COODE

ON

LEGISLATIVE EXPRESSION;

OR,

THE LANGUAGE

OF

THE WRITTEN LAW

"To say the truth, almost all the perplexed questions, almost all the niceties, intricacies and delays, (which have sometimes disgraced the English as well as other courts of justice,) owe their origin, not to the common law itself, but to innovations that have been made in it by Acts of Parliament, 'overladen,' as Sir Edward Coke expresses it, 'with provisoes and additions, and many times on a sudden penned or corrected by men of none or very little judgment in law.' "—BLACKSTONE, Commentaries, Introd. Sect. 1.

"What I shall propound is not to the matter of the laws, but to the manner of their registry, expression, and tradition; so that it giveth them rather new light than any new nature."---LORD BACON, Proposal of a Digest.

BY GEORGE COODE

OF THE INNER TEMPLE, BARRISTER-AT-LAW

SECOND EDITION

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ADVERTISEMENT TO THE SECOND EDITION.

THE writer of this Tract was compelled, by the absolute want of any examples of a strict adherence to a better method of legislative composition, to illustrate the method he recommended by examples exclusively of his own compilation. In the nine years which have followed its first publication, abundant instances are to be found, especially in some of the Bills prepared under the direction of the Government, and in the drafts of some distinguished conveyancers of very skilful and happy adoption of simple, orderly and logical English in the manner proposed in this Tract, to legislative and jurisprudential composition. A hope may now be fairly entertained, that a good method once successfully adopted will be henceforth extended by the best practical means— by the example, imitation, and tradition of professional draftsmen; and although this may render unnecessary the further appearance of this Tract, its author will be very well satisfied that his project shall be forgotten in its own realisation.

March 1, 1852. G. C.

ADVERTISEMENT TO THE FIRST EDITION.

THE following remarks were first printed as an introduction to the Appendix annexed to the Report of the Poor Law Commissioners on Local Taxation, presented to Parliament in 1843. That Appendix, consisting of a digest of the whole of the Statute-law relating to the subject, was drawn up on the plan explained by the remarks.

It would not, on that occasion, have been desirable to draw illustrations or examples from any part of the law, the matter of which was not immediately under consideration. Much more striking illustrations could easily have been found amongst the statutes on more popular subjects, which, on this account, are left to be framed by persons less conversant with practical details and legal language, than those who for the most part are concerned in preparing laws directing the imposition and levy of taxes. But for this very reason, that the laws on the subject of taxation are generally better considered and better framed than most others, it has appeared to the writer still to be desirable in this reprint to limit his illustrations of imperfect expression to examples taken from these laws; and, accordingly, he has simply reprinted his remarks as they appeared in the Parliamentary paper, without addition or alteration.

February 15, 1845.

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ON LEGISLATIVE EXPRESSION

THERE is an acknowledged, indeed an obvious, distinction between the three operations of determining the final objects or policy of a law, of choosing the means for the attainment of those objects, and of enunciating that choice by means of language. Though the last process is subordinate, and is only executory of the two former, it does, like all executory functions, according as they are well or ill performed, fix the limits within which the superior function shall operate. The most determined will in the lawgiver, the most benevolent and sagacious policy, and the most happy choice and adaptation of means, may all, in the process of drawing up the law, be easily sacrificed to the incompetency of a draftsman.

The present paper is confined to the examination of what are the essential parts of the third process of enunciating in language the will of the legislature, and to the statement of the very simple rules which are derivable from that analysis.

It is beyond a doubt that many of the more positive errors and gross defects of legislation are to be prevented by observing a very few intelligible and simple rules, which any person capable of dividing grammatically a sentence of his native language would be competent to apply. Through neglect of such rules a law, good in its substance, is rendered confused in its form, proportionally difficult to be understood and applied, and sometimes is even made inoperative, or, what is worse, a delusion and a snare.

Arbitrary or artificial rules of composition cannot be insisted on. Even where they can be made generally intelligible they will not be sufficiently comprehensive for all cases. Legitimate occasions for disregarding them will occur, and the fair cases for exception being once admitted, the application of the rules could scarcely be maintained in any case. None but natural rules, that is to say, such rules as are strictly derived from the nature of the subject matter, and therefore of universal application to it, can ever be maintained. Such natural rules, from their admitting no exceptions, and from their being extremely simple, intelligible, and efficacious, can be easily applied by the draftsman, and any infraction of them readily detected and displayed. To ascertain these natural rules, it is necessary first to determine what are essentially the elements of a legislative expression.

The Elements of every Legislative Expression.

Essential elements

THE EXPRESSION of every law essentially consists of,

1. *the legal subject*;

—1st, the description of the *legal Subject*;

2. *the legal action*

—2dly, the enunciation of the *legal Action*.

Occasional elements

To these, when the law is not of universal application, are to be added,

3. *the Case*; —3dly, the description of the Case to which the legal action is confined; and,

4. *the Conditions,* —4thly, the Conditions on performance of which the legal action operates.

Some general explanations will perhaps be here allowed. If the statements appear too elementary, it will be borne in mind that these elementary matters are as much disregarded in practice as if they were unknown, and that it is therefore allowable to recur to them as things not altogether obvious nor universally admitted; and this more especially in a matter in which a distinct recognition of first elements conduces so much, as it will here be seen to do, to clearness and certainty in the most remote and complicate practical combinations.

The purpose of the law in all cases is to secure some benefit to some person or persons. When this benefit is secured to the public generally, or when it may be acquired by any person independently of the will of any other, the benefit secured is a Right; where it is confined to a class of persons into which any other person cannot enter, or into which he can only be admitted by the permission of some person or persons, the benefit secured is a Privilege. Privileges conferred for the purpose of being used, not for the benefit of the privileged person, but for the benefit and on behalf of some other person or persons, are Powers.

It is only possible to confer a Right, or Privilege, or Power, on one set of persons, by imposing corresponding Liabilities or Obligations on other persons, compelling these to afford the benefit conferred, or to abstain from invading it. Though the imposition of an Obligation is never the ultimate purpose of a law, it is very often (especially whenever the corresponding Right, Privilege, or Power is already recognised) the only thing which a given law does, in fact, express.

A law, then, can operate in two ways : it can confer the Right, Privilege, or Power directly, and it can impose the corresponding Obligation directly*. It is rarely, however, that both are done in the same law. Either the Right, or Privilege, or Power, is created, as that A may enjoy the Rights of a natural born subject, or may marry again; that B shall have the Privilege of trading exclusively to the East Indies, or of measuring all the cloth brought to a certain market, taking a fee for it; or that C shall have the Power, in a certain case, to imprison another; and the corresponding Obligations are implied, that is, they are left to result from the declaration of the Right, Privilege, or Power: or more ordinarily the Obligation is alone expressed, and the resulting Right, Privilege, or Power is left to be enjoyed through the practical operation of the Obligation.

But the law can only perform the one or the other of these processes, or both. No single sentence in a law can do anything else than one or both of these.↑t

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* When right has existed before, and the immediate object of the law is to restrict that right, the effect is still to create a new right; but the right here created consists in the new liberty communicated to those who were before under an obligation to respect the former unrestricted right.

↑ Preambles and Recitals to Statutes often contain merely statements of fact or opinion, but these are no exceptions, for they are not laws, though they are intended to indicate the intention of the law. Declaratory enactments, interpretation clauses, and adaptations or extensions of former laws to new purposes, do not always display immediately the purpose of creating or the extending rights, privileges, or powers of persons, or of

It would follow, therefore, that if the modes of expression appropriate to these processes could be clearly defined, and simple and natural rules be given for their use, those rules would comprise all that is essential to the matter of this paper,—the expression of the will of the lawgiver.

The Legal Subject.

1. the legal subject;

Now NO RIGHT, Privilege, or Power can be conferred, and no Obligation or Liability imposed, otherwise than on some person.

THE PERSON who may or may not, or shall or shall not do something or submit to something, is *the legal subject* of the legal action.

-the extent of the enactment determined by it.

The importance of a just discrimination and correct of the enact- expression of the legal subject cannot easily be exaggerated. The description of the legal subject determines the extent of the law, On this portion of every legal sentence it depends whether a right or privilege shall be limited to too few persons or extended to too many ; whether an obligation is imposed on more persons than is necessary or is not extended to sufficient persons in order to secure the correlative right; whether powers are reposed in right or wrong persons; whether sanctions are or are not made to fall on the proper subjects. Generally, be the law in itself good or bad, it is on this portion, the description of the legal subject, that its equal or unequal incidence upon persons depends. It is here that exemptions are filched by undetected omissions of persons, and encroachments effected by incautious insertions.

Hence the importance of the rules for securing the highest possible degree of clearness in the description and enumeration of *the legal subjects*.

The Legal Action.

2. *the legal Action*;

The *legal action* is that part of every legislative sentence in which the Right, Privilege, or Power, or the Obligation or Liability, is defined, wherein it is said that a person *may* or *may not*, or *shall* or *shall not* do any act, or *shall* submit to some act.

the *nature* of the enactment determined by it.

As the *legal subject* defines the *extent* of the law, so the description of the *legal action* expresses the nature of the of law. It expresses all that the law effects, as law. The selection of the legal subject is important ; but it is on the description of the *legal action* that the whole function of legislation exercises and exhausts itself. No special rules of composition apply to it; but it peculiarly exercises the capacity for practical legislation. It is in the terms in which this *legal adion* is expressed that every right, privilege, power, obligation, and sanction, is contained. It is in these terms that are to be detected the narrow definitions of rights, the authorization of licentious freedom, excessive privileges, inadequate or superfluous powers, insufficient or arbitrary obligations, inefficient, or misapplied, or cruel sanctions. It is on these terms, usually but few in number, that the vigilance of the legislator is

imposing obligations and liabilities on persons; but they always are in fact, only very comprehensive extensions or restrictions of the rights and obligations created by other provisions.

chiefly to be exercised. It is in these few words that the efficacy or inefficacy, the cause of failure or success, the safety and the danger, the sweet and the sting of the law are to be found.

To this part of every legal sentence it is therefore all important that the attention of the public and of the legislators should be certainly and easily directed. The *legal action* should immediately appear on inspection of the sentence. No good enactment requires to be covered up in deceptive language, or involved in a preamble, or got by implication from terms used in the description of the legal subject, or of the case or conditions ;—no bad legislation should be allowed the chance of passing muster in such ways.

Such are the essential elements of every legal sentence. Without both the *legal subject* and the *legal action* no law can be written; and all enactments of universal and constant operation consist of these alone. The practical importance of keeping them distinct has been adverted to. There is no conceivable case requiring any confusion of them.

Enunciation of *the legal subject*;--persons;-things

Although the *legal subject* of a legislative command, permission, or prohibition, is always some *person* or more, the words of the law are often such as not to make this person apparent; but they seem to apply the command, or permission, or prohibition, to some *thing*. This is always only apparent. None but persons are the legal subjects of a law, however they may be verbally disguised or kept out of view. It is obviously impossible to confer in effect a right, privilege, or power, on a thing, or to impose obligations on a thing, or in other words, to affect a thing with a command, or prohibition or permission. All that can be done by the law in regard of things is to confer rights, privileges, and powers on persons in respect of them—to command, prohibit, or permit certain actions of persons in respect of certain thing.

The instances in the law of imperative and permissive language applied to things are innumerable. The obscurity produced by the form may be seen in such instances as the following.—

Legal Subject — ALL RATES founded on such valuation *shall* be made, allowed, published, and recovered, in the same manner as rates for the relief of the poor.

4 & 5 Wm. 4, c. 35.

—meaning, apparently, no less than that the same PERSONS *shall* be liable as ratepayers; that the same PERSONS (overseers, qu. guardians?) *shall* make the rate; that the same PERSONS (overseers, cu. guardians?) shall publish the rate; that the same PERSONS *shall* pay or be liable to be levied on; and that the same PERSONS (overseers, qu. guardians ? justices, constables) *shall* enforce the payment, as are respectively liable to the like obligations in the case of poor's rate.

Again—

Legal Subject — THAT TRUE AND JUST COPIES of all rates hereafter to be made, [*shall*] be fairly wrote and entered in a book or books, to be provided for that purpose.

17 Geo. 2, c. 38, 8. 13.

—meaning that 'OVERSEERS' *shall* provide books for the entry of rates, and that THE 'OVERSEERS' *shall* cause true and just copies of all rates to be fairly wrote and entered in such books.

Again—

Legal Subject

That, in addition to the salary to be paid to the chief constable of the county,

REASONABLE ALLOWANCES

shall be made to him for extraordinary expenses necessarily incurred by him and by the constables under his orders in the apprehension of offenders and in the execution of his duties, &c.

WHICH ALLOWANCES

shall be examined and audited by the justices of the county in quarter sessions assembled.

2 & 3 Vic., c. 93, s. 18.

—meaning, to judge by other parts of the Act, that 'the TREASURER *shall* pay such allowances out of the County Rate;' but leaving it wholly impossible to tell who is bound to make the account. It would seem to be the treasurer's proper duty to do so when once the allowance has been made; and yet it would seem to be hard that he should be subject to loss, if the allowance should not be approved. Perhaps the meaning was, that the chief constable's account of 'extraordinary expenses' was to be 'examined and allowed,' not that the allowances should be examined and audited ; but this reasonable meaning is wholly conjectural, while no reasonable meaning is apparent.

In the first of these examples, the whole of a most important set of provisions are rendered doubtful, perhaps inoperative, by the neglect to determine whether it is THE OVERSEERS of the individual parish, or THE GUARDIANS of the whole Union, who are to make, publish, and levy the rate. The example is a fair one of the frequent mischief produced by the practice of naming things instead of naming the persons who really are intended to be the legal subjects of the enactment.

The avoiding the definition of the person is often a mask of ignorance, or the resource of indolence; often it is the result merely of carelessness. As it is a disguise, it should never be adopted without a special reason.

The only legitimate occasion for naming a thing as the legal subject, is when the persons to be affected have been already ascertained, and the relations of those persons to the thing named have been already clearly determined. In such cases, if the persons to be affected in relation to that thing are very numerous, it will sometimes save a troublesome enumeration of persons to name the thing as the legal subject; thus to say the 'THE RATE *shall* be made and levied in the right manner as the poor's rate,' may save the enumeration of three sets of persons, the true legal subjects of the enactment, for it is equivalent to saying that THE

PERSON liable to be rated to the relief of the poor *shall* be rated to this rate in like manner as to the poor's rate; that THE PERSONS (overseers and justices) authorized to make the poor's rate; *shall* make this rate in like manner as the poor's rate; and that THE PERSONS (justices, constables, overseers, &c.) empowered to levy poor's rates, *may* levy this rate in like manner as a poor's rate. Again, where a certain *term* has been used in relation to certain persons, these persons can often be extensively affected, or others included very conveniently, by using such term as the legal subject; thus THE WORD 'overseers' *shall* be construed 'to include overseers, churchwardens, assistant-overseers, and all other subordinate officers.'* &c.

-impersonal expressions

It may sometimes be convenient, instead of naming the legal subjects, to use an impersonal form, as, 'IT shall be lawful' where it is intended to confer a right, privilege, or power, on many undefined persons, but not universally on all persons. The form, however, has no advantage, but is needlessly indefinite, where the persons on whom the right, power, or privilege is to be conferred are easily denoted; thus, 'it shall be lawful for any two justices' may be better expressed by 'ANY TWO JUSTICES may', 'IT *shall* be lawful for any person to', or 'IT shall not be lawful for any person to,' are more clearly expressed by 'EVERY PERSON may', 'NO PERSON shall.'

-rules for expression of the *legal subject*

The rules of most effect as to the expression of the legal subject, are,

First, to keep the *legal subject* distinct in form and in place from other parts of the legal sentence.

Secondly, not to permit it to be withdrawn from view or disguised by the non-description of persons or by the substitution of *things* instead of persons, or by the use of impersonal forms of expression.

The *legal subject* of an enactment is always conceived as existing before *the legal action* can operate.• It is, in fact, merely the name or description of some existing object on which the law is about to act, and the use of the words to describe such an object is to be governed by the ordinary rules of composition. Therefore, in describing the legal subject,—and the same thing applies whenever any existing

* Nevertheless, in these provisions for arbitrary constructions the true legal subject is most usually disguised without necessity. Even in the instance given, the more proper expression is thus:—

The case	Whenever the word 'overseer' is used in this Act,
Legal subject	OVERSEERS, churchwardens, assistant-over seers, and other subordinate officers, &c.
Legal action	shall be held to be included.

• It is most commonly some natural person. But sometimes the legal subjects of one enactment may have been created by some other legal action preceding the present enactment. Thus an enactment may take a man of a given description, and declare that he shall be a magistrate; in this enactment the man described is the legal subject, and the investiture with magisterial powers the legal action. Having thus by one legal action created the magistrate, he may now become the legal subject of some new legal action, as, where it is said, that ANY JUSTICE OF THE PEACE may commit an offender, &c.

object is to be named or described in other parts of a legal sentence,—the business of a draftsman of a statute has nothing distinguishing it from the work of other writers in naming or in accurately describing the same objects.

Enunciation of *the legal action;*

The legal subjects having been determined by the ordinary process of naming or of definition, the intended *action of the law, upon those subjects*, comes to be described. In this some special rules of composition, modified by the peculiar attributes of the law, do apply.

If the law confers a right, privilege, or power on the legal subject, its language is properly facultative; if it imposes an obligation to do or to abstain, its language is properly imperative or prohibitory. In this the language of the law is, or rather ought to be, confined to modes of speech peculiarly expressive of its facultative or compulsive functions. Language taking indicative or descriptive, or narrative or passive forms, or any other than authoritative forms, is totally out of place and character. In English the words *may* and *shall*, with their negatives, are exclusively the proper auxiliaries of the enacting verb. These auxiliaries with their negations, serving as they do peculiarly to join *the legal subject to the legal action*, and denoting peculiarly the facultative or compulsive character of the legal action, may be called *modal copulæ*, or simply *the copula of a legal sentence*.

-Copula; enacting verb;

If a right, privilege, or power is conferred, the appropriate *copula* is *may* or *may not*; if a right, power, or privilege is to be abridged, the appropriate copula is *may not*; if an obligation is imposed to render any duty, the appropriate *copula* is *shall*; if the obligation is to abstain, the appropriate *copula* is *shall not*: again, if the purpose is to affect the legal subject with a liability or sanction, the appropriate *copula* is still '*shall;*' only when the subject is to be active, the whole enacting verb will be active, 'shall forfeit,' &c., and where the subject is to submit, or be passive, the whole enacting verb will be passive, as '*shall*' be imprisoned,' &c.

All such descriptive and narrative expressions as 'it is hereby allowed, authorized, and permitted,' instead of *may*; 'is hereby commanded and required to,' or, 'shall, and is hereby required to,' instead of simply *'shall*;' and all such passive expressions where the legal subject is intended to be active, as 'notice *shall* be given,' leaving the person to give it unascertained, instead of 'THE SURVEYOR (?) *shall* give notice;' THE RATES *shall* be made, allowed,' &c., leaving it impossible to ascertain by whom, as in the 4 & 5 Wm. IV., c. 76, s. 35.; instead of 'THE GUARDIANS(?) or THE OVERSEERS (?) *shall* make the rates;' 'THE ALLOWANCES *shall* be examined and audited' instead of 'THE CHIEF CONSTABLE (qu. THE TREASURER?) *shall* account for the allowances, and THE JUSTICES *shall* examine and audit such account,' &c., are at the best weak and inexpressive, and are very frequently, as in some of the above instances, wholly unintelligible.

Not one case can be imagined, in which it is necessary or convenient to use any other than permissive or imperative language in the enacting verb; and these two rules, therefore, ought never to be allowed to be infringed;

1st. That the copula, which joins the *legal, subject* and the *legal action* is to be *may*, or *may not*, or *shall*, or *shall not*, as 'ANY PERSON *may*,' 'NO PERSON *may*,' 'EVERY PERSON *shall*,' or 'NO PERSON *shall*;'

2nd. That the whole of the enacting verb is always to be an active verb, except only where the legal subject is to submit or suffer, as where executory force, or punishment, (sanctions) are directed to be submitted to by the person described in the legal subject.

It would almost seem unnecessary to add that the cases for facultative and for imperative language ought not to be confounded. Yet it is so often said in statutes that 'it shall be lawful' to do something, where it is in fact meant that certain parties 'shall' do the act, that the greatest misapprehensions are constantly caused, people believing that they have an option to do the act or not as they may think proper; and the courts of law have been obliged to frame a special rule of construction, an exceedingly indefinite one, however, and quite incapable of application in a multitude of instances, that wherever an act is authorized for the sake of justice, or wherever an act is authorized, which is for the public benefit, 'may,' or 'it shall be lawful,' must be construed to mean, 'shall,' or 'it is hereby required.' To avoid this difficulty apparently, the absurd formulæ 'shall and may' ; 'may and is hereby required' ; 'it shall be lawful, and it is hereby required;' and a variety of others have been adopted, all equally amounting, however, to a simple command, and properly expressed by the single word *shall*. There could arise no difficulty if these rules were observed—

—whenever an act is allowed *as a right* or *as a privilege*, that is to all the members of the community, or to certain persons for their own benefit, the proper *copula* is *'may*;'

—whenever the act is authorized *as a power*, that is to certain persons to perform, not for their own benefit, but for the benefit of others on whose behalf the power is given, the proper *copula* is *shall*.

Combinations of several legal subjects, copulae, and legal actions.

The combination of these elements are necessarily simple, and may be multiplied to any extent without q rendering the expression of the law intricate or confused.

There may be a single *legal subject* and a single *legal action*; in which case there can be properly but one *copula*, inasmuch as the enunciation of one single action must either be facultative, or obligatory, or afflictive, cannot be more than one of these; as,

THE PARISHIONERS

may

as they think fit, order an abstract of the accounts to be printed and published.

THE OVERSEERS or the greater part of them

shall

take orders from time to time, with the consent of two justices, to raise the rate—

or there may be many *legal subjects*, to be operated upon by one *legal action*; in this case also there can be properly but one *copula*; as,

EVERY CLERK, COLLECTOR, RECEIVER, and OTHEROFFICER appointed by any Court of Sewers shall as often as is required by such Court, render a true, exact, and perfect account in writing under his hand—

or there may be one *legal subject*, to be operated upon by many *legal actions*, in which case there may be several *copula*, inasmuch as some of the legal actions may be facultative, some obligatory, and some afflictive; as,

THE OVERSEERS of every parish

shall provide a book or books

and *shall* take care that true and just copies of all rates for the relief of the poor be fairly written and entered therein.

THE TENANT

may

deduct the money so paid out of his rent

and *shall* be acquitted and discharged for so much money as he has so paid.

or there may be many *legal subjects*, and many *legal actions*, applied to all the same subjects: in this case also there may be several *copula*; as,

EVERY SURVEYOR, DISTRICT SURVEYOR, and ASSISTANT SURVEYOR

shall

within 14 days after the appointment of the new surveyor, make up his accounts for the year preceding, in writing,

and shall sign and balance them,

and shall within one calendar month sign and lay them before the justices at a special session,

and shall, within 14 days after leaving his office, deliver his accounts, verified before justices at special sessions;

but if the legal subjects are all expressed and kept together, the extent of the law can never be difficult to express, and if right words be used, can never be mistaken. If the copulae of each enacting verb are joined immediately to their enacting verbs, and not thrown in a heap together to be afterwards discriminated and distributed to their proper subjects and actions, referendo singula singulis, each legal action will, as a consequence, stand out singly and simply, and the whole law will be as easy to compose, as it will be, when composed, easy of comprehension and terse in style.

Distinctive printing for the *legal subject* and *legal action*

The paramount legislative importance of these two members of legal sentence, the *subject* and the *action* renders it desirable that they should not only be distinguished by the construction of the sentence, but that they should be instantly discovered by the eye, and each at once distinguished from the other. In the following Appendices* this is attempted; the beginning of the *legal subject* is distinguished by printing the first words in Roman capitals, and the commencement of each several *legal action* is distinguished by printing its *copula* in Italics.

The Case.

3.*the Case.*

IF ALL LEGISLATION were as simple as that instanced 3. above, there would be but little use in making the foregoing distinctions. But it is now comparatively rare that rules of universal and constant operation are laid down by statutes. If such rules constituted a considerable part of the modern law, no great, or at least no very frequent, complication of expression would occur. The simplicity of the matter would secure a general simplicity of expression.

Importance of legislating for cases.

It is no demerit of modern legislation that it applies itself minutely to special cases. It would, in fact, be the of greatest merit of any system of laws that they varied exactly as every case varied in its elements. It is the indiscriminating and general rules of law that make the harshness of a system of law—that make special classes of persons obnoxious to unintended and unforeseen oppression—that require for their mitigation the arbitrary modifications of judicial construction and of courts of equity. The more a legislature is civilized the more it measures and considers the differences in each class of cases, and adjusts the law to their varieties. With every fair enactment for the peculiarities of a special case, the law loses a portion of its rudeness and unbending character. The proper object of legislation is to make certain rules of the utmost possible convenience—not to propound rules of the utmost possible generality. Legislation is not a science, but a practical art. The perfection of a science is reached when every particular proposition is resolved into or deducible from one general proposition; but the perfection of legislation is attained in proportion as every variety of right, and every corresponding obligation and liability are most specifically determined, and when the least is left to inference from extensive and remote generalities. It is most true that in adjusting its provisions to special differences, the general principles of the pre-existent law should be as far as possible adhered to; mutual consistency having a great value as well as particular aptness ; and it is also true in regard to law as in regard to all other things, that a simple general rule is most easily comprehended by those who have no practical acquaintance with the particulars included by it, and this fact is also of practical importance in legislation: but to those who do know the particulars experimentally, as each man knows his own case, the more general the terms of a rule the less certain and close does its application appear—the more specific the terms of a rule, the more easily and precisely is its application seen and understood. Generalizing the expression of the law is more the work of the scholastic professor; specializing the law the proper task of the practical legislator. In this process of modifying and adjusting the law to special cases, the constant action of the

* That is to say in the Appendices to the Poor Law Commissioners' Report on Local Taxation. The game distinctive printing is adopted in the examples contained in this reprint.

legislature and of the judiciary of England has undeniably made a greater and better progress than the institutions of any other country; and to desire a codification or simplification which would destroy these nice adjustments, or diminish in any way the speciality of the law, or to propose arrangements to cramp or obstruct in future the further extension of specific legislation, would be to sacrifice aptness and certainty in the law to verbal generality; and to supplant the beneficient officiousness of the legislator by the despotic formalities of the methodizer.

Nevertheless, this beneficent process of adjusting our law to the partial and various interests of the community, has unquestionably, so far as our statute law is concerned, introduced a cumbrousness, intricacy, and confusion, quite without any parallel in the legislation of any other country.

Without some rule for expressing the limitation of the law to its specific occasions, the draftsman first draws an enactment in terms too general for his purpose; he then attempts to detract from its generality by interpolated limitations, qualifications, exceptions, and by that bane of all correct composition, the Proviso. It would indeed be lamentable if the aptness and flexibility of legislation could only be attained by such intricacy and confusion in the expression of the law, as we see resulting from this clumsy process. But there is no necessary connexion in these effects. The law can universally be made, like every other matter, clearer in all its details, and more compact in all its parts, by the orderly specification of those details.

Enunciation of the *case*:

As on the due expression of the legal subject the extent of the law depends, and as on that of the legal action the nature of the law depends; so on the expression of the case, and of the conditions, do the clearness, precision, and form of our statute law mainly depend.

-rule for the expression of the *case.*

The rule to be observed is of such simplicity as to make its utterance appear almost an absurdity; but simple as it is, it is the most frequently neglected of any rule of composition.

It is, that *wherever the law is intended to operate only in certain circumstances, those circumstances should be invariably described* BEFORE *any other part of the enactment is expressed*.

If this rule were observed, nine-tenths of the wretched provisoes, and after-limitations and qualifications with which the law is disfigured and confused, would be avoided, and no doubt could ever possibly arise, except through the bad choice of terms, as to the occasions in which the law applied, and those in which it did not. It is beyond a doubt that the casus legis, which can be described in a proviso, or in a phrase interpolated into other matter by way of limitation, can be more easily expressed alone, and at the beginning of the enactment. It is equally beyond a doubt that its proper place is at the beginning, and that it is misleading the reader to commence an enactment as if it were universal, and to wind it up by a parenthetical qualification or proviso which limits it to certain occasions only.

As the law is only to operate when the supposed case arises, the proper language to express it would be subjunctive language, as ‘if any person be.' But as *subjunctive language* cannot be distinguished from conditional, and as conditional language is more specifically necessary for the expression of the *conditions* (to be hereafter referred to), it would appear to be better, in describing the *case*, to use the still more ordinary language of the *indicative* mood.

> Where any person is aggrieved by any rate, or has any material objection, &c.
>
> Where notice of appeal has been given in writing, &c.
>
> Nevertheless in any case in which no notice of appeal has been given in writing, &c.

This indicative language describing the case as now existing, or as having now occurred, is consistent with the supposition of *the law being always speaking*; and its use may, on this supposition, be justified, to the exclusion of subjunctive language, which is less popularly used, and is more wanted elsewhere.

But subjunctive language ought, at all events, to be used in preference to the ordinary absurd form—

> Where any person *shall* find himself aggrieved,
>
> If notice of appeal *shall* have been given,

a form which confounds the proper language of obligation with that of hypothesis, depriving the former (the peculiar language of the law) of its force, and often leaving a doubt whether the action described is one merely supposed as a case or condition, or one imperatively required to be performed.

It would add much to the facility of discovering the case immediately in every legal sentence, if it invariably commenced with the words 'when' or 'where' or 'in case.'

The Appendix affords, it is hoped, a multitude of instances of the clearness resulting from the invariable statement of the *casus legis* before any other part of the enactment. Comparison with the originals would prove the wideness of the difference between the ordinary practice and what is easily attainable, by observing the proposed rule.

The following are a few selected instances of the application of this rule:—

POOR'S RATE.

134 b.

1st *Case*	If the 'parish' be in a county.
Legal Subject	'TWO JUSTICES' (19, - 21),
	whereof one to be of the *quorum*,
	dwelling in or near the division where the 'parish' doth lie,

Legal Action	*shall* allow the rate. 43 *Eliz*., c. 2, s. 1. 13 & 14 *Car*., c. 12, s. 17..
2d Alternative *Case*	Or if the 'parish' be wholly within an exclusive jurisdiction
Legal Subject	'TWO JUSTICES' of that jurisdiction
Legal Action	*shall* allow the rate. 43 *Eliz*., c. 2, 8. 8.
3d Alternative *Case*	Or if a parish lie within two places of concurrent jurisdiction,
Legal Subject	'TWO JUSTICES' of either jurisdiction, or one of the one jurisdiction and one of the other,
Legal Action	*shall* allow the rate. 43 *Eliz*., c. 2, s. 8.
4th Alternative *Case*	Or if a parish lie within two places of exclusive jurisdiction,
Legal Subject	'TWO JUSTICES' at least of each such jurisdiction
Legal Action	*Shall* allow the rate. 43 *Eliz*. c. 2, 8. 9.

POLICE RATE.

26

Case	When the justices of the peace of any 'county,' assembled at 'quarter sessions,' have agreed that the ordinary officers appointed for the preservation of the peace are not sufficient for the preservation of the peace, the protection of the inhabitants, and the security of property with the county, and when they have set forth the same, and have declared how many constables are in their opinion needed for the aforesaid purposes, and what rates of payment it would be expedient to pay to the chief and other constables, and when such report has been sent to one of Her Majesty's principal secretaries of state, .

2 & 3 Vic., c. 93, s. 1.

and when one of Her Majesty's principal secretaries of state has made,

. . . .

2 & 3 Vic., c. 93, s. 3.

and finally settled,

2 & 3 Vic., c. 93, s. 4.

any rules for the government, pay, clothing, accoutrements, and necessaries of such constables ;

2 & 3 Vic., c. 93, s. 3.

and when such rules, as finally settled, (?) have been received from the Secretary of State,

2 & 3 Vic., c. 93, s. 4.

by the clerk of the peace of such 'county,'

2 & 3 *Vic*., c. 93, 8. 4.

Legal Subject THE SAID JUSTICES

Legal Action may appoint a chief constable, &c

2 & 3 *Vic*., c. 93, 8. 4, *&c.*

COUNTY RATE.

129 c.

Case. Where any 'parish or place' is situated in and extends into two or more counties, ridings, or divisions, having separate and distinct commissions of the peace,

and where the messuages, lands, tenements, and hereditaments in such 'parish or place' are rateable to the relief of the poor therein,

and to the county rates of the respective counties, ridings, or divisions in which such messuages, lands, tenements and hereditaments are respectively situated;

and where no separate 'overseers' are appointed, and no separate rate is made for the respective parts of such 'parish or place,'

Legal Subject ALL THE POWERS, provisions, clauses, pains, penalties, and forfeitures given, granted, made, and imposed by any Act relating to county rates

Legal Action shall apply, and extend, to all intents and purposes, to the respective parts of such 'parish or place.'

1 & 2 *Geo*. 4, c. 85, s. 1.

COUNTY RATE.

154

Cases. When any 'overseer' of any 'parish,' or the petty constable or peace officer,

12 *Geo*. 2, c. 29, ss. 3, 4, 12.

or other inhabitant of any 'place,' where there is no 'overseer' or person appointed to act as such,

55 Geo. 3, c. 51, s. 14.

has reason at any time to believe that the said 'parish' or 'place'

12 *Geo*. 2, c. 29, s. 12.

55 *Geo*. 3, c. 51, s. 14.

is aggrieved by any county rate,

whether on account of the proportions assessed on the respective 'parishes' or 'places' being unequal;

or on account of some one or more of them being, without sufficient cause, omitted altogether from the rate;

or on account of such 'parish' or 'place' being rated at a higher proportion of the pound sterling, according to the fair annual value of the rateable property therein, than that declared by the justices in sessions as the basis of the rate;

or on account of some other 'parish' or 'parishes,' 'place' or 'places,' being rated at a lower proportion of the pound sterling, according to the fair annual value of the rateable property therein, than that declared by the justices in sessions as the basis of the rate ; or on account of any other just cause of complaint whatsoever,

55 Geo. 3, c. 51, s. 14.

Condition if such 'overseer,' constable or peace officer, or other inhabitant,

give 14 clear days' notice, in writing,

of the intention to try such appeal at the general or quarter sessions,

to the parties against whose rate the appeal is to be made,

and to the clerk of the peace of the county,

and to the hundred constable,

57 Geo. 3, c. 94, s. 2.

Legal Subject	SUCH 'OVERSEER,'
	constable or peace officer
	12 Geo. 2, c. 29, s. 12.
	or other inhabitant
	or person,
Legal Action	may
	55 Geo. 3, c. 51, s. 14.
	appeal
	against such part of the rate only
	as may affect the
	12 Geo. 2, c. 29, s. 12.
	55 Geo. 3, c. 51, s. 14.
	'parishes or places' which are unequally rated,
	or which appear to be over-rated, or under-rated,
	or omitted altogether from the rate,
	55 Geo. 3, c. 51, 8. 14.
	to the justices of the peace at their next general or quarter sessions,
	12 Geo. 2, c. 29, s. 12.

The Conditions.

4. *the Conditions.*

A LAW universal as to its subjects, and restricted or not restricted to certain occasions (*cases*), may still operate only upon the performance by some person of certain *conditions*. It is not till something has been done that the right can be enjoyed, or that compliance with the obligation can be enforced, or that the liability can be applied.

These *conditions* are invariably conditions precedent. The action of the law never takes place till these are complied with. No such thing as the so-called conditions subsequent or executory can be conceived to apply to a legal action.

Importance of the expression of *the conditions*.

The expression of *the condition* is of very high importance. A condition is sometimes expressed as the condition of acquiring or enjoying a right; if in this case it exceeds, by the smallest particle, what is necessary to the condition, it will so far prohibit the enjoyment of the right. Conditions are more frequently expressed as the conditions of enforcing an obligation on another; if in these cases the condition is in any respect more stringent than necessary, it so far prevents the enforcement of the obligation; on the other hand, every word by which the condition is made less stringent makes the obligation more so, and renders the law unnecessarily hard, by

imposing obligations of an extent disproportionate to the value of the right to which they subserve. But conditions are still more frequently used to determine the occasions on which the powers of Courts of Justice and public officers are to be used: in this case, if the condition be expressed too widely, it paralyses the use of the power; if it be not extensive enough, it affords unnecessary occasions and pretexts for the exercise of such powers, making their intervention meddlesome and arbitrary. The absence or vagueness of conditions upon the exercise of powers is the characteristic of all arbitrary institutions. On the other hand, the imposition of unimportant formalities as the conditions of the exercise of public powers, constitutes for the most part the history of the decay of institutions, the origin of sinecures, and, above all, the obsolescence of remedies, and with them of the rights for the protection of which the remedies had been provided. We have a lamentable example of this in the English law, in the loss of civil remedies for a large class of injuries now left to be redressed only by resorting to coarse and inefficient penal vindications.

-rile for the expression of *the conditions*.

It seems superfluous to say that the proper language of a condition is the conditional,

If he give notice, he may, &c.

Unless he give notice he shall not, &c.

but the practice in drawing bills disregards this rule much more frequently than it conforms to it—indeed defies all rule; the most common mode of expression is equally regardless of grammatical principle, popular custom, or force of expression; it is—

if he shall insist on the same,

if, upon the hearing, *the Court shall order* any rate to be set aside,

if it hall appear to the said Court.

This is almost the universal formula. What the *'shall'* is to effect it seems impossible to conceive. The language in all such cases becomes correct and expressive by the simple omission of the '*shall*.'

if he insist,

if the Court order,

if it appear, &c.

This misuse of 'shall,' in a condition, is not only objectionable in itself, but it always deprives the obligatory language of the legal action, where the 'shall' is in its proper place, of its due force; it often does even worse, inasmuch as it seems to convert a condition which may be performed or not at the will of a party according as he wishes or not to secure the benefit of the enactment, into a positive command, as

Fourteen clear days' notice in writing *shall* be given by the parties intending to appeal, &c.

—where the meaning merely is that 'if 14 days' notice be given, the. party may appeal,' or 'unless 14 days' notice be given, the appeal shall not be received.' *

Order of expression for several *conditions*.

There may be many distinct conditions imposed. In this case the conditions are never to be performed simultaneously. The order of their performance in time ought to be carefully observed in expressing them; so that the person, or several persons, on whom they are imposed may see the order in which to proceed to realize all the conditions of the legal action, and may be in no doubt when those conditions are all complied with. For the reason that the legal action is postponed, and cannot act upon the legal subject, until these conditions are all complied with, *the expression of the conditions ought immediately to precede that of the legal subject*.

The natural place and the order of succession of the conditions are seen in such examples as the following:—

COUNTY RATE

305

Case	Where any person seeks to remove any rate made in pursuance of this Act,
	or to remove any order or other proceeding made or taken by the general or quarter sessions touching any such rate,
1*st Condition*	unless the motion be made in the first week of the next term after the time for appealing from such rate or order is expired ;
	12 *Geo*. 2, c. 29, s. 21.
2*nd.*	nor unless such motion be made within six calendar months after such (rate?) order or proceeding made or taken;
3*rd.*	nor unless the party suing for the same hath given six days' notice thereof in writing to the justices, or to two of them, if so many there be, by whom such order or proceeding was taken, to the end that such justices, or the parties therein concerned, may, if they think fit, show cause against the granting of such certiorari;

* The mischief of the misuse of 'shall' is often much greater than is indicated by the above instances. There are innumerable examples where it is impossible to tell, from the language itself, whether the law is merely describing something, or is imposing a condition, or is really issuing a command. The context sometimes helps to the determination of the effect; but very often even this affords no light to the construction; for instance, in the 29th section of the Poor Law Amendment Act (4 & 5 Wm. 4, c. 76) the word 'shall' occurs in two consecutive phrases, 'the poor of such parishes who shall be maintained or relieved in or out of any workhouse of such union, for which each such parish shall in future be charged separately.' The first 'shall' is in a phrase which the context shows to be descriptive merely • upon the second 'shall' a most important consequence depends: if it be descriptive like the first, it causes the burden of the whole maintenance of the poor in a Union to fall in a manner exactly the contrary of that in which it will fall if the word 'shall' be imperative.

4*th* nor unless the giving of such notice be duly proved on oath;

13 *Geo*. 2, c. 18, s. 5.

5*th*. nor unless it be made to appear to the court, by affidavit or otherwise, that the merits of the question upon such (rate) appeal or order (or proceeding) will, by such removal, come properly in the judgment of the said court;

6*th*. nor until sufficient security be given to the treasurer of the county, in the sum of 1001. to prosecute such writ of certiorari with effect, and to pay the costs, to be ascertained by the court, in case such rate or order (or proceeding) be confirmed.

12 *Geo*. 2, c. 29, 8. 21.

Legal Subject NO SUCH WRIT of certiorari

Legal Action *shall*

be granted

12 *Geo*. 2, c. 29, 8. 21.

13 *Geo*. 2, c. 18, 8. 5.

POOR'S RATE.

156

1*st*. *Condition* Unless the notice of appeal against any rate made for the relief of the poor be in writing,

2*nd*. and unless it state and specify the particular grounds or causes of appeal (154)

3*rd*. and unless it be signed by every person giving the same or by his attorney on his behalf;

4*th*. and unless it be delivered to the 'overseers' of the 'parish,' or to any two of them, or be left at their places of abode;

Legal Subject THE 'JUSTICES' at such sessions (154)

Legal Action *shall not*

receive such appeal.

41 *Geo*. 3, c. 23, 8. 4.

There is another striking example in the specimen at page 199.

Recapitulation EVERY FORM of every possible legislative enunciation resolves itself into two or more of these four elements, of which the *legal subject* and the *legal action* are essential, and must necessarily be present, while *the case* or *the condition* may or may not be present.

If the enactment is to operate on its subject universally, constantly, and unconditionally, the sole elements are the *legal subject* and the *legal action.*

If the enactment is only to operate on its subject in certain circumstances, *the case* must express these circumstances in *the first words of the sentence*, and not in a subsequent phrase inserted parenthetically in the description of the subject or the action, nor in a separate proviso.

If the enactment is only to operate on its subject after performance by somebody of certain precedent conditions, these *conditions should be all expressed immediately before the legal subject, and in the order in which they must be executed*; that is, in their chronological order.

Next comes the *legal subject*, immediately followed by the appropriate modal *copula*, introducing the *legal action.*

advantage of this order; of-

THE SPECIFIC IMPORTANCE of each of these several elements of a legal sentence has been adverted to above, but the importance of observing invariably the order of expression of 1st, the *case*; 2nd, the *conditions*; 3rd, the *legal subject*; 4th, the *legal action*, is still to be pointed out.

-the Cases first

The case being placed first, the first few words of the sentence answer immediately to the inquirer, whether his case is included in the provision or not; whether he need read on, or should proceed to seek the law applicable to his circumstances in another clause. Suppose, for instance, these are the words:—

Case Where any Quaker

7 & 8 *Wm.* 3, c. 34, s. 4.

refuses to pay any church rates, or any customary or other rights, dues, or payments belonging to any church or chapel, or which of right by law and custom ought to be paid for the stipend or maintenance of any minister or curate officiating therein.

1 *Geo.* 1, stat. 2, c. 6, s. 2.

—it is evident that no person who knows the circumstances of any case can doubt whether the law presently to be expressed applies to his case or not; he can at once determine (if the case is thus expressed at the threshold, and he is not to be balked by some subsequent limitation of the law to some more special case, by some subsequent parenthetical phrase or proviso, or some clause somewhere else in the statute) whether he has or has not before him the law he seeks.

-the Conditions next;-

Having ascertained that there is law applicable to his case,—he next learns what is to be done to make it operative; this he learns from the *conditions* which follow immediately upon the case, and precede the expression of the law,—

Conditions if any churchwarden or other person who ought to receive or collect the same complain thereof,

7 & 8 *Wm.* 4, c. 34, s. 4.

and if such Quaker have reasonable warning of such complaint:

1 *Geo*. 1, stat. 2, c. 6, s. 2.

—here, whether complainant or defendant, he sees at once all the requisites to make the law operate in the case. Whoever seeks to make the law operate proceeds to do the things required as conditions in the order in which they are prescribed, and these being done, the right of the claimant and the liability of the defendant and the duty of the functionary are complete,—the law has now only to operate functionally.

-the legal Subject next;

The *legal subject* describes the person now enabled or commanded to act,—

Legal Subject ONE OF THE NEXT JUSTICES of the peace,

53 *Geo*. 3, c. 127, s. 6.

of the same county,

1 *Geo*. 1, stat. 2, c. 6, s. 2.

other than such justice of the peace as is patron of such church or chapel :

1 Geo. 1, stat. 2, c. 6, s. 2.

—here will be found determined all the persons who, in the case, and on performance of the conditions prescribed, are immediately authorised, obliged, or prohibited by the legal action. The suitor, the defendant, the Court itself, all look here to see that the Court (or other *legal subject*) is competent. The Court finds from its description here, as the legal *subject*, that it has or has not jurisdiction in *the case*; it finds whether it is yet empowered to act or not, according as *the conditions* have or have not been complied with.

-lastly, the legal Action

The case before the Court (or other legal subject) is seen to be the case described in the statute; the conditions as prescribed are executed; the Court (or other legal subject) is recognised as conforming to its description, and is therefore competent; now comes *the legal action*;—

Legal Action. *may*

by warrant under his hand and seal, summon such Quaker

before the two next justices of the peace,

of the same county:

7 & 8 *Wm*. 3, c. 34, 8. 4.

—here the Court (or other *legal subject*) finds what by law it is required to do, to summon, convict, execute, or what else.

-applied to the legal procedure

APPLY THE ABOVE to the oral or documentary proceedings in any Court, and the advantage of this mode of expressing the law will be at once apparent. Suppose the complaint is to be made, the complainant has nothing to do but look at the case and conditions, to word his complaint so as to include the very words of the statute,

filling in his own and the defendant's personal description and the necessary dates and places. Nothing can be simpler than this process; when done no astuteness can successfully impugn it.

Consider on the other hand the defence. The defendant or other antagonist has only to show in his defensive allegation, his plea, or other appropriate answer, that the case is other than the case described in the statute, and he ousts the jurisdiction of the Court, or the competence of the other legal subject; or he has only to show that the prescribed conditions have not been complied with, and he justly and inevitably defeats the complaint, the declaration or other allegation of the pursuing party.

Next as to the decision—the Court recites in it the very same words in which the case is described, that the conditions in the words of the statute were performed, or that they or some of them were not; it describes itself by the use of the very terms of the legal subject, by which the competence of the tribunal is established in terms which can only be successfully attacked by defeating the statute itself; the Court now proceeds to execute its authority, to convict or to give its decision or judgment, using the very words of the legal action, and abstaining from everything going beyond those words.

At every stage the proceedings would thus run parallel, *pari passu* with the words of the statute, in a manner which would greatly diminish the perplexity of all who have only to obey or execute the law.

Combination of distinct Enactments.

THUS FAR the construction of a separate enactment has been considered. Usually, a statute, and every section of a statute consists of several of these enactments.

Any number of legal subjects can be enumerated cumulatively with '*and*,' or alternately with '*or*,' as the subjects of any one legal action. This requires no example.

Where many *legal actions* are to apply to the same *legal subject*, or class of subjects, one description of the legal subject may be followed by any number of legal actions;* but these legal actions should be kept distinct by the use of distinct copulæ, and they should follow one another in the order in which they are to take place; not, for instance, directing justices 'to order and ascertain the proportions of rate to be paid,' as if they were to 'order' it first and 'ascertain' it afterwards (12 *Geo*. 2, c. 29, s. 5). The following are examples of one legal subject and a succession of legal actions;—

POOR'S RATE.

* Two or more distinct legal subjects, and two or more distinct legal actions, should never be brought together in the game sentence by means of the same copula. This always renders the meaning obscure, and causes the frequent necessity for the application of the process *referendi singula &singulis*. It is proposed by a local Act to pave the town of Brighton and to manage its poor: the purpose is described to be *to manage and pave the town of Brighton and the poor thereof, as if the poor were to be paved*.

99

Whenever it is made to appear to the Poor Law Commissioners, by representation in writing from the Board of Guardians of any Union or 'parish,' under their common seal,

or from the majority of the [1] overseers' or other officers competent to the making and levying the rate, that a fair and correct estimate for the aforesaid purposes (95 b.) cannot be made without a new valuation,

Legal Subject. . . . . THE Poon LAW COMMISSIONERS

Legal Subject	THE POOR LAW COMMISSIONERS,
1st Legal Action.	*may*
	where they see fit,
	order a survey, with or without a map or plan,
	on such a scale as they think fit,
	to be made and taken of the messuages, lands, and other hereditaments, in respect of which persons are liable to be rated to the poor's rate,
	in such parish, or in all or any one or more parishes of such a union;
2*nd.*	and *may* (order) a valuation to be made of the said messuages, lands, hereditaments, according to their annual value,
3*rd*	and *may* direct such guardians
	to appoint a fit person or persons for making and taking every such survey, map or plan, and valuation,
	and to make provision for paying the cost of every such survey, map or plan, and valuation,
	either by a separate rate, or by a charge on the poor's rate, as they may see fit.

6 & 7 *Wm*. 4, c. 96, 8. 3.

POOR'S RATE.

121

Cases	Where there is any question between any 'parishes' touching the boundaries of such 'parishes,'
	or where such parishes are desirous of having such boundaries ascertained, or a new boundary line defined;

Condition	if a majority of not less than two-thirds in number and value of the landowners of such parishes make application in writing;
Legal Subject	THE TITHE COMMISSIONERS for England and Wales,
.	or any of their Assistant Commissioners,
1*st Legal Action*	*may* deal with any dispute or question concerning such boundaries,
2*nd*	and *may* ascertain, adjust, set out, and define the ancient boundaries between such parishes,
3*rd*	or *may*
	draw and define a new line of boundary as they may see fit.
Legal Subject	And ALL THE POWERS given to the Tithe Commissioners or Assistant Commissioners
1*st Legal Action*	*shall*
	extend,
2nd	and shall
	so far as the same may, in the judgment of the Commissioners or Assistant Commissioners, be applicable to such question,
	be applied by them thereto.
	2 & 3 Vic., c. 62, s. 34.
HIGHWAY RATE.	
266	
Legal Subjects	EVERY SURVEYOR,
	district surveyor,
	and assistant surveyor,
1st Legal Action	shall within 14 days after the appointment of the new surveyor,
	make up his accounts for the year preceding in writing,
2*nd*	and *shall* sign and balance them,
	5 & 6 *Wm*. 4, c. 50, s. 44.
3*rd*	and *shall*,
	within one calendar month

sign and lay them before the justices at a special session,

5 & 6 *Wm*. 4, c. 50, s. 39.

4th and shall,

within 14 days after leaving his office

deliver his accounts,

verified before justices at special sessions

5 & 6 Wm. 4, c. 50, s. 42.

POOR'S RATE.

280 a.

If such justices think fit,

THEY *shall*

examine into the matter of every such account,

and *shall*

disallow

and strike out of every such account

all such charges and payments as they deem to be unfounded,

and *shall*

reduce such as they deem to be exorbitant,

and *shall*

specify, upon, or at the foot of such account,

every such charge or payment,

and its amount, so far as such justices may disallow or reduce the same,

and the cause for which the same ii disallowed or reduced;

and *shall* signify their allowance and approbation

of every such account

under their hands;

and *shall*

sign and attest the caption of the

same

at the foot of the account,

without fee or reward.

50 *Geo*. 3, c. 49, s. 1.

Sometimes one general *legal action* is provided with a variety of differences adjusted to a variety of different *cases*. No course is so clear as that of describing in succession each *case*, and repeating the *subject* and *action*;

-as-

POOR'S RATE.

134

THE 'OVERSEER,' or the greater part of them,

shall

take order

from time to time

with the consent (allowance) of 'two justices' to raise the rate.

43 *Eliz*., c. 2, s. 1.

b. If the 'parish' be in a county,

'TWO JUSTICES' (19, 21),

whereof one to be of the *quorum*,

dwelling in or near the division where the 'parish' doth lie,

shall allow the rate.

43 *Eliz*., c. 2, 8. 1.

13 & 14 *Car*. 2, c. 12, s. 17.

Or if the 'parish' be wholly within an exclusive jurisdiction

'TWO JUSTICES' of that jurisdiction

shall

allow the rate.

43 *Eliz*, c. 2, 8. 1.

13 & 14 *Car*. 2, c. 12. s. 17

Or if a parish lie within two places of concurrent jurisdiction,

'TWO JUSTICES' of either jurisdiction, or one of the one jurisdiction and one of the other,

shall

allow the rate.

43 *Eliz*, c. 2, 8. 8.

Or if a parish lie within two places of exclusive jurisdiction,

'TWO JUSTICES' at least of each such jurisdiction

shall

allow the rate.

43 *Eliz.*, c. 2, s. 9.

Contents of a single clause

Parliamentary considerations favour the accumulation of materials into one clause. But as a question of composition and interpretation, there can be no doubt that 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 that 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.

General application to the occasions of Legislation.

Composition of special enactments

To REVERT to the subject before adverted to, the facilitating of the work of legislation, the enabling of the Legislature to apply a special rule to the most special and minute cases, the making of the law apt and flexible, if the above analysis be correct, it will appear that intricacy. of expression is neither an aid to speciality in legislation, nor a necessary consequence of it.

It has been made to appear that however various the cases to which the law applies, each is severally simple; and if each be expressed singly, and in immediate succession, and not involved with other elements of the legislative sentence, the task of composition will be easy. Again, however various *the conditions*, each will be in itself simple; and if all be expressed in the order of their performance, it will more often be found that the one throws light on the other than that the one obscures the other. Again, as to the *legal subjects*, there is no limit to the number which may be enumerated or described one after another; and here also one subject will often throw a light on another with which it is associated. So of *legal actions*, they may be added one after another with perfect intelligibleness, if the order of their chronological succession be observed, and if the stages of their operation be indicated by prefixing to each new legal action 8 description of the incidental case.

-Amendments in bills

IT WILL HENCE BE SEEN that this order of expression involves no impediments—but rather affords facilities for the introduction, during the progress of a Bill, of amendments analogous to the original matter. If another *case* is to be included, its place is obvious; if some case is to be excepted,

again nothing is easier than to insert amongst the cases the description of the exception. If further *conditions* on the action are required, the place for them is apparent. If the extent of the law is too narrow or too wide, *the legal subject* presents itself distinctly to be enlarged or restricted. If legislation be admitted to be required for the cases on the conditions expressed, and in respect of the legal subjects enumerated, but the nature or quality of the legislation be in question, that question is limited to *the legal action*. A little attention will convince the reader, that if the essential parts of legal sentences were kept distinct and conspicuous in a Bill, the difficulty of criticising a measure while in its progress through Parliament must be greatly diminished: that it would be comparatively easy to show the excesses or omissions of each enactment, and to call the promoters of a Bill to account; while it must be in the same degree difficult for sophistry to cast a doubt about the elements of a measure, all of which were exposed so simply and conspicuously. The question of a member, For what case does this enactment apply? or, Is this enactment absolute and without condition? or, Who is to have this right,—to be compelled to this sacrifice, —to exercise this authority? or, When, where, and how, is it to be exercised? calls attention at once to the enunciation of *the case, the condition, the subject, the action*, respectively. The smallest inconsistency between the answer of the conductor of the Bill, and the expression in the Bill of either of these elements, will at once compel the insertion of modifications accordant with his explanations. The unfair and unavowable legislation which now sometimes passes in the confusion of an intricate phraseology, would be prevented at once.

The mere literary composition of a statute will, by fixing the attention on these elements, be as much facilitated as its interpretation will afterwards be. The multitude of instances to be found in the following appendices, or those cited as examples in the present suggestions, where modifications and amendments of an original law have been made by a series of subsequent Acts, which modifications and amendments are fully expressed by a word or phrase interpolated in *the case, the condition, the subject*, or *the action*, will serve to prove beyond a question the facility with which the like modifications and amendments might, if they had been thought of, have been introduced either in the original draft of the Bill, or in its course through Parliament. The compiler may, perhaps, be allowed to adduce his further personal experience, that in making a compilation of the whole of the Statute Criminal Law in force before the year 1833, and the whole of the Poor Law Statutes passed from the beginning of George Ill.'s reign till the year 1840, no single instance occurred to him in which the statement of what he understood to be the law, in the very terms of the law, was not perfectly easy on the plan proposed.

On the other hand, it is a matter of astonishment that expressions so intricate as those in which the law is now ordinarily expressed can ever be brought to a grammatical close. It requires the most* consummate skill in

language to interweave cases, conditions, subjects, and actions, with all their limitations, exceptions, qualifications and consequences into one sentence; and when it is considered that this is sometimes done in a phraseology which is not English, it passes comprehension how the draftsman could ever get through his task. In such instances as the following, it will be seen, by comparing the original statement with the re-statement in the summary, how a wonderful ingenuity in making and threading a maze of language is only thrown away, and how a much more humble amount of skill would be sufficient to effect all the purposes in a much more satisfactory manner.

Original

The numbers indicate what should be the order.

1*st Copula*, first fragment. It *shall* be lawful

1*st Legal Subject*.	to and for the justices of the peace of any county, or the major part of them, in general or quarter sessions, or at any adjournment or adjournments thereof assembled,
1*st Case*.	as often as they *shall* have deemed it necessary to make a rate or rates, assessment or assessments, on all the rateable property within the limits of their jurisdiction, according to the fair annual value of the same, as derived from any or all of the several sources of information which are hereinbefore mentioned;

1*st Copula*, second fragment *and they are hereby authorized and empowered*

1*st Legal Action*.	to order warrants to be from time to time issued in the same manner as now authorized and practised by law for collecting the county rates,
	to the several high constables within their respective counties,
	ordering and requiring them
2*nd Legal Action*	to issue their warrants to the respective overseers of the poor within their respective divisions to levy, collect, and pay to the said high constables,
	within the time to be named and limited m the warrant to be issued from the sessions as aforesaid,
	all such rate or rates, assessment or assessments,

Amended statement

County Rate.

196

When the justices of the peace in general or quarter sessions have made a rate,

THEY *shall*

from time to time

issue their warrants

to every high constable within the county,

requiring him, at a time to be specified in the warrant,

to collect the same from the overseers within his division,

and to pay the same to the treasurer of the county at a time to be named in the warrant.

a. When the high constable has received the warrant of the justices at quarter sessions,

HE *shall*

issue his warrants

to the respective overseers (and other persons required to act as overseers) within his division,

requiring them to levy and collect such rate, and to pay the same to him, within the time named in the warrant of the justices,

and at such a time as he may specify in his warrant,

C. SUCH OVERSEERS,

or other persons appointed to act as overseers,

shall

levy and raise

Original

6*th Legal Subject and Action* which each high constable *shall and he is hereby directed and required to pay*

expressed parenthetically. at such time as shall be specified in such warrant,

to the treasurer of the county for the time being,

7*th Legal Subject and Action* to be applied and disposed of in such manner and for such purposes as the county stock or rate is now applicable, or may hereafter be made applicable by law;

—*Case* to the 7th *Legal Action* And in cage any overseer or overseers of the poor, or other person appointed to act as such under the provisions of this Act, in any of the several parishes, townships, or places, whether parochial or otherwise, within any county liable to pay the same,

shall neglect, make default, or refuse to pay the same, within the time to be specified and limited for that purpose as aforesaid, ,to the high constable of the division within which such overseer or overseers, or other person or persons so liable and neglecting to pay, shall reside or be appointed to act,

Copula *it shall and may be lawful*

Legal Subject for any justice of the peace of the said county,

Condition. upon complaint thereof made by any such high constable,

5*th Legal Action*. by warrant under the hand and seal of any such justice, to levy the game by distress and sale of the offender's goods;

Amended statement

by an equal rate or assessment upon the estates and property rateable to the relief of the poor within their respective 'parishes' or 'places,'

such sums of money as may be necessary to raise the county rate assessed on such 'parishes' or 'places,'

or as may be necessary to reimburse such overseers or other persons such sums of money as they may respectively have paid on account of such county rate.

And THE OCCUPIERS for the time being of such estates and rateable property, (and the inhabitants, parsons, vicars, and others liable to be rated to the relief of the poor?)

shall

pay such rate,

197

If any 'overseer'

or other person appointed to act as such in any 'parish' or 'place' (f. g. h.),

neglect, make default, or refuse

to pay the sum of money

assessed on his 'parish'

or 'place,'

at the time specified in the warrant of the high constable (196 a.

and if such high constable make complaint thereof before any one justice of the peace

SUCH JUSTICE

may,

by warrant under his hand and seal,

levy the same

Original

Legal Subject.	And the overseer or overseers of the poor of any parish, township, or place, whether parochial or otherwise, or other person or persons appointed to act as such overseer or overseers,
Copula.	*shall, and may, and is, and are hereby empowered*
3*rd Legal Action*.	to levy and raise by an equal rate or assessment upon all and every the several estates and property rateable to the relief of the poor, within their respective parishes, townships, or places, whether parochial or otherwise, such sum and sums of money as shall be required and necessary, in order to raise the several sums assessed upon such parishes, townships, or places respectively, or to reimburse such overseer or overseers, or other person or persons as aforesaid, such sum or sums of money as they shall respectively have paid on account of the same;
4*th Legal Action*.	such rate or assessment to be paid
4*th Legal Subject*.	by the occupier or occupiers for the time being of such estates and rateable property as aforesaid.

55 *Geo*. 3, c. 51, s. 12.

Amended Statement

by distress and sale of the goods and chattles of the 'overseers,'

or either of them,

or of any such other person appointed to act as, overseer, =

rendering to the owner thereof the overplus,

if any there be, after deducting the money assessed and the charges of distress and sale.

249

When the high constable has received the rate from the overseers, or from the other persons required to pay the same (196 c.)

and when the time specified in the warrant of the justices has arrived

HE *shall*

pay it to the treasurer of the county.

252

THE SUMS or MONEY paid into any treasurer's hands, by virtue of his appointment

shall

be deemed and taken to be the public stock.

Remarks on the Abuse of Provisoes.

Occasions for Provisoes

IT IS MOST DESIRABLE that the use of provisoes should be kept within some reasonable bounds. It is indeed a question whether there is ever a real necessity for a proviso. At present the abuse of the formula is universal. Formerly they were used in an intelligible manner;— where a general enactment had preceded, but a special case occurred for which a distinct and special enactment was to be made, different from the general enactment, this latter enactment was made by way of proviso. For instance, the 43 Eliz., c. 2, having made dispositions for the relief generally of the poor in all parishes in England, proceeds by way of proviso to make a special enactment for the Island of Foulness, in Essex, adapted to its special circumstances. The proviso might still be legitimately used on the same plan, of taking special cases out of the general enactments, and providing specially for them.

Interpretation of Provisoes

Nothing has inflicted more trouble on the judges than the attempt to give a construction to provisoes. The Courts have generally assumed, in accordance with the old practice just described, that a proviso was a mode of enactment by which the general operation of a statute was excluded in favour of some case. There are, therefore, in their decisions, various distinctions propounded between mere exemptions, or exceptions, or salvoes and proper provisoes. But it is admitted by all writers, to be impossible to make any general application of the doctrines laid down by the Courts to the multitude of cases in which the formula of a proviso has been adopted. Where the form of a proviso in fact serves only to make a mere exception, how can a doctrine which distinguishes a proviso from an exception apply? And what common doctrines of interpretation can possibly be applied to the innumerable provisoes used in our statutes only as formulæ for heaping together matter wholly unconnected, or only so remotely connected as to be incapable of being combined with the rest, by the use of any form of speech of a settled meaning?

Present use of Provisoes;-

The present use of the proviso by the best draftsmen is very anomalous. It is often used to introduce mere exceptions to the operation of an enactment,

-as exceptions;

where no special provision is made for such exceptions. But it is obvious that such exceptions would be better expressed as exceptions; if particular cases were excepted, to be expressed in the case; if particular conditions were dispensed with, to be expressed in the condition: if certain persons were to be excluded from the operation of the enactment, to be expressed in the subject. In fact, where the enunciation of the general provision is merely to be negatived in some particular, the proper place for the expression of that negation is by an exception expressed in immediate contact with the general words by which the particular would otherwise be included. This would make, in all cases, the definition of the case, condition, subject, or action, complete at once, that is to say, it would show in immediate contact all that is included and all that is excluded.

to define *the case*,-

Bills, in other respects well drafted, often use provisoes to limit to some particular case or cases, an enactment stated at first in general terms. This is

-or *the condition*,-

-or *the legal subject*,-

-or the *legal action*;-

merely to displace and disguise the case. Sometimes provisoes are used to introduce a condition on the general enactment— a displacement and disguise of the condition; sometimes they define the persons on or through whom the enactment is to operate—a displacement and disguise of the legal subject; sometimes they determine the time, place, manner, or circumstance of the operation of the enactment—a displacement and disguise of the legal action.

-to mark successions;-

Another common use of provisoes is to introduce the several stages of consecutive operations. In such cases the words "provided always" are mere surplusage, or should be replaced by the conjunction "and."

-to disguise incoherence.

Worse than all the above anomalies, however, is the use commonly made by ordinary draftsmen of the proviso. Wherever matter is seen by the writer to be incapable of being directly expressed in connexion with the rest of any clause, he thrusts it in with a proviso. Whenever he perceives a disparity, an anomaly, an inconsistency, or a contradiction, he introduces it with a "provided always."

Examples

The following are a few instances of the misuse of provisoes. In the 3 Vic. c. 15, s. 28, a general power is first conferred on the Tithe Commissioners—next, a condition is imposed that before they exercise the power, application must be made to them in writing: involved amongst the terms of this condition is the definition of the case to which the entire authority of the Commissioners is limited. Next follows a proviso, which prescribes imperatively ('shall') all the conditions to be performed by the Tithe Commissioners before they exercise the powers given by the first words of the enactment; next follow in the terms of a prohibition, ('No Assistant Commissioner shall') and apparently not included in the proviso, what are only other conditions precedent on the exercise of the Commissioners' authority ; then follows in imperative language ('shall') a direction as to the exercise of the power, to which is joined a confirmation of the powers expressed by way of a dispensation from certain other conditions: lastly comes another proviso, describing a condition on which the exersise of the whole power depends. The original is here set forth in contrast with the mode of statement recommended in its place :—

1. *The Original.*

The numbers in the margin (9, 8, 10, 2, 1, &*c*.) show the displacement from the proper order.

	And whereas by the said lastly recited Act powers are given to the said Commissioners, or any Assistant Commissioners, upon the application in writing of not less than two-thirds in number and value of the landowners in any parishes or townships, to set out and define the boundaries of such parishes or townships in manner in the said Act provided; and it is expedient to extend such power in manner hereinafter mentioned; be it enacted,
9. *Copula*.	That *it shall be lawful*
8. *The Legal Subject*	for the said Commissioners, or Assistant Commissioners
10. *The Legal Action*.	but at the sole discretion of the said Commissioners, and only in such manner as they *shall* see fit and proper, to exercise all and every the powers so given by the said lastly-recited Act relating to boundaries of parishes or townships,
2. The first *Condition*,	on the application in writing of two-thirds in number and value of the landowners of any one parish, place, or township;
1. *The case*	whose boundary shall be in question,
11. Fragment of the *Legal Action*	notwithstanding the landowners in the parish, place, or township adjoining such boundary *shall* not join in such requisition;
4. The third *Condition*.	Provided always, that in every such case the said Commissioners, or Assistant Commissioner, *shall*, 21 days at least before proceeding to make inquiry and adjudicate on such question of boundary,

2. *Proposed mode of Statement*

Where there is any question touching the boundary of any 'parish' or 'place,'

if two-thirds in number and value of the landowners, of any such parish or place, apply in writing to the said Tithe Commissioners,

and if the said Commissioners think fit to make inquiry on such question of boundary;

and if the said Commissioners, or any of their Assistant Commissioners,

cause notice to be sent by post, or otherwise given,

21 days at least before proceeding to make such inquiry,

addressed to the churchwardens and overseers,

and also to the surveyors of the highways of every 'parish' or 'place' adjoining such boundary,

of the intention of the said Commissioners or Assistant Commissioners, to proceed on the question of such boundary,

and of the time and place of meeting so to proceed therein ;

and if the said Commissioners or Assistant Commissioner, annex to each copy of such notice, a copy of the said application of the landowners;

The Original

. cause a notice to be sent by the post, or otherwise given, addressed to the churchwardens and overseers, and also to the surveyors of the highways of every parish, place, or township adjoining such boundary, of the intention of the said Commissioners, or Assistant Commissioner, to proceed on the question of such boundary, and shall specify in such notice a time and place of meeting so to proceed therein;

5. The fourth *Condition*. and *shall* annex to each copy of such notice a copy of the application of the landowners requiring the Commissioners to make such inquiry and adjudication,

6. The fifth *Condition* and *shall* also cause a copy of such notice to be inserted once at least in two successive weeks previous to the day of such meeting in some newspaper having circulation in the county where such parish, place, or township is situated;

14. A second *Legal Action* and no Assistant Commissioner shall proceed in any such inquiry

13. The Condition of the second Legal Action. without exhibiting at such meeting the papers containing the advertisements of such notice and also a certificate under the hands of the said Commissioners, or any one or two of them, of one copy of such notice having been respectively sent to such churchwardens and overseers, and a copy to such surveyors, as aforesaid;

15. A third Legal Action. and the Assistant Commissioner shall thereupon proceed in all respects,

Proposed mode of Statement

and if the said Commissioners, or Assistant Commissioner, also cause a copy of such notice to be inserted, once at least in two successive weeks previous to the day of meeting, in some newspapers circulating in the county where such 'parish' or 'place' is situated;

and if, during the interval of such 21 days,

no application be made in writing

addressed to the said Commissioners

by two-thirds at least in number and value of the landowners;

in any parish or place adjoining such boundary,

not being parties of the aforesaid application,

objecting to the said Commissioners or Assistant Commissioners proceeding in the matter of such boundary;

THE SAID TITHE COMMISSIONERS, or any of their Assistant Commissioners,

may

at the sole discretion of the said Commissioners,

and only in such manner as they shall think fit and proper,

exercise all and any of the powers given to them by the Acts relating to boundaries or parishes (121),

notwithstanding that the landowners in the 'parish' or 'place adjoining such boundary have not joined in such application.

a. And where any Assistant Commissioner intends to proceed in any such inquiry at any meeting,

unless he exhibit at the meeting

the papers containing the advertisement of such notice,

and a certificate under the hands of the said Commissioners, or any one or two of them of one copy of such

The Original

16. A fourth *Legal Action*. and his proceeding shall be as valid and binding as if the said inquiry had been instituted on the application in writing of two-thirds in number and value, as well of the landowners of the parish, place, or township to which such notice shall have been so sent as of the parish, place, or township causing such inquiry to be instituted.

7. The sixth *Condition*. Provided nevertheless that upon the application in writing, addressed to the said Commissioners during the interval of such 21 days, of not less than two-thirds in number and value of the landowners in any parish, place, or township adjoining such boundary, and not being parties to any such application as aforesaid, objecting to the said Commissioners, or Assistant Commissioner, proceeding under the same in the matter of such boundary, all proceedings which shall have been instituted upon the application of such single parish, place, or township under this Act, shall forthwith be stayed.

Proposed mode of Statement

notice having been respectively sent to such churchwardens and overseer, and one copy to such surveyors as aforesaid,

HE *shall not*

proceed in such inquiry.

And thereupon

THE ASSISTANT COMMISSIONER

shall

proceed in all respects,

as if the inquiry had been instituted on the application in writing,

of two-thirds in number and value,

as well of the landowners of such 'parish' or 'place' to which such notice has been so sent

as of the parish or place causing the inquiry to be instituted;

And HIS PROCEEDINGS

shall

be as valid and binding as if the inquiry had been so instituted.

The following is a specimen of the manner in which provisions having some connexion, but only a remote one, with each other, are jumbled into one clause by the formulæ 'Provided always,' and 'Provided also;'

> And be it enacted that the justices present at any such special or adjourned session shall, for the aforesaid purpose, have all the powers for amending or quashing any such rate so objected to of any parish or other district within their division, and likewise of awarding costs to be paid by or to any of the parties, and of recovering such costs, which any court of quarter sessions of the peace has upon appeals from any such rate, except as here excepted :
>
> Provided always, that no order of the said justices shall be removed by certiorari or otherwise, into any of His Majesty's Courts of Record at Westminster :
>
> Provided also, that nothing in this Act contained shall be construed to deprive any person or persons of the right to appeal against any rate to any court of general or quarter sessions;
>
> Provided also, that no order of the said justices in special session shall be of any force pending any appeal touching the same subject matter to the court of general or quarter sessions of the peace having jurisdiction to try such appeal, or in opposition to the order of any such court upon such appeal.
>
> G & 7 *Wm.* 4, c. 96, s. 7.

An example may be seen in the 57 Geo. Ill., c. 94, s. 2, of a long enactment relating to the levy of a rate, upon which is grafted, by way of a proviso, a provision in no wise relating to the levy of rates, namely, a condition upon all appellants that they shall give 14 days' notice of appeal against a rate.

It is the belief of the compiler that in the whole body of the statute law digested in the following Appendix, out of many hundreds of provisoes not one is to be found legitimately introduced, nor scarcely one to which the doctrines of the courts as to the construction of provisoes, could be made by any ingenuity to apply. Perhaps cases may occasionally occur in which the proviso might be found a useful formula; but considering the obscurity of the doctrine on the subject of the construction of provisoes, it is even questionable whether a correct use of the proviso would secure a correct interpretation. It would, therefore, probably be better never to admit the formula at all. At all events if it were limited to proper occasions it would not ordinarily make its appearance once in all the Acts of a session.

*The Language** of Statutes. Verbs.*

Verbs,-

-in compulsory sentences;

THE attempt to express every action referred to in a statute in a future tense renders the language complicate, anomalous, and difficult to be understood. The practice is founded apparently on a false assumption that the Words 'shall' and 'shall not' put the enacting verb into future tense. But in all commanding language at least the word 'shall' is modal, not temporal; it denotes the compulsion, the obligation to act, (*scealan*, to owe, to be obliged.) and does not prophesy that the party will or will not at some future time do the act. 'Thou *shalt* do no murder' is not a prediction, but the 'shalt' is obligatory in the present tense, continuously through all the time of the operation of the law. When the verb '*may*' is used, the appearance of the future tense unquestionably disappears from the enacting verb; as it does equally in the numerous cases in which such words are used as 'he is hereby authorised, empowered, required to,' *&c*. 'the same is hereby declared to be null and void,'

-in sentences descriptive of the *case*;

But because the enactment, the *legal action*, is supposed to be sometimes (that is, where *'shall*' is used) in the future tense, the further attempt is made, for consistency sake, to express the circumstances which are required to precede the operation of the enactment, that is, the *case* or the *condition*, either in the future or perfect future. We thus have unceasing repetitions of such phrases as,

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* In modern Acts it has become very much the practice to give arbitrary senses to terms, by means of a declaration in an interpretation clause, that certain words or phrases shall have a more extended or more restricted meaning than they have by common usage. When the words are invariably used in the same Act, in the same extended or restricted sense, there is only one objection to this practice, and that is, that it demands an incessant consciousness in the writer and in the reader, that the words are arbitrarily used, and a constant vigilance least something proper to be included be lost, or something proper to be excluded be carried, by the arbitrary change in the sense of ordinary terms. The danger is evidently increased where it is intended that the restriction or extension is not to apply universally wherever the word is used in the Act; but only, as is commonly declared, when the context may reasonably admit of the arbitrary construction. This, though it may make the process of legislating easy by dispensing with distinctions in the statute, leads to many surprises, particularly in the case of amendments introduced by persons who have not considered the effect of the construction clause; and it evidently amounts generally only to this, that people must get a decision by means of litigation as to the meaning of the Act, which it is troublesome to the draftsman to determine expressly and beforehand. But far the worst operation is that which all persons conversant with the progress of bills in Parliament must be very conscious of, namely, the opportunity which these interpretation clauses afford for concealing important and extensive effects under what appears to be an innocent definition of some unsuspected word; nothing being more common, when 8 provision is wanted which cannot be openly proposed, than the enquiry whether it cannot be disguised in a construction clause. The courts of law are aware how little light a construction clause throws on the real deliberate intention of Parliament, and therefore pay very small respect to them; but this does not diminish the difficulty of those who have to obey the law, who between the ordinary meaning of the words, the arbitrary enlargement or contraction of that meaning, and the ignorance of the extent to which the courts of law would apply that enlargement or contraction in 811 the parts of the statute where the word occurs, are wholly confused by these definitions, instead of being, 88 is the proper effect of 8 definition, made by their Bid more certain of the meaning.

Definitions should challenge attention by being placed before, not ag is the more common practice, after, the matter to which they have reference.

The words defined ought always to be distinguished, whenever used in Bill, by some mark, as for instance, by quotation mark8. This is done in the following appendices.

—if any person *shall* give notice, he may appeal, &c.;

—if the said commissioners *shall*, by any order, &c.;

—all elections *shall* hereafter, so far as the said commissioners *shall* direct, &c.;

—in case any person *shall* wilfully neglect or disobey, &c.;

—when such notice *shall have been* published,

—if any balance *shall have been* found to be due, &c. ;

Here are two specimens in quite a different style from two adjacent clauses:

Provided always, and the said commissioners are hereby authorized, if they shall so think fit, &c.,

4 & 5 *Wm*. 4, c. 76, s. 28.

Provided always, and the said commissioners are hereby authorized if they see fit, &c.,

ib. s. 29.

-an error as to retroactive construction.

It is supposed sometimes that it is necessary to describe *the case* and *the conditions* in the future or perfect future, for fear that if it were expressed in the present tense, as, 'when any person *is* aggrieved,' the law would operate only upon cases existing at the moment of the passing of the Act; or that if it were expressed, 'when any person *has been* convicted,' &c., the law would be retrospective, and apply only to convictions previous to the passing of the Act. But this apprehension is entirely founded on a mistake. The rule of interpretation is never to give a retrospective effect to a statute, except when a retrospective intention is manifested by clear words; accordingly there are multitudes of instances existing, in the statutes, of cases, including many descriptions of offences, where the construction of the statute would be most strict, in which the verbs are in the present or past tense. Some of these will be presently cited.

-a rule proposed for the use of verbs in *cases* and *conditions*.

If the law be regarded while it remains in force as *constantly speaking*, we get a clear and simple rule of P expression, which will, whenever a case occurs for its application, accurately correspond with the then state of c facts. The law will express in the present tense facts and conditions required to be concurrent with the operation of *the legal action*; in the perfect past tense, facts and conditions required as precedents to *the legal action*; thus,

—present tense, the facts required to be concurrent with the legal action,—

The law.— Where by reason of the largeness of parishes the inhabitants *cannot* reap the benefits of this Act,

Two OR MORE OVERSEERS shall be chosen, &c.

—the facts.— Whereas; by reason of the largeness of the parish of All Saints, the inhabitants thereof *cannot* reap the benefit of the Act, &c., now therefore, &c.

The law.— Where the justices of the peace of the county *are excluded* from holding jurisdiction in any liberty, franchise, &c.,

ALL THEIR POWERS, &c., shall, &c.

—the facts.— Whereas the justices of the peace of the county of Herts are excluded from holding jurisdiction in the liberty of St. Albans, now, therefore, &c.

—perfect tense, the facts required to have preceded the legal action,—

The law.— When the justices of the peace of any 'county assembled at quarter sessions' *have agreed* that the ordinary officers appointed for the preservation of the peace are not sufficient for the preservation of the peace, the protection of the inhabitants, and the security of property within the county,

and when they *have set forth* the same, and *have declared* how many constables are in their opinion needed for the aforesaid purposes, and what rates of payment it would be expedient to pay to the chief and other constables,

and when such report *has been sent* to one of Her Majesty's Principal Secretaries of State,

and when one of Her Majesty's Principal Secretaries of State *has made* and finally *settled* any rules for the government, pay, clothing, accoutrements, and necessaries of such constables;

and when such rules as finally settled (?) *have been received* from the Secretary of State by the clerk of the peace of such county;

THE SAID JUSTICES *may* appoint a chief constable, &c.

—the facts.— Whereas the justices of the peace of the county of Herts assembled at quarter sessions *have agreed* that the ordinary officers appointed for the preservation of the peace, the protection of the inhabitants, and the security of property within the said county.

and whereas they *have set forth* the same, and have declared that 200 constables are in their opinion needed for the aforesaid purposes, and that the rate of payment which it would be expedient to pay to the chief constable is by the year, and to the other constables, is s. by the week,

and whereas such report *has been sent* to one of Her Majesty's Principal Secretaries of State,

> and whereas one of Her Majesty's Principal Secretaries of State *has made* and finally *settled* certain rules for the government, pay, clothing, accoutrements, and necessaries of such constables;
>
> and whereas such rules as so finally settled *have been received* from the Secretary of State by the clerk of the peace of the said county,
>
> now we, THE SAID JUSTICES do hereby, &c.

This mode of expression, assuming the law to be always speaking,— *reciting facts concurrent with its operation, as if they were present facts,* and *facts precedent to its operation, as if they were past facts,*—has two very considerable advantages :

—First, it avoids the necessity of very complicated grammatical construction in the statement of cases and conditions, often involving the use of futures, perfect futures, and past conditionals—

> if a person *shall* be convicted of, &c.; and if he *shall have been* before convicted of the same offence; and if he *shall* not *have* undergone the punishment which he *should have undergone* for the offence of which he *shall have been so before convicted*.

Secondly, keeping the description of cases and conditions in the present and in the perfect tenses, it leaves the imperative and potential language of *the legal action* clearly distinguished, by the broadest and most intelligible forms of expression. Narration will appear in narrative language, instead of being allowed, as now, to usurp imperious language, and thus to confound *the facts* and *the law*.

There are many partial examples to be found in statutes of the practice now recommended for adoption universally; but they are not deliberately used, and are often mingled in the same sentence with the contrary practice. Thus—

> 'If the Court shall order the sum at which any person *is* rated, to be raised.'—41 *Geo*. 3, c. 23, 8. 17.
>
> 'If any one duly rated to a Church Rate, the validity of which *has not been* questioned.'
>
> 'Any justice of the peace of the county, &c., where the church *is* situate 53 *Geo*. 3, c. 127, s. 7.
>
> 'Any justice, &c., other than such justice as *is* patron of the church.'—l *Geo*. 1, stat. 2, c. 6, s. 2.

A penal example.

> 'If it shall appear that the husband or father, &c., *is* an idle or disorderly person, able to work, but by his neglect of work, or

> for want of seeking employment, or by spending the money *he earns* in alehouses or places of bad repute, *does not* maintain his wife or children, and *suffers* them to be reduced to want, it shall be lawful,' &c.— 22 *Geo*. 3, c. 83, s. 35.

-rules as to language of cases, conditions, and of *legal subjects* and *actions* recapitulated,

THE LANGUAGE appropriate in other respects to *the case*—that it should be hypothetical; to *the condition*— that it should be conditional; to *the legal subject*—that it should be simply nominative; to the copula, and to *the legal action*—that it should be facultative or imperative, has been adverted to before, in treating severally of these elements of a legislative sentence.

IN CONFORMING to these rules, it is to be observed that, after all, nothing is more required than that instead of an accidental and incongruous style, the common popular structure of plain English should be resorted to.

There is apparently a notion amongst amateurs, that legislative language must be intricate and barbarous. Certain antick phrases are apparently thought by them to be essential to law writing. A readiness in the use of 'nevertheless,' 'provided always,' 'it shall and may be lawful, and he is hereby authorized, empowered and required to,' 'anything in any Act or Acts to the contrary notwithstanding,' &c. &c., seem to be admitted to constitute the qualification for drawing Acts of Parliament. The merit appears to mount higher in proportion as the author can succeed in including a greater number of limitations, qualifications, conditions, and provisoes, between the nominative case and its verb, or any other pair of dependent words. It is, however, a clear mistake to think that this absurd style, prevalent as it is, and much as we sacrifice to adhere to it, has the sanction of authority. The bills prepared by judges and well-informed lawyers, or by men really practised in the forms of legal expression, have at all times been, as a rule, remarkable for simplicity and directness, and allowing occasionally something to the technical nature of the subjects, for the popularity of their style and construction.

If it could be made to be generally recognised 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.

Review.

IT WILL, PERHAPS, SEEM to be a great waste of care to make all these distinctions, as to the elements, the method of distribution, and the expression of a *single legislative sentence*. It may seem as if the whole structure of a complicate statute should be more readily explained than the structure of a single sentence seems to be explained in the foregoing observations.

But it is of these simple elements that the whole law consists. If these be not well discriminated and well marshalled in each sentence, there is no hope for their being well combined in the whole law. On the other hand, if each single sentence be well constructed, though the large divisions of the whole statute be ill-combined, the parts will still be clear—the law will still be

certain when it is found, although by bad arrangement made less capable of being readily discovered; and the worst effect that could result would be that the law would then consist of an ill-connected mass of well-expressed provisions, instead of being, as the statute law now is for the most part, an ill-connected mass of ill-expressed provisions.

It is scarcely possible that the single sentence can be systematically framed, on good principles, without an equal improvement taking place in general arrangement, at the first stage, of each individual statute; and at the next stage, of the more general heads of the law, and thus the objects referred to at page 184, of facilitating special legislation, and at the same time securing consistency in principles, and generality in expression, is made more attainable ; for how can *the case* be always placed foremost without its being apparent how often, for the same case, different provisions are made,—how often verbal, formal, and accidental variations are made in the description of cases in essentials the same; and how can any one resist the immediate conclusion that the expression of all such cases should be made identical, and the various enactments for the same case combined together? Or, where *conditions* are found in a constant place and order, can they be as capriciously introduced, varied, or abandoned, as now? and where analogous conditions are imposed in various cases, will not the principle of these conditions force itself on attention, and compel their extension to all other cases coming within the same principle? Where *the subject* is always kept conspicuous, is it probable that the same persons can be constantly brought into view, without suggesting the identity of their conditions and relations, and the propriety therefore of the generalisation of the law applicable to them, or without compelling the extension to all such persons of the rights only withheld from some by accident, and of the obligations only escaped by others by like accident? Again, can the *legal action* be placed uniformly and conspicuously before the legislature or the public without attention being called to every new experiment in legislation, to every anomaly in legal action, or without causing more consistency to be observed in the creation and expression of rights, obligations, powers, sanctions, and vindications; or without producing, by the concentration of attention upon the functional part of legislation, a better appreciation of the legislator's peculiar business, and a more systematic performance of it?

If these questions, or any of them, are to be answered in the affirmative, the foregoing discussion of the elements and form of a legislative sentence, long as it is, will be in some measure justified.

GEORGE COODE.

Inner Temple,

July 25, 1842.