The Awful Statute Book of Great Britain

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The Statutes of the United Kingdom have never been the object of much admiration, at all events in the United Kingdom itself. One of my predecessors, as First Parliamentary Counsel, Sir William Graham Harrison, writing in 1935 revealed that they resembled the early Christians in Rome: "As for this sect, we know that everywhere it is spoken against." More recently Lord Gardiner, who was Lord Chancellor in the Labour Administration of 1964-70 and in that capacity initiated or participated in a number of changes (always referred to honoris causa as "reforms"), addressed the University of Durham on the subject of the Role of the Lord Chancellor in the field of Law Reform. His address listed the things which the new Law Commission, set up by Act of Parliament in 1965, had done, were doing and had yet to do. It contained the following passage relating to the Statute law: "Sixthly, the reform of our awful Statute Book, which, when I took office, contained over 3,000 Public Acts of Parliament dating back to 1225, is at last really under way."

So we have the highest judicial authority (our Lord Chancellor combines the position of Chief Minister responsible for the administration of the law with that of head of the Judiciary) for the proposition that our Statute Book is awful. Lord Gardiner made no secret of his views while in office, and it is fair to say that he had as little admiration for the language and structure of contemporary legislation as for the way in which the whole Statute Law as in force is arranged and published. In what follows I shall say something first about the methods by which we produce the legislation comprised in this awful Statute Book, and secondly about the detailed criticisms which it provokes and the remedies adopted to meet those criticisms. In doing so I shall take leave to embark on one or two digressions culled from a lifetime in the centre of the legislative machine.

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How Legislation is Developed in England

There are two material distinctions between the legislative processes in the United States and the United Kingdom of which one is elementary and the other less well-known. The first is that in the United Kingdom the members of the Government are not excluded from the legislature. The political executive is drawn almost exclusively from members of one or other House of Parliament, and mainly of course from the Commons. There was indeed a brief period at the outset of the 18th Century when an Act was in prospective operation which would have excluded from the Commons all holders of office of profit under the Crown; but this was superseded in 1705 by the Succession to the Crown Act, which, after a long battle between the two Houses, produced a modified rule embodied in two of the worst-drafted sections I ever had to deal with in the course of 33 years on the job. The combined effect of these was understood to be that the holders of new offices of profit under the Crown (i.e., those created after 1705) were absolutely disqualified for the Commons. This was of course designed to prevent the Sovereign packing the Commons with "place-men." On the other hand the holders of old offices (Secretary of State and so forth) could sit in the Commons, provided they were elected or re-elected after appointment. This system, heavily patched and shored up by some 80 subsequent Acts dealing with particular offices, survived for 250 years. One result was that when a new Government was formed and a member of the Commons appointed to an "old" office, he had to resign his seat and contest a bye-election in the course of which, occasionally, he failed to secure re-election; and the Government then had to find him another seat, which might be done by getting hold of another supporter with a really safe majority and tempting him with a peerage—an article then more highly prized than it is today. That particular element of comedy was eliminated in 1919; further simplifications were made in 1937; and finally in 1957 the whole tangle was swept away by they House of Commons Disqualification Act of that year, which repealed sections 24 and 25 of the Succession to the Crown Act 1707 and about 120 other enactments, and as regards the political offices imposed a mere limitation on the number of Ministers who could sit simultaneously in the House of Commons. The whole list runs to about 100 offices, and the effect of the limit is that a small number of Ministers of each class (the absolute minimum in the case of a Labour Administration) are drawn from the House of Lords.

The Bill for the Act of 1957 was unusual in many ways, including the time from the drawing board to final enactment (14 years) and the procedure in Parliament, where the Bill was referred to a Select Committee (much more similar to American legislative Committees than the normal Standing Committee which considers our legislation). At almost the last moment I was asked by the Committee to turn the Bill completely inside out and convert what had been a scheme disqualified for membership of the Commons the holders of a large range of Government and other specified posts, with all the trimmings necessary
to deal with the consequences of a breach, into a scheme disqualifying members of the Commons from holding those posts with an entirely different set of trimmings. This was done in quick time, but in the long run the alternative was not adopted, which was perhaps as well because, although it had certain virtues, the chances of getting everything right with a volteface of those dimensions at that stage were not high. There is a moral here for students of legislative drafting. You can compress the drafting time just so far (and your clients will usually expect maximum compression as a matter of course); but if you try to go even faster, you will probably fall flat on your face.

Another moral for such students, this time in the Act of 1705, is that compromise usually breeds ambiguity. But the main point that emerges from the contemplation of this legislation is the extraordinary adaptability of legal concepts, whether statutory or not. In this case, the original distinction between Crown Offices of profit old and new in 1705 gradually transformed into an entirely different distinction between political offices which could (and in some cases must) be filled by members of the Commons, and other offices, whether in the Crown service or not, from which members of the Commons were totally excluded; but right down to 1957 the new distinction remained balanced on the original enactment.

The presence in the House of Commons of most of the government, drawn from and supported by a reliable majority in that House, means that with rare exceptions, Government legislation is always passed and no other legislation is passed unless agreed to by the Government. The official opposition do not now introduce Bills. There are limited facilities for what are known as Private Members' Bills, but these are either uncontroversial or, occasionally, so controversial that no government would wish to be involved either way. The Abortion Act of 1967 was an instance of the latter kind. When such a Bill shows signs of passing, the government endeavours to remain neutral, but tries to get the drafting as right as possible and for that purpose authorises its own draftsmen to prepare any necessary amendments. Having handled that particular job, I am not proud of the result. This was however another case of a Bill founded on a compromise, in which precision was hardly attainable. It appears that the Act works in practice and produces the results intended by at least some of the legislators who passed it; and in point of precision it is perhaps a little worse than the previous law.

The second main distinction between our legislative process and yours has been examined elsewhere by Professor Dickerson. In the United States there may be many bodies of legislative draftsmen providing the input to any particular legislature; and that legislature itself usually has its own corps of draftsmen as well. In Great Britain, on the other hand, almost all government Bills (and this, as explained above, means almost all Bills that are in fact enacted) are drafted by one small self-contained body of government lawyers known as the Parliamentary Counsel. I say "almost"
only because we have two systems of law, English and Scots, and Bills which relate exclusively to Scotland are handled by the Lord Advocate's Department. This system dates from 1869, before which I believe our system (so far as we had one) approximated more closely to that which prevails in the States today. The position of the Parliamentary Counsel in the British Civil Service is unusual. They are not responsible to any particular Minister for the way they conduct their drafting business. For pay and rations they belong to the Prime Minister's Civil Service Department; in the preparation of each Bill they act for the particular Minister who is responsible or primarily responsible for that Bill. They are in effect on the cab rank. Before a particular Minister can hail the cab he has to obtain Cabinet approval both for his journey, and for the Session in which he is to take it. Our Parliament normally turns out 70 or 80 Acts per Session, so it would not only break the system but would serve no useful purpose if 200 Bills were being prepared simultaneously. Accordingly we have an elaborate and efficient Cabinet drill by which the competing bids for Government legislation are collated and reduced (by a combination of horse-trading and sheer brutality) to a manageable ration for the ensuing Session.

Once instructions for a Bill are given and received, the analogy of the cab driver continues. The Minister can't select a particular cab off the rank. That is done by the First Parliamentary Counsel. Nor does the selected draftsman just drive the customer straight towards his destination regardless of the rules and courtesies of the road. He has to ensure that the department's legislative scheme is internally coherent and effective and that the substance and language of the Bill are consistent with the pattern of the general law. On legal matters he is not a mere temporary employee of the Minister. In practice he exercises his own judgment but can if necessary refer any question of doubt to the Attorney General, as the Minister primarily concerned with the legal aspects of current legislation. Again, the draftsmen stand in a position of trust towards Parliament and the officers of both Houses, who have no corps of draftsmen of their own. There is room here for friction between Ministers and the draftsmen; but, as Sir Alan Ellis (another predecessor of mine) wrote in 1949, "It is to the credit of the British genius for adjustments that there is in fact no case on record of a difference between a Minister and the temporary pilot of his ship with whom the Office supplies him which has called for a decision on how such a difference should be resolved." 12

When a draft Bill is ready to be introduced it is circulated to all Government departments and examined by a small committee of Ministers, sometimes known as the "Legislation Committee." This is not a "policy" committee--the general policy has been decided elsewhere before drafting began--and it is not a drafting committee in the sense of going through the Bill line by line and making amendments. But it does consider both peripheral questions of policy, including legal
policy, and points of drafting which are thrown up by the Minister in charge of the Bill or by other members of the Committee. This is essentially the forum in which general decisions can be arrived at (and subsequently enforced if necessary) upon typical recurrent questions such as the scale of penalties for offences: whether, and if so how, a continuing penalty should be imposed for a continuing offence; whether it is permissible (in view of the doctrine of collective Cabinet responsibility) to enact that one Minister must consult another in carrying out a particular function; or whether any and what express provision should be made for securing (or excluding) a civil remedy in damages at the suit of a person injured by the breach of a new statutory duty imposed by the legislation and enforceable by criminal proceedings. To those familiar with the working of committees in general it will come as no surprise if I add that such decisions, once arrived at, are often overthrown in relation to the next Bill that comes along, and the draftsmen of subsequent Bills are left wondering which decision to follow. The Attorney General or the Solicitor General takes an active part in these meetings, and one of the duties of the draftsman is to brief them in writing on points of legal policy and on any matters which have given rise to special difficulty in the course of the drafting. This is a laborious business when properly done, and it has to be done when the pressure of time is at the maximum. But it is a salutory exercise for the draftsman. The need to explain what has been written often exposes the possibility of improving it.

After the Bill is introduced into Parliament, the Minister still retains effective control over the language and structure. In the House of Commons, where most Government Bills and almost all important ones are introduced, the Bill can be amended at two stages, committee and report. The committee may be a committee of the whole House (comprising over 600 members) but more usually it is one of the Standing Committees. There are usually five or six of these Committees comprising between 20 and 30 members. They are not specialists in the sense of dealing with particular subjects such as Law and Order, or Trade. Two of them are composed of all the members who sit for constituencies in Scotland and Wales respectively, and deal with Bills relating exclusively to those parts of the country (the latter are rare). But apart from those, the business taken in any particular Standing Committee depends simply on which of them is available to handle it, and the actual allocation of Bills is settled by the Government Whips acting in consultation with the Opposition Whips. Each of these Committees has a chairman (drawn from a panel which includes both Government and Opposition members) and a permanent nucleus of members. Additional members are nominated for each particular Bill by their own party Whips. Care is always taken to ensure that the voting strength on the Committee reflects the voting strength in the whole House—in other words the Government always has a majority of at least one. The chairman of the Committee is essentially neutral (like the Speaker in the House).
He is there to enforce compliance with the rules of order and to ensure that minority views get a fair crack of the whip. Although amendments to the Bill can in theory be moved without notice, in practice written notice is given of all proposed amendments, and these are printed and circulated before the meetings of the Committee. There are often very large numbers of notices of amendments. On my own last Bill, the Parliament (No.2) Bill of 1969, we had notice of 280 separate amendments at the Committee Stage. In the case of the Industrial Relations Bill of 1971, I believe the number was 950. The Chairman of the Committee goes through all the proposed amendments with the advice of (a) the Committee Clerk, an officer on the staff of the House of Commons who is neither a draftsman nor a lawyer, but probably well experienced in the legislative process, and (b) the draftsman of the Bill. Some are rejected as "out of order" for one reason or another. From the remainder a selection is made with a view to securing an orderly debate in which most or all of the points of substance on each clause are discussed. At this point, as already mentioned, the draftsman is no longer acting as the Minister's servant or agent—he gives the best information and advice he can with complete impartiality. The one privilege the Government has here (and it has it not because it is the Government but because the Minister is "the Member in charge of the Bill") is that all Government amendments are selected for debate, unless, improbably, they are found to be out of order. I was once "no-balled" on a Government amendment, but this doesn't often happen.

To sum up, the Standing Committee is not an autonomous body with a particular sphere of expertise, armed with its own legal and drafting services and equipped to negotiate with the Administration on the substance and detail of the Bill before it. It has no power to call for or receive evidence from the Government or elsewhere. It is just a stage in the Parliamentary process, subsequent to the decision of the Whole House on Second Reading approving the principles of the Bill. Amendments contrary to the principles of the Bill (known as "wrecking amendments") are out of order. The Minister, so long as he can command the support of his own party in the Committee, can more or less count on the vote if it comes to a division. The proceedings are almost adversary in character. If, as sometimes happens by inadvertence or otherwise, an adverse vote is carried in Committee, the Government can, if necessary, get it reversed at the Report Stage, where their majority is more reliable.

The mechanics are different in the House of Lords, but the results are very much the same. The Government of the day is more or less well represented in this House as well as the Commons, but a Labour administration can't rely on a majority there. The House of Lords is still basically a hereditary body comprising the holders for the time being of titles which have been conferred over the years by the Sovereign in the exercise of the Royal prerogative, and these are still mostly Conservatives. It is difficult to believe—indeed we can hardly believe it ourselves—that in this day and age the legislature of a highly developed democracy can include a body of this
nature: but this is another of our antique institutions, of which the basic structure has been patched and altered to the point where it bears little resemblance to the original. As matters stand, the legislative powers of the Lords are restricted both by Parliamentary usage and by the Parliamentary Act 1911. They don't initiate or amend financial Bills; and as regards other Bills which are sent up from the Commons any head-on clash between the two Houses can be resolved, in the long run, in favour of the Commons. Originally the procedure for that purpose involved a delay of three Sessions of Parliament, but this was cut to two in 1949 during the first post-war Labour Administration.

In my time as First Parliamentary Counsel I was engaged on three successive operations on this venerable patient, the first two successful and the third not. By 1957 the representation of the Labour Party in the Lords had become quite inadequate. Conservative Prime Ministers were ready and willing to recommend senior Labour politicians for elevation to the peerage to supply the deficiency; but the party was opposed in principle to the hereditary system and it had become increasingly difficult to find suitable men who would devote not only themselves but their eldest sons and their remoter issue to maintaining the system.

Some of the old war-horses who had accepted the transition when no alternative was available were already regretting the effects on their families, and in particular Lord Stansgate, formerly Mr. Wedgwood Benn, whose active son was doing very well in the Labour Party in the Commons and wanted to stay there when his father died. That particular saga could easily fill two or three articles but must be taken very shortly here. Meanwhile the immediate remedy was to provide for the creation of peerages for life, which would entitle the holders to a seat in the Lords but would not descend to their heirs. This was done by the Life Peerages Act 1958, a very short and simple Act. Supporters of Women's Lib will note with approval subsection (3) of section 1: "A life peerage may be conferred under this section on a woman," which was not quite as easy to draft as it looks. (That subsection has been liberally used, and generally speaking we find that Life Ladies, like other ladies, are generally speaking.) The Bill for this Act was treated by the Labour opposition under Sir Hugh Gaitskill with a reserve amounting almost to contempt, but in practice it has been operated by both parties and the House is now well stocked with experienced politicians holding life peerages. Only a handful of the hereditary peers who have acquired their titles by succession take any regular part in the legislative process and those who do are well qualified for the purpose. Both major parties and also the Liberal Party are well represented, and there are many active peers who are committed to no party. In practice it is now a compact and efficient component of the legislative machine.

The next step was taken in 1963 as the result of the gallant battle sustained by the Wedgwood Benns. It was now generally accepted that the hereditary system could operate to the disadvantage of the successor. If he was in the House of Commons (or wanted to get there) he would
be automatically disqualified whether or not he took up his seat in the Lords. Even in other fields the possession of a title could be an embarrassment. To deal with this, the Peerage Act of 1963 enabled any person who succeeded to a hereditary peerage to disclaim it within a year after succeeding or after attaining his majority, which ever was the later. According to my recollection it was originally intended not to make this provision retroactive; but in the long run those peers who had already succeeded were given 12 months from the end of July 1963 in which they too could disclaim the title. This was primarily of interest to Mr. Wedgwood Benn, who duly disclaimed and subsequently held office as a Cabinet Minister in the Commons throughout the Labour Administration of 1964 to 1970. It also produced spectacular effects on the leadership of the Conservative Party. Lord Hailsham resigned his hereditary peerage in order to make himself available for selection as Mr. Quintin Hogg. In Practice Lord Home was selected instead, and he was still in time to disclaim his peerage, take over the Premiership, and fight in the next election as Sir Alec Douglas Home. In fact the Conservatives lost that election and the next. By the time they got back in 1970, Sir Alec had been replaced by Mr. Heath as Leader of the party (although he still held office as Foreign Secretary in the Commons). Mr. Quintin Hogg, on the other hand, was appointed to be Lord Chancellor, and now sits in the House of Lords again as the holder of a new life peerage with his old title of Lord Hailsham. One day perhaps Sir Alec may follow suit.

My third and last Bill in that field was much more ambitious. It was a new Parliament Bill introduced by the Labour Government in 1969, and intended to deal comprehensively with the composition and powers of the House of Lords. It was a package deal and in some ways not a bad package at that. On composition, it would have excluded from the House of Lords all future peers acquiring title by succession and have removed the power to vote (but not the right to attend and speak) from existing hereditary peers. In the long run this would have produced an upper Chamber composed exclusively of members nominated as new Peers by successive Prime Ministers acting within established Parliamentary conditions. On powers the package was less ideal. A reformed upper Chamber should have received enlarged powers. Instead, the Bill proposed to repeal the Parliamentary Acts of 1911 and 1949 and substitute an even simpler and quicker procedure for enabling the Commons to overrule the Lords in the event of a head-on clash on legislation, including subordinate legislation.

The Bill was introduced after discussions which had all but resulted in agreement between representatives of all three parties; but the Government of the day, provoked by a show of resistance by the House of Lords to the continuance by Order in Council of sanctions against Rhodesia, withdrew from the discussions and subsequently introduced the Bill as their own solution. Accordingly the opposition parties were free to let their backbenchers make hay with the Bill, which was also bitterly opposed by a substantial and very vocal section of the
Government party, who wanted something much more radical. Between them they occupied so much time that the government, in order to salvage the rest of their programme, had to let the Bill drop. We don't have any automatic time-tables on legislation. The Government can nearly always impose one if necessary by moving what we call a Guillotine motion. But this was the rare exception where they could not count on their own party to support the motion.

So in the long run this Bill came to nothing, and the House of Lords continues to function as it did before, with the sword of Damocles suspended over its august and venerable head, and the existing Parliament Acts in the background. In practice the Commons, and through the Commons the Government of the day, have the last word on all amendments made by the Lords on government legislation. When it comes to the crunch the Lords don't "insist" on amendments which the Commons disagree to, so there is no great point in making such amendments in the first place. On the other hand the Lords readily pass strings of Government amendments designed to clear up any damage sustained by a Bill during its passage through the Commons. There is therefore little left of one of the causes which were advanced in 1857 and 1875 for the condition of "our awful statute-book," namely "the uncertainty arising from inconsistent and ill-considered amendments."

It is arguable that the British legislative system compares unfavourably with those of the United States in that it is far less democratic. Though groups of members of Parliament acting in concert (especially if they belong to the Government party) can influence the policy of a Bill, individual legislators who may be eminent lawyers and may be (or may fancy themselves as being) adept at drafting have little chance of influencing even the language and structure. As an example of the fury which may be caused by this situation, here is part of a letter to THE TIMES of 6th of April 1970 written by a well-known lawyer who was then a prominent member of the Opposition and is now a Minister in the new Conservative administration:

On the standing committees there are almost invariably M.P.s who are practising lawyers and professional men who have to interpret and apply the Bills when those Bills become law. They are capable of drafting amendments which will work in practice. They do so, time and time again as the order paper of any standing committee testifies. Yet, time and time again their efforts are treated with polite or contemptuous rejection by Ministers. The language of the parliamentary draftsman, who has not been in the general practice of the law for years, is forced on to the statute book by the whipped (but sometimes protesting) backbench Government supporters—not because the Minister (or anyone else for that matter) knows what it means but because it is quicker that way.

One cannot help sympathising with much of this, but the fact is that it is very difficult for any draftsman,
however skilled and experienced he is, to prepare amendments to another draftsman's Bill without doing some accidental damage. In other words the best person to settle the wording and position of an amendment to a Bill is the draftsman of the Bill, not because he is a better draftsman but because he is the draftsman of that Bill.

It has indeed been suggested from time to time that the Houses of Parliament should be provided with their own bodies of expert statutory lawyers, who would advise them as required on the Bills presented to them. This proposal was first made in a report from the Statute Law Commissioners which led to the appointment in 1857 of a Select Committee of the House of Commons to consider means of improving the manner and language of current legislation. That Committee made no report, but another similar committee was appointed in 1875, which among other things looked into this proposal and turned it down flat. The grounds were that the proposed system would impair responsibility, place the Government draftsman in an invidious position, lead to disputes with no means of resolving them, and generally increase (with devastating effects towards the end of a session) the delays inherent in the legislative process. The proposal slept until 1931 when it was revived in a different form before a Select Committee of the House of Commons on Procedure in the conduct of Public Business. This time the proposal was that each Committee on a Bill should have its own expert draftsman who would go through the Bill after the Committee Stage and clean it up so as to make the result "clear and intelligible." The proposal was not adopted (or even discussed) in the Committee's report, but it was firmly panned by Sir William Graham Harrison in the Article already referred to.22

I can't help thinking that some of the objections to this proposal may sound rather exaggerated to those who are accustomed to State and Federal legislation over here. At all events it appeared from the National Conference on Federal Legislative Drafting in the Executive Branch, which I had the privilege to attend in Washington several years ago, that the legislative draftsmen of the two Houses have the confidence of those of the Administrative departments, and vice versa, and the two work efficiently and harmoniously together, to give effect to the requirements of the Committee on the Bill. Perhaps, to revert to Alan Ellis' observation, a "genius for adjustments" is not a British monopoly.

Some Criticisms and Remedies

Having given a sketchy and selective account of the methods by which we construct and maintain our Statute Book—from which it appears that the governments of the day and their permanent servants in the Parliamentary Counsel Office are fixed with the responsibility for its shortcomings—I turn to the main criticisms which are directed against it and the attempts which have been made to correct some of them. As indicated at the outset of these remarks, it is not our most popular form of literature. Other Statute Books have fared better in the past. I think it was
Herodotus who recorded how the Athenians employed Solon to codify all their laws. When the job was done they were so pleased with the result that they did two things. In the first place, they took a solemn oath not to amend any of the laws without his agreement; secondly, no doubt in order to ensure at least a period of stability, they sent him away on compulsory sabbatical leave for 10 years.

So far as Britain is concerned, the preface to the latest work on legislative drafting begins with an apt quotation from Gulliver's Travels:

> This society has a peculiar cant and jargon of its own that no other mortal can understand and wherein all their laws are written, which they take care to multiply.

This passage neatly summarises the two main criticisms of our Statute Book, namely (a) that it is unintelligible and (b) that there is far too much of it. I shall deal with these points in inverse order and begin with the quantity rather than the quality.

This brings us back to Lord Gardiner's address published in the Law Quarterly Review, in which he rehearsed his own initiative in establishing a permanent independent Law Commission charged with the duty of promoting the reform of the law, including statute law. After referring to our total of over 3,000 Acts, he continued: "At long last the consolidation into one Act of many statutes covering the same field is proceeding at an increasing pace. Since October, 1964, 28 Consolidation Acts have been introduced, each repealing many existing Acts. So at long last we are repealing more Acts than we are passing. In addition to this, with the assistance of the Law Commission, we have already repealed in Statute Law Repeal Acts 197 Acts and parts of a further 246 Acts. Moreover, with the help of the Law Commission and of the Statute Law Committee, of which the Lord Chancellor is chairman and of whose Publications Committee the chairman of the Law Commission is chairman, we are in process of changing from a chronological statute book to an alphabetical, or titles, statute book."

Lord Gardiner's figure of over 3,000 statutes wholly or partly in force is indeed correct. Is this a disgrace to a country whose legislative history extends over 750 years? It averages out at about four Acts per annum over the whole period, which is not perhaps excessive. I am informed that two or three thousand Acts a year is the norm for some of the State legislatures. But whether a disgrace or not, it is fair to add that after nine years of the Law Commission the number of Acts wholly or partly in force in Great Britain appears to be very much the same as it was in 1964.

Nor would it be right to infer from Lord Gardiner's remarks that the process of Statute Law Repeal owes more than a marginal debt to the Law Commission. This pruning process began well over 100 years ago, when our Statute Book was really in a deplorable state. It was uncertain both what Acts had actually been enacted as such in the earliest
period of Parliament; and which enactments of that and later periods had been repealed by subsequent Acts. The first of these problems was entrusted to the Record Commissioners who produced an authentic edition of all Acts passed down to the end of 1714. No more need be said here about that.

The second problem was mainly one of interpretation, since it was not then the general practice to include a list of specific repeals consequential on the passing of a new Act. Repeals were either left to the operation of the general principle that any enactment is repealed by implication by any inconsistent subsequent enactment, or dealt with (if that is the right expression) by a clause repealing, without naming them ("all enactments repugnant to this Act"). This practice pretty well ended with the establishment of the Parliamentary Counsel in 1869, but the washing-up left by previous operations had to be cleared off, and this was done by a series of Statute Law Revision Acts (by now some 42 in number) which repealed expressly all enactments which had been repealed by implication (or by "splash" repeal clauses) or which had expired by effluxion of time.

These Statute Law Revision Acts are not designed to alter the law, and originally contained elaborate savings to insure against doing so; they are merely designed to clear off the books material which is physically present but legally inoperative. And the approach is essentially conservative, as illustrated by one instance which came to light in the drafting of the House of Lords Reform Bill already mentioned. While the Bill was in draft it was suggested by the officials of the House of Lords that we should include among the repeals an Act of Henry VIII regulating the placing of Peers in Parliament. This Act assigned definite places in the House to all Peers, including the Lords Spiritual, and had been largely ignored since the advent of party politics, if not before; and it was thought that the opportunity should be taken to get rid of it. After some deliberation (since it was not wholly consequential on what we were proposing) I included this repeal as "obsolete or unnecessary."

Now one of the original sections of the Act of Henry VIII was designed to secure an appropriate place in the House for Thomas Cromwell, and it read as follows:

II And forasmuch as the Kings Majesty is justly and lawfully supreme Head in Earth, under God, of the Church of England, and for the good exercise of the said most Royal Dignity and Office, hath made Thomas, Lord Cromwell and Lord Privy Seal, his vice-regent for good and due ministration of justice to be had in all causes and cases touching the Ecclesiastical Jurisdiction, and for the Godly reformation and redress of all errors, heresies and abuses in the said Church.

It is therefore enacted by the authority aforesaid, that the said Lord Cromwell, having the said office of vice-regent . . . shall sit and be placed, as well in this present Parliament, as in all Parliaments to be holden hereafter,
on the right side of the Parliament Chamber, and
upon the same form that the Archbishop of Can-
terbury sitteth on, and above the same Archbishop
and his successors, and shall have voice in
every Parliament to assent or dissent, as other
Lords of the Parliament.

This provision was "spent" on the death of Thomas Cromwell
and after a decent interval of over 400 years it was re-
ppealed by the Statute Revision Act of 1948. But they
had left outstanding the first bit of the preamble to the
section, which was and still is cited in the text-books
as one of the authorities if not the authority for the
proposition that the sovereign (and not the Pope) is the
Head of the Church of England. So we had to chose between
the alternatives of (a) repealing the whole Act, thus
laying impious hands on this part of the preamble to
section 2; and (b) expressly excepting from the repeal of
the Act a section of which the operative part had been spent
for 400 years and repealed for 20. Having obtained all
necessary approvals, we opted for (a). Pundits write in
to point out the mistake we had made, and in due course
Sir Michael English, one of the opponents of the Bill, got
on to the point and gave notice of an amendment at the
committee stage.

The committee stage of this Bill was taken on the floor
of the House, and when that happens there is no Report
stage unless the Bill is amended in Committee. Once it
became plain that the opponents were determined to obstruct
this Bill by all means fair and foul the government de-
cided to play them at their own game and neither propose
nor accept any amendments in Committee. If even one
amendment, however innocuous, had been accepted at that
stage, we should have had to endure the whole process
again on Report. So a battle of wits developed, the
opponents seeking by all means to find some real flaw in
the Bill, or at least some improvement on which we could
not decently refuse to accept an amendment; while we had
to find mistakes or defects in all the amendments they
proposed—which was usually fairly easy though the
opponents included two celebrated egg-heads in the persons
of Mr. Boyd Carpenter and Mr. Enoch Powell. There were in
fact two minor mistakes in one clause of the Bill, but
these they didn't find. On the other hand an amendment
to preserve the constitutional position of the Queen as
head of the Church looked like a winner. The battle was
not in fact joined, since the Government abandoned the
Bill long before we had reached the repeal clause. But
in the interval I had been doing some deeper research on
the Act of Henry VIII, and had found that it was at least
open to question whether the relevant part of the preamble
had not been repealed as long ago as 1555 by section 24
of 1 and 2 Phil. and M. c.8, the Act which restored (for
a few brief years) the ecclesiastical jurisdiction of the
Pope, and repealed the series of enactments from 1529
onwards by which Henry had denounced and eliminated that
jurisdiction. After reciting and expressly repealing
some 19 of these Acts, the Act of 1 Phil. and M. proceeded
as follows:
XXIV And be it further enacted by the Authority aforesaid, that all clauses, sentences and Articles of every other Statute or Act of Parliament, made since the said XXth year of the reign of King Henry the Eighth, against the supreme Authority of the Popes Holiness, or See Apostolick of Rome, or containing any other matter of the same effect only, that is repealed in any of the statutes aforesaid shall be also by the authority hereof from henceforth utterly void, frustrate and of none effect.

It is perhaps worth lingering for a few moments over these two Tudor enactments. Henry VIII is reputed to have done a good deal of his own statutory drafting (as to which it has been observed elsewhere that it must have been more perilous than it is today to engage in the national sport of jeering at the results). Who ever did it, it is fine rolling stuff, packed with double entries which we should not allow ourselves today. "Dignity and Office," "good and due" ministration of justice, "causes and cases," "reformation and redress," "errors, heresies and abuses," "sit and be placed." There are similar features in 1 & 2 Ph. & M. C. 8 S. 24--"clauses, sentences and articles," "Statute or Act of Parliament," "void, frustrate and of no effect." But the more interesting feature of this enactment is that it contains what is known in drafting circles as a "squinting modifier." Does the phrase "that is repealed in any of the Statutes aforesaid" (i.e. the 19 Acts of Henry VIII which were individually recited and repealed) refer back to "matter of the same effect only" or to "every other Statute or Act of Parliament" further up in the sentence? Disregarding the punctuation, as one must, either construction is possible. On one view s.24 repealed any sentence of any Act passed since 1529 which contained only matter to the same effect as the 19 repealed enactments, in which case the first sentence of the preamble to s.2 of the Act of 1539 was clearly repealed. On the other view s.24 merely re-repealed any Act against the authority of the Pope etc., which had been repealed by any of the 19 repealed enactments. The latter construction is plausible because in those days--and indeed right down to 1850—the repeal of an Act reinstated the previous law as if the Act repealed had never been passed; so if you wanted to prevent the revival of an act repealed by the Act which you were repealing, you had to say so--and one method of saying so was to repeal it again. The main difficulty in the way of this second construction is that none of the 19 Acts of Henry VIII had repealed anything, at all events specifically. Whatever the answer to this question may be, those responsible for the Statute Law Revision Act of 1948 were not obliged to decide it, and very properly left it alone.

Despite the conservative approach just illustrated of our Statute Law Revision Acts, they had reduced the physical volume of the statutes actually in force in 1878 to the point where they could be reprinted in a revised edition comprising only 18 volumes. A second Edition was begun in 1888, the preface to which makes rather sad reading in retrospect:
It is expected that the Edition will be completed within 3 or 4 years; and the price of the whole (inclusive of the Index and Chronological Table of the whole Statute Law) will not exceed 7 or 8 guineas.

In practice this Edition was not completed until 1929. It covered in 24 volumes the whole of the Statutes down to 1920. The Third Edition was published simultaneously in 1951, and reproduced in 32 volumes the whole of the living Statute Law down to the end of 1948. The intention was to repeat this process about once every ten years, and never let things get out of hand again. In practice nothing was done in 1961 or in the next few years. This was not strictly my business as First Parliamentary Counsel, but had I foreseen the future I should surely have made it mine.

By 1965, 20 Annual Volumes had been added to the shelves, making 52 in all with the 32 volumes of Statutes Revised. In the same period about 37% of the material in the statutes revised, and about 14 1/2% of the annual volumes, had been repealed. A fourth edition produced at that time would have occupied something less than 40 volumes. It was sorely needed, and the text was ready to produce it. But Lord Gardiner and the Law Commission were dissatisfied with an edition of bound volumes arranged in chronological order, and this led to the setting up of the Publications Committee referred to in the passage quoted above. The result to date, six years later, is that we have no Fourth Edition of the Statutes Revised, whether arranged chronologically, alphabetically or in any other manner and little early prospect of seeing one. Meanwhile another 8 or 9 annual volumes have been added to the shelves, with no corresponding reduction of the earlier material; and the original 32 volumes groan under a series of manuscript insertions and deletions, often piled on each other like Ossa on Pelion. To this extent one can only agree that our Statute Book is indeed "awful," but the responsibility for its condition is certainly shared by the new Reformers.

Much of the intervening time has been spent on devising a system of clarification with a view to arranging the Acts according to subject-matter instead of according to their chronological dates. The passage quoted above from Lord Gardiner draws no distinction between an alphabetical arrangement and an arrangement by subject matter, but the difference is crucial. For purposes of ready reference, which is the primary purpose of any revised edition, an alphabetical arrangement would be as good as (and in some ways preferable to) the standard Chronological. An arrangement by subject-matter is clearly the worst of the three. You have to begin by ascertaining which volume contains the particular Act you want before you can even start to locate it there.

For the purposes of any official republication of the U.K. Statutes there is much to be said for adhering to the natural chronological sequence. The date of an Act is a vital dimension which should not be concealed. From the practical point of view all our Acts have short titles
which include the calendar year of enactment; and when you want to refer to an Act, whether to operate on it or just to see what it says, by far the quickest thing is to go to the Volume of Acts of that year in the revised statutes and pick it out. The argument to the contrary is that if the Act is one of a series you may need five or six volumes open on your desk to trace out the combined effects. It may be doubted whether this is all that more troublesome than keeping five fingers in the same volume of a set arranged by subject matter. But if it is, we already have in Halsbury's Statutes (a commercial publication not unlike the United States Codes) a series arranged by subject matter, which has advantages that no official edition could enjoy. The boot is of course on the other leg where, instead of merely republishing the existing law, you re-enact it. In that situation it would be absurd to follow out the original sequence of enactment: but it is unlikely that the Parliament could find the time, if it had the inclination, to embark on so ambitious a venture. For the time being at least we must look to the well-tried expedients of expurgation, consolidation (statutory codification), and republication.

In the field of expurgation, the Law Commission has already made a modest advance. The regular Statute Law Revision Acts, as already demonstrated, were always conservative and swept away nothing that could be said to have any potential life left in it. The Law Commissioners, having taken over from the Parliamentary Counsel the responsibility for this class of legislation, can be a good deal bolder, and the Statute Law Repeal Acts referred to by Lord Gardiner are samples of a new approach. For example, if a dozen antique statutes are all but obsolete, it is possible to make them wholly obsolete by enacting (or re-enacting) one simple clause. Parliament is always suspicious of officials, but the independent position of the Law Commission commands greater confidence. All proposals made by the Commission (including proposals for Statute Law Repeal) are carefully discussed beforehand with the professions and other interested parties, and are first published in the form of a report to the Lord Chancellor with full annotations showing exactly what they propose and why. Even so, their proposals in the field of Statute Law Repeal have not all survived the parliamentary battle. It seems nearly as true today as it was when Sir Cecil Carr delivered his Carpentier lectures at Columbia in 1940 that the British Parliament reacts emotionally rather than rationally to proposals for the repeal of any part of Magna Carta, however obsolete. By the same token the Statute Law Repeal Act 1969, which eliminated a number of antique and obsolete constitutional enactments, still left untouched the House of Lords Precedence Act 1539.

The other main instrument which we use for keeping the statutes in a more or less orderly condition is Consolidation. What we know as a Consolidation Bill is a Bill to re-enact (if possible in improved form but without any change of substance) a series of previous enactments dealing with a single subject. Parliament is jealous of its legislative function, but an exception is made for this type of Bill because it is essentially non-legis-
Consolidation Bills are introduced in the House of Lords, and referred after Second Reading to a Select Committee of members of both Houses, usually presided over by one of the Law Lords, and composed wholly or mainly of lawyers. The proceedings are non-party, and the main purpose, if not the only one, is to make quite sure that the Bill does not alter the substance of the law at all. In this the Chairman and other members of the Committee rely very heavily, as they must, on the draftsman of the Bill. Once the Committee has reported that the Bill (with any amendments they may have made) accurately reproduces the existing law, all further stages in both Houses are taken more or less formally, and no precious government time is lost. (Mr. Graham Page used to make some more or less brief, and more or less derogatory, comments on Third Reading in the Commons: but he is not muzzled by Office and it does not appear that his mantle has fallen on anyone else). The result of this relative immunity from Parliamentary controversy and debate is that the Government Whips don't care how many pure Consolidation Bills we introduce in addition to the programme of substantive legislation selected by the Cabinet for the Session. They occupy no appreciable Parliamentary time.

Though one might conclude otherwise from the passage already cited from Lord Gardiner's Article, the Law Commission has not so far accelerated the production of Consolidation Bills. Ever since 1947 the Parliamentary Counsel had maintained a separate branch devoted exclusively to the preparation of Consolidation Bills; and between then and 1965, when the responsibility for this class of business (and the necessary drafting force) was transferred to the Commission, we had turned out 95 Acts at an average of over 5 per session. Lord Gardiner's figure of 28 includes 14 of these Acts, some of them very substantial indeed. When the figures are adjusted it appears that in terms of numbers of Acts passed (which is not a very accurate test anyway) consolidation was going along very well before the establishment of the Law Commission, and perhaps not quite so well since.

This steady progress does not satisfy the more ambitious reformers, who would like to see the whole of the Statute Law of Great Britain consolidated into a manageable number of principal Acts in the shortest possible time. This objective is in a sense implicit already in the terms of reference of the Law Commission, who are required by their Act to prepare and submit to the Lord Chancellor "comprehensive programmes of consolidation and statute law revision."

What ever the true construction of that expression (in which acute observers will detect another squinting modifier), the Law Commission do not at present propose to attempt a total consolidation. For one reason, they have more important things to do. This proposal is (or is about to be) mooted by a private body of lawyers and other professional consumers known as the Statute Law Society, which formed itself in 1968 for the purposes of promoting improvements in the form and publication of statutes, and of educating the public at large about the legislative process. They issued in 1970 a Report telling us what is wrong with the existing system, and will shortly issue another prescribing their remedies.
A total consolidation would (if otherwise possible) require a greatly increased force of legislative draftsmen, and the proposal is that the existing strength (of about 20) should be reinforced (a) by instituting training courses for draftsmen and offering attractive rates of pay and conditions in the Parliamentary Counsel Office; and (b) by farming out consolidation Bills to members of the Bar in general practice. These proposals are not new, and there are certain difficulties about them with which I shall not trouble you. But some interest is now being shown in the idea that statute law in general, and legislative drafting in particular, might be included in the curriculum of some at least of our law schools at post-graduate level.

We are of course well aware of the great benefits which have been derived in the United States from the courses maintained by the Legislative Drafting Fund at Columbia and other learned institutions in the United States. Even over here this is a relatively recent development. The Columbia Law Review of 1913 included a review by Thomas I. Parkinson of a book by Chester Lloyd Jones entitled "Statute Law Making in the United States." The review was not too enthusiastic, but concluded as follows: "Our statutes are still drawn by untrained legislators and persons of no particular experience or training fitting them for the business of drafting laws, and such persons will draft better statutes if they carefully study this book."

The situation has greatly altered in the last 60 years. The business of drafting Bills is still spread far more thinly and more widely over the legal profession than it is in the United Kingdom. But as the result of this enterprise in the teaching of the legislative art, the profession itself, whether in the administrative departments, in the State and Federal legislatures, in general practice or on the judicial bench, is now permeated by lawyers nurtured in the theory and practice of legislation. And this has an indirect result not much less valuable than the direct, in that the lawyer who knows the process by which statutes are written and enacted is better equipped to understand and apply them than the lawyer who does not. We should certainly like to share these indirect benefits in England, whether or not we really need more draftsmen and whether or not the institution of training courses would increase the supply if we did.

So much for the number of our statutes and the bulk of our Statute Book. To sum up briefly, we were doing pretty well in the way of purging, consolidating, and editing before the arrival on the scene of Lord Gardiner, the Law Commission and the Statute Law Society; and there are hopes that the good work will continue. One is reminded of the tale of Mr. Bethell (later Lord Westbury) opening an appeal before the House of Lords. After he had been going for a fairly short time one of their Lordships asked testily: "Mrs. Bethell, how long do you expect this case to continue?" He replied "My lords, before the Vice-Chancellor this case occupied two days—but there were no frivolous interruptions."

Turning to quality, there is by now a fairly well-known anthology of judicial obloquy directed against the statutes.
You will find some of it in C.K. Allen's "Law in the Making" and more in R.E. Megarry's "Miscellany-at-Law." A prime favourite from the anthology is the following thunderbolt hurled by McKinnon L.J. against s.4 of the Trade Marks Act 1938:

In the course of three days hearing of this case I have, I suppose, heard s.4 . . . read, or have read it for myself, dozens if not hundreds of times. Despite this iteration I must confess that, reading it through once again, I have very little notion of what the section is intended to convey, and particularly the sentence of two hundred and fifty-three words, as I make them, which constitutes sub-s.(1). I doubt if the entire statute book could be successfully searched for a sentence of equal length which is of more fuliginous obscurity.

As happens with other legal textbooks, one tends to find a proposition repeated from edition to edition, and exported from one book into another, without much critical examination. No other explanation can warrant the immortality of the dictum of Brett M.R. in Hough v. Windus in which he castigated the legislature for being deliberately "verbose and tautologous" because the substantive provisions of s.146 of the Bankruptcy Act 1883 were reinforced by the repeal in s.169 of part of the Statute of Westminster the Second. As already indicated, Repeal Schedules were a comparative novelty in 1884, and Brett M.R. is readily forgiven for his vituperation. But need we forgive the Statute Law Society for reproducing this in 1970 in a document purporting to expose the vices of modern Statute Law? No one suggests, least of all any member of that office past or present, that the productions of the Parliamentary Counsel are impeccable. But we do verify our references.

It would be hard, even with unlimited time, to list and examine all the complaints that are voiced against our contemporary statutes, and a short selection must be made, as follows:

(1) There is too much, or alternatively too little, detail.

(2) There is too much, or alternatively too little, textual amendment of previous enactments.

(3) We sometimes miss the ball altogether, and produce the opposite result to what was intended.

(4) We use a private style and language totally unintelligible both to the profession and to the public.

(1) Detail. The argument that there is too much detail comes from those who want to reduce the bulk of the statutes or the load on Parliament. Bills should enact general principles and leave the detail to be evolved either by decisions of the courts or by subordinate legislation. See for example Mr. Graham Page's memorandum of
January 15, 1971 to the Select Commission of 1970-71. 42

On the other hand the practitioner and the judge are a good deal happier if the case in hand is specifically dealt with, and they don't have to work the answer out from a general proposition. 43 This is clearly a matter of judgment in each case, bearing in mind the political as well as the legal considerations. We can never forget that a Bill is a Bill before it is an Act. As a general principle, one has to screw it down tighter the more it is likely to hurt. Finance is an obvious example, but if there is anything an Englishman values more than his money it is his driving licence.

Here is an instance in which it might perhaps have been useful to apply one more turn of the screw. The Road Safety Act 1967 introduced into Great Britain the rule that you may not drive with more than so much alcohol in the blood. Section 1 made it an offence to drive after consuming alcohol in such quantity that the proportion of alcohol in the blood, as ascertained by a prescribed test, exceeded the prescribed limit. In Rowlands v. Hamilton 44 the accused, who had been drinking, got involved in a traffic accident. Before the police arrived, he repaired to the nearest public house and drank three more glasses of whisky. The prescribed test, which was subsequently carried out, showed he had just double the prescribed amount of alcohol in the blood, and expert evidence was given that he would have been over the limit without the additional three glasses. The House of Lords (with Lord Pearson dissenting) held he could not be convicted. The test did not show the alcohol present in the blood when the accused was driving, and the expert evidence was not admissible. This point cannot have been overlooked at the drafting stage, for the practice of carrying a flask in the car was well known in Scandinavia from which the principle of this legislation was derived. Presumably those responsible for the Bill relied on our courts to fill in the detail for themselves. It would have been simple to deal with the point by express provision, but one mustn't forget the politics. The sacred right of the Englishman to "hold his liquor" was being invaded for the first time.

(2) Textual Amendment. When I first entered the Parliamentary Counsel, there was some restiveness among Members of Parliament about the way in which our Bills amended previous enactments. It was said, with some justice, that clauses which effected their objectives by a series of textual amendments were quite incomprehensible to the members who were asked to pass them. 45 Various steps were taken to meet these objections. In some cases we include a schedule setting out the relevant enactments as amended by the Bill. We also adopted the general practice of including in parentheses words indicating the effect of other enactments referred to in the Bill, whether for the purpose of textual amendment or otherwise--for example:

... section 28 of the Magistrates' Court Act 1952
(which relates to committal to quarter sessions with a view to a Borstal sentence)

These parenthetic indications illustrate the point that you can't please everyone. Designed to help Members of Parlia-
ment and other general readers, they merely infuriate the expert practitioners who already know what the enactment referred to is about. I was once told by a leading firm of stockbrokers in the City that as soon as the annual Finance Bill is published they put one of their clerks on with a blue pencil to strike out all these "aids," and this process is carried on with each fresh print of the Bill down to and including the Act as passed. Unless this is done, they simply can't read it. This is obviously a situation in which footnotes would be appropriate, but we are not allowed footnotes.

By the same token, whereas textual amendment is usually the least explicit method of changing previous law, and accordingly the least welcome to Members of Parliament, the pressure group already referred to, the Statute Law Society, are currently agitating for a much wider use of this technique and indeed would have it universally adopted wherever possible. So keen are they on this panacea that they presented to the Select Committee on the Process of Legislation the relevant passages of their current draft report before it had even been approved by their own Council. This is an old argument in which neither side fully understands the other's point of view because they start from different premises. It really depends on whether your eye is fixed on an end-product which consists of an official edition of Statute law kept permanently up to date—for which purpose textual amendment is generally preferable; or on the need to produce an amending statute in which the change itself is presented, first to the legislator and then to the practitioners who know the subject, in the most direct and digestible form. The British draftsmen naturally have their eye on the second of these objectives, and use whichever method of arrangement is the better for the case in hand. The attack on this system, or lack of system, was opened in a paper presented to the Commonwealth Law Conference at Sydney in 1965 on behalf of the British Institute of International and Comparative Law by H. H. Marshall and Norman Marsh, the former Assistant Director of the Institute (and an ex-"Colonial" Attorney General) and the latter one of the newly appointed Law Commissioners and a distinguished academic lawyer. The latest shot in the campaign (apart from the activities of the Statute Law Committee) was fired by G. C. Thornton (also a "Colonial" draftsman) in the work already mentioned. One may not agree with his conclusion, which is naturally in favour of the textual system, but it is impossible not to relish the passage in which he describes our own approach:

The United Kingdom style produces a pottage comprising direct amendments and provisions incorporating both techniques. The effect, at least to one not nurtured in his early years on English Statutes, is confusing, particularly so as it rests on a stream of consistently invidious and inevitably inconsistent decisions as to which amendments should properly be effected by one method, which by the other, and which by both.

This is not a live issue in the States. But anyone interested enough in the argument to pursue it further will find an antidote to the Marshall-Marsh Paper of 1965 in the Annex to
the Paper submitted to the 1970-71 Select Committee on Procedure by Sir John Fiennes (my successor as First Parliamentary Counsel).49

(3) Missing the Ball. Derisive hoots arise from the touchlines when this occurs. Sir Carleton Allen refers50 to the "ingenious and diverting manner in which so many of our statutes produce results opposite to those intended." One cannot deny that mistakes occur--when 1500 to 2000 pages of Acts are turned out per annum, mostly drafted or amended (or both) under extreme pressure of time it would be surprising if there were none. I was involved in the Law Commission's recent report about the Interpretation of Statutes,51 for the purpose only of preparing the draft clauses set out in Appendix A at p. 51. But it did seem to me that the moral to be drawn from many of the cases discussed in that report was not that the principles and practice of interpretation are defective but that the enactment which caused the trouble, when examined with hindsight, might have been better drawn. The Commission took account of this point in paragraph 5 of their report, but thought it an over-simplification. Anyway, as they observed:52

There are practical limits to the improvements which can be effected in drafting. Account must be taken of the inherent frailty of language, the difficulty of foreseeing and providing for all contingencies, the imperfections which must result to some degree from the pressures under which modern legislation has to be produced, and the difficulties of expressing the finely balanced compromises of competing interests which the draftsman is sometimes called upon to formulate.

But with all gratitude one must admit that the ball is sometimes missed without any such alibi. Section 58 of the Finance Act 1960, which was intended to deal with the payment of interest on past as well as future assessments, used the words "where an assessment is made." It was held in Ex Parte Fysh53 that previous assessments were not covered, and the point had to be put right in the Finance Act of 1962, s.26. On the other hand it is not only Parliament and the draftsman who nod. The Bar and the Bench have their blind spots too. One instructive example was Hultquist v. Universal Pattern and Precision Engineering Co.54 dealing with section 2 of the Law Reform (Personal Injuries) Act 1948--a short and simple section, the final subsection of which was printed over the page. The question at issue in the case (and in five previous cases) was expressly dealt with in the final subsection; but it was not until Hultquist went to the Court of Appeal that this was discovered, thus shedding a new light on C. K. Allen's "ingenious and diverting manner" in which Acts are found to mean the opposite of what Parliament intended.

(4) Gobbledygook. The first thing a new draftsman has to unlearn is that legislation has a separate language into which his task (and only task) is to translate the instructions which he receives. The wording should be as plain
as is consistent with reasonable solemnity, and this is certainly our objective. Nevertheless this allegation of using a private language incomprehensible to anyone else is heard from others besides Mr. Graham Page. It is indeed one of the normal weapons of the opposition in Parliament to brand as unintelligible any legislation prepared by the Government of the day of which they dislike the policy. What was new in the last Parliament was the glee with which Ministers themselves joined in the witch-hunt. Consider the following back-hander from the then Lord Chancellor, replying to a technical point raised in the House of Lords on the Scottish application clause of the Misrepresentation Bill:  

I am, as your Lordships know, on the one hand always as anxious as anyone to see our Statutes written in plain English; on the other hand, somewhat delicate in anything I say about our present methods of Parliamentary drafting. Yesterday I received from the Law Commission a report which I shall of course be laying before Parliament...; and there is attached to it a draft of three clauses... These clauses, I observe, are all written in English.

What the Lord Chancellor apparently did not observe, or at all events remember, was that these clauses were drafted for the Law Commission by members of the Parliamentary Counsel office seconded to them for the purpose. Perhaps the moral, if any, is that the quantity of English to be found in a draft Bill depends on the client rather than the draftsman. However that may be, this attack on the draftsmen was repeated in Lord Gardiner's Article already referred to.

Here again, the official draftsmen don't imagine that there is no room for improvement; but here too it is arguable that their performance is sometimes equal to that of their critics. Let me end with a brief account of the last Act (as opposed to the last Bill) that I drafted in the office—the Wills Act 1968. A hard case had been decided in the Courts in which two deserving beneficiaries under a Will had been deprived of their inheritance because the Testatrix (in order to "make it legal" as she thought) insisted on them adding their names as witnesses in addition to the two independent witnesses. Before even the Law Commission could react to this opportunity for reform, a private member of the Commons rushed in notice of a Bill to amend the Wills Act. The Government favoured his enterprise and took on the drafting. It was not entirely straightforward. We had to validate bequests made in similar circumstances, but without creating the situation in which bequests of shares of residue to A, B and C in a Will witnessed by them and no other witnesses would all be valid because there were two disinterested witnesses for each of the three bequests considered separately. In the long run, after some distillation, I produced the following clause covering the positive and the negative points in a pretty small compass:
For the purposes of section 15 of the Wills Act 1837 (avoidance of gifts to attesting witnesses and their spouses) the attestation of a will by a person to whom or to whose spouse there is given or made any such disposition as is described in that section shall be disregarded if the will is duly executed without his attestation and without that of any other such person.

Having bagged that one off, I reached for my bowler hat with the comforting thought that in 30 years' drafting I had at least got one Bill right and sweet. Not a bit of it. Two years later the Statute Law Society, published their Report on Statute Law Deficiencies. I read it eagerly. I had long wanted to start up a scientific study of how well or ill our products stood up after we had parted with them, but never had the time. Here we should find the answer, with all the work done for us by a learned and devoted band of expert consumers. In this I was wholly disappointed, but there was some stern comment on my Benjamin: "An instance of the kind of ambiguous, badly framed legislation which must be avoided was the Wills Act 1968." This was supported by the following comment from an anonymous respondent to their (loaded) questionnaire: "The use of the word 'without' suggests that the attestation is not there, whereas the whole point of it is that it is there. Modern usage would call for 'apart from,' and if these words had been substituted for 'without' it would not be necessary to read the section several times in order to find out what it is trying to say." As Professor Dickerson has remarked, one of the crosses the legislative draftsman has to bear is the complacency and condescension of the profession at large. It probably never occurred to the anonymous correspondent that the draftsman would have carefully appraised the choice between "apart from" and "without" before adopting the latter. It is perhaps not obvious that either of these expressions is more modern than the other. But any competent draftsman knows that "apart from" is ambiguous and sometimes used, even in Statutes as equivalent to "but for"—in which sense it would have been exactly wrong in the context.

Instead of reproducing, without stopping to think, this splenetic attack on the main clause, the Statute Law Society might have fastened upon subsection (2), which, believe it or not, reads as follows: "This section applies to the will of any person dying after the passing of this Act." It seems that 30 years is not long enough to learn to avoid the squinting modifier.

Conclusions

As regards the production of new Statute Law, the British system differs substantially from those of the United States and the several states. The differences are marked both at the pre-parliamentary and at the parliamentary stage. They flow from the absence in the United Kingdom
of any constitutional limitation of the powers of Parliament and the presence there of effective control by the Government over the input of Bills and the output of Acts. If legislation is regarded, as it is in the United Kingdom, as a primary objective of Government and almost an end in itself, the British system is apparently the more efficient. The American systems appear, at least to a stranger, to be far more democratic.

As regards housekeeping of the Statute law, the processes of expurgation, consolidation, and republishing have been going on more or less actively in the United Kingdom for well over 100 years, and have received some stimulus from the recently appointed Law Commissioners. It is perhaps only a personal view that their intervention in the field of republication has been unfortunate. On any view, the United Kingdom is far behind the States in the field of re-enactment and likely to remain so. Such as it is, the pressure for a total consolidation of our Statute Law comes from an unofficial self-appointed body whose productions to date have not earned much admiration.

As regards quality, there is always a chorus of criticism. Many of the complaints cancel each other out, and others stem from prejudice or ignorance: but some at least are justified, and the proof of the pudding is in the eating. When an Act proves difficult to apply in a particular case, still more where it is interpreted in a sense contrary to the actual intention, the conclusion of the draftsman is not that the principles of interpretation need modification but that the drafting was not good enough. We also have much to learn from the universities in the States about the teaching of Statute law and legislative drafting. The dividends are more likely to be realised in better interpretation than in better drafting. Some people, including the author of these remarks, will never learn.
Footnotes


2. 87 L.W.Rev. 326 (1971).

3. Act of Settlement 12 & 13 Will III c.2 §6 (17 ).

4. 4 Anne c.20, subsequently re-enacted after the Union with Scotland by §§ 24 and 25 of the Succession to the Crown Act of 1707, 6 Anne c.41.

5. See text accompanying note 20, infra.


8. 5 & 6 Eliz. II c.20.

9. 1967 c.87.


13. Ideally, express provisions for consultation between Ministers should be avoided. Provision for joint or several action by two or more Ministers should be made only where their jurisdiction is divided territorially. The recent fashion of re-organizing the whole Government structure each time a new Government is formed has created some havoc with statutory provisions conferring functions on named Ministers, especially where more than one is named. We might usefully now move over to the Australian practice.

15. See text accompanying notes 26-30 infra.

16. See the most valuable analysis submitted by Professor J.A.G. Griffith and Miss Norma Percy to the House of Commons Select Committee on Procedure 1970-71, H.C. No. 538 Appendix 9, at p. 316: "The pattern of speaking is that Ministers and Shadow Ministers engage for much of the time in gladiatorial combat."


19. 6 & 6 Eliz. II c.21.

20. 1963 c.48.


22. Id. 15-16.


24. There are, however, signs of movement. On the day on which his lecture was delivered the Lord Chancellor was answering a Parliamentary Question by Lord Gardiner about the numbers of Public Acts in force respectively on 1st October 1964 and 6th August 1971. The answer revealed a reduction of 155 in the interval.

25. It appears that a similar practice had been forced on the draftsmen of Indiana by Act 4.


27. The House of Lords Precedence Act 1539, 31 Hen. VIII c.10.

28. The Archbishops of Canterbury and York, and the Bishops of London, Durham and Winchester still occupy the places allotted by the Act of 1539, but of course they do not need an Act to enable them to go on doing so.

29. LAW SOCIETY'S GAZETTE, June, 1967, at 293.

30. 1877 in Indiana. See IND. CODE OF 1971, Title I, art. 1, ch. 5.1.

31. This observation now requires qualification. Around August 1972 there appeared on the British scene the first two volumes of a fresh edition, arranged by subject and made up in loose-leaf (or rather loose-Act) form. Future titles will follow over the years, and it is hoped officially that the whole issue will be completed by 1980. This is a sad decline from the achievements and intentions of those responsible for the Third Edition, but at least it is something.
32. The practical difficulty is much increased if and so long as the subject-matter edition is incomplete--it is then necessary to begin by ascertaining whether the Act you want is to be found there at all.

33. Or has it? See Dickerson, supra note 25.

34. CARR, CONCERNING ENGLISH ADMINISTRATIVE LAW (1940).

35. He is author of the letter to the Times (of London) referred to above.


37. 13 Colum. L. Rev. at 562.

38. ALLEN, LAW IN THE MAKING 484-487 (7th ed. 1964).


40. Bismag v. Amblins (Chemists) Ltd. [1940] Ch. 667, at 687.

41. 12 Q.B.D. 224.

42. H.C. No. 538 at 67.

43. See e.g. Re Kellner's Will Trusts [1950] Ch. 46 at 62 where Vaisey J. complained that the application of s.60 of the National Health Service Act 1946 to the case in hand could be ascertained "only by a microscopic examination of its terms."

44. [1971] 1 W.L.R. 647.

45. The U.K. has of course no constitutional enactment, as in Indiana and elsewhere, requiring the sections or subsections amended to be "set forth and published at full length." Indeed one of the objectives of the original Interpretation Act passed in 1850 was to reverse what had become an established practice of doing so.

46. H.C. No. 538 Appendix 18.

47. Case Law, Codification and Statute Law Revision, 3rd COMMONWEALTH AND EMPIRE LAW CONFERENCE RECORD 420-426.

48. THORNTON, supra, note 23, at 298.

49. H.C. No. 538 at 326-7.


52. Id. 321. See also ALLEN, supra note 38, at 484.


56. GARDINER, supra note 2, at 332.

57. Wills Act 1965 chap. 28.


59. DICKERSON, LEGISLATIVE DRAFTING, Introduction at 3-4 (1954). With reference to the Bismag case, note 39, supra, a delicious sample of this condescension may be found in KERLOY, LAW OF TRADEMARKS, para 545, 97th ed.

   See e.g. Finance Act 1969, Chap. 32, Schedule 17 Part II para. 8.

60. "Something lingering, with boiling oil in it." Mikado Act II per curiam.