INCONSISTENT STATUTES

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Introduction

The statute law of Commonwealth countries is not in the form of a code, but is a collection of individual statutes. In this vast conglomeration of statutory provisions there is much inconsistency, and, at times, outright conflict. No doubt some of these inconsistencies are the result of deliberate legislative policy, but equally certainly a good number of them have arisen entirely by accident, those responsible for the later piece of legislation being unmindful of the existence of the earlier.[1] This need occasion no surprise when one takes into account the huge number of statutes, the vast disparity in their ages, the variety of their subject-matter, the frequency with which they are amended, and the fact that they are drafted by different people.

Because in theory all statutes in the system are of equal authority, a court faced with an argument of repugnancy between two different provisions has a difficult task: to find some mode of reconciling the two provisions or, if this be impossible, to determine which of them is to prevail.

Several devices are available to solve such a problem.

I. THE PROVISIONS CAN STAND TOGETHER

First, the court will sometimes be able to find (and it will prefer to do so where it can) that the two provisions can exist side by side without the need to curtail or modify either of them: to use the words of Viscount Dunedin, they "can live together".[2] This can happen in two ways.

1. *Reconciliation*

The court may find that each provision deals with a separate subject matter, and that the two can thus be read together without inconsistency or overlap. An example is the well-known case of *Flannagan* v. *Shaw*.[3] The Distress for Rent Act 1737 provided that if a tenant refused to quit demised premises after himself giving notice he was liable to a sum equal to double the rent. The Increase of Rent and

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1 This is sometimes judicially admitted as a possibility, although the court's task is not to conjecture on the reasons for the inconsistency: *Bennett* v. *Minister for Public Works* (1908) 7 C.L.R. 377, 378 per Griffith C.J.; *In re Oamaru Harbour Board, ex parte Smith* (1894) 13 N.Z.L.R. 24, 29 per Denniston J.

2 *Re Silver Brothers Ltd.* [1932] A.C. 514, 523.

3 [1920] 3 K.B. 96. Other examples are *Wallwork* v. *Fielding* [1922] 2 K.B. 66; *Rippingale Farms Ltd.* v. *Black Sluice Internal Drainage Board* [1963] 1 W.L.R. 1937; *Murdoch* v. *British Israel Foundation* [1942] N.Z.L.R. 600; *Maybury* v. *Plowman* (1913) 16 C.L.R. 468; *R.* v. *Eager* (1903) 6 G.L.R. 236.

Mortgage Interest (War Restrictions) Act 1915 provided that where the rent of a dwelling house was increased above a certain standard, the excess should be irrecoverable. It was held that the two Acts were reconcilable. The later was concerned only with the case of the landlord who himself attempted to raise his tenant's rent, whereas the former was dealing with a sum, not really rent at all, which the law imposed as a penal measure on a tenant who held over after himself terminating the tenancy. In the words of Duke L.J.,[4] "the two enactments might be written in one statute without the one influencing the other in the least".

Sometimes the effect of holding that two provisions can stand together in this way will be that a party bound by them will have to satisfy the requirements of both of them cumulatively.[5]

2. *Alternatives*

Sometimes, although two provisions cover the same subject matter in a way which is different and inconsistent, the court will find that they can stand together as alternatives in the sense that a litigant may choose the one on which he wishes to rely. The Matrimonial Proceedings Act 1963 (N.Z.) empowers the Supreme Court, on making a decree of divorce, to make certain orders for the disposition of the matrimonial home.[6] The Matrimonial Property Act 1963 (N.Z.) passed on the same day, empowers the court at any time, before or after divorce, to make such order as appears just for the solution of any question between husband and wife as to any matrimonial property.[7] The two statutes obviously cover much common ground, but do so in ways which are strangely inconsistent. Under the former Act, matrimonial fault may be taken into account when determining the shares to which the parties are respectively entitled;[8] under the latter, fault is expressly made irrelevant.[9] Moreover under the Matrimonial Property Act the court may not make any order which could defeat a common intention expresed by the parties;[10] the Matrimonial Proceedings Act contains no such provision. It has been accepted that, despite the inconsistencies between the two statutes, both remain in full force, and on the making of a divorce decree an applicant may choose which he will rely on.[11] An applicant who has been guilty of adultery would thus be advised to head up his papers under the Matrimonial Property Act. These two New Zealand statutes are perhaps a rather special case in that they were passed at the same time, and there was no opportunity for applying the doctrine of implied repeal; but even where the statutes have been enacted at different times this solution will sometimes be reached. This has happened, in the main, in cases involving causes of action in a civil claim,[12] perhaps because even at

4 Ibid., 108.
5 For example *Hill* v. *Hall* (1876) 1 Ex. D. 411. Cf. *Stubbing* v. *Barnett* (1909) 28 N.Z.L.R. 810 where the court had to decide whether both provisions applied cumulatively, or one to the exclusion of the other.
6 Section 58.
7 Sections 2, 5 and 7.
8 *Pay* v. *Pay* [1968] N.Z.L.R. 140.
9 Matrimonial Property Act 1963, s. 6A.
10 Ibid., s. 6 (2).
11 *L.* v. *L.* [1969] N.Z.L.R. 314, 318 per Turner J. for C.A.; *E.* v. *E.* [1971] N.Z.L.R. 859, 875 et seq per North J. and 889 et seq per Turner J.
12 E.g. *O'Meara* v. *Westfield Freezing Co. Ltd.* [1947] N.Z.L.R. 253; *Enman* v. *Enman* [1942] S.A.S.R. 131.

common law alternative civil causes of action are by no means uncommon. The same approach has by and large not been taken with regard to criminal statutes, there being a line of cases to the effect that if two statutes define substantially the same offence, but provide for different procedures or penalties, the later is taken impliedly to repeal the earlier.[13] However the principle of these cases has not been universally applied, and it does not seem altogether consistent with that provision which commonly appears in Interpretation Acts that where an act constitutes an offence under more than one statute the offender will be liable to be prosecuted and punished under any one of those statutes.[14]

The confusion in this area of the law is in no way alleviated by the fact that in some of the cases where two acts have been held to stand as alternatives the court has (erroneously, it is submitted) purported to apply the maxim *generalia specialibus non derogant.*[15]

II. Generalia Specialibus Non Derogant

1. *The principle*

> . . . [W]here there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words without any indication of a particular intention to do so.[16]

Rather, in such a case, the earlier special statute continues to have exclusive application to its own subject matter, and the later general act, although in terms wide enough to extend to the subject matter of the earlier act, is held not to have any application to it. In fact, the effect of the earlier special act may be looked upon as engrafting an exception on to the general words of the later.[17]

An example is the case of *Blackpool Corporation* v. *Starr Estate Co. Ltd.*[18] By the Blackpool Improvement Act 1917 a certain company was to sell land to the corporation, the price to be determined, in default of agreement, by arbitration as provided in the Act itself. A later Act, the Acquisition of Land (Assessment of Compensation) Act 1919, provided that where by any statute land was authorized to be acquired compulsorily by any local authority, any question of disputed compensation was to be determined in the manner therein set out. It was held by the House of Lords that the former Act, dealing in a

13 E.g. *Mitchell* v. *Brown* (1858) 1 El. & El. 267; *Smith* v. *Benabo* [1937] 1 K.B. 518.

14 E.g. Interpretation Act 1889 (U.K.), s. 33; Crimes Act 1961 (N.Z.), s. 10. Cf. *Summers* v. *Holborn Board of Works* [1893] 1 Q.B. 612 and *Keep* v. *Vestry of St. Mary's* [1894] 2 Q.B. 524.

15 See *O'Meara* v. *Westfield Freezing Co. Ltd.* [1947] N.Z.L.R. 253.

16 *Seward* v. *Vera Cruz (Owners)* (1884) 10 App. Cas. 59, 68 per Lord Selborne.

17 "Where there is a general provision which, if applied in its entirety, would neutralise a special provision dealing with the same subject matter, the special provision must be read as a proviso to the general provision, and the general provision, in so far as it is inconsistent with the special provision, must be deemed not to apply": *Goodwin* v. *Phillips* (1908) 7 C.L.R. 1, 15 per O'Connor J.

18 [1922] 1 A.C. 27. See the application of the maxim also in *Miller* v. *Minister of Mines* [1961] N.Z.L.R. 820, 831 per Gresson P.

specific way with a specific situation, applied exclusively to the Starr company-Blackpool transaction, and that the later general statute had no application to it.

It is common to regard *generalia specialibus non derogant* as a rule of construction enabling the specific and general provisions to be reconciled. It is, however, a rather more violent mode of reconciliation than in I. above, for it virtually involves the engrafting of an exception on to general words which, in their natural signification, readily extend to the situation in hand. Indeed the maxim has its classic application only where the natural meaning of the general provision conflicts with that of the specific one.[19]

The maxim can have considerable force, and at times can even take on the appearance of an arbitrary rule to be applied regardless of the legislature's intention. In the *Starr* case, for instance, it was applied despite a provision in the 1919 statute that "the provisions of the Act by which the land is authorised to be acquired . . . shall . . . have effect subject to this Act, and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect".[20] In other cases it has been applied despite the fact that the court suspected that desirable social policy might be being partially frustrated by the decision.[21] However these cases mark the high water mark. In the last analysis the court's task is to give effect to what it finds to be the legislature's intention, and if that intention is clearly that the later general act is to be all embracing, that act will be held to prevail and the inconsistent special act will accordingly be held to have been impliedly repealed.[22]

2. *What is a special statute?*

The principle has somewhat hazy boundaries. It only applies where there is a "special" statute and a "general" one. These are expressions of degree. In many of the older cases on the subject the matter was clear enough; the "special" act was usually either a local act dealing with a limited area such as a parish or borough,[23] or the empowering act of a particular enterprise such as a railway company.[24] The upholding of these truly "special" statutes at the expense of later public general statutes is reminiscent of the common law's willingness to countenance local custom. It could be, and was, justified on at least three grounds. First, it would be unfair to attribute to Parliament in the general act an intention to repeal the special one, for that would deprive the inhabitants of the locality affected of the chance they would

19 *Fonteio* v. *Morando* [1971] V.R. 658, 662 per Winneke C.J. See also *Bank Officials' Association (South Australian Branch)* v. *Savings Bank of South Australia* (1923) 32 C.L.R. 276, 282-283 where Knox C.J. sets out the conditions for the application of *generalia specialibus non derogant;* and *Dick and Sauer* v. *Attorney-General (No. 2)* [1956] N.Z.L.R. 563, 581-582 per Shorland J.

20 One law Lord (Lord Shaw) dissented on this point.

21 E.g. *R.* v. *Minister of Health*; *ex parte Villiers* [1936] 2 K.B. 29, 45 per Lord Hewart C.J.

22 Infra, p. 608.

23 E.g. *Ashton under Lyne Corpn.* v. *Pugh* [1898] 1 Q.B. 45; *Thorpe* v. *Adams* (1871) L.R. 6 C.P. 125; *Barker* v. *Edger* [1898] A.C. 748; *Re Hawke* (1901) 20 N.Z.L.R. 34.

24 E.g. *London & Blackwall Railway Co.* v. *Board of Works for Limehouse District* (1856) 3 K. & J. 123.

otherwise have to make representations to the House.[25] Second, there is in any event a presumption that an act does not intend to deprive persons of their vested rights, particularly rights in reliance on which they may have expended money.[26] Third, Parliament having already given its attention to a special set of facts and provided carefully for them, is unlikely to want to alter that provision by a general enactment in the course of whose passing the special set of facts has not been discussed.[27]

Yet the maxim can clearly have application beyond the very narrow area of local and specific empowering acts. At attempt was once made to confine its scope by defining a special act as one which protects a class of persons or the property of such class.[28] Yet the notion of "class" is vague; a similar guideline has produced nothing but uncertainty in other areas, for example the tort of breach of statutory duty. In fact the maxim *generalia specialibus* has been applied when it was difficult to discern anything that could be called a protected "class" of persons. In *Cox* v. *Hakes*,[29] for instance, it was held that the Judicature Acts, providing for a right of appeal from a High Court decision, did not affect ancient statutes providing that no appeal would lie from a discharge in proceedings for habeas corpus. It is artificial to say that these ancient statutes protected a "class of persons" more than do any other statutes dealing with rights of the citizen. At best these statutes were more restricted in scope and dealt with a narrower range of subject matter than the Judicature Acts. In such a situation the first two grounds given above for justifying the maxim *generalia specialibus* have no obvious relevance; decisions like *Cox* v. *Hakes* must thus be justified solely on the third of the above grounds.

Yet one wonders where the cut-off point comes. In some cases where *generalia specialibus* is pleaded, it is in fact very difficult to say that the earlier act is really any more "special" than the later; there are, as Kitto J. has put it,[30] cases were "each enactment may be called general or special according to the point of view from which it is regarded". Strangely enough, one case where that was arguably so was a case which is usually cited as one of the small handful of leading authorities on the application of the maxim. It is *Seward* v. *Vera*

25 *Thorpe* v. *Adams* (1871) L.R. 6 C.P. 125, 138 per Willes J.; *Garnett* v. *Bradley* (1878) 3 App. Cas. 944, 969 per Lord Blackburn.

26 *Garnett* v. *Bradley* (1878) 3 App. Cas. 944, 953 per Lord Hatherley; *Esquimault Waterworks Co.* v. *Victoria Corpn.* [1907] A.C. 499, 509 (P.C.) per Sir Alfred Wills.

27 *London & Blackwell Railway Co.* v. *Board of Works for Limehouse District* (1856) 3 K. & J. 123, 128 per Page Wood V.C.; *Barker* v. *Edger* [1898] A.C. 748, 754 (P.C.) per Lord Hobhouse. The special acts have given "individual treatment": *Blackpool Corporation* v. *Starr Estate Co. Ltd.* [1922] 1 A.C. 27, 34 per Lord Haldane.

28 *Garnett* v. *Bradley* (1878) 3 App. Cas. 944, 968-970 per Lord Blackburn.

29 (1890) 15 App. Cas. 506. The statutory basis of the law on habeas corpus is explained clearly only in the judgment of Lord Halsbury (see especially 516-517 and 519), and it is on the basis of this judgment that one is able to classify the case as an example of *generalia specialibus*. For further exexamples of cases where it is difficult to regard the special act as truly "special" in this sense, see *The Tynwald* [1895] P. 142; *R.* v. *Ramasamy* [1965] A.C. 1; *Shearman* v. *Kay* (1910) 29 N.Z.L.R. 540.

30 *Butler* v. *Attorney-General for Victoria* (1961) 106 C.L.R. 268, 280.

Cruz (Owner).[31] It was a case where death had resulted from a collision at sea, and the question involved the relationship between the Fatal Accidents Act 1846 and the Admiralty Court Act 1861 allowing an action in rem in proceedings for "damage done by a ship". It was held that, since a claim under the Fatal Accidents Act was a purely personal claim, the latter provision had no application. Two members of the House of Lords[32] (composed in that instance of only three members) ostensibly based their decision on *generalia specialibus,* although it is not apparent that either statute was more "special", or more "general", than the other. The doctrine may therefore be of some flexibility; it may enable a court in at least some cases to refuse to apply the later of two inconsistent provisions where the common sense of the case makes the other result preferable. In both *Cox* v. *Hakes*[33] and the *Vera Cruz* case,[34] members of the respective courts, in addition to citing the maxim, supported their decision by reliance on considerations of policy, in particular the absurdity and inconvenience which could result from any other solution. In other words, the maxim may well just have been the legal expression of a result arrived at for other reasons.

3. *The order of the provisions*

The great majority of the cases where the maxim has been applied have been cases where the specific provision has preceded the general one. But it is also occasionally applied as a means of "reconciling" otherwise inconsistent provisions in the same statute,[35] or in two different statutes passed at the same time.[36] If, however, the specific provision is later in time than the general, the maxim is seemingly never applied. In such a case the specific provision again prevails, and again has the effect of engrafting a proviso on to the earlier general one, but this result is normally justified not on the basis of the maxim, but by saying that the later provision impliedly repeals the earlier *pro tanto.*[37] There is no pretence here that the matter is merely one of construction. However the practical effect is usually the same whether the special provision is later or earlier: it creates an exception to the general one, and even if the order of the two provisions is later reversed by one of them being consolidated it will normally make no difference.[38] However it should be pointed out at this stage that while a later specific provision will *always* prevail over an earlier general one, the converse is not universally true; in some (exceptional) cases a later general statute will be held to override an earlier special one. To that extent, the order of passing can make a difference.[39]

31 (1884) 10 App. Cas. 59.

32 Lords Selborne and Blackburn. Lord Watson gave no reasons for his decision.

33 (1890) 15 App. Cas. 506, 525-526 per Lord Bramwell.

34 (1884) 10 App. Cas. 59, 72-73 per Lord Blackburn.

35 *Taylor* v. *Oldham Corporation* (1877) 4 Ch.D. 395, 410 per Jessel M.R.; *No. 20 Cannon St. Ltd.* v. *Singer & Friedlander Ltd.* [1974] 2 W.L.R. 646.

36 *Stubbing* v. *Barnett* (1909) 28 N.Z.L.R. 810; *Shearman* v. *Kay* (1910) 29 N.Z.L.R. 540.

37 Infra, p. 609.

38 Infra, pp. 613-614.

39 Infra, p. 608. And note the case of *Westminister Corporation* v. *Gordon Hotels Ltd.* [1908] A.C. 142, 143 where Lord Loreburn admitted that the decision might have been different "if the order of the dates had been inverted".

III. Implied Repeal

1. *The principle*

Maxwell[40] thus states the received doctrine, quoting in part from the leading case of *Kutner* v. *Phillips*:[41]

> If . . . the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together, the earlier is abrogated by the later.

This doctrine of implied repeal is a last resort, only to be applied if other devices such as reconciliation or *generalia specialibus* fail, and the courts lean against it.[42]

2. *Illustrations of its application*

However the doctrine, thus stated, is deceptively simple. Implied repeal, so-called, is in fact one of the more complicated legal devices. It will be worthwhile, for purposes of discussion, to outline a few examples of its application.

(a) The most common application of the doctrine is where two statutes make provision for the same matter, but do so in different ways which cannot "live together". For instance in one case responsibility for the maintenance of certain roads was vested in two different bodies of persons by two different acts; the later was held to prevail.[43]

(b) The doctrine will be applied if two statutes provide for two categories of persons in different ways, and in a particular case one person falls squarely within both categories. In this type of case it may be said that the two statutes, although normally not inconsistent, may be so in particular cases; there is, as it were, a potential for overlap between them. For example, if one statute lays down certain criteria for promotion in the public service, and another lays down down quite different criteria for the promotion of returned servicemen in any employment, what is the position of a returned serviceman in the public service?[44] If one statute provides that persons under 21 are not to be sentenced to imprisonment unless there are special circumstances, and another statute provides that a person convicted of certain drug offences is to be imprisoned in the absence of particular circumstances, what is the position if a person under 21 is convicted of one of those drug offences?[45]

(c) The doctrine will also be applied, as already stated, if a general provision is followed in time by a specific one in a contrary sense: if for instance a public general act laying down a prohibition on building beyond a certain line is followed by a special act empowering a

40 Maxwell, *Interpretation of Statutes* (12 ed. 1969) 193.

41 [1891] 2 Q.B. 267.

42 Ibid., 275 per A.L. Smith J. For this purpose, the date of an act is taken to be the date of its passing, not the date of its coming into force: *R.* v. *Middlesex Justices* (1831) 2 B. & A. 818; *Re Bruce's Oatmeal Co.* (1890) 8 N.Z.L.R. 598.

43 *R.* v. *Middlesex Justices* (1831) 2 B. & A. 818. For other examples see *Dobbs* v. *Grand Junction Waterworks Co.* (1883) 9 App. Cas. 49; *Williams & Kettle Ltd.* v. *Official Assignee of Harding* (1908) 27 N.Z.L.R. 871.

44 *Butler* v. *Attorney-General for Victoria* (1961) 106 C.L.R. 268.

45 *Police* v. *Hicks* [1974] 1 N.Z.L.R. 763. See also *The Danube II* [1921] P. 183. Could *Seward* v. *Vera Cruz (Owners)* (1884) 10 App. Cas. 59 be another example?

particular railway company to build in a way which appears to infringe the earlier prohibition.[46] This is *generalia specialibus non derogant* in reverse.

(d) If a later act expressly repeals provisions of an earlier act, it will be deemed also impliedly to repeal provisions in the earlier act which were dependent upon the existence of the repealed provisions, for they now lack any sensible subject matter.[47]

(e) However the doctrine of implied repeal has also been applied in many cases where, although the doctrine *generalia specialibus* was available, the court has been able to determine that Parliament intended by the later general statute to repeal the special one(s) which preceded it. This conclusion has been reached on several occasions where far reaching general reforms have been enacted the efficacy of which would be impeded by the continued existence of earlier special or local statutes. The Judicature Acts and Rules of the Supreme Court, for instance, have been held to sweep away earlier provisions relating to costs in particular types of matters,[48] and the Married Women's Property Act to remove earlier specific provisions relating to the disposition by married women of certain types of property in specific situations.[49] In such cases the court is giving effect to what it genuinely finds to have been the intention of Parliament, and in seeking out this intention it will have regard to the later enactment,[50] the inconvenience or absurdity of holding the earlier provisions still in existence[51] and the language of the later act—for instance repeated use of sufficiently strong general words may be enough to convince the court that the act was intended to replace everything which preceded it.[52] Such a conclusion will be fairly readily reached when the earlier statutes are ancient and in practice obsolete. In such cases the doctrine of implied repeal fulfils much the same function as a doctrine of desuetude,[53] which is officially unknown in English law.

3. *The nature of implied repeal*

It will be apparent from the foregoing examples that implied repeal is of many varieties. In some instances, particularly those in (d) and (e), the effect of the later act is to destroy the earlier act completely, as effectively as if it had been repealed expressly; it no

46 *City & South London Railway Co.* v. *London County Council* [1891] 2 Q.B. 513. See also *London Chatham & Dover Railway Co.* v. *Wandsworth Board of Works* (1873) L.R. 8 C.P. 185; *Hall* v. *Arnold* [1950] 2 K.B. 543.

47 *Brooking* v. *Crawford* (1905) 24 N.Z.L.R. 738; *Bank of New Zealand* v. *Commissioner of Taxes* [1922] N.Z.L.R. 388.

48 *Garnett* v. *Bradley* (1878) 3 App. Cas. 944.

49 *In re Drummond & Daine* [1891] 1 Ch. 524. Cf. however *Re Smith's Estate* (1887) 35 Ch. D. 589. For other examples of general acts repealing specific ones see *The India (No. 2)* (1884) 33 L. J. Ad. 193; *Re O'Connor* (1888) 6 N.Z.L.R. 712; *Walker* v. *Hammant* [1943] 1 K.B. 604; *Luby* v. *Warwickshire Miners' Association* [1912] 2 Ch. 371; *Taitumu Marangatana* v. *Patena Kerehi* (1911) 31 N.Z.L.R. 513.

50 *Garnett* v. *Bradley* (1878) 3 App. Cas. 944, 959 per Lord O'Hagan; *Lukey* v. *Edmunds* (1916) 21 C.L.R. 336, 343 per Griffith C.J.

51 *Garnett* v. *Bradley* (1878) 3 App. Cas. 944, 956 per Lord Hatherley.

52 *Walker* v. *Hammant* [1943] 1 K.B. 604, 606 per Vt. Caldecote C.J.: repeated use of the word "any" held significant.

53 See especially *Luby* v. *Warwickshire Miners' Association* [1912] 2 Ch. 371; *The India (No. 2)* (1874) 33 L.J. Ad. 193; *Mitchell* v. *Scales* (1907) 5 C.L.R. 405.

longer exists for any purpose. But more commonly "implied repeal" does not have this effect of total annihilation. In most cases, particularly in categories (b) and (c), but also often in (a), the effect of the later act is not truly to abrogate the earlier act at all, but only to render the earlier act inapplicable in one particular situation—to limit its application by rendering it subject to an exception in one kind of case. This is often called implied repeal *pro tanto*. The two "degrees" of implied repeal were recognised by Griffith C.J. in the High Court of Australia:[54]

> . . . [W]here the provisions of a particular Act of Parliament dealing with a particular subject matter are wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication . . . . Another branch of the same proposition is this, that if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act.

The presumption against implied repeal, and the recognition of it as a last resort only, would seem to be equally strong in either case.[55]

Although in a few rare cases the error has been made of holding a section to be totally repealed when the facts seemed to support only a repeal *pro tanto*,[56] the distinction between the two kinds of implied repeal has normally been judicially accepted and has caused few problems. However terminology has been somewhat inconsistent, some judges preferring not to describe repeal *pro tanto* as repeal at all, but rather to use such expressions as "curtailment',[57] "modification",[58] or "the superadding of conditions".[59] In *Mirfin* v. *Attwood*[60] Hannen J. put it that the section later in time "merely in specified cases intercepts the operation of the statute, which statute remains in existence and unrepealed notwithstanding".

This slight disagreement is normally a matter of terminology only, and as such of little account. However in at least one sort of case it can matter a great deal. Interpretation Acts normally contain provisions relating to the effects of the repeal of a statute.[61] In particular they normally provide that the repeal of a statute does not revive any act previously *repealed*. While it seems clear that this Interpretation Act provision applies where the earlier act was impliedly *totally* repealed,[62] it is by no means so clear whether it does

54 *Goodwin* v. *Phillips* (1908) 7 C.L.R. 1, 7.
55 *Seward* v. *Vera Cruz (Owners)* (1884) 10 App. Cas. 59, 68 per Lord Selborne (passage quoted above at p. 603); *Murdoch* v. *British Israel World Federation* [1942] N.Z.L.R. 600, 659 per Johnston J.
56 E.g. *Re Bacovich* (1901) 20 N.Z.L.R. 135.
57 *Commissioner of Inland Revenue* v. *Parson* [1968] N.Z.L.R. 375, 378 per McCarthy J. and 380-381 per Haslam J.
58 Ibid., per McCarthy J.; *Gläholm* v. *Baker* (1866) L.R. 1 Ch. App. 223, 229 per Turner L.J.
59 *Mount* v. *Taylor* (1868) L.R. 3 C.P. 645, 650 per Bovill C.J.
60 (1869) L.R. 4 Q.B. 333, 340 (Hannen J. was dissenting). See also *Jenkins* v. *Jones* (1882) 9 Q.B.D. 128, 136 per Cotton L.J.; *In re Williams* (1887) 36 Ch.D. 573, 578 per North J.; *Bury* v. *Cherryholm* (1876) 1 Ex.D. 457, 461 per Bramwell B.
61 E.g. Interpretation Act 1889 (U.K.), s. 11 (1); Acts Interpretation Act 1924 (N.Z.), s. 20 (a).
62 E.g. *Taitumu Marangatana* v. *Patena Kerehi* (1911) 31 N.Z.L.R. 513, 548 per Edwards J.

when that earlier act was merely impliedly repealed—or "modified"—*pro tanto*. The problem, in essence, is this: act A, passed in 1940, is inconsistent with act B, passed in 1950, in a way which leads a court to hold that the 1940 act, while not totally repealed, is subject to an exception imposed by the 1950 act; in other words it is to that extent, *pro tanto,* repealed. In 1960 another statute is passed repealing the 1950 provision. Does the 1940 provision, the qualification on its operation now gone, spring back into full force and effect? Or does the Interpretation Act mean that having been once repealed even *pro tanto,* the 1940 provision, despite the later removal of the act qualifying it, has forever lost its full original force unless it is revived by express enactment? The first of these solutions would seem to have considerable attractions, not the least of which is that unless it is correct an act which expressly sets out to remove a qualification on an earlier piece of legislation might fail in its purpose.[63]

The case law on this point is unsettled, there being decisions supporting both views. One of the most recent, and thorough, discussions of the topic is to be found in *Commissioner of Inland Revenue* v. *Parson,*[64] a decision of the New Zealand Court of Appeal. Section 66 of the Judicature Act 1908 confers upon the Court of Appeal jurisdiction to hear appeals from "any judgment, decree or order" of the Supreme Court. Section 40 of the Land and Income Tax Act 1954 provided that decisions of the Supreme Court in certain tax matters were to be subject to appeal to the Court of Appeal *except on a question of fact.* This 1954 provision thus clearly imposed a qualification on the potential generality of the 1908 section. In 1960, section 40 of the Land and Income Tax Act 1954 was repealed. It was argued that, because of the Interpretation Act provision under discussion, this repeal meant there was no longer any provision authorising an appeal to the Court of Appeal in the type of tax case under consideration; section 66 of the Judicature Act 1908 could not confer such a right because, having been impliedly repealed by the 1954 provision, it did not revive when the 1954 provision was repealed. This argument failed. It was held that the effect of the 1954 provision had been merely to "curtail" or "modify" the 1908 provision.

> As I read these two sections, s. 66 of the Judicature Act 1908 was not repealed in the circumstances set out above, but was merely limited in its operation while s. 40 of the Land and Income Tax Act 1954 . . . continued in force. When the latter was repealed without re-enactment, s. 66 of the Judicature Act 1908 revived in its former fullness to embrace appeals in land and income tax matters reaching the Supreme Court on a case stated by the Commissioner.[65]

A line of authority supports *Commissioner of Inland Revenue* v. *Parson,*[66] but there are cases going the other way which on their facts

63 See *Glaholm* v. *Baker* (1866) L.R. 1 Ch. App. 223, 229 per Turner L.J.; and *Walker* v. *District Land Registrar* [1918] N.Z.L.R. 913, 915 per Chapman J.

64 [1968] N.Z.L.R. 375.

65 Ibid., 381 per Haslam J.

66 E.g. *Glaholm* v. *Baker* (1866) L.R. 1 Ch. App. 223; *Mount* v. *Taylor* (1868) L.R. 3 C.P. 645; *Walker* v. *District Land Registrar* [1918] N.Z.L.R. 913, 915 per Chapman J.

are not at all easy to distinguish from *Parson*.[67] One is *The Dart*.[68] The Judicature Act 1873, providing that appeals from County Courts to the Divisional Court were final without special leave, was qualified by a section of the County Courts Act 1875 providing that no leave was necessary where the High Court of Admiralty altered a judgment of the County Court. That qualification was repealed in 1888. It was held that the Judicature Act provision did not "spring back" into full force so as to cover admiralty appeals. The attempts to distinguish *The Dart* in *Parson's* case were, with respect, not very convincing logically: that *The Dart* depended on the "peculiar and intricate legislative history" in that case[69], and that *The Dart* involved a case of true implied repeal whereas what was at issue in *Parson* was mere "modification".[70]

At the moment the state of the authorities is such that each case may depend on its own facts, a solution which might be taken to presuppose that there are differences of degree even within the category of implied repeal *pro tanto*. In any event, some Interpretation Acts, including that of New Zealand, provide that the rule about non-revival is always subject to a contrary intention.[71]

There is little authority on the related question of whether implied repeal *pro tanto* is "repeal" for the purpose of those other Interpretation Act sections which provide that repeal is not to affect rights which had accrued before it took place.[72] It must be said that when the question is whether a person has been deprived of accrued rights it would seem quite immaterial to the justice of the case whether it is a total repeal or merely a modification of the previous statute which has affected him.[73] If one accepts both this and *Parson's* case, however, one may be forced to the view that the word "repeal" means different things in different sections of the Interpretation Act.

4. *Its absolute nature*

The doctrine of implied repeal embodies a rule of last resort: if all else fails, the second in time of two conflicting provisions prevails. This is an absolute rule, and not even Parliament itself can avoid it. Thus in *Dobbs* v. *Grand Junction Waterworks Co.*[74] the second of two inconsistent provisions relating to the assessment of water rates was held to prevail despite a provision in the later act that it was not to be deemed to alter or repeal several named earlier acts, of which the act in question was one. Lord Blackburn said that "when the second Act was passed reciting the first and saying that it was not repealing it, if it enacted a rule that was contrary to it, it had really the effect of repealing it and it was the same thing as if it had been

67 E.g. *The Dart* [1893] P. 33; *Mirfin* v. *Attwood* (1869) L.R. 4 Q.B. 333; *Butcher* v. *Henderson* (1868) L.R. 3 Q.B. 335; *Lothian* v. *Bugden* (1904) 23 N.Z.L.R. 901, 903 per Williams J.

68 Ibid.

69 [1968] N.Z.L.R. 375, 381 per Haslam J.

70 Ibid., 378-379 per McCarthy J.

71 Acts Interpretation Act 1924 (N.Z.), s. 20. A similar qualification does not appear in s. 11 of the Interpretation Act 1889 (U.K.), although it does in s. 38 (2).

72 E.g. Acts Interpretation Act 1924 (N.Z.), s. 20 (e), (g); Interpretation Act 1889 (U.K.), s. 38 (2) (c).

73 See however *Walker* v. *District Land Registrar* [1918] N.Z.L.R. 913.

74 (1883) 9 App. Cas. 49.

repealed".[75] More important is the rule, firmly established by the *Ellen Street* case,[76] that Parliament cannot, in earlier legislation, provide that that earlier legislation is to prevail over inconsistent later legislation. That would be an attempt to limit the sovereignty of a later Parliament, and it is well established constitutional doctrine that this is impossible. Thus the not uncommon statutory provision that a certain statute is to prevail "notwithstanding anything in any other act" is probably only effective with regard to *earlier* inconsistent acts.[77] It has at times been pondered whether this doctrine has not been pushed a little too far. Undoubtedly it would be objectionable if Parliament could effectively legislate against its own legislation being expressly repealed or amended. But the same argument does not apply quite as strongly to *implied* repeal or amendment. A great deal of inconsistent legislation is the result not of any deliberate parliamentary policy but of accident: it is a function of the complexity of the system. There would not seem to be anything inherently objectionable in Parliament providing in a statute which lays down an important general principle, that a later act can only abrogate or modify that principle if the earlier statute is named, and it is clear that there was a deliberate intention to depart from it. This would at least avoid the spectacle of important legislation being whittled down by later inconsistent statutes, some of which have been passed without that earlier legislation even being considered. But it is fairly clear that it is too late now to argue for any such principle. The Real Property Act 1886 of South Australia—the basic land registration statute—provided that no future law, so far as inconsistent with the Act, would apply to land subject to the Act, unless it were expressly enacted that it should so apply "nothwithstanding the provisions of the Real Property Act 1886". This was a modest attempt to ensure that accidentally inconsistent legislation would have no effect. The attempt failed. The High Court of Australia held[78] that the only effect of the provision in the Real Property Act was to assist in the interpretation of the later legislation; if the legislature in that later legislation manifested its intention that it should apply even to land under the Real Property Act the omission to use the exact form of words prescribed did not prevent it from so applying.

So the doctrine of implied repeal—"the last in time prevails"—is one of considerable strength. Probably any other solution to the problem of contradictory statutes would infringe Parliamentary sovereignty. Any rule that the court could choose between inconsistent provisions—as it can do in the case of conflict between judicial precedents, and as it has on occasion done when faced with a conflict between sections in a single act[79]—would no doubt enable the rule to be selected which provided the best justice in the individual case.

75 Ibid., 58.

76 *Ellen Street Estates Ltd.* v. *Minister of Health* [1934] 1 K.B. 590.

77 *Paterson's Freehold Gold Dredging Co. Ltd.* v. *Harvey* (1909) 28 N.Z.L.R. 1008, 1012 per Williams J. Cf. however *Butler* v. *Attorney-General for Victoria* (1961) 106 C.L.R. 268, 277-278 per Fullagar J.

78 *South Eastern Drainage Board* v. *Savings Bank of South Australia* (1939) 62 C.L.R. 603.

79 E.g. *Wertheim* v. *Samson* (1886) N.Z.L.R. 5 S.C. 208.

But that would be giving the court a greater degree of discretion than has ever been admitted in relation to a statute. It would also at times involve a holding that Parliament's latest word on the subject was null and void, and this would be too great a derogation from parliamentary supremacy; it would, moreover, be allowing the court to produce an effect which even Parliament itself, by virtue of the *Ellen Street* doctrine, cannot legislate for.

5. *Its arbitrary nature*

However the rule "last in time prevails" can have a quite arbitrary effect in cases where the inconsistency is accidental and uncontemplated by Parliament. For example in the New Zealand case of *Police* v. *Hicks*[80] the question was whether a person under 21 convicted of trafficking in drugs should be dealt with under that provision which presumes in favour of imprisonment for trafficking offences, or that provision which presumes against imprisonment for person under 21. O'Regan J., having decided there was an inconsistency between the two provisions, applied the doctrine of "last in time", and imposed a sentence of imprisonment. But it does seem unsatisfactory that so important a matter of policy should have to be determined by so arbitrary a matter as the order of time in which the two provisions were passed. Indeed it is not without interest that O'Regan J. was able to support his decision by referring to considerations outside the statutes, in particular the international convention on which the New Zealand narcotics legislation was based.

The arbitrary nature of the "last in time" rule is, however, probably best demonstrated by the practice of periodic consolidation of enactments. Imagine the following situation: section 4 of statute X passed in 1955 is impliedly repealed by section 5 of statute Y passed in 1960. What is the position if, in 1970, the original act of 1955 is consolidated and the original section 4 is re-enacted in its original form? If one is to take the doctrine of "last in time" to its extreme, one would have to say that the 1970 provision now prevails and impliedly repeals the 1960 one. The position would be reversed again if in 1975 the 1960 act were to be consolidated and re-enacted. This "shuttle" effect is little short of absurd; moreover the mechanics of consolidation these days render it highly unlikely that Parliament intended any such repealing effect.

The courts are clearly anxious to avoid this shuttle effect. They will look at the earlier history of consolidating provisions and the fact that the original order of the statutes has been reversed by a consolidation is, it would seem, a factor which will induce the court to attempt even more strenuously than would otherwise be the case to reconcile them or to find that they can otherwise stand together.[81] But some cases go further and suggest that a statute which repeals and re-enacts an earlier statute cannot have the effect of repealing an intermediate enactment.[82] However an examination of the cases in which

80 [1974] 1 N.Z.L.R. 763, noted supra, n. 45.

81 *Murdoch* v. *British Israel World Federation* [1942] N.Z.L.R. 600; *R.* v. *Ramasamy* [1965] A.C. 1; *Enman* v. *Enman* [1954] S.A.S.R. 131.

82 *Morisse* v. *Royal British Bank* (1856) 1 C.B.N.S. 67, 86 per Williams J., 86 per Crowder J.; *R.* v. *Minister of Health, ex parte Villiers* [1936] 2 K.B. 29, 44 per Lord Hewart C.J. In *Meadows* v. *Commissioner of Crown Lands* [1949] N.Z.L.R. 663, 667 O'Leary C.J. said there appeared to be "substance in this contention".

such words have been spoken reveals that they were cases where a general act had been modified by a later specific one, and the general act was then re-enacted.[83] In such a case reversing the order of the statutes will normally not make a difference anyway: the specific provision continues to qualify the general one, whether it be by virtue of *generalia specialibus* or implied repeal *pro tanto*.[84]

However there are some cases where the two provisions are in outright conflict, and where the "last in time" rule is the only one which can be applied, whether this leads to the "shuttle" effect or not. A striking example is the Australian case of *Bennett* v. *Minister of Public Works*.[85] An act of 44 Vict. provided for the payment of interest on certain moneys at 6 percent; by an act passed on 4 September 1900 it was declared that interest was payable on those moneys at 4 percent; on 22 September 1900 the earlier legislation was consolidated. It was held that, although it was highly likely that the consolidation had been passed without the discrepancy being noticed, the court's only possible course was to apply the clear words of the latest word on the subject: the rate was back to 6 percent.[86]

Consolidation may have one further implication for implied repeal. Imagine the following situation. Section 15 of statute A, passed in 1930, is inconsistent with section 4 of statute B, passed in 1950. The two sections are then drawn together in a consolidation in 1960, and both are re-enacted at the same time. This problem is rare in the United Kingdom but has caused some difficulty in New Zealand where in 1908 all previously existing statute law was consolidated and re-enacted at the same moment of time. In such cases the commonly expressed view is that the doctrine of implied repeal is not open, but that the court is obliged to find some mode of reconciliation.[87] However there are dicta to the effect that if reconciliation is absolutely impossible, all the court will be able to do is to look back at the history of the respective provisions. If in so doing it is found that one was originally enacted before the other, so that a court would before the consolidation have held it to have been impliedly repealed, the court may have to hold the implied repeal to be perpetuated in the consolidation, so that one of the re-enacted provisions is of no

83 See the explanation of *Morisse's* case in *Bennett* v. *Minister of Public Works* (1908) 7 C.L.R. 372, 378 per Griffith C.J.

84 Supra, p. 606.

85 (1908) 7 C.L.R. 372.

86 Likewise if a general act impliedly repeals a specific one, and the specific one is then consolidated and re-enacted, the only solution is that the specific act now prevails: see *Hall* v. *Arnold* [1950] 2 K.B. 543. See also *Westminster Corporation* v. *Gordon Hotels Ltd.* [1908] A.C. 142, noted supra, n. 39; and *Maybury* v. *Plowman* (1913) 16 C.L.R. 468 (in which compare the judgments of Barton A.C.J. and Isaacs J.). Some consolidation acts contain a provision that their provisions are to be read subject to all enactments to which they were subject before the consolidation: *Bank of New Zealand* v. *District Land Registrar* (1907) 27 N.Z.L.R. 126.

87 *South Eastern Drainage Board* v. *Savings Bank of South Australia* (1939) 62 C.L.R. 603, 626 per Dixon J.; *Castrique* v. *Page* (1853) 13 C.B. 458, 464 per Jervis C.J. In some statutes a later statute itself contains provision that it is to be read together with and as part of an earlier act: e.g. *Selwyn County Council* v. *Sheate* (1888) 6 N.Z.L.R. 730.

effect.[88] However such a violent and "heroic" mode of construction is to be avoided at all costs if possible.[89]

Shearman v. *Kay*,[90] a New Zealand case, is a striking example of the problems which can be caused by multiple consolidation. Act 1, passed on 3 November 1884, provided for a £5 penalty for anyone who permitted horses or cattle to be at large without proper guidance. Act 2, passed on 6 November 1884, provided for a £5 penalty for anyone who permitted cattle to be at large or without proper guidance. Act 3, passed on 8 November 1884, provided that certain persons might impound cattle found wandering at large, and that the owner would be liable to a penalty of £2 a head—however this last provision was not to apply to catttle whose owner had obtained council permission for grazing. Acts 1, 2 and 3 were all re-enacted in identical terms at the same time in 1908. Edwards J. took the view that before the consolidation the holding would have been that the Act 3 provision impliedly repealed the other two, so that the holder of a council grazing permission could not be prosecuted under any of the statutes. The judge refused to hold, however, that the implied repeal was carried forward into the 1908 consolidation, but was nevertheless able to hold that since the provisions of Act 3 related to a more limited range of matters than Act 1 and 2, *generalia specialibus* applied. Therefore the holder of a permission could not be convicted of offences under Acts 1 and 2. Yet, with respect, it would seem that this is precisely the same effect that would have been attained by holding the implied repeal perpetuated. If Act 3 was narrower in scope than Acts 1 and 2 the repeal could never have been more than repeal *pro tanto* anyway, and in any case *generalia specialibus* normally is equivalent to "implied repeal in reverse".[91]

IV. Conclusions

The foregoing survey raises a number of matters of interest upon which comment may briefly be made.

1. As a rule a specific provision prevails over a general one in whatever order the two were passed into law—unless of course Parliament clearly intended by a later general act to supersede earlier specific ones. The result is that there is a tendency for statute law to be a collection of special instances. It is difficult for uniform general principles to emerge, for they are so readily susceptible to acts passed to meet specific problems. Even legislative attempts to set up certain principles as dominant have not had a happy record of success; insofar as they attempt to control the future passing of inconsistent legislation they are ineffective, and sometimes extraordinarily strained constructions have been put on provisions which merely attempt to override

88 *Paterson's Freehold Gold-Dredging Co. Ltd.* v. *Harvey* (1909) 28 N.Z.L.R. 1008, 1015 per Williams J.; *Shearman* v. *Kay* (1909) 29 N.Z.L.R. 540, 546-547 per Edwards J. See also *Weston* v. *Fraser* [1917] N.Z.L.R. 549, 551 per Sim J.

89 *Shearman* v. *Kay*, ibid., per Edwards J.

90 (1909) 29 N.Z.L.R. 540.

91 In *Williams & Kettle Ltd.* v. *Official Assignee of Harding* (1908) 27 N.Z.L.R. 871 the Court of Appeal held that a provision of the Bankruptcy Act 1892 was inconsistent with, and thus impliedly repealed, a section of the Chattels Transfer Act 1889. Both sections were re-enacted in the same form in the 1908 consolidation.

earlier inconsistent legislation.[92] A result has been that what were intended by their framers to be fundamental principles dominating an area of the law have sometimes been frustrated in their purpose. The sad history of the Acquisition of Land (Assessment of Compensation) Act 1919 (U.K.) provides one instance.[93] The record of the statutory principles of indefeasibility of title under the Torrens system of land registration is another; as Ruoff has said:[94] "No one thing has undermined the attempt to achieve indefeasibility more than inconsistent legislation". In this regard it might be said that Commonwealth statute law has followed the common law; it is rather a collection of single instances. Perhaps Commonwealth lawyers tend to believe in the ad hoc solution of particular problems when they arise rather than in the formulation in the abstract of general principle.

2. Dogma has it that a court's task is to construe statutes and no more. It must not depart from the words the act has used; it must not read in words which are not there. Yet the boundaries of "construction", like the boundaries of meaning itself, are extremely fluid, and while one judge may believe that a certain result involves no more than a construction of the statutory words in their context, another may think that his brother's view involves a modification of those words rather than a construction of them. This subject of inconsistent statutes magnifies this point. Many regard *generalia specialibus* as no more than a rule of construction, the general words being narrowly "construed" to enable their reconciliation with the prior special statute. Yet it really amounts to the engrafting of an exception on to those general words—a necessary process, perhaps, but still one which seems a little more than merely saying what those words mean.[95] Yet in the case of implied repeal *pro tanto,* where a specific provision follows a general one in time, there is never any need to pay lip service to "construction". There, because a statute can always repeal and amend earlier legislation, it is possible to say openly that there has been "modification", "curtailment", "repeal *pro tanto*". Yet, if ever consolidation were to reverse the order of the two provisions, it might again become a matter of "construction". Perhaps the most striking example of the relation between "construction" and "modification" is the case of *Shearman* v. *Kay*[96] where a result which before consolidation would have been justified as implied repeal, was after it based on construction.

92 E.g. *Blackpool Corporation* v. *Starr Estate Co.* [1922] 1 A.C. 27.

93 *The Blackpool Corporation* case, ibid.; and *Ellen Street Estates Ltd.* v. *Minister of Health* [1934] 1 K.B. 590.

94 *An Englishman Looks at the Torrens System* (1957) 18.

95 Sometimes where, in cases like *Flannagan* v. *Shaw* supra, p. 601, the court reconciled two provisions by holding them to apply to different subject matters, the construction is also of a somewhat "violent" kind. If one of the two provisions had stood alone it might well have received a different interpretation than it did when read in conjunction with the other provision; to this extent it may be said that the second provision "modifies" the first. Indeed in some cases it is not very clear whether *generalia specialibus* is being applied, or whether the two provisions are being reconciled: E.g. *Sarris & Guise* v. *Penfold's Wines Pty. Ltd.* [1962] N.S.W.R. 801.

96 Supra, p. 615.

3. The rule that in case of conflict the last in time prevails is an arbitrary one. But it is a rule of last resort. It need only be applied if other approaches fail. There is sufficient flexibility in the maxim *generalia specialibus*,[97] and in the modes of reconciling apparently conflicting provisions,[98] to mean that the judge will sometimes be able to avoid applying the provision last in time if that provision seems to produce an unsatisfactory result in the case before him. In this area, as in all areas involving the extraction of meaning from statutes, the judge's function, while in theory purely mechanical, can in fact involve some freedom of movement.

97 Supra, p. 603.

98 Obviously views may sometimes differ on whether two provisions are truly "inconsistent": *Ryhope Coal Co.* v. *Fryer* (1881) 7 Q.B.D. 485, 492 per Grove J.