The Law Commission

(LAW COM. No. 94)

JUSTICES OF THE PEACE BILL

REPORT ON THE CONSOLIDATION OF CERTAIN ENACTMENTS RELATING TO JUSTICES OF THE PEACE (INCLUDING STIPENDIARY MAGISTRATES), JUSTICES' CLERKS AND THE ADMINISTRATIVE AND FINANCIAL ARRANGEMENTS FOR MAGISTRATES' COURTS, AND TO MATTERS CONNECTED THEREWITH

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To the Right Honourable Lord Elwyn-Jones, C.H.,
Lord High Chancellor of Great Britain.

The Justices of the Peace Bill which is the subject of this Report seeks to consolidate a substantial collection of enactments relating to the matters mentioned above which have been passed at various times from 1742 onwards. In order to produce a satisfactory consolidation it is necessary to make a number of recommendations which are set out in the Appendix to this Report. Some of the amendments proposed in the recommendations could have been authorised under the Consolidation of Enactments (Procedure) Act 1949, but the majority could not.

The Lord Chancellor's Department and the Home Office have been consulted in connection with the recommendations.

MICHAEL KERR,
Chairman of the Law Commission.

12 *March* 1979

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APPENDIX

RECOMMENDATIONS

1. The principle of section 1 of the Justices Jurisdiction Act 1742 is that a justice of the peace is not to be disqualified from acting in a matter which affects local rates notwithstanding that he is a ratepayer in the locality in respect of which the rates are leviable. For this purpose the section gives three examples of matters which, in accordance with the law and practice of local administration in force in 1742, would have affected local rates, and then adds " or any other laws concerning parochial taxes, levies or rates ". The word " parochial " reflected the fact that the parish was generally the unit in respect of which local rates were then levied. The three matters singled out for special mention were " the relief, maintenance and settlement of poor persons "; " passing and punishing vagrants "; and " repair of the highways ".

The first of these examples related to the " old poor law " as it existed before the reforms of 1834. That system varied greatly in detail from one parish to another; but almost everywhere justices of the peace played, in various ways, a large and often a preponderant part in it. The relief of poverty is now a function partly of the State, through the national system of social security, and partly of local authorities, through the various social and welfare services which they administer. In neither of these areas do justices as such have any other than marginal functions to perform.

The second example was closely related to poor law relief. The practice of physically conveying vagrants out of the parish and depositing them elsewhere (" passing vagrants ") has long since fallen into disuse; and, although the Vagrancy Act 1824 still provides for the punishment of certain categories of persons falling within the general heading of vagrants, the exercise of these powers of punishment can hardly have any significant effect on local rates.

As to the reference to the repair of highways, this evidently related to the complex and cumbersome system for repairing highways which existed in the first half of the eighteenth century. Part of this system was the sporadic levying of a highway rate imposed on a parish or township by order of the justices of the peace on the application of the local surveyor of highways. The justices of the peace at quarter sessions also had the function of trying indictments of the inhabitants at large for non-repair of a highway, and, on conviction, of imposing fines which would be collected by the sheriff by way of an additional rate levied on the inhabitants of the parish. Here again, the legal and administrative background has changed to such an extent as to make this reference to highways out-of-date. The cost of maintaining highways is no longer met by a separate highway rate; and indictments for non-repair of highways have been abolished.

The result is that the three matters specified in the section have for all practical purposes ceased to be relevant as examples of the principle embodied in the section.

The principle of the section, however, is not defunct, since justices of the peace still have functions to perform in relation to rates, mainly by way of enforcing the payment of rates under Part VI of the General Rate Act 1967 and sitting as members of the Crown Court to hear appeals against rates under section 7 of that Act. These functions are exercisable by justices of the peace generally, and it is therefore unnecessary to refer to particular areas of jurisdiction.

We recommend that section 1 of the Justices Jurisdiction Act 1742 should be re-enacted in a form which gives effect to the principle on which it is based, but in terms appropriate to the present state of the law. Effect is given to this recommendation in clause 65 of the Bill.

2. Section 2 of the Justices Protection Act 1848 is a long and involved section relating to acts done by a justice of the peace without or in excess of jurisdiction and to acts done under a conviction or order made or warrant issued by a justice of the peace without or in excess of jurisdiction. In the third place where the word " conviction " occurs in the section it appears without the addition of the words " or order ". The actual wording is " no such action shall be brought for anything done under such conviction or order until after such conviction shall have been quashed, either upon appeal, or upon application to Her Majesty's Court of Queen's Bench ". In *O'Connor* v. *Isaacs* [1956] 2 Q.B. 288, Singleton L.J. at p.342 said that the omission may have been inadvertent, but that it was " more likely that the draftsman was endeavouring to preserve the position that a conviction ought to be set aside in the proper place before it can be questioned in a civil court, while an order is in a different category ". Morris L.J. at p.355 took the same view; but Romer L.J. at p.366 was inclined to think that the words had been omitted inadvertently. However this may be, the fact remains that this part of the section is really unworkable in a case where there has been an order but no conviction; and it is significant that the words " conviction or order " are to be found in the corresponding provision in section 2 of the Protection of Justices (Ireland) Act 1849.

We recommend that section 2 of the Justices Protection Act 1848 should be re-enacted with the insertion of the words " or order " after " conviction " at this place in the section. Effect is given to this recommendation in clause 45(3) of the Bill.

3. Section 5 of the Justices' Clerks Act 1877 (so far as it has not been repealed) provides that in each petty sessional division there shall be only one salaried clerk to perform the duties of clerk of petty sessions, clerk of special sessions and clerk of any justice or justices of the peace. But the Justices of the Peace Act 1949, section 19, provides in subsection (1) that a magistrates' court committee may appoint more than one justices' clerk " for any area ", and, in subsection (2), that a justices' clerk shall be paid a salary. Similarly, in the inner London area, the Administration of Justice Act 1964, section 15(1), requires the committee of magistrates to appoint " one or more chief clerks for each petty sessional division ". The Act of 1964 does not in terms provide that a chief clerk for a petty sessional division is to be paid a salary; but presumably it was taken for granted that a salary would have to be paid. There is therefore an inherent contradiction

between section 5 of the Act of 1877 and the later enactments. In fact, it appears that it is not the present practice to appoint more than one justices' clerk in petty sessional divisions outside the inner London area, but that in the inner London area there are petty sessional divisions having more than one justices' clerk, each of whom is in receipt of a salary. It would not be possible to consolidate these enactments so as to reproduce both the restriction imposed by section 5 of the Act of 1877 and the latitude allowed by the Acts of 1949 and 1964. We have consulted the Home Office who are in favour of consolidating so as to remove the restriction.

We recommend that, in consolidating these enactments, section 5 of the Justices' Clerks Act 1877 should be repealed and not re-enacted. Effect is given to this recommendation in Schedule 3 to the Bill.

As one effect of this recommendation will in theory (though unlikely to have any such effect in practice) be to authorise a possible increase in the expenditure of the Secretary of State, by adding to the expenditure in respect of which he is empowered to make grants under the enactments to be consolidated in clause 59 of the Bill, a Money Resolution will be required when the Bill reaches the House of Commons.

4. Section 3(1) of the Justices of the Peace Act 1949 disqualifies a justice of the peace from acting in certain cases if he is a member of a local authority, including a local authority within the meaning of the Local Government (Scotland) Act 1947. The Act of 1947 was superseded by the Local Government (Scotland) Act 1973, which contains provisions for substituting, in other enactments, references to the later Act for references to the earlier Act. But these provisions (section 214(1) and Schedule 27, paragraph 1(2)) do not extend to England, and therefore in section 3(1) of the Justices of the Peace Act 1949, as part of the law of England, the reference to the Scottish Act of 1947 remains unaltered.

We recommend that, in re-enacting section 3(1) of the Justices of the Peace Act 1949, a reference to the Local Government (Scotland) Act 1973 should be substituted. Effect is given to this recommendation in clause 64(1) of the Bill.

5. Sections 3(1) and (3) and 13(1) of the Justices of the Peace Act 1949 refer to a " magistrates' court ", and section 44(1) of that Act provides that this " means a court of summary jurisdiction or examining justices, and includes a single examining justice ". Sections 21(1) and 27(1)(*a*), (10)(*b*) and (12) of the Act refer to a " court of summary jurisdiction ". The Act does not contain any definition of " court of summary jurisdiction ", and evidently relied on the definition of that expression in the Interpretation Act 1889, section 13(11), which was as follows:—

> " any justice or justices of the peace, or other magistrate, by whatever name called, to whom jurisdiction is given by, or who is authorised to act under, the Summary Jurisdiction Acts, whether in England, Wales or Ireland, and whether acting under the Summary Jurisdiction Acts or any of them, or under any other Act, or by virtue of his commission, or under the common law ".

The Interpretation Act 1978, which came into operation on the 1st January 1979, has repealed the Interpretation Act 1889 without re-enacting the definition of "court of summary jurisdiction" or providing any new definition in place of it.

The Interpretation Act 1978 also provides (section 5, schedule 1 and Schedule 2, paragraph 4(1)(*b*)) that, in any Act whenever passed, unless the contrary intention appears, "magistrates' court" has, in relation to England and Wales, the meaning assigned to it by section 124 of the Magistrates' Courts Act 1952, namely—

> "any justice or justices of the peace acting under any enactment or by virtue of his or their commission or under the common law."

Since the definition of "magistrates' court" in section 44(1) of the Justices of the Peace Act 1949 is not in terms the same as the definition applied by the Interpretation Act 1978, we think that this must be regarded as a case where "the contrary intention appears", and therefore the 1978 Act definition does not at present apply to the references to a magistrates' court in the Act of 1949.

There has been a considerable amount of case-law about the meanings both of "court of summary jurisdiction", as defined by the Interpretation Act 1889, and of "magistrates' court", as defined by the Magistrates' Courts Act 1952. So far as the case-law affects the present consolidation, its outcome broadly is that the scope of these two expressions is the same, except that "magistrates' court" has been held to include examining justices whereas "court of summary jurisdiction" has generally been thought not to include them.

Apart, therefore, from the problem (referred to below) created by the repeal of the Interpretation Act 1889, we have concluded that it would make no difference of substance if, in all the provisions of the Justices of the Peace Act 1949 which are mentioned at the beginning of this paragraph, the references were to a "magistrates' court" as defined in accordance with the Interpretation Act 1978. In theory, sections 21(1) and 27(1)(*a*), (10)(*b*) and (12) might thereby be extended so as to apply to examining justices; but these provisions are not in practice apt to apply to the functions of magistrates as examining justices.

It would be desirable that the Bill should refer to "magistrates' courts" rather than to "courts of summary jurisdiction", since the latter is an obsolescent expression and it would be a retrograde step to use it in re-enacting the law if this can be avoided. To some extent this substitution in the present context has already been anticipated by Parliament. Section 27(1)(*a*) of the Justices of the Peace Act 1949 relates to "fines imposed by a court of summary jurisdiction and all sums which become payable by virtue of an order of such a court and are by any enactment made applicable as fines so imposed". Examples of such enactments are the Auxiliary Forces Act 1953, section 31(5)(*a*); the Immigration Act 1971, Schedule 2, paragraphs 23(3) and 31(4); and the Powers of Criminal Courts Act 1973, section 32(6). Each of these enactments relates to sums becoming payable by virtue of an order of a "magistrates' court" (defined in the Auxiliary Forces Act 1953 as having the same meaning as in the Magistrates' Courts

Act 1952 and undefined in the other two Acts) and refers to section 27 of the Justices of the Peace Act 1949 as if it were expressed in terms of "magistrates' courts". The re-enactment of section 27 as a provision relating to "magistrates' courts" would, therefore, be in harmony with what has already been done in other Acts in applying that section.

Two views are tenable as to the way in which the repeal of the Interpretation Act 1889, without providing a new definition of "court of summary jurisdiction", may have affected the construction of the relevant provisions of the Justices of the Peace Act 1949. One view is that the repeal cannot have affected their construction at all. The other is that the words "court of summary jurisdiction", where they occur in the Justices of the Peace Act 1949, must as from the 1st January 1979 be construed as undefined words, to which it is for the courts to attribute a new meaning, unfettered and, at the same time, unassisted by the Interpretation Act 1889. There is therefore a doubt which, for the purposes of this consolidation, we would propose to resolve on the assumption that it cannot have been the intention of Parliament, in passing the Interpretation Act 1978, to alter the meaning of existing Acts in which the words "court of summary jurisdiction" are used. The proposed substitution of references to "magistrates' courts" would therefore proceed on the basis that the meaning of "court of summary jurisdiction" in the Justices of the Peace Act 1949 has not been changed by the repeal.

Accordingly we recommend that, in re-enacting these provisions of the Justices of the Peace Act 1949, the references to "magistrates' court" and "court of summary jurisdiction" should be dealt with as follows:—

(1) In re-enacting sections 3(1) and (3) and 13(1), the words "magistrates' court" should be retained.

(2) In re-enacting sections 21(1) and 27(1)(*a*), (10)(*b*) and (12), "magistrates' court" should be substituted for "court of summary jurisdiction".

(3) In each case the expression "magistrates' court" should be used without definition, other than that which is automatically supplied by the Interpretation Act 1978.

Effect is given to these recommendations in clauses 18(1), 29(1), 61(1)(*a*), (5) and (7)(*b*) and 64(1) and (3) of the Bill.

6. Section 25(1) and (3) of the Justices of the Peace Act 1949 and section 121(1) of the Magistrates' Courts Act 1952 (reproduced respectively in clause 55(1) and (3) and clause 16(1) of the Bill) contain references to "petty sessional court-houses". This expression was defined by the Interpretation Act 1889, section 13(13); but no corresponding definition is to be found in the Interpretation Act 1978 by which that Act was repealed. The repeal has, therefore, raised a question of construction similar to that referred to in paragraph 5 above in relation to "court of summary jurisdiction". As in that case, we think that such doubt (if any) as may exist should be resolved on the assumption that it cannot have been the intention of Parliament to alter the meaning of "petty sessional court-house" in existing Acts.

We recommend that, for the purpose of re-enacting section 25(1) and (3) of the Justices of the Peace Act 1949 and section 121(1) of the Magistrates' Courts Act 1952, a definition of "petty sessional court-house" having the same effect as that contained in section 13(13) of the Interpretation Act 1889 (though, in view of the cumbrous and antiquated form of that definition, not necessarily a reproduction of it word for word) should be inserted in the Bill. Effect is given to this recommendation in clause 70 of the Bill.

7. Section 25(2)(*b*) of the Justices of the Peace Act 1949 provided that the expenses of magistrates' courts committees to be defrayed by local authorities should include any contributions to which such a committee might be liable "under the National Insurance Acts 1946" as employer of a justices' clerk or his staff. "The National Insurance Acts 1946" meant the National Insurance Act 1946 and the National Insurance (Industrial Injuries) Act 1946. Those Acts have been superseded by subsequent legislation. But the reference to them in section 25(2)(*b*) has never been amended; nor is there any provision in the subsequent legislation which substitutes a reference to the existing Acts. The Interpretation Act 1978, section 17(2) (which relates to Acts which repeal a previous enactment and re-enact it with or without modifications), does not seem to apply, because the new legislation has abolished the provision for industrial injuries contributions as such without re-enacting it, and has replaced the former system of national insurance contributions by what is to a substantial extent a new system.

In relation to the inner London area there is a corresponding provision in section 17(2)(*b*) of the Administration of Justice Act 1964; and this has been amended twice and brought up to date, as reproduced in clause 58(2)(*b*) of the Bill.

We have been informed that magistrates' courts committees in areas other than the inner London area do in practice pay contributions in accordance with the social security legislation now in force; and it seems clear that it is by an oversight that section 25(2)(*b*) of the Justices of the Peace Act 1949 has not been amended and kept up to date.

We therefore recommend that, in re-enacting section 25(2)(*b*) of the Justices of the Peace Act 1949, the references to social security contributions should be brought into line with those in section 17(2)(*b*) of the Administration of Justice Act 1964 as amended. Effect is given to this recommendation in clause 55(2)(*b*) of the Bill.

As in the case of paragraph 3 above, this recommendation might in theory increase the expenditure of the Secretary of State under the enactments to be consolidated in clause 59 of the Bill, and accordingly it will require to be supported by a Money Resolution when the Bill reaches the House of Commons.

8. Schedule 4 to the Justices of the Peace Act 1949 describes the procedure for constituting magistrates' courts committees. The area for which a magistrates' courts committee is established may be a non-metropolitan county, a metropolitan district, a London commission area (other than the inner London area) or the City of London or may be a joint committee area; and it may be or include one or more areas divided into

petty sessional divisions. There is therefore room for a considerable diversity in the composition of these committees; and in a variety of cases meetings of magistrates for a petty sessions area may have to be held for the purpose of choosing representatives from among them to serve on a committee. Paragraph 5 of the Schedule (inserted in it by the Courts Act 1971, Schedule 7, paragraph 3) provides that meetings of magistrates for carrying out functions under this procedure can be convened by the magistrates' courts committee or by the Secretary of State. But this power, as expressed in paragraph 5, is limited to convening meetings of "the magistrates for a county". It may be that, by virtue of section 2(3) of the Administration of Justice Act 1964, this is to be read as applying also to the magistrates for a London commission area; and equally that, by virtue of the Justices of the Peace Act 1968, Schedule 3, paragraph 3, it is to be read as applying to the magistrates for the City of London. But it cannot be held to apply to the magistrates for a metropolitan district or for a petty sessional division of a metropolitan district; and it is at least very doubtful whether it can apply to the magistrates for a petty sessional division of a non-metropolitan county, as distinct from the whole body of the magistrates for such a county. Since, for the purposes of the procedure in question, it may be necessary to convene a meeting of the magistrates for any petty sessions area for which a magistrates' courts committee is to act, we recommend that the paragraph inserted as paragraph 5 in Schedule 4 to the Justices of the Peace Act 1949 should be re-enacted so as to be applicable to the magistrates for any kind of petty sessions area. Effect is given to this recommendation in clause 22(3) of the Bill.

9. Section 118(3) of the Magistrates' Courts Act 1952 relates to a person other than "the salaried clerk" in a petty sessions area who acts as clerk to the justices for that area. It provides that such a person shall be treated as having acted as deputy to the salaried clerk and shall make a return to the salaried clerk of all matters done before the justices and all matters which the clerk to the justices is required to register or record.

These references to "the salaried clerk" give rise to doubts in two respects. First, there is the possibility, already referred to in paragraph 3 of this Appendix, that there may be two or more salaried justices' clerks in a petty sessions area. In such a case it would be doubtful to whom the person acting as clerk to the justices ought to make his return. Secondly, the staff employed by the magistrates' courts committee to assist the justices' clerk or justices' clerks in a petty sessions area may include one or more salaried officers who could properly be described as "salaried clerks". It is not entirely clear whether in this subsection a "person other than the salaried clerk in a petty sessions area" includes a person who is a salaried clerk on the staff of the justices' clerk or justices' clerks.

We think that the aim of section 118(3) was to deal with a person who acts as clerk to the justices in a petty sessions area but who has not been appointed by the magistrates' courts committee as justices' clerk in that area. As will appear from the enactments reproduced in clauses 25–27 of the Bill, it is (except in the inner London area) only a clerk so appointed who has the official status of justices' clerk. If a person not appointed by the magistrates' courts committee as justices' clerk act as clerk to the justices,

it seems appropriate to provide that he shall be treated as having acted as deputy to the duly appointed justices' clerk. Where the magistrates' courts committee appoints two or more justices' clerks in a petty sessions area, we think it should be for the committee to indicate which of them is the justices' clerk to whom another person acting as clerk to the justices should be regarded as deputy and to whom such a person is to make his return.

A. We recommend that, in re-enacting section 118(3) of the Magistrates' Courts Act 1952, the references to the salaried clerk should be omitted and replaced by references to the justices' clerk appointed by the magistrates' courts committee.

B. If our recommendation **A** in this paragraph is accepted, we further recommend that a provision should be added whereby, in the case of a petty sessions area in which two or more justices' clerks have been appointed by the magistrates' courts committee, it shall be for the committee to designate one of them for the purpose of section 118(3) of the Magistrates' Courts Act 1952 as re-enacted.

Effect is given to these recommendations in clause 30 of the Bill.

10. Section 2(3) of the Administration of Justice Act 1964, as amended by the Domestic Proceedings and Magistrates' Courts Act 1978, section 86, contains two propositions, namely (*a*) that, for all purposes of the law relating to commissions of the peace, justices of the peace, magistrates' courts, magistrates' courts committees, the custos rotulorum, justices' clerks and matters connected with any of these matters, a London commission area shall be deemed to be a non-metropolitan county, and (*b*) that references to a county in any enactment passed or instrument made before the passing of the Act of 1964, and references to a non-metropolitan county in any enactment or instrument as amended or modified by or under the Local Government Act 1972, shall be construed accordingly. It is, however, not clear whether the first of these propositions is limited by the second of them (so that it would apply only to so much of the law relating to commissions of the peace etc. as is contained in enactments or instruments such as are described in the second proposition) or whether it is, as taken by itself it appears to be, a provision of general application.

In drafting the Bill the aim has been to spell out in full the areas to which the various provisions of the Bill apply. The operation of the Bill, therefore, does not depend upon any such "deeming" provision as is contained in the first proposition in section 2(3) of the Administration of Justice Act 1964; and it is unnecessary, for the purpose of this consolidation, to resolve the ambiguity referred to above, which is reproduced in clause 2(2) of the Bill.

Since, however, the wider construction of the first proposition to be reproduced in clause 2(2) of the Bill may be the correct one, it is necessary to make some saving provision for avoiding an overlap between clause 2(2), whereby London commission areas are deemed to be non-metropolitan counties, and other clauses in the Bill, such as clauses 4, 19, 20 and 22, in which London commission areas (or the outer London areas) are expressly

mentioned in addition to non-metropolitan counties. A similar overlap could occur in the impact of clause 2(2) on enactments not contained in the Bill where the same method of spelling out the areas in full is used. Apart from section 1 of the Administration of Justice Act 1973 (which is to be repealed by the Bill) the only existing example of this of which we are aware is the definition of " petty sessions area " in section 88(1) of the Domestic Proceedings and Magistrates' Courts Act 1978.

We recommend that, in re-enacting section 2(3) of the Administration of Justice Act 1964, a saving provision for avoiding any overlap of this kind should be inserted, for the purposes both of the Bill and of other enactments not contained in the Bill. Effect is given to this recommendation in clause 2(3) of the Bill.

11. Section 3(1) of the Administration of Justice Act 1964 confers power by Order in Council to adjust London commission areas, but provides that the City of London shall not by virtue of any such Order be included in " an area for which a commission of the peace is issued ". These words made good sense in the Act of 1964, which, by section 2(1) as originally enacted, provided that there was to be a separate commission of the peace for each of the areas designated as London commission areas, but did not permit a commission of the peace to be issued for the City of London. The words quoted were, therefore, at that time an intelligible, if somewhat indirect, way of providing that an Order in Council was not to be made so as to include the City in a London commission area. But since then (first by section 1(2) of the Justices of the Peace Act 1968 and subsequently by section 1 of the Administration of Justice Act 1973) the City has itself become an area for which a commission of the peace is issued. The words quoted from section 3(1) of the Administration of Justice Act 1964 have therefore become an inappropriate and confusing way of stating the proposition which they were evidently intended to convey.

We recommend that, in re-enacting section 3(1) of the Administration of Justice Act 1964, the words " a London commission area " should be substituted for the words " an area for which a commission of the peace is issued ". Effect is given to this recommendation in clause 3(1) of the Bill.

12. Section 5(3) of the Justices of the Peace Act 1968 relates to the role of a justices' clerk as adviser to the justices about law, practice or procedure in connection with the discharge of their functions " out of sessions ". Before the passing of the Courts Act 1971 the words quoted were generally understood to refer to justices when not assembled in general or quarter sessions and therefore not constituting a court of quarter sessions within the meaning of the Interpretation Act 1889, section 13(14). This is evidently what the words meant in the long title of the Summary Jurisdiction Act 1848; and in Stone's Justices Manual 1978, volume 1, page 26, a footnote to section 5(3) of the Justices of the Peace Act 1968 says that " out of sessions " means when not sitting as a court of quarter sessions. But courts of quarter sessions were abolished by the Courts Act 1971, section 3. Therefore in an Act passed in 1979 " out of sessions " could not mean what it would have meant in an Act passed before 1971. If these words used in an Act of 1979 are not to be regarded as meaningless, it would

be necessary to attribute to them some different meaning; for example, when not sitting as a court. This would certainly not be in accordance with the intention of section 5(3) of the Act of 1968.

Section 5(3) of the Justices of the Peace Act 1968 was inserted by way of an amendment at the committee stage in the Commons. The note on the amendment shows that the intention of the words " out of sessions " was to exclude questions arising at quarter sessions; and the reason given for this was that it would not be practicable or appropriate for a county justice sitting at quarter sessions to seek the advice of the clerk to the particular bench of justices of which he is a member. Similar considerations apply to the functions of a justice of the peace when sitting as a judge of the Crown Court, presided over by a judge of the High Court, a Circuit judge or a Recorder, in accordance with section 5 of the Courts Act 1971.

We recommend that, in re-enacting section 5(3) of the Justices of the Peace Act 1968, the words " out of sessions " should be omitted, and instead words should be inserted excluding functions as a judge of the Crown Court from the functions of justices referred to in the subsection. Effect is given to this recommendation in clause 28(3) of the Bill.

13. Paragraph 3 of Schedule 3 to the Justices of the Peace Act 1968, as amended by the Local Government Act 1972, Schedule 27, paragraph 19(1), makes provision for the application to the City of London of enactments which relate to justices of the peace, magistrates' courts, justices' clerks or connected matters and which contain references to a county or a non-metropolitan county or to county justices, a county council or a county fund. The paragraph provides that such references shall be construed as including respectively references to the City of London, to justices for the City, to the Corporation of the City acting through the Common Council or to the general rate fund of the City. It is, however, debateable whether, as originally enacted, the paragraph extended to references in enactments passed after the passing of the Act of 1968, or whether, as amended by the Local Government Act 1972, it extended to references in enactments passed after the Act of 1972. If the paragraph were simply reproduced in the Bill in its existing form, the resultant provision would also be ambiguous; but it would be a different ambiguity, the question being whether it extended to references in enactments passed after the passing of the Bill. This is therefore a case in which it is impossible on consolidation to reproduce exactly the effect of the existing law.

No question of policy appears to us to arise in determining the form in which this paragraph should be re-enacted; and therefore we think it is a matter to be determined by considerations of legislative convenience.

A. In future legislation which relates primarily to other matters but contains ancillary provisions relating to justices of the peace, magistrates' courts or justices' clerks, the need to make provision for the City of London as well as for counties might by inadvertence be overlooked.

We recommend that, in re-enacting paragraph 3 of Schedule 3 to the Justices of the Peace Act 1968, it should be made applicable to enactments contained in future Acts unless expressly excluded by any such enactment. Effect is given to this recommendation in clause 41(1) of the Bill.

B. At the same time it is necessary in this case, as in the parallel case referred to in paragraph 10 of this Appendix, to avoid creating an overlap between the paragraph as re-enacted and provisions of the Bill or of other enactments (whether existing or future) in which the City of London and counties or non-metropolitan counties are both expressly mentioned in the same context.

We recommend that, in re-enacting paragraph 3 of Schedule 3 to the Justices of the Peace Act 1968, a saving provision for avoiding any overlap of this kind should be inserted. Effect is given to this recommendation in clause 41(2) of the Bill.

14. The existing law contains contradictory provisions about the areas for which magistrates' courts committees are to be constituted.

Section 217(3) of the Local Government Act 1972 provides that there shall be a separate magistrates' courts committee for each non-metropolitan county and each metropolitan district. When read with the Administration of Justice Act 1964, section 2(3) (as amended by section 86 of the Domestic Proceedings and Magistrates' Courts Act 1978) and section 13(1), and with paragraph 3 of Schedule 3 to the Justices of the Peace Act 1968 (as amended by the Local Government Act 1972, Schedule 27, paragraph 19(1)), this amounts to a provision that there shall be a separate magistrates' courts committee for each non-metropolitan county, each metropolitan district, each of the London commission areas other than the inner London area, and the City of London.

Section 217(3) of the Local Government Act 1972 is duplicated by section 16(2) of the Justices of the Peace Act 1949, as amended by the Local Government Act 1972, Schedule 27, paragraph 5(2), but with a proviso which enables a single magistrates' courts committee to be constituted for a joint committee area. This proviso does not enable the City of London to be included in a joint committee area (Justices of the Peace Act 1968, Schedule 3, paragraph 4(4)); but, in conjunction with the provisions of the Administration of Justice Act 1964 and the Domestic Proceedings and Magistrates' Courts Act 1978 mentioned above, its effect is that a joint committee area may consist of any two or more areas, other than the City of London, of a kind for which, apart from the proviso, a separate magistrates' courts committee is required to be established.

The proviso enabling joint committee areas to be established was contained in section 16 of the Justices of the Peace Act 1949 as originally enacted. The proviso was re-enacted in an amended form by paragraph 5(2) of Schedule 27 to the Local Government Act 1972; and therefore it cannot have been the intention, when that Act was passed, to abolish joint committee areas. It is evident that the omission from section 217(3) of the Local Government Act 1972 of any words making it subject to the proviso, or to any corresponding proviso, was due to inadvertence.

We recommend that, in re-enacting section 217(3) of the Local Government Act 1972, it should be made subject to a provision (corresponding to the proviso to section 16(2) of the Justices of the Peace Act 1949 as amended

and applied by other enactments) permitting the establishment of joint committee areas. Effect is given to this recommendation in clause 19(2) and (3) of the Bill.

15. Section 2(7) of the Administration of Justice Act 1973 enables a person to be appointed as an acting stipendiary magistrate in any commission area in which a stipendiary magistrate "may be appointed under this section". It is not clear whether these words mean any commission area in which a stipendiary magistrate can be appointed under that section or whether they mean any commission area in which, in the events which happen, a stipendiary magistrate is so appointed. On the former construction, an acting stipendiary magistrate could be appointed in a commission area which normally has no stipendiary magistrate. On the latter construction, an acting stipendiary magistrate could be appointed only as a temporary deputy for, or supernumerary to, an existing established stipendiary magistrate.

After consultation with the Departments concerned, it has been concluded that in this subsection "may" must have been used in the sense of "can".

We recommend that, in re-enacting section 2(7) of the Administration of Justice Act 1973, "can" should be substituted for "may" in this context. Effect is given to this recommendation in clause 15(1) of the Bill.

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(LAW COM. No. 93)
(SCOT. LAW COM. No. 54)

CUSTOMS AND EXCISE MANAGEMENT BILL

REPORT ON THE CONSOLIDATION OF THE ENACTMENTS RELATING TO THE COLLECTION AND MANAGEMENT OF THE REVENUES OF CUSTOMS AND EXCISE

Presented to Parliament by the
Lord High Chancellor and the Lord Advocate
by Command of Her Majesty
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THE LAW COMMISSION AND THE SCOTTISH LAW COMMISSION

CUSTOMS AND EXCISE MANAGEMENT BILL

REPORT ON THE CONSOLIDATION OF THE ENACTMENTS RELATING TO THE COLLECTION AND MANAGEMENT OF THE REVENUES OF CUSTOMS AND EXCISE

To the Right Honourable Lord Elwyn-Jones, C.H., Lord High Chancellor of Great Britain, and

the Right Honourable Ronald King Murray, Q.C., M.P., Her Majesty's Advocate.

The Customs and Excise Management Bill which accompanies this Report is the largest in a group of seven Bills* which together consolidate the enactments relating to customs amd excise duties and their management. These enactments were last consolidated by the Customs and Excise Act 1952 and have been amended, sometimes radically, by subsequent Finance Acts. Other Acts, notably the Criminal Law Act 1977, have also made important changes.

At an early stage in drafting this and the other Bills a number of consolidation problems relating to the duties and their management were identified. In order to resolve these problems there was included in the Finance Act 1978 a Schedule of pre-consolidation amendments. The opportunity was there taken to dispose of all difficulties which had come to light by April of this year. Since that time, during the completion of the drafting process, four further points of difficulty (none of which relates to duty) have been identified. In order to dispose of these points and produce a satisfactory consolidation, we make the recommendations set out in the Appendix to this Report.

Of these recommendations we think that those numbered 3 and 4 are minor corrections or improvements which could be made under the Consolidation of Enactments (Procedure) Act 1949.

These recommendations are made with the agreement of the Commissioners of Customs and Excise and, in the case of the first recommendation, the Department of Trade also.

MICHAEL KERR — *Chairman of the Law Commission*

J. O. M. HUNTER — *Chairman of the Scottish Law Commission*

31 *October* 1978

**Note:* The other Bills are the Customs and Excise Duties (General Reliefs) Bill, the Alcoholic Liquor Duties Bill, the Hydrocarbon Oil Duties Bill, The Matches and Mechanical Lighters Duties Bill, the Tobacco Products Duty Bill and the Excise Duties (Surcharges or Rebates) Bill. They are pure consolidation Bills requiring no recommendations.

APPENDIX

RECOMMENDATIONS

1. Under section 10(1) of the Finance Act 1966, references in certain Parts of the Customs and Excise Act 1952 to "ships" or "vessels" apply as if they included references to hovercraft. A number of the customs control provisions falling within these Parts of the 1952 Act apply only to ships or vessels of less than a specified tons register. Because the capacity of hovercraft cannot be computed in the same way as that of ships, that is, by reference to their tonnage, it was necessary in the 1966 Act to provide for all hovercraft to be treated as either over or under these specified tonnage limits. Hovercraft were considered to present special risks of revenue evasion; the policy of the 1966 Act therefore was to treat hovercraft in every case as if they were ships of less than the specified tonnages.

Provision was made accordingly by paragraph 1 of Schedule 2 to the 1966 Act. Paragraph 1 lists all the provisions of the 1952 Act which apply to ships of less than the specified tonnage except, unaccountably, section 68(5). That subsection requires all vessels not exceeding one hundred tons register to be marked in accordance with the directions of the Commissioners of Customs and Excise. It is clear that the requirement is meant to and does apply to hovercraft as "vessels" but the application of the requirement is unclear because the words excluding hovercraft over one hundred tons register are unworkable. It is thought that the anomalous omission of this provision from the list in paragraph 1 of Schedule 2 to the 1966 Act must have been an oversight.

We therefore recommend that in reproducing section 68(5) of the 1952 Act it should be treated as if it had been listed in paragraph 1 of Schedule 2 to the 1966 Act.

Effect is given to the recommendation in clause 81(7) of the Bill.

2. Schedule 12 to the Finance Act 1978 (pre-consolidation amendments) includes in paragraph 19 a number of amendments designed to pave the way for a more rational terminology in the customs and excise Acts. This was necessary because the Finance (No. 2) Act 1975 had provided for the revenue elements of customs duties to be renamed as excise duties, leaving the term "customs duties" applying only to protective duties on imports. As a result the old terminology, which was based on the traditional distinction betweens customs duties (as being duties on imported goods) and excise duties (as being duties on home-produced goods), had become misleading.

Paragraph 19(1)(*a*) of Schedule 12 to the 1978 Act replaces the 1952 Act's separate definitions of "customs Acts" and "excise Acts" with one defined expression "the custom and excise Acts". Paragraph 19(2) goes on to make any reference to "the customs Acts" or "the excise Acts" in any enactment (including the 1952 Act) a reference to "the customs and excise Acts" as defined in 19(1)(*a*).

Special provision was needed however in the case of Part IX of the 1952 Act. That Part is about the control of persons engaged in the United Kingdom in producing goods or in activities in respect of which excise duties are chargeable.

Those persons (formerly "excise traders") are termed "revenue traders" in the new terminology, and the provisions of the customs and excise Acts relating to their activities are termed "the revenue trade provisions of the customs and excise Acts". In Part IX there are a number of references to "the excise Acts" for which it was inappropriate to substitute the expression "the customs and excise Acts", since Part IX is not concerned with imported goods. Accordingly paragraph 19(3) provides for these references to be replaced by the expression "the revenue trade provisions of the customs and excise Acts". By an oversight, however, paragraph 19(3) does not apply to the reference to "the excise Acts" in section 253(1) of the 1952 Act. If this omission were not remedied on consolidation, the effect would be that the scope of section 253(1) would be widened and its special provisions about distress would apply in respect of unpaid penalties incurred by a revenue trader under provisions of the customs and excise Acts not relating to his trade. Paragraph 19 was not of course intended to make any such change of substance. We therefore recommend that in reproducing section 253(1) there should be substituted for the expression "the excise Acts" the expression "the revenue trade provisions of the customs and excise Acts" and not simply "the customs and excise Acts" as would be required on a literal consolidation.

Effect is given to this recommendation in clause 117(8) of the Bill.

3. Another term used in the 1952 Act which was falsified by the conversion in 1975 of customs revenue duties into excise duties was "customs charge". This expression refers to the control which the Commissioners of Customs and Excise exercise over imported goods for a period after their importation to secure the payment of duty or the observance in other respects of the customs laws. When this control has accomplished its purpose an out-of-charge note is issued in respect of the goods.

"Customs charge" is inappropriate where the Commissioners' control of imported goods arises because the goods are chargeable on importation with excise duty. Paragraph 19(7)(*a*) of Schedule 12 to the Finance Act 1978 was intended to substitute in the specified cases the expression "out of charge" for "from customs charge". When paragraph 19(7)(*a*) was drafted, the words "from customs charge" in section 260(1) of the 1952 Act were overlooked. To avoid a confusing difference in terminology where there is no difference in the substance, we recommend that, in reproducing section 260(1), the words "out of charge" be substituted for "from customs charge".

Effect is given to this recommendation in clause 127(1) of the Bill.

4. Section 3(3) of the Provisional Collection of Taxes Act 1968 applies where a resolution of the House of Commons imposes an excise duty in respect of goods produced or activities carried on in the United Kingdom to which provisional statutory effect cannot be given under section 1 of that Act. Section 3(3) confers on the Commissioners power to secure the payment of the duty by regulations which may apply the provisions of "the excise Acts" to the duty so imposed, to the revenue trade in connection with which the duty may become chargeable and to the person carrying on that trade.

As mentioned in connection with recommendation 2 above, paragraph 19(2) of Schedule 12 to the Finance Act 1978 converts the expression "the excise Acts",

wherever it appears, into "the customs and excise Acts". It is clear, however, from the context of section 3(3), that the statutory provisions which the Commissioners are empowered to apply are those defined as "the revenue trade provisions of the customs and excise Acts". The Bill repeals paragraph 19(2) of Schedule 12 to the 1978 Act and reproduces by way of textual amendment in Schedule 4 its effect on enactments outside the consolidation. We recommend that in amending section 3(3) of the 1968 Act consequentially on the repeal of paragraph 19(2), the expression "the revenue trade provisions of the customs and excise Acts", and not "the customs and excise Acts", be substituted for "the excise Acts".

Effect is given to this recommendation in Schedule 4 to the Bill.

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(LAW COM. No. 90)

(SCOT. LAW COM. No. 53)

INTERPRETATION BILL

REPORT ON THE INTERPRETATION ACT 1889 AND CERTAIN OTHER ENACTMENTS RELATING TO THE CONSTRUCTION AND OPERATION OF ACTS OF PARLIAMENT AND OTHER INSTRUMENTS

Presented to Parliament by the
Lord High Chancellor and the Lord Advocate
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INTERPRETATION BILL

REPORT ON THE CONSOLIDATION OF THE INTERPRETATION ACT 1889 AND CERTAIN OTHER ENACTMENTS RELATING TO THE CONSTRUCTION AND OPERATION OF ACTS OF PARLIAMENT AND OTHER INSTRUMENTS

To the Right Honourable Lord Elwyn-Jones, C.H.,
Lord High Chancellor of Great Britain, and

the Right Honourable Ronald King Murray, Q.C., M.P.,
Her Majesty's Advocate.

The Interpretation Bill which is the subject of this Report seeks to consolidate the Interpretation Act 1889 and certain other enactments relating to the construction and operation of Acts of Parliament and other instruments. In order to produce a satisfactory consolidation, we have made a number of recommendations which are set out in the Appendix to this Report. One or two of the amendments proposed by these recommendations might have been authorised under the Consolidation of Enactments (Procedure) Act 1949, but the majority could not.

The departments concerned with the production of legislation and subordinate legislation have been consulted in connection with the recommendations. In a context such as this, complete unanimity cannot be expected on every detail, but with one exception, upon which opinion is divided, the recommendations are welcomed by the departments. The exception is recommendation No. 2 relating to words importing the feminine gender.

The amendments proposed by our recommendations include the introduction of two new common-form provisions of exactly the same quality as those comprised in the Act of 1889 as it stands. They will not create substantive law, but merely influence the form of future Acts by eliminating the need for the repetition of standard supplementary provisions and savings.

SAMUEL COOKE,
Chairman of the Law Commission.

J. O. M. HUNTER,
Chairman of the Scottish Law Commission.

April 1978.

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RECOMMENDATIONS

1. Under section 36(2) of the Interpretation Act 1889 an Act which is expressed to come into operation on a particular day is to be construed as coming into operation " immediately on the expiration of the previous day ". Under the Acts of Parliament (Commencement) Act 1793 an Act which makes no provision for its commencement comes into force " on " the date endorsed as the date of Royal Assent. In that case, the Act has effect from the first moment of the day of Royal Assent (*Tomlinson v Bullock* (1879) 4 QBD 230).

A. There is no practical distinction for purposes of commencement between the beginning of one day and the end of the previous day, and we recommend that in reproducing the above enactments the moment of commencement should be expressed as the beginning of the relevant day, whether appointed by the Act or depending on the date of Royal Assent.

B. Subsection (2) of section 36 has also become technically defective in the light of two modern developments in the field of commencement. It is common practice for different provisions of the same Act to be brought into force on different dates and for the date (or dates) of commencement to be fixed by order made under the Act, rather than by the Act itself. There is no room for a different rule as to the moment of commencement in such cases, and we recommend that in reproducing section 36(2) they should be treated in the same way as the case where a whole Act is expressed to come into operation on a day specified in the Act.

Effect is given to the above recommendations in clause 4 of the draft Bill.

2. Section 1(1) of the Interpretation Act 1889 directs that unless the contrary intention appears in an Act passed after 1850—

(*a*) words importing the masculine gender shall include females; and

(*b*) words in the singular shall include the plural, and words in the plural shall include the singular.

This provision was derived from the first sentence of section 4 of Lord Brougham's Act of 1850 (13 Vict. c. 21) which was to the same effect, and has probably contributed more than any other single enactment to the declared objective of Lord Brougham's Act (" An Act for shortening the language of Acts of Parliament "). The contribution would have been little if any greater if the gender rule had been drawn so as to operate both ways, as in section 61 of the Law of Property Act 1925 (c. 20) (construction of deeds, contracts, wills, orders and other instruments). It has however been represented to us that there are legislative contexts (such as nursing and consent to adoption) where the feminine pronoun might with advantage be used to include the masculine, instead of vice versa. It is occasionally so used without the benefit of section 1(1) of the Interpretation Act 1889, as in the following passage in section 36(1) of the Finance Act 1977 (c. 36):—

> " living accommodation is job-related for a person if it is provided for him by reason of his employment, or for his spouse by reason of hers ".

In this passage " him " and " his " include " her " and " hers " by virtue of section 1(1): but common sense alone requires the final " hers " to be read as " his " where the person whose accommodation is in question is a married woman.

We recommend that in reproducing 1889 section 1(1) the rule should be made to operate both ways. Effect is given to this recommendation in clause 6 of the draft Bill.

3. The text of section 37 of the Interpretation Act 1889 is as follows:—

> " 37. Where an Act passed after the commencement of this Act is not to come into operation immediately on the passing thereof, and confers power to make any appointment, to make, grant, or issue any instrument, that is to say, any Order in Council, order, warrant, scheme, letters patent, rules, regulations, or byelaws, to give notices, to prescribe forms, or to do any other thing for the purposes of the Act, that power may, unless the contrary intention appears, be exercised at any time after the passing of the Act, so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of the commencement thereof, subject to this restriction, that any instrument made under the power shall not, unless the contrary intention appears in the Act, or the contrary is necessary for bringing the Act into operation, come into operation until the Act comes into operation."

The section has been expounded in *R.* v *Minister of Town and Country Planning* [1951] 1 KB 1 and *Usher* v *Barlow* [1952] Ch. 255, which established that the word " operation " is used in two senses, namely (1) commencement, and (2) effective working. The distinction is expressly drawn in clause 13 of the Bill. We recommend that the following additional amendments should be made in reproducing section 37.

A. As already mentioned, it is common practice for different provisions of an Act to be brought into force at different times. That situation is not expressly contemplated by section 37, but the principle of that section should apply whether it is a whole Act or a particular provision which is to be brought into " operation ".

B. It has been represented to us that there are cases in which statutory powers have to be exercised before an Act or provision comes into force in order to secure the effective working of the Act or provision, not at the time when the Act or provision comes into force but at a subsequent but relatively early date. This is not warranted by section 37, which requires that the purpose must be to bring the Act into operation " at the date of commencement thereof ", but it is within the spirit of the section, and should be covered expressly.

C. Section 37 confers a limited power to do things in advance for the specified purpose of bringing the Act into operation, but subject to the " restriction " that an instrument made under the power must not come into operation until the Act comes into operation unless that is necessary for the same purpose. We consider that the restriction is little more than a repetition in negative form of the limitation contained in the power itself, and could be omitted without detriment; and we recommend accordingly.

Effect is given to the above recommendations in clause 13 of the draft Bill.

4. Section 32(3) of the Interpretation Act 1889 provides that where an Act confers power to make "rules, regulations or by-laws", the power (in the absence of a contrary intention) is to be construed as including power to rescind, revoke, amend or vary the rules, regulations or by-laws.

A. A power to amend or revoke is usually required for other kinds of subordinate legislation to be made under an Act, and the restriction of section 32(3) to rules, regulations and by-laws has led to a proliferation of *ad hoc* provisions authorising amendment and revocation of Orders in Council, Ministerial orders and other instruments. To take only one volume of recent statutes, such provisions are to be found in 1975 c.68 s.38(2) and (3); c.69 s.26(2); c.70 s.28(2); c.71 s.123(4); c.72 s.106(3); c.76 s.18(3); c.77 s.55(4) and c.78 s.13(6) and s.14(4). We consider that when section 32(3) is reproduced, it should be extended so as to dispense with the need for such *ad hoc* provisions in the future. On the other hand there are certain instruments made under statutory powers for which a power to revoke or amend is unnecessary, and others for which such a power would be inappropriate. Two of the enactments mentioned above (1975 c.71 s.123(4) and c.77 s.53(4)) exclude particular orders from the power to revoke or amend. There are other instances, for example compulsory purchase orders, where power to revoke or amend is never conferred. Some selectivity is therefore required if section 32(3) is extended as we propose. The line is not easy to draw but we believe that it will be sufficient for practical purposes to exclude from the extended provision any subordinate legislation which is not made by statutory instrument.

Accordingly we recommend that the existing provision should be extended so as to cover, in addition to rules, regulations and by-laws, Orders in Council, orders and other types of subordinate legislation made by statutory instrument. With this limitation there should seldom be need for an express provision excluding the implied power to revoke or vary. Effect is given to this recommendation in clause 14 of the draft Bill, coupled with the definition of "subordinate legislation" in clause 21(1) and clause 24(3).

B. In connection with section 32(3), it has been represented to us that there are certain cases in which it would be desirable to bring together in a single instrument the effects of a series of previous instruments without revoking the latter. This situation is no doubt rare, but we recommend that the opportunity should be taken to make it clear that collation as well as amendment and revocation is covered by the implied power. Effect is also given to this recommendation in clause 14.

5. Section 38(2) of the Interpretation Act 1889 contains a number of important saving provisions which are implied (subject to the contrary intention) where an Act repeals any other enactment. The common law rule was that when an Act is repealed it is treated as if it had never been enacted except as to matters and transactions past and closed; and the effect of section 38(2) is to modify that rule by preserving the previous operation of the repealed Act and rights and liabilities acquired or incurred under it. It is settled that the benefit of these savings is not confined to express repeals but extends to any enactment which abrogates or limits the effect of a previous enactment (*Moakes* v *Blackwell Colliery Co.* [1926] 2 KB 64 at p.70).

The common law rule applies, and section 38(2) does not, where a temporary Act expires by effluxion of time. Accordingly *ad hoc* savings have been necessary in such Acts. The usual saving, e.g. section 17(3) of the Prevention of Terrorism (Temporary Provisions) Act 1976 (c.8), is to the effect that section 38(2) of the Interpretation Act is to apply on the expiration of the temporary Act as if it was then repealed by another Act. Temporary Acts are not a major feature of modern legislation, but we recommend that such savings should be generalised by extending section 38(2) to expirations. Effect is given to this recommendation in subsection (2) of clause 16 of the draft Bill.

6. Section 38(1) of the Interpretation Act 1889 provides that where an Act repeals any provisions of a former Act and re-enacts them with or without modification, references in "any other Act" to the provisions so repealed are to be construed (unless the contrary intention appears) as references to the provisions so re-enacted.

A. The words "any other Act" are ambiguous, and it is unsettled whether the translation operates upon internal references to the provisions repealed which occur in the Act containing those provisions. We recommend that this ambiguity should be resolved so as to include internal, as well as external, references to the repealed provisions. Effect is given to this recommendation in clause 17(2)(*a*) of the draft Bill.

Under clause 22(1) and paragraph 3 of Schedule 2, this restatement of section 38(1) will operate in relation to repeals and re-enactments effected by Acts passed after 1889. The change, if it is one, can safely be made retrospective to this extent. In so far as section 38(1) has been relied upon for the translation of "internal" references, the restatement will give effect to the intention. In so far as the section has not been so relied upon, the restatement will (harmlessly) duplicate express translations effected by former Acts. What is inconceivable is that any former Act which intended *not* to translate internal (as opposed to external) references to provisions repealed and re-enacted would have relied for that purpose on the doubt whether section 38(1) applied to them. In such a case (if there ever was one) an express provision would have been necessary, and this would establish the contrary intention for the purposes of clause 17(2).

B. Section 38(1) is also defective in so far as the translation of references to the repealed enactment is confined to references which appear in other Acts. In practice the translation is equally required for references which appear in subordinate legislation or in documents which are not legislative in character. Accordingly section 38(1) is seldom if ever relied upon in Consolidation Acts. The normal practice is to include an express saving (without prejudice to the operation of section 38) to the following effect:

> "Where any enactment or document refers . . . to any of the repealed enactments, the reference shall, except where the context otherwise requires, be construed as a reference to this Act or to the corresponding provision of this Act".

We recommend that section 38(1) be extended so as to cover references to enactments repealed and re-enacted, whether those references occur in Acts of Parliament or any other enactment or document. Effect to this

recommendation is given in clause 17(2)(*a*), clause 23(2) and (3) and clause 24(2) of the draft Bill.

C. Another standard saving, which appears regularly in Consolidation Acts, provides that subordinate legislation made, and other things done, under the enactments repealed are to be treated as made or done under the corresponding provision of the Consolidation Act. Frequently this, and the extended version of section 38(1) referred to above, are the only savings needed in a Consolidation Act—see for example Costs in Criminal Cases Act 1973 (c.14) s.21(3) and (4); Independent Broadcasting Authority Act 1973 (c.19) s.39(2) to (4); Legal Aid Act 1974 (c.4) s.42(2) and (3). We recommend that this additional saving be introduced alongside the original saving in section 38(1). Effect to this recommendation is given in subsection (2)(*b*) of clause 17 of the draft Bill.

7. Subsections (1) and (2) of section 35 of the Interpretation Act 1889 read as follows:—

"(1) In any Act, instrument or document, an Act may be cited by reference to the short title, if any, either with or without a reference to the chapter, or by reference to the regnal year in which the Act was passed, and where there are more statutes or sessions than one in the same regnal year, by reference to the statute or session, as the case may require, and where there are more chapters than one, by reference to the chapter, and any enactment may be cited by reference to the section or subsection of the Act in which the enactment is contained.

(2) Where any Act passed after the commencement of this Act contains such reference as aforesaid, the reference shall, unless a contrary intention appears, be read as referring, in the case of statutes included in any revised edition of the statutes purporting to be printed by authority, to that edition, and in the case of statutes not so included, and passed before the reign of King George the First, to the edition prepared under the direction of the Record Commission; and in other cases to the copies of the statutes purporting to be printed by the Queen's Printer, or under the superintendence or authority of Her Majesty's Stationery Office."

A. Subsection (1) was derived from section 3 of Lord Brougham's Act which was to the same effect but with certain differences of detail:—

(1) The earlier section did not authorise citation by short title. Short titles were by no means unknown in 1850 (see e.g. Towns Improvement Clauses Act 1847, s.4; House of Commons Costs Taxation Act 1847, s.11), but were not the general rule. By 1889 the practice was firmly established. Only a handful of Acts of the previous decade, and none later than 1893, received short titles under the Short Titles Act 1896.

(2) In prescribing the details of citation by regnal year and chapter, Lord Brougham's Act distinguished between Acts made before 7 Henry 7 and those made after 4 Henry 7 (the apparent overlap was illusory). In the former case provision was made for citation by statute if more than one in the same regnal year; in the latter for citation by statute or session if more than one in the same regnal year (see e.g. I Mary, Sessions 1 to 3, 13 Chas. 2 Stats. 1 and 2. The Act of 1889 omitted this distinction, and referred to "statutes or sessions" regardless of the date of the Act to be recited.

(3) Lord Brougham's Act directed that the citation by regnal year, statute or session and chapter should be sufficient " without reciting the title of such Act [or the provision of such section] so referred to ". This was omitted in 1889, no doubt as having already done its work.

To return to the text of section 35(1) as it stands, we observe in the first place that it is otiose in so far as it purports to authorise the citation of an Act by a short title by which it is otherwise authorised to be cited. This applies to all the 2,000 odd enactments scheduled to the Short Titles Act 1896 and to every other Act which includes a short title clause. Secondly the provision for citation by regnal year, statute/session and chapter cannot be taken literally as authority for the subsidiary citations which are used in the Chronological Table of the Statutes and in Schedules of amendments or repeals, such as Schedule 3 to the draft Bill. Only two of the references in the first column of that Schedule identify " the regnal year in which the Act was passed " (these being comparatively rare cases in which the relevant Session of Parliament was begun and ended in the same regnal year). Thirdly section 35(1) is and always has been inappropriate to the Acts of the Parliament of Scotland, which were numbered by calendar year and chapter and not by reference to regnal years (This defect was not inherent in the Bill for the Interpretation Act as introduced, which referred to regnal or calendar years; but for reasons which do not appear on the record the calendar year was dropped in the course of the parliamentary proceedings).

These problems, as well as the change in the citation of Acts of 1963 onwards introduced by the Acts of Parliament (Numbering and Citation) Act 1962, could be looked after by suitable redrafting of subsection (1) of section 35 in the Consolidation Bill. But the question is whether that is worth doing. The methods used for identifying previous statutes would be exactly as they are if subsection (1) of section 35 were not in force. There is no comparable provision for the identification in U.K. Acts of Acts of the Parliament of Northern Ireland either by their short titles or by regnal year (or calendar year since 1944) and chapter; and there is no provision authorising the identification in such Acts of subordinate legislation by S.R. & O. or S.I. year and number. Both are regularly so identified in U.K. statutes without specific statutory authority. The choice therefore lies between expanding section 35(1) so as to authorise these citations, and repealing it as unnecessary. We recommend the latter option, to which effect is given by Schedule 3 to the draft Bill.

B. Subsection (2) of section 35 was and is still required in order to govern the selection between the chapters or sections attributed to the same Act in different editions of the earliest statutes. A once well-known instance of the problem was 6 Ann c.41 sections 24 and 25 (Statutes of the Realm) *alias* 6 Ann c.7 sections 25 and 26 (Statutes at Large). A similar problem, not dealt with by subsection (2) as it stands, arises in relation to some of the Acts of the Parliament of Scotland. We recommend that in these cases also preference should be given to the edition published by authority. Effect is given to this recommendation by subsection (1) of clause 19 of the draft Bill.

8. The great majority of Acts of Parliament contain references of some kind to other existing enactments which, or some of which, have been

amended by intervening legislation. This raises the theoretical question whether the reference is intended to denote the enactment in the form in which it was originally passed or in the form in which it stands at the time of the reference. The intention is almost invariably the latter. Where it is not, words are added to make that clear—see for example paragraph 7(1) of Schedule 2 to the Acquisition of Land (Authorisation Procedure) Act 1946, which refers to sections 78 to 85 of the Railways Clauses Consolidation Act 1845 "as originally enacted and not as amended . . . by section 15 of the Mines (Working Facilities and Support) Act 1923."

Nevertheless the practice has grown up, no doubt to be on the safe side, of including in Acts which contain such references a clause to the effect that they are to be construed as referring to the enactments in question as amended by subsequent Acts. On an approximate estimate such a clause now appears in two out of every three Acts. Although the general purpose is the same, these clauses differ from each other in detail, ranging from the simplest form—"Any reference in this Act to any enactment is a reference to that enactment as amended by any subsequent enactment" to the full treatment—"Unless the context otherwise requires, any reference in this Act to any other enactment is a reference thereto as amended, and includes a reference thereto as extended or applied, by or under any other enactment, including this Act".

Apart from the expenditure of paper and ink upon clauses the need for which is at best doubtful, these provisions are disturbing because it is seldom self-evident why the clause appears in different forms in different Acts, and does not appear at all in the others.

We recommend accordingly that the consolidation should include a clause designed to eliminate these recurrent *ad hoc* clauses. Effect to this recommendation is given in clause 20(2) of the draft Bill.

9. The application of the Interpretation Act 1889 to subordinate legislation is selective, not to say capricious. Section 6 (meaning of "county court" in England and Wales) applies to Orders in Council as well as Acts. Contrast section 29 ("county court" in Northern Ireland) which applies only to Acts. Subsection (1) of section 35 authorises the citation of Acts by short title, or by regnal year and chapter, where the citation is made in "any Act, instrument or document". But subsection (2), which governs the references to regnal year and chapter in the case of the early statutes for which there were variations in different editions, applies only to references occurring in Acts of Parliament; and subsection (3), under which a quotation of words from a previous Act is treated as inclusive, applies only where the quotation is made in an Act. Similarly in section 36 subsection (1) defines "commencement" when used in and in relation to Acts only; while subsection (2) regulates the time of day at which an Act or subordinate legislation comes into operation when expressed to come into operation on a particular day. The effects of sections 11 and 38 (repeals) depend upon the meaning of the word "enactment" as used in those sections. It is clear that subsection (1) of section 38, which translates references to provisions repealed and re-enacted, applies only to the repeal of Acts by Acts and is confined to references in other Acts. On the other hand the savings contained in section 11(1) and section 38(2) may and probably do apply where

(as occasionally happens) subordinate legislation is repealed by Act of Parliament, though not by subsequent subordinate legislation. The general definitions contained in the Act of 1889 (sections 12 to 30) apply only to Acts of Parliament. Under section 31 expressions used in subordinate legislation have the same meaning as in the parent Act, but this provision imports the general definitions only where the expression defined occurs both in the parent Act and in the subordinate legislation, not where it occurs in the latter only.

Naturally the draftsmen of subordinate legislation have not left it there. Most instruments of any elaboration contain a clause applying the Interpretation Act as it applies to an Act of Parliament; and instruments which revoke previous subordinate legislation usually go on to provide expressly that section 38 is to apply as if the revocation were a repeal of an Act by an Act. The practice (as of 1971) is described in Halsbury's Statutes, Vol. 32 "Statutes" at p. 407. A great deal of space in the Statutory Instruments series is occupied by such provisions, which would not be needed if the Interpretation Act were directly applied to subordinate legislation without the curious distinctions described above.

Accordingly we recommend that (subject to certain minor exceptions referred to below) the following amendments should be made in the application of the Act of 1889 to subordinate legislation:—

(1) All definitions, and all other provisions except those capable only of application to Acts of Parliament (sections 8, 9 and 10) should apply, so far as applicable and unless the contrary intention appears, to subordinate legislation made after the consolidation comes into force.

(2) The provisions relating to repeals (sections 11(1) and (2) and section 38(1) and (2)) should also apply where subordinate legislation is repealed either by Act or by subordinate legislation.

(3) In those provisions, and in other provisions which relate to the impact of an Act on other legislation, references to other enactments should include subordinate legislation.

The exceptions referred to above relate to Orders in Council under section 5 of the Statutory Instruments Act 1946, which are *sui generis*, and Orders in Council under two Acts relating to Northern Ireland, which are dealt with by another Recommendation.

Effect is given to this recommendation in subsections (1), (2) and (4) of clause 23 of the draft Bill.

10. The Interpretation Act does not apply to Acts of the Parliament of Northern Ireland. It was originally extended to such Acts by the Interpretation Act 1921 (12 Geo. 5 [N.I.] c.4): but that Act, and the Act of 1889 as applied by it, were repealed by the Interpretation Act (Northern Ireland) 1954 section 48(1) and (2). In general therefore the two codes are separate, the one applying to Acts of the Parliament of the United Kingdom and the other to Acts of the Parliament of Northern Ireland, to Measures of the Northern Ireland Assembly, and (by specific application) to Orders in Council under modern legislation which have the effect of such Acts.

The question does arise however whether and how far the provisions of the Interpretation Act 1889 relating to the effects of repeals (sections 11 and 38) operate in cases where Acts of the Parliament of Northern Ireland are repealed by Acts of the Parliament of the United Kingdom, or contain references to enactments of either Parliament which are so repealed. If an Act of Northern Ireland which repealed a previous Act of Northern Ireland is itself repealed by U.K. legislation, is the original repeal preserved by section 11(1) or section 38(2)(*a*) of the Act of 1889? If an enactment referred to in an Act of Northern Ireland is repealed and re-enacted by U.K. legislation, is the reference translated into a reference to the new enactment by section 38(1) of the Act of 1889?

It is on account of such doubts that *ad hoc* applications of section 38 are often included in Acts which repeal Northern Ireland legislation. A recent example of such an Act is the Social Security (Consequential Provisions) Act 1975 (c.18), section 2(4)(*b*) of which provides as follows:

> "(4) Section 38 of the Interpretation Act 1889 (effect of repeals)—
>
> . . . .
>
> (*b*) has the same operation in relation to any repeal by this Act of an enactment of the Parliament of Northern Ireland or of the Northern Ireland Assembly (or of any provision of an Order made under, or having the same effect as, such an enactment) as it has in relation to the repeal of an Act of the Parliament of the United Kingdom (references in section 38 of the 1889 Act to Acts and enactments being construed accordingly)."

Such provisions would be unnecessary if it were made clear that while the Interpretation Act 1889 continues to apply only to the provisions made by Acts of the Parliament of the United Kingdom, the impact of those provisions upon other "enactments" extends to enactments of the Parliament of Northern Ireland and other Northern Ireland legislation; and we recommend accordingly. Effect is given to this recommendation in clause 24(2) of the draft Bill.

11. Section 27 of the Interpretation Act 1889 did not define "committed for trial" as respects Ireland. The reason for this omission is not clear, but it may have been that Irish lawyers were content to rely on some dicta of Palles C.B. in *R.* (*Feely*) *v. Fitzgibbon* (delivered in Nov. 1888 and reported in Judgments of the Superior Courts in Ireland (1890) 191 at page 195) regarding the meaning of the expression "return for trial" which was then more commonly used in Ireland. The learned Chief Baron appeared to regard "trial" as referring exclusively to trial by a jury, summary offences being "heard" or "heard and determined" as opposed to "tried". Unfortunately, the work in which this Judgment appears has not been available to the public for a very long time and, as most enactments now in force in Northern Ireland refer to "committed for trial" rather than "returned for trial", the absence of a definition of the former corresponding to that in force in England, suggests inconsistency in the interpretation of the law of two parts of the United Kingdom. Any such inconsistency has already been removed, as respects Northern Ireland enactments, by the inclusion in section 42(4) of the Interpretation Act (Northern Ireland) 1954

(c.33) of a Northern Irish version of the definition in section 27 of the Act of 1889. We recommend that a similar version should be made applicable to Westminster Acts extending to Northern Ireland, but with one change, namely, the substitution of the words " on indictment " for the words " before a judge and jury ". This change is necessary because, for a temporary period, section 2 of the Northern Ireland (Emergency Provisions) Act 1973 c.53 (as amended by section 18 of the Northern Ireland (Emergency Provisions) (Amendment) Act 1975 c.62) authorises certain indictable offences to be tried without a jury. It is, however, desirable that the expression " committed for trial " should cover committals for trial of these offences and the form of the definition we recommend for Northern Ireland provides accordingly.

Effect is given to this recommendation in paragraph (*b*) of the definition in Schedule 1 to the draft Bill.

12. Section 3 of the Interpretation Act 1889 defines " land " as including messuages, tenements, and hereditaments, houses, and buildings of any tenure. The definition was derived from section 4 of Lord Brougham's Act. It has never been appropriate for Scotland, where messuages and hereditaments are unknown to the law. Most modern Acts in which the meaning of " land " is significant contain their own definition (see for example the Town and Country Planning Act 1971 (c.78) section 290(1), the Town and Country Planning (Scotland) Act 1972 (c.52) section 275(1) and the Community Land Act 1975 (c.77) section 6(1)). The points looked after by such definitions are the inclusion of (1) buildings and structures, (2) lakes, rivers and foreshore (land covered with water), (3) particular estates or interests in land and (4) easements (in Scotland servitudes) and other rights over and in land. We recommend that for the purposes of future Acts the definition in section 3 should be re-written so as to cover these points. Effect is given to this recommendation in Schedule 1 to the draft Bill. It is very improbable that any damage would be done by applying this definition retrospectively to Acts passed since 1850 which do not contain their own: but in order to be on the safe side the draft Bill retains the present definition for such Acts (Schedule 2 paragraph 5).

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