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ORAL EVIDENCE TO THE RENTON COMMITTEE BY HEDLEY MARSHALL, C.M.G., Q.C. AND BRIAN RUSSELL ON BEHALF OF THE STATUTE LAW SOCIETY

Present: The Rt. Hon. Sir David Renton (Chairman); The Duke of Atholl; The Rt Hon. Baroness Bacon; The Hon. Mr. Justice Cooke; Sir Basil Engholm; Mr. J. A. R. Finlay; Sir John Gibson; Mr. P. G. Henderson; Sir Noel Hutton; Mr. K. R. Mackenzie; Sir Patrick Macrory; Mr. Ewan Stewart.

Secretaries: Mr. A. M. MacPherson and Mr. R. S. Gumming.

CHAIRMAN: Mr. Hedley Marshall and Mr. Russell, have you come to us on behalf of the Statute Law Society?

A. (MR. MARSHALL): Yes.

Q. I would like to say how very welcome both of you are and to assure you that we are all familiar with the work of the Statute Law Society, having read the Heap Report and the Stow Hill Report. I understand that the Stow Hill Report was produced two years after the Heap Report and was an elaboration of some of the principal proposals in it; is that correct? A. To a certain extent, yes sir.

Q. Is there further work in this field of legislative drafting which your society proposes to do in the near future? A. Yes.

Q. And we shall have a memorandum from you when the work is completed? A. Yes.

SIR NOEL HUTTON: A good deal of the Heap Report comes pretty straight from the paper which Mr. Marshall and Mr. Norman Marsh presented to the Commonwealth Law Conference in 1965? A. (MR. MARSHALL): A lot of it, yes.

Q. There is one rather significant omission. I wondered if it was still your view that little criticism can be levelled against the general standard of professional drafting of principal legislation at the present day. Is it fair to ask if you still adhere to that proposition?

A. I would not level any criticism against the professional standard. The criticism we level is at the methods which the professional officers have inherited over a number of years and by which they are bound. I think that the professional qualifications and the professional expertise of the parliamentary draftsmen in this country cannot be bettered or improved anywhere in the world. It is the methods adopted which I think require considerable improvement.

Q. I am obliged. My next question is on paragraph 7, page 2, of your current memorandum, and with that I would like to associate paragraph 84,

page 34, of the Heap Report. The Heap Report says that examples of defective language which give trouble could be given in their hundreds if not thousands. I am bound to say that 1 personally was rather disappointed that few actual examples were given in that report. I would like to ask you shortly about the Wills Act, which is one of them. But coming back to your present paper, this says that the Heap Report abounds with examples of cases where judges have criticised and stigmatised the wording used in the drafting of statutes. 1 do not think it does abound very much, does it? May I just ask about some of the examples? There are all told six reported cases referred to on pages 11 and 12. The first of these is *Trevillian v. Exeter Corporation* ((1854) 5 De G.M. & G. 828). Do you carry in your head what that case was about?

A. No. I do not think all these extracts are mine. I would not like to say that I have gone into all these cases myself. They were produced by other members of the Heap Committee.

Q. Will you take it from me, if that is the right way to put it, that this was a case discussing a local and private Act passed in 1829?

A. Yes, that may well be.

Q. You can safely take that from me. The next one, *Hough v. Windus* ((1884) 12 Q.B.D. 224), do you remember about that one? Or perhaps in general it can be said that you have not yourself actually looked at them?

A. No, I have not myself gone through these cases.

Q. In that case it would not be fair of me to ask questions about that.

A. This is not my document; it is the report of the committee.

Q. Yes, I see. Perhaps I could put it briefly that out of the cases described as "abounding with examples "we really come down to a couple of cases on the Rent Acts, and we all know about them, and one very temperate complaint by Lord Radcliffe of the estate duty legislation. The only remaining case is *Lockwood* ([1957] 3 W.L.R. 837) which was one of the very unusual examples where the draftsman actually made a mistake, and that is perhaps not really ***ad rem*** for the purposes of this committee. I just wanted to establish by question that although we are constantly told there are hundreds or thousands of things wrong, it is very difficult to get specific instances of them. Speaking for myself 1 do not really find them in the Heap Report.

A. (MR. RUSSELL): As one of the signatories and draftsmen of this particular report, I think what Sir Noel Hutton has just said is perfectly accurate. People are over-enthusiastic in general criticism of the draftsmen, and then find little in the way of examples which can be produced in a report like this. In fact when the Heap Committee was sitting, we had a great number of comments by the judges here and there; some applied to statutory instruments, some to local Acts, some to statutes of Parliament itself. But these were selected, I regret to say, as being probably the rudest it was perhaps not the nicest thing that we should have done about it. Bu they were produced, as we thought, as a reasonable sample. *Hough v. Windus*, I think relates to the Bankruptcy Act 1883. The Rent Restrictions Acts are of course almost fair game for anybody. More recently, as w observed in our memorandum, there has been a remark by Lord Salmon the Immigration Act 1971. We have found that there is considerable

dissatisfaction amongst users of the statutes. It was as a result of an unexpressed, almost inchoate dissatisfaction, that our society was formed; and I have no doubt that as the society gets more information on its files we will be able to produce more and better examples. The difficulty can be illustrated by the experience of lawyers such as myself who have to spend a lot of time in looking up a particular point and then worrying over whether our understanding of the law is correct. The convenience of the user should be taken into account.

CHAIRMAN: Would you rather have the terms of the statute itself capable of being understood by the users than making the users depend upon some extraneous material explaining the statute? A. Yes, that is absolutely so.

SIR NOEL MUTTON: I just want to pursue paragraph 84 of the Heap Report a little more. It says that hundreds, if not thousands, of examples could be given. It would be useful to this committee if we could have a few more than those which are given. In respect of the next one which is given in paragraph 84—I must declare an interest in this because I drafted the Wills Act of 1968—this seems to be so plainly mistaken as a criticism that I wondered again if you yourselves had actually read the Act before publicising this as a criticism of it.

A. No, it was another member of the committee who was the respondent referred to at the top of page 35. I am afraid that the Wills Act 1968 is a lacuna in my regular and expert knowledge.

Q. I am obliged. You did mention a moment ago the judgment of Lord Salmon in *Azam* 's case ([1974] A.C. 18). You have it in mind that this has now been reported in All England Reports.

A. (MR. MARSHALL): Yes, this memorandum was prepared before that. Q. And that, oddly enough, it does not say the same thing in All England Reports.

A. No; that has happened before. CHAIRMAN: This is what is known as “editing.”

SIR NOEL HUTTON: May I ask one final question on the foot of page 2 of your memorandum about section 61 of the Law of Property Act 1925? I was greatly puzzled by this proposal and I do not think I understand what it is. Section 61 of the Law of Property Act applies to deeds and contracts, I think, three of the definitions which are applied generally to statutes, by the Interpretation Act. Is the suggestion that when the Interpretation Act is rewritten it should be applied not only to statutes but to all legal instruments? Is that the proposal that is made there?

A. (MR. RUSSELL): Yes, it is. This was drafted by me. I am sorry if it caused you to be puzzled. I can only say that it was done in rather a hurry. I had been drafting documents for years before I discovered that this admirable and useful section even existed. I may add that from what I see of contracts, and I have seen hundreds, the existence of this section is not known about, or else it is wilfully ignored by at least half the profession It would be very useful to commercial people as a whole if this sort of section were to be become rather better known, so that people would not have to go writing definition sections for things which are already defined for them by

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SIR PATRICK MACRORY: Following on Sir Noel's question, Mr. Marshall said that the Statute Law Society were not criticising the professional skill of the draftsmen. I must say that when Sir Noel spoke of page 3 of your memorandum I thought he might have raised what you said in paragraph 82 of the Heap Report about draftsmen. There you refer to the style of the statutes as legalistic, often obscure and circumlocutious, and you mention long involved sentences, obscure grammar and archaisms. I am not saying that I disagree or agree with that criticism. But do you still stand by that paragraph?

A. (MR. MARSHALL): Yes, I think so, sir, because it is an inherited style, an inherited system. It is a system which is perhaps peculiar to Westminster,' or to this country, and is not found in the overseas countries of the Commonwealth, where a more brisk and more clearcut system is used, which has been brought about of course by the textual method of drafting! But ours is a traditional system, it is a literary system, a system which is ingrained in the method which has been adopted. That is not the fault of the highly skilled draftsmen: it is what they have had to do as a result of what has been handed down to them. It is part of the method that we are complaining about.

MR. STEW ART: It has been said twice that the draftsmen are bound by this method. Why and by whom are these draftsmen bound to do something in a way which you think is out of keeping with the times?

A. I thank you for raising that point. The way draftsmen draft depends very largely on the way politicians legislate. First of all, the Government wants a Bill prepared in a particular form, and then in order to get it through the House in a minimum time without a large number of divisions, a Bill has to be drafted in a particular way. Furthermore, Bills have to be drafted in such a way as to explain to Members of Parliament as they are going through what they mean and what their purpose is, not what the final result will be. It is the user who wants to know the final result. The Government wishes to put across, I will not say propaganda, but its principles in a cogent way; and Members of Parliament wish to know what the effect of the Act is in reference to all the other Acts that exist without going to the library of the House of Commons or the Inns of Court to find out and to refer to these documents. The way in which the parliamentary draftsmen draft is governed by such circumstances as the Government s policy, the standing orders of the House of Commons and pressure of time. Also there is the inherited literary expertise which they have acquired from their predecessors and which they continue to use.

Q. I can see that in respect of the referential style of amendment as against the textual. But the criticism you make in paragraph 82 of the Heap Report is surely not forced on the draftsmen by outside pressures—using archaisms, legally meaningless words and phrases, and so forth.

A. I think that it probably is, because that is to some extent part of the tradition of the English law which we are trying to get rid of. We use very many phrases which are archaic, very many words which are meaning; because they are duplications, and many phrases which are not understood by the ordinary man. May I suggest that in the same way as Sir Ernest Cowers has introduced the idea of plain words for civil servants,

might be a similar exhortation to use plain words to the legal draftsmen. It would be naive to propose the abolition of technical terms, but plain grammar, up-to-date words and simple language should be actively

BARONESS BACON: When you say that part of the reason for Bills being as they are is because Ministers wish to get them through Parliament quickly, are you referring to long clauses which may save time by not permitting too many clauses stand part, discussions and votes; or are you referring to the situation that although more explicit information could be included in the Bill if it were widened, the more one widens it, the greater the long title and the more it is open to amendment?

A. I am referring to both. If you proceed on the basis of general principles and say, "Here we have an idea. We will not cope with this by one little ad hoc amendment but we will cope with the whole of this afresh, even if you do it by a short Bill, you would attract a whole host of amendments and criticisms, because it would be a wonderful opportunity for the opposition, whoever they are, to criticise the law. Whereas if you have an ad hoc amendment the general law would not be touched, because to do so would be out of order. Secondly, as to the method of drafting, there was a reference somewhere to the Law Reform (Married Women and Tortfeasors) Act 1935. That is a classic example of phrases which might be the subject of separate sections being the subject of subsections. Therefore to avoid the necessity for a large number of divisions you have about five different subsections in one section and you go into the lobby once.

CHAIRMAN: It is not only the number of divisions, it is the number of discussions on clause stand part?

BARONESS BACON: I must say I cannot see the point of all this, but maybe the parliamentary draftsmen when they draft a Bill have that in mind. When I was a Minister I never had that in mind. I do not know about you, Mr. Chairman—did you? I was never aware of saying as a Minister "Look, we must do it this way."

A. (MR. MARSHALL): No, probably the Minister would not at that stage. But may I point out one Act to which we refer in the Heap Report, and which I dealt with in considerable detail in a lecture which I gave to the Statute Law Society? That is the Children Act of 1908. If you study the Hansard of that it is a very revealing exercise. The Liberal Party had decided that a great new era would dawn for children, and almost everything should be put into this Bill. It was introduced by Mr. Herbert Samuel, as he then was, and this Bill was framed in a way to present to the public this big new charter and to get it through the House speedily. In that Bill were put a very large number of matters which related to all sorts of external subjects: there was the variation of settlements, there was the placing of children in industrial schools, there was infant life preservation there were all sorts of things. The proper method to deal with that sort of situation, we suggest, would be to have a White Paper on the subject of a children's charter and then have a series of small Bills amending the Acts in question, thus treating the Act of Parliament as a working tool, and not a policy document. If you look at the Children Act 1908 it is a mess, a rag-

bag, of subjects. When the user has to look at that he is not interested from the policy point of view, he is interested in trying to apply it.

Q. I would have thought that putting everything in one Act so that it was easily understood was to be applauded, rather than amending the Act by a lot of little Bills. It is that which makes it complicated.

A. It is easier for the Member of Parliament, who wants to know what it is all about as it goes through, but, when it is through, it is not easier for the user because he has to do a scissors and paste exercise to apply all these pieces. The referential method is a method whereby the legal draftsman does not complete his task but he indicates the amendments which there should be. In the textual method he completes his task. In the referential method the user has to come and look at sections and then go to the original Act and say, "What do I do about this? "and in some cases he has literally to take pen and paper and make his own amendments.

(MR. RUSSELL): I fear that we may be trying to deal with two slightly different points. What Lady Bacon may be getting at is the desirability of codifying all statute law relating to a particular matter under one particular heading, as we get in Colonial laws particularly. The difficulty with the Children's Charter was that it did not do this. A similar case is the Companies Act which is by no means a company's charter in the sense that you can find all the statute law relating to companies in it.

MR. EWAN STEWART: May I give an example from Scotland? I remember as a law officer trying to check on the authorisation of the number of judges in the Court of Session when we were trying to increase the number. We stuck, we could not find the last authorisation. Eventually it came out of the Resale Price Maintenance Act.

A. (MR. MARSHALL): May I explain to Lady Bacon one method of avoiding that sort of thing? It is the method which they adopt in Canada. I would like to refer, with your permission, Mr. Chairman, to a Bill introduced in the House of Commons of Canada. It is called the Protection of Privacy Bill and its purpose is by amendments to the Criminal Code to create offences relating to the interception of private communications, etc.; by amendments to the Crown Liability Act to provide for civil liability of the Crown in circumstances where a private communication is unlawfully intercepted; and by amendments to the Official Secrets Act to provide for the interception or seizure of communications, and so on. The Bill goes on to amend the Criminal Code and these other Acts textually, in each case with an explanatory note opposite to it. You have your Protection or Privacy title, which tells the public what it is about, and you have your textual amendments there, and there are explanatory notes as well.

CHAIRMAN: That is one composite Bill amending several principal Acts.

A Yes.

Q. When you were referring to the Children Act 1908 just now you said that it should have been done by a number of separate Bills.

A. Yes, that is another method.

Q That is another method of achieving textual amendment, in o words, textual amendment lends itself to either of those two alternatives.

A. Yes.

Q. Is there any third alternative?

A Yes sir. The difference between the Protection of Privacy Act of Canada and the Children Act was that in the Children Act the amendments were not done textually and you had this referential tangle linking this Bill 11D with other Acts. As regards legislation by a number of small Acts, may I refer to the second report from the Select Committee on Procedure, 1970-71 and to question 1024 put by the Chairman to Sir John Fiennes about Second Readings: "1024. Surely, that is a very rare occurrence, is it n0t?_A. It is indeed. If one divided Bills into little innocuous bits, either by rule of procedure or by a convention in the House, the House could let them go through." We have received information from the Australian National University that under a Cabinet direction, Acts of the Commonwealth Parliament now contain only amendments of the Principal Act to which the amending Act relates. Where consequential amendments are required to other Acts these are effected by separate amending Acts. Our correspondent says, "It may be objected that this entails the passage of a greater number of Bills through the Parliament. While this is true, the difficulty is more apparent than real, and the practice is to suspend standing orders to enable the related Bills to be dealt with together." He encloses a copy of a statement of this practice from an official handbook of the procedure of the House of Representatives of the Commonwealth of Australia.* That, sir, is the other method. When the decimal currency system was introduced into Australia they had something like 37 Bills, but they were all considered together, and the small ones went through on the nod. That was a digression to a certain extent, but in reply to Lady Bacon's question and to your question may I sum up the position as follows? Any reformers would have, I suggest, three alternative courses in carrying out changes to the system of amendment. One would be the preparation of one Bill amending several Acts with the aid of the Textual Memorandum, to which we referred in the Stow Hill Report. Such a Textual Memorandum has already been prepared by the parliamentary draftsmen at Westminster in connection with one of the recent Bills, the Furnished Lettings (Rent Allowances) Bill 1972. I do not know whether you know that, sir; it is an interesting document. It is Cmnd. 5183, with subsequent revisions. That is one method. The second method is the Canadian system which I have indicated. Copies of the Protection of Privacy Bill can be supplied if necessary, or a copy can be lent for copies to be made. But the same principle applies in the Canadian Bill which we have in the Stow Hill Report here. That is the same procedure here

* Extract from an official handbook of the procedure of the House of Representatives of the Commonwealth of Australia. **"BILLS TAKEN TOGETHER**

It is not unusual, to meet the convenience of the House, for the standing orders to be suspended to enable related Bills to be considered together. The suspension of the standing orders may, depending on the particular circumstances, provide for—

(a) a group of Bills to be presented together and taken through their various readings and the committee stage together.

(b) the calling on together of several orders of the day for the second reading of various Bills with provision that they be taken through their remaining stages together; or

(c) the calling on together of several orders of the day for the second reading of various Bills with provision for the moving of one motion, That the Bills be now passed.

In such a case as the group of more than thirty related Bills dealing with decimal currency, and in other cases where the passing of a number of related Bills is a formal matter, this form of procedure is of much advantage in saving the time of the House."

although it is a slightly different method. The third one is the Australian system to which I have just drawn attention. Those are the three alternatives.

Q. May I ask you one or two questions arising out of this very important answer which you have given to us? Would it be possible for any one legislature to use more than one of those three alternatives, or must each legislature opt for one only of the three and stick to it?

A. I think it would be open to any legislature (by standing orders in this country—not by Cabinet direction as in Australia) to opt for any system either as an experiment or permanently. In our humble way in Northern Nigeria—I do not like to bring in personal reminiscences . . .

Q. Why not?

A. At one stage I was in the position of being a legal draftsman; I was later Attorney-General and also a Minister. At the same time I was a member of the House of Assembly and a member of the Executive Council. So what happened was that I had to present a memorandum to the Executive Council setting out the policy that I wanted. Then I had to go back to my chambers and get the parliamentary draftsmen to draft a Bill. I then had to present it in the House and see it through. I have thus had experience of all the stages. We have adopted all the different processes at different times, except for the Textual Memorandum which of course is a new one. But we have adopted the suspension of standing orders. We had a number of Bills—in fact we were forced to have a large number of Bills in the Colonies because Royal Instructions directed that "each different matter should be provided for by a different ordinance." This was to prevent the old system of tacking, whereby you got objectionable principles through on an essential Bill. So we have used all those, and I think there is no reason why they should not be adopted. Mind you, conditions in the former colonies were very much simpler than they are here. But I would emphasise that this textual system—one Act one subject—is adopted in Canada and the provinces of Canada, in Australia and the states of Australia with great success. In fact the draftsmen I have met in some of these countries say that they do not know how they would get on otherwise. Here conditions are different. We have not got, in three or four volumes, the entire statute law of the country, as they have over there. There you have the statute law of the country embodied in a few volumes, and you have a 10-year revision, which is done not by process of repeal and consolidation but by the administrative act of some legal officer inserting the textual amendments.

Q. A scissors and paste job?

A. A scissors and paste job, yes. In some countries that is presented to parliamentary committee, sometimes presented to the Executive Council, in each case it goes through the House on the nod. That avoids all parliamentary procedure when you come to the 10-year revision. I will not dilate now on the principle of the loose-leaf system, which permits revisions to be inserted as you go along. I think in some ways that it is a dangerous system because if you do not put your revision in, your laws are out of date.

Q. You do not regard it as a necessary corollary of any of the three textual amendment systems?

A No I do not. There are points in favour and against both the conventional system of binding and the loose-leaf system. But if you have your scissors and paste system you do it every 10 years. Or in between, if you like, the government printer can be directed to reprint a particular Act which has become heavily amended and reamended, and he can produce that for the benefit of all concerned between the 10-year revision.

Q. I do want to follow this up further; I think we are on to something very important. You have referred to the complexity of our system as compared with that in newly developed countries; we have a vast and ancient statute book. Would you therefore agree that it would be possible to adopt the textual amendment system only gradually in this country? A. Yes sir.

Q. But would you say that eventually all our legislation would be capable of it, or would some of it not be capable of it?

A. I think all should be if the proper methods are adopted. Mr. Francis Bennion and Sir John Fiennes in discussion before the Select Committee on Procedure agreed that at the present time you can only be sure of amending textually either a consolidation Act or an Act dealing with a completely new subject, a clean principal Act. So far as others are concerned, you can try, you can do it here and there but you cannot be sure of it. But one of our principles is that once you have a clean principal Act, never again should that be amended referentially. You should try and keep that a clean, tidy Act.

Q. I suppose the number of years that it would take to have the clean Acts passed so that eventually you got right over to the system of textual amendment would depend first and foremost on the number of skilled parliamentary draftsmen available for the work? A. Yes sir.

Q. Would it also not depend upon the amount of parliamentary time that could be devoted to it in each session?

A. Yes, to a certain extent, but there is the Consolidation of Enactments Procedure Act which provides for a special procedure for consolidation. This enables consolidation of Acts to go through by a very much more quick and easy procedure.

Q. Therefore you would hope that all principal Acts would start as mere consolidation Acts so that you would get the foundation laid without too much parliamentary controversy?

A. Yes. This has been gone into in correspondence with the former Chairman of the Law Commission, Mr. Justice Scarman, as he then was, where we advocated a crash programme of consolidation. I think it has been estimated—I do not know how accurately—by us that at the present rate it would take 60 years to consolidate the existing Acts. By that time, unless the system is altered, there will be more Acts coming along, still with the same defects of referential drafting. It is like the Gordian knot, the entanglement of these Acts.

Q. But there would be nothing to prevent some of the work being done on an experimental basis, and having on a particular subject started a system of textual amendment you would continue at any rate within that subject?

A. (MR. RUSSELL): Yes.

Q. Given ideal conditions and enough draftsmen, instead of 60 years now many years do you estimate it might take to move over to it and complete the process?

A. (MR. MARSHALL): I do not know, sir; I have no idea at all I remember when the previous Labour Government came into power in 1964 Lord Gardiner, the Lord Chancellor, said that his aim was that within 20 years all the Acts on the statute book would be new ones. He wanted a process of repeal, consolidation and change in 20 years, but I think that was rather optimistic.

Q. And thereafter there would have to be periodical revisions, like the 10-year one that you mentioned in Nigeria?

A. Yes, and in most Commonwealth countries including Canada and Australia. I do not know whether the members of this committee have seen recently any of the Revised Editions of the statutes of these territories, but it would give them some idea of what is involved. I have brought along Volume I of the Northern Nigerian Revision 1963 which I prepared when I was Law Revision Commissioner and which gives you some idea of the way things are done. You will see that each Act deals with one subject, and the numbers of the Acts which have carried out the amendments in the past are set out in the margin on page 1 of each Act.

Q. Yes. Mind you, your Criminal Procedure Code is vast and covers a wide range of subjects, does it not?

A. Yes. I admit that this is very simple compared with the problem here. But it is the germ of the idea which I am trying to sow.

(MR. RUSSELL): You asked a question, Chairman, about timing. The Society is investigating the use of computers and a lot of work has been done on this in America. I am not suggesting that a computer can take the place of the draftsman, but it can take over a great deal of the back-breaking work of going through the books and checking everything. I think it was in the Act which abolished the distinction between felony and misdemeanour that somebody had to go through the whole of the statute book and find every reference to either felony or misdemeanour. I gather that in America they have undertaken a similar job. One of the states there has gone through its statute book. The first time this was done it took a draftsman between 15 and 18 months: on the second occasion by which time they had got the information on to computers, it took just about as many minutes. We are now only at the beginnings of what one might term the science of information retrieval. The computer is quite fantastic. It works extremely fast. It works, on the whole, extremely accurately. But of course there is the old question that if you put in rubbish you will get rubbish out • You have to get the questions right and you have to get the ʷ”° programming right. Although Lord Gardiner may well have been optimistic in his 20 year estimate with conventional methods, I think this could be reduced to five or 10 years if we are able to harness the computer to this job.

Q. I just want to ask two more questions. Whether we have computers or not, which of the three methods of textual amendment would you think most appropriate to the needs of our legislature, if you have a choice?

A So far as our legislature is concerned I think it would be very aim

for me to answer, never having been a member of this. I would hazard, if I might an opinion on what would be best received by the users, those in commerce and industry. I think this would probably be the Canadian system. There the law is all clearly set out so that one can look at it and get a relatively quick answer out of it. Putting things through in little bundles of statutes is a very convenient system, it is much more convenient than our present system. But I personally would prefer the Canadian system. Then, as Mr. Marshall has said, one could get ultimately to the stage where the whole statute book could be revised on a 10-year basis. Q. Do you agree with that last answer, Mr. Marshall? A. (MR. MARSHALL): On the whole, yes I do.

Q. My final question is this: have you, or has the society, worked out a list of subjects which could be given priority if we were to have the introduction of textual amendment on an experimental basis? When I say priority I mean priority of subject. A. No, sir, we have not at the moment. (MR. RUSSELL): But we could.

MR. FINLAY: Could I take up one point arising out of the Nigerian statute book which Mr. Marshall produced. The numbers of the amending statutes are noted in the margin so that one can find out which amending Acts have been passed to produce the finished article? A. (MR. MARSHALL): Yes.

Q. Sometimes one has to find out not what the law is today but what it was a decade or 25 years ago. How easy is it to work that out with textual amendment?

A. What happens in practice is that there is in a library a set of the old laws with the laws that have been passed since, and if you want at any time to find the derivation of an Act you have to refer back. The general user does not want to look back: the lawyer in court would probably have to.

Q. So that the loose-leaf system, although well adapted to tell you what the law is at the moment, does not work when you want to know what it was in the past?

A. I think it is very dangerous because it does not tell you what the law was, it tells you what it is, and if you have not got a very skilful and trustworthy clerk it tells you what it might be, because he may have forgotten to take out one part and put in a new revision, or if he has taken out the old one he may have forgotten to put in the new one. It is a very dangerous system unless you have utterly trustworthy people, or you do it yourself.

THE DUKE OF ATHOLL: The importance of the correct titles for Bills was emphasised. Presumably this will become more important if they are computerised. Obviously governments will continue to wish to make a political impact with their legislation. Is it possible that there might be someone who should put in the short titles for the Bills, and if you think this is possible what body should that be?

A. I do not know, because my knowledge of parliamentary procedure is not very profound. May I tell you what happened in 1929 with regard to the Child Destruction Bill? Mr. Justice Talbot tried a case at assizes where a man was charged with the murder of a baby. The baby was in the process of

being born.. It was not an offence to kill a person who was not in being the man was acquitted. This was a loophole in the law. Mr. Justice Talbot saw Lord Darling and asked what he could do about it. Lord Darling introduced a Bill in the House of Lords to close the gap. This went down to the House of Commons and was rejected. It was reintroduced into the House of Lords with amendments as the Preservation of Infant Life Bill (See Second Reading, Parl. Deb., Lords, Vol. 72, col. 269, 1928-29) Lord Darling said:

"It was called the Child Destruction Bill. ... I gave it a different title, but the parliamentary draftsmen gave it that one, and naturally enough in the House of Commons, as the Member in charge there told me, there was an idea that it had something to do with a method for getting rid of the redundant population, and therefore it did not obtain support."

It is now called the Infant Life Preservation Act. But the offence is still "child destruction "in the body of the Act. That and the Infanticide Act and all these other Acts we have referred to in our memorandum, might easily have been incorporated as amendments into the Offences Against the Person Act 1861 without all this difficulty. In answering your question "who should do this? "in 1929 it was apparently done by the parliamentary draftsman, and it may now be the clerk of the House, I do not know. But I think there should be some person or body to co-ordinate titling so as to avoid these difficulties.

Q. This is what I was trying to get at.

A. I do not know who would do it.

CHAIRMAN: The Speaker could take responsibility.

SIR JOHN GIBSON: Apart from the question of titles of individual Bills, your system seems to depend on having before you start a scheme of groupings into what you call principal Acts?

A. Yes.

Q. How would you suggest that that should be drawn up? Would you adopt Butterworth's classification or would you adopt the classification which the Editorial Board of the Statutes Revised is now engaged in producing?

A. That is very much a matter for experts. In Commonwealth countries the Law Revision Commissioners used to choose their own titles, their groupings. They used to have certain categories of laws under a title heading and the Acts used to be put under those for revision purposes. What in fact happened was this. To take a simple case—rent restriction, or highways--"you had an Act relating to rent restriction you put it under rent restriction, if you had one relating to highways you put it under highways, everything to do with the subject went into that Act and nowhere else.

Q. But before you started, would you not have to have a scheme of short headings?

A. I suppose in a country like this where the legislation is so complicated, yes. We did not; things were fairly simple out there. But over here I think there must be some person or body in authority who would choose a title.

THE DUKE OF ATHOLL: Presumably there would have to be a gen index of all titles showing exactly what fell into each group?

A. Yes.

Q Thinking at the moment of the Badgers Bill which has just gone through it is for the protection of badgers, yet it is called the Badgers Bill. But the Protection of Wild Birds Act is called the Protection of Wild Birds Act and not just the Wild Birds Act. It seems that one or the other must be

A There was in each colony a Wild Animals Preservation Ordinance which started out as a model Ordinance sent out by the Colonial Office with a direction. There was a central directing authority. That is why all these laws are so coherent. So everybody had a Wild Animals Preservation Ordinance. If you had to deal with badgers, or if you had to deal with sparrows, it all went into that. Nobody was allowed to put up a Badgers Ordinance or a Sparrows Ordinance. SIR JOHN GIBSON: But an index would certainly be necessary, would it not?

A. Oh yes.

Q. You would agree that you could not have a perfect classification there, a cross classification?

A. Yes, because it depends so much on the subjective outlook of the draftsman or the reviser; each man has his own ideas about these things.

Q. The example you referred to earlier, the Children Act, is a very good one, because there are masses of things which could go under the heading of children which could also go under the heading of divorce or husband and wife or cruelty?

A. Except that "children "should not be a title at all because children are in almost all cases, apart from education, exceptions to the general rule. They represent a collection of exceptions.

(MR. RUSSELL): The committee may remember the discussion that went on over the hovercraft as to whether it was an aircraft or a ship.

MR. STEWART: May I ask a question on territorial application in the short title? It seems to me that an English nationalist might point out that there is no such thing as an Act of Parliament applying to England, that there are Acts of Parliament that apply to Scotland only, there are Acts of Parliament that do not apply to Scotland or Northern Ireland, but we do not seem to have any English Acts of Parliament and when you read the titles you cannot tell whether it is England and Wales only or if it is the United Kingdom. Would it not be a sensible idea to show that a measure applies to England and Wales where that is the case?

A. (MR. MARSHALL): One of the things that our committee may propose is a separate statute book for Scotland, because at the moment Scotland appears to be treated as the exception to England. We have the Education (Scotland) Act, the Highways (Scotland) Act, and so on. Also, instead of having English Acts applied to Scotland, we should have a Scottish Act, because the law is very different in many cases. Or if there is an Act for the United Kingdom the title should say it is for the whole of the United Kingdom.

SIR BASIL ENGHOLM: May I take you back to the discussion you started with on the language and the presentation of statutes? It has been said to us

by a number of people that we have a dilemma to face here because c and certainty are contrary objectives which do not match, and that English law has tended to go for certainty with the result that you et complexity and lack of clarity. Continental law tends to go the other wav for general objectives, and not to worry about covering every contingency so that you get greater clarity but less certainty. Would you agree that is this antithesis or not?

A. Yes, there is, to a very large extent. You get it also in the United States, where there is a tendency to state general principles and let the courts fill in the details; and it is so, I believe, on the continent. But the desire of the United Kingdom Parliament to cover every possible eventuality produces complexity and prolixity.

Q. Would you yourself feel that there would be some advantage in our changing over to the continental or the American method, going more for general principles and objectives and leaving greater discretion to the courts to interpret?

A. Since I have been brought up as an English lawyer I would say no. I would not give so much discretion to the courts, particularly in these days. I think that for the protection of the citizen and for the protection of his constitutional rights things need to be stated as clearly as possible.

Q. Does that mean that you would feel, in the light of what you have said, that inevitably we are going to have to continue with a good deal of lack of clarity?

A. I think there must be some lack of clarity but it can be considerably minimised if the system is changed, and that is the purpose of our proposals.

Q. Why do you feel that the system of allowing a greater latitude to the courts to interpret on the fairly rare and hypothetical cases that are dealt with at the moment is a bad system as compared with the system which we have at present?

A. Because of the differing views of judges. Judges are only human, they have different outlooks and different values, they may produce different results from a given situation. That can be seen from some of the decisions of the Supreme Court of the United States where judges differ diametrically on questions of policy. And one can see from dissenting views both in the Court of Appeal and the House of Lords, that very great differences of opinion can emerge here from a single situation which to a layman may appear to be perfectly clearcut. I think that it is not desirable to increase that uncertainty. ,

Q Would your view differ according to the subject matter of the legislation? If you- have a statute dealing with rights of individuals on a subsidy scheme, then maybe certainty is necessary, but if you have a .statute which is dealing with general principles-an Act which has been mentioned to us is the Sale of Goods Act-is that the kind of case where one could leave greater discretion to the courts without going into the complexity of trying to deal with every single contingency?

A I think that it is to the benefit of the litigant to know before he goes into court what his rights are instead of waiting for the accident of litigation

and for the judge to decide them afterwards. Certainty is desirable before

(MR. RUSSELL): We have a perfect example in the City Code. That is certainly not statute law. Over the years that it has been in existence it has grown and grown. It started originally as a series of statements of general principles and rules on the application of those principles. Since then, about every two or three months, the Panel issues a practice note making some point clear, and each year they produce an annual report which among other things adds certain other practice points. On the whole it has worked extraordinarily well, perhaps because the people who are involved in it are a relatively small group. It would be superficially attractive, under the continental system, to have access to the lawgivers themselves, namely the directors of the Panel; but I agree with Mr. Marshall that certainty is desirable, and if this means a complexity in the statute we will have to put up with it. Nevertheless, in many cases, the existing form of the statute book does create greater difficulties than are really necessary.

Q. Now that we are a member of the European Community a lot of the legislation which the Community passes is drafted on a different basis from our own so that we have two different types of legislation side by side and two different types of interpretation, by the European courts and the courts here. Do you think this is likely to lead to any complication or difficulty? A. (MR. RUSSELL): Yes.

(MR. MARSHALL): Yes I think it would. This touches on a point we wish to bring up. That is that our proposals cannot in the present state of affairs be considered to be final so far as the form or the style of drafting is concerned. We are now in the Common Market and we must somehow reconcile some of our legislation with the legislation of the other members. It has been suggested to me by a very eminent lawyer that our society should take this into account in making definite proposals. He said, "I commend to you the limpid, lucid and beautiful drafting of the French." This is something we shall have to go into.

SIR JOHN GIBSON: Continental legal systems are referred to at the bottom of page 28 of the Heap Report, apparently with approval. You say that a move towards the continental attitude to legislation would be welcomed by many in this country.

A. This was written before we went into the Common Market and if it was desirable at that time, it is now probably imperative.

Q. There is another way of dealing with this question of detail, and it is a method which is sometimes followed by us, not always successfully. That is for the statute to be an enabling statute and to allow the detail to be filled in with subordinate legislation which has to be either affirmatively approved by Parliament or can be negatived by either House. Have you considered that as an alternative to judicial responsibility?

A. Yes it has been considered. But I think our society would not accept it as a good alternative, for this reason: subordinate legislation laid on the table of the House is treated, I do not say superficially, but it is not always considered in detail and debated. If there is something objectionable in it might be objected to; but it is a very different thing to place subordinate legislation on the table of the House than to debate that legislation in committee of the House, so that every section receives proper attention.

MR. JUSTICE COOKE: I am not sure that I have appreciated Mr Marshall's final view as to the choice between detailed legislation and legislation which states principles, leaving the courts to work out those principles. Certainly page 28 of the Heap Report seems to me to come down in favour of a statement of principles. It is not clear to me whether Mr Marshall finally was agreeing with what is said there or was saying that so far as we can in this country we must have legislation which condescends on the utmost detail.

A. The answer to that lies in the last sentence of paragraph 69, and it is a matter of degree:

> "The choice is not between complete arbitrariness and absolutely binding rules; the exercise of discretion falls in the middle of those two extremes, and in this exercise principles act as ' guide posts ' and not as ' hitch-posts '."

I did not write the last words and I do not know quite what they mean. But I think it is a matter of degree, the extent to which you declare principles and the extent to which you go into detail.

Q. That I would accept. But I would still like to know your view as to whether the existing British practice is satisfactory or errs too much on one side or the other.

A. That depends on the Act in question. It may well be that in matters like the Road Traffic Act far too much detail is spelt out, where it might be left to the discretion of the courts to decide what is a contravention in a particular case. There are other cases where too much detail cannot be inserted. I probably disagree with Mr. Russell on this; in the case of the Sale of Goods Act, it is most desirable that merchants who are dealing with very large sums of money and a very large quantity of goods should know exactly where they stand.

Q. But would that necessarily lead to the conclusion that the Sale of Goods Act should be recast in a much more detailed form? After all, the Sale of Goods Act is backed by an enormous quantity of what the French call jurisprudence, and many people would say that our law as to the sale of goods has a very high degree of certainty. Certainly that is the view of very many people of varying nationalities who do not need to have their contracts governed by English law, yet who expressly choose English law to govern their contracts of the sale of goods.

Q. The reason for that presumably is, at any rate in part, that English law gives you certainty.

A. Yes.

Q. And that despite the generality of the terms in which the Sale of Goods Act is drafted?

A. Yes. Of course if you go on to the question of codification codified system it might well be that much of that case law would be embodied in a new Sale of Goods Code. On the other hand, in countries where they have codes, such as France and Germany, there is still a lot of case law. It is again a matter of degree.

Q. I believe that it is fashionable now among the *avant garde* of French lawyers to speak of the advantages of decodification of the civil law?

A. Yes.

CHAIRMAN: Are there any other points?

A. May I make one final point? This arises out of Sir John Fiennes' memorandum and his evidence to the Select Committee on Procedure, as reproduced in the Stow Hill Committee Report. I refer to page 49, paragraphs 11 to 13, and Sir John Fiennes' comparison of the textual and referential systems in his annex reproduced on pages 51 and 52. I know that one can go on for ever producing examples of the merits and demerits of the two systems, the textual system and the referential system. Sir John Fiennes there states that he thinks that what he calls direct drafting, which I understand to be referential drafting, is more economical. But in order to show that it is not always economical (which perhaps is a self-evident fact), in order to show you the differences between a section drafted referentially and one drafted textually I would like to produce this example which was produced for the press release of the Stow Hill Report.[¨]

SIR PATRICK MACRORY: If the textual method is adopted is there any way of avoiding the situation so vividly described by Sir Leslie Scarman, as quoted on page 29 of the Heap Report, and the resulting mess to which he refers?

A. That of course occurs both in the textual and the referential system. You will always have a mess where you have amendment, it is just a matter of degree. I think if you have competent staff who can be relied upon to write these things in you are in a better state under the textual system than you are under the referential system. But the paper I have handed you shows not only that in some cases the textual form can be more economical, but also, which may not be entirely to my advantage, that it is less comprehensible to a Member of Parliament when it is passing through the House. A Member of Parliament, I would say, would understand much better the referential amendments on the left than he would the textual amendments on the right. But when the user comes to insert his textual amendments he would have less difficulty. I suggest that this conflict could be overcome by the use of either the Canadian method or the textual memorandum, an example of which has been mentioned today, because that explains the textual amendments.

CHAIRMAN: Mr. Marshall and Mr. Russell, you have given us very interesting evidence by coming here. We are most grateful to you for the trouble you have taken. I am sure I speak for the whole Committee when I express our gratitude to you.

(The witnesses withdrew)

[¨] See Appendix.

APPENDIX

Referential amendments contained in section 25 (3) of the Finance Act 1962	*The same amendments converted into textual form*
(3) In section twenty-eight of the Finance Act, 1960 (which provides for the cancellation of tax advantages from certain transactions in securities where the tax advantage is obtained or obtainable in the circumstances set out in subsection (2) of the section),—	3) Subsection (2) of section 28 of the Finance Act 1960. is hereby amended in the following respects—
(a) the reference in paragraph (a) of subsection (2) to a person being entitled by reason of any exemption from tax to recover tax in respect of dividends received by him shall include a reference to his being by reason of section twenty (subvention payments) of the Finance Act, 1953, so entitled; and	(a) by the insertion in paragraph (a), after the word "income", of the words "or by reason of section 20 of the Finance Act, 1953"; and
(b) the reference in paragraph (b) of subsection (2) to a person becoming entitled in respect of securities held or sold by him to a deduction in computing profits or gains by reason of a fall in the value of securities shall include a reference to his becoming in respect of any securities formerly held by him (whether sold by him or not) so entitled;	(b) by the insertion in paragraph (b), after the word "him". of the words "or formerly held by him (whether sold by him or not)".