the most important single aspect of legal practice. Significant areas of the law are determined entirely by statute. No area of the law has escaped statutory modification.’<sup>5</sup>

Unfortunately many UK judges have not caught up with this realisation. They seem unaware of Lord Simon’s ‘code of communication’, whose heart is the identifying of all relevant interpretative criteria and the weighing and balancing of conflicting interpretative factors. A recent example is the House of Lords Appellate Committee’s treatment in *R v JTB*<sup>6</sup>. Here they upheld the decision of the Court of Appeal in *R v T*<sup>7</sup>, where Latham LJ said:

‘On behalf of the appellant, Mr Peter Blair Q.C., in his extremely able submissions, has sought to persuade us that common law has long recognised the concept of *doli incapax* as a defence, in the same way as self defence, and that it has an existence entirely separate from the presumption which existed up to 1998 which required the prosecution to prove that the child between the ages of 10 and 14 knew that what he or she had done was wrong. Bearing in mind the well-known passages in Bennion

<sup>1</sup> *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg A.G.* [1975] AC 591 at 645.

<sup>2</sup> *Maunsell v Olins* [1975] AC 373 at 392.

<sup>3</sup> Hon. Justice M. Kirby, ‘Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts’, (2003) 24(2) *Statute Law Review* 95 at 97.

<sup>4</sup> *Ibid.* at 96.

<sup>5</sup> Hon. J. J. Spigelman AC, ‘The Principle of Legality and the Clear Statement Principle’ (2005) 79 ALJ 769.

<sup>6</sup> [2009] UKHL 20.

<sup>7</sup> [2008] EWCA Crim 815.

Part XV11 entitled The Principle Against Doubtful Penalisation, that concept, Mr Blair submits, could only have been abrogated by clear express words.<sup>8</sup>

The single speech in the Appellate Committee did not mention the principle against doubtful penalisation or any other interpretative criterion except (exclusively by way of *Pepper v Hart*<sup>9</sup>) the informed interpretation rule. It was as if techniques of statutory interpretation, with their weighing and balancing, did not exist.<sup>10</sup>

*Postscript* I have been wondering just why there is so much reluctance in our courts to get to grips with statutory interpretation. Can it be that Justice Kirby has the answer? In another part of the passage cited above he said about the need for lawyers to take account of techniques of statutory interpretation:

‘In Australia, courts have discovered that many lawyers intensely dislike this feature of their lives. They find the obligation to read Acts of Parliament, from beginning to end, so distasteful that they will do almost anything to postpone the labour. The High Court of Australia has been moved to protest at this unwillingness to grapple with the words of the statutory text, instead of returning to the much loved words of judges, written long ago and far away, who uttered them before the legislature’s text became law. Whilst this tribute to the judiciary is touching, it does not represent the law. The world of common law principle is in retreat. It now circles the orbit of statute. Where statute speaks – and particularly a curious statute like a Constitution or a Human Rights Act – there is no escaping the duty to give meaning to its words. That is what I, and every other judge in the countries of the common law world that observe the rule of law, spend most of our time doing.’

#### 4

### Frühlings Erwachen

People who object to {sex:adolescence} {sex:education}sex education for children should read and ponder on Frank Wedekind’s recently staged 1891 play *Frühlings Erwachen* (*Spring Awakening*), which he subtitled A Tragedy of Childhood. It is a deeply disturbing portrayal of the distresses of puberty when exacerbated by ignorance and not alleviated by adult wisdom.

The central characters, Moritz and Melchior, are lifelong schoolboy friends, aged around fourteen. They are fond of each other, but not in a sexual way. In the final scene the revenant Moritz (who is now dead) says he would do anything if he could only go out with Melchior once more. Melchior replies:

‘Farewell, Moritz. Thank you for coming. How many happy days we’ve had in the fourteen years . . . come what may, I shall never forget *you*.’

Moritz answers: ‘Thanks, thanks, dear heart . . .’

Earlier, the living two converse about their sexual ignorance and consequent bewilderment. Moritz has a theory that if he has children he will let them all, boys and girls, sleep together with very little clothing – if possible in the same bed. ‘Brought up like that, they’ll be, well, less disturbed than we usually are.’

**MELCHIOR:** I’m sure you’re right Moritz. The only question is, when the girls have babies, what then?

**MORITZ:** How do you mean, have babies?

Melchior tries to explain, then:

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<sup>8</sup> Paragraph 4.

<sup>9</sup> [1993] AC 593.

<sup>10</sup> On this case see F A R Bennion, ‘Mens rea and defendants below the age of discretion’, [2009] Crim. LR 757-770.

**MELCHIOR:** May I ask, Moritz, when the boys sleep in the same bed as the girls, and then suddenly feel . . . the first stirrings of their manhood, well, I bet anything . . .

**MORITZ:** You may be right. Even so . . .

I found the most haunting passage in the play to be where, after Moritz has died, he haunts a certain wall in the cemetery and is given an occasional voice. As indicated above, he can speak to his friend Melchior, who is still in this world rather than the next.

**MELCHIOR:** Though I live to be an old man with white hair, you may still be closer to me, Moritz, than all the living.

**MORITZ:** [*Alone*] – So here I sit with my head on my arm. –The moon hides her face, unveils herself again, and looks not a bit the smarter. –So I shall go back to my little plot . . . I shall lie on my back again, warm myself with the putrefaction, and smile . . .

## 5

### **Earl Forsooth and the participle**

Here is another letter from the past in which His Lordship acted in a favourite role – as a {grammar}grammarian.

**From the Rt. Hon. Earl Forsooth K.G.**

## **Montmorency Castle**

### **Rutland**

12 May 1997

Nigel Bryant  
Bridge House  
Bromham  
Bedford

Sir,

#### *The wrongly-attached participle*

In the letter about your barbecue in the Times today you write ‘Whilst I was attempting to light the charcoal it started to spit with rain’. This use of the pronoun indicates that it was the charcoal that started to spit. Clearly that was not your intended meaning.

What you have perpetrated here is known to the cognoscenti as the wrongly-attached participle. You have attached the participle ‘Whilst I was attempting to light the charcoal’ to a wholly incorrect substantive, namely the Clerk of the Weather or whatever agency it is that controls these matters. I will refer to it as ‘the Agency’.

The fault is exacerbated by your haphazard use of the common pronoun ‘it’. You intend this to denote the Agency, but grammatically it denotes the charcoal. This is ridiculous. We all know that charcoal does not spit with rain (or at least it has not done so in my experience).

The Fowler brothers {Fowler, F.W.} {Fowler, H.G.} in *The King’s English* said that the wrongly attached participle ‘is one of the blunders most common with illiterate or careless

writers'. If in future you presume to achieve publication in our premier organ kindly get your grammar right.

In this instance I blame the Times. They should never have passed your letter for publication.

Yours faithfully,

*Forsooth*