Bennion on Statute Law

Part III - The Need for Processing of Texts

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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).