Legislative Drafting*

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Statutes are often criticized severely by judges, lawyers and laymen, and no doubt some of their criticism is well founded. Those who draft the statute law have it in their power, by the application of a few fundamental principles, to remove from the statutes many of their admitted defects. Legislative drafting, however, is a subject that should interest every lawyer even though he may have no occasion to draft a statute himself. Familiarity with the fundamentals of legislative drafting is a valuable aid in reading and construing statutes. Moreover, a statute is but another legal document and many of the rules applicable to the drawing of statutes are equally applicable to the preparation of commercial legal documents. In the following pages an attempt will be made to stimulate some interest in the subject; at the same time attention will be drawn to some of the more common sources of ambiguity, and a few suggestions will be offered on how to avoid ambiguity and how to improve the language of statutes.

A perfect statute would be clear and unambiguous, saying neither too much nor too little and leaving in the reader's mind

*Readers interested in this subject might refer further to:—

Jeremy Bentham, Nomography, vol. III, Collected Works of Jeremy Bentham (Edinburgh, 1843); George Coode, On Legislative Expression; or, The Language of The Written Law (Extract from Appendix to Report of the Poor Law Commissioners on Local Taxation, House of Commons Papers 1843, vol. xx. London, 1845; Reprinted London, 1852; Reprinted Halifax, 1946); Lord Thring, Practical Legislation: The Composition and Language of Acts of Parliament and Business Documents (London, 1877; Reprinted Toronto & Boston, 1902); Sir Courtenay Ilbert, Legislative Methods and Forms (Oxford, 1901); Sir Alison Russell, Legislative Drafting and Forms (4th ed., London 1938); E. L. Piesse, Elements of Drafting (Sydney, 1946); Sir Ernest Gowers, Plains Words: A Guide to the Use of English (London, H.M. Stat. Off. 1948); Rules of Drafting adopted by the Conference of Commissioners on Uniformity of Legislation in Canada (1948), 26 Can. Bar Rev. 1231; F. A. Mann, The Interpretation of Uniform Statutes, 62 L.Q.R. 278; Ernst Freund, The Use of Indefinite Terms in Statutes, 30 Yale Law Journal 437; U. A. Lavery, Punctuation in the Law, 9 American Bar Association Journal 225; Granville Manson, The Drafting of Federal Statute Law, 43 American Bar Association Journal 121; H.E. Read and J. W. MacDonald, Cases and Other Materials on Legislation (Brooklyn, 1948).

no doubt as to what is intended. Language, however, is far from being a perfect medium of expression and it is perhaps too much to expect a draftsman to turn out a perfect piece of work; but it is not too much to expect him to make a determined effort to reduce doubt or ambiguity to a minimum. His success as a draftsman depends upon the extent to which he succeeds in doing so.

The Preliminary Process

A statute is merely the verbal expression of a thought and the function of a draftsman is to reduce the thought to words. It follows that he must have a clear conception of what he wants to say. Muddled thinking cannot produce clear language, and a draftsman who does not know what he wants to say is defeated before he starts.

Consider, for example, the following law:

> Any unauthorized interference with animals after inspection, whether by substitution or otherwise, or any evasion, or misrepresentation, will be deemed a breach of these Regulations, and, in addition will render the shipment liable to seizure and detention pending the orders of the Minister as to its disposal.[1]

What is an *unauthorized interference with animals* or an *evasion?* As the section reads, it is not merely an evasion of the regulations or a misrepresentation of some matter material to the regulations that is deemed to be a breach of the regulations; any *evasion* or *misrepresentation* (whatever that may mean) is deemed a breach. The difficulty with this section is that the draftsman did not know what he wanted to say.

Another example of confused thinking may be found in the Feeding Stuffs Act.[2] Subsection one of section five requires that every package containing any feeding stuff "mentioned in column 1 of Schedule A" to the Act shall be labelled in such manner as may be prescribed from time to time by regulation. The first item in Schedule A reads:

> Feeding stuffs (excluding chop feeds), ground, crushed or in meal, cake, pellet or biscuit form, not otherwise provided for, *and to which, in the opinion of the Minister, the particulars specified are appropriate.*

What was the draftsman thinking when he said *and to which, in the opinion of the Minister, the particulars specified are appropriate?*

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[1] Section 17, Quarantine Regulations, Animal Contagious Diseases Act, R.S.C., 1927, c. 6.

[2] Statutes of Canada, 1937, c. 30.

Before he can begin his work the draftsman must know what he wants to say. The thoughts to be expressed usually come from someone else. A lawyer does not draft agreements, leases and wills for amusement, and he does not draft them to suit his own fancy. His task is to carry out his client's instructions. True, the lawyer may, and usually does, suggest ideas to the client and he may even persuade the client to change his mind, but in the end the document must carry out the intentions of the client. So it is with the legislative draftsman. He does not decide how the law is to be changed nor what new laws are to be enacted. His function is to prepare the legislation desired by someone else, and it follows that there must be a transfer of ideas to the draftsman. He must understand precisely what change is to be made in the law or what the new law is to be. He may draft a perfectly plain amendment but if that amendment is not the desired amendment he has not done his work properly. Statutes and other legal documents frequently fail their purpose because the draftsman, although he had a clear conception, did not have the *right* one. The understanding of instructions is vital. Those who give instructions may have difficulty in explaining what they want, and the draftsman, by cross-examination, by illustrations or otherwise, must carefully probe their minds. In the process he may suggest new ideas, but he must bring about a complete meeting of the minds. The draftsman may lack the technical information necessary to a complete understanding of his instructions. If so, he must obtain it. Extensive legal research may be necessary. If so, he must undertake it.

Language

When the draftsman has a *clear* conception, and the *right* one, his next step is to express it in *appropriate* language. He must convey his meaning to the reader and at the same time must, if possible, exclude every other meaning. As one judge said ". . . it is not enough to attain a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand".[3]

Language, then, is the tool of the draftsman and, like every other craftsman, he must know his tools and how to use them. Imperfections in statutes are usually attributable to imperfections in language. Over a hundred years ago Bentham[4] enumer-

[3] Stephen J. in *In re Castioni* (1891), 1 Q.B. 147, at p. 167.
[4] Nomography by Jeremy Bentham.

ated the imperfections of which statute law is susceptible, and what he said then is true to-day. He divides these imperfections into two classes, Imperfections of the First Order and Imperfections of the Second Order. Imperfections of the First Order are *ambiguity, obscurity and overbulkiness*, which he defines as follows:

1. *Ambiguity* is where the effect of the expression employed is to present in conjunction divers imports, in such sort, that though to the individual mind in question it appear clear enough that in one or other of them is to be found the import which by the legislator was intended to be conveyed, yet which it is that was so intended to be conveyed is matter of doubt.

2. *Obscurity* is where, of the expression employed, the effect is, for the present at least, not to present any one import, as that which by the author or authors of the portion or portions of law in question, was on the occasion in question intended to be conveyed.

In the case of ambiguity, the mind is left to float between two or some other determinate number of determinate imports:— in the case of obscurity, the mind is left to float amongst an indeterminate, and it may be an infinite number of imports. Obscurity is ambiguity taken at its maximum.

3. *Overbulkiness.* Ambiguity and obscurity are imperfections, capable each of them of finding its seat in any the minutest part of a mass of the matter of law: overbulkiness is an imperfection not capable of being brought into existence but by the accumulation of a large number of such points.

These Imperfections of the First Order, according to Bentham, flow from Imperfections of the Second Order, namely:

1. *Unsteadiness in respect of expression* — when for the designation of the same import, divers words or phrases are employed.

2. *Unsteadiness in respect of import* — when to the same word or phrase, divers imports are attached in different places.

3. *Redundancy* — when of any number of words employed in connexion with each other, the whole or any part might without prejudice to the sense — i.e. to correctness, completeness, and facility of intellection — be simply omitted, or others in less number be inserted in the room of them. Redundancy is either curable by simple omission, or not curable but by substitution.

4. *Longwindedness* — when a portion of legislative matter, the elements of which are in such sort connected with each other, that to comprehend in a complete and correct manner any one part, the mind finds itself under the necessity of retaining within its grasp the whole, is drawn out to such length as to be liable to overpower the retentive faculty of the minds on which the obligation of taking cognizance of it is imposed.

5. *Entanglement* — when propositions distinct in themselves are forced together into one grammatical sentence, and in this state carried on together throughout the course of it.

6. *Nakedness in respect of helps to intellection* — especially, if in respect of such as are in general use:— such as division into parts of moderate length,— designations of those parts by concise titles and figures of arithmetic expressive of numbers, for indication of such respective parts — and reference by titles and numbers as above, instead of by general description of their contents.

7. *Disorderliness* —1. In respect of the arrangement given to the several matters,— whether by including under one and the same name, and thence under the same treatment, matters which, in respect of the diversity of their nature, require each a different treatment;— 2. By placing at a distance from each other those which for facility, and clearness, and correctness of intellection, ought to stand contiguous to each other, or near at least to each other: or contiguous or near those which ought to be at a distance;— or, 3. By giving to this or that article the precedence over this or that other, which for clearness or facility of intellection, ought to have been placed before it.

Many of these imperfections can be eliminated if the draftsman will realize that there is only one English language. If he entertains the notion that he must make the statute sound "legal", that is to say, that he must employ expressions such as *aforesaid, hereinafter, hereinbefore, heretofore* at every opportunity, that he must precede his nouns with *such, said* or *the said* whenever he can, that he must search for the longest word he can find and couple it with a synonym or two, that he must add a *provided that,* a *provided further* and a *provided always* to each section and that each sentence or paragraph must be stretched out as far as it will go, he will succeed only in confusing himself and everyone else. Statutes must be written in good English. The advice of Fowler and other authorities on language is valid for the draftsman too. There is no special language for statutes. Of course, every art and science has its own technical terms, designed to express certain meanings with the utmost precision. It is not suggested that the draftsman should avoid these when he is drafting a statute relating to a particular branch of knowledge. Good English includes these words. Law, too, has its own special terms and when occasion requires they must be used. For example, *fee simple, habeas corpus, consideration, domicile, executor, testator, remainderman* are technical legal terms, but they mean something, and when properly used, will avoid ambiguity and not create it. The best and safest rule for the draftsman to follow is that words and sentences should be as short and simple as circumstances will permit.

It must not be supposed, however, that statutes can be written so that everyone can understand them. Obviously, not every literate person can understand a modern Landlord and

Tenant Act or a Real Property Act, but it does not follow that they are badly drafted statutes. Human activity is so diverse and complex that law, and particularly statute law, must necessarily be complicated. It is not fair to criticize a Companies Act or a Bills of Exchange Act on the ground that a layman cannot understand all its provisions. A reader of statutes must have some knowledge of the subject matter. A Companies Act is written for businessmen; a reader who cannot in a general way distinguish a company from a partnership, who does not know anything about directors, by-laws, shareholders and other company matters cannot be expected to understand such an Act and he has no right to complain if he does not understand it. It is not the function of legislative draftsmen to write treatises for the education of the uninformed.

A draftsman should try to write his statute so that it can be understood by those who are supposed to understand it, namely, the persons to whom it is directed, the persons who have to administer it and the courts and judges who have to apply it. All these people he should keep in mind, and he should always ask himself "what will the courts say?" If the draftsman succeeds in writing his statute so that the courts are left in no doubt as to its meaning it is altogether likely that the persons to whom it is directed and the persons who have to administer it will also understand it.

It is not quite enough to write a statute so that it will be understood. A sentence containing a grammatical error or a colloquial expression may be perfectly plain. A statute should read well, too, and the draftsman is advised to adhere to generally accepted standards of grammar and vocabulary.

Copying

The draftsman should hesitate before he copies. It is dangerous to take a section out of one statute and insert it in another. A section taken out of its context may lose its meaning or may acquire a new meaning in another context. The draftsman should satisfy himself that the section to be copied will have the intended effect in the new statute and, if not, he should re-write it.

There is a tendency to copy statutes from other jurisdictions without making any alterations in the text. Faulty provisions are repeated as they stand; archaic or clumsy words or forms are retained. This habit merely perpetuates bad law. The draftsman should not hesitate to make whatever improvements he

can, and certainly he should not copy anything that he himself would not write.

The justification given for copying statutes is that past and future judicial decisions can be applied to the new statute. This is not always a sound excuse. Draftsmen do not always go to the trouble of looking for the decided cases. There may be no cases, but, if there are, they may be of no value, or may even reveal defects in the statute. In any event the application or the relevancy of a judicial decision does not always depend upon an exact reproduction. Surely it is the *substance* of the statute that is important and if the substance of the two statutes is the same, that may be enough. For example, if a draftsman were to convert a number of disconnected provisoes into separate subsections, the relevancy of the judicial decisions would not be affected in the least.

Of course, the draftsman may not have a free hand. His instructions may prohibit any alteration in the text, even though the alteration relates only to form and not substance.

It is not being suggested that a draftsman should never look at the legislation of other jurisdictions. On the contrary, it may be a great help to him to study the statute of another jurisdiction on the same subject, and the judicial decisions as well.

Choice of Words

A long or unusual word should not be used if a simpler or more common word will convey the meaning equally well. The draftsman should aim at precision and readability and a generous use of long, complicated and strange words will make the reader's task more difficult.

It is desirable to avoid using words that have not yet found a recognized place in our language, and above all a draftsman should not invent words. No language is richer in vocabulary than the English, and there is no need for a draftsman to go outside a standard dictionary for words to express his thoughts. It is true that our language is a living, growing language and that as time goes on new words will be added and new meanings given to old words, but it is not the function of the draftsman to hasten the process. By so doing he only creates doubts. He may know what he intended to say but the probabilities are that his reader will not.

Foreign words and expressions should be avoided. Draftsmen are still too quick to throw Latin phrases into statutes. Sometimes the draftsman must resort to Latin — for example, *habeas*

corpus, quo warranto, certiorari — but many of the Latin phrases commonly employed could be replaced by English words without loss of precision.

Unnecessary words should not be added to legislative sentences. For example, the Dominion Elections Act provides that:

> Every person who violates, contravenes, or fails to observe any of the provisions of this section is guilty of an indictable offence against this Act, punishable as in this Act provided.[5]

What is the difference between violating the section, contravening it, and failing to observe its provisions? Why go on to say *punishable as in this Act provided* when section 86 of the same Act prescribes the penalties for *any indictable offence against this Act?* The example could be written:

> Every person who violates this section is guilty of an indictable offence.

Twelve words instead of thirty-one, and no punctuation!

Old favourites like *aforesaid, herein, hereinbefore, hereinafter, whatsoever, wheresoever* and *howsoever* should find no place in modern legislation. These words rarely add anything to the meaning of the sentence and frequently give rise to ambiguity. If it is necessary to make a reference to something that has gone before or that is to follow, a more precise method should be chosen. For example, section 19 of the Indian Act[6] says:

> All reserves for Indians, or for any band of Indians, or held in trust for their benefit, shall be deemed to be reserved and held for the same purposes *as they were held heretofore,* but shall be subject to the provisions of this Part.

What were the purposes *heretofore?* Perhaps the draftsman did not even trouble to find out what the intended purposes were, but, assuming that he did know, who knows now?

Different words should not be used to express the same thing; the same words should not be used to express different things. Words like *each, any, all, every,* can frequently be replaced by an article.

Use of Words

Care should be taken in the use of a qualifying word or phrase if the word or phrase is capable of application to two or more things. Various devices may be used to avoid ambiguity, but no general rules can be laid down; each case must receive individual treatment. Sometimes it is best to repeat the qualifying word; sometimes ambiguity can be avoided by re-arranging the

[5] S. 66(6), Dominion Elections Act, R.S.C., 1927, c. 53.
[6] R.S.C., 1927, c. 98.

words. For example, the phrase *any gross carelessness or neglect of duty*[7] is ambiguous. It is not clear whether *gross* applies to *neglect*. If it was intended to do so, the phrase should have been *any gross carelessness or gross neglect*. If not, it should have been written *any neglect or gross carelessness*.

On the other hand there may be no necessity of repetition in a phrase like

> Every one is guilty of an indictable offence who . . . knowingly cuts, tears or in any way removes . . .[8]

The section would perhaps be awkward if written *knowingly cuts, knowingly tears or in any way knowingly removes*. As it stands, the word *knowingly* probably would be construed to apply to *tears* and *removes*. Frequently a mechanical device can be employed to avoid doubt. In the example just given, the phrase could be re-written:

> who . . . knowingly
> (i) cuts,
> (ii) tears, or
> (iii) in any way removes.

Many sections of the Criminal Code take this form. For example, section 207 of the Code provides:

> Every one is guilty of an indictable offence and liable to two years' imprisonment who *knowingly, without lawful justification or excuse*
> (a) makes, manufactures, or sells . . .
> (b) publicly exhibits . . .
> (c) offers to sell, advertises . . .

This mechanical device is perhaps the easiest method of avoiding doubt. If the sentence runs along without any divisions it is frequently very difficult to understand. For example, the last half of paragraph (d) of section 7 of the Post Office Act[9] reads:

> The Postmaster General may . . . make regulations . . . for marking on the covering of letters, circulars or other mailable matter suspected to concern illegal lotteries, so-called gift concerts, or other illegal enterprises of like character, offering prizes, or concerning schemes devised or intended to deceive or defraud the public, for the purpose of obtaining money under false pretences, whether such letters or circulars or other mailable matter are addressed to or received by mail from places within or without Canada, a warning that they are suspected to be of a fraudulent character and for returning such letters, circulars or other mailable matter to the senders.

When the reader comes to *so-called gift concerts* he is apparently thrown back to *suspected to concern*. Then he comes to *offering*

[7] S. 64, Consolidated Revenue and Audit Act, 1931, c. 27.
[8] S. 479(d), Criminal Code.
[9] R.S.C., 1927, c. 161.

prizes but the phrase *suspected to concern . . . offering prizes* does not make sense. He goes back a step to *mailable matter* but the condemnation of *mailable matter . . . offering prizes* does seem very drastic. Surely Parliament didn't mean that! The only escape from this conclusion is to assume that the comma after *character* is a mistake and that *offering prizes* must be read in conjunction with *enterprises*. The reader then arrives at *concerning schemes* but the phrase *suspected to concern . . . concerning schemes* is meaningless. The draftsman must have intended *mailable matter . . . concerning schemes*. Then, to what do the phrases *devised or intended to deceive or defraud the public* and *for the purpose of obtaining money under false pretences* apply? Probably *schemes*, but then the phrase *intended to deceive* is out of place. The next phrase goes back to *letters, circulars or other mailable matter*. The phrase commencing *a warning* goes back to *marking*.

How much clearer it would have been to have said:

for marking on the covering of letters, circulars or other mailable matter
- (a) suspected to concern
  - (i) illegal lotteries,
  - (ii) so-called gift concerts, or
  - (iii) other illegal enterprises of like character offering prizes, or
- (b) concerning schemes
  - (i) devised for the purpose of obtaining money under false pretences, or
  - (ii) intended to deceive or defraud the public,

whether such letters, circulars or other mailable matter are . . .

The section itself could probably be improved, but a mere rearrangement along these lines would do much to clarify its meaning. Furthermore, by arranging a section in this way the draftsman is forced to clarify his own thoughts.

Long sections should be avoided. A long section is harder to write than a short one; by increasing the length of the section the possibilities of error or ambiguity are also increased; long sections are hard to read. An interesting example is furnished by subsection two of section 235 of the Criminal Code.[10] Here are nineteen lines of print before the first proviso is reached; seven lines to the second; six lines to the third; six lines to the fourth; thirty-three lines to the fifth; thirteen lines to the sixth; and eight lines to the end. Ninety-two lines and nearly a thousand words in one subsection. Sometimes, of course, a section must

[10] R.S.C., 1927, c. 36, as amended by 1934, c. 11, s. 1; 1935, c. 56, s. 1, 1938, c. 44, s. 13; 1946, c. 5, s. 1; and 1948, c. 40, s. 1.

be long and complicated, but the draftsman can reduce possibility of doubt and make it easier to read by dividing up the section.

Punctuation

Punctuation is frequently a source of ambiguity. A safe rule to follow is to use as little punctuation as possible. This is particularly true of the comma, because this mark can be used to convey meaning. The classic example is the sentence "The teacher says the inspector is a fool", the meaning of which is completely altered by the insertion of commas after the words "teacher" and "inspector". If the draftsman must rely on a comma to convey his meaning it is usually an indication that the section requires re-drafting.

The Legislative Sentence

The first scientific analysis of a legislative sentence was made by George Coode.[11] He says that

> The expression of every law essentially consists of
> — 1st, the description of *the legal Subject;*
> — 2dly, the enunciation of *the legal Action.*
> To these, when the law is not of universal application, are to be added,
> — 3rdly, the description of *the Case* to which the legal action is confined; and,
> — 4thly, *the Conditions* on performance of which the legal action operates.

In its simplest form an enactment directs or empowers some person to do something or to abstain from doing something. The person who is directed or empowered is the legal subject and the thing to be done or not done is the legal action. For example in the section,

> The *Board* may *appoint* Inspectors to assist in the enforcement of this Act,[12]

the legal subject is the *Board* and the legal action is *appoint.*

When the law is not universal in its application, a *case* is introduced to define the circumstances in which the law operates, thus:

> *Where the compensation has not been otherwise apportioned,* a judge in chambers may apportion the same among the persons entitled.[13]

When some event must transpire before the law operates, a condition is introduced. For example:

[11] On Legislative Expression; or The Language of the Written Law. House of Commons Papers 1843, vol. xx. Printed separately London 1845; Re-printed London 1852.

[12] S. 40(1), Foreign Exchange Control Act, 1946, c. 53.

[13] A common provision in a Fatal Accidents Act.

> Where a person is charged with an offence under this Act, *if it is established that the said person did any act for which a permit is required under this Act,* it shall not be necessary to establish that the person charged did not possess a permit and the burden of proof that he possessed the necessary permit shall be upon the person charged.[14]

The condition is invariably a condition precedent.

Coode recommends that the correct order of expression is 1st the case; 2nd the conditions; 3rd the legal subject; 4th the legal action. It may be found, however, that the sentence will be easier to read if some other order is adopted.

It is essential to keep these four elements distinctly in mind in drafting a legislative sentence. By doing so the draftsman can arrange his thoughts better and he will be able to express himself with greater clarity.

A section may include any number of cases, conditions, legal actions or legal subjects and any number of exceptions to any of these elements, but the section should not be made too complicated. As Coode says "the more strictly each clause is limited to one class of cases, one class of legal subjects, and one class of legal actions, the better; and it is a mischief to confer in one sentence two distinct species of rights, to impose two distinct kinds of obligations, to confer two distinct kinds of powers, and so on: where parliamentary convenience does not prevail, no good draftsman ever does so".

A case may be introduced by a variety of expressions — *where, when, whenever, if, in any case where,* etc. It is suggested that the draftsman should adhere to *where* or, if a single or rare occurrence is contemplated, *when.* It is also suggested that *if* should be reserved for introduction of conditions and not cases.

Care should be used in writing a case that consists of a number of elements. The introductory word should not be repeated. Thus *where . . . and . . . and . . .* describes only one case, but *where . . . and where* describes two cases. Despite the conjunction *and,* the cases may well be alternative. Care should also be taken to distinguish clearly between cases and conditions. A condition must always be a condition precedent; some event must transpire in the future before the law operates.

Tense

The present tense should be used wherever possible. It is unnecessary for the draftsman to project himself into the future

[14] S. 12, The Emergency Exchange Conservation Act, Statutes of Canada, 1948, c. 7.

for the law must be construed as always speaking. This was the rule at common law[15] and in any case the Interpretation Acts usually contain a declaration to this effect. The Canadian Interpretation Act[16] provides in section ten that "the law shall be considered as always speaking, and whenever any matter or thing is expressed in the present tense, the same shall be applied to the circumstances as they arise. . .". It follows, therefore, that the draftsman should never use the future auxiliary *shall*. Of course, where it is necessary to express a time relationship between two or more acts or events, other tenses may be used where the present tense is also used.

Voice

The active voice should be preferred to the passive. The objection to the use of the passive is that it fails to identify the legal subject. If there can be no doubt as to the identity of the legal subject then there is no objection to the use of the passive form except that a direct statement may require fewer words. An example of the correct use of the passive may be found in section four of the Loan Companies Act,[17] which provides that "No letters patent incorporating a loan company shall after the twelfth day of June, one thousand nine hundred and fourteen, be issued under the provisions of Part III of the Companies Act . . .". The persons to whom the section is directed are those who under Part III of the Companies Act have authority to issue letters patent.

Mood

The subjunctive mood is not now used as frequently as formerly. For example, it is correct to say that a report shall be laid before Parliament at a certain time "if Parliament *be* then in session" but it is now more usual to say "if Parliament *is* then in session". It would be correct to express the cases and the conditions in the subjunctive but this is no longer regarded as necessary and it is suggested that both the case and the condition should always be in the indicative. For this reason it is suggested also that *if* should be reserved for introducing conditions and not cases. Otherwise the conditions may be confused with the cases.

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[15] *Ex parte Pratt* (1884), 12 Q.B.D. 334, *per* Bowen L.J. at p. 340.
[16] R.S.C., 1927, c. 1.
[17] R.S.C., 1927, c. 28.

Many enactments are in the imperative. The draftsman is cautioned, however, to employ the imperative only where the section is truly a command. A command should never be used for a mere declaratory sentence, that is to say, a sentence that merely lays down an abstract proposition of law. A true imperative involves two elements, namely, an indication of the person who is being commanded and a statement of the thing that he is required to do or to refrain from doing. If either one of these elements is lacking there is no true imperative. A common example of the false imperative is a definition section that says an expression *shall mean* something. An enactment of this kind does not require a person to do or refrain from doing something; the person to whom the "command" is directed is neither mentioned nor implied, and it is idle to suggest that the "command" is directed to the courts.

Another common example of the false imperative is a section that defines the application of an Act or a section. Subsection one of section three of the Loan Companies Act[18] provides that "The provisions of this Act *shall apply* to every loan company incorporated by Act of the Parliament of Canada after the twelfth day of June, one thousand nine hundred and fourteen". The correct form of this type of section appears in section six of the Merchant Seaman Act,[19] "This Act *applies* to accidents happening within or without Canada".

Statutes frequently declare that documents, not executed in accordance with their provisions, *shall be void.* Here again the "command" is not directed to a person but to a thing. Similarly statutes establishing courts frequently provide that an appeal *shall lie;* this should read an appeal *lies.* Of course, if the passive form is used, although no person is mentioned, a person is implied. For example, a section might require that notice *shall be given.* This requirement is a command because it is directed to the persons who have the right or the duty to give the notice and these persons will doubtless be identified in other places.

The Bills of Exchange Act[20] properly distinguishes between the indicative and the imperative. Many of the sections of that Act merely lay down abstract principles of law and the draftsman was careful to employ the indicative rather than the imperative. Section 109 says that in order to render the acceptor of a bill liable *it is not necessary* to protest it. Section 137(2) says that a transferor by delivery *is not liable* on the instrument.

[18] R.S.C., 1927, c. 28.
[19] Statutes of Canada, 1946, c. 58.
[20] R.S.C., 1927, c. 16.

In the other type of false imperative a person is identified, but he is not required to do or to refrain from doing anything. A common example is a penalty section providing that "every person . . . *shall be* guilty of an offence and *shall be* liable to . . .". This provision merely lays down an abstract principle of law. A person who contravenes the provisions of a statute *is* guilty of an offence and *is* liable to certain punishment.

In The War Service Grants Act[21] section 3 states that every member of the forces *shall*, upon discharge, *be entitled* to be paid a war service gratuity. Here again, a person is mentioned, but he is not required to do or to refrain from doing anything; the correct form is *is entitled*. Section 5 of the National Film Act[22] states that no one *shall be eligible* for appointment to the Board. The section should read no one *is eligible*.

Improper use of *shall* may create a doubt as to the time when the legal action operates. A section may say that goods *shall be forfeited*. Does this mean that they *are forfeited* upon the commission of the acts constituting the offence, or does it mean that something must be done to effect forfeiture? A statute may declare that a person *shall be entitled* to something. Is he entitled now, or at some time in the future? The English version of the Quebec Civil Code furnishes a good lesson on the proper use of the imperative. Throughout, one finds the simple indicative where in English language statutes the imperative is frequently found. For example, article 290 says that:

> A tutor has the care of the person of his pupil, and represents him in all civil acts.
>
> He is bound to manage his property like a prudent administrator, and is liable for the damages which may result from bad management.

A section like this commonly appears in English-language statutes, "A tutor *shall have* the care of the person of his pupil, and *shall represent* him in all civil acts. He *shall be* bound to manage his property like a prudent administrator and *shall be* liable for the damages which may result from bad management."

Referential Words

The draftsman should strive to make each section and subsection self-contained. For example, section 4 of the Returned Soldiers Insurance Act[23] begins with the words "The said payments". The reader is left to assume that the *payment* referred

[21] Statutes of Canada, 1944-45, c. 51.
[22] Statutes of Canada, 1939, c. 20.
[23] Statutes of Canada, 1920, c. 54.

to is the *payment* mentioned in subsection one of section three. Unless the clause is self-contained there may be doubt as to what is intended. Sometimes it is impossible to tell what the draftsman intended to say. Section 36 of the Post Office Act[24] begins "Such exclusive privilege, prohibition and penalty . . .". Going back to section 35, we find a reference to *exclusive privilege* but no mention of *prohibition or penalty*. What, then, do these words mean in section 36?

Difficulties of interpretation frequently arise through use of referential words like *aforesaid, herein, hereinbefore* and *hereinafter*. If it is necessary to refer to something outside the section or subsection, a more specific reference should be made if possible.

References to sections like *the last preceding section* or *the next following section* should be avoided for the reason that Parliament might some day insert a new section or re-arrange the sections. For example, section 47 of the Supreme Court Act[25] referred to the *three sections last preceding*. These sections were 44, 45 and 46. Section 44 restricted appeals to appeals from final judgments; section 45 prohibited appeals from orders made in the exercise of judicial discretion; section 46 dealt specially with Quebec appeals. In 1920 the Supreme Court Act[26] was amended and the jurisdiction sections were completely revised. Section 47 of the old Act re-appeared as section 42, but the opening words were unaltered. Section 42 still refers to the *three sections last preceding*,[27] namely, 39, 40 and 41. However, the old section 44 became 36, section 45 became 38 and section 46 disappeared. In its reference to sections 39 and 40, section 42 is meaningless. If direct section references had been made in the first instance it would have been easier for the draftsman to see that an amendment was required and it would have been a simple matter to change the numbers.

Such and Said

The words *such* and *said* are used too often. In many cases these words can simply be omitted and in other cases the definite article would be better. Frequently, indiscriminate use of *such* leads to ambiguity.

Subsection two of section 308 of the Railway Act[28] reads:

[24] R.S.C., 1927, c. 161.
[25] R.S.C., 1906, c. 139.
[26] Statutes of Canada, 1920, c. 32.
[27] R.S.C., 1927, c. 35.
[28] R.S.C., 1927, c. 170.

> Where a municipal by-law of a city or town prohibits *such* sounding of the whistle or *such* ringing of the bell in respect of any *such* crossing or crossings within the limits of *such* city or town, *such* by-law shall, if approved by an order of the Board, to the extent of *such* prohibition relieve the company and its employees from the duty imposed by this section.

The word *such* appears six times in this short enactment. What does the draftsman mean by *such city or town?* The only *city or town* referred to is *a city or town.* What does he mean by *such sounding of the whistle?* Subsection one begins

> When any train is approaching a highway crossing at rail level the engine whistle shall be sounded at least eighty rods before reaching such crossing. . . .

The words *sounding of the whistle* do not occur in subsection one, so how can there be a reference to *such sounding of the whistle?* Assuming that the draftsman intended to refer to *whistle shall be sounded,* does he mean *sounding of the whistle* or *sounding of the whistle at least eighty rods before reaching such crossing?*

Definitions

Definitions should be used sparingly. A definition that merely gives statutory sanction to the use of the dictionary meaning of a word is unnecessary. Before he defines a word the draftsman should carefully consider whether he is in reality adding something to or subtracting something from the ordinary meaning of the word. Where it is impossible to define a word with any degree of precision, the draftsman should look for another word or should leave it to the courts to establish the boundaries.

The use of the imperative form in a definition section should be avoided. Definitions are not commands.

The expression *means and includes* should never be used. *Means* restricts and *includes* enlarges the meaning of a word. There may be occasions, however, when a draftsman finds it necessary to define a word restrictively and at the same time, to avoid doubt, to include an additional matter. This can be done by saying that the word *means* one thing and *includes* another. For example, " 'Inland waters of Canada' means all the rivers, lakes and other navigable fresh waters within Canada, *and includes* the river St. Lawrence . . .".[29] This merely enlarges the meaning of the term *as defined* and is not self-contradictory as is *means and includes.*

Another error frequently committed is the insertion of sub-

[29] Statutes of Canada, 1934, c. 44, s. 2(41).

stantive provisions in definition sections. A definition section is merely a glossary of terms or a special little dictionary and should not contain substantive matters of law. The insertion of substantive matter in a definition clutters up the definition and makes the law hard to find. One of the worst examples of this type of definition is the definition of *domicile* in the Immigration Act.[30] In some cases the purpose of the statute can be defeated by inserting substantive matters in definitions. Paragraph (g) of subsection one of section 4 of the former regulations under the Dairy Industry Act imposed a penalty for selling skim-milk cheese unless the words *skim-milk cheese* were branded on the cheese and the container. The term *skim-milk cheese* was defined (section 1(g)) to mean "cheese which in the water free substance contains less than 48 per centum of milk fat, or which is made from or by the use of milk commonly known as 'skim-milk', or from milk from which any cream has been removed, or from milk to which skim-milk has been added *and may not contain any preservatives other than salt (sodium chloride) and, if processed with or without emulsifying agents, shall not contain more than 43 per centum of water*". This means that cheese made from skim-milk, but to which a preservative other than salt has been added or which contains more than 43 per centum water, is not skim-milk cheese as defined. There was nothing in the regulations to prohibit the manufacture or sale of cheese of this type and, since it would not be *skim-milk cheese*, the branding requirements of section four would not apply.

Will

Will should never be used in place of *shall* when a true command is intended. Army commands usually are in the form *all men will parade*, but since disobedience is almost inconceivable the command can safely take the form of a prediction. The draftsman, unfortunately, cannot risk indulging in predictions.

Forfeiture Clauses

Care should be taken in drafting forfeiture provisions. Unless the draftsman is careful there will always be doubt as to when and how forfeiture takes place. It is not enough to say merely that an article *shall be forfeited* or *shall be confiscated* or *shall be seized and forfeited*. Does the forfeiture take place when the acts constituting the offence are committed or is some further act

[30] R.S.C., 1927, c. 93, s. 2(e).

required to effect forfeiture, namely, a declaration of the court or an act of seizure? If a judicial declaration is necessary does the declaration effect the forfeiture or merely confirm the forfeiture? A forfeiture section is extremely important and it should be carefully framed.

and/or

The symbol *and/or* should never be used. One good reason is that in most cases it is unnecessary; the one conjunction or the other is usually enough. Another reason is that if more than two things are joined by *and/or* there may be doubt as to what is intended. For example, the expression A and/or B and/or C presumably must be read four times as follows: (1) A and B and C; (2) A or B or C; (3) A and B or C; and (4) A or B and C. The first two give rise to no difficulty, but the third is ambiguous. Is the choice between A and B on the one hand and C on the other or is it A certainly and either B or C? Likewise, in the fourth case, is the alternative between A on the one hand and B and C on the other, or is it C certainly and either A or B? If four or more matters are joined by *and/or*, construction becomes impossible. Frequently this symbol produces absurdities.

A simple expression such as *one or more of A, B and C* is quite clear and does everything that the device *and/or* is supposed to do. Whatever the circumstances a better form than *and/or* can always be found.

Proviso

One of the greatest sources of doubt and ambiguity is the proviso. It is capable of producing all Bentham's "imperfections" either singly or in combination. As will presently be demonstrated the proviso is neither necessary nor correct. It is only a legal incantation that should be banished from the statute book.

An examination of some three hundred provisoes in the Revised Statutes of Canada and subsequent statutes reveals that the proviso is most frequently used merely for the purpose of tacking one independent enactment on another. In many cases the conjunction *and*, or even a semicolon, could be substituted for the proviso; in other cases a new subsection or section should be substituted. For example, subsection one of section 19 of the Copyright Act[31] states what shall not be deemed to be an infringement and then goes on to say:

[31] R.S.C., 1927, c. 32.

Provided that

(i) nothing in this provision shall authorize any alterations in, or omissions from the work reproduced, unless contrivances reproducing the work subject to similar alterations and omissions have been previously made by, or with the consent or acquiescence of, the owner of the copyright, or unless such alterations or omissions are reasonably necessary for the adaptation of the work to the contrivances in question; and

(ii) for the purposes of this provision, a musical, literary or dramatic work shall not be deemed to include a contrivance by means of which sounds may be mechanically reproduced; and

(iii) the making of the necessary manuscript arrangement and instrumentations of the copyrighted work, for the sole purpose of the adaptation of the work to the contrivances in question, shall not be deemed an infringement of copyright.

The contents of this proviso are merely separate enactments and each one of them should be a separate subsection.

Subsection two of section 198 of the Criminal Code reads as follows:

> Whether any particular published matter is a blasphemous libel or not is a question of fact: *Provided that no one is guilty of a blasphemous libel for expressing in good faith and in decent language, or attempting to establish by arguments used in good faith and conveyed in decent language, any opinion whatever upon any religious subject.*

The proviso is again a separate enactment and should be expressed in a separate subsection. Subsection two of section 17 of the Juvenile Delinquents Act[32] says:

> In every such case it shall be within the power of the court to make an order upon the parent or parents of the child, or upon the municipality to which it belongs, to contribute to its support such sum as the court may determine: *Provided that where such order is made upon the municipality, the municipality may from time to time recover from the parent or parents any sum or sums paid by it pursuant to such order.*

This proviso is a separate enactment and could be added to the first provision by the conjunction *and* or by a semicolon, or a new subsection could be substituted.

Provisoes are frequently used to restrict the operation of an enactment. For example, subsection one of section 79 of the Insurance Act[33] says:

> No such company shall make any contract with any director, trustee, officer, employee or servant of the company, save such agents as are employed to solicit insurance, to pay any compensation or reward whatever by way of commissions in respect of the business of the company or any portion thereof: *Provided, however, that this subsection shall not apply to insurance personally solicited and secured outside of office hours*

[32] R.S.C., 1927, c. 108.
[33] R.S.C., 1927, c. 101.

by any employee or servant not being a director, trustee or officer of the company.

This proviso should be a separate subsection.

The second most frequent use of the proviso is to supply a missing fragment of the case, the condition, the legal subject or the legal action; usually the legal action. Instead of completing these elements by way of an afterthought the draftsman should put the provision in its proper place. For example, section 23 of the Civil Service Act[34] says:

> When it has been determined by the Governor in Council that any post office, the employees of which do not come under this Act, is to be brought hereunder, any person then employed in such office, who
>
> (a) has had at least two years' postal experience, one of which was in the office in question; and
>
> (b) was, at the commencement of his service, within the limits of age prescribed by the Commission; and
>
> (c) satisfies the Commission that he possesses the necessary qualifications;
>
> shall be considered eligible for appointment to any position in such office without competitive examination: *Provided, however, that any person employed in any such post office on the twenty-seventh day of June, one thousand nine hundred and twenty-five, shall be eligible for appointment, even though he was not, at the commencement of his employment, within the limits of age prescribed by the Commission.*

Here the proviso is merely part of the legal subject and is intended to be an alternative to paragraph (b). Paragraph (b) should be revised to read

> *was employed in any such post office on the twenty-seventh day of June, one thousand nine hundred and twenty-five, or was, at the commencement of his service, within the limits of age prescribed by the Commission.*

Where the fragment belongs to the legal action the word *but* or *except* can usually be substituted, although it is often preferable to write a separate subsection. Section 88 of the Customs Act[35] says:

> The collector may, if he sees no reason to refuse such permission, permit an importer to abandon to the Crown any whole package or packages of warehoused goods, without being liable to pay any duty on the same; and the same shall then be sold and the proceeds shall belong to the Crown: *Provided that, if such goods cannot be sold for a sum sufficient to pay the duties and charges, they shall not be sold but shall be destroyed.*

Here the proviso is merely part of the legal action and the word *but* could be used in place of *provided that.* In section 61 of the Yukon Placer Mining Act[36] the proviso is also part of the legal action. The section states:

[34] R.S.C., 1927, c. 22.
[35] R.S.C., 1927, c. 42.
[36] R.S.C., 1927, c. 216.

> The holder of a water grant with the privilege of selling water may distribute the water to such persons and on such terms as he deems advisable, within the limits mentioned in his grant: *Provided that the price charged for such water shall be subject to the control of the Commissioner, and the water shall be supplied to all claim owners who made application therefor in a fair proportion, and according to priority of application.*

The proviso to section 856 of the Criminal Code can be eliminated by various methods. It reads:

> Any number of counts for any offences whatever may be joined in the same indictment, and shall be distinguished in the manner shown in form 63, or to the like effect: *Provided that to a count charging murder no count charging any offence other than murder shall be joined.*

For *provided that* the word *but* could be substituted, or the word *except* could be substituted for *provided*, or a new subsection could be added in which case the section might begin with the words *except as provided in subsection two.*

Provisoes are also frequently used in definition sections. The placing of substantive provisions in definitions has already been discussed and the practice is more reprehensible when the substantive provisions are introduced by way of a proviso. Examples of this type of proviso are contained in the definitions in the Immigration Act.[37] The expression *Canadian citizen* is defined as follows:

> 'Canadian citizen' means
> (i) a person born in Canada who has not become an alien;
> (ii) a British subject who has Canadian domicile; or
> (iii) a person naturalized under the laws of Canada who has not subsequently become an alien or lost Canadian domicile:
> *Provided that for the purpose of this Act a woman who has not been landed in Canada shall not be held to have acquired Canadian citizenship by virtue of her husband being a Canadian citizen: neither shall a child who has not been landed in Canada be held to have acquired Canadian citizenship through its father or mother being a Canadian citizen:*

This proviso consists of a number of substantive provisions that should appear in the Act and not in the definition section.

Provisoes are also used as a cloak for nebulous thinking. For example, subsection one of section 3 of the Salary Deduction Act[38] reads:

> Notwithstanding the provisions of any statute or law, there shall, during the fiscal year ending the thirty-first day of March, 1935, be deducted from the compensation of every member of the public service of Canada ten per centum of the amount thereof: *Provided that no provision of this Act shall operate to reduce the compensation of any member*

[37] R.S.C., 1927, c. 93, s. 2.
[38] Statutes of Canada, 1934, c. 22.

of the public service of Canada below one thousand dollars per annum. Provided further that such deduction shall not apply to any member of the public service of Canada whose compensation during such fiscal year is not more than one thousand dollars, and there may be paid out of any unappropriated moneys in the Consolidated Revenue Fund such sums, not to exceed in the aggregate one million dollars, as are not otherwise provided for and are necessary to give effect to the provisions of this subsection.

The first proviso is a fragment of the legal action. The last part of the second proviso on the first reading appears to have nothing to do with the subject matter of the section. What the draftsman apparently had in mind was that it might in some cases happen that monthly deductions had been made from the salary of a person who received less than $1,000.00 during the fiscal year, and this person would therefore be entitled to receive back the amount of the deductions. The draftsman therefore thought it was necessary to insert an appropriation section. Perhaps it did not occur to him that if a deduction was illegally made the employee would be entitled to his salary and probably no special provision was necessary. If it was necessary to make special provision for this case the draftsman might have provided simply that deductions not authorized by the statute should be refunded to the employee out of the Consolidated Revenue Fund. It is interesting to note that in a similar statute enacted in the following year[39] the language of the proviso was altered to say "and there may be paid out of any unappropriated moneys in the Consolidated Revenue Fund such sums, not to exceed in the aggregate three million dollars, as are required and not otherwise provided in order to ensure that the compensation of every member of the public service of Canada shall not be less than the full amount thereof reduced only by the deduction provided for by this Act". A further improvement was made in 1936[40] when this provision was dropped.

Provisoes are also used to join together two completely unconnected enactments. For example, section 20 of the Civil Service Act[41] says:

> Except where otherwise expressly provided, all appointments to the civil service shall be upon competitive examination under and pursuant to the provisions of this Act, and shall be during pleasure: *Provided that no appointment, whether permanent or temporary, shall be made to a local position within a province, and no employee shall be transferred from a position in a province to a local position in the same or in another province, whether permanent or temporary, until and unless the candidate or employee*

[39] Statutes of Canada, 1935, c. 26, s. 3(1).
[40] Statutes of Canada, 1936, c. 8, s. 3(1).
[41] As enacted by Statutes of Canada, 1938, c. 7, s. 1.

has qualified, by examination, in the knowledge and use of the language of the majority of the persons with whom he is required to do business: provided that such language shall be the French or the English language.

Another example of joining unrelated thoughts by a proviso may be found in the Yukon Act.[42] Subsection two of section 23 says:

> The Public Administrator shall perform such duties as are imposed upon him, and be invested with such powers as are bestowed upon him by or under any Act of the Parliament of Canada or any ordinance of the Governor in Council or the Commissioner in Council, and shall be otherwise subject to the provisions of any such Act or ordinance with respect to the said office of public administrator: *Provided that no such ordinance of the Commissioner in Council shall have force or effect except in so far as it is not inconsistent with any ordinance of the Governor in Council or any Act of the Parliament of Canada.*

The proviso has nothing to do with the main provision.

Occasionally *provided that* is used as a substitute for *if*. Section 22 of the Chinese Immigration Act[43] says that "Persons of Chinese origin or descent may pass through Canada to another port or place out of Canada: *Provided that such passage is made in accordance with and under such regulations as are made for the purpose by the Governor in Council*".

The proviso is far too convenient a tool. If the draftsman has neglected to complete the case, condition, legal action or legal subject, or has said too much, he makes a correction by way of a proviso; if he has not a clear idea of what he wants to say he adds one or more provisoes; if he has forgotten the existence of such simple words as *if, but, and* or *except*, or has forgotten the expedient of adding a new section or subsection, he adds a proviso.

In every case where a proviso is used it can be eliminated and the result will invariably be an improvement in the statute. It is not always a simple matter to eliminate provisoes. Where innumerable enactments are heaped upon each other, where the draftsman's thinking has not been clear or where the proviso supplies missing fragments of the case, condition, legal action or legal subject or two or more of these elements, it may be necessary to recast the entire section, or perhaps the whole Act, but in the end it will be worthwhile. A more readable and clearer statute will result, with fewer sources of doubt or ambiguity.

These considerations are sufficient to justify the abolition of the proviso. There is, however, a better reason for eliminating it from the language of statutes. It has no grammatical function

[42] R.S.C., 1927, c. 215.
[43] R.S.C., 1927, c. 95.

in the modern statute. The word *provided* is merely the past participle of the verb *to provide* and the expression *provided that* can mean only that *it is provided* or, to complete the thought, *it is provided by Parliament that.* In other words the phrase is only an enacting formula, but since the whole statute is preceded by an enacting formula that governs every provision in it, additional enacting words within the statute should not be used.

The earliest statutes were called *provisions* and today we frequently speak of the provisions of a section or the provisions of a statute. The first statute in volume one of the Revised Edition of the Statutes of England, 1870, is Provisiones de Merton (the Provisions of Merton). The next statute in this volume is entitled "Provisio de Anno Bisertili et Die" (a Provision for the Day in Leap-Year). The verb *to provide* is used in the enacting formula. The statute of Merton begins with a preamble *it was provided . . . in the Court of our Lord the King . . .* and concludes *thus it was provided.* The second statute referred to says *We therefore . . . have provided . . . that.*

Later, other verbs were used in the enacting formula and the expression most frequently used was *it is enacted.*

Until the middle of the nineteenth century, in the original Parliamentary roll, statutes were written in one single piece without distinction by paragraphs or sections and without punctuation. Each separate enactment was distinguishable only by a separate enacting clause. If two provisions were closely related as to subject matter or if one provision added an exception, limitation or qualification to a preceding enactment it was generally introduced by the words *it is provided* or *it is provided further.*

Although the Acts were written in one piece in the original Parliamentary roll the printers broke them up into sections. The first section was always the preamble, which included one substantive provision. The first section following the preamble was invariably numbered II. For example, 1 George I, c. 18, begins with a preamble outlining the reasons for the statute and concludes with the words *Be it enacted . . . that . . . .* The next section is number II and begins *Be it further enacted.* Section III begins *Provided.* Section IV has its own preamble ending with *Be it enacted by the authority aforesaid.* Section V begins *And it is hereby further enacted.* Section VI begins *And it is hereby further enacted and provided.* Section VII begins *Be it enacted by the authority aforesaid.* Section VIII begins *Provided always;* section IX *Provided also.* Section X has a preamble concluding

with *Be it further enacted.* The last three sections (XVI, XVII and XVIII) begin with the word *Provided.*

A glance through the earlier statutes reveals that in some instances *Provided that* is contained within a section and in other instances the section begins with these words. There was apparently no rule to indicate the occasions when this form should be used in place of *It is enacted* or the occasions when the formula should remain in the section or should begin a new section. In any case it is clear that *provided* was merely an enacting word. Sometimes it introduced an exception or a qualification but at other times it merely added another provision.

This practice continued until the reign of Queen Victoria, but a change was made in 1850. Section 2 of chapter 21 of 13 & 14 Victoria enacted that "All Acts shall be divided into sections if there be more enactments than one, which sections shall be deemed to be substantive enactments without any introductory words". This statute was declared to come into force at the beginning of the following session and we see a change in the form of the statutes of 13 & 14 Victoria. The preamble no longer contains a substantive provision and it is not numbered; the individual sections are not preceded by separate enacting clauses.

The preamble to chapter one of 14 & 15 Victoria reads "Whereas it is expedient to amend the Passengers Act, 1849, as hereinafter mentioned: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same; That . . .".

The concluding word *that* makes it clear that the enacting formula now applies to every enactment that follows. Obviously with this formula it is unnecessary to have enacting clauses for each section, and they were accordingly dropped. Strangely enough, in cases where the enacting clause would formerly have occurred in the middle of a section, it was retained.

The enacting formula for Canadian statutes is set out in section 5 of the Interpretation Act [44] as follows:

> His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

The words *enacts as follows* govern the whole statute and to insert a further enacting clause is not only unnecessary but also incorrect.

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[44] R.S.C., 1927, c. 1.

The phrase *provided that* cannot be said to have acquired a special meaning through usage; these words are used in so many different senses that it is impossible to attribute to them any precise meaning. Coode and other authorities suggest that a proviso may properly be used to take a particular case out of general enactment and to make special provision for it. Even this restricted use is incorrect. The proper course is to add a new subsection and to precede the main provision by the words *except as provided in subsection two* or *subject to subsection two.* This form is correct and it warns the reader that an exception is to follow. In any event the form of the proviso sanctioned by Coode is rarely found in the statutes. Not one proviso in a hundred takes this form.

The only meaning that the words *provided that* can have acquired by usage is *it is provided by Parliament that,* and this is its only grammatical meaning. If it means that, it can and ought to be eliminated. This suggestion is not as startling as it might at first appear to be. The proviso does not appear in the French version of the statutes of Canada and provisoes are not used in the English version of the statutes of the province of Quebec. There is no French equivalent for the proviso, and in the French version of the statutes of Canada the phrase *provided that* appears as *mais, toutefois, cependant, néanmoins* or sometimes as *il est prescrit de plus.* These words could be translated back into English and there would be no loss in meaning. In the English version of the Quebec statutes the proper English equivalents are used for *mais, toutefois, cependant, néanmoins* and other similar words. Where these words do not fit the thought, a new paragraph, subsection or section is added. The result is that the English versions of the Quebec statutes are, on the whole, simple and direct, easy to read and to understand.

Conclusion

Two short sentences from Coode might appropriately be quoted in conclusion. He says that "There is apparently a notion amongst amateurs, that legislative language must be intricate and barbarous", and that "If it could be made to be generally recognized that the essentials of every law are simple, and that their direct expression is the perfection of law writing, the greatest defects of our statute law would cease".[45]

[45] Page 58 (1852 ed.).