

# Sir William Dale Annual Memorial Lecture

## Is Legislation Literature?\*

*Sir Geoffrey Bowman* \*\*

### A Introduction

By way of prelude, let me suggest that literature (or something approaching literature) can sometimes be found in fairly unlikely material. The celebrated orders of the seafarer Sir John Hawkins given to his men in 1564 conjure up a vivid and humane image, and they are expressed with clarity and simplicity –

Serve God daily, love one another, preserve your victuals, beware of fire, and keep good company.<sup>1</sup>

Or consider the quiet dignity, and the appeal to a startled imagination, of a sign such as this if you were to see it on a motorway –

Emergency telephone 150 miles ahead.

Or you might experience an elegant stirring of the imagination if you were to come to a roundabout in France and see two signs, one reading ‘All directions’ and the other reading ‘Other directions’.

If communications like these can display some of the qualities of literature, can legislation do the same?

Let me appeal to your imagination by mentioning some stirring events of 1869. The Suez Canal was opened, the Cutty Sark was launched on the Clyde, John Stuart Mill’s essay deprecating the subjection of women was published, and the Parliamentary Counsel Office was established in London. The first head of the Office was the great Henry Thring (later Lord Thring). He was born on 3 November 1818, so today is the anniversary of his birth. He retired in 1901. By then he was said to have become pedantic and narrow as a result of the drudgery of legislative drafting.<sup>2</sup>

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1 See, for example, R. Unwin, *The Defeat of John Hawkins*, Pelican Books 1962, pp. 49-50; N.A.M. Rodger, *The Safeguard of the Sea, A Naval History of Britain 660-1649*, Penguin Books 2004, p. 311.

2 See Jehu Junior in *Vanity Fair*, 29 June 1893.

I can readily believe that verdict. For although the legislative drafter ranges over the whole law and a large part of human activity, on a technical level the drafter operates within narrow limits. And one consequence is that it is difficult to produce anything that would normally be called literature.

Dr. Helen Caldwell tackled this subject in her stimulating essay “Can legislation rank as literature?”<sup>3</sup> She answered the question by reference to factors like vocabulary, layout, cross-references, parenthetical words, and purpose clauses. And she drew on the evidence of a database. I want to approach the question from a different angle, one which is less scientific and perhaps more intuitive.

First, here is a quotation from Tennyson’s *Locksley Hall* –

And she turned – her bosom shaken with a sudden storm of sighs –  
All the spirit deeply dawning in the dark of hazel eyes.<sup>4</sup>

Those sensitive and mellifluous lines appeal to our emotions. And they certainly amount to literature.

Contrast this quotation from the Health and Social Care Act 2012 –

Any person who provides a health care service for the purposes of the NHS must hold a licence under this Chapter.<sup>5</sup>

That is restrained and dull. It would not be called literature, unless we took literature to mean literally anything in writing – which I do not propose to do.

## B Literature

What, then, do we mean by literature? In his *Life of Abraham Cowley*, Dr. Johnson refers to Cowley’s biographer, Dr. Thomas Sprat, as –

an author whose pregnancy of imagination and elegance of language have deservedly set him high in the ranks of literature.<sup>6</sup>

These words are praise indeed from such a giant literary figure as Dr. Johnson. And in them we have an indication of what we generally mean by ‘literature’. First there is the content, or some creative or imaginative element that excites a response in the reader. Secondly there is the form, or elegance of language.

3 C. Stefanou and H. Xanthaki (Eds.), *Drafting Legislation – A Modern Approach*, Ashgate Publishing Ltd, 2008, Chapter 17.

4 *The Poems of Tennyson*, Longmans 1969. *Locksley Hall* is at pp. 688-699, and the lines quoted are at p. 691 (lines 27 and 28).

5 Health and Social Care Act 2012 (c.7), Section 81(1).

6 S. Johnson, *Lives of the English Poets*, The World’s Classics (Oxford University Press) 1964, Vol. I, p. 1. Johnson’s *Lives of the English Poets* were first published in 1779 and 1781. Lord Macaulay admired the ‘great propriety and dignity of style’ of Sprat’s prose compositions: see T.B. Macaulay, *The History of England from the Accession of James II*, Everyman’s Library, Vol. 2, Chapter IX, p. 29.

These two elements were in the mind of C.S. Lewis when he wrote one of his finest books, *The Allegory of Love*. For he wrote that both the content and the form of medieval allegorical love poetry will repel the modern reader.<sup>7</sup>

That sentiment could just as easily apply to statutes. Nobody in search of a good read would be likely to turn to an Act of Parliament. Neither the subject matter nor the style is likely to appeal. If statutes are literature at all, they are literature of a kind that is very limited and stark. This is because the legislative drafter has to work in an environment that is substantially different from that in which many other authors operate. Let me give some instances.

### C Subject Matter

First there is the subject matter. Most authors are free to choose their own subject. But the drafter has no choice in the matter. You may get something as appealing as human rights. But you are more likely to be given something without obvious appeal, such as diseases of fish.

In fact, so far as the drafter is concerned, the subject matter is not of prime importance. The fascination tends to come from other factors, such as the intellectual challenge and the attempt to produce an orderly and neat product from a mass of material. But we need to consider not only the drafter's perspective but also the reader's. If the subject matter is dry and unappealing so far as the reader is concerned, the drafter is to some extent hampered from the start.

For instance, the drafter is unlikely to be able to start a Bill with anything as tantalising as the opening sentence of Gibbon's *Decline and Fall of the Roman Empire*. It starts us on an inspiring journey of hundreds of pages expressed in majestic and felicitous prose. And the first sentence reads –

In the second century of the Christian Aera, the empire of Rome comprehended the fairest part of the earth, and the most civilised portion of mankind.<sup>8</sup>

Contrast the first sentence of the legislation creating a new tax which reads –

A tax, to be known as insurance premium tax, shall be charged in accordance with this Part.<sup>9</sup>

That is stark and functional. There is no scope for elevating it into literature. And one of the reasons is that the subject matter is unappealing.

7 See C.S. Lewis, *The Allegory of Love, A Study in Medieval Tradition*, Oxford University Press 1953, p. 1. *The Allegory of Love* was first published in 1936.

8 E. Gibbon, *The History of the Decline and Fall of the Roman Empire*, The World's Classics (Oxford University Press) 1920, Vol. I, p. 1. Gibbon's *Decline and Fall* was first published between 1776 and 1788.

9 Finance Act 1994 (c.9), Part III, Section 48(1).

Consider not only beginnings but also endings. Many authors can send their readers off with a tantalising thought, as in the last couplet of John Milton's moving elegy *Lycidas* –

At last he rose, and twitched his mantle blue:  
To-morrow to fresh woods, and pastures new.<sup>10</sup>

Contrast the Chemical Weapons Act 1996. This ends with a Schedule containing a highly technical list of toxic chemicals, drawn from the Convention of 1993 which prohibits chemical weapons. The last words of the Schedule (and the Act) are these –

This Schedule must be read subject to the following proposition, which is based on a note in the Convention: where reference is made to groups of dialkylated chemicals, followed by a list of alkyl groups in parentheses, all chemicals possible by all possible combinations of alkyl groups listed in the parentheses must be taken to be listed in the Schedule.<sup>11</sup>

It is true that chemical weapons could form the subject of a gripping novel. But a novel will rarely have to descend to the arid detail exhibited in that final sentence of the Act, which is unlikely to send the general reader away feeling stimulated.

So the subject matter of a Bill is generally unlikely to lead to literature. It is likely to lack pregnancy of imagination. But even if the drafter is given a subject that does look attractive to many people, the result is unlikely to be literature. And that is because of the other constraints inherent in the drafter's work.

## D General Application

So let us consider the next factor that distinguishes legislation from most other forms of writing. This is that the only function of legislation is to lay down rules (or precepts). I shall say more about this later. But a consequence of this limited function is that legislation is of general application, and that is what I want to consider now. Legislation has to apply broadly and perhaps universally. This means that it looks impersonal, sometimes to the point of abstraction.

Take this provision of the Equality Act 2010, which is about discrimination. The provision refers to protected characteristics (which include age, disability, race and religion) and it envisages two people called A and B. It reads –

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.<sup>12</sup>

10 *The English Poems of John Milton*, The World's Classics (Oxford University Press) 1965. *Lycidas* is at pp. 34-39.

11 Chemical Weapons Act 1996 (c.6), Schedule, note 3.

12 Equality Act 2010 (c.15), Section 13(1).

Now take this passage from Laurence Sterne's good humoured and humane novel *Tristram Shandy*. It comes from a conversation between two gentle characters, expressing sentiments which we now (mercifully) find natural. But the conversation was way ahead of its time in the 1760s, when the novel was written. Uncle Toby and Corporal Trim have concluded that a black slave has a soul just as anyone else has. Trim then asks whether a black wench is to be treated worse than a white one, and the conversation continues like this –

I can give no reason [why], said my uncle Toby –  
 Only, cried the corporal, shaking his head, because she has no one to stand up for her –  
 'Tis that very thing, Trim, quoth my uncle Toby, which recommends her to protection – and her brethren with her ...<sup>13</sup>

In the Equality Act the participants (A and B) are nameless abstractions, and the discrimination is couched in general terms as a universal rule. In the novel the characters are credible people with human emotions, and discrimination is tackled by way of a specific and readily understood example. The Act is direct and economical. But I doubt whether anyone would call it literature. The passage from the novel is literature. It has pregnancy of imagination. It lingers in the mind.

So here we have a major reason why statutes are often difficult to read compared with many other forms of communication. Statutes are couched in abstract rules which appeal to the intellect. And thinking is difficult. Forms of communication we would regard as literature are more likely to proceed by way of example and to be couched in terms of real people and events, or at least of readily imagined people and events. They are more likely to summon up a striking picture in the imagination, and to appeal to the senses or emotions. And pictures and emotions are easier to absorb than abstract precepts that require the difficult act of thinking. And they are more likely to linger in the mind.

The distinction between abstractions and concrete examples will be clear to any accomplished writer. For instance, in a letter of 1734 Alexander Pope says that general precepts are obscure compared with homely examples, and adds this –

Precepts only apply to our Reason, which in most men is but weak: Examples are pictures, and strike the Senses, nay raise the Passions.<sup>14</sup>

13 L. Sterne, *Tristram Shandy*, Collins 1955, Vol. 9, Chapter 6, p. 459. *The Life and Opinions of Tristram Shandy, Gentleman* was first published in nine volumes between 1759 and 1767.

14 Letter of 26 July 1734 to Arbuthnot, cited in G. Tillotson, *On the Poetry of Pope*, 2nd edn, Oxford University Press 1950, p. 163.

In his first novel, *Joseph Andrews*, Henry Fielding says –

It is a trite but true observation, that examples work more forcibly on the mind than precepts.<sup>15</sup>

And in his fable *Rasselas* Dr. Johnson says –

Example is always more efficacious than precept.<sup>16</sup>

If you want to put it even more succinctly than Pope or Fielding or Johnson, it can all be summed up in the proverb that example is better than precept (itself a precept, ironically enough).

So, the fact that an Act has to be of general application is one of the factors preventing it having pregnancy of imagination (to use Dr. Johnson's phrase).

## **E Elegance of Language**

Now I want to say more about elegance of language (to use Dr. Johnson's other phrase). I want to show that some of the techniques available to many authors are rarely open to the legislative drafter.

By way of prelude I want to say more about something I mentioned earlier, a very important factor that distinguishes legislation from other forms of communication. The point was made clearly by Sir Christopher Jenkins (then the First Parliamentary Counsel) in a memorandum of 23 June 1997 to the select committee on the modernisation of the House of Commons.<sup>17</sup> I gratefully draw on what he wrote. Legislation has a precise and narrow object, which is to change or state the law, to lay down rules. It is not designed to do the things that many other forms of writing do. For instance, it is not there to inform, explain, argue, justify, provoke, stimulate or entertain. The result of this very narrow object is that every word of an Act will be taken to have a purpose, and all its words carry equal weight. Its language is spare and compressed. It speaks in a monotone. It is restrained and deadpan. General Ulysses S. Grant, on hearing of General Robert E. Lee's surrender after years of sickening slaughter, was said to show no more emotion than a redundant bird's nest.<sup>18</sup> And that description could equally apply to a statute.

With that stark background in mind, let me consider a few of the many literary techniques rarely open to the legislative drafter. I shall start with repetition.

15 H. Fielding, *Joseph Andrews*, The World's Classics (Oxford University Press) 1957, Book I, chapter I, p. 9. *Joseph Andrew* was first published in 1742.

16 S. Johnson, *The History of Rasselas, Prince of Abissinia*, Penguin Books 1976, Chapter XXX, p. 105. *Rasselas* was first published in 1759.

17 Select Committee on Modernisation of the House of Commons, *The Legislative Process (first report)* (HC 1997-1998, 190), Appendix 2.

18 See G.C. Ward, R. Burns & K. Burns, *The Civil War*, Bodley Head 1991, p. 378.

## F Repetition

Repetition is generally designed to secure emphasis. The opening of Dickens' *Bleak House* contains a sustained description of fog, where the word 'fog' is repeated over and over. It is very effective in creating the atmosphere. But in an Act every word will be assumed to have some effect. So an Act cannot say the same thing twice merely to emphasise it. If it did, the reader would wonder whether something else stated only once was to carry equal weight.

Take these two lines from William Cowper's poem *John Gilpin* –

What news? what news? your tidings tell,  
Tell me you must and shall –<sup>19</sup>

The poem's sense of urgency is emphasised by the use of 'must' and 'shall', two words that I think in the context mean the same thing. It is common enough in Acts to provide that someone must do something, or alternatively to provide that someone shall do something. But an Act would not say 'must *and* shall' simply to emphasise the duty.

So in Acts you get laconic, deadpan provisions unlikely to set the pulse racing. Here is an example using the word 'shall'. It is from an Act of 1988 setting up an authority for the Norfolk and Suffolk Broads, and it reads –

The Authority shall review the Broads Plan at least once in every five years.<sup>20</sup>

And here is an example using the word 'must'. It is from the Scrap Metal Dealers Act 2013, and it reads –

The Environment Agency must maintain a register of scrap metal licences issued by authorities in England.<sup>21</sup>

Consider the repetition not only of positive statements but also of negative ones. The opening of Keats' *Ode on Melancholy* reads –

No, no, go not to Lethe<sup>22</sup>

Three negatives in the first six words vividly emphasise the poet's determination. It is common enough for Acts to contain negative propositions. But an Act would not use three negatives (or even two) where one would suffice. So again you get laconic, deadpan provisions unlikely to excite the reader. Here is an example, again from the Scrap Metal Dealers Act 2013 –

19 *The Oxford Book of Eighteenth Century Verse*, Oxford University Press 1926, reprinted 1951. *The Diverting History of John Gilpin* is at pp. 568 to 577, and the lines quoted are at p. 574.

20 Norfolk and Suffolk Broads Act 1988 (c.4), Section 3(2).

21 Scrap Metal Dealers Act 2013 (c.10), Section 7(1).

22 *The Poetical Works of John Keats*, The World's Classics (Oxford University Press) 1927, reprinted 1951. *Ode on Melancholy* is at p. 234.

A scrap metal dealer must not receive scrap metal from a person without verifying the person's full name and address.<sup>23</sup>

So an Act cannot say the same thing twice merely to emphasise it. That would raise doubts as to whether something else stated only once was to have equal weight. So the legislative drafter is not allowed the freedom to use repetition in the way that some other writers do.

Another sort of repetition occurs when something is said twice but in different words. Consider overviews. And take this instance from Lord Macaulay's *History of England from the Accession of James II*. At the beginning of Chapter 2 he gives us a stately and vivid overview in these words –

The history of England, during the seventeenth century, is the history of the transformation of a limited monarchy, constituted after the fashion of the middle ages, into a limited monarchy suited to that more advanced state of society in which the public charges can no longer be borne by the estates of the crown, and in which the public defence can no longer be entrusted to a feudal militia.<sup>24</sup>

But remember that Acts exist only to change or state the law. Provisions that do this are operative. And the traditional view is that Acts should be confined to operative material. Inoperative material, such as overviews, should be excluded. But some Acts now include overviews. They tend to feature in the very long Acts produced by the tax law rewrite project, which was designed to restate a large part of the tax law in modern, accessible language. When I worked on the project I produced some overviews. But the experience persuaded me that the traditional stance of excluding them is the correct one.

One reason for my doubts about overviews arises from the fact that they must involve no danger of conflicting with the operative provisions. Any difference between the two may create ambiguities and may be exploited by a party to a dispute. The courts may ascribe to the supposedly inoperative words an (unintended) effect of glossing the operative provisions. But a scrupulously accurate overview is surprisingly difficult to achieve. And it can turn out to be so bland as to be virtually useless. I think on reflection that this is true of my own efforts. Here is one of them –

This Chapter provides that in certain circumstances where a transfer is made regarding land, and the transferor or an associate becomes liable to make a payment connected with the land, corporation tax relief for the payment is restricted.<sup>25</sup>

23 Scrap Metal Dealers Act 2013 (c.10), Section 11(1).

24 T.B. Macaulay, *The History of England from the Accession of James II*, Everyman's Library, Vol. I, Chapter II, p. 121.

25 Corporation Tax Act 2010 (c.4), Section 834.



Another reason for my doubts about overviews is that they are traps if the operative provisions are later changed (whether as the Bill progresses through Parliament or by amendment in a later Act). In that case it is only too easy to forget to update the inoperative provisions, which may become increasingly misleading and dangerous.

I think the tax law rewrite project was brave to include overviews. And I am glad that I experimented myself. For if nobody is willing to try new things, improvements are never made. But drafters should feel free not only to experiment but also to abandon an experiment. And, having tried overviews, I feel that they should be excluded from legislation.

So I think it is best to confine the legislative text to the operative. Omit inoperative material. It is legislatively superfluous and empty. The right place for it is the explanatory notes. Then the reader knows that everything in the legislative text actually constitutes the law, and everything has equal weight. The explanatory notes perform a different function. They are not designed to change or state the actual law. They can be expansive and loose, and in fact they may have to be if they are to be useful. Mixing the two elements of law and explanation in the same text (the Act) risks obscurity and confusion. And some people are irritated by non-operative explanatory material in the legislative text, rather like the Gryphon in *Alice's Adventures in Wonderland*. The Mock Turtle asks Alice to explain something –

“No, no! The adventures first,” said the Gryphon in an impatient tone: “explanations take such a dreadful time”.<sup>26</sup>

So, repetition may be a useful literary technique for many authors. But it should be avoided by the legislative drafter.

## G General Exuberance

Another literary technique not usually open to the drafter is general exuberance. Dr. Johnson once said of a play that –

It has not wit enough to keep it sweet.

But he converted it into something more grandiose –

It has not vitality enough to preserve it from putrefaction.<sup>27</sup>

A drafter would readily change a sentence to make it clearer. But a drafter would rarely embellish a sentence simply to make it appear more grandiose. Another

26 L. Carroll, *Alice's Adventures in Wonderland*, in *Alice's Adventures in Wonderland and Through the Looking-Glass*, Oxford University Press 1971, Chapter X, p. 92.

27 Boswell's *Life of Johnson*, Oxford University Press 1969 under June 1784, p. 1312.

observation of Dr. Johnson might be more apt. In talking about a historian he felt would be “buried under his own ornaments”, he offered this advice –

Read over your compositions, and where ever you meet with a passage which you think is particularly fine, strike it out.<sup>28</sup>

I would echo his words, and say this to a drafter. If you find yourself getting carried away, restrain yourself, strike out anything that is unnecessary or unduly ornate, and keep to your limited and precise object. Remember the old saying that excess matter in Bills, as in people, tends to go septic.

This intellectual rigour was not always adopted. Take this Act passed in 1485 soon after Henry VII defeated Richard III at the battle of Bosworth. It repeals an Act which helped to legitimise Richard’s rule. But it includes propaganda, it makes a value judgement, and it is couched in extravagant terms. It refers to the false and seditious imaginations and untruths of Richard’s Act, and it provides that it be void, annulled, repealed, cancelled, of no force or effect, taken out of the roll of Parliament, burnt and utterly destroyed. As if that boisterous display were not enough, it then provides that every person having a copy of the offending Act must bring it to the Chancellor or utterly destroy it before Easter. And it states the object to be that everything said in the offending Act may be forever out of remembrance and forgotten.<sup>29</sup>

I do not know whether Henry VII’s Act would generally be described as literature, though I think it might be. It creates a vivid image and makes it clear that the statute to be repealed was thought to be a really bad one. It wants to treat the repealed Act as never existing. But no modern Act would be so exuberant. Contrast this provision of the Law Reform (Enforcement of Contracts) Act 1954. It too makes a retrospective repeal, and it reads –

Section four of the Sale of Goods Act 1893 is hereby repealed in relation to any contract, whether made before or after the commencement of this Act.<sup>30</sup>

That creates no exuberant image in the mind. It contains no propaganda and makes no value judgement. It is restrained, pedestrian and dull. It is not literature. But it is all that is needed to do the job.

## H Elegant Variation

And then there is a whole range of other literary techniques that simply do not feature in the drafter’s armoury. Elegant variation<sup>31</sup> is an example. This is a

28 Boswell’s *Life of Johnson*, Oxford University Press 1969, under Friday 30 April 1773, p. 528.

29 *Rotuli Parliamentorum*, Vol. VI, pp. 288-289. The year books record that the Act of Richard III’s reign was to be ‘put in perpetual oblivion’: see YB 1 Hen 7, Hil, pl 1 (1486).

30 Law Reform (Enforcement of Contracts) Act 1954 (c.34), Section 2.

31 See Fowler’s *Modern English Usage*, 2nd edn, Oxford University Press 1965, reprinted 1975, pp. 148-151; 3rd edn, 1996, revised 1998, p. 243.

device by which authors avoid repeating a word. For instance, in *The Rape of the Lock* Alexander Pope describes the preparation of coffee. He refers to cups. But a few lines later he avoids repeating the word 'cups' and refers instead to 'China's earth'.<sup>32</sup> Sir Walter Raleigh (the Victorian Professor, not the Elizabethan adventurer) gives an instance in his book *Style*. He puts the case where an author asks whether oysters breed typhoid. Pride allows the author only the one reference to the oyster by name, so that later on he refers to it as the succulent bivalve.<sup>33</sup>

The legislative drafter will not use different words in order to refer to the same object. That would risk different meanings being ascribed to the same thing. The result may look a little tedious. But the drafter is happy to live without elegant variation if the precise object is achieved with clarity. For instance, in this provision of the Sale of Goods Act 1979 the word 'goods' is used four times in a fairly short sentence –

The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by him after the making of the contract of sale, in this Act called future goods.<sup>34</sup>

## I Alliteration

Another literary technique not open to the drafter is alliteration. In his poem *Morte d'Arthur* Tennyson describes Sir Bedivere making his way through frozen mountains, and he uses these words to great effect –

The bare black cliff clanged round him.<sup>35</sup>

But a drafter's object is limited, and creating atmosphere is irrelevant. So any alliteration you find in statutes is likely to be accidental or incidental. When I was reading the 14th-century alliterative poem *Piers Plowman* by William Langland I did not get into a Bill anything as pleasing as his fair field full of folk.<sup>36</sup> But in the Magistrates' Courts Act 1980 (a consolidation) I was pleased to repeat from the 1952 Act an italic cross-heading about fees, fines and forfeitures.<sup>37</sup> But in the context the alliteration has no literary merit.

32 Alexander Pope's *Collected Poems*, Everyman's Library 1924, reprinted 1963. *The Rape of the Lock* is at pp. 76 to 96, and the relevant lines are at p. 86 (canto III, lines 105-110).

33 W. Raleigh, *Style*, 4th edn, Arnold 1901, pp. 49-50.

34 Sale of Goods Act 1979 (c.54), Section 5(1).

35 *The Poems of Tennyson*, Longmans 1969. *Morte d'Arthur* is at pp. 585-598, and the words quoted are at p. 593 (line 188).

36 W. Langland, *Piers Plowman*, Clarendon Medieval and Tudor Series (Oxford University Press) 1972, Prologue, line 17 ('A faire felde ful of folke'), p. 1.

37 Magistrates' Courts Act 1980 (c.43), italic cross-heading immediately before Section 137 (*Fees, fines, forfeitures, etc*); repeating, from Magistrates' Courts Act 1952 (c.55), italic cross-heading immediately before Section 112.

## J Humour

Humour is another literary device that the drafter cannot use (not deliberately anyway). Humour can take many forms. Consider bathos – that is, the use of anticlimax or the descent from the serious to the trivial. Alexander Pope used this to great effect, as in this elegant couplet from *The Rape of the Lock* where the death of husbands is equated with the death of lap dogs –

Not louder shrieks to pitying Heaven are cast,  
When husbands or when lap-dogs breathe their last.<sup>38</sup>

But legislation is not there to entertain. If you get bathos in an Act it is likely to be unintentional. For instance, the very first section of the Constitutional Reform Act 2005 is headed ‘The rule of law’. You cannot get anything much more important than that. Perhaps the reader expects a restatement of the rule of law or an abrogation from it. In fact the actual section is rather a disappointment, because it provides merely that the Act does not affect the rule of law. To be precise, it reads –

This Act does not adversely affect –  
a the existing constitutional principle of the rule of law, or  
b the Lord Chancellor’s existing constitutional role in relation to that principle.<sup>39</sup>

The section does precisely what it sets out to do. If its effect is one of anticlimax, it is because it has a limited and precise object. It is not because of a deliberate attempt at bathos.

Humour can also arise from the absurdity produced by juxtaposing the diverse. Here is a celebrated example from Lewis Carroll’s *Through the Looking Glass* –

“The time has come,” the Walrus said,  
“To talk of many things:  
Of shoes – and ships – and sealing-wax –  
Of cabbages – and kings –<sup>40</sup>

But it is not open to the legislative drafter to offer such entertainment. If you get anything similar in an Act it will be unintentional. For example, the capital gains tax legislation gives roll-over relief in respect of listed assets. The list is beguilingly eclectic. It includes such things as ships, aircraft, goodwill, milk and potato

38 Alexander Pope’s *Collected Poems*, Everyman’s Library 1924, reprinted 1963. *The Rape of the Lock* is at pp. 76 to 96, and the lines quoted are at p. 88 (canto III, lines 157-158).

39 Constitutional Reform Act 2005 (c.4), Section 1.

40 ‘Through the Looking Glass’, in L. Carroll, *Alice’s Adventures in Wonderland and Through the Looking Glass*, Oxford University Press 1971, Chapter IV, p. 164.

quotas, and ewe and suckler cow premium quotas.<sup>41</sup> So the list is diverse. But if the diversity pleases it does not do so deliberately.

## K Mystery

From humour let us turn to mystery. Some authors like to introduce a mysterious element. But the legislative drafter cannot use this device (not deliberately at any rate).

The mystery might come from the discerning use of a single word or phrase that we do not expect. For instance, in his poem *The Pobble Who Has No Toes* Edward Lear refers to Aunt Jobiska's Runcible Cat.<sup>42</sup> Even in a nonsense poem the word 'Runcible' makes us pause, wondering what a Runcible Cat can be. A reference to (say) a tortoise-shell cat would not have the same effect. Again, there is Lewis Carroll's poem *Jabberwocky*,<sup>43</sup> where one of the attractions is the mystery of what the Jabberwock is.

If we find anything like this in legislation, it will arise incidentally and not because the drafter deliberately sets out to mystify. For instance, in the Dangerous Wild Animals Act 1976 there is a reference to Geoffroy's cat.<sup>44</sup> But, unlike the Runcible Cat, it is a real creature with a scientific name in Latin (*Oncifelis geoffroyi*). Or take the Endangered Species (Import and Export) Act 1976 (as originally enacted) where the paradoxical frog appeared. The paradoxical frog may have been a mystery to the uninitiated. But, unlike the Jabberwock, it is in fact a real creature with a Latin name (*Pseudis paradoxa*).<sup>45</sup>

Mystery is not confined to single words or expressions. At the end of Laurence Sterne's joyful and tender novel *A Sentimental Journey* the narrator (Parson Yorick) is in bed in an inn. Another bed in the room is occupied by a lady hitherto unknown to him. He creates a disturbance by speaking. The lady's maid (the *fille de chambre*) comes into the room and in the dark finds herself between the two beds. The novel ends in the middle of an unfinished sentence, with these words –

So that when I stretch'd out my hand, I caught hold of the *fille de chambre*'s<sup>46</sup>

There it ends, with an apostrophe, a letter 's' and no other punctuation.

Sterne's whimsical and elegant ending deliberately teases the reader. A drafter could not use the device. But here is a similar instance that occurred accidentally. An Act of 1879 provided that certain loans "shall be secured by a mort-

41 Taxation of Chargeable Gains Act 1992 (c.12), Sections 152 and 155.

42 *The Complete Nonsense of Edward Lear*, Faber and Faber, fifth impression, 1950, p. 242, at p. 243.

43 'Through the Looking Glass', in L. Carroll, *Alice's Adventures in Wonderland and Through the Looking Glass*, Oxford University Press 1971, Chapter 1, p. 134.

44 Dangerous Wild Animals Act 1976 (c.38), Schedule.

45 Endangered Species (Import and Export) Act 1976 (c.72), Schedule 1 (as originally enacted).

46 L. Sterne, *A Sentimental Journey*, The World's Classics (Oxford University Press) 1967, p. 233. *A Sentimental Journey Through France and Italy* was first published in 1768.

gage, in the form set forth in the Third Schedule hereto”.<sup>47</sup> But the Act ended with the second Schedule. There was neither a third Schedule nor a form of mortgage. The puzzled reader was left staring into a void, and I doubt whether he was amused. In any event, such things arise by accident, not because the drafter deliberately sets out to mystify and entertain the reader.

## L Other Techniques

Other examples of literary techniques that do not appear in the drafter’s armoury are metaphor, simile, irony and deliberate ambiguity. And no drafter would embrace Laurence Sterne’s recommendation of digression. In *Tristram Shandy* he tells us –

Digressions, incontestably, are the sunshine; – they are the life, the soul of reading! – take them out of this book, for instance, – you might as well take the book along with them.<sup>48</sup>

Nor would a drafter’s object be achieved by following another piece of Sterne’s advice – to treat writing as conversation and to leave a fair amount to the reader’s imagination. In *Tristram Shandy* he says this –

Writing, when properly managed (as you may be sure I think mine is) is but a different name for conversation. As no one, who knows what he is about in good company, would venture to talk all; – so no author, who understands the just boundaries of decorum and good-breeding, would presume to think all: The truest respect which you can pay to the reader’s understanding, is to halve this matter amicably, and leave him something to imagine, in his turn, as well as yourself.<sup>49</sup>

## M Techniques Available

So, the constraints within which the legislative drafter operates exclude the use of some techniques. This makes it important for the drafter to use with especial skill those techniques that *are* available. There are in fact many techniques which the drafter can use. Examples are creating a helpful Bill structure in which the reader is given information in easy stages; using helpful sentence structure in which (for instance) the main proposition is stated before a conditional clause; avoiding clutter such as unnecessary cross-references; using short sentences and wording that

47 Artizans and Labourers Dwellings Act (1868) Amendment Act 1879 (c.64), Section 22. The Artizans and Labourers Dwellings Act (1868) Amendment Act (1879) Amendment Act 1880 recited that in Section 22 of the 1879 Act the words “in the form set forth in the Third Schedule hereto” were inserted by mistake, and provided that “the said section shall be construed and read as if the said words had not been inserted therein”.

48 L. Sterne, *Tristram Shandy*, Collins 1955, Vol. 1, Chapter 22, p. 68.

49 *Ibid.*, Vol. 2, Chapter 11, at page p. 95.

is simple, direct and colloquial; and generally refining so that the essential (and only the essential) is included. It is all a matter of showing good manners towards the reader, of taking great pains to revise and polish with a view to helping the reader to follow difficult propositions. But legislative techniques are pretty pedestrian and unlikely by themselves to elevate the drafter's product into literature.

## N Summary

Let me summarise. The subject matter of Acts is often pedestrian. And the drafter is creating abstract rules, making it difficult to create vivid pictures in the reader's mind. So you rarely get pregnancy of imagination.

On top of that, because legislation has a very limited object there is little scope for letting yourself go and for using many of the literary techniques available to other authors.

A result of the constraints is that the drafter should use with especial skill the techniques that *are* available. But they are not the sort of techniques that will elevate the drafter's product into literature.

## O Legislation Is Not Literature

I conclude from all this that legislation is not literature as normally understood. The constraints do not permit it. But legislation does not pretend to be literature. A drafter needs to have a keen interest in words, and wide reading will make you better at your job. But you will not produce literature yourself.

## P Attractions

You might conclude that legislative drafting is a thankless task. But it certainly has its attractions. And some of these spring from the very fact that the drafter has to operate within narrow limits unlikely to engender literature. Here are some examples.

First, take the drafter's primary ambition. This is to master the subject, to arrive at something that stands up to analysis, and to express it in a way that is as precise, clear and simple as the subject matter allows. That is challenging when you bear in mind the difficult and complex ideas behind a given piece of legislation and the stark literary environment in which the drafter has to work. And the challenge is in fact part of the job's interest.

Suppose you are drafting a Bill about perpetuities and accumulations. This highly technical aspect of the law of property compels you to assume that your reader is familiar with it – that the reader is not only a lawyer but is a lawyer with a particular specialist expertise. So the first section of the Perpetuities and Accumulations Act 2009 begins like this –

(1) The rule against perpetuities applies (and applies only) as provided by this section.

(2) If an instrument limits property in trust so as to create successive estates or interests the rule applies to each of the estates or interests.

(3) If an instrument limits property in trust so as to create an estate or interest which is subject to a condition precedent and which is not one of successive estates or interests, the rule applies to the estate or interest.<sup>50</sup>

The section continues in the same technical vein. It could hardly do otherwise. But it gets straight to the point and it presents the rules in a way that is as precise, clear and simple as the subject matter allows. Nevertheless, the Perpetuities and Accumulations Act is no more likely to be called literature than a highly technical book on physics is. The subject matter is arid, the rules are general abstractions, and there is no scope for using exciting literary techniques.

A second attraction of drafting lies in the fact that the precise and narrow world you inhabit bristles with logical concepts and puzzles. Drafters deal with these constantly and find pleasure in spotting them and in solving them. Here is an example of the sort of thing that pleases me. Lewis Carroll (who loved puzzles and words) was once rebuked by a young girl for not writing since his last letter. He in turn rebuked her, because of course it was impossible for him to write *after* the *last* time he wrote.<sup>51</sup>

As for Acts, here is an example of the sort of problem that drafters have to look out for and of a logical solution to the problem. The legislation creating the community charge (or poll tax) included a provision about joint and several liability of spouses for a charge. The rule depended on whether people were married on given days within a chargeable period. But what is the position regarding a day people become married or cease to be married? The Act answers the question by providing that –

For the purposes of this section people are not married to each other on a particular day unless they are married to each other throughout the day.<sup>52</sup>

That is not literature. But it is a satisfying solution to a logical question.

A third source of stimulation for the drafter is the sheer power of legislation. For instance, if you draft tax legislation you are dealing with vast sums of money. Or take the first subsection of the Scotland Act 1998 –

There shall be a Scottish Parliament.<sup>53</sup>

50 Perpetuities and Accumulations Act 2009 (c.18), Section 1(1) to (3).

51 See M.N. Cohen (Ed.), *The Selected Letters of Lewis Carroll*, Macmillan Papermac 1996, p. 197 (letter to Isabella Bowman of 14 April 1890).

52 Local Government Finance Act 1988 (c.41), Section 16(10).

53 Scotland Act 1998 (c.46), Section 1(1).



That sentence has a power which emanates not only from what it achieves but also from its quiet simplicity. It has the distinction of being inscribed on the mace of the Scottish Parliament. It is also cited in the Oxford Dictionary of Quotations, where the author is given as Anonymous.<sup>54</sup> But I doubt whether it would be called literature.

In the light of what I have said about the attractions of the job, take this very important provision of the European Communities Act 1972, drafted by the magisterial Sir John Fiennes –

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly...<sup>55</sup>

That is unlikely to be called literature. But it packs a great deal into relatively few words. It is precise. It is pretty powerful stuff. And its sonority brings to my mind this line from Wordsworth's noble tribute to Milton –

Thou hadst a voice whose sound was like the sea.<sup>56</sup>

## Q Conclusion

Bearing in mind everything I have said, I would like to end with three short but telling quotations. The context of none of them concerns legislation. But legislation's limited object and its stark and precise nature are such that the drafter might take them to heart, and do so more ardently than most other writers. They serve as a reminder that the drafter should appeal to the intellect and not to the emotions; should use words with care and restraint; should polish them for the reader's sake; and should omit legislatively empty material. In other words, the quotations serve as a reminder (if any is needed) that the drafter is not in the business of producing literature.

The first two quotations come from the works of the exquisite craftsman Alexander Pope. The first is from his *Essay on Man*. It is this –

What reason weaves, by passion is undone.<sup>57</sup>

54 *Oxford Dictionary of Quotations*, 6th edn, Oxford University Press 2004, p. 19, entry 10.

55 European Communities Act 1972 (c.68), Section 2(1).

56 *The Oxford Book of English Verse 1250-1918*, 2nd edn, 1939, reprinted 1994, p. 617.

57 Alexander Pope's *Collected Poems*, Everyman's Library 1924, reprinted 1963, *Essay on Man, Epistle II, line 42*. The line quoted is at p. 190.

The second appears in Pope's *Imitations of Horace*. It is this –

Prune the luxuriant, the uncouth refine,  
But show no mercy to an empty line.<sup>58</sup>

The third quotation appears in the book *Of the Laws of Ecclesiastical Polity*, written by the judicious and tolerant Richard Hooker and published in the late 16th century. It is this –

it behoveth our words to be wary and few.<sup>59</sup>

58 Alexander Pope's *Collected Poems*, Everyman's Library 1924, reprinted 1963, *Imitations of Horace*, Book 2, Epistle 2, lines 174-175. The lines quoted are at p. 308.

59 R. Hooker, *Of the Laws of Ecclesiastical Polity*, Everyman's Library 1963, Vol. 1, p. 151. Hooker's work appeared in 1593 (Books I-IV) and 1597 (Book V). See also King James Bible, *Ecclesiastes*, Chapter 5, verse 2 ("let thy words be few").