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For full version of abbreviations click 'Abbreviations' on FB's website.

****** Page 208 - Part III***

The Need for Processing of Texts

**** Page 209 - Chapter Thirteen*

Difficulties of the Statute User

In the remainder of this book we consider the processing of the text. Processing is necessary because the statutory text by itself is insufficient as a means of communication between legislator and citizen. It is not even sufficient as a means of communication between the legislator and citizen's professional adviser. It is drafted as if to stand alone, but the reader who looks at nothing else has small chance of understanding it. It is all cutting edge, doing little to reveal the purpose of that edge. Drafters learn that unnecessary words lead to trouble. Like an appendix, what is not needed to achieve legal effect can become gangrenous. Drafters' explanations give hostages to fortune. Mistakes will creep into them (since mistakes creep into everything). They cannot allow for future development. They are liable to conflict with the text itself.

For these reasons and others (such as lack of time), the drafter concentrates on the cutting edge. Explanations must be provided by other people, and in other ways. We begin this Part by considering in detail just why explanations are necessary, and in what respects. This requires us to examine the difficulties experienced by the user in attempting to rely on the legislative texts alone. First we must ask: Who is the user?

Who is the statute user?

Many people have thought (and many still think) that in a democracy the laws should be such as can be understood directly by the citizen. He cannot plead ignorance of law as an excuse for his trangression. Common fairness requires that knowledge of law should therefore be accessible. Here, as elsewhere, life defeats fairness. The truth has been expressed by a distinguished drafter, and expounder of drafting principles, Professor Driedger:

> There is always the complaint that legislation is complicated. Of course it is, because life is complicated. The bulk of the legislation enacted nowadays is social, economic or financial; the laws they must express and the life situations they must regulate are in themselves complicated, and these laws cannot in any language or in any style be reduced to kindergarten level,

any more than can the theory of relativity. One might as well ask why television sets are so complicated. Why do they not make television sets so everyone can understand them? Well, you can't expect to put a colour image on a screen in your living-room with a crystal set. And you can't have crystal set legislation in a television age (Driedger 1971, p 78).

In a paper written in 1966 I attempted to describe the statute user, beginning by pointing out that the legislative audience will differ according to the type of legislation. The paper continued:

In the case of administrative legislation the Act will principally be the concern of the civil servants or local government officials responsible for administering it. On the whole, judges and other lawyers will have relatively little to do with the working of this type of legislation while the general public will rely mainly on advertisments and leaflets summarising ±e effect of the legislation in simple language. The main legislative audience here is therefore the official who will implement the Act.

With other types of legislation judges and other lawyers will be more closely concerned. Few, if any, laymen desiring information as to their tax position, for example, will go direct to the Act. They will probably take advice from lawyers or accountants, or at least will look at a text- book. The main legislative audience here is therefore the professional one, with the courts to the forefront (Bennion 1966, p 2).

The paper went on to conclude that for practical purposes the user is principally the practising lawyer (on the bench, at the bar or in a solicitor's office), the public official, or the non-legal professional adviser (such as the accountant, planner or estate agent) whose services call for knowledge of some branch of statute law. (See also Bennion 1971 (2), pp 132-4).

Apart from adding a reference to company lawyers on the receiving end of administrative or regulatory legislation, I see no reason now to alter this description; and in this book that is what I mean by the user of legislative texts.

Text-collation

When the user seeks to discover and apply the statute law relevant to a subject area, or to a particular point, he first needs to find out which are the relevant texts and to assemble them. This is often a difficult task in itself. The user's failure to perform it correctly gives rise to *a wrong understanding of what the relevant law is.* It can be demonstrated by a simplified model. Suppose the statute law relevant to a point consists of four texts, as follows:

A — an Act of Parliament

B — another Act of Parliament

C — an order made under a power conferred by A

D — regulations made under a power conferred by B If a user has ABCD available, he has all the statutory texts needed

to work out his problem. He may not be able to construe the material properly, but at least he has it before him. Now suppose the user has done some research into what the relevant material is, but has failed to do it successfully. He comes up with the idea that the relevant texts consist only of ABD. He is under a misapprehension consisting of a wrong understanding of what the relevant law is. This may be because the system provides him with inadequate tools for finding the answer.

Now let us complicate the model slightly. Suppose there is a leading case on the meaning of A. In the language of this book the court has 'processed' A, and the result is a reported decision and set of judgments which we may call X. It is clear that the user now needs not only the statutory texts ABCD but the reported case as well. Even if his researches have produced the answer ABCD, he is still under a wrong understanding of what the relevant law is because the relevant law is ABCDX. Here the system that may have let him down is a different one. It is not the system that tells the user which statutory texts are relevant to certain subjects or points. It is the system that tells the user which reported cases have processed a particular text, and in what way.

Complicating the model still further, we may now suppose that the user's point is dealt with partly by the statutory provisions mentioned and partly by common law. Call the leading reported case at common law Z. The complete kit for the user to solve his problem is now ABCDXZ. If his researches produce only ABCDX he is once more under a wrong understanding of what the relevant law is. This time a third system may be at fault, namely that which tells people which reported cases are relevant for arriving at a rule of common law. That system is not however within the scope of this book.

The problem of text-comprehension

A further type of user's misapprehension is a *failure to understand* the statutory texts. Taking our model before its final complicating development, let us assume that the relevant material consists of ABCDX. This time our user has succeeded in his researches. He has before him the statutory texts ABCD and the reported case X. He studies this material, but either comes up with the wrong answer or retires baffled. Why?

Assuming the user has the intelligence and legal training needed, and has been able to devote sufficient time to the operation, the answer must lie in the form and arrangement of the materials and the nature of the task. If the user is concerned with the *entire* subject matter covered by ABCDX (say because he is the legal officer of a trade association concerned to draw up proposals for changing the law) his task is to work out the general effect of ABCDX. In practice he may rely on the efforts of someone else (say a textbook

writer) who has already worked this out and published his conclusions. But it is unsafe to rely entirely on the labour of others. It is also unprofessional. The conscientious user wishes to work things out for himself. If he is to assume personal responsbility, in accordance with his professional duty, he should if possible arrive at his own conclusions. (On this aspect of general professional ethics see Bennion 1969, chap 7.)

What is the nature of the task of the user who is concerned to work out the overall effect of ABCDX? It is governed by the fact that he has to handle five seperate texts, which under our system are likely to be only tenuously related textually. They will not be organised as a single coherent structure. Nor is it possible that in their original form they could be, since their timing and origins are different. A and B were passed by Parliament at separate times. C was made by a Minister some time after the passing of A. D was made by another Minister some time after the passing of B. X perhaps consists of three judgments, given by a court at a time later still.

The task of a reader faced with arriving at the combined meaning of disparate texts in this way is called *conflation.* As I said in evidence to the Renton Committee, conflation of statutory material is usually difficult, sometimes extremely difficult, and occasionally impossible (Bennion 1979 (4), p 32).

Nor is conflation the only problem. Acts of Parliament start life as Bills. As we saw in chapter 2, their form is subject to parliamentary considerations irrelevant to the needs of the ultimate user. The arrangement is distorted, the text compressed, and the headings and other signposts relatively few. These considerations do not apply to statutory instruments, but their standard of drafting tends to be less expert and they can only tell part of the story—the remainder always being in the parent Act. Court judgments are different in nature to statutory texts. The two can be combined only by *codification,* a difficult process rarely achieved in Britain.

What of the user merely faced with finding in ABCDX the answer to a *specific* problem? He has first to go through the procedure outlined above in relation to the general user. If the whole of this is not needed, he must at least work out the principles governing his own particular case. Then he must apply them to the facts of the case and work out the conclusion.

When it is remembered that our model is a very simple one, the scope for failure in text-comprehension under actual working conditions is seen to be formidable. The factors causing it are examined in greater detail in the next chapter.

Doubt-resolving

Suppose the user avoids a wrong understanding of what the relevant law is, and also avoids a failure to understand the statutory texts.

He assembles all the relevant texts, and none that are irrelevant. He accomplishes the difficult task of conflating them, and correctly extracts their combined meaning. Does he then have his solution? If he has sought a general view of that area of statute law does he achieve it? If he required the answer to a specific problem has he found it?

The answer is not necessarily. This is because statute law contains areas of doubt, which can only be resolved by processing. There are various reasons for this—all inescapable, and all linked to the drafter.

The drafter cannot say everything. We saw in chapter 2 how he is under a duty to keep his text as brief as possible. Even if it were not so, he could not as a creative writer do without implication. He would be bound to assume a knowledge of the surrounding legal system (including of course the Interpretation Act). He would have to leave the obvious unsaid (though aware that what is obvious to one person is far from obvious to another). The technique of *ellipsis* is a necessary tool of any author, and the drafter brings it to his aid. We discuss it further in chapter 15.

Another source of doubt is that, just as the drafter cannot say everything, so Parliament cannot decide everything. There are points beyond which it cannot exert its will, and must leave the choice to others. The name for this process is *delegation.* We have seen how Parliament delegates its powers to ministers, to be exercised by means of statutory instruments. There are other forms of delegation. Officials may be left to work out, by the use of their discretion, the detailed operation of an enactment. Or the task may be entrusted to courts or tribunals. Either way, the drafter is likely to effect this statutory delegation by use of what we may call a *broad term.* The effecting of delegation in this way is explored in chapter 16.

Ellipsis and this form of delegation are techniques by which the drafter deliberately causes doubt or, as we may call them for convenience, *doubt-factors.* The third deliberate doubt-factor, thankfully much rarer, is *intentional obscurity.* For various reasons the legislator feels unable or unwilling to express a precise and clear meaning, and requires that the provision be 'fudged'. Where it is an operative provision, and not mere window-dressing, the drafter knows that this inevitably means that some agency, probably the court, is liable one day to be called on to give an interpretation. Intentional obscurity, which is thus a form of delegation by the legislator, is discussed in chapter 17.

A further doubt-factor, this time not deliberate, is *unforeseeable development.* A statute is to be treated as always speaking. While it remains unrepealed it remains law, day in day out. But its language belongs to the period of text-creation. Every passing year brings changes in the nuances of our language. There are developments also in inventions, and in social practices and values. Our society

is always in a state of flux. These points are explored in chapter 18.

The final doubt-factor, again not deliberate, is *error*. Drafters make a great many errors, a fact which drafters (being human) are apt not to acknowledge in public. As a drafter myself I see no need for this coyness, which gets in the way of a just assessment of the workings of statute law. There is not necessarily any blame to be attributed. To err is human, and the person who never makes a mistake never makes anything. Furthermore, errors causing doubt are not always made by the drafter—another member of the team may be at fault. Even where they are made by the drafter, and he discovers them in time, he may not be allowed a *locus poenitentiae*. Still, he has an overall responsibility for the product, second only to that of Parliament itself. The concept of parliamentary infallibility was discussed in chapter 1, in a brief survey of the duplex approach to legislative meaning. The drafter's fallibility, linked to it in a way crucial to the duplex approach, is examined in detail in chapter 19.

Differential readings

Even when the statute user has successfully surmounted all the difficulties previously outlined in this chapter, a further hazard awaits him. He may have collected all the relevant texts, understood them, resolved any doubts correctly, and still fail. This is because it is possible for different minds to reach opposing views about the plain meaning of a text. One person entertains no doubt that the text has one meaning, while another person feels equally sure that it has another. The process of applying a general rule to particular facts can only end in a mental 'feeling' that one interpretation or another is 'correct'. Such feelings are justified in presentation by magnifying the supporting arguments and diminshing the others. The weight to be attached to each argument, and the offsetting weight of each counter-argument, are in every case a question that ultimately can only be subjective.

A practitioner advising a client may thus feel sure about the answer the law gives to the client's case. Yet he could be confounded if the matter came to court, for the judge may confidently find for the opposite view. Then the only hope is an appeal. This problem is further discussed in chapter 22.

Processing as a remedy

It is a principal theme of this book that problems of text-collation, text comprehension and doubt resolving fall to be dealt with by processing. *Text-collation* becomes less difficult as the number of different texts relevant to a subject is reduced by combining them into a unified whole. Consolidation and composite restatement are

two methods of doing this. The subject of *text-manipulation* is explored generally in chapter 23. To the extent that texts remain separate, adequate indexing and other aids assume greater importance, and this aspect is also dealt with in chapter 23.

Text-manipulation is also an answer to failure in *text- comprehension.* The vices of statute law described in the next chapter can be alleviated, if not removed, by suitable treatment of the text— as chapter 23 again demonstrates.

The dynamic processing of *doubt factors* is carried out in various ways by government officials, by academic and professional commentators, and of course by judges. The contribution made by each is discussed in chapters 20-22.

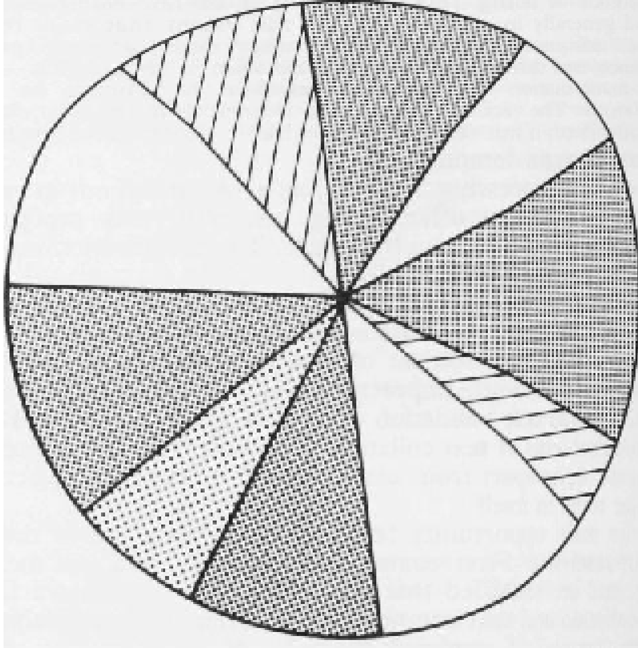
We have reached the point where we can begin working out in detail a new approach to statute law. Already we have seen that there is more to the problem of understanding statute law than rules of 'interpretation'; important though these are. Methods of text-creation and text-validation need to be grasped. The user must tackle the problems of text collation. The subjective comprehension of the texts, quite apart from any doubts that may exist objectively, is a major topic in itself.

But the main opportunity for a new approach lies in the area of doubt-resolving. First comes diagnosis. We find the meaning unclear, and are satisified that this is not due to our own failure in text collation and text comprehension. There is an objective area of doubt. Instead of applying the rules of interpretation, or the presumptions, or any other general aids discussed in Part II, let us take a different approach. Precisely what, in the text we are examining, causes the doubt? What is its etiology, as a medical practitioner would say? Only when we understand that can we proceed further along the road to resolving it.

I have explained how in this Part the various doubt factors are examined. I conclude this summary of the difficulties of the statute user by showing the *deliberate* doubt factors in diagrammatic form (see p 216).

The circle depicts the whole area of legislative meaning and intention in a particular text. The dark areas represent those parts of the meaning and intention that are *expressed.* The white areas represent the parts that, by the technique of ellipsis are to be *implied.* The hatched area indicate parts which the drafter has not felt able to work out in detail. Instead, by the use of a *broad term,* he has left the detail to be elaborated later. The agents for this are the *processors,* whether administrative authorities (chapter 21), or the courts (chapter 21). The dotted area stands for *politic uncertainty.*

The diagram does not include the two *unintentional* doubt factors, namely the unforeseeable development and the drafting error. These superimpose confusion on the intended plan.



**** Page 217 - Chapter Fourteen*

Vices that Block Comprehension

The methods of text-creation and text-validation employed in British type legislation produce four characteristics which can justly be described as the four vices of statute law. In the title of an article, *Our legislators are CADS* (Bennion 1976(1)), I offered a mnemonic for remembering them. The four vices are Compression, Anonymity, Distortion and Scatter.

Compression

In chapter 2 we saw how modern drafters are required to make their Bills as brief as possible. At the same time, governments and legislators in British-type systems wish to see statutes worked out in close detail. This provides the origin and justification for common- law drafting as opposed to civil-law drafting. Where both brevity and detail are demanded the only course available to the drafter is compression of language. If we add the parameters of certainty and legal effectiveness we tighten the screw further. As the Renton Committee remarked, 'a primary objective is certainty of legal effect, and the United Kingdom legislature tends to prize this objective exceptionally highly'. They added:

> For these reasons statutory phrases often irritate or baffle the reader, either because they state the obvious or because the 'punch-line' is delivered with such economy that it is intelligible only to those who have the time and inclination to inform themselves of the whole context on which it operates (Renton 1975, para 7.5).

The Renton Committee received with sympathy complaints that 'skilfully compressed wording' was difficult to understand, and that it would be preferable 'to sacrifice such elegant economy of expression in order to achieve greater clarity, even at the cost of increased length' (Renton 1975, para 17.18). They cited the following example:

> For the purposes of this Part of this Schedule a person over pensionable age, not being an insured person, shall be treated as an employed person if he would be an insured person were he under pensionable age and would be an employed person were he an insured person.

The Committee commented that 'any enactment of this type is liable to be provocative, and the more so the more skilfully it is compressed' (Renton 1975, para 6.3). However they missed a vitally important point, which is that the difficulty can be largely removed by better presentation of the same wording.

The quoted passage contains a number of defined terms. If by typographical means (say the use of italics) this fact is conveyed to the reader, and he knows where to find the definitions, his task of comprehension is eased. It is eased still further if the passage is spatially broken up into its grammatical clauses. The treatment, which may be called *comminution* (from the Latin *comminuere,* to split into smaller parts), produces the following:

(1) For the purposes of this Part of this Schedule

(2) a person OVER *pensionable age* (not being an *insured person)*

(3) shall be treated as an *employed person* if—

(4) he would be an *insured person* were he UNDER *pensionable age*

AND

(5) he would be an *employed person* were he an *insured person*. Why cannot our legislation be produced in this form? There are

practical difficulties. A Bill printed like this would take up more pages, and would be more difficult to amend. It is better to administer this treatment *after* enactment, combining it with remedies for the other three vices of statute law. That is the course adopted in the Composite Restatement method (chapter 23). The above is an extreme instance of the technique of compression by use of defined terms. Its 'provocative' quality springs from the fact that to the unwary reader it appears to be nothing more than clever gibberish. Unless you realise it to be stuffed with defined terms, and you read it alongside the definitions, it *is* gibberish when considered as a sample of English prose. In truth, it is not prose at all but telegraphese.

Another form taken by the vice of compression is the covering of too many different cases by a single formula. Sometimes this grossly distorts the natural meaning of words, and inevitably leads to difficulties in interpretation. An example is the way the law deals with certain types of dishonest conduct. If dishonest trespass to the person or to goods is 'unsuccessful', so that the ingredients of the crime of theft are not present, all the law (as expressed in the Theft Acts 1968 and 1978) can do is fall back on the concept of 'attempt'. Yet from the viewpoint of common sense, many cases of dishonest trespass amount neither to theft nor attempted theft.

The House of Lords held in *Haughton* v *Smith* [1975] AC 476 that one cannot 'attempt' to do something which is in fact impossible, eg steal from an empty pocket. In *R* v *Easom* [1971] 2 QB 315 it was held that a would-be thief committed no crime when he picked up a woman's handbag from the floor in a cinema, went through it and (finding nothing he wanted) put it back intact. Both

cases would have been caught by an offence of dishonest trespass on the following lines:

(1) A person commits an offence if, with intent to steal, he commits trespass to the person or trespass to goods.

(2) For the purposes of subsection (1) a person may be treated as intending to steal notwithstanding that his intent is conditional and the condition is unsatisfied.

These are examples of conceptual error, treating as 'attempts' acts which are not. Even without conceptual error, compression leads to trouble. Different cases are treated in one formula when it would be more comprehensible to present each in turn separately. The drafter, in search of brevity, uses a single statement to encompass a wide variety of circumstances. The crime of burglary furnishes an example, of heightened importance since it has to be understood by lay jurors (not to mention ill-educated members of the criminal class). The Theft Act 1968 defines burglary in a building (as opposed to a vehicle or vessel) in two brief subsections (s 9(1) and (2)). These encompass no fewer than six basic situations, but do not separate them out:

(1) A person is guilty of burglary if—

(a) he enters a building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in subsection (2) below; or

(b) having entered any building or part of a building as a trespasser he steals or attempts to steal anything in the building or that part of it or inflicts or attempts to inflict on any person therein any grievous bodily harm.

(2) The offences referred to in subsection (l)(a) above are offences of stealing anything in the building or part of a building in question, of inflicting on any person therein any grievous bodily harm or raping any woman therein, and doing unlawful damage to the building or anything therein.

These few words encompass a number of serious criminal offences, all of great concern to the citizen. They are as follows:

(1) entry as a trespasser with intent to steal,
(2) stealing or attempting to steal *after* entry as a trespasser,
(3) entry as a trespasser with intent to inflict grievous bodily harm,
(4) inflicting or attempting to inflict grievous bodily harm *after* entry as a trespasser,
(5) entry as a trespasser with intent to rape,
(6) entry as a trespasser with intent to do unlawful damage.

A jury is likely to be faced with an indictment, and evidence, related to only one of these six situations. The jurors would obviously find life much simpler if the law they had to consider were framed only in terms of that one. In other words there should be six separate formulations of the burglary offences, instead of a drafter's omelette frying them all together in one pan.

Why did the drafter of the Theft Act 1968 not create six separate burglary offences? He would no doubt answer, somewhat impatiently, that to do so would have made his Bill six times as long, and ministers would not have stood for that. It may not be altogether a sufficient answer. Drafters could often do more in this direction if they wished to, since they have much *de facto* authority. Nor would the Theft Act 1968 really have been six times as long on this basis (though it might have been twice as long). Fortunately, by post-enactment processing, we can achieve much the same result. Unlike a real omelette, a drafter's omelette can usually be unscrambled.

Of the six offences of burglary listed above, the first and second (both concerned with stealing) are the most commonly committed. Unscrambling the omelette for the first would produce die following:

A person is guilty of burglary if he enters a building or part of a building as a trespasser with intent to steal anything therein.

This is considerably simpler than the way entry with intent to steal is scrambled together with the other five fact-situations in s 9(1) and (2) of the Theft Act 1968. Indeed it is too simple, as we can now see. It does not fit all the circumstances it was intended to catch. Also it is ambiguous in its reference to stealing 'anything therein'. (For details see Bennion 1979(3), p 1172.) Here we perceive a major drawback of compression of language. Even the drafter may fail in the task of text-comprehension, notwithstanding that it is his own text.

A drafting technique for easing compression is the *spacing-out* of provisions. This can be shown schematically as follows. It is desired to say 'X shall apply except in cases Y and Z'. To describe each of X, Y and Z requires many words, so the proposition is spaced out in the form of three provisions, as follows:

(1) X [describing it] shall apply, subject to paragraph (2).

(2) X shall not apply where [description of case Y], nor in a case falling within paragraph (3).

(3) A case falls within this paragraph if it is [description of case Z].

The advantage of this technique of spacing out is that, instead of three complicated descriptions being crammed together into one paragraph, each gets a paragraph to itself. The user does not always appreciate this advantage. Thus a practising solicitor described spacing out as 'the contradictory style beloved of draftsmen but no one else' (see Bennion 1981(6), where a full description of the above schematic treatment is given). It is true that spacing out makes for tortuous prose. Statute users need to learn the characteristics of this prose, so that they can better understand it. It is not adopted just to annoy.

Failure in text-comprehension is more likely still with another compression technique. This is the device of *applying* detailed

provisions, with specified modifications, to a situation they were not drafted to cover. Returning to the Consumer Credit Act 1974, used as an example in chapter 3, we find an instance of this. Part III of the Act creates a licensing system for credit and hire businesses. It contains 22 sections, and is very detailed. When (in Part X) the Acts get round to dealing with another kind of business, to which it gives the label 'ancillary credit business', it needs to impose a licensing system on this also. To avoid setting out a further 22 sections in similar words, the Act says (in s 147) that the provisions of Part III apply to an ancillary credit business as they apply to a credit business. But it is not quite as simple as that, because the whole of Part III is not suitable as it stands. So some of its provisions are disapplied, and others are modified, for this purpose.

The device is also used as a means of extending *non-statutory* legal rules to additional cases. For example the rules relating to contempt of court were originally developed by the judges, without assistance from Parliament. Section 6(1) of the Bail Act 1976 extends the rules by making absconding from bail an offence punishable 'as if it were a criminal contempt of court'. The difficulties of interpretation that can be caused by the use of what might be termed *asifism* are illustrated by *R* v *Singh* [1979] QB 319. An absconder from bail was given a custodial sentence by the Crown Court. He appealed on the ground (a) that the judge-made rules only provided for imposing a custodial sentence where a contempt was committed *in the face of the court* and *(b)* that these words did not appear in the statutory hypothesis. The Court of Appeal held that they were implied. (As we shall see in chapter 15, this is an example of the drafter's technique of *ellipsis.)*

A case that went the other way is *Slater* v *Richardson and Bottoms Ltd* [1980] 1 WLR 563. To end tax dodging in the building industry by the so-called 'lump', the Finance Act 1971 requires main contractors to withhold 30 per cent of sums due to non-exempt subcontractors and pay it over to the collector of taxes. Relief may be given by the collector against inadvertent failure to comply. In *Slater,* the collector refused relief, and the contractor sought to appeal. The relevant regulations dealt with appeals by applying 'all the provisions of the Income Tax Acts regarding appeals'. Nevertheless the right to appeal was denied by the court. The Income Tax Acts deal with appeals from decisions of *inspectors*. This was a decision of a *collector.*

Asifism, or the statutory pretence that something is so when it is not, appears in a wide variety of forms. One example, contained in s 72 of the Housing Act 1980, was characterised by Lord Roskill as 'the worst piece of parliamentary drafting for 1980' (125 SJ 232). Section 72 is brief. It starts by abolishing rent tribunals. Then it says that the functions previously conferred on rent tribunals are to be carried out by rent assessment committees. Finally comes this piece of asifism: '(3) A rent assessment committee shall, when

constituted to carry out functions so conferred, be known as a rent tribunal'. This is what aroused Lord Roskill's ire. It was not altogether the drafter's fault. He was instructed to do it by the department sponsoring the Bill (though he would have been wiser not to accept the instruction). The department acted with the best of motives. They thought it would be helpful to the public to retain the name rent tribunal even though the animal itself had vanished. The grin, according to respectable precedent, was to survive the Cheshire cat.

Another respectable precedent tells us that tangled webs get woven once we embark on deception. Nor is innocent, well-meaning deception immune. Are there heated arguments in pubs (or elsewhere) between citizens who are sure they have heard that rent tribunals have been abolished and other citizens who insist that they have just been up before one? If a kindly lawyer within earshot attempts an explanation will this, if understood, enhance the law's reputation or diminish it? Can it really be wise to shield the public from confusion by a pretence which confuses even learned law lords?

Because the 'application' technique provides an easy and brief way of legislating, it is frequently employed. But this is a convenience gained by the drafter and legislator at the expense of the statute user. It is a difficult mental exercise to read a text drafted for one type of case as if it were instead drafted in terms of another. The usual problems of text-comprehension are compounded. The difficulty is made worse where the reader is further instructed to bear in mind specified modifications to the text. A frequent victim of this technique has been the Scottish lawyer. Acts of the Westminster Parliament often have provisions tacked on which 'adapt' them to Scottish law. The resulting problems were thus described by the Law Society of Scotland:

> Whereas an English practitioner has a clear run-through of the legislation, the Scottish practitioner has to engage in a most time-consuming and frustrating process of elimination and amendment before he can make sense of the new legislation (cited in Renton 1975, para 12.1).

Here the form of text-manipulation which can come to the rescue is a rewriting of the 'applied' provisions, incorporating the specified modifications. Thus the Land Compensation (Scotland) Act 1973 re-enacted (under the procedure applicable to consolidation) the provisions and Scottish modifications contained in the Land Compensation Act 1973. On the consolidation of any Act which uses the 'application' technique it would be possible to write out the applied provisions in full, but this is rarely done. The device of'writing-out' forms a useful feature of the Composite Restatement method (chapter 23).

Drawing together the threads on Compression, the first of the four vices of British-type statute law, we may say that it works

in two different ways. One way retains and condenses material, while the other omits it. Here it may be useful to summarise.

Retaining and condensing material

We saw above that a legislative proposition can be divided up under the headings Case, Condition, Subject, Declaration and Exception. Compression by retaining and condensing material involves dealing in a single proposition with a *number* of elements falling under one of these headings, instead of with just one. It may even extend this treatment to two or more of the headings. If we took the original example given on p 45 and applied this kind of compression to it throughout, we might get the following result:

Heading	*Elements*
Case	Where a person is in charge of a vehicle, or is driving or attempting to drive it, or is the owner of it
Condition	if so required by a constable, or a traffic warden, or anyone having reasonable cause to believe an offence is being committed
Subject	that person, or anyone authorised by him, or otherwise acting on his behalf
Declaration	shall produce his licence or (if the licence is not in his possession or custody, or he does not hold a licence) shall give his name and address
Exception	unless he is exempt from holding a licence, or is a police constable, ambulance officer or fire officer on duty.

A drafter who combined all these elements in one legislative sentence (or even in two) would furnish an example of Compression by retaining and condensing material. We have examined a real life example relating to burglary, where the draftsman combined no less than six disparate elements in his statement of the Case (p 219).

Omitting material

As we have seen, the two ways of achieving Compression by omitting relevant material from the legislative proposition are (a) by relegating it to a definition section and using a defined term to denote it, or *(b)* by utilising material which exists elsewhere by 'applying' it with or without modifications.

Anonymity

The second of the four vices of statute law can be dealt with more briefly. From the descriptions of Acts and statutory instruments given in chapters 3 and 4 it can be seen that few headings, sidenotes

and other signposts are provided for the user. Cross-references are sometimes given, but are more often omitted. Typographical devices are not employed to pick out key phrases or denned terms.

There are sound reasons for these deficiencies. A Bill is usually heavily amended in its progress through Parliament. This amendment takes place at four or five different stages. Each time, the Bill is reprinted in updated form. The numbering of clauses, subsections etc is altered accordingly. It would add to the difficulties of the legislative process if the provisions were not largely anonymous, and numerous headings, cross-references etc had to be changed at every stage. Printing problems would multiply, and errors increase. But, it may be asked, cannot these aids be added when the Act is printed after assent? Parliament however is rightly jealous of any tinkering with its finished work. If what is produced is to carry full authority as an Act of Parliament it must be scrutinised by Parliament, and must be capable of amendment. That would lead back into the difficulties mentioned in the previous paragraph.

Mere typographical changes might avoid this objection. The Renton Committee examined the question, and the objections put forward by officials. Sir Anthony Stainton, for example, feared that special type might be a distraction to the reader (Renton 1975, para 11.18). Finally the Renton Committee recommended that the Statute Law Committee 'should consider what visual aids and pointers could be helpful in the light of available type faces, page space and technology generally' (Renton 1975, para 11.21). Nothing has come of this.

There are two practical remedies for anonymity of the type described above. One is the provision of indexes and other external aids. The other is the addition of signposting and typographical devices in reprinted versions of the text. This is a feature of Composite Restatement. Both are described in chapter 23.

Statutory anonymity has another aspect. As explained above, common law drafting eschews explanations, and concentrates on cutting edge. Furthermore the drafter may shrink from committing himself to the situation he has in mind, in case other unforeseen situations arise. So while the literal meaning of a provision may be clear, the reason why Parliament enacted it may not. Again, the remedy lies in subsequent treatment of the text.

Distortion

The third of the four vices of statute law is distortion. By this is principally meant the deformity of structure and arrangement induced by text-validation procedures. Considered as operative law, a text might be most helpfully presented in a certain way. One can envisage the possibility of its assuming an ideal form. So far as this is practicable, it is prevented by parliamentary factors. An Act of Parliament starts life as a Bill, which is a dual-purpose

text. As a vehicle for legislative proposals submitted for debate and amendment, it must comply with the parameter of *procedural legitimacy.* It must be in the form of clauses and Schedules. It must be drafted in a way to disarm political criticism and enable its crucial features to be debated in logical order. A Bill often introduces novel concepts, which have to be led up to and adequately explained. As a potential Act, it must be designed to function effectively long after its novelty has worn off and the conditions in which it was drafted and debated have passed into history. Plainly what may be desirable for a Bill may be less desirable for an Act, and vice versa. So that is one cause of distortion.

Another cause lies in the fact that when the drafter is designing his Bill he does not know what, when Parliament has finished with it, it will contain. Many Bills are heavily amended during their passage, sometimes by the insertion of wholly new material. Thus Part III of the Health and Safety at Work etc Act 1974 goes very much wider than health and safety *at work.* It is largely concerned with building regulations, which apply to buildings of every kind. Originally a separate Bill, it was tacked on to the end of this measure to get it through when it might otherwise have failed for want of parliamentary time (see Spencer 1981). As a pointer to this, the drafter had the grace to insert 'etc' in the short title to the Act.

An architect would not design a very tidy building if at each stage of its construction he were told that the client's requirements had radically changed. Even after assent this process of unforeseeable alteration continues, as one amending Act follows another.

Party-political factors can cause distortion. There have been many instances of the shape and content of a Bill being distorted purely for political motives. A classic example is the Children Bill of 1908, which was put forward by the new Liberal Government as a 'Children's Charter'. The proper method of legislating would have been to deal with the various matters involved by amendment of the separate Acts relating to each of them—for example those governing the sale of intoxicating liquor, variation of trusts, criminal procedure and public health. Instead, the whole was dressed up as something it clearly was not: a comprehensive reform of the legal position of children.

A common form of distortion dictated by political factors is the placing of the contents of a Bill in a smaller number of clauses than would be natural, simply in order to reduce the number of debates on 'Clause stand part'.

The average statute user is ignorant of all these considerations. He seeks to understand the text as it appears before him. It is a segment of enacted law, a portion of the Statute Book. Why is it not easier to follow, more logically arranged? As the Departmental Committee on Income Tax Codification (1927-1936) said: 'the more difficult and elaborate the subject, the more important are precision and orderliness in its presentation' (Cmd 5131, para 26).

Even an experienced legal civil servant, Sir William Dale, fell into the trap of overlooking the factors that cause distortion. In his book extolling civil-law drafting, *Legislative Drafting—A New Approach,* he criticised a number of modern British Acts on this score. One of them is the Consumer Credit Act 1974. As an illustration of the effect Distortion can have, it is instructive to examine Dale's comments (all made without reference to, or apparent awareness of, parliamentary factors).

He begins by saying that the long title of the Consumer Credit Act (set out on p 42 above) is 'admirable'. Then the criticisms start. 'Part I sets up the Director General of Fair Trading, and one must again protest that matters of administration are not of the first, or perhaps of any, concern to the normal enquirer' (Dale 1977, p 270). This happens not to be true, since the fact that the Act is administered by the Office of Fair Trading closely concerns almost everyone involved with it. Even if it were true, it is irrelevant. This is because the question of who was to administer the Act was of great interest to MPs. It was about the only issue which divided the Labour Party from the Conservatives (who wished to set up a new department headed by a Consumer Credit Commissioner).

Sir William's next complaint is that Part II of the Act consists wholly of definitions. He mysteriously adds 'and that Part cannot be, and probably was not meant to be, absorbed'. Part II is a good example of the effect of distortion. The statute user would find it convenient to have all definitions assembled in one place (under British practice he would look for them at the end of the Act). But the legislator, faced with proposals for wide-ranging new controls over more than half the commercial firms operating in this country, has a different priority. He first needs to settle just what activities are to be subject to the controls. Novel terms and concepts, of basic importance to the legislative scheme, must be hammered out and agreed before detailed consideration can start.

Dale regards the Act as 'an advanced case of what we may call the centrifugal style of drafting . . . The draftsman, instead of gathering his material into central propositions of maximum content, has made it fly off to the extremities, fragmented in definitions and similar ancillary clauses . . . " Dales cites s 21, which states 'a licence is required to carry on a consumer credit business or consumer hire business'. Strangely, he describes this as a proposition 'bare of any content at all' *(ibid,* pp 271-2).

The arrangement of the Consumer Credit Act 1974 is actually an orderly one, allowing for the fact that political considerations dictated the content of the first two Parts. Part III imposes the licensing system on credit and hire businesses. Then successive Parts deal in a natural order with seeking business, entry into agreements, matters arising during the currency of agreements, termination of agreements etc. Only when we come to Part X do we again see the effect of distortion. This deals with ancillary businesses, such

as credit brokerage. The statute user would no doubt prefer to see them dealt with alongside credit and hire businesses, and not hived off at the end of the Act. Parliamentary considerations required however that all the details regarding the two main types of business subject to control should first be worked out and agreed. Only then was it politically convenient to turn attention to the question of how far these basic provisions needed to be modified for ancillary businesses.

If distortion causes deformity in the arrangement of an Act, the only remedy is to rearrange the Act when opportunity offers. This can be done on consolidation (chapter 6), and is a principal feature of the Composite Restatement method (chapter 23). Meanwhile, adequate indexes and other aids are of assistance.

Scatter

The last of the four vices is scatter. Instead of being dealt with in one place, the law on a topic is found in two or more different texts. We discussed in the last chapter the problems of textcollation and conflation to which this gives rise. There are various causes of scatter, some overlapping:

(1) The absence of a Statute Book arranged under Titles on a one Act-one subject basis means that a topic may be dealt with in two or more different Acts. Sometimes the number of Acts on a particular topic is very large indeed, though things have improved in this respect with the growth of consolidation during the last century. Writing in 1876, RM Kerr, an editor of Blackstone's *Commentaries,* said of the poor law statutes:

It is impossible to give more than an outline of the laws for the relief of the poor. The statutes in force on this subject are nearly 300 in number, and to them, therefore, the editor will on no account venture to refer the reader (1 Kerr 1876, p 329).

(2) Compression by omitting material involves scatter between the text containing the 'application' provision or defined term and the text which is applied or which contains the definition, as the case may be.

(3) Indirect or non-textual amendment of Acts (see below) creates scatter between the principal Act and the amending Act or Acts.

(4) The practice of supplementing an Act by statutory instruments made under it (chapter 4) involves scatter between the parent Act and the statutory instruments.

(5) Internal scatter occurs because of the rules governing the arrangement of an Act or statutory instrument. In particular, there is scatter between the provision introducing a Schedule and the Schedule itself. Every Act must be read as a whole, and its provisions hang together. One can never be certain of the Act's effect on a particular topic without considering all its provisions.

(6) Since the Interpretation Act applies to all other Acts, and to statutory instruments, it is invariably a cause of scatter.

Scatter of the first three types can be alleviated by consolidation (chapter 6). Acts and statutory instruments are never consolidated together however. Nor can consolidation assist with internal Scatter or the problems created by the existence of an Interpretation Act. Composite Restatement can cure all types of scatter. The greater the degree of scatter, the more important it is to have adequate indexes and other aids (chapter 23).

Indirect amendment

Finally in considering the factors that impede text-comprehension, we consider a peculiarly British phenomenon. Although Britain has never possessed a Statute Book arranged under Titles on a one Act-one subject basis, its Parliament has from time to time passed Acts each of which could be regarded as the *principal Act* on the subject it deals with. Principal Acts can be identified broadly as of three types: (1) the consolidation Act; (2) the Act which embodies initial legislation on a novel topic; and (3) the Act which is a substantially- altered version of a previous principal Act. An example of the second type is the Consumer Credit Act 1974, while an example of the third is the Highways Act 1959 (p 70).

Whichever category it may fall into, a principal Act is the product of a great deal of skilled work. It tidies up the area of law with which it is concerned. Common sense would indicate that if it is later amended, the amendments should be done textually and not indirectly. That way the amended Act can be reprinted as one text. Its integrity is preserved, and the vice of scatter avoided. Instead of each statute user being required to accomplish the difficult task of *conflation,* it is done once and for all by the drafter of the amending Act. With this method, the need for consolidation is less frequent. (See further Bennion 1980(11)).

Yet the British practice has been to amend *indirectly,* and not by altering the text of the principal Act. Here is an example. The Improvement of Live Stock (Licensing of Bulls) Act 1931 imposed a licensing system for the keeping of bulls, and empowered the Minister of Agriculture to refuse a licence on certain grounds. In 1944 it was desired to extend this system to boars. Instead of amending the 1931 Act textually and altering its title accordingly, the 1944 Act extended it indirectly. Then in 1963 it was desired to broaden the grounds on which a licence could be refused. Once more the opportunity of producing a unified text was disdained. Instead, s 17 of the Agriculture (Miscellaneous Provisions) Act 1963 said:

The powers of the Minister . . . under section 2(2) of the Improvement of Livestock (Licensing of Bulls) Act 1931, or under that section as applied

to pigs by s 6 of the Agriculture (Miscellaneous Provisions) Act 1944, to refuse to grant a licence to keep a bull or boar for breeding purposes shall include power to refuse to grant such a licence if he is not satisfied that the bull or boar conforms to such standard of suitability for breeding purposes as may be prescribed for bulls or boars respectively under the said Act of 1931; and different standards may be so prescribed for different classes of bulls or boars.

The result was that anyone who, not content with a textbook summary, was concerned to discover the law on licensing of bulls and boars *from the source* had to get hold of three different texts and perform the troublesome task of conflating them. Since this was the almost invariable technique by which amendments were effected, the same applied generally throughout the field of statute law. Why should this be so? Why should a system so obviously inimical to understanding of the law be officially adopted?

The answer lies in the *four-corners doctrine* (see p 32). Indirect amendment satisfies this doctrine, whereas textual amendment is often incomprehensible without some form of accompanying explanation.

The pernicious four-corners doctrine served the convenience of those who make the law at the expense of those who need to understand and apply it. The doctrine was laid to rest by the Renton Committee in these words: 'We recommend that in principle the interests of the ultimate users should always have priority over those of the legislators: a Bill, which serves a merely temporary purpose, should always be regarded primarily as a future Act, and should be drafted and arranged with this object in view' (Renton 1975, para 10.3). (For further details of the four-corners doctrine see Bennion 1979 (4) pp 36-43 and 54-60. As to the current use of textual amendment in Britain, see Bennion 1980 (1) and (5).) Although textual amendment has largely superseded indirect amendment, it has not entirely done so. In any case, we still have a considerable legacy of statute law produced by this discredited method.

Indirect amendment produces the vice of scatter. An Act amended textually can be reprinted as a single text. Every time an Act is amended indirectly, an additional text is produced. The texts must then remain separate until brought together by a process of text manipulation such as consolidation or Composite Restatement.

Doubt-resolving

Having described the factors that induce subjective blocks on text- comprehension, we turn to the factors that cause objective doubt as to the meaning of legislative texts.

**** Page 230 - Chapter Fifteen*

Doubt-factor I: Ellipsis

One instrument used in the legislative drafter's everlasting pursuit of brevity is the technique of ellipsis. A passage will be shorter if you omit to state the obvious. That can be left to be inferred. But what seems obvious to the drafter, skilled and experienced in statute law, may not be obvious to the statute user. Hence doubt arises.

Ignorance of drafting methods has meant that doubt of this kind is not discussed in terms of the technique of ellipsis. Indeed no attention whatever has been paid to the technique, and the doubts have been resolved in random ways. It is suggested that for anyone concerned to resolve such a doubt, it would help to analyse it in terms of this technique. I begin by describing the technnique, and go on to give examples of its use and treatment.

The technique of ellipsis

The drafter does not wish to to use unecessary words. Words are unnecessary where, although the proposition they embody is intended to have effect, interpreters will accord that effect without its being spelt out. As Coleridge J said in an early case: 'If . . . the proposed addition is already necessarily contained, although not expressed, in the statute, it is of course not the less cogent because not expressed' *(Gwynne* v *Burnell* (1840) 7 Cl & F 572, 606). Effect may be given to unexpressed words for one of three reasons. The first is that it is the known and accepted practice to treat the words as implied: they are there *by operation of law.* The second reason is that the implication arises as a matter of grammar or syntax from the words that are *expressed.* The third reason is that the implication arises from the legal or political *context* of the Act.

An example of the first type of ellipsis is the following. Many Acts create criminal offences. They do so in general terms: 'A person who does so-and-so is guilty of an offence, and shall be liable on summary conviction to a fine of so much.' It is not usual to add that an offender is not liable to be convicted unless he is over the age of criminal responsibility, and is of sound mind. Nor are other general rules of criminal law referred to. Yet all these rules are

taken to apply. As Stephen J said in *R* v *Tolson* (1889) 23 QBD 168, 187:

> In all cases whatever, competent age, sanity and some degree of freedom from some kinds of coercion are assumed to be essential to criminality, but I do not believe they are ever introduced into any statute by which any particular crime is defined.

Many other general defences may be imported by operation of law; for example necessity, provocation or self-defence. Criminal statutes are to be construed with regard to the accused's right of silence *(see A vHM Treasury* [1979] 1 WLR 1056).

In whatever field of law the Act operates, it will import so far as relevant the basic principles of that field of law. Thus if a market is set up by statute, the common law of markets applies to it *(Wakefield City Council* v *Box* [1982] 3 All ER 506). If a tribunal is set up by statute, the common law governing tribunals applies to it *(Anisminic Ltd* v *Foreign Compensation Commission* [1969] 2 AC 147), and so on. Lord Diplock said in relation to statutory provisions defining the offence of arson (ie s 1(1) and (3) of the Criminal Damage Act 1971):

> Those particular provisions will fall to be construed in the light of general principles of English criminal law so well established that it is the practice of parliamentary draftsmen to leave them unexpressed in criminal statutes, on the confident assumption that a court of law will treat those principles as intended by Parliament to be applicable to the particular offence unless modified or excluded *(R* v *Miller* [1983] 2 AC 161, 174).

An important category of implication by operation of law is *statutory* implication, for example by virtue of the Interpretation Act 1978.

This type of ellipsis is referable to the fact that an Art of Parliament, even where it is a principal Act, is but one unit in the *corpus juris*. The law consists of many elements, both statutory and non-statutory. Except where a new statute alters these elements, it takes its place among them and operates with due regard to their provisions. Doubt may arise where the existence or extent of one of the provisions is itself doubtful.

The second type of ellipsis relates not to standing rules of the *corpus juris* but to the particular language used by the drafter. It is rare that language is totally free from implications. The drafter relies on them to do his work for him. The more obvious they are, the readier he is to leave what they say unexpressed. In creating a statutory office for example, he will regard it as obvious that the office is to be vacated on the death of the holder; and only slightly less obvious that the holder can resign, or may be dismissed for misconduct. Sometimes he will confirm such implications by indirect references (for example, while not thinking it necessary to provide

an express power of resignation he may refer to a vacancy in the office 'on resignation or otherwise').

Another example is provided by the rule that where an Act creates a power, this will be taken to include whatever may be necessary to make the power effective. In *Cookson* v *Lee* (1854) 23 LJ Ch 473, a private Act vested lands in trustees for the purpose of sale as building land. The Act omitted the usual provision empowering the use of purchase money for laying out roads on retained land and otherwise rendering it suitable for later sale as building land. The court held that this provision should be taken as implied.

The way a word is employed by the drafter may irresistibly suggest an implication. Thus when the drafter of s 57 of the Offences against the Person Act 1861 said that 'whosoever, being married, shall marry any other person during the life of the former husband or wife' was guilty of felony, he irresistibly suggested that he was using the word 'marry' in a very odd and unusual way. Under our monogamous system, a person who is already married cannot marry. Yet the only concern of s 57 is with the case where he or she does 'marry'. To give the section any effect the word has to be treated as by implication modified. So in *R* v *Allen* (1872) 1 CCR 367 the court held that it meant 'go through the form and ceremony of marriage'.

The law has adopted maxims regarding the implications to be drawn from certain types of grammatical construction. The leading principles of this kind are explained in chapter 12.

The third type of ellipsis brings in the context or setting of the Act. It cannot be looked on as a piece of prose standing alone. It must be construed in the light of its legislative history, the conditions of its time, and the earlier state of the law. It is well known, said the eighteenth-century lawyer Daines Barrington, that in the exposition of a statute the leading clue is the history of the times (Barrington 1767, p 4).

Abbreviated terms

In search of brevity, the drafter will choose a term he takes to comprehend meanings that might otherwise have to be spelt out. Section 29(4) of the Prices and Incomes Act 1966 imposed a wage-freeze by prohibiting an employer from paying remuneration 'at a rate which exceeds the rate of remuneration paid to him for the same kind of work before July 20th 1966.' It was held in *Allen* v *Thorn Electrical Industries Ltd* [1968] 1 QB 487 that the word 'paid' meant either actually paid or contracted to be paid (though *not* actually paid).

The need for compression forces the drafter to state many propositions without crossing all the t's and dotting all the i's. The interpreter is forced to do that for himself. In *Khan* v *Khan* [1980] 1 WLR 355, the court considered the power to make matrimonial

orders conferred by s 2(1) of the Matrimonial Proceedings (Magistrates' Courts) Act 1960. This says that an order may contain one or more specified provisions, including 'a provision that the husband shall pay to the wife such weekly sum as the court considers reasonable . . .'. Nothing is said about whether such a maintenance order may be either unlimited in time or limited in time. Sir John Arnold P said (at p 359):

In my view the word 'such' is not limited to defining the amount of the weekly sum but carries with it an ability to qualify that sum in every relevant respect, in terms of duration in particular so far as this case is concerned, as well as amount. Nor does there seem to me to be anything inconsistent with that provision in making the weekly payments of a variable nature, in relation to successive periods.

The reports are full of instances where the court proved ready to fill out statutory propositions by taking them to imply necessary detail. Here are just a few:

(1) Where an onerous lease is disclaimed by a trustee in bankruptcy, the lease shall 'be deemed to have been surrendered' on the date of adjudication.
Held: words should be read in restricting this so that it only applied as between lessor and bankrupt. Where the bankrupt had sublet the lessor could therefore distrain for non-payment of rent, which after a genuine surrender he could not do *(Ex pane Walton* (1881) 17 Ch D 746).
(2) Witnesses who attest 'any will or codicil' under which they are beneficiaries shall be treated as good witnesses, but the gifts made to them shall be void.
Held: the words 'of real estate' should be implied after the quoted words since, under the then state of the law, wills of personalty did not require attestation *(Brett* v *Brett* (1826) 3 Add 210).
(3) All drug shops 'shall be closed . . . at 10 pm on each and every day of the week'.
Held: Although it does not say so, this means also that they shall *stay* closed until morning. It is not therefore sufficient compliance for a drug shop to close for a few minutes and then open again *(R* v *Liggetts-Findlay Drug Stores Ltd* [1919] 2 WLR 1025, cited Driedger 1974, p 15).
(4) It is an offence to 'stab, cut or wound' any person.
Held: this did not extent to biting off a person's nose, because use of a weapon or instrument is implied *(R* v *Harris* (1836) 7 C & P 416).
(5) Every person who fraudently harbours uncustomed goods shall forfeit a specified sum, 'and the offender may either be detained or proceeded against by summons'.
Held: this included an *apparent* offender, since otherwise guilt would have to be conclusively determined before action could be taken

(*Barnard* v *Gorman* [1941] AC 378, *Wiltshire* v *Barrett* [1966] 1 QB 312).

Ellipsis often gives rise to doubt, by its very nature. But it is some help for the interpreter to be aware that it is frequently employed, and why. He can then be on the look-out for it, and not fall into the trap of thinking that some rule of literalism has the effect of excluding implications. *A legislative text contains both what is expressed and what is implied.*

While we have referred to the *technique* of ellipsis it has to be admitted that implications are sometimes found by the court where they were not consciously intended by the drafter. Quite often a drafter does consider a specific point and then decide to deal with it by raising an implication. Sometimes however an implication may be drawn which was probably never considered by the drafter, but is nevertheless held to arise from the language used.

An example is given by Blackstone when he says of the statute 1 Car 1 c 1 that it 'does not prohibit, but rather impliedly allows' innocent Sunday amusements after the time of divine service (Blackstone 1765, iv 52). In *Ex pane Johnson* (1884) *Law Times* Vol L 214 the court considered the requirement in s 8 of the Bills of Sale Act 1878 that a bill of sale to which the Act applies 'shall set forth the consideration for which such bill of sale was given'. Bowen LJ said that s 8 'means—it does not say so in words, but it says so impliedly—that the consideration must be *truly* set forth' (p 217; emphasis added). Inference may occasionally be restored to by the court in order to resolve a difficulty caused by drafting error.

References to ellipsis

Cases in which judges have referred in terms to the use of ellipsis in statutes include the following: *Inland Revenue Commrs* v *Hinchy* [1959] 1 QB 327, 335 (s 48 of the Income Tax Act 1952 expresses in clearer and lengthier language 'what is intended to be conveyed by the elliptical expression in s 25(3), "the tax which he ought to be charged" '); *Commonwealth of Australia* v *Bank of New South Wales* [1950] AC 235, 295 ('It is a somewhat elliptical but by no means an impossible use of language to speak of a decision upon a certain question when what is meant is a decision in a suit, which cannot be decided without the determination of that question, or, more shortly, a decision involving a certain question or involving the determination of a certain question'); *Lord Advocate* v *AB* (1898) 3 Tax Cases 617 (the words 'in any other manner' in s 21(4) of the Taxes Management Act 1880 refer back to the preceding subsection 'though perhaps it may he said that the words are a little elliptical'); *British Railways Board* v *Dover Harbour Board [* 1964] 1 Lloyd's Rep 428,439 ('the wording is, on any possible interpretation

elliptical and it seems to me to result from seeking to compress within a single sentence the limitations of the duration of existing and future liability on existing and future guarantees'); *Robertson* v *Day* (1879-80) 5 App Cas 63, 69 ('It is doing no violence to the words to read them as if they were slightly elliptical . . .').

Judicial reluctance to recognise ellipsis

In view of the undoubted, and very common, use by drafters of ellipsis, as explained above in this chapter, it is remarkable that some judges have denied that statues contain implied terms. In a famous dictum, Rowlatt J said of taxing Acts: 'Nothing is to be read in, nothing is to be implied' *(Cape Brandy Syndicate* v *IRC* [1921] 1 KB 64, 71). Lord Goddard CJ appeared to rule out implication in Acts of every description when he said that the court 'cannot add words to a statute or read words into it which are not there' *(R* v *Wimbledon **JJ,** ex pane Derwent* [1953] 1 QB 380). More common however are dicta going the other way. Thus in *R* v *Ettridge* [1909] 2 KB 24, 28 the court held itself entitled, in reading an Act, to 'reject words, transpose them, or even imply words'.

In *Wills* v *Bowley* [1983] 1 AC 57 the House of Lords gave a firm rebuttal to such dicta as that of Lord Goddard CJ set out above. The case concerned s 28 of the Town Police Clauses Act 1847, a very long section running to some three pages. In explaining the case it is helpful to make use of the technique of *comminution* mentioned above (p 218). What we need here is a refinement of the technique, which we may call *selective* comminution. Retaining the words of the section, we limit the restatement of them in broken- up form to those that are relevant to the facts of the case in question. Further to assist exposition, we number the grammatical clauses. If they deal with more than one matter, we divide them into Parts accordingly. Applied to the facts of *Wills* v *Bowley,* this technique produces the following version of s 28:

Part I

(1) Every person who in any street
(2) to the annoyance of the residents or passengers
(3) uses any obscene language
(4) shall be [guilty of an offence].

Part II

(5) [Any constable] shall take into custody without warrant
(6) and forthwith convey before a justice
(7) any person who within the constable's view commits any such
offence.

This selective comminution reproduces the relevant wording of s 28, except that the passages in square brackets simplify provisions as to which there was no dispute between the prosecution and the

defence in *Wills* v *Bowley*. The facts of the case were as follows. The female appellant was charged with two offences. The first ('the s 28 offence') was an offence under the provision restated above as Part I. The second ('the assault offence') was the offence of assaulting, while in the execution of their duty, the constables who (under Part II) arrested her for the s 28 offence. The appellant was acquitted of the s 28 offence because, although she had used obscene language in a street (clause (3) above), no residents or passengers were proved to have been annoyed by it (clause (2)). The question for the House of Lords was whether, in the light of this acquittal, her conviction of the assault offence could be upheld.

There was no doubt that the appellant had assaulted the constables in the course of her arrest: so violent was she that it took three of them to get her into the police van. But only if it was authorised by the provision restated above as Part II was the arrest lawful. Only if the arrest was lawful could the appellant be guilty of assaulting the police in the execution of their duty. If the arrest was unlawful they were not excecuting their duty in carrying it out, and she was entitled to resist them with all reasonable force.

The key lies in clause (7) of the above restatement. If it is restricted to its literal meaning, the appellant is not guilty of the assault. The arrest was unlawful because she did not commit the s 28 offence within the view of the constables. She did not commit it at all, whether within their view or not.

To sustain the assault conviction, the prosecution were obliged to argue that clause (7) had a further implied meaning. This could be spelt out by rewording clause (7) as follows:

(7) any person who within the constable's view commits any such offence *or so acts as to cause the constable reasonably to believe that he is committing any such offence.*

The House of Lords held that this further meaning was indeed to be implied. They thus confirmed that dicta to the effect that words are never to be read into an enactment cannot be relied on. If enactments are frequently elliptical, as is undoubtedly so, they must equally often contain implications. That is the nature of an ellipsis. (For a fuller treatment of this case see pp 306-309 below).

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Doubt-factor II: The Broad Term

In the previous chapter we saw how, in a search for brevity, the legislative drafter is forced to create doubt by leaving out what it is not essential to state. Now we examine another technique of brevity. By use of a word or phrase of wide meaning, legislative power is delegated to the processors whose function is to work out the detailed effect. Again, doubt is necessarily created. Until the details are worked out, it will be doubtful what exactly they are. The statute user must use his own judgment. Moreover, under our system there is rarely if ever a point at which it can be said that the detail is complete. Even such detail as can be discerned tends to be obscured by the inexact methods used by processors, particularly judges.

A broad term may consist either of a single word or a phrase. In *Regan & Blackburn Ltd* v *Rogers* [1985] 1 WLR 870, 873 Scott J said of the phrase 'pending land action' in the Land Charges Act 1972, s 17(1): 'those words are very broad and cannot be given their full literal meaning'. They were what may be described as a multiple broad term.

A broad term may perform the function of a verb, adverb, adjective or substantive. If a substantive, it is what was described in *Hunter vBowyer* (1850) 15 LTOS 281 as a *nomen generate.* Other descriptions of the broad term include 'open-ended expression' *(Express Newspapers Ltd* v *McShane* [1980] 2 WLR 89, 94), 'word of the most loose and flexible description' *(Green* v *Marsden* (1853) 1 Drew 646), and 'somewhat comprehensive and somewhat indeterminate term' *(Campbell* v *Adair* [1945] JC 29, 23).

The drafter selects a broad term which is either a processed term or an unprocessed term. Either way it is likely to have a core of certain meaning and a penumbra of uncertainty. It may be mobile or static. Its meaning will be coloured by the context, and the legislative purpose.

An implied intention that an unqualified broad term shall be construed as if a narrowing provision had accompanied it will not be found where the absence of such a provision is explicable only on the ground that it was not intended. Thus in *Puhlhofer* v *Hillingdon LBC* [1986] AC 484 the House of Lords declined to treat the term 'accommodation' in the Housing (Homeless Persons) Act 1977, ss 1

and 4 as qualified by an implied epithet such as 'appropriate' or 'reasonable' because if Parliament had intended such a narrowing of its meaning it would surely have said so. Moreover such a narrowing ran contrary to features of the Act. The Act did not increase the stock of housing available to authorities governed by it, and was clearly not intended to enable persons to jump the queue of those whose names were on the waiting list for housing.

Processed **and** unprocessed terms

When the drafter decides to attain brevity by using a broad term, he looks for one which has been processed. If the courts have already worked out the meaning of a term, and that meaning corresponds with the drafter's intention, the term is suitable for adoption. Instead of there being uncertainty about whether subsequent processors will adopt the meaning he desires, the drafter can be reasonably sure that the established meaning will be followed.

Usually, the processed term will be one used in previous legislation. Only rarely will a term whose meaning has been worked out solely at common law present itself as suitable for adoption. The drafter of AP Herbert's Divorce Act, the Matrimonial Causes Act 1937, used a processed verb when he expressed as a ground of divorce that the respondent 'has deserted the petitioner without cause' for three years. The verb 'deserted', used by itself, is a typical broad term. There are many different acts which might be held to fall within it. One is a simple refusal of sexual intercourse. But it had been held in *Jackson* v *Jackson* [1924] P 19 that such refusal did not constitute desertion within the meaning of an earlier Act. When the point was raised under the 1937 Act Tucker LJ took the same line: 'I think the Legislature in... refraining from defining desertion must be taken as accepting the tests which had hitherto been applied in the courts . . .' *{Weatherley* v *Weatherley* [1946] 2 All ER 1, 8).

Doubt may arise as to whether use of a processed term in a new Act brings in the processed meaning or the ordinary (dictionary) meaning. Often there is no significant difference. Where there is a difference, the point may turn on whether the new Act is *in pari materia* with the earlier Acts in which the term appeared. The rule was thus laid down by Lord Buckmaster in *Barras* v *Aberdeen Steam Trawling and Fishing Co* [1933] AC 402, **411:**

> It has long been a well-established principle to be applied in the consideration of Acts of Parliament that where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase *in a similar context* must be construed so that the word or phrase is interpreted according to the meaning that has previously been ascribed to it (emphasis added).

Two points should be noted. It is not the practice of drafters (who

tend to be over-cautious) to attract processing by saying expressly in the new Act that the term has the same (undefined but processed) meaning as in the previous Act. This renders unrealistic the remark by Lord Simon of Glaisdale that 'If Parliament wishes to endorse the previous interpretation it can do so in terms' (*Fairell* v *Alexander* [1977] AC 59, 90). Second, the courts will be reluctant to attach previous processing to the term in its new use if they think the processing defective (eg *Royal Crown Derby Porcelain Co* v *Russell* [1949] 2 KB 417, 429).

While the borrowing by the drafter of a term already processed may be convenient, it can give rise to a conceptual difficulty. A word or phrase used in an Act is to be construed in accordance with the purpose of that Act. Decisions on its meaning may be misleading if it is borrowed for another Act with a different purpose (eg *Hanlon* v *The Law Society* [1981] AC 124).

Core and penumbra

Doubt arises from the drafter's use of a broad term only where its meaning is to some extent uncertain. There are terms which are broad in the sense that they cover many different cases, but whose meaning is certain in virtually every case: for example 'mammal' or 'moving'. We are not here concerned with these.

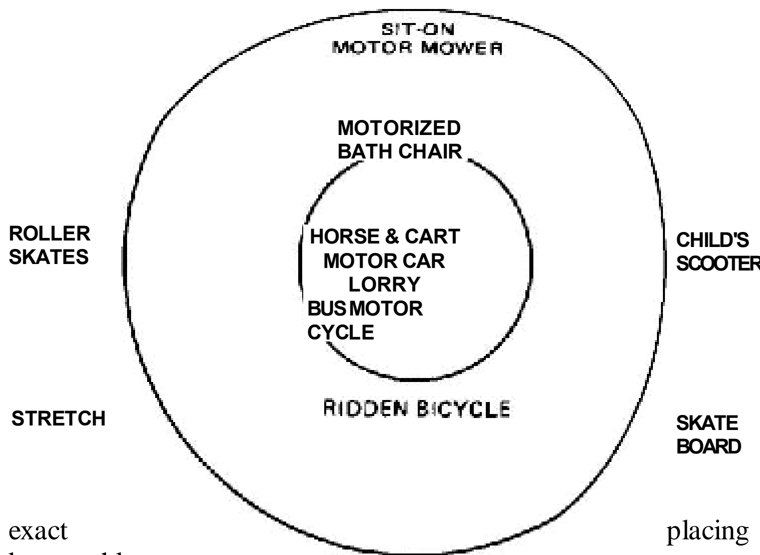
On the other hand, it is unlikely that the application of a statutory term will be doubtful in *every* case. Selection by the drafter of such a term would almost certainly be an error, since it would mean that the entirety of the legal rule in question was founded upon uncertainty; which is not the nature of law. A will may be declared void for uncertainty, but this rule does not apply to Acts of Parliament. Nevertheless a modern Act whose application was uncertain in every case would certainly be considered ill-drawn: at least if drafted on common-law lines.

It follows that what we are in practice concerned with is the broad term whose application to some cases is clear and to others doubtful. A *penumbra* is defined as a partial shade bordering upon a fuller or darker one; in other words a twilight. This is a good description here because we are all familiar with the difficulty caused by a phrase such as 'during the hours of darkness'. Midnight is clearly within it, and noon equally clearly outside it. But there are periods around dawn and sunset during which it must be debatable whether darkness has ceased or fallen.

The drafter tries to choose phrases whose penumbra of doubt is as small as possible. At common law, burglary was committed when a dwelling-house was broken and entered *by night* with intent to commit a felony. Night was understood as the period between sunset and sunrise. A later common-law refinement held it not to be night if there was sufficient light from the sun to tell a person's face. Finally, when statute intervened, night was precisely defined

as the period between 9 pm and 6 am. Although the penumbra remained in nature, it vanished from the law of burglary.

An unnecessarily wide penumbra is an instance of bad drafting. A standard example used in juristic discussions of what Hart calls the 'open texture' of language is the notice reading 'No vehicles allowed in the park' (see Twining and Miers 1982, p 205). We can depict the uncertainty this causes by a diagram in which the inner circle depicts the core of certain meaning while the space between the circles marks the penumbra of doubt about what is allowed in the park. Outside this penumbra the meaning is once again certain—in the opposite sense. Not everyone would agree with the



exact placing of these objects, but assuming it to be roughly correct we have three doubtful cases. There could be genuine argument with the park-keeper over whether it is allowed to take into the park a ridden bicycle, a motorised bath chair, or a sit-on motor mower. Other doubtful objects can readily be imagined, and we can vary the condition of the ones mentioned. Does it make a difference if the bicycle is pushed instead of ridden, or the motor mower belongs to the council? Is an ambulance allowed in to take away the victim of an accident on the slide? Suppose a car chassis, minus wheels and engine, is carried in by mischievous youths? The possibilities of doubt are endless.

Greater precision can be achieved by detailed wording, but then we end up with the closely-printed park notice that nobody reads.

Even the park-keeper may not read it, and so lack conviction in trying to repel the practical villains: motorists and motor cyclists. The modem legislative drafter goes into as much detail as he considers practicable. For the rest, he relies on ellipsis or selects broad terms with the smallest penumbra of doubt.

Cutting down the broad term

Sometimes, by usage or judicial decision (or a combination of both) the width of a broad term is drastically cut down. The term 'immoral purposes' is very wide. Yet as used in s 1(1) of the Vagrancy Act 1898 (reproduced in s 32 of the Sexual Offences Act 1956) it has been held to be doubly limited. First, it excludes all forms of immorality except sexual immorality. Second, even as respects sexual immorality, it excludes all but homosexual acts. (See *Crook* v *Edmmdson* [1966] 1 All ER 833). This illustrates that the term selected by the drafter as his 'broad term' may itself be elliptical. Here the courts have processed the term 'immoral purposes' as if it were 'purposes involving sexual immorality of a homosexual nature'.

Static and mobile terms

Broad terms can be divided into two types. First there is the case where the content of the term is static or constant, in both place and time. The circumstances that fall within it are basically the same wherever they happen, and at what historic moment. An example is the term 'accident'. Secondly there is the *mobile* phrase. What falls within it may differ according to time or place (or both). For instance one person may or may not be regarded as belonging to another person's 'family' according to the place, or the period, in which they live.

We now consider the two categories in turn, examining these and other examples from decided cases. We shall see later that failure by the drafter to understand the distinction between the categories can have important consequences.

The static broad term

The term 'accident' has been frequently employed in legislation. One famous example of its use was in the Workmen's Compensation Acts, which gave a workman a right to compensation for 'an accident arising out of and in the course of his employment'. This is a multiple broad term of epic proportions. Many thousands of judicial decisions proved necessary to process it. The process began with the first case to reach the House of Lords under the 1909 Act. This concerned a workman suffering from a form of heart disease induced by natural causes, an aneurism. The aneurism might have burst and killed the workman at any time—even while he was asleep in bed. In fact

it did so while he was at work, engaged in manual labour of a by no means strenuous kind. Was this an 'accident'? Yes, said the House of Lords in a judgment we are not surprised to find lacked unanimity. The fact was that the policy of the Act plainly required the term 'accident' to be given a wide meaning. As Kennedy LJ said in deciding that it even covered the murder of a cashier by a thief:

An historian who described the end of Rizzio by saying that he met with a fatal accident in Holyrood Palace would fairly, I suppose, be charged with a misleading statement of fact. . . But whilst the description of death by murderous violence as an 'accident' cannot honestly be said to accord with the common understanding of the word, wherein is implied a negation of wilfulness and intention, I conceive it to be my duty rather to stretch the meaning of the word from the narrower to the wider sense of which it is inherently and etymologically capable . . . *(Nisbet* v *Rayne and Burn* [1910] 2 KB 689).

This neatly illustrates the difference between the case where the drafter has selected a term which is etymologically capable of the wide meaning it should bear and the case where he has erred by making his wording narrower than the object (as to the latter see pp 264-266 below).
Other examples of static broad terms are the following:

Repairing Rules made under the Railway Employment Prevention of Accidents Act 1900 protected workers engaged in 'relaying or repairing' the permanent way. Did this include the routine oiling and maintenance of apparatus working the points? In *London and North Eastern Railway* v *Berriman* [1946] AC 278 the House of Lords, by a majority of three to two, held that it did not. [Here the wording was *narrower than the object,* a frequent drafting defect: see p 264].

Supply Section 1(1) of the Finance Act 1972 introduced a new tax in these words: 'A tax, to be known as value added tax, shall be charged . . . on the supply of goods and services in the United Kingdom . . .'. In *Customs and Excise Commissioners* v *Oliver* [1980] 1 All ER 353,354, Griffiths J said: 'There is no definition of "supply" in the Act itself, but it is quite clear from the language of the Act that "supply" is a word of the widest import'.
Many more instances could be given of static broad terms, but this is not necessary. The terms are 'static' in the sense that, by processing, detailed rules can be worked out which will be of universal application despite differences of time or place.

The mobile broad term

Section 4(1) of the Obscene Publications Act 1959 provides a defence against a charge of publishing an obscene article 'if it is proved that publication of the article in question is justified as being for

the public good on the ground that it is in the interests of science, literature, art or learning, or of other *objects of general concern'* (emphasis supplied). In *R* v *Jordan* [1976] 2 WLR 887, 893, Lord Wilberforce said that the italicised phrase 'is no doubt a mobile phrase; it may, and should, change in content as society changes'.

Changes of this kind may occur in time or in place. Often they occur in both. Since an Act is always speaking, it must be worded so as to accommodate them. The drafter of the Obscene Publications Act 1959 assumed that, throughout the life of the Act, science, literature, art and learning would be of general concern. It was safe therefore to specify them (and helpful to do so, since they gave shape and colour to his proposition). But other topics were to be judged not on what was of general concern in 1959 but on what was of general concern at the time of an alleged offence. If the Act lasted 50 years, and a prosecution was brought at the time of its golden jubilee, the drafter intended the case to be judged by what was of general concern in 2009 not 1959. Let us take some other examples, first of changes in time and then in place.

Suppose it is desired to impose control over firearms but exempt any antique weapon. The term 'antique' is vague. The drafter might seek precision by referring instead to a weapon 'manufactured more than 100 years before the passing of this Act'. But that would be illogical. If the Act were passed in 1968 a gun made 105 years earlier would be exempt. By 1978 however, a gun made 105 years earlier would not be exempt, because it would have been made only 95 years before the passing of the Act. What is wanted is a rolling period, so that at any moment the Act will exempt guns which *at that moment* are 100 years old. The drafter of s 58(2) of the Firearms Act 1968 did not adopt this. Instead, he provided a flurry of broad terms: 'Nothing in this Act relating to firearms shall apply to an antique firearm which is sold, transferred, purchased, acquired or possessed as a curiosity or ornament.' No definitions were provided for 'antique', 'curiosity' or 'ornament'.

The question of the meaning of 'antique' in s 58(2) came before the Divisional Court of the Queen's Bench Division in *Bennett* v *Brown* (1980) *The Times,* 12 April. The prosecutor appealed from magistrates' acquittal of a defendant in relation to three guns 'dating from possibly 1886, and after 1905 and 1910'. He told the court that prosecuting authorities needed guidance on what was 'antique' for this purpose. Eveleigh LJ said it was a question of fact, but guns manufactured in the present century 'could not be antique'. The court directed the magistrates to convict in relation to the guns made after 1905 and 1910. Regarding the gun possibly made in 1886, Eveleigh LJ said that the magistrates were entitled to come to their conclusion, though he would not have done so himself. This judgment seems to put excessive weight on the arbitrary division of time into centuries.

Is 'book' a mobile term? It might not seem so. Everyone knows what is and is not a book. Or do they? Section 9 of the Bankers' Books Evidence Act 1879 defines 'banker's book' as including ledgers, day books, account books, 'and all other books used in the ordinary business of the bank'. In 1879 it was no doubt unthinkable that banks would keep their records in anything but bound books. One cannot blame the drafter for failing to envisage the invention of microfilm. Yet in seeking to make copies of all bank records admissible in evidence he might have managed to find a phrase of more general meaning. In *Barker* v *Wilson* [1980] 1 WLR 884, the Divisional Court had no hesitation in coming to the drafter's rescue. They treated 'book' as a mobile term wide enough to embrace microfilm—and indeed 'any form of permanent record kept by the bank by means made available by modern technology'. It did not worry Caulfield J that a microfilm 'is not normally called a book'.

Another technological development came before the court in *Aerated Bread Co* v *Gregg* [1873] LR 8 QB 355. At the time of the passing of the Bread Act 1836 a certain type of bread, of a certain shape, was widely sold as 'fancy bread'. The Act used this term without definition. Quain J held that 40 years later the term could be applied to bread of the same kind, even though of a different shape and produced by an altered mode of baking.

Social change has frequently to be accommodated by the mobile term. When 'single woman' was first used in Affiliation Acts it referred solely to an unmarried woman. The growing frequency with which marriages broke up led to its ultimate extension to a married woman living apart from her husband—even where they shared the same roof *{Watson* v *Tuckwell* (1947) 63 TLR 634).

It follows that a judicial decision on the meaning of a term will be disregarded if the meaning changes. The Rent Acts give protection, where the tenant dies, to a member of the tenant's 'family'. In 1950 it was held by the Court of Appeal that this did not include the tenant's common law husband *(Gammons* v *Ekins* [1950] 2 KB 328). In another case 25 years later the same court reversed its ruling. The case was *Dyson Holdings Ltd* v *Fox* [1976] QB 503, where Bridge LJ said (p 513):

> If the language can change its meaning to accord with changing social attitudes, then a decision on the meaning of a word in a statute before such a change should not continue to bind thereafter, at all events in a case where the courts have constantly affirmed that the word is to beunderstood in its ordinary meaning.

By this Bridge LJ clearly referred to the fact that a mobile term is to be applied to facts arising at a particular time in accordance with its meaning *at that time.*

Another matrimonial term of long standing is 'cruelty' as a ground of divorce. Here we see the effect of a social change attributable to advancing civilisation. As the times become less rough and

barbarous, and the standard of comfort advances, people will put up with less hardship. What was once part of the give-and-take of marriage becomes 'cruelty'. Mental cruelty enters the scene, alongside physical ill-treatment. There is a similar progression with broad terms like 'riotous', 'disorderly', 'indecent' and 'insulting' as descriptions of public behaviour. A dog may now be held 'dangerous' within the meaning of the Dogs Act 1871 even though its behaviour is something less than savage or ferocious *(Keddle* v *Payn* [1964] 1 WLR 262).

Sexual *mores* are notoriously mobile in time. Section 32 of the Sexual Offences Act 1956 (a consolidation Act), reproducing s 1(1) of the Vagrancy Act 1898, makes it an offence for a man to solicit for 'immoral purposes'. In *Crook* v *Edmondson* [1966] 2 QB 81, this was held to mean purposes considered immoral by 'the majority of contemporary fellow citizens' *(per* Winn LJ at p 90).

Here are two other examples of broad terms whose content varies from place to place:

Section 59 of the Highways Act 1980 gives a highway authority power to recover compensation from an operator responsible for damage 'caused by *excessive* weight passing along the highway, or other *extraordinary* traffic thereon'. Both these broad terms are modified by reference to the average maintenance expenses of highways in the *neighbourhood.* Here the variability of the content is expressed in the statute.

In the other example the variability is not expressed, but has been held by the courts to be implied. Section 74(4) of the Licensing Act 1964 (reproducing earlier legislation) empowers justices to extend permitted licensing hours for the sale and consumption of alcoholic liquor on a 'special occasion.' No definition of this term is provided. In a case decided under earlier legislation, Lord Coleridge C] said 'the question what is a special occasion must necessarily be a question of fact in each locality'. He added: 'Each locality may very well have its own meaning to those words, and it is for the justices in each district to say whether a certain time and place come within the description' *(Devine* v *Keeling* (1886) 50 JP 551, 552). Thus the Saturday before a bank holiday may be a 'special occasion' in a seaside holiday resort but not in an industrial town (/? v *Corwen Justices* [1980] 1 WLR 1045).

Static term—mobile concept

Not only should the processor be alert to the distinction between the static and mobile broad term, but the drafter needs to be aware of it too. It is really a distinction between static and mobile *concepts.* If the concept for which the drafter needs a term is static, then he should select a static term, and vice versa. If he fails in this he may create unnecessary difficulties of interpretation. The commonest error, and the most troublesome, is where the

drafter with insufficient imagination thinks his concept is fixed when it is in fact mobile. The Canadian Criminal Code made it an offence to trade or traffic in 'any bottle or syphon' which had upon it the trade mark of another person, or fill it with any beverage for sale, without his consent (cited Driedger 1974, p 86). It is obviously possible for beverages to be sold in other forms of container, such as cartons. By looking only at the conditions prevailing at the time he was writing, and failing to exercise his imagination, the drafter made his text unnecessarily and unjustifiably narrow. He could easily have written 'container' instead of 'bottle or syphon'. We saw earlier how a similar difficulty arose in connection with bankers' books.

The reverse error, of using a mobile term for a static concept, creates unnecessary vagueness. It would not have been sensible to say 'container' instead of 'bottle' in a provision intended to guard against danger from broken glass.

The broadest term

As we have seen, the wider the penumbra of doubt attached to a broad term the greater the discretion effectively delegated to the processor. There is an important class of cases where, because the limiting framework is virtually non-existent, delegation occurs practically across the whole field. In effect the legislator abdicates completely. For his judgment is substituted that of the processor, guided only by vague concepts such as what is 'reasonable' or 'just' or 'fit and proper'.

There are many examples of this form of delegation. Here is one, drawn from the Consumer Credit Act 1974. In this instance the processor is an official, the Director General of Fair Trading. Section 25(1) states that a licence to carry on a credit or hire business shall be granted on the application of any person if he satisfies the Director General that he is 'a fit person to engage in activities covered by the licence'. If this stood alone, as it well might have done, it would empower the Director General to set his own standards of fitness. Parliament has thought it right to lay down guidelines however, and the section goes on to instruct the Director General to have regard to specified factors—such as whether the applicant has a record of dishonesty or violence.

Parliament has been more ready to entrust unfettered discretion to judges than officials. In the early days of divorce law for example, the court was empowered in relation to the children of dissolved marriages to 'make such provision as it may deem just and proper' with respect to their custody, maintenance and education (Matrimonial Causes Act 1859, s 35).

The modern tendency is for judges to receive (and indeed expect) more positive guidance. When the grounds for divorce were recast in 1969-70 elaborate criteria were laid down for maintenance,

including the momentous requirement to put the parties as nearly as possible in the position they would have been in if the marriage had not broken down (Matrimonial Proceedings and Property Act 1970, s 5(1) and (2)); see now Matrimonial Causes Act 1973, s 25(1)).

Guides to meaning

Sometimes, as we have seen, guides to the interpretation of the broad term are stated expressly in the legislative text. Even where this is not done, the meaning is not left completely at large. Under the *noscitur a sociis* principle (pp 195-196), terms are recognised to gain colour from their context.

The context may not always furnish assistance. The Housing Act 1980 laid down the repairing covenants that are to apply where the secure tenant of a flat exercises his statutory right to acquire a long lease (see Sched *2,* paras 13 to 17). It enabled the landlord to charge the tenant a 'reasonable' proportion of the cost of non- structural repairs. Often when the broad term 'reasonable' is used, as with the concept of a 'reasonable' rent, the factors by reference to which it is to be applied are obvious. Here they are not. The Act imposed on the landlord the duty to repair whether or not it was 'reasonable' that he should be saddled with this. It then enabled him to transfer to the tenant such part of the duty as might be 'reasonable'. If, from an objective viewpoint it was wholly unreasonable in a particular case to saddle the landlord with repairs, how could it be 'reasonable' to transfer only a part of the cost to the tenant? The courts are forced to grope for a meaning in such cases, without guidance from the legislature. (For further details see Bennion 1981(6)).

Above all, the broad term must be construed so as to further the purpose and intention of the instrument in which it is used. The ways in which broad terms are processed in this way are examined in Part IV.

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Doubt-factor III: Politic Uncertainty

The final deliberate doubt-factor is seldom used, and so requires only brief discussion. There are various reasons why it may be considered politic to shroud a legislative text in obscurity. They can be condensed into the following propositions:

(1) If the parties to a proposal cannot agree, it may be necessary to fall back on putative agreement by propounding an imprecise formula to paper over the cracks.
(2) Where a government's proposal is politically contentious the government may sneak it on to the statute book under a cloak of bland and harmless phraseology.
(3) On some politically sensitive issues certain forms of words acquire the quality of a shibboleth, which it is felt *must* be advanced regardless of resulting obscurity.
(4) Officials who desire a free hand in administering a regulatory Act favour imprecise language. If no one can be sure what the Act means, there can be no proof that the officials have exceeded their powers.

Treaty provisions

The commonest example of the first proposition is the international treaty. As the Renton Committee remarked, in such documents 'clarity is sometimes sacrificed to expediency' (Renton 1975, para 9.11). When representatives of many nations seek to hammer out agreement they may feel bound to resort to spurious compromise. Either there is agreement or there is not. To pretend to agreement by the use of ambiguous language is ignoble. But it is done. As Brinkhorst and Schermers say in *Judicial Remedies in the European Communities* (p 22): 'Political compromises are often attained by the use of ambiguous words' (quoted Renton 1975, para 9.11).
Every treaty contains compromise of this sort. If the treaty is converted into municipal law, the ambiguity is spread. That is one objection to the idea of making the European Convention on Human Rights part of domestic law. To secure agreement, many important principles were watered down when the wording of the Convention was settled.

An example of an international treaty converted directly into municipal law is the Warsaw Convention, as amended at the Hague in 1955. This is given the force of law in the United Kingdom by s 1 of the Carriage by Air Act 1961. The result is to apply directly a number of obscure provisions. Article 18(3) is an example. It begins by saying that the period of the carriage by air does not extend to 'any carriage by land, by sea or by river performed outside an aerodrome'. Then it qualifies this by saying that if such carriage does in fact take place 'any damage is presumed, *subject to proof to the contrary,* to have been the result of an event which took place during the carriage by air' (emphasis added). The italicised phrase seems to contradict the purpose of the qualification.

A case where treaty obligations were implemented indirectly was the Oil in Navigable Waters Act 1955. Reproducing the obscure wording of the treaty, s 1 of the Act said that if oil were unlawfully discharged from a British ship 'the owner or master' of the ship would be guilty of an offence. In *Federal Steam Navigation Co* v *Department of Trade and Industry* [1974] 1 WLR 505, *both* the owner and the master of a ship were convicted. In dismissing their appeals, the House of Lords split three to two.

An extraordinary example of deliberate obscurity induced by a treaty concerns the 1961 Vienna Convention on Diplomatic Relations. By the Diplomatic Privileges Act 1964, certain articles of this are made part of the law of the United Kingdom. One of them is art 31, which gives immunity from jurisdiction except in the case of a 'real action' relating to private immovable property. Now (Admiralty jurisdiction excepted) there are no such things as real actions in English law, so what can this exception conceivably mean? We have an Act of Parliament solemnly legislating about things that simply do not exist. It is as if the Act gave immunity in respect of 'dodos, unicorns and gryphons'. For a valiant attempt by the court to grapple with this difficulty see *Intpro Properties (UK) Ltd* v *Samel* [1983] 2 WLR 1 (reversed [1983] 2 WLR 908).

Politically contentious provisions

Enactments which 'paper over the cracks' are not limited to the field of international conventions. For a domestic example relating to the Marine Insurance Act 1906 see p 75 above. Another possible example was referred to by Lord Wilberforce in the 1982 case about the cheap London fares policy, *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768. Speaking of the duty imposed by s 1 of the Transport (London) Act 1969 to provide 'integrated, efficient and economic' facilities, Lord Wilberforce said (p 814): 'There has been a good deal of argument as to the meaning of these words, particularly of 'economic'; no doubt they are vague, possibly with design.' An acutely controversial point may be left deliberately uncertain

despite the fact that MPs debating the Bill point to the doubt. This happened on the question of whether the 1968 Race Relations Bill applied to working men's clubs. Lord Simon of Glaisdale said in 1981 that it was notorious that such clubs practised racial discrimination but Parliament shrank from making clear whether the Bill applied to them or not because 'a decision either way was bound to attract some odium' (HL Deb 9 March 1981 col 77).

Craies includes among the causes of defective statute law: 'More or less intentional obscurities, perplexities, or imperfections, inserted or permitted with a view to facilitate the passage of the Bill through Parliament' (Craies 1971, p 28). Sir Courtenay Ilbert explained how in his day counsels of perfection urged by the drafter from the legal view were ignored by politicians. He added that 'whether the Minister who had to decide between the risk of losing his Bill and responsibility for leaving the law obscure adopted the right course is a nice question of political ethics' (Ilbert 1901, pp 18, 22).

It might be a nice question of political ethics, but no realist would suppose for a moment that a minister would be prepared to lose his Bill, or have it delayed, on any grounds except political ones— and then only when they were compelling. This highlights a central paradox: the true arbiters of legal change and content are not lawyers but politicians, whether they be ministers or back-benchers. So it is not surprising that the *corpus juris* assumes erratic shapes.

Another political factor is the party shibboleth. This has been particularly obvious in the protracted battles over trade unionism. Labour hatred of the Industrial Relations Act 1971 was so acute and bitter that it distorted the Act which followed, the Trade Union and Labour Relations Act 1974. Although Labour wished to retain many features of the 1971 Act, its *total* repeal had been a leading general election issue. How do you repeal an Act totally, while retaining large parts of it?

The way it can be done is to be seen in s 1 of the 1974 Act:

(1) The Industrial Relations Act 1971 is hereby repealed.
(2) Nevertheless, Schedule 1 to this Act shall have effect for re-enacting ... the under-mentioned provisions of that Act, that is to say ...

Simple, when you know how!

Another party-political distortion in the 1971 Act derived from Labour adherence to the historic fact that trade unions were unincorporated associations and not bodies corporate. Although for practical reasons unions needed to be given most of, if not all, the attributes of corporate status, the drafter was not allowed to turn unions into corporations. How the resultant contradictions misfired was recounted on pp 183-185 of the second edition of this book (now omitted).

Sir Harold Kent, a former drafter, has described in his book of reminiscences *In on the Act* the conflict of interest between the drafter on the one hand the the Minister and his department on the other. The drafter seeks to confine the Bill strictly to matters requiring an alteration of the law. On the other hand:

The department is conscious that the Minister would like to make a Parliamentary splash; it also knows that administration is sometimes helped by being able to refer to an Act of Parliament; so it wants to put as much as possible into the Bill' (Kent 1979, p 44).

Kent goes on to point out that other occasions of conflict are when the Minister wants a clause to look as attractive politically as possible, or is 'impatient of the detail needed for precision'.

Convenience of officials

The development of legislation as an instrument of social policy has brought a corresponding increase in bureaucracy. Regulatory legislation requires officials to administer it. They are then in the public eye, and the subject of constant probing and attack. Everything they do is open to challenge, and often is challenged. So it is not surprising that the officials take advantage of what refuge they can find. If the Act which officials administer is obscure, their antagonists have less opening for attack. Even when not afflicted with megalomania (and few officials are) it is more comfortable to be covered by wide, vague powers. Then you can get on with the job without fear of challenge.

The departmental official has a guiding hand in the preparation of legislation. Usually its shape is a reflection of his views. They are not idiosyncratic personal views; but the demands of his work colour his approach. The official does not think it important that the statute user should be able to understand the law from the text alone: he is always ready with advice.

The legislative drafter opposes this view. If not particularly concerned about the plight of the statute user, he does at least want to express the law he intends to make. Sir Harold Kent describes the conflict by recollecting occasions in his own experience 'when the department wants its administrative powers drawn widely, or even obscurely, so as to avoid risk of legal challenge, an attitude which hardly pleases a self-respecting draftsman'.

Kent's last word on this really says it all. 'I remember a clause of mine receiving the dubious compliment of "nice and vague" from a bureaucrat of seasoned experience' (Kent 1979, p 45).

It should perhaps be added in conclusion that the rise of judicial review since the above was written in 1979 has rendered it less likely that challenge will be avoided by the use of obscurity in drafting.

Doubt-factor IV: The Unforeseeable Development

As we saw from the discussion of updating construction (pp 181- 186), the longer a statute remains in operation, the more likely it is that doubts will arise as to its application. It is a static text amid constant flux. Changes in language, technology, social practice and in the surrounding law are bound to be continual.

The static text

We may usefully consider some examples. It is truly remarkable how long-lived English statutes are. In magistrates' courts throughout the land, people are still being bound over to keep the peace under an Act passed more than six centuries ago. It is still 'speaking'. Can its voice be comprehensible today? This is how it begins:

Primement q en chescun Countee Dengletre soient assignez, p[1] la garde de la pees, un Seign[1], & ovesq lui trois ou quatre des meultz vauez du Countee, ensemblement ove ascuns sages de la ley, & eient poer de restreindre les mesfesours, rioto[r]s, & touz auts baretto[r]s . . .

Even that is not the oldest criminal statute operative. The law of treason, an offence still carrying the death penalty, is embodied in an Act of 1351. This begins as follows:

Auxint p[r]ceo q divses opinions ount este einz ces heures qeu cas, q[a]nt il avient doit estre dit treson, & en quel cas noun, le Roi a la requeste des Seign[r]s & de la Coe, ad fait declarissement q ensuit, Cest assavoir; q[a]nt home fait compasser ou ymaginer la mort nre Seign[r] le Roi, ma dame sa compaigne, ou de lour fitz primer & heir . . .

It is true that for both these fourteenth-century statutes an official translation is provided. But the wording, even in translation, is redolent of times long past. There can be no justification for a modern state still expressing its law against attacks on the head of state by imposing sanctions 'when a man doth compass or imagine the death of our lord the King, or of our lady his companion or of their eldest son and heir; or if a man do violate the King's companion, or the King's eldest daughter unmarried, or the wife of the King's

eldest son and heir; or if a man do levy war against our lord the King in his realm, or be adherent to the King's enemies in his realm, giving them aid and comfort in the realm, or elsewhere . . .' (Treason Act 1351).

Nor can there be any justification for subjecting today's citizens to the risk of binding-over by saying that 'in every country of England shall be assigned for the keeping of the peace one lord, and with him three or four of the most worthy in the county, with some learned in the law, and they shall have power to take of all them that be [not] of good fame, where they shall be found, sufficient surety and mainprise of their good behaviour towards the King and his people . . .' (Justices of the Peace Act 1361).

Apart from obvious archaisms, the texts of these two Acts abound with doubts and defects. It is doubtful whether the word 'not' is really present in the passage just cited, there being a respectable argument for saying that not only was that negative never included but that other words (not cited above) render its omission necessary! Blackstone it is true felt confident that 'not' was properly included. He gives us an engaging picture of the sort of people who in his day fell within the ambit of a provision that was already more than 400 years old:

> Under the general words of this expression, *that be not of good fame,* it is held that a man may be bound to his good behaviour for causes of scandal, *contra bonos mores,* as well as *contra pacem:* as, for haunting bawdy-houses with women of bad fame; or for keeping such women in his own house; or for words tending to scandalize the government, or in abuse of the officers of justice, especially in the execution of their office. Thus also a justice may bind over all night-walkers; eaves-droppers; such as keep suspicious company, or are reported to be pilferers or robbers; such as sleep in the day, and wake in the night; common drunkards; whore-masters; cheats; idle vagabonds; and other persons whose misbehaviour may reasonably bring them within the general words of the statute, as persons not of good fame: an expression, it must be owned, of so great a latitude, as leaves much to be determined by the discretion of the magistrate himself.' (Blackstone 1756, IV 268. See further 133 SJ (1989) 498. As to broad terms generally see chapter 16 above.)

Other Acts still in our statute book, though not as ancient as the two just mentioned, nevertheless govern today's citizens by the language of the past. Here are just a few examples at random. All are in force today.

The Pedlars Act 1871 contains a definition of'pedlar' stating that it means 'any hawker, pedlar, petty chapman, tinker, caster of metals, mender of chairs, or other person who, without any horse or other beast bearing or drawing burden, travels and trades on foot . . .'.

Section 4 of the Vagrancy Act 1824, still in constant use, punishes 'every person wilfully, openly, lewdly, and obscenely exposing his person with intent to insult any female'. It was decided only in

1972 that the reference to a person exposing his 'person' means the penis and nothing else: *Evans* v *Ewels* [1972] 1 WLR 671. The section goes on to penalise the carrying of any gun, pistol, hanger, cutlass or bludgeon, and renders such weapons forfeit to the King's Majesty. Then the section says that anyone apprehended as an idle and disorderly person and violently resisting any constable or other peace officer shall be deemed a rogue and vagabond. We are not surprised to find that such a rogue and vagabond is to be committed 'to the house of correction'.

Section 4 of the Statute of Frauds 1677 remains an important element in the law of contract. It provides that 'noe action shall be brought whereby to charge the defendant upon any speciall promise to answere for the debt default or miscarriages of another person unlesse the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writeing and signed by the partie to be charged therewith . . .'

The Gaming Act 1710 is still important to gamblers and those who exploit them. It renders void any security given in respect of 'gaming or playing at cards dice tables tennis bowles or other game or games whatsoever or by betting on the sides or hands of such as do game at any of the games aforesaid . . .' The effect is somewhat reduced by the Gaming Act 1835.

How doubts arise

It is clear that the static text, enduring through changing conditions, must raise uncertainty as to how it is to be interpreted at a given time. Looking only at examples quoted above, we feel doubt as to how they are to be construed today. Is it really punishable to 'imagine' the death of a monarch? Suppose the monarch's heir is not the 'eldest son' but the eldest daughter, or the second-born son? Does 'violating' the consort mean only taking her by force, and exactly what sexual conduct is proscribed? Can a person who w 'of good fame' be bound over? What does 'surety and mainprise' mean? Does the *ejusdem generis* rule (p 196) apply to the 1871 definition of 'pedlar' and if so to what effect? Does s *6(b)* of the Interpretation Act 1978 ('words importing the feminine gender include the masculine') now mean that it is an offence for a person to expose his person with intent to insult a *male?* What conduct is 'idle and disorderly' today? The way courts deal with such questions is described above in the discussion of updating construction (pp 181-186).

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Doubt-factor V: The Fallible Drafter

Statute law consists of words. The words are put together by an anonymous being formerly called the draftsman. In the present edition, out of deference to the fact that this task is nowadays performed by both sexes, I have substituted 'drafter'.

Under the British system there is usually one person who composes the text, and can be regarded as its author. Yet, as we have seen, the drafter is far from being a free agent. Much constraint bears upon him before he begins to compose. Then his careful composition is liable to be distorted by various factors. Within the instructing government department, administrators and their collaborating lawyers will intervene. Government ministers then have their say. In Parliament, lobbyists exert pressure. Opposition members gain concessions, according to the magnitude of their political clout. The result may be a hotch-potch. The drafter's original concept can be bent out of shape. The extent of this distortion depends on a number of considerations, including the political content of the measure, the degree of government control, and the force of the drafter's own resolution. He can do much if determined to fight for the integrity of his contribution to the statute book; little if uninterested.

It is not widely understood that doubtful passages in statute law often owe their uncertainty to drafting errors. Books on statutory interpretation devote little space to this. Yet the truth is that if the meaning of a legislative text is objectively obscure this is due either to one of the factors discussed in the four preceding chapters or to inadequate drafting. Here let it be made clear once and for all that in referring to drafting error we do not necessarily impute blame to the drafter himself. Often he is helpless, overcome by forces which are, or seem to be, of greater strength. By drafting error we refer to all defects in the text which need not have been there.

Drafting errors are of many types. In this chapter I attempt to describe them, one by one. For convenience, the discussion is in terms of *Acts,* though it applies equally to statutory instruments. As the exemplar of the legislative unit, we refer to a *section* (meaning one not broken into subsections; in other words a single proposition). Again, what is said about sections applies equally to subsections,

or paragraphs in a Schedule, or any other legislative units. We are concerned with drafting errors that cause doubt as to meaning or application, and we aim to relate varieties of doubt to types of error. We begin with errors confined to the section itself. Later we discuss errors that involve another part of the Act. Finally we deal with errors related to other Acts.

Errors confined to the section itself

We consider first errors that make the text defective or garbled, including printing errors and punctuation mistakes. Next we deal with defects in meaning, including syntactic ambiguity. Logical defects follow, and then cases where the literal meaning fails to carry out the intention. Next we examine two common instances where the drafter's intention itself is at fault, and his words go narrower or wider than the mischief or object. Following this we look at the problem of the incomplete text, where the drafter has failed to say enough. Finally we consider cases where the project is misconceived through some mistake of fact, or the drafter mounts a faulty hypothesis. (See further the section on *disorganised composition* at pp 312-314 below.)

Garbled texts

Not infrequently, errors creep into the texts even of modern Acts. We saw in the previous chapter how there is doubt about the presence of the word 'not' in the Justices of the Peace Act 1361. In s 2 of the Justices Protection Act 1848 there is doubt about whether the words 'or order' have been omitted. The section gives certain rights where 'any conviction or order' is based on insufficient jurisdiction. The proviso states that 'no action shall be brought for anything done under such conviction or order until after such conviction shall have been quashed'. It seems obvious **that** 'or order' has been accidentally omitted after 'such conviction'. This view is strengthened by a later reference to a time 'after such conviction or order shall have been so quashed as aforesaid'. Yet in *O'Connor* v *Isaacs* [1956] 2 QB 288, 328 it was held that it could not be assumed the missing words were omitted in error, nor could they be implied.

A well-known example of a garbled text is s 8 of the Prescription Act 1832, where 'convenient' has crept in instead of 'easement' in the opening passage referring to 'any land or water upon, over or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed'. In *Laird* v *Briggs* (1881) 19 Ch D 22, 23, Jessel MR thought 'convenient' could be ignored as an absurdity.

Another familiar example occurs in s 6 of Lord Tenterden's Art, which is still in force (the Act is now called the Statute of Frauds Amendment Act 1828). The section requires production of a signed

memorandum before an action can be brought 'to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character ... of any other person, to the intent or purpose that such other person may obtain credit, money or goods *upon*". In *Lyde* v *Barnard* (1836) 1 M & W 101 the judges disagreed as to whether the italicised word should be rejected as nonsensical or the words 'such representation or assurance' should be implied as following it.

In *Green* v *Wood* [1845] 7 QB 178, 185, it was suggested that 'or execution issued' in s 2 of the Warrants of Attorney Act 1822 should be read as 'and execution levied' but the court declined to do this, preferring to say that the words had no meaning at all. On the other hand it was held in *R* v *Oakes* [1959] 2 QB 350 that 'and' should be read as 'or' in a passage making it an offence where a person 'aids or abets *and* does any act preparatory to the commission' of another specified offence. Lord Parker CJ said that the passage as it stood was 'unintelligible'. In *Jubb* v *Hull Dock Co* (1846) 9 QB 443, 455 the court found it necessary, in order to make sense of a section, to read in the words 'to the owner or party interested' between 'the sum of money to be paid' and 'for the injury done to the lands of any such party'.

A similar omission occurred in s 33 of the Fines and Recoveries Act 1833, which provided that if the protector of a settlement should be convicted of felony or an infant, the Court of Chancery should be the protector 'in lieu of the infant'. In *Re Wainwright* (1843) 1 Ph 258 the court supplied the omission by reading in a reference to the convict also.

A section may be garbled by punctuation errors. It is well-known that Sir Roger Casement was said to have been hanged by the last comma in the passage from the Treason Act 1351 quoted on pp 252- 253 (*R* v *Casement* [1917] 1 KB 98). A comma was omitted after 'justice' in s 10 of the Fugitive Offenders ACT 1881. This authorised extradition to be refused if it would be unjust 'by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise'. By inserting the missing comma before 'or otherwise', the court in *R* v *Governor of Brixton Prison, ex pane Naranjansingh* [1962] 1 QB 211 greatly widened the stated grounds for refusal of extradition.

Other misplaced punctuation marks may cause difficulty. In a Canadian case the court was faced by an errant full stop which rendered the passage meaningless. They accordingly read '. . . judicial district in this Province. The statement of claim may issue . . .' as if it said '. . . judicial district. In this Province the statement of claim may issue . . .' (cited Driedger 1974, p 112).

By garbling of the text we refer to mistakes which have crept in by some form of crude mishap, often a printer's error. They are not something the drafter can ever have intended. We pass now

to cases where the drafter himself has gone wrong, and used a form of words inapt to convey his meaning.

Defects in meaning

Inefficient construction of the sentence is a prime cause of doubt. In particular, failure to make clear which words a modifier modifies and which it does not gives rise to ambiguous modification or syntactic ambiguity. Thornton gives the following examples, among others, in his book *Legislative Drafting:*

a public hospital or school (is the school 'public'?)
a registered dentist or medical practitioner (is the medical practitioner 'registered'?)
a teacher or student of mathematics (is mathematics the teacher's subject too?)
an owner of gold bullion in New Zealand (does 'in New Zealand' qualify 'owner' or 'bullion'?)

A famous syntactic ambiguity related to the words 'if need be' in the statute 4 Edw 3 c 14. By applying them to the whole sentence, instead of to the last part only, medieval kings constantly disregarded the law requiring annual Parliaments to be held (see Erskine May 1976, p 57). For an alleged syntactic ambiguity in s 49(4)(6) of the Race Relations Act 1976 see *R* v *Racial Equality Commission, ex pane Hillingdon London Borough Council* [1981] 3 WLR 520, 532; 126 Sol J 167. A remarkable example of *two* syntactic ambiguities in one phrase is to be found in rule 8(6) of the Industrial Tribunals (Labour Relations) Regulations 1974. This gives a tribunal chairman power to correct 'clerical mistakes or errors arising from accidental slip or omission'. If (which is denied) there is any difference between a 'mistake' and an 'error', does this require an error to be 'clerical'? Clearly an omission may be made otherwise than by accident (as where it is deliberate). Can the chairman correct it?

It is surprising that, despite the publicity given to the vice of syntactic ambiguity, drafters still fall into it so often. Section 20(1) of the Sexual Offences Act 1956 contains an elementary example. Replacing the provisions relating to abduction in s 55 of the Offences against the Person Act 1861 (which used the term 'unlawfully'), s 20(1) speaks of abduction 'without lawful authority or excuse'. Does the latter mean any excuse or only a 'lawful excuse'? It took the Court of Appeal decision in *R* v *Tegerdine* [1983] Crim LR 163 to give us the answer. It means a lawful excuse only. Even then, as Professor Smith remarks *(ibid),* the meaning remains obscure. What would amount to a lawful excuse that would not also be a lawful authority? No one has any idea.

Thornton quotes a remarkable example of faulty relation of a pronoun to its antecedent: 'And when they arose early in the morning, behold, they were all dead corpses' (2 Kings 19, 35). As Thornton

says, 'Ambiguity caused by faulty reference is almost always no more than the result of carelessness' (Thornton 1987, p 30). Twining and Miers say the same: 'Syntactic ambiguity is almost always a defect that can and should be avoided at the formulatory/drafting stage' Twining and Miers 1982, p 212.

Another instance, frequently found, is misuse of the word 'any'. Section 50 of the Town Police Clauses Act 1847 gives power to revoke the licence of a hackney carriage proprietor or driver upon conviction for the second time for *any* offence under that Act or other specified legislation. This could either mean that the second conviction must be for the *same offence* as the first, or that it need merely be for an offence of the same class. In *Bowers* v *Gloucester Corporation* [1963] 1 QB 881 the latter interpretation was preferred. On a similar point under different legislation, the court came to the opposite conclusion in *R* v *South Shields Licensing Justices* [1911] 2KB 1.

Such defects in meaning are due to sloppy construction, where the drafter does not stop to consider whether he has been deluded by a spurious appearance of sense. Section 65 of the County Court Act 1888 gave power to send certain cases for trial in the court in which the action might have been commenced 'or in any court convenient thereto'. In *Burkill* v *Thomas* [1892] 1 QB 99 it was held that the drafter had put down a phrase which may have seemed sense to him at first sight but was in fact meaningless. One court cannot be 'convenient' to another.

Sometimes sloppy construction leads to downright contradiction within the section. Section 2(2) of the Married Women (Maintenance) Act 1949 gave the court power to extend certain child maintenance orders which would otherwise expire when the child reached 16. In logic you cannot 'extend' an order which has already expired, so in *Norman* v *Norman* [1950] 1 All ER 1082 the court were prepared to reject an application initiated after the child had reached this age. It was then pointed out that the section gave power to extend if it appeared that the child '*is or* will be engaged' in a training course after attaining 16. The italicised words could only apply where the child was already 16 at the date of the application (in other words when the order had already expired). Faced with this contradiction, the court held that Parliament must have intended that 'continuation' of the order could be granted after an interval had elapsed since its expiry.

The technique of overlap Where an Act states a proposition in tautologous phrases there may be interpretation difficulties if the nature of the drafting process is not understood. With modern precision drafting the tautology is likely to be partial rather than complete. The purpose is to *build up* an enactment by overlapping expressions, each contributing its share to a rounded statement. One expression used alone may be doubtful, but with two or more used

in conjunction the doubts as it were cancel each other out. A simple example is provided by the Motor Car Act 1903. This, the first of the Acts regulating the driving of motor vehicles, made it an offence to drive a car 'recklessly or negligently'. Here the drafter took two imprecise terms with overlapping meanings and put them together. The overlap meant that at the centre the imprecision disappeared. There could be no argument that a piece of driving was 'reckless' rather than 'negligent' (or vice versa) because the same consequences followed either way. This advantage was lost when in a later more complex enactment, the Road Traffic Act 1930, s 11(1), the concept of recklessness was used on its own (see Bennion 1981(5)).

Humpty-Dumptyism Another example of defect in meaning concerns the case where the drafter decides to flout an established definition. Since he is composing what is to be overriding law, he possesses a power denied to other authors. Occasionally this fact goes to his head. He employs a word with one meaning to denote something quite different. This may be called Humpty-Dumptyism, after the Lewis Carroll character who boasted: 'When / use a word, it means just what I choose it to mean—neither more nor less' *{Alice Through the Looking Glass,* chapter 6).

What is the difference between nullity and dissolution? Most people would say that a null thing is void from the outset, while a dissolved thing exists until its dissolution. That established view was departed from in the drafting of the Nullity of Marriage Act 1971 (re-enacted in the Matrimonial Causes Act 1973, ss 11-16). Section 5 of the 1971 Act (now s 16 of the 1973 Act) provides that a decree in respect of a voidable marriage 'shall operate to *annul* the marriage only as respects any time after the decree has been made absolute and the marriage shall, notwithstanding the decree, be treated as if it had existed up to that time'. Thus was the distinction between nullity and dissolution abolished at a stroke. Humpty- Dumptyism asserted itself.

In *Re Roberts deed* [1978] 1 WLR 653 the Court of Appeal held that this change in the law might very possibly give rise to anomalies, but that could not justify interpreting the statutory language otherwise than in accordance with its plain terms. One anomaly was that a will could now be automatically revoked by a 'marriage' of the testator to which he was mentally incapable of consenting. Buckley LJ said that whether that effect had been appreciated by Parliament was doubtful, but it was the inescapable effect of the legislation. This illustrates the danger of departing from established meaning. Humpty-Dumptyism by drafters is to be deprecated.

Having considered the garbled text, and the text defective in conveying the drafter's meaning, we now turn to the case where the drafter's proposition is logically deficient.

 Logical flaws

Doubt is inevitably raised by a logical failure in the drafting of the section. An example is the leaving of a lacuna in a recital of alternatives. This breaks one of the logical rules of division, namely that the constituent species must together exhaust the genus. The division must not leave gaps, or 'make a leap' *(divisio nonfacit saltum).* In *R* v *Secretary of State for the Home Department, ex pane Zamir* [1979] QB 688 the Divisional Court had to consider an immigration rule which provides that a passenger holding a current entry clearance duly issued to him is not to be refused leave to enter unless the Immigration Officer is satisfied that:

(a) false representations were employed or material facts were concealed... for the purpose of obtaining the clearance, or
(b) a change of circumstances since it was issued has removed the basis of the holder's claim to admission.

One circumstance which may remove the basis of the holder's claim to admission is his marriage, as occurred in this case. He married six weeks after the issue of the clearance, and the Court had no difficulty in applying the rule. But suppose he had married six weeks *before* the issue of the clearance, but after submitting an application for the clearance stating (correctly at the time) that he was unmarried. This might easily have happened, since nearly three years elapsed between the making of the application and the issue of the clearance. Now the error made by the drafter of the rule set out above becomes obvious. Paragraph (a) relates to what was said or omitted in the application. Paragraph *(b)* relates to what happens after the application is granted. There is a lacuna as to the period between the making and granting of the application. Instead of 'since it was issued' in paragraph *(b)* the drafter ought to have written 'since it was applied for'.

Self-defeating text

Sometimes it is clear what the intention is, and equally clear that it has misfired. In 1965 JD Davies pointed out in the *Law Quarterly Review* that the drafter of the Perpetuities and Accumulations Act 1964 (who was myself) had fallen into an elementary error over the repeal of s 163 of the Law of Property Act 1925 (81 LQR 346). Section 4 of the 1964 Act replaced s 163 by improved provisions, expressed in terms of what the position would be 'apart from this section'. This would have worked perfectly but for the fact that the consequential repeal of s 163 was placed in s 4 itself (as seemed natural to the drafter). Apart from s 4 therefore, s 163 would remain operative and this put the hypothesis wrong. The guilty drafter

managed to engineer a correction later by the insertion of a provision in another Act he was drafting (for fuller details see Bennion 1976(2)).

Another type of misfiring of intention is the erroneous reference to a related enactment. Section 66(2)(6) of the War Damage Act 1943 was intended to authorise capital to be raised under s 30 of the Universities and College Estates Act 1925 for defraying war damage contributions. Instead of referring to s 30 however, it referred to s 31. This also deals with raising money on mortgage. The mistake passed unnoticed. It misled the drafter of an Act passed nearly 20 years later into giving a similarly erroneous reference (see Town and Country Planning Act 1962, s 206(1)). Both errors were finally corrected by the Universities and College Estates Act 1964, s 4(1) and Sched 3.

A parallel case arose in *R* v *Wilcock* (1845) 7 QB 317, which concerned a reference to an Act described as having been passed in 13 Geo 3. Lord Denman CJ said:

> A mistake has been committed by the Legislature; but, having regard to the subject matter, and looking to the mere contents of the Act itself, we cannot doubt that the intention was to repeal 17 Geo 3, and that the incorrect year must be rejected (p 338).

A similar error occurred in s 42 of the Stannaries Act 1869, which referred to 6 & 7 Viet c 106 instead of 6 & 7 Will IV c 106.

The mistakes we have so far dealt with can be described as slips, which do not go to the root of the legislative intention. Now we venture into deeper waters.

Error of law

The drafter is not likely to produce a satisfactory text if he is mistaken about the law he is attempting to alter. Such mistakes are rendered more frequent by the chaotic state of our statute book. A famous example is *IRC* v *Ayrshire Employers' Mutual Insurance Association. Ltd* [1946] 1 All ER 637. The intention of s 31 of the Finance Act 1933 was to subject mutual insurance companies to income tax on the surplus arising from transactions with contributors who were their members. The drafter attempted to achieve this by saying that for tax purposes such a surplus was to be included in the company's profits or gains as if it arose from transactions with non-members. He failed to realise that in law the surplus was immune from tax for a different reason. Under the terms of the contracts with the contributors (which the Act did not deem to be altered) the surplus belonged not to the company but to the contributors. The House of Lords declined to alter the statutory language so as to remedy this error. As Lord Buckmaster had said in an earlier case, the subject ought not to be made liable to tax 'by an elaborate process of hair- splitting arguments' *(Ormond Investment Co* v *Belts* [1928] AC 143,

Lord Diplock criticised the *Ayrshire* decision by saying that if the courts can identify the target of legislation 'their proper function is to see that it is hit; not merely to record that it has been missed' (cited Cross 1976, p 93). The problem in such cases is that it is far from obvious what form the legislation would have taken if the drafter had not misunderstood the existing law. Various courses would have been open, some involving a greater incidence of tax in certain cases than others. Courts may legislate, but they certainly cannot tax.

A case that went the opposite way is *Salmon* v *Duncombe* (1886) 11 App Cas 627. The Judicial Committee of the Privy Council held that the drafter of a Natal Ordinance had clearly mistaken the relevant law. The preamble recited that it was expedient to exempt British- born settlers from the local law relating to testamentary dispositions of real and personal property. Section 1 said any such settler could exercise the rights given by English law 'as if [he] resided in England'. Under private international law, real property passes according to the *lex situs* and personal property according to the law of the domicil. In neither case is the place of residence material.

It was held that s 1 should be construed as if it had been worded on a correct understanding of the relevant law, in other words as if the hypothesis had not related to residence in England but to the location there of the real property devised and (in relation to personal property) the domicil there of the testator. The Judicial Committee said it would be 'a very serious matter to hold that when the main object of a statute is clear, it shall be reduced to a nullity by the draftsman's . . . ignorance of law' *{ibid,* p 634).

The drafter of an important constitutional statute, the Parliament Act 1911, made a minor error of constitutional law. In ss 1(1) and 2(1) he speaks of a Bill passed under the procedure laid down by the Act as becoming law 'on the Royal Assent being signified'. Yet Bills become law not on the date when assent is signified but on the date (which could be later) when it is communicated to both Houses of Parliament (see Bennion 1981(11), p 137).

Drafters have occasionally perpetrated errors of law by not studying with sufficient care an Act they were engaged in amending. Thus the drafter of the Nuisances Removal Act 1860 'must have forgotten that in the [Nuisances Removal Act 1855] there was power given not only to the local authority but to an inhabitant to initiate proceedings' *(Cocker* v *Card-well* (1869) LR 5 QB 15,*17 per* Cockbum CJ, who remarked that this was 'one of the most remarkable specimens of legislative incuria of the many that are daily brought before us').

We now go on to consider cases where, through drafting error, either the section goes narrower or wider than the object or the text is incomplete.

Narrower than the object

It is common to refer to the problem or deficiency intended to be remedied by the section as 'the mischief (see the discussion, on pp 159-163, of the rule in *Hey don's Case).* The *object* of the section is to remedy this mischief. If it does not go wide enough there is a *casus omissus.* Usually the object is not stated or described, but manifests itself by implication from the text. This means that where there are cases that the section does not cover, but apparently ought to cover, doubt arises.

The 'a fortiori' case

Sometimes a case not covered by the words of the section has a claim stronger even than the cases that are covered. The interpreter feels surprise. The doubt raised by the wording is acute.

The statute 22 & 23 Car 2 c 25 restricted possession of guns for taking game to 'the son and heir apparent of an esquire, or other person of higher degree'. This is a good example of ambiguous modification. Every person (with certain exceptions) is prohibited from having guns for taking game. It is clear that one exception is the son and heir apparent of an esquire. The other exceptions may be either A or B:

A Any person of higher degree than the son and heir apparent
of an esquire *or*

B the son and heir apparent of any person, where that person
is of higher degree than an esquire.

Since the test clearly turns on social rank, it seems obvious that A is to be preferred (though both A and B are defective in not covering persons *of equal* degree to the rank specified). Yet the court in *Jones* v *Smart* (1785) 1 TR 44 preferred B, even though this had the absurd result of favouring a son and heir at the expense of his father.

The court was equally reluctant to remedy a defect in *A-G* v *Sillem* (1864) 2 H & C 431. Section 7 of the Foreign Enlistment Act 1819 made it an offence to 'equip, furnish, fit out or arm' a ship for the warlike service of a foreign prince. Obviously it was an *a fortiori* case if a person actually went to the length of building a new ship for this purpose, yet the section did not mention building. Pollock CB elected to treat the omission as deliberate, though no reason for it was suggested. If providing arms to warring foreign states is regarded by Parliament as a mischief, then greater acts are more in need of remedying than lesser ones. It was left to Parliament itself to achieve this in the replacing s 8 of the Foreign Enlistment Act 1870, where a prohibition of building leads the way.

In *Adler* v *George* [1964] 2 QB 7 the court considered an appeal against conviction under a section prohibiting obstruction 'in the

vicinity of any prohibited place (Official Secrets Act 1920, s 3). Obviously obstruction *within* a prohibited place is more serious than obstruction in its vicinity. Lord Parker CJ robustly held that 'in or' must be treated as inserted before 'in the vicinity of. The conviction was upheld accordingly.

The 'in pan materia' case

While the *a fortiori* case is relatively rare, there are many instances where a section does not cover cases which seem to be just as qualified for inclusion as those it does cover. Here are a few examples.

In *Whiteley* v *Chappell* (1868-9) 4 LRQB 147 a statute aimed to prevent electoral malpractice made it an offence to personate 'any person entitled to vote'. The accused was charged with personating X, whose name was still on the register although he was dead. The court found that no offence had been committed. The personation was not of a person entitled to vote because a deceased person is not entitled to vote. He does not exist, and can have no rights.

R v *Dyott* (1882) 9 QBD 47 concerned a section which said that a local church rate would not be valid unless notice of it was affixed on or near the door of the church or chapel. Although a rate could otherwise have been made for Hopwas Hays, an extra-parochial place, it possessed neither church nor chapel. The court held that this invalidated the rate.

In *R* v *Symington* (1895) 4 BCR 323 a Canadian court considered an Act exempting 'any resident farmer' from liability for killing deer in his cultivated fields. The court held that although there was no mention of a resident farmer's *agent,* he was to be treated as included in the exemption.

The court in *Christopherson* v *Lotinga* (1864) 33 LJCP 121 refused a corporation leave to file an affidavit under wording empowering a judge to order discovery of a document upon the application of either party to a cause 'upon an affidavit by such party'. Although the corporation was indeed a party to the cause, it was of course incapable of swearing an oath.

Section 2(1) of the Inheritance (Family Provision) Act 1938 provided that an order under the Act should not be made 'save on an application made within six months from the date on which representation in regard to the testator's estate for general purposes is first taken out'. This overlooked the possibility of a hidden will being found some time after issue of a grant of administration as on intestacy. Such a contingency occurred in the case of *Re Bidie* [1949] Ch 121, where the court's rejection of jurisdiction to make a late order was reversed on appeal.

Any person over the age of ten is capable in law of committing murder or manslaughter, and not infrequently children do this. Yet s 3 of the Homicide Act 1957, in laying down the test of provocation,

speaks of the effect the conduct in question would have on a reasonable *man.* In *Director of Public Prosecutions v Camplin* [1978] AC 705, the House of Lords held that where a boy accused of murder raised the defence of provocation his age and other characteristics should be taken into account.

Wider than the object

While sometimes the drafter goes narrower than the object, at other times he may raise doubt by going wider. Where the Act is penal, or has other adverse effects on those subject to it, this gives rise to unjustified hardship or inconvenience. Here are some examples:

Section 39(3) of the Powers of Criminal Courts Act 1973 deals with criminal bankruptcy orders. Where an order is made in respect of more than one offence, it requires the judge to apportion the sum in question accordingly. The purpose is to quantify what is owed to each creditor. It follows that it is not necessary to carry out an apportionment when the same person is the creditor under every debt subject to the order. Yet the Act still requires it to be done. Lord Widgery CJ described this as 'purely an exercise of futility' *(R* v *Saville* [1981] QB 12, 17).

The Redundancy Payments Act 1965 was passed so as to compel employers to pay compensation to employees made redundant. It was held in *Lee* v *Nottinghamshire County Council* (1980) *The Times,* 28 April, that since the Act was in broad terms it covered the case of a teacher who took a short-term engagement knowing perfectly well that through a fall in the birth-rate his sector of employment was rapidly diminishing and there was no chance of his engagement being extended.

The Companies Act 1867 said that a prospectus 'shall specify the date and the names of the parties to *any contract* entered into by the Company or the promotors . . . before the issue of such prospectus' (emphasis added). In terms this would cover any contract made by the promotors at any time in their lives. In *Twycross* v *Grant* (1877) 46 LJCP 636 the Court of Appeal disagreed on just where the obviously necessary line of demarcation should be drawn.

Section 161 of the Income Tax Act 1952 aimed to tax benefits in kind received by company directors. It treated as a director's own taxable income any expense incurred by the company 'in or in connection with the provision of living or other accommodation or of other benefits or facilities of whatsoever nature'. There was a saving for expense incurred by the company in the 'acquisition or production' of an asset which remained its own property. To prevent hardship from the width of the main provision, the House of Lords strained these saving words to include *repairs* of a kind normally executed by a landlord *(Luke* v *Commissioners of Inland Revenue* [1963] AC 557).

 267 **Wider and narrower**

A legislative instrument often has more than one object. This is true even of a single section. It is possible for a section to go wider than one of the objects and at the same time go narrower than another. The main object of the Leasehold Reform Act 1967 was to enable lessees under long leases at a ground rent to purchase their freeholds. It was desired however to except family arrangements under which a lease can be brought to an end at the death of the tenant. That was the 'object' of the proviso to s 3(1), which excepts 'a tenancy granted so as to become terminable by notice after a death or marriage'. The wording goes wider than this object however, since it is not limited to a death or marriage in the family in question.

The wording was found to provide a major loophole by which lessors granting new leases could deny the lessee a right to enfranchisement which Parliament intended to give him. All that was necessary was to insert a provision in any ordinary lease whereby the lessee had a right to determine the lease on say the death of the last survivor of the descendants of King George V alive when the lease was granted.

The lessee would never exercise the right, since it would not be in his interest to do so. No one else could exercise it against him, since it was conferred only on him (and his heirs and assigns of course). So by going wider than its own limited object, the proviso to s 3 produced the result that the Act as a whole went narrower than its principal object.

It is obvious that whenever a proviso or exception goes wider than its object this will result in the provision to which it is attached going narrower than its object, because too much will be excluded from it. *Patterson* v *Redpath Brothers Ltd* [1979] **1** WLR 553 concerned reg 9(1) of the Motor Vehicles (Construction and Use) Regulations 1973. This stated that the overall length of an articulated vehicle must not exceed 15 metres. A proviso excepted vehicles constructed for the conveyance of indivisible loads of exceptional length. This was obviously to deal with the well-known case where a large boiler or other such item has to be transported from where it was manufactured to the place of use.

In *Patterson* the respondents were conveying a purpose-built container for livestock. This fell within the literal meaning of the definition of an indivisible load, but the court held it was not excepted by the proviso. It would be simple to evade the length restriction by constructing special containers which were 'indivisible'. That was not what the proviso was designed for, and would reduce the effectiveness of the restriction.

Incomplete text

Akin to going narrower than the object, is failing to say enough

to deal with the case legislated about. This may sometimes be viewed as a misuse of the techniques described in chapters 15 and 16, namely ellipsis and the broad term. Yet the appropriateness of their use must largely be a matter of opinion, and opinions may legitimately differ.

One of the commonest drafting errors is the missed consequential. It is a principle of good drafting that the law should not be changed in a way which leaves the effect of the change on any existing rule uncertain. NA Bastin has drawn attention to a remarkable missed consequential in the Partnership Act 1890 ((1978) 128 NLJ 1021). The Act is usually regarded as a model of drafting, but s 3 contains a lacuna which should surely have been avoided. The section deals with the case where money is lent to the owner of a business under a contract whereby the lender is entitled to a rate of interest varying with the profits. If the owner becomes insolvent the section provides that the lender 'shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors . . . have been satisfied'.

But suppose the lender has taken security—for example a mortgage on land? If he forecloses to recoup his share of the profits, does this conflict with s 3? The point has given considerable trouble in practice, and the answer the courts have attempted to give is far from clear. To state the effect of s 3 on the general law of mortgages and security was a duty which surely should have been obvious to the drafter. In parallel circumstances, the Consumer Credit Act 1974 makes it clear that the Act is not to be evaded by the use of security, and s 113 spells out exactly what this means. Bacon's remark that to choose time is to save time might have been directed to drafters who deal with matters where the time of an event is relevant, yet fail to pinpoint its significance. They do not choose which is to be the significant time, and so waste the time of unfortunates obliged to grope for their presumed but probably non-existent intention.

Jackson v *Hall* [1980] AC 854 provides an example of this, based on the Agriculture (Miscellaneous Provisions) Act 1976. The Act states that on the death of an agricultural tenant any eligible person may within the relevant period apply for a direction by a tribunal entitling him to a tenancy of the holding. The term 'eligible person' is defined by s 18(2) as a survivor of the deceased in whose case certain conditions 'are satisfied', but the *time* when they must be satisfied is not stated. It could be the time of death, or the time of the application, or the time of the hearing by the tribunal. Or it could be all three. By four to one, reversing the Court of Appeal, the House of Lords held that it was all three. If the drafter had decided on this construction, and stated it, he would not merely have saved people's time. Lord Dilhorne said 'it is to be regretted that this lengthy *and no doubt expensive* litigation has been brought about by the inadequacy of the drafting of this Act' (p 885).

Time also caused problems in *Grant* v *A lien* [1981] QB 486. Here the question was whether, in conferring power on county court judges to settle the terms of agreements relating to the use of a site for a mobile home, the Mobile Homes Act 1975 enabled agreements to be made retrospective. Brandon LJ commented that 'the Act is not as clear about this as it might be' (p 495).

Such defects are often caused by failure to foresee what should be obvious. In *Grunwick Processing Laboratories Ltd* v *Advisory, Conciliation and Arbitration Service* [1978] AC 655, the report on the Grunwick dispute by the Advisory, Conciliation and Arbitration Service (ACAS) was declared void by the House of Lords because ACAS had not complied with its statutory duty to 'consult all parties who it considers will be affected' and 'ascertain the opinion of workers to whom the issue relates by any means it thinks fit' (Employment Protection Act 1975, ss 12(1) and 14(1)). How can you consult people who refuse to be consulted? It might have been foreseen by the framers of the Act, knowing the heated atmosphere often engendered by labour disputes, that an employer would, like Mr Ward, refuse to supply lists of his workers and that workers would, like those who braved the Grunwick picket lines, refuse to be interviewed. It might have been foreseen, and the Act might have said what then was to happen—thus saving the expense, trouble and delay of appeals up to the House of Lords. In fact it was not foreseen, or if it was the framers of the Act preferred to remain silent as to the intended consequences.

Drafters seem to have a blind spot for the fact that people often own or occupy land or buildings jointly rather than singly. In 1980 the House of Lords was concerned with two examples of this. *Tilling* v *Whiteman* [1980] AC 1 involved a provision in the Rent Act 1968. Case 10 of Pt II of Sched 3 gives the court jurisdiction to make a possession order where a person who occupies a dwelling-house as his residence lets it on a regulated tenancy and later wishes to live in it again. The Act is silent about the position where joint occupiers let, though it is obvious that in such a case one or more (but not all) of them may desire to reoccupy. That in fact happened in *Tilling* v *Whiteman,* and much judicial disarray ensued. In the end the House of Lords, by four to one, reversed the Court of Appeal and decided that one of two joint owners could obtain a possession order—even though the other did not wish to reoccupy.

In *Jackson* v *Hall* [1980] AC 854 the question concerned the transmission of an agricultural tenancy on the death of the holder. A survivor of the deceased was eligible if he satisfied certain statutory conditions, including not being 'the occupier' of any other commercial unit of agricultural land. The Act says nothing about the possibility, which arose in this case, of an applicant being one of two joint occupiers of another unit (the other occupier being ineligible, and therefore not applying, for a tenancy of the first unit).

Again the House of Lords reversed the Court of Appeal by four to one, and ruled that being such a joint occupier disqualified the claimant. Lord Dilhorne complained that the lengthy and expensive litigation had been brought about by inadequate drafting of the Act (the Agriculture (Miscellaneous Provisions) Act 1976).

In each of these cases the drafter no doubt relied on the Interpretation Act, which since Lord Brougham's Act of 1850 has provided that unless the contrary intention appears 'words in the singular include the plural' (see now Interpretation Act 1978, s 6(c)). But this simple formula is manifestly inadequate to deal with the complexities that may arise in real life. The cases cited each concerned the problem of how a condition to be satisfied in relation to 'the occupier' is to be taken to operate where there are two joint occupiers and only one of them satisfies the condition. Would it be an answer for the Interpretation Act to be amended so that it spelt out the detailed consequences of its simple provision? It is doubtful whether it is possible for one formula to comprehend all cases. There is no substitute for care by the drafter. He needs to ask himself if a joint or other plural case may arise, and if so how he intends his provision to apply to it.

This is, incidentally, an example of the difficulties attached to use of the definite article. The simple definite article may be inadequate where the Interpretation Act makes a singular substantive include the plural. In *Jackson* v *Hall* it was not enough to say that a person is qualified to succeed to a tenancy if 'he is not the occupier of a commercial unit'. The drafter needed to go on to add such words as 'or (in the case of a commercial unit occupied jointly) he is not one of the occupiers'. Similarly in *Tilling* v *Whiteman* it was insufficient merely to speak of 'the owner-occupier' desiring to reoccupy. It was necessary to deal with the possibility of joint owner-occupiers and say either that they all had to desire reoccupation or that it was sufficient if one of them did.

We see that, as so often happens, a drafting point masks a point of substance. In each of the cases cited there was a substantial policy difference between the two alternative constructions.

'As usual our parliamentary draftsmen did not display the skill expected of them.' This harsh judgment was passed in an article on the drug laws by WT West (122 SJ 322). It was called forth by the fart that s 1 of the Drugs (Prevention of Misuse) Act 1964 makes it an offence for a person to have a specified substance in his possession but says nothing about the possessor's mental state. In *R v Warner* [1969] 2 AC 256 the House of Lords was called upon to decide whether, in the words of Lord Reid, the offence created by s 1 'is an absolute offence in the sense that the belief, intention or state of mind of the accused is immaterial and irrelevant' (p 271). In a later case on the possession of drugs, Lord Reid said of the necessity for *mens rea* in offences by statute: 'In a very large

number of cases there is no clear indication either way' {*Parsley* v *Sweet* [1970] AC 132). Continuing his attack, Mr West said that here Lord Reid was 'trying wearily to spell out the message to our parliamentary draftsmen'. Drafters may get the message (they are not stupid), but can do little in isolation.

The mental state required for the commission of crime is one of the most complex areas of law. It was the subject of a Law Commission study in 1978 {*Criminal Law: Report on the Mental Element in Crime* (Law Com No 89)). Annexed to the report was a draft Criminal Liability (Mental Element) Bill. On its appearance Professor Glanville Williams said: 'Here is the long-awaited Report; and we can only surmise from the delays attending it what fearful impediments have been placed in its way by parliamentary counsel and departmental draftsmen' ([1978] Crim LR 588).

Unfortunately the 'fearful impediments' were not removed on publication, and the report is **still** blocked. The new Interpretation Act would have been a suitable vehicle for implementing it, but innovations were not on offer there.

Those who oppose general formulas in this field do have some justification. Professor Williams criticises the fact that the Law Commission's draft Bill confines itself to intention *as to results.* He mentions *Cotterill* v *Perm* [1936] 1 KB 53 where the question was whether a person who shot a house pigeon without knowing it to be such was guilty of 'wilfully' shooting a house pigeon. The defendant knew it was a pigeon, but believed it to be wild. He was convicted. Professor Williams says that as a matter of common sense the conviction was wrong, and rejoices that under the Law Commission's draft the defendant would not have been convicted 'unless he realised that the bird might be a house pigeon' {*ibid* p 590). But common sense might reject that also.

The truth is that there is no substitute for careful provision by the drafter of the individual measure. If one is trying to protect house pigeons from being shot, one needs to ask oneself precisely what state of mind is to attract guilt. The marksman may not 'realise that the bird might be a house pigeon' if he is unaware of the law protecting house pigeons. The question will be irrelevant to him unless it matters for some other reason (eg because he likes the flavour of cooked house pigeons). Ignorance of the law will not count as an excuse, but clearly it may affect the actual state of mind. The drafter should think out the result he wants to achieve and then express it. There would be few problems about a provision worded: 'It is an offence for a person to shoot a house pigeon knowing or suspecting it to be a house pigeon, or not believing it to be something other than a house pigeon'. This would exclude a case Professor Williams mentions, the man who shoots a house pigeon believing it to be a clay pigeon.

There is a clear order of preference here. The carefully worded individual provision is best because it is tailor-made. The general

off-the-peg formula is second best. Worst of all is what we usually get. As the Law Commission report says: '. . . where Parliament does not indicate to what extent an offence requires a certain mental element or negligence, the courts are often placed in a position of great difficulty, resulting in protracted and expensive litigation'.

Mens rea has probably given the courts more trouble than any other aspect of statutory interpretation. Lord Devlin once complained that Parliament had continually shown that it had no intention of troubling itself with the problem. It is a problem by no means confined to Britain. An example came before the Supreme Court of Victoria in *Pallero* v *Gladman* [1979] VR 197. Under s 85 of the Motor Car Act 1958, a person is guilty of an offence in that state if 'by any false statement' he obtains or attempts to obtain a driving licence. (In passing it may be mentioned that the reference to attempt was probably otiose, since under general criminal law principles it is only necessary to create the substantive offence: related inchoate offences follow automatically.)

What state of mind is required for commission of this offence? The doctrine of *mens rea* calls for knowledge that the statement is false, or recklessness as to its truth. The defendant (an immigrant) here pleaded that although his answer was false (ie incorrect) he misunderstood the question. As an answer to what he *thought* the question was it would have been correct. Lush J dismissed this argument on grounds based on the context of the words in s 85. In other words he held the offence to be one of strict liability.

Often drafters, and those instructing them, simply do not know what intention they mean to require when offences are created. In the past *mens rea* has been imported by words such as 'wilfully' or 'knowingly'. These are archaic in view of judicial development of the topic. A phrase like 'wilfully or recklessly' is slightly better. The opposite, importing strict liability, could be expressed by saying 'whether wilfully or recklessly or not'. It might appear clumsy, but if used consistently would be some improvement on the present position. The phrase 'whether knowingly or not' has been used (see Performers' Protection Act 1963, s 2).

We now turn to the case where the legislative project is misconceived in whole or part.

Project misconceived

If the drafter makes a mistake over the factual situation he is legislating about, the result will be a travesty. The mistake may relate to a single factual situation, or the *type* of situation his provision will encounter. Where an Act legislates about a single factual situation, but gets it basically wrong, the Act is likely to be abortive. A nineteenth century Act made detailed provision about the exploitation of a certain tract of land in Labrador. It was believed that the land was owned by the Labrador Company, and this was

the basis on which the Act operated. It later appeared that this may have been mistaken, and that the land was not owned by the Labrador Company at all. (See *Labrador Company* v *The Queen* [1893] AC 104.) Of course the drafter himself is unlikely to have been in any way to blame for this particular error.

More common is the case where the drafter has failed to get into his head the true nature of the factual situations with which the Act will in future have to deal. His wording is therefore inappropriate. Here are some examples.

Section 1(1) of the Race Relations Act 1968 defined racial discrimination by reference to the grounds on which discriminatory treatment is based. It specified the grounds of 'colour, race, or ethnic or national *origins'*. Yet some discrimination of this type is based on the *current* nationality of the victim, whether or not it is his nationality of origin. In *Ealing Borough Council* v *Race Relations Board* [1972] AC 342 the Council gave priority to British subjects when allocating housing. A Polish national resident in Ealing was not placed on the housing list for this reason. The House of Lords accepted that such discrimination was contrary to the object of the Act, but held that it was outside the wording. By misunderstanding the factual basis of the Act the drafter had gone narrower than its object.

Section 74 of the Harbours, Docks and Piers Clauses Act 1847 renders the owner of every vessel liable 'for any damage done by such vessel ... to the harbour, dock or pier'. But a ship is not capable in itself of 'doing' anything. Only the human beings controlling it can 'do' things, and the Act should have been worded accordingly. This would have saved much litigation, including the famous case of *River Wear Commissioners* v *Adamson* (1877) 2 App Cas 743 (in which strangely this point does not appear to have been raised). See further Holmes 1881, p 29.

Section 186 of the Customs Consolidation Act 1876 subjected a person who fraudulently harboured uncustomed goods to a penalty. It continued: 'and the *offender* may either be detained or proceeded against by summons'. This clearly operates upon a misunderstanding of the factual situation. At the arrest stage, it may not be known by the customs officer whether or not the person under suspicion is actually guilty. In *Barnard* v *Gorman* [1941] AC 378 a seaman arrested on suspicion of offending against s 186 was tried and acquitted. He then sued for damages for assault on the ground that it was thus demonstrated that he did not fall within the description 'the offender'. The House of Lords, reversing the Court of Appeal, found for the defendants. Lord Romer said:

> That the ordinary meaning of the word 'offender' is a person who has in fact offended must be conceded, but the context in which a word is found may be, and very often is, strong enough to show that it is intended to bear other than its ordinary meaning and such a context is in my opinion

to be found in the present case for the section provides that the offender may be proceeded against by summons, and to give the word 'offender' in this connection its ordinary meaning would be to render the provision nonsensical. It would mean that before issuing the summons the magistrate would have to decide that the offence had in fact been committed.

A similar mistake was made by the drafter of s 6(4) of the Road Traffic Act 1960, which dealt with drunken driving. It empowered a constable to arrest without warrant 'a person committing an offence under this section'. On a claim for damages for assault, the Court of Appeal held in *Wiltshire* v *Barrett* [1966] 1 QB 312 that this must be read as 'a person *apparently* committing an offence under this section'. It is unfortunate that on the consolidation of these provisions in 1972 the opportunity was not taken of correcting the error (see Road Traffic Act 1972, s 5(5)).

The Road Traffic Acts have since their inception been full of mistakes caused by drafters' inability to visualise the likely factual situation and provide properly for it. The breathalyser provisions are a notorious example. Section 8 of the Road Traffic Act 1972 said: 'A constable in uniform may require any person *driving or attempting to drive* a motor vehicle on a road or other public place to provide a specimen of breath. . .'. The natural meaning of'driving' suggests that the vehicle is in motion, but the mind boggles at the picture of a constable administering a breath test to a driver who is steering a moving car. Equally, as DJ Birch comments, it would undoubtedly seem odd to a layman to say that a person could be 'driving' a car with no ignition key and the steering locked. Yet it was so held in *Burgoyne* v *Phillips* [1983] Crim LR 265 (Birch's comment is at p 266). Since the word 'driving' plainly does not carry its normal meaning here, what exactly does it mean? The courts have spent much time, and litigants much money, in spelling it out. (See further on misconceiving the project, Bennion 1962, p344.)

Defective deeming

The final type of drafting mistake we consider before going on to examine errors relating to multiple texts can be described as defective deeming, or asifism gone wrong. As we have seen, common-law drafting makes extensive use of hypotheses. A certain situation is to be treated 'as if it were something else. Or, to be more precise, a certain legal rule (statutory or otherwise) is applied to a novel situation 'as if it were one to which the rule already applied directly. This has many advantages for the drafter. It saves him spelling out again (usually with modifications) statutory provisions which may be lengthy and complicated. In his constant search for brevity he jumps at it. Yet it contains the dangers which lurk in any form of pretence. W A Wilson goes so far as to say that there is always

doubt as to the extent of a statutory hypothesis (Wilson 1974, p 503). If asifism is to work properly it requires the drafter to consider every aspect of the applied provisions and check that (with any modifications he may prescribe) they fit exactly. This task, which may be laborious, is often skipped.

Section 52 of the Licensing Act 1953 provided that for the purposes of the Act the City of London and the administrative county of London should each be deemed separate counties. The drafter overlooked s 37 of his own Act, which provided for costs to be paid 'out of the county fund'. The City of London has no county fund. (See report of the Joint Committee on the Licensing Act 1964, pp 15-17.)

Ex pane Walton (1881) 17 Ch D 746, another example of defective deeming, has already been mentioned (p 233). In that case James LJ stressed that 'when a statute enacts that something shall be deemed to have been done, which in fact and truth is not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to' (p 756). The court's intervention is only required where the drafter has erred in his deeming. Courts are inclined to be impatient with this technique anyway. The judicial attitude showed through in the following words of Romer J in *Robert Batchellor and Sons Ltd* v *Batchellor* [1945] Ch 169, 176:

It is, of course, quite permissible to 'deem' a thing to have happened when it is not known whether it happened or not. It is an unusual but not an impossible conception to 'deem' that a thing happened when it is known positively that it did not happen. To deem, however, that a thing happened when not only is it known that it did not happen, but it is positively known that precisely the opposite of it happened, is a conception which to my mind . . . amounts to a complete absurdity.

Unfortunately for his robust common sense, Romer J was reversed on appeal. Perhaps the last word should lie with AP Herbert's Lord Mildew, who said 'there is too much of this damned deeming' (cited Megarry 1955, p 361).

Multi-textual errors: (1) Conflicts within the same instrument

So far in the account given in this we have dealt with drafting errors within a single proposition, taking a section of an Act as an exemplar. Now we move on to consider contradiction or disharmony between different parts of an Act or other instrument. A section may be clear and plain if taken by itself. Yet doubt must inevitably arise if elsewhere in the Act there is found a provision inconsistent with it. The interpreter is then forced to decide between the two. If the contradiction is between two sections (treating as

part of a section any Schedule induced by the section) the problem is most serious, since these are the operative provisions of an Act (sometimes misleadingly called the enacting provisions). Less difficult is a conflict between a section and a non-operative provision such as a preamble or heading. We take the former case first.

In *Curtis* v *Stovin* [1899] 22 QBD 513 the court ruled on a contradiction in the County Courts Act 1888. Section 65 allowed a contract claim not exceeding *100 pounds* brought in the High Court to be transferred to any county court 'in which the action might have been commenced'. But under another provision of the Act, only claims not exceeding *50 pounds* could be commenced in the county court. The court resolved the logical contradiction in favour of the reading clearly intended by the legislature. Bowen LJ said: 'I think we must introduce some words to this effect, *"if it had been a county court action"' (ibid,* p 518).

A contradiction which has caused difference of opinion among lawyers engaged in the criminal courts is contained in the Criminal Law Act 1977. The story begins with s 1 of the Criminal Damage Act 1971. Subsection (1) creates the offence of destroying or damaging property belonging to another, while subs (2) creates a more serious offence where a person destroys or damages property belonging to himself or another *with intent to endanger life.* The 1971 Art made the latter offence punishable only on indictment, but the former punishable either on indictment or (with consent of the accused) summarily. Then along came the 1977 Act, with its concept of the offence 'triable either way'. Section 16 of that Art made offences under s 1(1) of the 1971 Act triable either way. It left untouched offences under s 1(2), which remained triable solely on indictment. This was in accordance with the original scheme of the 1971 Act, and with common sense. Unfortunately the 1977 Act then went on to contradict itself. Section 23 said that if an offence charged involved a sum not exceeding £200, and was mentioned in Sched 4, 'the court shall proceed as if the offence were triable only summarily'. Schedule 4 includes offences 'under s 1 of the Criminal Damage Act 1971' (excluding arson), and thus in terms includes the serious crime created by s 1(2). For the confusion that resulted see [1979] Crim LR 266 and 607-8; and [1980] Crim LR 68-9. The controversy ended with an acknowledgment from Professor Glanville Williams that the contradiction had led him to state the law erroneously in his *Textbook of Criminal Law* (see [1980] Crim LR 69). It will not have escaped the reader that this is one more example of trouble involving asifism.

Another contradiction in a criminal Act is found in the Metropolitan Police Act 1839. Section 63 gives a general power of arrest for offences against the Act, but applies only where the offender's name and address are unknown and cannot be ascertained. A duplicate power of arrest, *without these words of limitation,* is contained in s 54 in relation only to the offence of obstruction created

by that section. In *Gelberg* v *Miller* [1961] 1 WLR 153 the contradiction was resolved by reading the general words of s 63 as if they contained an exception for s 54.

Driedger mentions a contradiction in an Ontario byelaw directed against owners of wandering dogs. It prohibited 'the running at large' of any dog. This appears to contemplate the appearance in any place of a dog not under control. Another provision of the byelaw however said that 'a dog shall be deemed to be running at large when found in a street or other public place and not under the control of any person'. Did this mean that a stray dog *not* in a public place was excluded from the prohibition? The court observed that such a reading would have the result that:

> Being pursued on the road, he would, if he were a wise dog, dodge through the fence upon a farm and forthwith cease to be running at large . . . A dog traversing the country would alternatively be, and not be, running at large, as he crossed the road or got through fences.

It was held that the repugnancy between the two provisions should be resolved in favour of the wider one, the narrower being treated as intended only to deal with cases where the stray dog was in a public place (Driedger 1974, p 39).

A case of conflict between a preamble and an operative provision was adjudicated upon in *AG* v *Prince Ernest Augustus of Hanover* [1957] AC 436. The preamble to an Act of Anne stated that with the object that the Electress Sophia:

> and the heirs of her body and all persons lineally descended from her maybe encouraged to become acquainted with the laws and constitutions of this realm it is just and highly reasonable that they *in your Majesty's lifetime* should be naturalised.

This wording suggests that the naturalising operation of the ensuing words is to be limited to persons born in the lifetime of Queen Anne. A moment's reflection will show however that this is another example of ambiguous modification. The italicised phrase was intended to indicate that the naturalising operation (extending to descendants whenever born) was desirably to be effected while the Queen lived. This was demonstrated by the ensuing words. The naturalised descendants of the Electress 'born or hereafter to be born', without limit of time. The House of Lords confidently held that they should prevail. Lord Normand said (p 467):

> The courts are concerned with the practical business of deciding a *Its,* and when the plaintiff puts forward one construction of an enactment and the defendant another, it is the court's business . . . after informing itself of what I have called the legal and factual context including the preamble, to consider in the light of this knowledge whether the enacting words admit of both the rival constructions put forward. If they admit of only one construction, that construction will receive effect even if it is inconsistent

with the preamble, but if the enacting words are capable of either of the constructions offered by the parties, the construction which fits the preamble may be preferred.

These words apply to any discrepancy between operative words and other parts of an Act.
Such discrepancies often arise between a definition contained in the interpretation section and an operative provision in which the defined term occurs. Definitions are usually stated to apply only where the context does not otherwise require. Even this caveat may not be enough to avoid doubt, as occurred in *Old Grovebury Manor Farm Ltd* v *W Seymour Plant Sales and Hire Ltd (No 2)* [1979] 1 WLR 1397. The drafter of s 140 of the Law of Property Act 1925 broke the rule that the definite article is properly used only where the substantive to which it is attached is unique. He defined 'lessee' as including persons deriving title under a lessee. Then he said that a right of forfeiture for breach of covenant could not be enforced until the lessor served a notice on 'the lessee'. If the breach is of a convenant against assignment of the lease without the lessor's consent there must be at least two people who fall within the definition: the assignor and the assignee. Which of them is 'the lessee'? The Court of Appeal found little difficulty in answering this question. They held in effect that the phrase 'the lessee' in s 146 is elliptical. Its full meaning is 'the current lessee'.
Where there are conflicts within an instrument, the rule as we have seen is to reconcile them by reference to the instrument read as a whole and its overall policy (see also *Nugent-Head* v *Jacob (Inspector of Taxes)* [1948] AC 321). In the very last resort, where this does not produce the answer, the courts will adopt the rule of thumb that a provision nearer the end of the instrument is taken to prevail over one nearer the beginning. Thus in *A-G* v *Chelsea Waterworks* (1731) Fitzg 195 it was laid down that a proviso should be taken to repeal the purview (ie the words to which it is a proviso) 'as it speaks the last intention of the makers'. (A sounder ground, at least with the modern proviso, would be that the proviso is intended to contradict a part of the purview.) In *R* v *Ramsgate* (1829) 6 B & C 712, 717 Holroyd J said that the disputed words 'must be construed, according to their nature and import, *in the order in which they stand in the Act of Parliament'.* See also p 189 above.

Multi-textual errors: (2) Conflicts between different instruments

If there is inconsistency between two Acts, the later prevails. This rule robs such inconsistencies of much of their difficulty. Nevertheless problems can still arise where the two Acts are by an express provision to be construed as one, or are otherwise *in pari materia*. Then, if it appears that the drafter of the later Act

intended not to contradict the earlier Act, but has nevertheless produced an inconsistent provision, the position may be very like that prevailing where there is inconsistency within the same instrument.

The Interpretation Act is to be read as one with every later Act, though it does not apply where the contrary intention is shown. The trouble is that it may be doubtful whether there is a contrary intention on the part of the drafter of the later Act. Drafters are instructed to be constantly aware of the provisions of their Interpretation Act. Lord Thring went so far as to say 'it is the duty of every draftsman to know it by heart' (Thring 1902, p 14).

Another source of conflict is the amending Act. This may alter the wording of the earlier Act in ways which seem contrary to the basic intention of the amending Act. Thus it seemed that the purpose of an Art amending the County Courts Admiralty Jurisdiction Act 1868 was to confer on county courts certain powers corresponding to the jurisdiction of the High Court of Admiralty. One provision however conferred jurisdiction to try claims not exceeding £300 arising out of agreements for the use or hire of any ship. The Admiralty Court possessed no such jurisdiction. (See *Brozvn & Sons* v *The Russian Ship 'Alina'* (1880) 42 LT 517 and *The Queen* v *The Judge of City of London Court* [1892] 1 QB 273.)

Arts which make textual amendments sometimes leave the amended text in a defective condition. Driedger gives a good example from Canada, concerning an Art dealing with appeals from magistrates' decisions in small debt cases. Before amendment, the Art required an appellant to do the following:

(a) serve notice of appeal on the magistrate within *five* days after the date of judgment, and then
(6) serve a copy of the notice (on which the magistrate would have meanwhile endorsed the amount of security required) on the clerk of the district court within *ten* days after the date of judgment.

The amending Art changed 'five' to 'twenty' in paragraph (a) but left paragraph *(b)* untouched. In *Fleming* v *Luxton* (1968) 63 WWR 522, the judge treated this as a 'draftsman's error' and read 'ten' in paragraph *(b)* as 'thirty' (Driedger 1974, p 51).

Conclusion

In this chapter we have surveyed a considerable number of different types of drafting error, but we have merely scratched the surface. The truth is that it is extremely common for drafters to produce a text which raises doubt unnecessarily.

Lord Reid, who made a considerable contribution to elucidating problems of statutory interpretation, once said: 'Fortunately draftsmen do not often make mistakes but I cannot suppose that every draftsman is entirely free from that ordinary failing' *(Connaught*

Fur Trimmings Ltd v *Cramas Properties Ltd* [1965] 1 WLR 892, 899). Lord Reid used the language of courtesy, as was his wont, but he was far too kind.

Sometimes, as we know in other connections, excessive kindness is harmful. The harm here is that, by treating drafting error as a rarity rather than a commonplace, the courts have inhibited the development of adequate techniques to deal with it.