The difficulties largely arise out of the identification of a responsible officer and the analysis of managerial functions. The present uncertainty reflects both the strength and weakness of an empirical approach to such problems.

The most recent tendency in legislation, however, has been a retreat from corporate criminal liability and stress on the personal responsibility of management—see, for instance, s.18 of the Theft Act 1968 for a directors' liability clause for criminal deception, obtaining pecuniary advantage by deception and false accounting. In such cases if an offence is committed by the company, directors and officers implicated in the offence are guilty of the offence and often the onus is on them to prove that it was committed without their consent and that they exercised due diligence to prevent its commission.[6]

Although corporate criminal liability has been dealt with in a few learned articles and in specialist textbooks on jurisprudence, company law and criminal law, there was a need for a scholarly work to trace the history, to examine the underlying social policy and to compare our system with foreign systems. This gap Dr. L. H. Leigh seeks to fill by *The Criminal Liability of Corporations in English Law*[7] which is based upon his Ph.D. thesis for the University of London.

After detailed research into the English, Commonwealth and U.S. cases and legislation and consideration of the underlying social policy, Dr. Leigh's main conclusions are that no convincing case can be made out for the retention of corporate criminal liability and that we must choose between vicarious liability and personal liability. At p.186 he writes, "The real issue is not whether an entity should be made criminally liable; it is granting the existence of a problem in the enforcement of modern legislation, what sanctions ought the legal system to employ in the struggle for enforcement. . . . In a sense the apparent issues posed by corporate criminal liability are really non existent. The real issues are issues not of criminal responsibilities, but of procedure, evidence and sanctions".

In the present writer's opinion, however, it seems a little premature to talk in terms of "the real issues" and "the true problem" and relegating "the conceptual niceties of corporate criminal liability to the attention of history" when by Dr. Leigh's own admission we know so little about corporate crime. Thus he writes at p.135, "We do not know what number of offences are committed in the name of corporations. We do not know whether violations represent corporate policy, and if so, why such policies are adopted. We do not know whether the problem lies primarily in deterring wilful infractions, or whether the hub of the problem is managerial negligence". All we know for certain is that research needs to be done. It is submitted that a lot of criminological research needs to be carried out into the nature of corporate crime in this country before we go rushing to conclusions about "the real issues" and "the true problem". Law reports are limited social documents and the intuitive assessments of experts are no substitute for social research of this kind.

[6] See Glanville Williams *Criminal Law: The General Part* (2nd edn.) pp. 868-869 for a list of such cases.

[7] *The Criminal Liability of Corporations in English Law*, by L. H. Leigh (L.S.E. Research Monograph 2). Weidenfeld and Nicolson; pp. 221, 56s.

DRAFTING

Will or Shall?

By R. W. RAMAGE, B.Sc.(Econ)
Solicitor

A TESTATOR left his residuary estate to his children in equal shares, with a proviso that "in case any child of mine *shall die* in my lifetime leaving issue living at my death, such issue *shall stand* in the place of such deceased child . . .". At the time when the will was made, one of the testator's children had died leaving a daughter living at the time of the testator's death. The granddaughter took out a summons to determine whether she was entitled to share in the residuary estate. It was held by the Court of Appeal (*Re Walker* [1930] All E.R. Rep. 392) that she was not entitled to share in it. Lord Hanworth M.R. said, at p.393: "It is plain that the words 'any child of mine shall die' have a plain meaning. In using the words 'shall die' the testator is using words of futurity". Futurity in this context, as shown later in this article, means futurity as at the date of the will. Similar facts and words of a will have been considered in other cases, in some of which similar and in others contrary conclusions have been reached. The distinction drawn between the two lines of cases is fine if not artificial.

In *Rayfield* v. *Hands* [1958] 2 All E.R. 194, in a different field of law, the articles of association of a limited company stated (*inter alia*) that "every member who intends to transfer shares *shall inform* the directors who *will take* the said shares equally between them at a fair value . . .". A member having given notice to the directors in accordance with the relevant article, and the directors having been unwilling to take the shares, the member took proceedings against the directors and sought an order that they purchase his share at their fair value. The directors contended that they were not obliged to take the shares, and it was argued on their behalf that, although the word "shall" where it appeared connoted obligation, the use of the word "will" later in the article indicated that the directors were not under any obligation to purchase the shares but imported the idea of option or choice. Vaisey J. said at p.196: "I appreciate the force of that argument, but I cannot accept it. In this context, while the word 'shall' clearly imports compulsion and obligation, the word 'will' indicates as it seems to me a resultant prospective eventuality, in which case the member has to sell his shares and the directors have to buy them, each being under an obligation to bring that eventuality into effect".

The meaning of the word "will" as an auxiliary verb has been considered further by the court in the case of *Hector S.S. Co.* v. *Soufract V.O. (Moscow)* [1945] K.B. 343, in which the following clause in the charterparty was construed: "Should steamer be ordered on a journey by which the charter period *will be exceeded* charterers to have use of the steamer to enable them to complete the voyage . . .". At p.348, Atkin J.

said that what was being dealt with was clearly the ordering of a voyage which would *ex necessitate,* not which might exceed the charter period—and it was not material whether or not the word " will " meant " shall ". Had the parties meant otherwise, the clause could have read: " Should steamer be ordered on a voyage which in fact, or in the results, exceeds the charter period ".

In *Ledingham and Others* v. *Bermejo Estancia Co. Ltd.* [1947] 1 All E.R. 749, a clause was construed whereby interest was waived " until such time as the company *is* in a position to pay ". It was argued that the word " is " was to be read to indicate the present, at the time of making the agreement, but it was held, *per* Atkinson J. at p.751, that even if the company were at the time of the waiver able to pay the interest out of capital, this was clearly not intended, because the purpose of the waiver was to enable the company to carry on business, and so it was the intention that what was meant was not present payment but future payment out of income.

These cases drawn from varied fields all illustrate that difficulties in the construction of legal documents can arise solely on account of the choice of the auxiliary verbs used. Particular difficulties are found in the words " will " and " shall " in legal as well as in everyday English. Whilst a very wide range of meaning can be ascribed to them, and usage varies according to the time and place and the practice of the user, there are broad principles generally accepted in everyday English to distinguish the words " will " and " shall ".

The general rule is that in the English spoken in England, the future is expressed in the first person by the use of the word " shall ", and in the second and third persons by the word " will ". Contrariwise the word " will ", when used in the first person, and the word " shall ", when used in the second and third persons, connotes intention or compulsion. This can be illustrated by the Scottish use of these two words, which gives to them the opposite meanings from those given to them by English usage. The story is told of a Scot who fell accidentally into the Thames and, fearing that he would drown, shouted: " Help! *I will drown.* No one *shall save* me ". A passing Englishman heard these words and, concluding that the Scot intended to drown and did not wish to be saved, walked away and left him to drown. The purpose of this article is to show that the generally accepted English usage of the words is applicable to legal as well as to everyday language and that legal documents can be drafted with greater precision and clarity than at present if this usage is adopted.

The following typical clause in a lease, taken from form 2: 64 in volume 11 of the 4th edition of the *Encyclopaedia of Forms and Precedents,* embodies these two words using them in the manner commonly but wrongly used by lawyers: " If the tenant *shall desire* to determine the term hereby granted . . . and *shall give* to the landlord six months' previous notice in writing . . . and *shall* up to the date of such determination *pay* the rent . . . then immediately on the expiration of such notice the present demise . . . *shall cease and be void. . . .*"

Before considering the use of the words, the structure of the clause itself must be analysed. There are generally three parts in the basic structure of a legal clause such as the above, namely:—

1. *the case* or circumstances with respect to which or the occasion on which the clause is to take effect: i.e. " if the tenant shall desire to determine the term hereby granted ";
2. *the condition* stating what is to be done to make the clause operative. In the example there are two conditions i.e. " and shall give to the landlord . . ." and " and shall up to the date of such determination pay the rent "; and
3. *the legal action* which is to result or which a person to whom the clause applies is enabled or commanded to do, i.e., " then . . . the present demise . . . shall cease and be void ".

In this lease clause the word " shall " is used four times in all, but only once in the imperative sense. In stating the case and the two conditions, the word is used, apparently, to put them into the future tense in the belief that a matter expressed in the present or past tenses can relate only to matters concurrent with or previous to the document referring to them. This is mistaken because a document is construed to relate to matters concurrent with or previous to the relevant circumstances when they occur, and not to those applicable at the date of the document, unless a different intention is clear from the document itself.

Even if it were proper to use the future tense, the word "shall " would be inappropriate because it connotes an obligation; the word " will " ought to have been used and, if in the example the word " will " is substituted in the case and the conditions for the word " shall ", it becomes apparent that the use of the future tense is not only unnecessary but also confusing.

This use of the word " shall " in statements of the case and condition was formerly common not only in private legal documents between parties but also in Acts of Parliament, but in the latter the practice has been established to limit the use of " shall " to expressions of obligation only. The case and condition should be, and in Acts of Parliament always are, expressed in the present tense, when stating facts required to be concurrent with the legal action, and in the perfect tense when stating facts required to have preceded it. In *On Legislative Expression* (*House of Commons Papers* (1843) vol. xx) George Coode states the advantage of this rule saying that " keeping the description of cases and conditions in the present and perfect tenses, [it] leaves the imperative and potential language of the legal action clearly distinguished. . . . Narration will appear in narrative language instead of being allowed, as now, to usurp imperious language, and thus confound the facts and the law ". The statement of the legal action may be either mandatory, when " shall " is used, or permissive, when " may " is usually appropriate.

For example: in s.109(1) of the Companies Act 1948 the case and the legal action are both contained in the opening paragraph, whilst the conditions are set out in the following sub-paragraphs. The case is in the perfect tense, as are the first, second and last of the four conditions, since they are all required to have preceded the legal action, but the third condition is in the present tense, since it must continue up to the time of the legal action, thus:

[*case*] " 109.—(1) Where a company . . . *has issued* a prospectus . . . [*legal action*] the company *shall not commence* any business . . . unless [*conditions*] (a) shares . . . *have been allotted* to an amount not less . . . than the minimum subscription; and (b) every director of the company *has paid* to the company . . . a proportion . . .; and (c) no money *is* . . . liable

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to be repaid to applicants . . .; and (d) there *has been delivered* to the registrar of companies . . . a statutory declaration. . . ." Space does not permit a restatement of this extract in the language typically used by the draftsman of private legal documents where "shall" and "shall have", etc., are substituted for the present and past perfect tenses; but the reader is invited to recast for himself the extract on this basis and to compare the confused and complicated language which results with the clarity and precision of the enactment itself.

The previous example of a typical clause from a lease can be used to illustrate the application of this principle to private legal documents. In it, the case and the second of the two conditions are to continue up to the time of legal action, whilst the first condition (relating to the giving of such notice) is in the past in relation to the legal action. Rewritten in this manner the clause now reads: "If the tenant *desires* to determine the term hereby granted . . . and *has given* to the landlord six months' previous notice in writing . . . and up to the date of such determination *pays* the rent . . . then immediately on the expiration of such notice the present demise . . . *shall cease and be void* . . .".

Now the operative part of the clause is clearly distinguished by its language from the other parts, and the whole is more simply and clearly expressed.

One other error frequently made, but not in the example used in this article is to follow the use of "shall" in the case and condition with "will" in the legal action, e.g., ". . . the demise *will cease and be void* . . .". Whilst this use of "will" may serve to distinguish the operative from the narrative parts of the clause, it is nevertheless a misuse of the word, because "will" connotes simple futurity, whereas the usual purpose of such clauses is not to forecast the future, but to express future obligation or discretion for which only words of compulsion or permission are appropriate.

The use of the permissive form "may", instead of "shall", in private legal documents is illustrated by the contrast between the two types of legal action contained in this example: "If the tenant *fails* to comply with his covenant to [repair] the Landlord *may* serve notice on the tenant . . . and if the tenant *fails* . . . to comply with such notice the tenancy *shall determine*".

Applying the principles discussed above to wills, in contrast to documents made *inter vivos*, one may take the phrase taken from *Re Walker* with which this article opened, in which the words "shall die" form part of the case and "shall stand" part of the legal action. The simple fact that wills take effect on death means that for most purposes, including this example, cases and conditions must necessarily precede the legal action and therefore, according to the principles discussed above, ought to be expressed in the past tense. Thus the example could be rewritten: "In case any child of mine *has died* in my lifetime leaving issue living at my death such issue *shall stand* in the place of such deceased child . . .".

If the rule given in *Re Walker* is correct, then the effect of this clause might be that the issue of children who had died before the date of the will would take their deceased parent's share, but the issue of children who died after the date of the will, but before the death of the testator, would not share. This would not be a sensible conclusion to draw although on the most recent, as well as on older authorities it could represent a correct statement of the law.

In *Re Donald, Royal Exchange Assurance* v. *Donald* [1947] 1 All E.R. 764 it was held that the court could construe ambiguous phrases in accordance with the context of the will, and so the phrase "who shall have died in the lifetime of J." could be read as "who shall not be living at the death of J.", so enabling the issue of a nephew, who had died six months before the birth of J., to share in the estate. At p.766, Lord Greene M.R. said: "Quite apart from and beyond the ordinary rule that ambiguous phrases must be construed in accordance with the context, I find that the court has been ready to discover that testators have fallen into a trap which it is quite easy to fall into, of using tenses ungrammatically and making references to time inaccurately". Whilst this case may be of considerable value, it is not sufficient in the light of previous authorities to allay the doubts that a testator or his draftsman might have in using language which, although unambiguous in everyday English usage, in Acts of Parliament and in private legal documents, might be misconstrued in a will. For this reason, where wills are concerned, whilst the principles advocated in this article may be adopted, any question of doubt as to the time from which the will is to speak should be made clear expressly, and not by implication: e.g., in the example taken from *Re Walker* (*supra*) after the words "has died in my lifetime" could be added "whether before or after the date of this will".

The conclusion to be drawn is that the draftsmen of private legal documents are perpetuating a major cause of difficulty and confusion by adhering to an incorrect use of the word "shall" in cases and conditions, and thereby ignoring precepts of draftsmanship compounded over a century ago, adopted in the drafting of Acts of Parliament and set out more recently by E. L. Piesse and J. Gilchrist Smith in *The Elements of Drafting*, of which a third edition was published in 1965.