Bennion on Statute Law

Part III - The Need for Processing of Texts

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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.

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).

 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.