CHAPTER 5

RESTRICTIVE CONSTRUCTION

1. CONSEQUENCES TO BE CONSIDERED

BEFORE adopting any proposed construction of a passage susceptible of more than one meaning, it is important to consider the effects or consequences which would result from it, for they often point out the real meaning of the words. There are certain objects which the legislature is presumed not to intend, and a construction which would lead to any of them is therefore to be avoided. It is not infrequently necessary, therefore, to limit the effect of the words contained in an enactment (especially general words), and sometimes to depart, not only from their primary and literal meaning, but also from the rules of grammatical construction in cases where it seems highly improbable that the words in their wide primary or grammatical meaning actually express the real intention of the legislature. It is regarded as more reasonable to hold that the legislature expressed its intention in a slovenly manner, than that a meaning should be given to them which could not have been intended.

This passage, which has appeared in previous editions of *Maxwell*, is supported by the weight of the modern authorities. Sometimes, indeed, the meaning of words is so plain that effect must be given to them regardless of the consequences,[1] but more often—as the cases discussed in the following pages show—a construction is arrived at with reference to the consequences which must follow from it. "It is always proper," Lord Reid has said, "to construe an ambiguous word or phrase in light of the mischief which the provision is obviously designed to prevent, and in light of the reasonableness of the consequences which follow from giving it a particular construction."[2] "If the language," he said elsewhere, "is capable of more than one interpretation, we ought to discard the more natural meaning if it leads to an unreasonable result, and adopt that interpretation which leads to

[1] See, *e.g.*, *Brown* v. *N.C.B.* [1962] A.C. 574, *per* Lord Reid; *Heaney* v. *Smith* [1964] 1 W.L.R. 789.

[2] *Gartside* v. *I.R.C.* [1968] A.C. 553, at p. 612. *Cf. Coutts & Co.* v. *I.R.C.* [1964] A.C. 1393, *per* Lord Reid.

a reasonably practicable result."[3] In the words of Romer L.J., "the court . . . when faced with two possible constructions of legislative language, is entitled to look to the results of adopting each of the alternatives respectively in its quest for the true intention of Parliament."[4]

Examples of construction with reference to the consequences

In several old cases, a statute which made an Act criminal in unqualified terms was understood as not applying where the act done was excusable or justifiable on grounds generally recognised by law: a literal interpretation would have given rise to consequences which the legislature could not possibly have intended. Thus a statute which imposed three months' imprisonment and the forfeiture of wages on a servant who "absented himself from his service" before his term of service was completed was understood as confined to cases where there was no lawful excuse for the absence.[5]

Similarly, a statute which made it felony "to break from prison" would not apply to a prisoner who broke out from the prison while it was on fire, not to recover his liberty, but to save his life,[6] and one which declared it piracy to "make a revolt in a ship" would not include a revolt necessary to restrain the master from unlawfully killing persons on board,[7] even if it could justly be termed a revolt.

By section 1 (1) of the Poor Prisoners' Defence Act 1930: "Any person committed for trial for an indictable offence shall be entitled to free legal aid in the preparation and conduct of his defence at the trial and to have solicitor and counsel assigned to him for that purpose . . . if a certificate . . . is granted." The Court of Criminal Appeal held that this section gave the right to an accused person once the certificate was granted to have a solicitor assigned for the purposes mentioned, but not a right that that solicitor or another should defend him at the trial. "If the section, properly construed, gave an accused person a right to have a solicitor at the trial, it would mean that he could repeatedly refuse to have the solicitors assigned when he got advice which he did not like and go to others, and there would be no means whatever to prevent that, with the result that there

[3] *Gill* v. *Donald Humberstone & Co., Ltd.* [1963] 1 W.L.R. 929, at p. 934.
[4] *Fry* v. *I.R.C.* [1959] Ch. 86, at p. 105. *Cf. I. & H. Caplan, Ltd.* v. *Caplan (No. 2)* [1963] 1 W.L.R. 1247; *Free Lanka Insurance Co., Ltd.* v. *Ranasinghe* [1964] A.C. 541; *Mercantile Credit Co., Ltd.* v. *Cross* [1965] 2 Q.B. 205.
[5] *Re Turner* (1846) 9 Q.B. 80.
[6] 2 Inst. 590.
[7] *R.* v. *Rose* (1847) 2 Cox C.C 329.

might be added expense to the country, delays and abuse of the whole procedure."[8]

In *Fine Fare, Ltd.* v. *Aberdare Urban District Council*,[9] the Divisional Court avoided a construction of section 8 of the Shops Act 1950 which would have given rise to there being two different closing hours for premises in which several kinds of business were carried on.

By section 41 (1) (*a*) of the National Assistance Act 1948, "a man shall be liable to maintain his wife and children." In *Din* v. *National Assistance Board*,[10] it was held that "wife" and "children" did not have their normal meaning of "wife" and "children" of a monogamous marriage. "It would perhaps be as remarkable as it would be unfortunate if a man coming from a country where he is lawfully married to a woman and is lawfully the father of her children may bring them here and leave them destitute with impunity, so that when the National Assistance Board is obliged to come to their assistance, he can avoid all responsibility and thereby throw the whole burden of maintaining [them] upon the public."

John Stephenson J. refused to adopt a construction of the 1964 revision of the Judges' Rules which would have meant that a person could not be questioned, save in exceptional circumstances, after being taken into custody and told that he was being taken there because he was suspected of having committed an offence.[11]

By section 24 (1) of the Town and Country Planning Act 1947: "If within the period specified in an enforcement notice . . . any steps required by the notice to be taken . . . have not been taken," the planning authority might enter on the land, take "those steps" and recover the reasonable cost of doing so from the owner. In *Arcam Demolition and Construction Co., Ltd.* v. *Worcestershire County Council*,[12] it was argued that "those steps" meant all the steps required to be taken, so that in the particular circumstances of the case a council could not enter on land and demolish buildings without committing itself to removing tarmac and concrete surfacings. "I agree," said Cross J. (at p. 670), "that the more natural construction of the words 'any steps required by the notice' is 'all steps.' But . . . my mind revolts from the idea that the planning authority if it does

[8] *R.* v. *Sowden* [1964] 1 W.L.R. 1454, *per* Lord Parker C.J. at p. 1458.
[9] [1965] 2 Q.B. 39.
[10] [1967] 2 Q.B. 213, *per* Salmon L.J. at p. 218: hardly a restrictive construction but a good example of interpretation in the light of the consequences.
[11] *R.* v. *Brackenbury* [1965] 1 W.L.R. 1475 n.
[12] [1964] 1 W.L.R. 661.

anything is under a statutory duty to an owner in default to do all the work which he has failed to do, however disastrous to the public interest it might be that it should perform such duty. Such a construction, as I see it, would mean that a landowner could say to the planning authority: 'I defy you to put your policy into effect. My contraventions have been so gross and my impecuniosity is so great that you can do nothing whatever about it. You must either throw away public money to no purpose, or you must let me get away with it. Either way I shall have the laugh on you.' It would need stronger wording than I find in section 24 to induce me to come to that conclusion."

By section 37 (1) of the Town and Country Planning Act 1959, "a local planning authority shall not entertain any application for planning permission" unless it is accompanied by one or other of various certificates, for instance a certificate stating that the applicant is either the estate owner in respect of the fee simple or is entitled to a tenancy of the land. Widgery J., in the Divisional Court, held that the words "shall not entertain" did not limit the jurisdiction of the local authority to cases in which the certificate did not contain any factual error. "To hold otherwise would give rise to very serious complications in the way of those who have to buy and sell property, because among other things . . . a purchaser buying land is often very much influenced by the presence or absence of a planning permission obtained by his seller. If purchasers have to investigate not only whether a certificate was submitted when the application for permission was made, but also whether the certificate was correct in its own factual averments, a very grave complication would be put in their way."[13]

Cross J. declined to adopt a construction of the Variation of Trusts Act 1958 which would have meant that "the court would . . . be unable to vary a settlement made (say) in 1920 and governed by (say) Australian law, even though the beneficiaries, the trustees and the trust property had been for many years in this country."[14]

Salmon L.J. held that tenements were "houses" and not "other buildings" within the meaning of these terms in section 42 (1) of the Housing Act 1957. Otherwise, he would have had to come to "the absurd and unhappy conclusion" that a group of eight houses in which sixteen families lived could be declared a clearance area, but

[13] *R.* v. *Bradford-on-Avon U.D.C., ex p. Boulton* [1964] 1 W.L.R. 1136, at p. 1147.
[14] *Re Paget's Settlement* [1965] 1 W.L.R. 1046, at p. 1050.

not eight houses in which "some 90 families [lived] in . . . revolting conditions . . . It would be strange indeed if the section had to be construed so that it was effective to abolish the smaller evil but not the greater."[15] In another case on section 42, Lawrence J. said that it was "proper to take into account" in resolving the problem of construction the fact that one interpretation contended for "would result in the displacement of thirty-six families with no obligation on the local authority to provide any of them with alternative accommodation [while] the tenement itself could remain a deserted hulk."[16]

In *R.* v. *Aubrey-Fletcher, ex p. Ross-Munro*,[17] Lord Parker C.J. refused to accept a construction of section 19 of the Extradition Act 1870 which would have the "alarming consequence . . . that if, when the person concerned arrives in this country after being surrendered by the foreign state, he is arrested, cautioned and questioned by a police officer, evidence of what he said, whether for him or against him, would be quite inadmissible."

And finally, in *Buchanan-Michaelson* v. *Rubinstein*,[18] Pennycuick J., referring to Order 6, rule 3 (1) of the Rules of the Supreme Court, said: "The contention advanced . . . would lead to the most extraordinary results. It would follow, for example, that if documents came into the possession of persons as executors and they then handed over those documents to themselves in their capacity as trustees of the same will, the moment they have done so they would be exempt from discovery in an action in which they were sued as personal representatives." He would not be led to "such an unreasonable conclusion."

Restriction of operation

Sometimes, to keep the Act within the limits of its scope, and not to disturb the existing law beyond what the object requires, it is construed as operative between certain persons, or in certain circumstances, or for certain purposes only, even though the language expresses no such circumscription of the field of operation. For example, the Bills of Sale Act 1854, s. 2, which required that where a bill of sale was made subject to a declaration of trust the declaration

[15] *Quiltotex Co., Ltd.* v. *Minister of Housing and Local Government* [1966] 1 Q.B. 704, at p. 712.

[16] *Annicola Investments, Ltd.* v. *Minister of Housing and Local Government* [1968] 1 Q.B. 631, at p. 644.

[17] [1968] 1 Q.B. 620.

[18] [1965] Ch. 258: order of Pennycuick J. discharged on different grounds: [1965] 1 W.L.R. 390.

should be registered as well as the bill, on pain of invalidity against the assignee in the event of execution or bankruptcy, was held to apply only to declarations of trust by the grantee for the grantor and not to trusts declared by the grantee in favour of other persons. The object of the Act was only to protect creditors against sham bills of sale, such object was completely attained by requiring the registration of the first-mentioned trusts (it being immaterial to a creditor whether the grantee under the bill held the property for himself or in trust for someone else), and the registration of any others would have been foreign to the purposes of the Act.[19]

Section 13 of the Bills of Sale Act (1878) Amendment Act 1882, prohibiting the removal of goods for five clear days after seizure, was held to be confined to the protection of the person giving the bill and not to give his landlord any right to complain of an earlier removal.[20]

Section 3 of the Distress for Rent Act 1737, which gives to landlords a right of action to recover double the value of goods fraudulently carried off the premises to avoid a distress, applies to goods of the tenant only and not to those of a stranger.[21]

The provision in the Gaming Act 1845 which, after making all wagers null and void, enacted that no suit should be maintained to recover money won on a wager or deposited to abide the event, was construed only as preventing a party to the wager from suing to recover his winnings, and not as preventing him from suing the stakeholder to recover his deposit before it had been actually appropriated.[22] Moreover, an action will lie by one partner in a betting business against the other for an account of the partnership dealings.[23]

It has been held that the provisions of a Railway Act which placed the management of the company's affairs in the hands of a certain number of directors were intended for the protection of the shareholders only, and that it was not open to a stranger to complain that they had not been complied with.[24]

In the same spirit, the operation of the Diplomatic Privileges Act 1708 which, with a view to securing the inviolability accorded to ambassadors by the law of nations, enacted that all processes whereby an ambassador or his servant might be arrested, or his goods seized,

[19] *Robinson* v. *Collingwood* (1865) 34 L.J.C.P. 18.
[20] *Lane* v. *Tyler* (1887) 56 L.J.Q.B. 461.
[21] *Tomlinson* v. *Consolidated Credit & Mortgage Corporation* (1890) 24 Q.B.D. 135.
[22] *Hampden* v. *Walsh* (1876) 1 Q.B.D. 189; *Diggle* v. *Higgs* (1877) 2 Ex.D. 422.
[23] *Keen* v. *Price* [1914] 2 Ch. 98.
[24] *Thames Haven Dock & Ry. Co.* v. *Rose* (1842) 4 M. & Gr. 552 *per* Maule J. criticised in *Re Alma Spinning Co.* (1880) 16 Ch.D. 681.

should be null and void, was held not to extend beyond what might be necessary for the protection of the rank, duties and religion of the ambassador. Hence it did not protect his servant, who rented a house and let part of it in lodgings, from having his goods taken by distress for non-payment of a parochial rate. A house of that character not being absolutely necessary for the servant's residence, to extend the operation of the Act to such a case would have been to cover ground foreign to its scope.[25]

By section 14 (1) of the Factories Acts 1961 (replacing Factories Act 1937, s. 14 (1): "Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction so as to be safe to every person employed or working on the premises as it would be if securely fenced." The House of Lords has held that this section imposes a duty to fence the dangerous part securely for the purpose of preventing the body of the operator coming into contact with the machinery. Accidents resulting from parts of the machinery[26] or of the material on which the machine is working[27] flying out, or from a tool which the workman was holding and which he was required to use in the course of his work coming into contact with the dangerous part,[28] are outside the scope of the section.

Similarly, the provision in section 16 of the 1961 Act replacing section 16 of the 1937 Act, that the fencing shall be "constantly maintained and kept in a position while the parts required to be fenced or safeguarded are in motion or use" has been very narrowly construed. "In motion" does not bear its natural meaning of "moving" so that the section does not protect a workman from injury from a machine which is being slowly or intermittently moved for purposes of maintenance or repair.[29]

Section 1 (4) of the Caravan Sites and Control of Development Act 1960 defines "caravan site" as "land on which a caravan is stationed for the purposes of human habitation and land which is used in conjunction with land on which a caravan is so stationed." The Court of Appeal has held that the second part of the definition must be understood as covering only what Lord Denning M.R.

[25] *Novello* v. *Toogood* (1823) 1 L.J.(o.s.)K.B. 181.
[26] *Close* v. *Steel Co. of Wales, Ltd.* [1962] A.C. 367.
[27] *Nicholls* v. *F. Austin (Leyton), Ltd.* [1946] A.C. 493.
[28] *Sparrow* v. *Fairey Aviation Co., Ltd.* [1964] A.C. 1019.
[29] *Richard Thomas & Baldwins, Ltd.* v. *Cummings* [1955] A.C. 321; *Knight* v. *Leamington Spa Courier, Ltd.* [1961] 2 Q.B. 253; *Mitchell* v. *W. S. Westin, Ltd.* [1965] 1 W.L.R. 297.

described as land "used immediately and directly in conjunction," such as for a latrine or for keeping a motor-car. It could not include two and a half acres of sand-dunes on which the owner of a bungalow placed a caravan which he let to holidaymakers, and the whole of which he allowed them to use for purposes (such as recreation) incidental to their occupation of the caravan.[30]

Paragraph 7 (1) of Schedule 7 to the Companies Act 1948, dealing with banking or finance companies which provided capital for an exempt private company, "shall not apply if the banking or finance company has the right . . . to exercise or control the exercise of one fifth or more of the total voting power at any general meeting of the relevant company." In *Qualter, Hall & Co., Ltd.*, v. *Board of Trade*,[31] it was held that "any general meeting" did not mean "every general meeting," but only those meetings at which the banks or finance companies had the right to vote.

By section 113 (1) of the Food and Drugs Act 1955: "A person against whom proceedings are brought under this Act shall, upon information duly laid by him and on giving to the prosecution not less than three clear days' notice of his intention, be entitled to have any person to whose act or default he alleges that the contravention of the provisions in question was due brought before the court in the proceedings." This right has been held not to be conferred by the section upon persons charged with a contravention of regulations made under the Act, rather than of the Act itself.[32]

Section 2 (3) of the Industrial Courts Act 1919 empowers the Minister of Labour to refer to the court "for advice any matter relating to or arising out of a trade dispute." This section has been narrowly construed as referring only to references for advice, so that when the Minister submits a matter to the court for its *decision* as an arbitral tribunal, this is not a statutory reference within section 2 (3).[33]

By section 10 of the Partnership Act 1890: "Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm . . . the firm is liable therefor to the same extent as the partner so acting

[30] *R.* v. *Axbridge R.D.C., ex p. Wormald* [1964] 1 W.L.R. 442, at p. 445.
[31] [1962] Ch. 273. Sched. 7 was repealed by the Companies Act 1967, s. 130, Sched. 8, Part III.
[32] *United Dairies (London), Ltd.* v. *Beckenham Corporation* [1963] 1 Q.B. 434.
[33] *R.* v. *Industrial Court, ex p. A.S.S.E.T.* [1965] 1 Q.B. 377.

or omitting to act." "In my judgment," said Winn J., "section 10 of the Act of 1890 deals only with such secondary liability as the liability of one person for the act of another who is acting in the course of his employment or as agent for him; as I have expressed it, it equates the position of a partner in those respects with that of an employer or a principal. But where liability arises from a duty owed by the partner, other than the acting partner, which is personal to him or where he himself is involved actively in the commission of the act complained of, albeit the hand which does it is the hand of another partner, the injured person needs not to avail himself of the provisions of the statute . . . ; he complains of a tort committed by the partner other than the partner whose hand actually performs the deed."[34]

Lastly, by section 23 (4) of the Limitation Act 1939: "Where any right of action has accrued to recover any debt or other liquidated pecuniary claim . . . and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment." Lawton J. has held that, on the true construction of this provision, when a person acknowledges a debt, the cause of action which is already subsisting accrues afresh, and no new cause of action accrues. The section does not change the nature of a right, but gives it "a notional birthday and on that day, like the phoenix of fable, it rises again in renewed youth—and also like the phoenix, it is still itself."[35]

Restriction to specific object

In many other cases, where it was evident that a literal construction would have carried the operation of the Act far beyond the object with which it was enacted, words have been given a restricted construction.

Thus section 6 of the Habeas Corpus Act 1679, which, for the prevention of unjust vexation by reiterated committals for the same offence, enacts that no person who has been discharged on habeas corpus shall be imprisoned again for "the same offence," except by the court before which he is bound by recognisances to appear or another court having jurisdiction in the cause, would not extend to a case where the discharge was made on the ground that the

[34] *Meekins* v. *Henson* [1964] 1 Q.B. 472, at pp. 477, 478.
[35] *Busch* v. *Stevens* [1963] 1 Q.B. 1, at p. 6

committal had been made without jurisdiction, though the offence for which he was arrested on the second occasion was the same, for this was obviously beyond the object of the Act.[36]

It has been decided that an Act which empowered the directors of a company to make contracts and bargains with workmen, agents and undertakers would be construed as conferring on them authority to bind the company by such transactions without consulting their shareholders, but not as altering the general law so as to dispense with those formalities by which alone a corporation can bind itself to contracts.[37]

Section 52 of the National Debt Act 1870, which directed the Bank of England to keep a list of unclaimed stock, which was to be open for inspection at the usual hours of "transfer" would not entitle a person with no bona fide claim to an interest in any unclaimed stock to inspect such list.[38]

An Act of the Manx legislature for amending the criminal law declared that its provisions should not affect the right of the courts to punish contempts and that the House of Keys and certain officers should "when in the execution of their respective offices" have the power of punishing contempts in the same manner as a court. This was interpreted as limiting this power to the House of Keys only when exercising judicial, not legislative, functions. To give it that power when exercising the latter was obviously foreign to the object of the Act though the language, in its full and primary sense, included it.[39]

On similar grounds, a conveyance of property made solely to give a vote contrary to section 7 of the Parliamentary Elections Act 1695, which declared conveyances made "in order to multiply voices, or to split and divide the interest in . . . lands among several persons to enable them to vote" to be "void and of none effect," was void so far as to prevent the right of voting being acquired, which was the whole aim of the Act, but was in other respects valid between the parties so as to pass the property.[40]

An Act which empowered inspectors to inspect the scales, weights and measures of persons offering goods for sale, and to seize any

[36] *Att.-Gen. for Colony of Hong Kong* v. *Kwok-A-Sing* (1873) L.R. 5 P.C. 179; *R.* v. *Governor of Brixton Prison, ex p. Stallmann* [1912] 3 K.B. 424.
[37] *East London Water Works Co.* v. *Bailey* (1827) 4 Bing. 283. But see *South of Ireland Colliery Co.* v. *Waddle* (1868) L.R. 3 C.P. 463.
[38] *R.* v. *Bank of England* [1891] 1 Q.B. 785.
[39] *Re Brown* (1864) 33 L.J.Q.B. 193, 280.
[40] *Phillpotts* v. *Phillpotts* (1850) 20 L.J.C.P. 11.

found "light and unjust," was construed as limited to cases where the injustice was prejudicial to the buyer, and as not applying to a balance which gave seventeen ounces to the pound, since the object of the Act was not directed to the protection of the seller.[41]

Where a statute made it an offence in certain cases for any person to intimidate any other person, but provided that nothing in the Act should apply to seamen (to whom a special disciplinary code was applicable), it was held that the proviso only operated where the offence was committed *by* a seaman, and not where it was committed against a seaman.[42]

By section 23 (1) of the Arbitration Act 1950: "Where an arbitrator or umpire has misconducted himself or the proceedings, the High Court may remove him." Under subsection (2), it may also set the award aside. "In a two-tier arbitration," said Diplock L.J., "the umpire is *functus officio* once he has made his award, and his award ceases to be binding as soon as the board of appeal has made its award either confirming it or varying it." Misconduct by the umpire at this stage would not entitle the High Court to act under section 23.[43]

In *R.* v. *Commissioner of Police of the Metropolis, ex p. Blackburn*,[44] it was held that an appeal from a decision of the High Court on an application for mandamus to compel the Commissioner to reverse a policy decision that the time of police officers would not be spent on enforcing the provisions of the 1963 Betting, Gaming and Lotteries Act was not an appeal in a "criminal cause or matter" within section 31 (1) (*a*) of the Supreme Court of Judicature (Consolidation) Act 1925. Salmon L.J. said (at p. 910) that although the words "criminal cause or matter" should be given "a very wide construction," he was not convinced that they extended far enough to cover "proceedings in which neither party is at risk of being prosecuted as a result of the order sought or made."

Section 143 (1) (*b*) of the Town and Country Planning Act 1962 excludes the payment of compensation for disturbance in certain cases. In one case, it was argued for the Minister of Transport that "disturbance" should be interpreted widely so as to exclude from

[41] *Brooke* v. *Shadgate* (1873) L.R. 8 Q.B. 352; *East Gloucestershire Rly.* v. *Bartholomew* (1868) L.R. 3 Ex. 15.
[42] *Kennedy* v. *Cowie* [1891] 1 Q.B. 771.
[43] *Giacomo Costa Fu Andrea* v. *British Italian Trading Co., Ltd.* [1963] 1 Q.B. 201, at p. 208.
[44] [1968] 2 Q.B. 118.

matters for which compensation might be paid all loss consequent on dispossession such as estate agents' commission or surveyors' fees payable in respect of negotiating the amount to be paid by the compensating authority. But the Court of Appeal held that "disturbance" must refer solely to the fact of having to vacate the premises, and so the fees in question were not excluded.[45]

In *Ilford, Corporation* v. *Betterclean (Seven Kings), Ltd.*,[46] a launderette was open to customers on a Sunday: they could use the washing and drying machines, and also machines from which hot drinks, detergents and polythene bags were obtainable—all on the insertion of coins. Was the launderette "closed for the serving of customers on Sunday" (Shops Act 1950, s. 47)? The Divisional Court held that it was, restricting the meaning of "serving of customers" to personal service.

2. Presumption against Changes in the Common Law

Few principles of statutory interpretation are applied as frequently as the presumption against alterations in the common law. It is presumed that the legislature does not intend to make any change in the existing law beyond that which is expressly stated in, or follows by necessary implication from, the language of the statute in question.[47] It is thought to be in the highest degree improbable that Parliament would depart from the general system of law without expressing its intention with irresistible clearness, and to give any such effect to general words merely because this would be their widest, usual, natural or literal meaning would be to place on them a construction other than that which Parliament must be supposed to have intended. If the arguments on a question of interpretation are "fairly evenly balanced, that interpretation should be chosen which involves the least alteration of the existing law."[48]

In the case of a consolidating Act there is a particularly strong presumption that it does not alter the law contained in the statutes which it replaces. The reason is that "it is the invariable practice of Parliament to require from those who have prepared a consolidation

[45] *Lee* v. *Minister of Transport* [1966] 1 Q.B. 111.
[46] [1965] 2 Q.B. 222.
[47] *Arthur* v. *Bokenham* (1708) 11 Mod. 148, *per* Trevor C.J.: *Minet* v. *Leman* (1855) 20 Beav. 269, *per* Sir John Romilly M.R.; *Rolfe* v. *Flower, Salting & Co.* (1866) L.R. 1 P.C. 27; *River Wear Commissioners* v. *Adamson* (1877) 1 Q.B.D. 546, *per* Mellish L.J.; *Leach* v. *R.* [1912] A.C. 305, *per* Earl of Halsbury; *National Assistance Board* v. *Wilkinson* [1952] 2 Q.B. 648, *per* Lord Goddard C.J. and Devlin J.
[48] *George Wimpey & Co., Ltd.* v. *B.O.A.C.* [1955] A.C. 169, *per* Lord Reid at p. 191.

Bill an assurance that it will make no substantial change in the law and to have that checked by a committee."[49]

Cases in which the presumption has been applied

The provision in section 25 (8) of the Judicature Act 1873 that an injunction might be granted in all cases in which the court considered it "just and convenient" that such an order should be made was held not to extend the jurisdiction of the court beyond cases in which there was an infringement of a recognised legal or equitable right.[50]

An Act which provided that a mayor should not by reason of his office be ineligible as a town councillor or alderman would not make him eligible when he acted as returning officer for the ward in which he himself is standing at the election, for it would not be a legitimate inference from the language used that the legislature had intended to repeal by a side-wind the principle that a man shall not be a judge in his own cause.[51]

Section 4 (1) of the Criminal Evidence Act 1898 provides that the spouse of a person charged with an offence under any enactment mentioned in the schedule to the Act may be called as a witness either for the prosecution or for the defence. This was held by the House of Lords in *Leach* v. *R.*[52] only to make a wife a competent witness against her husband, and not to have what the Earl of Halsbury called the "perfectly monstrous" result of making her compellable. "The principle," said Lord Atkinson (at p. 311), "that a wife is not to be compelled to give evidence against her husband is deep seated in the common law of this country, and I think if it is to be overturned it must be overturned by a clear, definite and positive enactment, not by an ambiguous one such as the section relied upon in this case." Unless a statute imposes an inquisitorial duty on a court, it will not be held to abrogate the common law rules of evidence.[53]

This presumption applies to procedural matters as strongly as it applies to matters of substantive law. Thus in *Re Seaford*[54] the Court of Appeal refused to hold that the "highly artificial" common law doctrine of "relation back" (whereby a judicial act relates back

[49] *Beswick* v. *Beswick* [1968] A.C. 58, *per* Lord Reid at p. 73. *Cf.*, *ante*, pp. 20–25.
[50] *Day* v. *Brownrigg* (1878) 10 Ch. D. 294, *per* James L.J. Contrast the generous construction placed upon R.S.C., Ord. 20, r. 5 (1), in *Chatsworth Investments, Ltd.* v *Cussins (Contractors), Ltd.* [1969] 1 W.L.R. 1.
[51] *R.* v. *Owens* (1859) 28 L.J.Q.B. 316. [52] [1912] A.C. 305.
[53] *Field* v. *Field* [1964] P. 336. [54] [1968] P. 53, at p. 68.

to the earliest moment of the day on which it took place) "was, as a result of the Supreme Court of Judicature Act 1873 made applicable, as it were by a side wind, in matrimonial proceedings before the newly constituted High Court." And in considering the Foreign Judgments (Reciprocal Enforcement) Act 1933 Widgery J. felt "bound to take the view that one ought not to assume that this Act has made a substantial alteration in the common law approach to the enforcement of foreign judgments unless that intention can be found in express terms or by necessary implication. In my judgment the intention cannot be found, and ought not lightly to be assumed."[55]

Further, statutes dealing with procedure should, where possible, be limited in their construction to procedure only. Section 14 (2) of the Administration of Justice Act 1960 provides that where an application for habeas corpus has been made by or on behalf of any person, "no such application shall again be made by or in respect of that person on the same grounds, whether to the same court or judge or to any other court or judge, unless fresh evidence is adduced in support of the application." The purpose of this provision was solely to make it quite clear that (there being an appeal in both civil and criminal habeas corpus cases) there should be no right to go from judge to judge when making application. It "was never intended to, and does not, affect the ordinary law in regard to extradition."[56] Similarly the very general provision in the Rules of the Supreme Court (Ord. 45, r. 11) that "a party against whom a judgment has been given or an order made may apply to the court for a stay of execution . . . on the ground of matters which have occurred since the date of the judgment or order, and the court may . . . grant such relief . . . as it thinks just" does not disturb the principle that a court of equity will never interfere to prevent a legal mortgagee exercising his right to take possession, and so it does not confer any power to grant a stay of execution on an order for possession made in his favour.[57]

There are several cases in which the presumption under discussion has been applied in construing provisions of the Law of Property Act 1925. Thus an alleged easement of protection from the weather could not be supported as an "advantage" within the phrase (in s. 62) "easements, rights, and advantages whatsoever, appertaining

[55] *Société Co-operative Sidmetal* v. *Titan International, Ltd.* [1966] 1 Q.B. 828, at p. 847.
[56] *Ex p. Schtraks* [1964] 1 Q.B. 191, *per* Lord Parker C.J.: the words quoted are from the report, *sub nom. Re Shalom Schtraks (No. 2)*, in [1962] 3 All E.R. 849, at p. 850.
[57] *London Permanent Benefit Building Society* v. *de Baer* [1968] 2 W.L.R. 465.

or reputed to appertain to the land" "for the simple reason that, in order for section 62 to apply, the right or advantage must be one which is known to the law, in this sense, that it is capable of being granted at law so as to be binding on all successors in title. . . . A right to protection from the weather is not a right known to the law."[58] Section 61 of the Law of Property Act which, so far as material, provides that in all deeds, unless the context otherwise requires, words importing the singular number shall include the plural and vice versa was "designed to shorten the drafting of deeds," and for no other purpose. Therefore an attempt to apply the section to the provisions of a solicitors' partnership deed in such a way that one partner acting alone would have power to expel his two colleagues not surprisingly failed.[59] By section 86 (2) "any purported assignment of a term of years absolute by way of mortgage . . . shall . . . operate as a sub-demise." The words "by way of mortgage" were held by the Court of Appeal to apply to the quality of the assignment, not to the form of the document in which it was included, so that an assignment would fall within the provision even though it was not *expressed* to be by way of mortgage. Harman L.J. said that the section "cannot have been intended to alter the ancient law, which had always been, that Chancery would treat as a mortgage that which was intended to be a conveyance by way of security between A and B."[60] In *Beswick* v. *Beswick*[61] the House of Lords refused to place upon section 56 a construction which would have had the effect of overturning the whole doctrine of privity of contract, and in *National Provincial Bank, Ltd.* v. *Ainsworth*[62] a restricted construction was placed on the phrase "the rights of every person in actual occupation" in section 70 (1) (*g*) of the Land Registration Act 1925. It does not make mere personal "rights" of persons in occupation of registered land overriding interests so as to bind purchasers, but refers only to interests and rights "whose nature and whose transmissible character is known, or ascertainable, *aliunde*, *i.e.*, under other statutes or under the common law."

The courts are reluctant to interpret statutes as creating offences previously unknown to the law in the absence of clear words

[58] *Phipps* v. *Pears* [1965] 1 Q.B. 76 *per* Lord Denning M.R. at p. 84. *Cf. Lewisham Borough Council* v. *Maloney* [1948] 1 K.B. 50.
[59] *Re A Solicitors' Arbitration* [1962] 1 W.L.R. 353 *per* Russell J. at p. 356.
[60] *Grangeside Properties, Ltd.* v. *Collingwoods Securities, Ltd.* [1964] 1 W.L.R. 139, at p. 142.
[61] [1968] A.C. 58.
[62] [1965] A.C. 1175, *per* Lord Wilberforce at p. 1261.

declaring the acts in question to be offences. So the statement in section 21 of the Betting and Lotteries Act 1934 that "subject to the provisions of this Part of the Act, all lotteries are unlawful" failed to accomplish its probable intention, which was to make unlawful lotteries not complying with the conditions laid down in succeeding sections.[63] Likewise the Motor Vehicles (Authorisation of Special Types) General Order 1955 authorised, subject to certain conditions, the use of vehicles in a way which might otherwise be contrary to the Motor Vehicles (Construction and Use) Regulations 1955. The Order, according to Lord Parker C.J., created no offence, but simply had the effect of providing defences which persons charged with breaches of the Regulations could set up.[64]

References to personal relationships in an Act are presumed to connote those relationships as they are understood at common law. Thus an illegitimate infant son could not claim as a dependant under the Inheritance (Family Provision) Act 1938.[65] And in *Sowa* v. *Sowa*[66] the Court of Appeal held that the phrase "married woman" in the Matrimonial Causes Acts and the Summary Jurisdiction Acts relating to matrimonial matters referred only to wives of monogamous marriages. Holroyd Pearce L.J. (at p. 85) said that in the light of the decision in *Hyde* v. *Hyde*,[67] which limited the matrimonial jurisdiction of the English courts to monogamous marriages, "Parliament would . . . have clearly expressed its intention that the principle of that case should not apply to [these statutes] had it so intended." By way of contrast, section 3 of the Family Allowances and National Insurance Act 1956 contained express provision for marriages performed outside the United Kingdom under a law which permitted polygamy so long as they in fact remained monogamous.

Section 5 (1) of the Caravan Sites and Control of Development Act 1960 provides that a site licence may be issued by a local authority "subject to such conditions as the authority may think it necessary or desirable to impose on the occupier of land in the interests of persons dwelling thereon in caravans, or of any other class of persons, or of the public at large." The House of Lords held that this only authorised the imposition of conditions relating to the use of the land, and that the local authority was not entitled by virtue of section

[63] *Sales-Matic, Ltd.* v. *Hinchcliffe* [1959] 1 W.L.R. 1005.
[64] *Siddle C. Cook, Ltd.* v. *Holden* [1963] 1 Q.B. 248.
[65] *Re Makein (deceased)* [1955] Ch. 194.
[66] [1961] P. 70: but see *Din* v. *National Assistance Board, ante*, p. 107.
[67] (1866) L.R. 1 P. & D. 130.

5 (1) to dictate to an occupier what classes of persons he should or should not accept as tenants of caravan sites or the terms on which he should or should not let the sites. "The question here," said Lord Reid, "is whether, by inserting in section 5 . . . the general words with which I have been dealing, Parliament can be held to have provided for the introduction of a completely new and indeterminate type of security of tenure and rent control for caravan dwellers. . . . In construing a provision of doubtful meaning I think we are entitled to have some regard to the legislative habits of Parliament, and it seems to me so extremely improbable that Parliament could ever have intended to achieve this result in this way that I would hold these general words to have a more limited meaning if that is reasonably possible."[68]

"Gaming" is defined in section 55 (1) of the Betting, Gaming and Lotteries Act 1963 as "the playing of a game of chance for winnings in money or money's worth." At common law there can only be gaming if each player has a chance of losing as well as one of winning, and the House of Lords has held that the Act has done nothing directly or by inference to alter the previous law. Therefore, where the holder of a justices' on-licence provided free bingo with free prizes at his premises, there being no charge for playing and no stakes hazarded by those who played, he was not conducting "gaming" within the meaning of the Act.[69]

Where a provision does unequivocally set out to alter the common law, its effect will still be limited to what necessarily follows from the words used. Section 6 (1) (*c*) of the Law Reform (Married Women and Tortfeasors) Act 1935 introduced a right of contribution between tortfeasors in these words: "any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage." The House of Lords held that this statutory right to recover contribution could not be exercised against a joint tortfeasor who had been sued and held not to be liable, albeit on purely technical grounds, Lord Tucker saying that "it is to be remembered that this Act is giving to the claimant a new cause of action against the contributor which did not previously exist."[70]

[68] *Chertsey U.D.C.* v. *Mixnam's Properties, Ltd.* [1965] A.C. 735, at pp. 750, 751.
[69] *McCollom* v. *Wrightson* [1968] A.C. 522.
[70] *George Wimpey & Co., Ltd.* v. *B.O.A.C.* [1955] A.C. 169, at p. 192. *Cf. Randolph* v. *Tuck* [1962] 1 Q.B. 175 (s. 6 (1) (*c*) does nothing to alter the common law rule that a cause of action can not be based on an estoppel by record).

A more recent illustration of the same principle is provided by the case of *E.T.U.* v. *Tarlo* [1964] Ch. 720. The effect of section 57 of the Solicitors Act 1957 is that a solicitor and client may make an agreement *in writing* to the effect that the solicitor will receive less than the usual amount of costs in relation to non-contentious business. Where an *oral* agreement was made regarding both contentious and non-contentious business, it was held that section 57 did not prevent the client relying on it in so far as it related to contentious business. "These sections," said Wilberforce J. (at p. 731), "are super-imposed upon the common law, and in particular section 57 reproduces section 8 of the [Solicitors] Remuneration Act 1881, it brings in a new type of disability which did not exist before the Act, a disability to make an agreement as regards non-contentious business unless it is in writing. It does not seem to me that, that being so, there is any justification for spreading over that disability, imposed in relation to non-contentious business, into the area of contentious business which, under the common law, was not affected by this requirement."

Statutes plainly and unambiguously altering the common law

But where the words of a statute are plain and unambiguous, and an intention to alter the common law is evident from the words of the Act, there is no place for the application for the presumption which the foregoing cases illustrate.[72]

Section 2 (1) (*d*) of the Limitation Act 1939 refers to "actions to recover any sum recoverable by virtue of any enactment." It was argued that this provision maintained a distinction of long standing between an action on a statute and an action given by a statute. The House of Lords held that it did not. "This distinction," said Lord Reid, "seems to me so difficult that it does not surprise me that Parliament should abolish it, and the words of section 2 (1) (*d*) are so clear that I do not think it possible to force on them the interpretation which the appellants put forward."[73]

Similarly, section 1 (1) of the Evidence Act 1938 was held, in view of the object of the Act (to have all the relevant evidence before the court), to have reversed the common law rule that the consistency of witnesses may not be proved by their own previous statements.

[72] See *John Mackintosh and Sons, Ltd.* v. *Baker's Bargain Stores (Seaford), Ltd.* (1965) L.R. 5 R.P. 305, *per* Browne J.

[73] *Central Electricity Board* v. *Halifax Corporation* [1963] A.C. 785, at p. 799. *Cf. Chatsworth Investments, Ltd.* v. *Cussins (Contractors), Ltd.* [1969] 1 W.L.R. 1 (R.S.C., Ord. 20, r. 5).

Lawton J. said that he had "come to that conclusion with some regret because it seems to me that it is an unfortunate situation if counsel can call a witness and, when that witness does not come up to proof, counsel should be allowed to produce some earlier document which shows that on some other occasion the witness made a different statement."[74]

3. Mens Rea in Statutory Offences

Almost every crime which exists at common law independently of any statute requires for its commission some blameworthy state of mind on the part of the actor, called *mens rea*. Where an offence is created by statute, however comprehensive and unqualified the language of the statute, it is usually understood as silently requiring that the element of *mens rea* should be imported into the definition of the crime, unless a contrary intention is expressed or implied. In other words, the plain words of the statute are read subject to a presumption (of arguable weight), which may be rebutted, that "the general rule of law . . . that no crime can be committed unless there is *mens rea*"[75] has not been ousted by the particular enactment. By *mens rea* is meant, in the context of the discussion which follows, quite generally some blameworthy mental condition, whether constituted by knowledge or intention or otherwise: it is no part of this work to examine the specific elements required to constitute the *mens rea* of particular offences.[76]

"It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind."[77]

"In these days when offences are multiplied by various regulations and orders to an extent which makes it difficult for the most law abiding subjects in some way or at some time to avoid offending against the law, it is more important than ever to adhere to this principle."[78]

[74] *Harvey* v. *Smith-Wood* [1964] 2 Q.B. 171, at p. 175, not following *Cartwright* v. *W. Richardson & Co., Ltd.* [1955] 1 W.L.R. 634.
[75] *Williamson* v. *Norris* [1899] 1 Q.B. 7, *per* Lord Russell of Killowen C.J. at p. 14.
[76] *e.g.*, the difficult cases on bigamy: *R.* v. *Tolson* (1889) 23 Q.B.D. 168; *R.* v. *Wheat* [1921] 2 K.B. 119; *R.* v. *Gould* [1968] 2 Q.B. 65.
[77] *Brend* v. *Wood* (1946) 175 L.T. 306, *per* Lord Goddard C.J.
[78] *Harding* v. *Price* [1948] 1 K.B. 695, *per* Lord Goddard C.J. at p. 700.

At times it has seemed as though this principle, that *mens rea* should be presumed to be required unless the contrary clearly appeared, was declining in importance. So in 1910 Kennedy L.J. said that "there is a clear balance of authority that in construing a modern statute this presumption as to *mens rea* does not exist."[79] And in 1958 Donovan J. said that "modern statutes create offences where knowledge on the part of an offender is not essential, and . . . accordingly there is no universal prior presumption of *mens rea*."[80] But in 1963, in the case of *Lim Chin Aik* v. *R.*,[81] the question was fully discussed in the Privy Council and, as the opinion of the Board (delivered by Lord Evershed) makes clear, the presumption as to *mens rea* is still a strong one and will only be displaced if certain conditions are fulfilled.

"Where the subject-matter of the statute," said Lord Evershed (at p. 174), "is the regulation for the public welfare of a particular activity—statutes regulating the sale of food and drink are to be found among the earliest examples—it can be and frequently has been inferred that the legislature intended that such activities should be carried out under conditions of strict liability. The presumption is that the statute or statutory instrument can be effectively enforced only if those in charge of the relevant activities are made responsible for seeing that they are complied with. When such a presumption is to be inferred, it displaces the ordinary presumption of *mens rea*. . . . But it is not enough . . . merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly . . . which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim."[82]

According to Lord Evershed, then, two conditions must be satisfied if the presumption as to *mens rea* is to be rebutted: strict liability must be "required to give practical effect to the legislative intention,"[83]

[79] *Hobbs* v. *Winchester Corporation* [1910] 2 K.B. 471, at p. 483.
[80] *R.* v. *St Margaret's Trust, Ltd.* [1958] 1 W.L.R. 522, at p. 527.
[81] [1963] A.C. 160.
[82] Citing *Reynolds* v. *G. H. Austin & Sons, Ltd.* [1951] 2 K.B. 135 and *James & Son Ltd.* v. *Smee* [1955] 1 Q.B. 78, and preferring them to *Hobbs* v. *Winchester Corporation, supra*, and *R.* v. *St. Margaret's Trust, Ltd., supra.*
[83] *Vane* v. *Yiannopoullos* [1965] A.C. 486, *per* Lord Evershed at p. 500.

and the person charged with a breach of the statutory requirements must have had some opportunity of furthering their observance.

Cases in which the presumption requiring *mens rea* has been applied

In *Lim Chin Aik's* case[84] it was held that the accused could not be guilty of entering and remaining in Singapore contrary to an order, prohibiting him from doing so and made under the Singapore Immigration Ordinance of 1959, when that order had not been brought to his attention. To impose absolute liability on a prohibited person would not have ensured observance of the order since he could not have complied with it if he did not know of it and no practicable means of his ascertaining that he had become a prohibited person was provided by the Ordinance.

Under the Prevention of Crime Act 1953, s. 1 (1), it is an offence for any person, without lawful authority or reasonable excuse, to have "with him in any public place any offensive weapon." The words "has with him" here mean "knowingly has with him." "If some innocent person has a cosh slipped into his pocket by an escaping rogue, he would not be guilty of having it with him within the meaning of the section."[85]

Under section 9 (*b*) of the Family Allowances Act 1965, replacing section 9 (*b*) of the Family Allowances Act 1945, it is an offence to obtain or receive "any sum as on account of an allowance, either as in [the defendant's] own right or as on behalf of another, knowing that it was not properly payable, or not properly receivable by him or her." It was held that a "trafficker in family allowances," who was making 800 per cent interest a year on his dealings, and who had a number of woman agents, could not be convicted of soliciting, or conspiring with, them to commit an offence under section 9 (*b*) unless it was proved that the agents knew that the allowances were not properly receivable by them. To the Crown's argument that an agent must be taken to know the law and hence that an allowance was not properly receivable by her, the court replied that the offence created by the statute was not an absolute one, that there might be circumstances in which receipt of another person's allowance would be lawful, and that knowledge of the wrongfulness of the transaction must therefore be proved.[86]

[84] [1963] A.C. 160.
[85] *R.* v. *Cugullere* [1961] 1 W.L.R. 858, *per* Salmon J. at p. 860.
R. v. *Curr* [1967] 2 Q.B. 944.

It is a defence to a charge of dangerous driving and to a charge of careless driving that the driver, without fault of his own, was deprived of control of his motor vehicle by a mechanical defect therein of which he did not know and which was not such as he should have discovered if he had exercised reasonable prudence.[87]

The requirement in Schedule 2, paragraph 2, of the Betting and Gaming Act 1960 that "no person who is apparently under the age of eighteen years . . . shall be admitted to or allowed to remain" in a licensed betting office could not be contravened "without some knowledge that a person apparently under the age of eighteen was on the premises.[88]

A man who forcibly took a girl under sixteen from the custody of her guardian, in the honest but mistaken belief that he himself was invested with that office and was acting simply in the exercise of his supposed rights, would not be guilty of abducting the girl, even though the offence was defined as "unlawfully taking a girl under sixteen out of the possession and against the will of the person having the lawful care of her."[89] On the other hand, the offence was committed by a man whose mistake was to believe, from the girl's appearance and assertions, that she was older.[90] It must be supposed, said Stephen J., that, the object of the legislature being "to prevent a scandalous and wicked invasion of parental rights," it intended that the wrongdoer should act at his peril."[91]

A licensed victualler who supplied liquor to a police constable whom he believed to be off duty was not guilty of supplying liquor to a police constable while on duty within section 16 (2) of the Licensing Act 1872.[92]

A duty to report an occurrence cannot impose an obligation on one who has no knowledge of the occurrence, for instance, that an animal was suffering from a notifiable disease, or that a motor accident had taken place.[93]

Under section 73 (1) of the Road Traffic Act 1960 "with a view to

[87] *R.* v. *Spurge* [1961] 2 Q.B. 205. *Cf. Hill* v. *Baxter* [1958] 1 Q.B. 277; *R.* v. *Evans* [1963] 1 Q.B. 412. The latter care establishes that the test of "dangerous" driving is an objective one, and that it is irrelevant whether the driver was deliberately reckless, careless, momentarily inattentive, or even doing his incompetent best.

[88] *Mallon* v. *Allon* [1964] 1 Q.B. 385.

[89] *R.* v. *Tinkler* (1859) 1 F. & F. 513.

[90] *R.* v. *Prince* (1875) L.R. 2 C.C.R. 154.

[91] *R.* v. *Tolson* (1889) 23 Q.B.D. 168.

[92] *Sherras* v. *De Rutzen* [1895] 1 Q.B. 918. *Cf. Cundy* v. *Le Cocq* (1884) 13 Q.B.D. 207 and *Mullins* v. *Collins* (1874) L.R. 9 Q.B. 292.

[9] *Nichols* v. *Hall* (1873) L.R. 8 C.P. 322; *Harding* v. *Price* [1948] 1 K.B. 695.

protecting the public against the risks which arise in cases where the drivers of motor vehicles are suffering from excessive fatigue, it is hereby enacted that it shall not be lawful in the case of . . . (*c*) a motor vehicle constructed to carry goods . . . for a person to drive or cause or permit a person employed by him . . . to drive" for continuous periods exceeding those specified in the section. It was held in *Grays Haulage Co., Ltd.*, v. *Arnold*[94] that there could be no conviction of "permitting" under this section where there was no proof of actual or constructive knowledge on the part of the defendants. Lord Parker C.J. (at p. 536) said that "there is a tendency today to impute knowledge in circumstances which really do not justify knowledge being imputed." The decision is a striking one since the purpose of the enactment, the protection of the public, was expressly stated in the Act, and the defendants could surely "by supervision . . . or by exhorting those whom [they] may be expected to influence or control"[95] have done something to promote the observance of the statute.

Cases in which the presumption requiring *mens rea* has been rebutted

Contravention of article 1 of the Hire-Purchase and Credit Sale Agreements (Control) Order 1956, which provided that a person should not dispose of any goods to which the Order applied in pursuance of a hire-purchase agreement unless the requirements specified in Schedule 2 of the Order were satisfied, was held to be an offence even though the act was innocently done: the requirement in question being that 50 per cent of the cash price should be paid before the agreement was signed. Donovan J. relied both on the words of the Order ("an express and unqualified prohibition") and its object. This was "to help to defend the currency against the peril of inflation which, if unchecked, would bring disaster upon the country. . . . The present generation has witnessed the collapse of the currency in other countries and the consequent chaos, misery and widespread ruin. It would not be at all surprising if Parliament, determined to prevent similar calamities here, enacted measures which it intended to be absolute prohibitions of acts which might increase the risk in however small a degree. . . . There would be little point in enacting that no one should breach the defences against a flood, and at the same time excusing anyone who did it innocently."[96]

[94] [1966] 1 W.L.R. 534. See now Part VI of the Transport Act 1968.
[95] *Lim Chin Aik* v. *R.* [1963] A.C. 160, *per* Lord Evershed at p. 174.
[96] *R.* v. *St. Margarets Trust, Ltd.* [1958] 1 W.L.R. 522, at p. 527.

The offence of being "concerned in the management of premises" used for smoking or dealing in cannabis (Dangerous Drugs Act 1964, s. 9 (1) (b)) was at first held to be absolute. Lord Parker C.J. took "judicial notice of the fact that drugs are a great danger today" and said that the provision was "a regulation of activities for the public welfare [which] has always been treated as a category of cases in which provisions are more readily held to be absolute offences."[97]

Section 28 (2) of the Larceny Act 1916 referred to persons being found by night without lawful excuse in possession of "any key, picklock, crow, jack, bit, or *other implement of housebreaking*." The Court of Criminal Appeal held that the words italicised meant nothing more than any other instrument capable of being used for housebreaking, and there was no reason to import into them any element of intention on the part of the person charged.[98]

The offence of causing a vehicle to be used as an express carriage contrary to section 134 (3) of the Road Traffic Act 1960 can be committed even though the operator of the vehicle has no actual knowledge of payments which are being made by his passengers to their employer in respect of the use of the vehicle, at any rate if the circumstances of the case were such as to make it imperative on the part of the operator to make some inquiries.[99]

By section 121 (1) of the Highways Act 1959, a person who "without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway" is guilty of an offence. The defendant in *Arrowsmith* v. *Jenkins*[1] argued that some *mens rea* must be essential, in the sense that a person would only be guilty if he knowingly did a wrongful act, so that a person who acted in the genuine belief that he had lawful authority to obstruct the highway would not be liable. But the Divisional Court rejected this argument, holding that all that was required to constitute the offence was that the person obstructing should act "intentionally, as opposed to accidentally, that is, by an exercise of his or her free will."

[97] *Yeandel* v. *Fisher* [1966] 1 Q.B. 440, at p. 446 citing Devlin J. in *Reynolds* v. *G. H. Austin & Sons, Ltd.* [1951] 2 K.B. 135, at p. 149: "Although, in one sense, the citizen is being punished for the sins of others, it can be said that, if he had been more alert to see that the law was observed, the sin might not have been committed." See now *Sweet* v. *Parsley* [1969] 2 W.L.R. 470.

[98] *R.* v. *Patterson* [1962] 2 Q.B. 429. See now Theft Act 1968, s. 25.

[99] *Wurzal* v. *Wilson* [1965] 1 W.L.R. 285. *Cf. Browning* v. *J. W. H. Watson (Rochester), Ltd.* [1953] 1 W.L.R. 1172.

[1] [1963] 2 Q.B. 561, *per* Lord Parker C.J.

The offence of making a false declaration under section 116 of the Fiji Customs Ordinance is absolute. "One cannot," said Lord Hodson, " 'falsify' without a guilty mind but . . . one can innocently make a 'false' entry."[2]

In several cases, convictions for selling unsound or adulterated food or drink have been affirmed notwithstanding the absence of any knowledge on the part of the accused.[3] In one such case Kennedy L.J. said that "the peril to the butcher from innocently selling unsound meat is deemed by the legislature to be much less than the peril to the public which would follow from the necessity in each case of proving a *mens rea*."[4] The importance of these cases has, however, been lessened since the introduction of the "third-party procedure" which enables a defendant who successfully casts responsibility for the default on to some other person in the chain of distribution to escape liability.[5]

In *Chajutin* v. *Whitehead*,[6] it was held that an alien could be convicted of the offence of "without lawful authority . . . [having] in his possession any forged, altered or irregular . . . passport" (art. 18 (4) (*d*) Aliens Order 1920), notwithstanding that it was found as a fact that he did not know that the passport had been altered, and honestly believed upon reasonable grounds that it had been issued to him in the ordinary course by the proper authority in Budapest.

In another case, it was held that an alien who had been brought in custody from Ireland to Holyhead and there detained could be convicted of a statutory offence of being "found" in the United Kingdom.[7]

In *Lockyer* v. *Gibb*,[8] the Divisional Court held that being "in possession of a drug" contrary to regulation 9 of the Dangerous Drugs (No. 2) Regulations 1964 is an absolute offence. Although it must be proved that the accused knew that he had the article which turned out to be a drug, it need not be shown that he knew what the article was. The regulation was said by Lord Parker C.J. (at p. 249) to be "a public welfare provision. . . . If one considered the mischief

[2] *Patel* v. *Comptroller of Customs* [1966] A.C. 356, at p. 363.
[3] *Fitzpatrick* v. *Kelly* (1873) L.R. 8 Q.B. 337; *Betts* v. *Armstead* (1888) 20 Q.B.D. 771; *Hobbs* v. *Winchester Corporation* [1910] 2 K.B. 471; *Quality Dairies (York), Ltd.* v. *Pedley* [1952] 1 K.B. 275.
[4] *Hobbs* v. *Winchester Corporation*, *supra*, at p. 484.
[5] Food and Drugs Act 1955, s. 113.
[6] [1938] 1 K.B. 506
[7] *R.* v. *Larsonneur* (1933) 24 Cr.App.R. 74.
[8] [1967] 2 Q.B. 243: but see *Warner* v. *Metropolitan Police Commissioner*, *infra*.

aimed at alone, there was every reason for treating a provision such as this as a provision imposing absolute liability."

Warner's case

In *Warner* v. *Metropolitan Police Commissioner*,[9] the question of absolute liability in statutory offences has now been considered by the House of Lords for the first time. But the speeches reveal so considerable a difference in attitude that the problem of absolute liability can hardly be regarded as finally settled.[10]

The appellant (whose appeal was dismissed by applying the proviso to section 4 (1) of the Criminal Appeal Act 1907) had been convicted of possessing a dangerous drug contrary to section 1 (1) of the Drugs (Prevention of Misuse) Act 1964. The absolute or other nature of the offence and the nature of "possession" for the purpose of the Act had both to be considered.[11]

(i) The House held, Lord Reid dissenting, that section 1 (1) creates an absolute offence at least in so far as it is unnecessary that the accused should have known that he had drugs in his possession.

Only Lord Reid (at p. 1316) affirmed the general presumption that *mens rea* is an essential element in a statutory offence. He held this presumption to be of such importance that it will displace the primary rule under which words bear their ordinary, grammatical meaning: "in cases of this kind the question is not what the words mean, but whether there are sufficient grounds for inferring that Parliament intended to exclude the general rule that *mens rea* is an essential element in every offence and the authorities show that it is generally necessary to go behind the words of the enactment and take other factors into consideration." Unless words were "crystal clear," he would not "impute to Parliament an intention to depart from its known desire to prevent innocent persons from being convicted."

Lord Morris of Borth-y-Gest and Lord Wilberforce both concluded that the offence was absolute largely from the plain words of the Act: "it shall not be lawful for a person to have in his possession." Lord Morris (at p. 1331) said that the degree of moral stigma attaching to conviction for an offence should not be considered: "it is to the words used by Parliament that attention has to be directed." Lord

[9] [1968] 2 W.L.R. 1303.
[10] See an account of the case in [1968] Crim.L.R. 380–384.
[11] The editor is most grateful to Mr. A. P. G. Hughes for his assistance in the preparation of the discussion which follows.

Wilberforce[12] (at p. 1353) thought there was "no need, and no room, for an inquiry whether any separate requirement of *mens rea* is to be imported into the statutory offence . . . the statute contains its own solution."

Lord Guest and Lord Pearce adopted a somewhat broader approach. Lord Guest, for example, referred both to the words of the Act ("as absolute as it can be") and to several other factors: the long and short titles, which indicated that it was possession which was to be penalised; the mischief aimed at, which was "the social evil of the trafficking of drugs" (at p. 1340); the widespread evasion which would result from a finding that *mens rea* was required; and the fact that certain exemptions were specifically provided for in the Act and by regulations.

Certain other points on statutory interpretation emerge from the speeches,[13] but the general result can only be said (somewhat unhelpfully) to be that the problem of absolute liability is one to be determined on the construction of the particular statute in question. To this extent, Lord Evershed's observations in *Lim Chin Aik* v. *R.*,[14] referred to with approval by Lord Reid but not dealt with by the other Law Lords, seem seriously weakened. Likewise affected must be the other remarks of the Judicial Committee in that case on the difficulty of imputing to the legislature an intention to create an absolute offence when the result will simply be the conviction of persons whose conduct could not in any way promote observance of the law. The distinction between the case in which strict liability will thus be without practical effect and that in which its imposition upon those engaged in a particular activity will exact a higher degree of care received no general support in *Warner's* case.

The long-term results of the decision will only be seen as various statutory provisions come for interpretation before the Divisional Court and the Court of Appeal in the next few years. The only safe

[12] It should be mentioned that Lord Wilberforce was avowedly dealing with the two issues of absolute liability and nature of possession as one.

[13] Lord Morris discussed at length the effect of the presence or absence of the word "knowingly" in the definition of an offence: see, *post*, p. 133. He considered that this may be of great importance in construing a particular provision, and thought it too sweeping to say that when Parliament does introduce the word into a definition it is merely stating what would normally be implied. Lord Pearce pointed to the power to impose a purely nominal penalty as consistent with the offence being absolute: the existence of a minimum penalty would, conversely, have pointed to the offence not being absolute. Lord Reid, on the other hand, thought that the imposition of absolute liability with a nominal penalty would serve no purpose and could not have been intended.

[14] [1963] A.C. 160, *ante*, pp. 124–125.

general conclusion from the speeches seems to be Lord Guest's: that the presumption as to *mens rea* has been to some extent whittled down.

Sweet v. Parsley

Shortly before going to press, the decision of the House of Lords in *Sweet* v. *Parsley*[16] has been reported.

The House has held, unanimously, that the offence of being concerned in the management of premises used for smoking cannabis, contrary to section 5 (*b*) of the Dangerous Drugs Act 1965, is not an absolute one. It must either be shown (according to some of their Lordships) that a person accused under this provision intended that the premises be used for smoking cannabis, or (according to other members of the House) that the accused knew the particular purpose to which the premises were being put.

All of their Lordships appear to have reached this conclusion primarily on the words of the section: among other matters which they considered were the general scheme of the Act, previous legislation on this and other subjects, and the hardship which would follow from holding the offence absolute.

In very broad terms, the case must be regarded as reaffirming what may have been in considerable doubt since *Warner's* case[17]: that the general presumption that *mens rea* is required in every criminal offence created by statute is as strong as ever. It is, however, disappointing that (apart from Lord Reid)[18] their Lordships seem to have made little attempt to provide guidance for courts in future faced with the problem whether a particular statutory offence is intended to be an absolute one or not.

[16] [1969] 2 W.L.R. 470.

[17] *Ante*, pp. 130–132: there is remarkably little discussion of *Warner's* case in the speeches in *Sweet* v. *Parsley*.

[18] According to Lord Reid, one must go outside the words of the statute and examine all the relevant circumstances before one can conclude that it *must* have been the intention of Parliament to make the offence absolute.

The relevant circumstances are:

(i) The subject-matter of the Act. But where an offence is truly criminal, rather than quasi-criminal, this alone is not enough, and Lord Reid regrets that in some recent cases this factor and the words of the Act have been all that has been taken into account.

(ii) Whether the public interest really requires that an innocent person should be prevented from proving his innocence in order that fewer guilty persons may escape.

(iii) The fact that every manifestly unjust conviction made known to the public tends to injure the body politic by undermining public confidence in the justice of the law and its administration.

"Knowingly," "maliciously," "wilfully"

The *absence* of the word "knowingly" in the statutory definition of an offence is not enough to work against the conclusion, gathered from the whole of the language used, that *mens rea* is required,[19] even though the word is found in other parts of the same statute or section.[20] For "all that the word 'knowingly' does is to say expressly what is normally implied."[21]

What of the *presence* of the word "knowingly"? It has been said that it "is apt to introduce a requirement of *mens rea* as to all the elements of the offence though it has not invariably been held to do so."[22] So the offence of having knowingly made a record without the consent in writing of the performers (contrary to section 1 (*a*) of the Dramatic and Musical Performers' Protection Act 1925) could only be proved by showing that the accused knew, at the time the record was made, that the consent mentioned had not been obtained.[23] And on an indictment against an accused of knowingly having in his possession any explosive substance (section 4 (1) of the Explosive Substances Act 1883) under circumstances which give rise to the suspicion that he did not have it for a lawful object, it must be shown not only that he knowingly had the substance in his possession, but also that he knew what it was.[24]

But the word "knowingly" will not be construed narrowly in favour of an accused. In *Ross* v. *Moss*,[25] where the holder of a justices' on-licence was charged with knowingly selling or supplying intoxicating liquor to persons to whom he was not permitted by the conditions of his licence to sell or supply it, Lord Parker C.J. (at p. 406) said that " 'knowledge' in this connection does not merely mean actual knowledge but covers the case of shutting your eyes to what is going on, and, still more, covers the case where you intend what occurs to go on, but deliberately look the other way."

[19] *Lim Chin Aik* v. *R.* [1963] A.C. 160.
[20] *Sherras* v. *De Rutzen* [1895] 1 Q.B. 918.
[21] *Taylor's Central Garages (Exeter), Ltd.* v. *Roper* [1951] 2 T.L.R. 284, *per* Devlin J. at p. 288: but see now *Warner* v. *Metropolitan Police Commissioner* [1968] 2 W.L.R. 1303, *per* Lord Morris of Borth-y-Gest, *supra*, p. 206, n. 13.
[22] Smith and Hogan, *Criminal Law*, p. 60.
[23] *Gaumont British Distributors, Ltd.* v. *Henry* [1939] 2 K.B. 711 (though Lord Hewart C.J. was "not suggesting for a moment that in a case like this the difficult topic of *mens rea* comes in").
[24] *R.* v. *Hallam* [1957] 1 Q.B. 569, overruling *R.* v. *Dacey* [1939] 2 All E.R. 641.
[25] [1965] 2 Q.B. 396. *Cf. Mallon* v. *Allon* [1964] 1 Q.B. 385; *Grays Haulage Co., Ltd.* v] *Arnold* [1966] 1 W.L.R. 534; *Roper* v. *Taylor's Central Garages (Exeter), Ltd.* [1951· 2 T.L.R. 284, *per* Devlin J.

"Maliciously," as used in the phrase "unlawfully and maliciously" in the definition of many crimes, has no consistent meaning. So it adds nothing at all to the definition of wounding with intent found in section 18 of the Offences Against the Person Act 1861, but in the offence of malicious wounding under section 20 of the same statute (for which no specific intent is required) the word does import on the part of the person who unlawfully inflicts the wound an awareness that his act may have the consequence of causing some physical harm to some person.[26]

"Wilfully" generally means something more than "intentional" or "voluntary." So in the context of "wilfully obstructing" a police officer in the execution of his duty (s. 51 (3) of the Police Act 1964), it "not only . . . means 'intentional' but something which is done without lawful excuse," and the exercise by an individual of his common law "right . . . to refuse to answer questions put to him by persons in authority, and to refuse to accompany those in authority to any particular place" was held to constitute such lawful excuse.[27] On the other hand, where a man fished solely for sport, replacing in the water every fish caught, he was held to have been rightly convicted of "unlawfully and wilfully" taking fish contrary to section 24 of the Larceny Act 1861, there being nothing to suggest that this statutory offence contained any of the elements of larceny.[28]

Master and servant

"While prima facie a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed."[29]

[26] *R.* v. *Mowatt* [1968] 1 Q.B. 421 *per* Diplock L.J. *Cf. R.* v. *Cunningham* [1957] 2 Q.B. 396.

[27] *Rice* v. *Connolly* [1966] 2 Q.B. 414, *per* Lord Parker C.J. at p. 419. *Cf. Eaton* v. *Cobb* [1950] 1 All E.R. 1016.

[28] *Wells* v. *Hardy* [1964] 2 Q.B. 447. For recent decisions on other expressions, see *R.* v. *Manners-Astley* [1967] 1 W.L.R. 1505 ("fraudulently"), and *Covington* v. *Wright* [1963] 2 Q.B. 469. ("with intent").

[29] *Mousell Brothers, Ltd.* v. *London & North-Western Ry. Co.* [1917] 2 K.B. 836, *per* Atkin J. at p. 845.

So, where the principal actor in a play, contrary to orders given by the theatre manager, departed from the stage directions and acted in an indecent manner, the manager was not guilty of "causing to be acted or presented" that part of the play which was not authorised by the Lord Chamberlain.[30]

But in many cases, particularly those involving occupiers of licensed premises, statutes have been held to give rise to vicarious liability,[31] and this is also true of offences of using or causing or permitting a vehicle to be used contrary to the Motor Vehicles (Construction and Use) Regulations.[32]

The Road Traffic Act 1960, s. 134 (3), for instance, makes it an offence for any person "being the holder of a road service licence wilfully or negligently" to fail to comply with any of the conditions attached to the licence. Although the words "wilfully and negligently" were words which had not appeared in any of the authorities in the matter, and although Cave J. in *Chisholm* v. *Doulton*[33] had said that when a word such as "negligently" which imports a condition of mind is used it refers to the state of mind of the master, it was held that section 134 (3) could give rise to vicarious liability. For, said Lord Parker C.J., the dictum of Cave J. "was in 1889, and there have been many decisions since then which show clearly that, even if some word is used which imports a frame of mind, yet it does not prevent the master from being liable for the acts of his servant provided the servant had that state of mind."[34]

These cases rest on what is called the "doctrine of delegation." This "is something quite independent of the principles which come into play when Parliament has created an absolute offence; when an absolute offence has been created by Parliament, then the person on whom a duty is thrown is responsible, whether he has delegated or whether he has acted through a servant; he is absolutely liable regardless of any intent or knowledge or *mens rea*. The principle of delegation comes into play, and only comes into play, in cases where, although the statute uses words which import knowledge or intent such as . . . 'knowingly' or . . . 'permitting' or 'suffering' and the like,

[30] *Lovelace* v. *D.P.P.* [1954] 1 W.L.R. 1468 (Theatres Act 1843, s. 15). *Cf. Grade* v. *D.P.P.* [1942] 2 All E.R. 118.
[31] *Allen* v. *Whitehead* [1930] 1 K.B. 211; *Linnett* v. *Commissioner of Metropolitan Police* [1946] K.B. 290.
[32] *James & Son, Ltd.* v. *Smee* [1955] 1 Q.B. 78.
[33] *Chisholm* v. *Doulton* (1889) 22 Q.B.D. 736.
[34] *G. Newton, Ltd.* v. *Smith* [1962] 2 Q.B. 278, at p. 284.

cases to which knowledge is inherent, nevertheless it has been held that a man cannot get out of his responsibilities which have been put on him by delegating those responsibilities to another."[35] If there has on the facts of the case been no delegation at all,[36] or, *a fortiori*, the words of the penal provision, read in the context of the Act as a whole, exclude any liability on the part of a master for his servants' activities,[37] vicarious liability will not arise. And, if a master is charged with aiding and abetting his servant to commit an offence, whatever its nature, a conviction can follow only if he actually knew of the facts out of which the offence arose.[38]

[35] *R.* v. *Winson* [1968] 2 W.L.R. 113, at p. 119.
[36] *Somerset* v. *Hart* (1884) 12 Q.B.D. 360.
[37] See *Vane* v. *Yiannopoullos* [1965] A.C. 486.
[38] *John Henshall (Quarries), Ltd.* v. *Harvey* [1965] 2 Q.B. 233.

Chapter 6

CONSTRUCTION TO PREVENT EVASION OR ABUSE

1. Construction to Prevent Evasion

"I never understand," said Lord Cranworth L.C. (at p. 89), "what is meant by evading an Act of Parliament. Either you are within the Act or you are not; if you are not within it, you are right; if you are within it, the course is clear, and it cannot be said that you are not within it because the very words of the Act may not have been violated."[1] On the other hand, there is no doubt that "the office of the Judge is, to make such construction as will suppress the mischief, and advance the remedy, and to suppress all evasions for the continuance of the mischief."[2] To carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined: *quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud.*[3]

This manner of construction has two aspects. One is that the courts, mindful of the mischief rule, will not be astute to narrow the language of a statute so as to allow persons within its purview to escape its net. The other is that the statute may be applied to the substance rather than the mere form of transactions, thus defeating any shifts and contrivances which parties may have devised in the hope of thereby falling outside the Act. When the courts find an attempt at concealment, they will, in the words of Wilmot C.J., "brush away the cobweb varnish, and shew the transactions in their true light."[4]

Cases in which the courts have refused to countenance evasion

In *Day* v. *Simpson*,[5] it was held that the Theatres Act 1843, which prohibited under a penalty the performance of plays without licence,

[1] *Edwards* v. *Hall* (1856) 6 De G.M. & G. 74.
[2] *Magdalen College Case* (1616) 11 Rep. 66b.
[3] *Cf. Jeffries* v. *Alexander* (1860) 8 H.L.C. 594, *per* Blackburn J.; *Philpott* v. *St. George's Hospital* (1857) 6 H.L.C. 338, *per* Lord Cranworth L.C.
[4] *Collins* v. *Blantern* (1767) 2 Wils. K.B. 347, at p. 852. *Cf. Armstrong* v. *Armstrong* (1834) 3 Myl. & K. 45, *per* Lord Brougham L.C.
[5] (1865) 34 L.J.M.C. 149.

would extend to a performance where the players did not come on the stage, but acted in a chamber below it, their figures being reflected by mirrors so as to appear to the spectators to be on the stage.

A statute which required in certain circumstances the insertion in a newspaper of a full apology for a libel was not complied with where the apology, though suitable in its terms, was printed in such a way as to be likely to escape the attention of ordinary readers.[6]

A scheme under which manufacturers were free, though not obliged, to notify to their secretary prices which they were minded to change, the secretary then notifying the other manufacturers participating in the scheme, was held to be an "arrangement" within the Restrictive Trade Practices Act 1956.[7] "All that is required to constitute an arrangement not enforceable in law is that the parties to it shall have communicated with one another in some way, and that as a result of the communication each has intentionally aroused in the other an expectation that he will act in a certain way."[8]

Whether a document ought to be registered under the Bills of Sale Acts is not concluded by its terms or form, but depends on the evidence of the real nature of the transaction and the intention of the parties.[9] Similarly, when the statutes against usury were in force, it was said that if a contract really was an usurious loan of money, the wit of man could not find a shift to take it out of the Act,[10] and accordingly transactions which were ostensibly sales of land,[11] or agencies,[12] or partnerships,[13] but were in reality usurious loans, were held to fall within the Act.

By section 2 (5) of the Matrimonial Proceedings (Magistrates' Courts) Act 1960: "In considering whether any, and if so what, provision should be included in a matrimonial order . . . for payments by one of the parties in respect of a child who is not a child of that party, the court shall have regard to the *extent*, if any, to which that party had, on or after the acceptance of the child as one of the family, assumed responsibility for the child's maintenance." The

Lafone v. *Smith* (1859) 28 L.J. Ex. 33.

[7] *Re Mileage Conference Group of the Tyre Manufacturers' Conference, Ltd.'s Agreement* (1966) L.R. 6 R.P. 49.

[8] *Re British Basic Slag, Ltd.'s Application* (1962) L.R. 3 R.P. 178, *per* Cross J. at p. 196; affirmed (1963) L.R. 4 R.P. 116.
Beckett v. *Tower Assets Co.* [1891] 1 Q.B. 638; *Maas* v. *Pepper* [1905] A.C. 102; *Johnson* v. *Rees* (1915) 84 L.J.K.B. 1276.

[10] *Floyer* v. *Edwards* (1774) 1 Cowp. 114, *per* Lord Mansfield C.J.

[11] *Doe* d. *Grimes* v. *Gooch* (1820) 3 B. & Ald. 664.

[12] *Harris* v. *Boston* (1810) 2 Camp. 248.

[13] *Gilpin* v. *Enderbey* (1822) 5 B. & Ald. 954 (deed found on facts to be not usurious).

argument that the word "extent" had here a temporal significance was rejected, Sir Jocelyn Simon P. saying that such a construction would mean that the sooner a party evaded his responsibilities, the greater his advantage.[14]

By section 15 of the Criminal Justice Act 1925: "Where in the course of a criminal trial any member of the jury dies or is discharged by the court as being through illness incapable of continuing to act or for any other reason, the jury shall nevertheless, subject to assent being given in writing by or on behalf of both the prosecutor and the accused," be regarded as properly constituted provided that the number of jurors does not fall below ten. In *R.* v. *Browne*,[15] it was held that where counsel on behalf of the accused signed a certificate under section 15, the court was entitled to presume that he did so with the consent of the prisoner, and that a prisoner who, realising what was happening, did not protest at the time, could not subsequently raise an objection. "It would be quite wrong," said Lord Parker C.J. (at p. 763), in the Court of Criminal Appeal, "to allow the defendant to sit back and to take the benefit of a favourable verdict and to come to this court if there was an unfavourable verdict and ask for a new trial."

By section 4 (1) of the Bankruptcy Act 1914, one of the circumstances in which a bankruptcy petition may be presented by a creditor is where the debtor "(*d*) . . . has carried on business in England, personally or by means of an agent or manager" within a year before the date of the petition. The Court of Appeal has refused to place a narrow construction on the words "carried on business," and has held that a debtor continues to carry on business in England until he has performed all the obligations which the fact of trading imposed on him, including his liability for income tax under Case I of Schedule D.[16]

In statutes dealing with betting and gaming, a strict literal construction has on occasion been rejected. In one case, in which roulette had been played at a club and a fixed charge of sixpence (regardless of the stake) was made on every bet and collected before the wheel was spun, the question was whether this was "a fixed sum of money determined before the gaming began" so as to be lawful within section 16 (7) (*b*) of the Betting and Gaming Act 1960. The Court of Appeal held that it was not. "In my judgment," said Lord

[14] *Roberts* v. *Roberts* [1962] P. 212.
[15] [1962] 1 W.L.R. 759.
[16] *Re Bird ex p. the Debtor* v. *I.R.C.*, [1962] 1 W.L.R. 686. *Cf. Theophile* v. *Solicitor-General* [1950] A.C. 186.

Denning M.R., "the gaming begins when the players come into the room and sit down to play. . . . It is when the playing begins, when the session begins, that the sum must be determined."[17]

Crickitt v. *Kursaal Casino, Ltd.* (*No.* 2),[18] a decision of the House of Lords, provides an excellent example of the court's having regard to the substance of a transaction. The case concerned roulette played with a zero. Since the bank took whatever had been staked when a zero resulted from the spin of the wheel, which made a so-called "evens" bet in fact one of eighteen to nineteen, the chances in the game were not equally favourable to all the players within section 32 (1) (*a*) (i) of the Betting, Gaming and Lotteries Act 1963. But the casino made genuine offers of the bank to the players, and claimed that they were therefore conducting the *gaming* so that the chances therein were equally favourable to all the players, which would make the gaming lawful within section 32 (1) (*a*) (ii). The House of Lords held that the substance of the matter should be considered to see whether the statutory requirements were fulfilled. Though the casino's offer was genuine, and so was a factor to be taken into account, yet if in practice it was almost never taken up, the fact that it was made would have little weight. On the facts of the present case, the offer did not convert the game, which was one in which the chances were inherently unequal, into gaming so conducted that the chances were equally favourable to all the players, for the casino had enjoyed the advantage of the bank for almost the whole period during which the gaming had been conducted in the manner in question, the offer of the bank having been accepted by players only twice during a period of more than five months.

Taxing Acts and "the substance"

Although statutes imposing pecuniary burdens are construed strictly in favour of those on whom the burden is sought to be imposed,[19] and in revenue statutes in particular the subject is aided by presumptions such as that against double taxation,[20] the question is primarily that of the "full and fair application of particular statutory language to particular facts as found. The desirability or

[17] *J. M. Allan (Merchandising), Ltd.* v. *Cloke* [1963] 2 Q.B. 340, at p. 347. But see *Mills* v. *Mackinnon* [1964] 2 Q.B. 96 (payment before each "shoe" held lawful).
[18] [1968] 1 W.L.R. 53. *Cf. Victoria Sporting Club* v. *Hannam* [1969] 2 W.L.R. 454.
[19] *Post*, pp. 256–258.
[20] *I.R.C.* v. *Clifforia Investments, Ltd.* [1963] 1 W.L.R. 396; *I.R.C.* v. *F.S. Securities, Ltd.* [1964] 1 W.L.R. 742. *Cf. Australian Mutual Provident Society* v. *I.R.C.* [1962] A.C. 135.

the undesirability of one conclusion as compared with another cannot furnish a guide in reaching a decision."[21] "So often, particularly in Tax Statutes, the spirit and intention of the Act . . . is subject to such uncertainty . . . that it may provide a misleading rather than a a reliable guide, and in any case affords a less certain guide than the construction of the words without a resort to conceptions of spirit and intention."[22] The language used is not to be either stretched, in favour of the Crown[23] or narrowed in favour of the taxpayer.[24] So where the court has to consider a provision expressly designed to prevent tax evasion, which uses unnecessarily wide language to achieve its purpose, that language will be given effect to even though the section is thereby made to apply to cases which it was probably never intended to catch.[25] And where a statute referred to the surveyor of taxes "discovering" an undercharge, the House of Lords could "see no reason for saying that a discovery of undercharge can only arise where a new fact has been discovered. The words are apt to include any case in which for any reason it newly appears that the taxpayer has been undercharged."[26]

Just as the courts will not narrow provisions designed to curb evasion, so they often apply ordinary charging sections with an eye to the substance of the transaction to be taxed rather than its form.[27]

For example, in *Bishop* (*Inspector of Taxes*) v. *Finsbury Securities, Ltd.*,[28] a company incorporated to carry on the business of dealing in stocks and shares entered into fifteen sets of transactions with other companies: these were "forward-stripping" arrangements, the object of which was to avoid tax. The question was whether the taxpayer companies acquired shares in these other companies in the course of its trade, so that it could say that it had sustained a loss in the course of its trade: Income Tax Act 1952, s. 341. By section 526, "trade" includes "every trade, manufacture, adventure or concern in

[21] *Shop and Store Developments, Ltd.* v. *I.R.C.* [1967] 1 A.C. 472, *per* Lord Morris of Borth-y-Gest at p. 493.
[22] *Mapp* (*Inspector of Taxes*) v. *Oram* [1968] 2 W.L.R. 267, *per* Ungoed-Thomas J. at p. 273.
[23] See *C.H.W.* (*Huddersfield*), *Ltd.* v. *I.R.C.* [1963] 1 W.L.R. 767; *I.R.C.* v. *Coutts & Co.* [1964] A.C. 1393; *Wm. Cory & Son, Ltd.* v. *I.R.C.* [1965] A.C. 1088.
[24] See *De Vigier* v. *I.R.C.* [1964] 1 W.L.R. 1073; *Ridge Nominees, Ltd.* v. *I.R.C.* [1962] Ch. 376, and *Westward Television* v. *Hart* [1968] 3 W.L.R. 480.
[25] *I.R.C.* v. *Jamieson* [1964] A.C. 1445.
[26] *Cenlon Finance Co., Ltd.* v. *Ellwood* (*Inspector of Taxes*) [1962] A.C. 782, *per* Viscount Simonds at p. 794.
[27] For the distinction between tax evasion and tax avoidance, see the discussion in *Odgers on the Construction of Deeds and Statutes*, 5th ed., pp. 466–473.
[28] [1966] 1 W.L.R. 1402.

the nature of trade."[28a] The House of Lords held that, as it was the essence of the transactions that the future interests of the vendors of the shares should be safeguarded and that the shares should be retained by the taxpayer company during the period of the transactions, the shares were not acquired for the purpose of dealing in shares and the transactions, although they were real and not sham, were wholly artificial devices to secure tax advantages, and were therefore not adventures or concerns in the nature of trade within the statutory definition.

In a case in which the question was whether a particular transaction was a "purchase" within section 3 (1) of the Finance Act 1894, Buckley J. said: "For this purpose, it is, I think, right to have regard to substance rather than form in this sense but no further; that is to say, conveyancing forms will not inhibit the court from holding the transaction to be a sale and purchase *if its true legal nature and effect, regarding the transaction as a whole, is that of a sale and purchase*, but it is insufficient merely to say that the effect of the transaction could have been achieved by a sale and purchase."[29]

The Court of Appeal in *Crossland (Inspector of Taxes)* v. *Hawkins*[30] had to consider section 397 (1) of the Income Tax Act 1952, which deals with settlements under which income is during the life of the settlor paid to a child of the settlor during any year of assessment. Section 397 (2) applies this provision to "every settlement" made after a certain date, and by section 403 " 'settlement' includes any disposition, trust, covenant, agreement, arrangement or transfer of assets." "The mere fact," said Holroyd Pearce L.J. (at pp. 553, 554), "that he did not concern himself with some of the 'steps' in the legal machinery involved does not make it any the less his arrangement within the section. A man does not avoid the incidence of section 397 by merely being absent from and leaving to his solicitors and accountants certain parts of the legal machinery if he is aware of the proposals for an 'arrangement' or a settlement and actively forwards them by personally carrying out and assisting in the vital parts in which his performance and co-operation are necessary. Nor can he avoid liability by merely giving his solicitors carte blanche to effect some scheme for the benefit of his family and refusing to concern himself with its precise form."

The substance rather than the form was, in a much more mundane

[28a] See *Wisdom* v. *Chamberlain* [1969] 1 All E.R. 332, *per* Salman J. at p. 337.
[29] *Re Harmsworth (deceased)* [1967] Ch. 826, at p. 833. [30] [1961] Ch. 537.

way, the deciding factor in *Commissioners of Customs and Excise* v. *H.G. Kewley, Ltd.*[31] It was held that kits comprising components for assembling into storage units came within the description "furniture" in the Finance Act 1958, Sched. 2, Group 11 (*b*), for furniture is nonetheless furniture although it is in parts.[31a]

Keeping outside the Act

It is, however, essential not to confound what is actually or virtually prohibited or enjoined by the statutory language with what is really beyond the enacting part, though it may be within the policy, of the Act: for it is only to the former case that the principle under consideration applies, and not to cases where, however manifest the object of the Act may be, the language is not fairly co-extensive with it. An Act of Parliament is always subject to evasion in this sense, for there is no obligation not to do what the legislature has not really prohibited nor to do what it has not really commanded. It is not evading an Act to keep outside it.[32]

Thus a hiring for a few days less than a year, though its avowed object was to prevent the servant from obtaining a settlement, was not regarded as any evasion of the Act which gave a settlement on a year's service.[33]

A shopkeeper who was licensed only to sell beer for consumption off the premises was held to be in breach of the relevant statute if he sold beer to be drunk on a bench which he provided for his customers close to the shop, the intention making it, virtually, a sale for consumption on the premises:[34] but a mere sale through a window to a person who stood on the road outside was held not to be an evasion, even though the buyer drank the beer immediately on receiving it.[35]

The occupier of a field adjoining a turnpike road successfully avoided payment of toll by making a semicircular road between two gaps in his hedge, one on each side of the toll bar, and driving by it instead of along that part of the highway which formed its chord.[36] Similarly, a shipowner avoided paying harbour dues by landing his goods some two hundred yards outside the boundary of the harbour,

[31] [1965] 1 W.L.R. 786. *Cf. Kenmir, Ltd.* v. *Frizzell* [1968] 1 W.L.R. 329 (Redundancy Payments Act 1965). [31a] See *Wisdom* v. *Chamberlain, supra*, n. 28a.

[32] *Edwards* v. *Hall* (1856) 6 De G.M. & G. 74, *per* Lord Cranworth L.C.; *Macbeth* v. *Ashley* (1874) L.R. 2 Sc. App. 352, *per* Lord Selborne.

[33] *R.* v. *Inhabitants of Little Coggleshall* (1817) 6 M. & S. 264.

[34] *Cross* v. *Watts* (1863) 32 L.J.M.C. 73.

[35] *Deal* v. *Schofield* (1867) L.R. 3 Q.B. 8. *Cf. Rogers* v. *Dodd* [1968] 1 W.L.R. 548 (coffee bar not "kept open" when hot dogs sold through window).

[36] *Harding* v. *Headington* (1874) L.R. 9 Q.B. 157.

through which his ship had passed (actually making use of some of the harbour installations) before docking.[37]

A railway company, which was prevented from raising money by loan, could lawfully procure money by selling a portion of its rolling-stock for the sum which it required, retaining the stock by hiring it for a term on payment of an annual sum which repaid the purchase-money with interest.[38]

In *Maclay* v. *Dixon*,[39] the owner of a cottage was only willing to let it on terms which would prevent the Rent Restriction Acts applying to the building. It was arranged that the proposed tenant should sell to the owner a number of articles of furniture, on the terms that they should be included in the letting and be repurchased by the proposed tenant when the letting came to an end. It was held that the parties had contracted for a furnished letting and had thereby prevented the Acts applying.

In *Chow Yoong Hong* v. *Choong Fah Rubber Manufactory*,[40] the Judicial Committee had to consider whether a transaction by which out-station cheques received by traders were exchanged for post-dated cheques. Was any profit arising "interest" within section 2 of the Malayan Moneylenders Ordinance 1951, which defined interest as including "any amount by whatsoever name called in excess of the principal payable or paid to the moneylender in consideration of or otherwise in respect of a loan"? Lord Devlin said (at pp. 216, 217) that their Lordships were, "of course, aware . . . that transactions of this sort can easily be used as a cloak for moneylending. The task of the court in such cases is clear. It must first look at the nature of the transaction which the parties have agreed. If in form it is not a loan, it is not to the point to say that its object was to raise money for one of them or that the parties could have produced the same result more conveniently by borrowing and lending money. But if the court comes to the conclusion that the form of the transaction is only a sham and that what the parties really agreed upon was a loan which they disguised, for example, as a discounting operation, then the court will call it by its real name and act accordingly." The present transaction was not caught by the statute: just because the defendants were in need of ready cash and the plaintiff supplied them with it and made a profit out of doing so, it did not follow auto-

[37] *Wilson* v. *Robertson* (1855) 24 L.J.Q.B. 185.
[38] *Yorkshire Railway Wagon Co.* v. *Maclure* (1882) 21 Ch.D. 309.
[39] [1944] 1 All E.R. 22.
[40] [1962] A.C. 209.

matically that there was a loan and a contract for its repayment.

Two groups of recent cases afford considerable hope for those who wish to "keep outside the statute" successfully.

One concerns "labour only" sub-contracting. By arranging to have work done by way of "labour only" sub-contracts, those who to all outward appearances are employer and employee in fact occupy the position of ordinary contractors.[41] Since many of the statutes dealing with industrial matters are dependent on the existence of an *employment*, the "employer" in such cases successfully avoids many of the obligations to which those engaging and paying workmen are normally subject. His workers will not get the benefit of the Trade Disputes Acts;[42] they will not be Class I contributors for National Insurance purposes;[43] he will not be obliged to give them notice of the particulars of their employment nor the statutory minimum periods of notice under the Contracts of Employment Act 1963; nor to pay levies under the Industrial Training Act 1964; nor to pay Selective Employment Tax; and he will not be subject to the Redundancy Payments Act 1965. And the "employee" will not be subject to the P.A.Y.E. system of collecting income tax, and, so far as setting expenses against earnings are concerned, will have the advantage of Schedule D, not Schedule E.

The second group of cases concerns the complex "re-financing" operations sometimes carried out in respect of vehicles which are already the subject of hire-purchase contracts. The object of the operation is the raising of a loan by the hirer, which he does by assigning away all his rights in the car which is eventually let to him under another hire-purchase agreement with a different finance company. The car probably never leaves his possession, and the "cash price" and "initial payment" under the second agreement will never actually be transferred in money. Nevertheless, his "sale" of the car is regarded as genuine, and not a sham: in effect money has been raised upon its security, yet there is not a chattel mortgage which would be subject to the Bills of Sale Acts.[44]

[41] *Emerald Construction Co.* v. *Lowthian* [1966] 1 W.L.R. 691; *Re C. W. & A. L. Hughes* [1966] 1 W.L.R. 1369; *Ready Mixed Concrete (South East), Ltd.* v. *Minister of Pensions and National Insurance* [1968] 2 Q.B. 497.

[42] See *Emerald Construction Co.* v. *Lowthian*, *supra*.

[43] *Ready Mixed Concrete (South East), Ltd.* v. *Minister of Pensions and National Insurance*, *supra*.

[44] *Snook* v. *London & West Riding Investments, Ltd.* [1967] 2 Q.B. 786. *Cf. Stoneleigh Finance, Ltd.* v. *Phillips* [1965] 2 Q.B. 537; *Kingsley* v. *Sterling Industrial Securities, Ltd.* [1967] 2 Q.B. 747.

2. Construction to Prevent Abuse of Powers

Enactments which confer powers are so construed as to meet all attempts to abuse them, and so the court will always be ready to inquire into the bona fides of a purported exercise of a statutory power.[45] The modern tendency seems to be against construing statutes so as to leave the person or body upon whom a power is conferred absolutely untrammelled in the exercise of it.[46] "A discretion," said Lord Wrenbury, "does not empower a man to do what he likes merely because he is minded to do so—he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reason directs. He must act reasonably."[47] In the words of Lord Macnaghten: "It is well settled that a public body invested with statutory powers . . . must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably."[48]

This approach to construction has two consequences: the statutory discretion must be truly exercised, and when exercised it must be exercised reasonably.

Statutory discretion must be exercised

First of all, then, there is a duty to exercise the discretion conferred by the statute in every case in which those upon whom it is conferred are called upon to exercise it: they may not fetter their own powers by self-imposed rules.[49] Thus, where an Act gave quarter sessions power, if the court thought fit, to give costs in every poor law appeal, the court was bound to exercise a fair and honest discretion in every case, and was not allowed to govern itself by a general resolution never to allow more than thirty or forty shillings, for this was in effect to repeal the provision of the Act.[50]

Similarly, although licensing justices are not limited as to the kind

[45] *Biddulph* v. *St. George's, Hanover Square, Vestry* (1864) 33 L.J.Ch. 411, *per* Turner L.J.; *Vernon* v. *St. James's, Westminster, Vestry* (1880) 16 Ch.D. 449.
[46] See the speeches in *Padfield* v. *Ministry of Agriculture, Fisheries and Food* [1968] A.C. 997.
[47] *Roberts* v. *Hopwood* [1925] A.C. 578, at p. 613.
[48] *Mayor, etc. of Westminster* v. *L. & N.W. Ry. Co.* [1905] A.C. 426, at p. 430.
[49] *R.* v. *Paddington and St. Marylebone Rent Tribunal* [1949] 1 K.B. 666.
[50] *R.* v. *Merionethshire Justices* (1844) 6 Q.B. 163; *R.* v. *Glamorganshire Justices* (1850) 19 L.J.M.C. 172.

of objection which they may entertain, they are bound to exercise their discretion in every case which comes before them. They cannot decide that they will automatically refuse all applications of a certain kind, but must hear and determine each application on its merits. So in one case the justices made it known that they would not hear applications for any new licences and, when an application for a new licence was made to them at the annual licensing meeting, they refused to hear the applicant. Mandamus issued to compel them to carry out their statutory duty to do so, for it was impossible for them to "exercise the discretion reposed in them unless they hear the facts and arguments which the applicant is prepared to adduce."[51] In the same way, they may not resolve to refuse all licences for public-houses where prostitutes obtain refreshments,[52] or to every applicant who is not also willing to take out an excise licence for the sale of spirits;[53] and they may not decide that they will never grant an occasional licence to the same applicant for more than two occasions in each year irrespective of the statutory consideration of whether it would be conducive to public convenience, comfort and order to do so.[54]

On the other hand, they may quite properly lay down general rules for their own guidance in exercising their discretion, provided that they are willing to consider in each particular case whether these rules should be applied. For "it is impossible to prevent [justices], in the privacy of their own room, from adopting any standard or practice which seems to them right, and if they do I think it is both right and convenient that they should state their practice publicly for the information of all concerned."[55] So, in *R.* v. *Torquay Licensing Justices*,[56] it was held that there was nothing wrong in justices, who were willing to deal with each application on its merits, declaring a general policy of unwillingness to grant full licences in place of restricted ones, unless special circumstances were shown.

The exercise of discretions must be reasonable

Even though an act done is ostensibly in execution of a statutory power and within its letter, it will nevertheless be held not to come

[51] *R.* v. *Walsall Justices* (1854) 18 J.P. 757, *per* Lord Campbell C.J.
[52] *Sharp* v. *Hughes* (1893) 57 J.P. 104, *per* Williams J.
[53] *R.* v. *Sylvester* (1862) 31 L.J.M.C. 93.
[54] *R.* v. *Rotherham Licensing Justices* (1939) 55 T.L.R. 718.
[55] *R.* v. *Holborn Licensing Justices* (1926) 42 T.L.R. 778, *per* Salter J at p. 781.
[56] [1951] 2 K.B. 784.

within the power if done otherwise than honestly and within the spirit of the enactment. A discretion is to be "regulated according to known rules of law,"[57] and not the mere whim or caprice of the person to whom it is entrusted on the assumption that he is discreet. "When," said Lord Halsbury L.C., "it is said that something is to be done within the discretion of the authorities . . . that something is to be done according to the rules of reason and justice, not according to private opinion; *Rooke's Case*;[58] according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself."[59]

"It is true," said Lord Greene M.R. in *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corporation*,[60] "the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably.' " But a decision can be called unreasonable only if it is "proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether."

Under section 62 of the Metropolis Management Act 1855, a borough council "shall . . . employ . . . such . . . servants as may be necessary, and may allow to such . . . servants . . . such wages as [it] may think fit." In *Roberts* v. *Hopwood*,[61] the House of Lords held that this did not give the local authority power to pay such wages as in good faith it thought fit, but only such wages as were in the circumstances reasonable: the House considered that to pay both

[57] *Lee* v. *Bude & Torrington Junction Ry. Co.* (1871) L.R. 6 C.P. 576, *per* Willes J. at pp. 580, 581.
[58] (1598) 5 Rep. 99b.
[59] *Sharp* v. *Wakefield* [1891] A.C. 173, at p. 179. *Cf. Westminster Bank, Ltd.* v. *Beverley Borough Council* [1968] 3 W.L.R. 671 *per* Diplock L.J. at 684.
[60] [1948] 1 K.B. 223, at p. 229. [61] [1925] A.C. 578.

men and women employees a minimum weekly wage of £4 (in 1922) was unreasonable, Lord Atkinson saying (at p. 594) that the council would fail in their duty if they "allowed themselves to be guided . . . by some eccentric principles of socialistic philanthropy, or by a feminist ambition to secure the equality of the sexes in the matter of wages in the world of labour." The council must have regard to the interests of its ratepayers, to whom it stood "somewhat in the position of trustees or managers of the property of others."

In another case, Birmingham Corporation operated a transport undertaking under local Acts which authorised it to charge fares for the conveyance of passengers: and, by virtue of section 104 (1) of the Road Traffic Act 1930, the local authority "may demand and take for passengers and parcels . . . such fares and charges as they may think fit." The Corporation decided to provide free transport for certain classes of old persons, the cost to be borne by the general rate fund. The Court of Appeal held that, since it was implicit in the local Acts that the Corporation owed a duty to the ratepayers to conduct their transport undertaking substantially on business lines, "it must necessarily follow that, in adopting the [free transport] scheme, the [Corporation] misapprehended the nature and scope of the discretion conferred on them, and mistakenly supposed that it enabled them to confer benefits, in the shape of rights of free travel, on any class or classes of the local inhabitants appearing to them to be deserving of such benefits by reason of their advanced age and limited means."[62]

By section 23 of the Municipal Corporations Act 1882, "the council may from time to time make such bye-laws as to them seem meet for the good rule and government of the borough, and for the prevention and suppression of nuisances." In *Kruse* v. *Johnson*,[63] Lord Russell of Killowen C.J. said (at pp. 99, 100) that the Court might condemn bye-laws made under the authority of this provision "as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.' "

[62] *Prescott* v. *Birmingham Corporation* [1955] Ch. 210, *per* Jenkins L.J. at pp. 237, 238.
[63] [1898] 2 Q.B. 91.

So in *Johnson* v. *Croydon Corporation*,[64] it was held that a bye-law prohibiting music other than military music in the streets of the borough on Sunday was unreasonable, on the ground that it did not require evidence of annoyance being caused. In another case, under a power to make bye-laws "for the good rule and government of the county," a county council prohibited the use of any profane or obscene language "in any street or public place, or on land adjacent thereto." The prohibition was successfully attacked on the ground of unreasonableness so far as it extended to the "land adjacent." Lindley L.J. said that the provision went "far beyond what is necessary for the good government of the county. Such a provision would cover the case of a man swearing in a passion in his own stable-yard, or even, as I think, in his own house, and its enforcement would really be tyranny. I have no doubt whatever that those words are bad."[65]

But bye-laws are to be " 'benevolently' interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. . . . Courts of justice ought to be slow to condemn as invalid any bye-law . . . on the ground of supposed unreasonableness."[66] So it has been held reasonable to forbid the keeping of pigs within a hundred feet of a dwelling-house in a populous place;[67] to prohibit burials within a hundred yards of public buildings, dwelling-houses or public roads;[68] and to forbid any person to "sound or play upon any musical or noisy instrument or sing in any public place or highway within fifty yards of any dwelling-house after being required by any constable, or by an inmate of such house personally, or by his or her servant, to desist."[69]

It has been held not unreasonable for a corporation to take the view that the use of motor vehicles might be attended with serious danger in a park frequented by young children and having rather narrow roads, and so a bye-law forbidding any motor-car to pass through any part of the park at any time was upheld.[70] Similarly, in *Ireland* v. *Wilson*,[71] the Divisional Court upheld a bye-law under which "every driver of a motor hackney carriage [in Liverpool] shall

[64] (1886) 16 Q.B.D. 708.
[65] *Strickland* v. *Hayes* [1896] 1 Q.B. 290, at p. 292. *Cf. Arlidge* v. *Mayor, etc., of Islington* [1909] 2 K.B. 127; *Repton School Governors* v. *Repton R.D.C.* [1918] 2 K.B. 133.
[66] *Kruse* v. *Johnson* [1898] 2 Q.B. 91, *per* Lord Russell of Killowen C.J. at p. 98.
[67] *Wanstead Local Board of Health* v. *Wooster* (1873) 38 J.P. 21.
[68] *Slattery* v. *Naylor* (1888) 13 App.Cas. 446.
[69] *Kruse* v. *Johnson*, *supra*.
[70] *Att.-Gen.* v. *Hodgson* [1922] 2 Ch. 429.
[71] [1936] 3 All E.R. 358.

when working or plying for hire keep himself sober clean and decently clothed, and conduct himself in a proper civil and decorous manner at all times and no driver shall smoke tobacco or any such like substance when driving such carriage." And in *Townsend (Builders) Ltd.* v. *Cinema News and Property Management Ltd.*,[72] the Court of Appeal refused to reject as unreasonable a bye-law which required a builder constructing a water-closet in connection with a building to "comply with the following requirements. . . . Such water-closet shall not be situated within nor entered from any room used for human habitation," with an exception relating to a water-closet used exclusively with a bedroom. Lord Evershed M.R. (at p. 122) cited the passage from Lord Russell's judgment in *Kruse* v. *Johnson*[73] on the "benevolent" interpretation of bye-laws, and added "that a court will be all the slower to hold invalid bye-laws in proceedings to which the local authority concerned are not parties."

Conditions may be attached to the grant of a site licence by a local authority under their statutory power to issue the licence "subject to such conditions as the authority may think it necessary or desirable to impose on the occupier of land in the interests of persons dwelling thereon in caravans, or any other class of persons, or of the public at large" (s. 5 (1) of the Caravan Sites and Control of Development Act 1960). In one case a local authority attached to a site licence conditions requiring that the site rents should be agreed with the council, that security of tenure should be granted to all caravan occupiers, that no restriction should be placed on the persons from whom occupiers purchased commodities or who called on them for purposes of trade or pleasure, and that existing caravan occupiers purchasing new caravans should not be compelled in any way to purchase a particular make of caravan or from a particular dealer. These were all said by Lord Upjohn to "involve such oppressive or gratuitous interference with the rights of the occupier subject to them that they can find no justification in the minds of reasonable men": consequently, they were held by the House of Lords to be invalid.[74]

Section 14 (1) of the Town and Country Planning Act 1947 provided that a local authority "may grant permission [for development] either unconditionally or subject to such conditions as they think fit." This did not confer an uncontrollable discretion on the local

[72] [1959] 1 W.L.R. 119.
[73] [1898] 2 Q.B. 91.
[74] *Chertsey U.D.C.* v. *Mixnam's Properties, Ltd.* [1965] A.C. 735, at p. 765.

authority, and so the Court of Appeal in one case held that a condition requiring an applicant to "construct an ancillary road over the entire frontage of the site at their own expense . . . and [to] give right of passage over it" was unreasonable. Its effect was to require an applicant to construct a road on his own land and virtually to dedicate it to the public without any payment being made by the local authority, while a more regular course for constructing a road at public expense, under which compensation for compulsory acquisition would be payable, was open to the local authority under the Highways Act 1959.[75]

[75] *Hall & Co., Ltd.* v. *Shoreham-by-Sea U.D.C.* [1964] 1 W.L.R. 240. *Cf. Westminster Bank, Ltd.* v. *Beverley Borough Council* [1968] 3 W.L.R. 871; *Kingsway (Investments) (Kent), Ltd.* v. *Kent County Council* [1969] 2 W.L.R. 249.

CHAPTER 7

PRESUMPTIONS REGARDING JURISDICTION

1. PRESUMPTION AGAINST OUSTING ESTABLISHED JURISDICTIONS

A STRONG leaning exists against construing a statute so as to oust or restrict the jurisdiction of the superior courts. Although this feeling may owe its origin to the contests for jurisdiction between the various courts in former times,[1] when the judges' emoluments depended mainly upon fees, "the well-known rule that a statute should not be construed as taking away the jurisdiction of the courts in the absence of clear and unambiguous language to that effect"[2] now rests on a reluctance to disturb the established state of the law or to deny to the subject access to the seat of justice. "The proper tribunals for the determination of legal disputes in this country are the courts and they are the only tribunals which, by training and experience, and assisted by properly qualified advocates, are fitted for the task."[3] "Any one bred in the tradition of the law," said Viscount Simonds, "is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal."[4] "It is," he said in another case, "a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is, as McNair J. called it in *Francis* v. *Yiewsley and West Drayton Urban District Council*,[5] a 'fundamental rule' from which I would not for my part sanction any departure."[6]

Recently, the rule has been stated somewhat more elaborately by Diplock L.J. in *Anisminic, Ltd.* v. *The Foreign Compensation Tribunal.*[7]

[1] See *Scott* v. *Avery* (1856) 5 H.L.Cas. 811, *per* Lord Campbell C.J. (arbitration clause in contract).
[2] *Commissioners of Customs and Excise* v. *Cure & Deeley, Ltd.* [1962] 1 Q.B. 340, *per* Sachs J. at p. 357.
[3] *Lee* v. *Showmen's Guild of Great Britain* [1952] 2 Q.B. 329, *per* Romer L.J. at p. 354.
[4] *Smith* v. *East Elloe R.D.C.* [1956] A.C. 736, at p. 750.
[5] [1958] 1 Q.B. 478.
[6] *Pyx Granite Co., Ltd.* v. *Ministry of Housing and Local Government* [1960] A.C. 260, at p. 286.
[7] [1968] 2 Q.B. 862; reversed [1969] 2 W.L.R. 183.

Where a statute passed after the establishment of the High Court of Justice "confers or imposes on any individual, when a situation described in the statute exists, a new right or a new liability which the executive branch of government will enforce, it is a question of construction of that statute (*a*) whether jurisdiction to determine whether or not that situation exists in the case of a particular individual is conferred upon the High Court or upon some inferior tribunal and, if upon the latter, (*b*) whether or not jurisdiction is conferred upon the High Court to correct the determination of the inferior tribunal for 'errors within jurisdiction.' If the statute contains no express provision as to (*a*), the intention of Parliament is presumed to be that the High Court shall have jurisdiction to determine whether the described situation exists or not." If, however, the statute expressly confers this jurisdiction on the inferior tribunal, "the intention of Parliament as to (*b*) is presumed to be that the High Court shall have jurisdiction to correct the determinations of the inferior tribunal for 'errors within jurisdiction,' unless the statute contains provisions which expressly deprive the High Court of jurisdiction of this kind."

Cases in which the presumption against ousting jurisdiction has been applied

Thus, in one old case it was held that an Act which provided that, if any question arose upon taking a distress, it should be determined by a commissioner of taxes, did not take away the jurisdiction of a superior court to try an action for an illegal distress.[8] In another, it was held that the court was not deprived of its preventive jurisdiction to stop by injunction the misapplication of poor rates by reason of the statutory power given to the Poor Law Commissioners to determine the propriety of all such expenditure.[9]

Section 12 (3) of the Matrimonial Causes Act 1950 provided that if the spouse obtaining a decree *nisi* of divorce did not make an application for it to be made absolute six months after the trial, then the other spouse could make application within a further period of three months and, if the circumstances warranted, obtain a decree absolute. The Court of Appeal held that this did not oust the jurisdiction of the court to substitute a decree of judicial separation for a decree *nisi*: "had it been the intention of the legislature to

[8] *Earl of Shaftesbury* v. *Russell* (1823) 1 B. & C. 666.
[9] *Att.-Gen.* v. *Guardians of the Poor of Southampton* (1849) 17 Sim. 6.

revoke this jurisdiction, it would have been done in a clearer way than by inference from the subsection."[10]

Similarly, in *Re S. (an infant)*,[11] the Court of Appeal held that section 1 of the Children Act 1948, under which a local authority may take a child into its care, does not preclude the Chancery Division "by virtue of its jurisdiction in representing the Crown as *parens patriae*," from interfering with a decision made by the local authority regarding a child in its care.

The fact that jurisdiction is conferred on one authority does not necessarily take away jurisdiction which another already possesses in the same matter. So a provision which enabled the Special Commissioners to collect tax at source in a particular way did not destroy the existing jurisdiction of the General Commissioners to collect it in another way.[12]

Many modern statutes contain provisions which attempt to remove decisions of Ministers or tribunals from review by the courts by making these decisions "final" or "conclusive." The use of such words was discussed by Denning L.J. in *R.* v. *Medical Appeal Tribunal ex p. Gilmore*:[13] "The remedy by certiorari is never to be taken away by statute except by the most clear and explicit words. The word 'final' is not enough. That only means 'without appeal.' It does not mean 'without recourse to certiorari.' It makes the decision final on the facts, but not final on the law. Notwithstanding that the decision is by a statute made 'final,' certiorari can still issue for excess of jurisdiction or for error of law on the face of the record."

A leading case on the attempted exclusion of judicial review is *Pyx Granite Co., Ltd.* v. *Minister of Housing and Local Government*.[14] The appellant company sought a declaration that it did not require development permission for the carrying on of certain quarrying operations. Section 17 of the Town and Country Planning Act 1947 provided that if any person who wished to carry out "any operations

[10] *Dove* v. *Dove* [1963] P. 321, *per* Ormerod L.J. at p. 326. *Cf. Hall* v. *Hall* [1963] P. 378: jurisdiction *conferred* by s. 26 (1) of the same Act not to be ousted by parties' instituting wardship proceedings.

[11] [1965] 1 W.L.R. 483. *Re M. (an infant)* [1961] Ch. 328, *post*, pp. 165–166, distinguished on the ground that it dealt with s. 2 of the same Act, which gives the local authority power to make an order vesting in itself all the rights and powers of the natural parents.

[12] *Grosvenor Place Estates, Ltd.* v. *Roberts (Inspector of Taxes)* [1961] Ch. 148, *per* Donovan L.J.

[13] [1957] 1 Q.B. 574, at p. 583.

[14] [1960] A.C. 260.

on land . . . wishes to have it determined . . . whether an application for permission in respect thereof is required under this Part of the Act . . . he may . . . apply to the local planning authority to determine that question." An appeal lay to the Minister (who might also "call in" the question before the local authority had come to its decision), and his determination was expressed to be final.[15] The House of Lords held that the provision by the Act of a special procedure for cases of this sort, and the statutory "finality" of the Minister's decision, did not take away by implication "the old and, as we like to call it, the inalienable remedy of Her Majesty's subjects to seek redress in her courts."[16]

In *Francis* v. *Yiewsley and West Drayton Urban District Council*,[17] a person served with an enforcement notice under section 23 of the 1947 Act did not avail himself of the right of appeal to a court of summary jurisdiction given by section 23 (4), but applied to the High Court for a declaration that the enforcement notice was invalid. It was held that he was not precluded by the statutory provision of an appeal procedure from seeking relief in this manner.

A provision that the decision of the Home Secretary on an appeal by a chief constable against his dismissal by the watch committee was to be "final and binding on the parties" did not oust the jurisdiction of the courts where the decision of the committee in the first place had been vitiated by failure to observe the rules of natural justice.[18]

Tribunals and Inquiries Act 1958

Statutes passed before August 1, 1958 must now be read in the light of section 11 (1) of the Tribunals and Inquiries Act of that year.[19] This provides that any provision in such statutes "that any order or determination shall not be called into question in any court, or any provision in such an Act which by similar words excludes any of the powers of the High Court, shall not have effect so as to prevent the removal of the proceedings into the High Court by order of certiorari or to prejudice the powers of the High Court to make orders of mandamus." By section 11 (3), this section is not to apply

[15] ss. 15 (3), 16 (2).
[16] *Per* Viscount Simonds at p. 286.
[17] [1958] 1 Q.B. 478.
[18] *Ridge* v. *Baldwin* [1964] A.C. 40.
[19] This applies to England and Wales and (apart from matters with respect to which the Parliament of Northern Ireland has legislative authority) to Northern Ireland. S. 11 (2) contains corresponding provisions for Scotland.

to statutes which make provision for applications to the High Court to be made within a specified time. And it has no effect on statutes which oust a remedy by way of declaration.

Plain words will oust the jurisdiction of the High Court

The Acquisition of Land (Authorisation Procedure) Act 1946, Sched. I, Part IV, para. 15 (1), provided for the challenging of a compulsory purchase order by "any person aggrieved" on specified grounds, by application to the High Court within a specified time. By paragraph 16: "Subject to the provisions of the last foregoing paragraph, a compulsory purchase order . . . shall not, either before or after it has been confirmed, made or given, be questioned in any legal proceedings whatsoever." The House of Lords held, by a bare majority, that paragraph 16 effectively ousted the jurisdiction of the courts even where the order was challenged on the ground that it had been made and confirmed wrongfully and in bad faith. Viscount Simonds said that the principles that the legislature could not be assumed to have intended to oust the jurisdiction of the courts, particularly where fraud was alleged, except by clear words, and that a statute should, if possible, be construed so as to avoid injustice did not "override the first of all principles of construction, that plain words must be given their plain meaning. There is nothing ambiguous about paragraph 16." Lord Radcliffe said that "whatever innocence of view may have been allowable to the lawyers of the eighteenth and nineteenth centuries, the twentieth century lawyer is entitled to few assumptions in this field. It is not open to him to ignore the fact that the legislature has often shown indifference to the assertion of rights which courts of law have been accustomed to recognise and enforce, and that it has often excluded the authority of courts of law in favour of other preferred tribunals.": *Smith* v. *East Elloe R.D.C.* [1956] A.C. 736.

Ouster of jurisdiction may even be effected by implication. In one notorious case, the Home Secretary had power under regulations to order the detention of any person whom he had "reasonable cause to believe . . . to be of hostile origin or associations": the House of Lords held that the Secretary of State could not be called upon to disclose and defend the grounds on which he made the order.[21]

One question which has given rise to a considerable amount of

[20] But see now *Anisminic, Ltd.* v. *Foreign Compensation Commission* [1969] 2 W.L.R. 163. [21] *Liversidge* v. *Anderson* [1942] A.C. 206.

case-law is whether the conferring by a statute of a particular remedy will impliedly deprive the person entitled to that remedy of his common law right to proceed in the High Court. In *Barraclough* v. *Brown*,[22] the statutory undertakers of a harbour were empowered to remove any vessel sunk in the harbour, and to recover the expenses of doing so from the owners in a court of summary jurisdiction. It was held that they could not recover the expenses as damages at common law in the High Court, nor could they have a declaration that, on the true interpretation of the Act, they were entitled to their expenses. "I do not think," said Lord Herschell (at p. 620), "the appellant can claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right."

This decision was distinguished by the House of Lords in the *Pyx Granite* case.[23] The statute in *Barraclough* v. *Brown* had given the undertakers a right against a third party who was not otherwise liable, in a court of summary jurisdiction. As Lord Watson said (at p. 622): "The right and remedy are given *uno flatu*, and the one cannot be dissociated from the other." The circumstances in the *Pyx Granite* case were, said Viscount Simonds (at p. 287), "far different. The appellant company are given no new right of quarrying by the Act of 1947. Their right is a common law right and the only question is how far it has been taken away. They do not *uno flatu* claim under the Act and seek a remedy elsewhere. On the contrary, they deny that they come within its purview and seek a declaration to that effect."

Thus, it was provided under sections 40 to 49 of the Local Government Act 1948 that the remedy of a person aggrieved by a valuation was to ask the valuation officer for an alteration in the valuation list; thence he could go to the local valuation court; thence to the Lands Tribunal; thence, on a point of law, to the Court of Appeal; and finally, with leave, to the House of Lords. It was argued that persons aggrieved could not use the remedies of certiorari and mandamus, since Parliament had provided a code of procedure specially designed to deal with their grievances. But the Court of Appeal held that the existence of the statutory procedure was no bar to the application to the High Court, for the case fell "within the

[22] [1897] A.C. 615.
[23] [1960] A.C. 260.

general principle that the jurisdiction of the High Court is not to be taken away without express words."[24]

On the other hand, a claim for unemployment benefit cannot be pursued by a summons for a declaration in the High Court, the National Insurance Act 1946 and regulations made thereunder having established their own machinery for the determination of claims;[25] where the legislature has made express provision for the determination of certain questions arising in arbitrations under the Agricultural Holdings Acts by the county court, the High Court has no concurrent jurisdiction in the matter;[26] and where the Small Dwellings Acquisition Act 1899 gave a local authority "a novel remedy, quite different from the remedies of a mortgagee at law or in equity" and provided that such remedy should be available in the county court, Pennycuick J. held that it could not be sought in the High Court.[27] Similarly, where "section 341 [of the Income Tax 1952] confers a right, the right to an adjustment of tax liability by reference to loss, [and], *uno flatu*, in the same breath, gives a specific remedy and appoints a specific tribunal for its enforcement, namely the General Commissioners or Special Commissioners . . . the taxpayer must resort to that remedy and that tribunal," and not to the High Court.[28]

2. Presumption Against Creating New, and Enlarging Existing Jurisdictions

It is also presumed that a statute does not create new jurisdictions or enlarge existing ones, and express language is required if an Act is to be interpreted as having this effect.[29] Thus a statute (s. 7 of the Admiralty Court Act 1861) which conferred on a court jurisdiction

[24] *R.* v. *Paddington Valuation Officer, ex p. Peachey Property Corporation, Ltd.* [1966] 1 Q.B. 380, *per* Denning M.R. at p. 400. Earlier cases were distinguished on the ground that they were concerned with particular assessments within a valid valuation list (in which case the procedure provided by Parliament must be followed), not with the basis on which the whole list was made up: *Pasmore* v. *Oswaldtwistle U.D.C.* [1898] A.C. 387; *R.* v. *City of London Assessment Committee* [1907] 2 K.B. 764; *Stepney B.C.* v. *John Walker & Sons, Ltd.* [1934] A.C. 365.

[25] *Punton* v. *Ministry of Pensions and National Insurance* (*No. 2*) [1964] 1 W.L.R. 226. See now National Insurance Act 1965.

[26] *Jones* v. *Pembrokeshire County Council* [1967] 1 Q.B. 181 *Cf. Re Jones and Carter's Application* [1922] 2 Ch. 599; *Att.-Gen. of the Duchy of Lancaster* v. *Simcock* [1966] Ch. 1.

[27] *Alnwick R.D.C.* v. *Taylor* [1966] Ch. 355.

[28] *Argosam Finance Co., Ltd.* v. *Oxby* (*Inspector of Taxes*) [1965] Ch. 390, *per* Plowman J. at p. 400.

[29] *Att.-Gen.* v. *Sillem* (1864) 10 H.L.C. 704; *Re Downshire Settled Estates* [1953] Ch. 218; *The St. Merriel* [1963] P. 247; *Re T.'s Settlement Trusts* [1964] Ch. 158. *Cf. The Retarded Children's Aid Society, Ltd.* v. *Barnet London B. C.* [1969] 2 W.L.R. 65.

over "any claim for damage done by any ship" was held not to confer on it jurisdiction over actions for personal injuries sustained in collisions at sea. Sir Alexander Cockburn C.J. said that it was "impossible to suppose that the legislature can have intended, under a general enactment . . . as it were by a side-wind, to effect so material a change in the rights and relative positions of the parties concerned in such an action."[30] And in the case of *The Vera Cruz*[31] the House of Lords held that the same enactment did not transfer to the Court of Admiralty jurisdiction over actions under the Fatal Accidents Act 1846. The Earl of Selborne L.C. (at p. 68) based the decision on the broad principle that "if anything be certain it is this, that where 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."

This presumption was applied by the Court of Appeal in construing section 1 of the Matrimonial Causes (Property and Maintenance) Act 1958. This provided that "any power of the court, under the enactments mentioned in the next following subsection, to make an order on a decree for divorce, nullity of marriage or judicial separation shall . . . be exercisable either on pronouncing such a decree or at any time thereafter." It was held that "the section merely enlarges the time within which an existing power of the court may be exercised. . . . If the legislature had intended to confer a new right to make a second application for maintenance in a case where a previous application had been dismissed, it would be reasonable to expect that such a provision would have been expressed in clear and unambiguous terms."[32]

Similarly, a statute giving power to a court to grant relief "on being satisfied" of certain facts does not confer on it any power to grant interim relief until the facts have been ascertained.[33] And the provision in section 1 (4) of the Administration of Justice Act 1960 that "for the purpose of disposing of an appeal under this section the

[30] *Smith* v. *Brown* (1871) L.R. 6 Q.B. 729, at p. 733: pointing out that the transfer of such actions to the Admiralty Court would deprive the parties of the common law mode of trial, and subject their substantive rights to doctrines (e.g., that of contribution) unknown at common law.

[31] (1884) 10 App.Cas. 59.

[32] *L.* v. *L.* [1962] P. 101, *per* Willmer L.J. at p. 118.

[33] *Re Heathstar Properties, Ltd.* [1966] 1 W.L.R. 993.

House of Lords may exercise any powers of the court below" does not authorise the House to exercise the power of the Divisional Court or Court of Appeal (Criminal Division) to certify that a point of law of general public importance is involved in its decision in a criminal cause or matter.[34]

Where, however, the words of the Act clearly and unambiguously confer jurisdiction, they must be given their full effect. Proviso (2) to section 5 of the Debtors Act 1869 enacts that "for the purposes of this section any court may direct any debt due from any person in pursuance of any order or judgment of that or any other competent court to be paid by instalments, and may from time to time rescind or vary such order." It was held that although this did not authorise a county court judge to revoke an order of committal for debt (he then being *functus officio*),[35] there was ample jurisdiction under the words of the section to enable the judge to increase or reduce the amount of the instalments payable according to the circumstances existing from time to time.[36]

3. How Far Statutes Affect the Crown

The Crown is not bound by a statute unless it is directly or by necessary implication referred to or, perhaps, the statute is one which does not touch the rights or property of the Crown: legislation is presumed to be for subjects only. "Since laws are made by rulers for subjects," said Diplock L.J., "a general expression in a statute such as 'any person,' descriptive of those upon whom the statute imposes obligations or restraints is not to be read as including the ruler himself."[37] Or, as was said more than four hundred years earlier, "when the King gives his assent he does not mean to prejudice himself or to bar himself of his liberty and his privilege, but he assents that it shall be a law among his subjects."[38] This last proposition was, however, thought by Wrottesley J. to be perhaps an overstatement of the position of the Crown. "The true rule is probably . . . more likely that it is not that the Crown merely legislates for its subjects but that very often the Crown legislates for itself and its subjects, and that, when the legislation in question is one which

[34] *Gelberg* v. *Miller* [1961] 1 W.L.R. 459. *Cf. R.* v. *Jefferies* [1969] 1 Q.B. 120.
[35] *Wiltshire* v. *Fell* [1960] 1 Q.B. 181.
[36] *J. Cooke & Sons, Ltd.* v. *Binding* [1961] 2 Q.B. 200. *Cf. Re Wholesale Confectioners Alliance's Agreement (No. 2)* (1961) L.R. 2 R.P. 231.
[37] *British Broadcasting Corporation* v. *Johns (Inspector of Taxes)* [1965] Ch. 32, at p. 78.
[38] *Willion* v. *Berkley* (1562) 1 Plowd. 223. *Cf. Att.-Gen.* v. *Donaldson* (1842) 11 L.J.Ex. 338.

would otherwise affect, or which would affect, the Crown's rights, interests and prerogatives, then the Act does not apply to the Crown unless the Crown is specially named in that sense."[39]

This presumption extends to the Crown's servants and agents as well as to the Crown itself,[40] but there are many persons and bodies whose position as servants or agents of the Crown is not altogether clear. A relatively simple case is that of Trinity House. This is "nothing more than an amalgamation by authority of state of a vast number of bodies having general authority over the lighthouses and beacons and buoys throughout the country for the general convenience. It is a corporation with very great powers vested in it by statute, but in no possible sense can it be deemed to represent the Crown. All the great officers of state are . . . emanations from the Crown. They are delegations by the Crown of its own authority to particular individuals. That is not the case with Trinity House, which has its nature and origin defined with sufficient clearness to enable us to say that at any rate it is in no sense an emanation from the Crown, nor in any way whatever a participant of any royal authority."[41]

The test seems to be the nature of the function performed by the person or body in question. Defence is indubitably a function of the Crown, and so a territorial association has been held entitled to exemption from the operation of statute when it acts in pursuance of Crown purposes, not only in so far as it occupies or seeks to occupy land or buildings by itself or its staff,[42] but also in exercising its statutory powers to lease redundant or unused premises to members of the public.[43] On the other hand, the British Transport Corporation was held to be in no sense a servant or agent of the Crown,[44] and since broadcasting is not a province of government and the British Broadcasting Corporation was an independent body corporate which was not exercising functions created by the government, it was held by the Court of Appeal not to be entitled to immunity from payment of income tax.[45] If, however, "Parliament intends that a new cor-

[39] *Att.-Gen.* v. *Hancock* [1940] 1 K.B. 427; the quotation is from the report in [1940] 1 All E.R. 32, at p. 34.

[40] *Commissioners of Public Works* v. *Pontypridd Masonic Hall Co., Ltd.* [1920] 2 K.B. 233; *Bank voor Handel en Scheepvaart N.V.* v. *Administrator of Hungarian Property* [1954] A.C. 584.

[41] *Gilbert* v. *Corporation of Trinity House* (1886) 17 Q.B.D. 795, *per* Day J. at p. 801.

[42] *Territorial Forces Association* v. *Philpot* [1947] 2 All E.R. 376.

[43] *Territorial & Auxiliary Forces Association of the County of London* v. *Nichols* [1949] 1 K.B. 35: the headnote is unhelpful on this point.

[44] *Tamlin* v. *Hannaford* [1950] 1 K.B. 18.

[45] *British Broadcasting Corporation* v. *Johns* (*Inspector of Taxes*) [1965] Ch. 32.

poration should act on behalf of the Crown [and] says so expressly, as it did in the case of the Central Land Board by the Town and Country Planning Act 1947,"[46] this will, of course, conclude the matter.

Cases in which the presumption that legislation does not affect the Crown has been applied

On several occasions it has been held that the Crown is not bound by Rent Restriction Acts.[47]

The Land Transfer Act 1897, which vested the legal estate in land in the personal representatives of a deceased person, did not bind the Crown, and the legal estate in escheated land did not, under section 1, vest in the Solicitor to the Treasury as the Crown's nominee.[48]

As it is a prerogative of the Crown not to pay tolls, rates or other burdens in respect of property, it was long ago established that the Poor Relief Act 1601, which authorised the imposition of a poor rate on every "inhabitant and occupier" of property in a parish did not apply to the Crown, or to its direct and immediate servants, whose occupation was for the purposes of the Crown exclusively.[49] So property occupied by the servants of the Crown exclusively for public purposes, as by the Post Office,[50] or a territorial association,[51] as a court-house,[52] or as a prison,[53] was all held exempt and is not now rateable to the general rate.

The Locomotives Act 1865, s. 4, which regulated the speed of locomotives on highways, was held not to bind the Crown.[54]

The Custodian of Enemy Property, being a Crown servant, was held not liable to tax on the interest obtained by investing the property in his possession.[55]

[46] *Tamlin* v. *Hannaford, supra, per* Denning L.J. at p. 25.
[47] *Clark* v. *Downes* (1931) 145 L.T. 20; *Wirral Estates, Ltd.* v. *Shaw* [1932] 2 K.B. 247; *Wheeler* v. *Wirral Estates, Ltd.* [1935] 1 K.B. 294; *Rudler* v. *Franks* [1947] K.B. 530.
[48] *In b. Hartley* [1899] P. 40.
[49] *Mersey Docks & Harbour Board* v. *Cameron* (1864) 11 H.L.C. 443, *per* Westbury L.C. and Lord Cranworth.
[50] *R.* v. *Smith* (1857) 26 L.J.M.C. 105. But a sub-post office was held not to be in the occupation of the Crown in *Williams* v. *Neath Assessment Committee* (1935) 154 L.T. 261.
[51] *Pearson* v. *Holborn Union Assessment Committee* [1893] 1 Q.B. 389; *Wixon* v. *Thomas* [1911] 1 K.B. 43.
[52] *Hodgson* v. *Carlisle Local Board of Health* (1857) 8 E. & B. 116.
[53] *R.* v. *Shepherd* (1841) 1 Q.B. 170.
[54] *Cooper* v. *Hawkins* [1904] 2 K.B. 164.
[55] *Bank voor Handel en Scheepvaart N.V.* v. *Administrator of Hungarian Property* [1954] A.C. 584.

Statutes of Limitation were formerly held not to bind the Crown,[56] but recent Limitation Acts have, subject to certain exceptions, been expressly made binding on the Crown.[57]

In *Ministry of Agriculture, Fisheries and Food* v. *Jenkins*[58] Lord Denning M.R. said (at p. 325) that "looking at the whole of the Town and Country Planning Act 1947, I am satisfied that the Crown does not need to get planning permission in respect of its own interest in Crown lands . . . not by virtue of any provision in the Act itself, but by reason of the general principle that the Crown is not bound by an Act unless it is expressly or impliedly included."

Section 14 (1) of the Conveyancing Act 1881 (which imposes certain conditions precedent to the exercise of a right of forfeiture under a lease) was held by the Judicial Committee not to bind the Crown in Tanganyika. The argument that it was extremely unlikely that the legislature, having imported the English law of landlord and tenant into Tanganyika, should have intended it to apply only to the relatively small portion of the country not declared to be public lands by section 3 of the Land (Law of Property and Conveyancing) Ordinance 1923 was rejected. Lord Morton of Henryton said that the fact that section 14 (1) would in consequence of section 3 "have a somewhat restricted operation in Tanganyika [was] not sufficient to create a necessary implication that the Crown was to be bound thereby."[59]

In *International General Electric Co. of New York Ltd.* v. *Commissioners of Customs and Excise*,[60] the Court of Appeal placed a very restrictive construction on section 21 (1) of the Crown Proceedings Act 1947, by which "in any civil proceedings by or against the Crown the court shall . . . have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require: Provided that: (*a*) where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties." It was held

[56] *Rustomjee* v. *R.* (1877) 1 Q.B.D. 487, 2 Q.B.D. 69; *Commissioners of Public Works* v. *Pontypridd Masonic Hall Co., Ltd.* [1920] 2 K.B. 233.
[57] Limitation Act 1939, s. 30; Law Reform (Limitation of Actions, etc.) Act 1954, s. 5.
[58] [1963] 2 Q.B. 317.
[59] *Premchand Nathu & Co., Ltd.* v. *Land Officer* [1963] A.C. 177, at p. 190. *Cf. Bashir* v. *Commissioner of Lands* [1960] A.C. 44.
[60] [1962] Ch. 784.

that this did not enable the court to make an interim declaration against the Crown in order to preserve the *status quo* until the trial of the action, corresponding to the interim injunction which might be granted in an action between subjects. For the only possible declaration between subjects was one which finally declared the rights of the parties, and therefore the order sought was not one "such as it has power to make in proceedings between subjects."

A still more extensive application of the rule took place in *Telephone Apparatus Manufacturers' Application.*[61] Under an agreement (the "Crown agreement") with the Postmaster-General, eight manufacturers agreed to supply telephone apparatus in accordance with orders placed by him through a committee established by the manufacturers. In connection with the performance of this agreement the manufacturers entered into a further agreement (the "T.A.M. agreement") among themselves. It was conceded that the Restrictive Trade Practices Act, 1956 did not bind the Crown and that so the Crown agreement, to which the Postmaster-General was a party, was not registrable under the Act. It was held (assuming that the T.A.M. agreement introduced restrictions beyond those contained in the Crown agreement) that the agreements were in substance complementary and, as the Crown agreement could not be operated without the T.A.M. agreement, any rendering void of the latter by the 1956 Act would prejudice the Crown, with the result that, as the Crown was not bound by the Act, the T.A.M. agreement was outside its ambit and not registrable under it.

A very difficult series of cases concerns the relationship between the prerogative right of the Queen as *parens patriae* of all infants in the Kingdom, exercised by the judges of the Chancery Division through their wardship jurisdiction, and the powers conferred on local authorities by the Children Act 1948.[62] In *Re M. (an infant)*,[63] Lord Evershed M.R. (at p. 345) summarised the position in this way: "(i) The prerogative right of the Queen, as *parens patriae* in relation to all infants within the realm, is not for all purposes ousted or abrogated as the result of the exercise of the duties and powers by local authorities under the Children Act 1948 . . . (ii) But even where

[61] (1963) L.R. 3 R.P. 462.

[62] *Re M. (an infant)* [1961] Ch. 328; *Re B. (infants)* [1962] Ch. 201 (Education Act 1944); *Re R. (K.) (an infant)* [1964] Ch. 455; *Re G. (infants)* [1963] 1 W.L.R. 1169; *Re S. (an infant).* [1965] 1 W.L.R. 94; *Re C. (A.) (an infant)* [1966] 1 W.L.R. 415.

[63] *Supra*, having cited with approval *Re A.B. (an infant)* [1954] 2 Q.B. 385, *per* Lord Goddard C.J.

a child is made a ward of court by virtue of the [Law Reform (Miscellaneous Provisions) Act 1949]' the judge in whom the prerogative power is vested will, acting on familiar principles, not exercise control in relation to duties or discretions clearly vested by statute in the local authority, and may, therefore . . . order that the child cease to be a ward of court . . . (iii) There remains the right (and duty) of the judge in whom the prerogative power is vested, to control the activities of a local authority in cases where the local authority is shown to be acting in some way in breach or in disregard of its statutory duties."

Cases in which the Crown is bound by statute

There are four possible cases in which the Crown may be held to be bound by a statute.

First, the Crown is clearly bound by a provision in which it is expressly stated to be bound. But the fact that the Crown is named in some sections of a statute does not necessarily extend to it the operation of other parts of the same Act: thus the Crown is not bound by section 3 of the Prescription Act 1832 (which deals with easements of light) even though it is mentioned in section 2 (which is concerned with easements in general).[64] And section 1 (1) of the Merchant Shipping (Salvage) Act 1940, which conferred on the Crown the right to claim for salvage services, did not have the effect of imposing on the Crown a corresponding liability where the services were negligently rendered.[65]

Secondly, the Crown is regarded as sufficiently named in a statute when an intention to include it is manifest. The Summary Jurisdiction Act of 1857 (by s. 2) entitled either party, after the hearing by a justice of "any information or complaint" which he had power to determine, to apply for the stating of a case for the opinion of one of the superior courts; authorised (by s. 4) the justice to refuse the application if he deemed it frivolous, provided that it should never be refused if made by the Attorney-General; and (by s. 6) directed the superior court to deal with the decision appealed against and to make such order regarding costs as seemed fit. This was held by the Court of Queen's Bench to authorise the making of an order for costs against the Crown. As the language of the second section was

[64] *Perry* v. *Eames* [1891] 1 Ch. 658; *Wheaton* v. *Maple & Co.* [1893] 3 Ch. 48.
[65] *Anglo-Saxon Petroleum Co., Ltd.* v. *Lords Commissioners of the Admiralty* [1947] K.B. 794.

wide enough to include the Crown, and as the fourth referred to the Crown as plainly as if it had spoken expressly of Crown cases, the language of the sixth was construed as applying to such cases also, as well as to cases between subject and subject.[66]

In *Stewart* v. *Conservators of River Thames*[67] it was held that a statutory exemption from "all parliamentary rates, taxes and payments whatsoever" could only be given effect to if it were construed as covering the payment of income tax to the Crown.

Although the Crown has power at common law to dismiss a civil or military officer at pleasure, a condition to that effect being an implied term of his contract of service, the New South Wales Civil Service Act 1884, being manifestly intended for the benefit of officers and inconsistent with such a condition, was held to restrict this power of the Crown.[68]

Thirdly, it was stated in previous editions of this work "that the Crown is not excluded from the operation of a statute where neither its prerogative, rights, nor property are in question."[69] But, with a single exception, the authorities mentioned in support of this proposition all concerned ancient statutes.[70] The exception was the Law Terms Act 1830 which was passed for the better administration of justice and enacted that writs of error upon judgments given in any of the superior courts should be returned to the Exchequer Chamber. This was held to apply to a judgment on an indictment[71] and on a petition of right,[72] although the Crown was not named or referred to in the Act.

Fourthly, it was said in the *Magdalen College Case*[73] in 1616 that certain classes of statutes always bind the Crown, namely, statutes for the advancement of religion or learning and for the maintenance of the poor, statutes for the suppression of wrong, and those for performing the will of a donor. Here, there is only space to repeat the conclusion of the learned editor of *Craies on Statute Law*[74] who,

[66] *Moore* v. *Smith* (1859) 28 L.J.M.C. 126. *Cf. Théberge* v. *Laudry* (1877) 2 App.Cas. 102; *Cushing* v. *Dupuy* (1880) 5 App.Cas. 409; and *Moses* v. *Parker* [1896] A.C. 245.

[67] [1908] 1 K.B. 893.

[68] *Gould* v. *Stuart* [1896] A.C. 575.

[69] 11th ed., p. 135.

[70] Such as the Statute of Marlborough (52 Hen. 3, c. 22) against distraining freeholders to produce their title deeds; the 31 Eliz. 1, c. 6, against simony; and the Ecclesiastical Leases Act 1571.

[71] *R.* v. *Wright* (1834) 1 Ad. & E. 434.

[72] *De Bode* v. *R.* (1849) 13 Q.B. 364.

[73] (1616) 11 Co. Rep. 66b.

[74] 6th ed., p. 443, citing the opinion of Sir George Jessel M.R. in favour of Coke's propositions: *Re Bonham, ex p. Postmaster-General* (1879) 10 Ch.D. 595.

after a careful analysis of the cases, says that they "are scarcely sufficient in number or variety to justify the very general adoption of the propositions propounded by Coke in the *Magdalen College Case*, with regard to the kind of statutes by which the Crown is bound without being named; at the same time there does not seem to be any case in which Coke's propositions are either denied or overruled."

Whether the Crown can take advantage of a statute which is not binding on it

"The only remaining question, which is one of great historical interest and importance, is whether the Crown can successfully say: 'We are not bound by the statute but we are at liberty to take advantage of it.' At first sight such a statement appears somewhat strange. There is undoubtedly a long series of statements in text-books repeating each other for some centuries; but there is something to be said for the view argued by Sir John Simon that they start with a passage in an unsuccessful argument of a law officer which was not even relevant to the case before the court,[75] but which has been taken out by a text-writer and repeated for centuries until it was believed that it must have some foundation. . . . It will need careful consideration when that question arises."[76]

By section 31 (1) of the Crown Proceedings Act 1947 the Act "shall not prejudice the right of the Crown to take advantage of the provisions of an Act of Parliament although not named therein; and it is hereby declared that in any civil proceedings against the Crown the provisions of any Act of Parliament which could, if the proceedings were between subjects, be relied upon by the defendant as a defence to the proceedings, whether in whole or in part, or otherwise, may, subject to any express provision to the contrary, be so relied upon by the Crown." But this subsection may not clarify the position where the Crown is not a "defendant in civil proceedings," since it begs the question whether there previously existed any right such as that which it mentions.

[75] *Magdalen College Case, supra.*
[76] *Cayzer Irvine & Co.* v. *Board of Trade* [1927] 1 K.B. 269, *per* Scrutton L.J. at p. 294.

CHAPTER 8

FURTHER PRESUMPTIONS REGARDING JURISDICTION

1. TERRITORIAL EXTENT OF BRITISH LEGISLATION

IT has been said by the Judicial Committee of the Privy Council that: "An Act of the Imperial Parliament today, unless it provides otherwise, applies to the whole of the United Kingdom and to nothing outside the United Kingdom: not even to the Channel Islands or the Isle of Man, let alone to a remote overseas colony or possession."[1] Lord Denning M.R. has said that the general rule is "that an Act of Parliament only applies to transactions within the United Kingdom and not to transactions outside."[2] These statements, however, perhaps oversimplify the position: leaving aside for the moment the questions of criminal statutes and statutes affecting real and personal property, it is proposed first to examine the effect of statutes on British subjects and foreigners both within and outside the United Kingdom.

It goes without saying that United Kingdom statutes bind British subjects within the realm. Whether or not they bind subjects of the Crown abroad seems to depend (in the absence of express provision) entirely on the nature of the statute.

In the *Sussex Peerage Case*,[3] for example, it was held that the Royal Marriages Act 1772, which provides that no descendant of King George II (other than the issue of princesses who marry into foreign families) "shall be capable of contracting matrimony, without the previous consent of His Majesty," operated to invalidate a marriage celebrated abroad, one of the parties being a British subject who was a descendant of George II. Giving the opinion of the judges to the House of Lords, Tindal C.J. said (at p. 1058) that the

[1] *Att.-Gen. for Alberta* v. *Huggard Assets, Ltd.* [1953] A.C. 420, *per* Lord Asquith of Bishopstone at p. 441.
C.E.B. Draper & Son, Ltd. v. *Edward Turner & Son, Ltd.* [1964] 3 All E.R. 148, at p. 150.
[3] (1844) 11 Cl. & F. 85.

object of the Act would be "frustrated, the mischief is remediless, and the power of the Sovereign nugatory, if the marriage, which in England would have been confessedly void, is to be held good and valid when celebrated out of the country."

Similarly, the Marriage Act 1835 (Lord Lyndhurst's Act), provided that all marriages celebrated between persons within the prohibited degrees of consanguinity and affinity should be absolutely null and void, and this was held to invalidate a marriage between a British subject and his deceased wife's sister, solemnised in Denmark. "That the Parliament of England," said Lord Campbell L.C., "in framing the prohibited degrees within which marriages were forbidden, believed and intimated the opinion, that all such marriages were incestuous and contrary to God's word I cannot doubt. All the degrees prohibited are brought into one category, and although marriages within those degrees may be more or less revolting, they are placed on the same footing, and before English tribunals, till the law is altered, they are to be treated alike."[4]

Section 3 of the Personal Injuries (Emergency Provisions) Act 1939 barred certain claims for negligence or breach of duty in respect of "war injuries" as defined in section 8 of the Act. This was held to apply to injuries sustained by British subjects in any part of the world. The general scheme of the Act, and the general conditions of universal war which seemed likely to exist when it was passed, tended to show that its application was not to be confined to the territorial limits of the United Kingdom.[5]

On the other hand, the Weights and Measures Act 1835, which prohibited the sale of liquids otherwise than by imperial measure, would not be considered as affecting a contract between British subjects for the sale of palm oil to be measured and delivered on the coast of Africa, for a different construction would have involved the absurd supposition that English traders should carry English weights and measures with them when they went abroad.[6]

So also, section 2 (2) of the Fertilisers and Feeding Stuffs Act 1926, which implies a warranty of fitness for suitability and freedom from certain ingredients "on the sale for use as food for cattle or poultry" of certain articles, applies only to sales in the United Kingdom, that is to say, to transactions in which the goods are in the United

[4] *Brook* v. *Brook* (1861) 9 H.L.C. 193, at p. 210. *Cf. Re De Wilton* [1900] 2 Ch. 481; *Pugh* v. *Pugh* [1951] P. 482.
[5] *Howgate* v. *Bagnall* [1951] 1 K.B. 265.
[6] *Rosseter* v. *Cahlmann* (1853) 8 Ex. 361.

Kingdom when the property passes from the seller to the buyer.[7]

In *Tomalin* v. *S. Pearson & Son, Ltd.*,[8] Cozens-Hardy M.R. cited with approval the following passage from *Maxwell*: "In the absence of an intention clearly expressed or to be inferred either from its language, or from the object or subject-matter or history of the enactment, the presumption is that Parliament does not design its statutes to operate on its subjects beyond the territorial limits of the United Kingdom."[9] This principle was applied in that case to the Workmen's Compensation Act 1906.

With regard to foreigners, the difficulty again concerns the application of British legislation to persons abroad, for there is no doubt that an English statute is applicable "to foreigners who, by coming into this country, whether for a long or a short time, have made themselves during that time subject to English jurisdiction."[10] With regard to foreigners abroad, Dr. Lushington stated the rule as being that no statute "ought . . . to be held to apply to Foreigners with respect to transactions out of British jurisdiction, unless the words of the Statute are perfectly clear."[11]

So, under the Bankruptcy Act 1869, it was held that a foreigner domiciled abroad could not be made bankrupt in England upon an act of bankruptcy committed abroad.[12] The Bankruptcy Act 1883 was similarly held to relate "only to debtors who are subject, either by birth and natural allegiance or by temporary residence, to the English law."[13] The Earl of Halsbury L.C. said of this statute that the general expressions "debtor" and "creditor" could not "be sufficient to give jurisdiction to the English Court of Bankruptcy, because if unlimited they would give jurisdiction all over the world in respect of debts, petitions, or acts of bankruptcy committed anywhere; and it is a familiar maxim of the law, '*Extra territorium jus dicenti paretur non impune.*' "[14] However, section 1 (2) (*c*) of the Bankruptcy Act 1914, which includes in the definition of "debtor" a person who, whether a British subject or not, was at the time when an act of bankruptcy was committed by him carrying on business in

[7] *C. E. B. Draper & Son, Ltd.* v. *Edward Turner & Son, Ltd.* [1964] 3 All E.R. 148.
[8] [1909] 2 K.B. 61. *Cf. Schwartz* v. *India Rubber, Gutta Percha & Telegraph Works Co., Ltd.* [1912] 2 K.B. 299.
[9] See 11th ed., p. 139.
[10] *Ex p. Blain* (1879) 12 Ch.D. 522, *per* James L.J.
[11] *The Amalia* (1863) 1 Moo.P.C. N.S. 471, at p. 474.
[12] *Ex p. Crispin* (1873) L.R. 8 Ch.App. 374.
[13] *Re Pearson* [1892] 2 Q.B. 263, *per* Fry L.J. at p. 268.
[14] *Cooke* v. *Charles A. Vogeler Co.* [1901] A.C. 102, at p. 108.

England, has been held to apply, by its express terms, to a foreigner who commits an act of bankruptcy outside England provided that he has not then ceased to trade in England for the purposes of the Act.[15]

General words will not give an English court jurisdiction to wind up a foreign company which had no branch office in England,[16] nor will an English Companies Act bind a foreign partnership.[17]

Provisions relating to solicitors acting as agents for each other in the Legal Aid and Advice Act 1949 apply only to the ordinary agency between solicitors of the Supreme Court and have no application to any foreign lawyer. It follows, therefore, that a Scottish solicitor employed to perform services in Scotland in connection with litigation in England "must be treated, for the purposes of taxation, simply as a foreign agent, and the charges incurred by him and paid to him are charges properly taxable as disbursements in the ordinary course."[18]

Section 4 of the Summary Jurisdiction (Married Women) Act 1895 provided that any married woman whose husband had deserted her might apply to any court of summary jurisdiction acting within the petty sessional district in which the cause of complaint arose for an order under the Act. The Court of Appeal held that the general words of section 4 did not constitute any exception to the rule (laid down by Lord Selborne L.C. in *Berkley* v. *Thompson*[19]) that a person resident abroad is prima facie not subject to the jurisdiction of the court. Therefore the section could not be invoked against a husband who had at all material times been resident and domiciled in Scotland, and who had not been personally present within the jurisdiction during the proceedings.[20]

On the other hand, dealing with the Guardianship of Infants Acts 1886 and 1925, Sir Raymond Evershed M.R. was "unable to conclude that the intendment of these two statutes is such that only fathers who are either subjects of this country, or personally resident permanently or for a short time in this country, are intended to be covered by the jurisdiction." Therefore, if an American father were to submit to the jurisdiction of the High Court either by personal

[15] *Theophile* v. *Solicitor-General* [1950] A.C. 186.
[16] *Re Lloyd Generale Italiano* (1885) 29 Ch.D. 219.
[17] *Bulkeley* v. *Schutz* (1871) L.R. 3 P.C. 764.
[18] *McCullie* v. *Butler* [1962] 2 Q.B. 309, *per* Diplock J. at p. 313.
[19] (1884) 10 App.Cas. 45.
[20] *Forsyth* v. *Forsyth* [1948] P. 125.

presence in England or by becoming an active party to litigation before the English court, the jurisdiction under the Acts would be exercisable against him.[21]

As in previous editions of *Maxwell*, the extent to which foreigners may avail of rights given by British statutes is discussed in a separate section.[22]

Criminal statutes

"Apart from those exceptional cases in which specific provision is made in regard to acts committed abroad, the whole body of the criminal law of England deals only with acts committed in England."[23] So in *R.* v. *Debruiel*[24] an indictment for larceny in Guernsey was held not to be triable in England. In *Macleod* v. *Att.-Gen. for New South Wales*[25] the Judicial Committee had to consider section 54 of the New South Wales Criminal Law Amendment Act of 1883: "Whosoever being married marries another person during the life of the former husband or wife, wheresoever such marriage takes place, shall be liable to penal servitude for seven years." It was argued that this provision was applicable where the second marriage had been solemnised in the United States. But Lord Halsbury L.C. said (at pp. 457, 458): "If their Lordships construe the statute as it stands, and upon the bare words, any person, married to any other person, who marries a second time anywhere in the habitable globe, is amenable to the criminal jurisdiction of New South Wales, if he can be caught in that Colony. That seems to their Lordships to be an impossible construction of the statute." It was held, therefore, that "whosoever being married" must be read as "whosoever being married, and who is amenable, at the time of the offence committed, to the jurisdiction of the Colony of New South Wales," and "wheresoever" as "wheresoever in this Colony the offence is committed." For "all crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and, except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever."

There are many exceptions to this general rule. Murder and manslaughter wheresoever committed by a British subject are expressly made punishable in England,[26] as are offences committed

[21] *Re Dulles Settlement* [1951] Ch. 265, at p. 274.
[22] *Post*, pp. 177–183.
[23] *Cox* v. *Army Council* [1963] A.C. 48, *per* Viscount Simonds at p. 67.
[24] (1861) 11 Cox C.C. 207. *Cf. R.* v. *Smith* [1962] 2 Q.B. 317.
[25] [1891] A.C. 455.
[26] Offences against the Person Act 1861, s. 9; *R.* v. *Page* [1954] 1 Q.B. 170.

abroad by servants of the Crown acting in the course of their employment which would be punishable on indictment if committed in England,[27] and also perjury.[28] Section 57 of the Offences against the Person Act 1861, in defining the crime of bigamy, refers to the second ceremony of marriage taking place in England "or elsewhere," and in *R.* v. *Earl Russell*[29] it was held that this express provision made persons contracting bigamous marriages abroad amenable to the jurisdiction of the English courts. And in *R.* v. *Casement*[30] the Court of Criminal Appeal held that high treason in the form of being "adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere" (Statute of Treasons 1351) was committed by a person adhering and giving aid and comfort to the King's enemies outside his realm just as much as if the adherence had taken place and the aid and comfort had been given within the realm.

Even if a statute applies to acts committed outside the jurisdiction, it will prima facie be regarded as applying only to such acts when committed by British subjects.[31] "One other general canon of construction is this," said Lord Russell of Killowen C.J. in the course of a trial for offences against the Foreign Enlistment Act 1870, "that if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting. . . . If in the course of the trial it turns out that any of the defendants are foreigners, every opportunity will be given to their counsel to take that objection, and to give legal effect to any defence attributable to that fact."[32] The most striking departure from this principle was in the case of *Joyce* v. *D.P.P.*,[33] where the fact that an alien had sought the protection of the Crown by applying for a passport was held to throw on to him a corresponding duty of allegiance, so that he could be guilty of committing treason outside the realm.

By section 2 of the Territorial Waters Jurisdiction Act 1878: "An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the

[27] Criminal Justice Act 1948, s. 31.
[28] Perjury Act 1911, s. 8.
[29] [1901] A.C. 446.
[30] [1917] 1 K.B. 98.
[31] *R.* v. *Lewis* (1857) 26 L.J.M.C. 104; *Nga Hoong* v. *R.* (1857) 7 Cox C.C. 489.
[32] *R.* v. *Jameson* [1896] 2 Q.B. 425, at pp. 430, 431.
[33] [1946] A.C. 347.

Admiral [the Central Criminal Court], although it may have been committed on board or by means of a foreign ship." "Open sea within the territorial waters" is, for this purpose, "any part of the open sea within one marine league of the coast measured from low-water mark": s. 7. This Act, which was passed as a result of the decision in *R.* v. *Keyn*,[34] was aimed at offences committed on a foreign ship, extending a jurisdiction "which theretofore had undoubtedly existed with regard to persons on British ships anywhere on the high seas, to persons on foreign ships provided those ships were in territorial waters. It further dealt only with indictable offences."[35] It does not provide a definition of "territorial waters" for all purposes, so that where some other statute refers to "territorial waters" (for example, section 6 (1) (*a*) of the Wireless Telegraphy Act 1949), this is to be construed as meaning such areas of sea as are from time to time declared by the Crown to be subject to its sovereignty and jurisdiction (as in the Territorial Waters Order in Council 1964): it is not limited to the precise area of the territorial waters as defined in the 1878 Act, or as existing at the time of the passing of the Act in question.[36]

By section 62 (1) of the Civil Aviation Act 1949: "Any offence whatever committed on a British aircraft shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be." Similar provision is made for British ships on the high seas.[37] Whether section 62 (1) is an offence-creating section, making any act which would be criminal if done in England punishable also if done on a British aircraft, or whether it relates only to jurisdiction so that one must first find that the act would, apart from section 62 (1), be punishable in England if committed abroad, has not yet been determined.[38]

Statutes affecting real and personal property

The general principle of private international law is that land is subject exclusively to the laws of the state within whose territory it lies, the nationality, residence and domicile of the owner of the land

[34] (1876) L.R. 2 Ex.D. 63.
[35] *R.* v. *Kent Justices, ex p. Lye* [1967] 2 Q.B. 153, *per* Lord Parker C.J. at p. 175.
[36] *R.* v. *Kent Justices, ex p. Lye* [1967] 2 Q.B. 153; *Post Office* v. *Estuary Radio, Ltd.* [1967] 1 W.L.R. 1396.
[37] Merchant Shipping Act 1894, s. 686 (1).
[38] *R.* v. *Martin* [1956] 2 Q.B. 272; *R.* v. *Naylor* [1962] 2 Q.B. 527; *Cox* v. *Army Council* [1963] A.C. 48.

being all irrelevant.[39] This principle is respected by English courts in applying statutes. Prima facie, an English statute will be regarded as affecting all land within the jurisdiction,[40] so that, for example, dispositions of land situated in England, by whomsoever made, must comply with the rules on accumulations contained in the Thellusson Act.[41] On the other hand, unless there is some express provision to the contrary,[42] English statutes will not be construed as applying to foreign land. Thus, the provisions of the Statute of Frauds relating to the formalities with which a conveyance of land must be executed were held not to apply to the conveyance of Scottish property made in England by one domiciled Englishman to another.[43] And in *Att.-Gen. for Alberta* v. *Huggard Assets, Ltd.*,[44] the Judicial Committee held that the Act of 1660 abolishing military tenures did not apply to Canada. "It seems to their Lordships strained," said Lord Asquith of Bishopstone (at p. 442), "to suppose that such an Act, recording a compromise between the King of England and his people, the main object of which was the abolition of certain peculiarities of our insular mediaeval land tenure, was intended to apply to a vast tract of country thousands of miles away which was only inhabited at the time by a few Indians and half castes: people who had never smarted under wardships, marriage and primer seisin, and had almost certainly never heard of them."

Again, according to private international law, moveable property has generally no other *situs* than that of its owner,[45] and in accordance with this principle statutes dealing with such property will generally be construed so as to affect all the property of persons domiciled in England wherever situated, but not that of persons domiciled abroad even though the property be in England.

Thus, the Legacy Duty Act 1796, which imposed a duty on every legacy given by an "will . . . of any person . . . out of [his] personal estate," and the Succession Duty Act 1853, which imposed a duty on every "disposition of property" by which "any person" became entitled to any property on the death of another, were held not to

[39] See Cheshire, *Private International Law*, 7th ed., p. 501.
[40] *Birtwhistle* v. *Vardill* (1840) 7 Cl. & F. 895.
[41] *Freke* v. *Lord Carbery* (1873) L.R. 16 Eq. 461.
[42] See, *e.g.*, Finance Act 1962, s. 28 (1), which has the effect of abrogating the general principle (contained in s. 28 (2) of the Finance Act 1949) that foreign immoveable property is not liable to English estate duty.
[43] *Adams* v. *Clutterbuck* (1883) 10 Q.B.D. 403.
[44] [1953] A.C. 420.
[45] See, with regard to administration of assets and succession on death, Cheshire, *op. cit.*, pp. 472–500.

apply where the deceased was a foreigner, or even a British subject domiciled abroad, though the property was in England.[46] But they did affect personal property abroad if the deceased was domiciled in England, even though he was a foreigner.[47]

Similarly, the Bankruptcy Acts, which effect an assignment of a bankrupt's personal property, would properly be construed as applying to the personal property, situated abroad, of a bankrupt domiciled in England.[48] Conversely, where a person domiciled abroad dies intestate, leaving personal property in England, succession to that property will be governed by the law of his domicile, and not by the English intestacy rules.[49]

2. How Far Statutes Conferring Rights Affect Foreigners

"Generally," said Lord Brougham, "we must assume that the legislature confines its enactments to its own subjects, over whom it has authority, and to whom it owes a duty in return for their obedience. Nothing is more clear than that it may also extend its provisions to foreigners in certain cases, and may, without express words, make it appear that such is the intendment of those provisions. But the presumption is rather against the extension."[50] Kennedy J., however, was of the opinion that in cases in which foreigners had been held not entitled to take advantage of an English Act "the statutory enactment under consideration was one which related to matter of a special and exceptional kind."[51] It is, in fact, difficult to extract any principle from the cases on this point: as will be seen from the examples which follow, some statutes have been held applicable to foreigners while others the subject-matter of which seems little different, are not so applicable.

Cases in which foreigners have not been allowed to take advantage of English statutes

In *Jefferys* v. *Boosey*,[52] the House of Lords had to consider the Copyright Act 1709, which gave a copyright of fourteen years to the

[46] See *Re Bruce* (1832) 2 Cr. & J. 436; *Arnold* v. *Arnold* (1837) 6 L.J.Ch. 218; *Thomson* v. *Advocate-General* (1845) 12 Cl. & F. 1; *Harding* v. *Queensland Commissioners of Stamps* [1898] A.C. 769.

[47] See *Att.-Gen.* v. *Napier* (1851) 6 Ex. 217; *Blackwood* v. *R.* (1882) 8 App.Cas. 81, *per* Sir Arthur Hobhouse.

[48] *Maxwell*, 11th ed., p. 146; by s. 167, the Bankruptcy Act 1914 is expressly made applicable to property situate outside England.

[49] See *In the Estate of Maldonado, decd.* [1954] P. 223.

[50] *Jefferys* v. *Boosey* (1854) 4 H.L.C. 815, at p. 970.

[51] *Davidsson* v. *Hill* [1901] 2 K.B. 606, at p. 612.

[52] (1854) 4 H.L.C. 815.

"author of any book." The House held that the benefit of the Act was limited in two ways, first as to works published in the United Kingdom, and secondly as to British subjects or to aliens temporarily resident here at the time of such publication. "Where," said Lord Cranworth L.C. (at p. 955), "an exclusive privilege is given to a particular class at the expense of the rest of Her Majesty's subjects, the object of giving the privilege must be taken to have been a national object, and the privileged class to be confined to a portion of that community, for the general advantage of which the enactment is made."

Page Wood V.-C. held that a foreigner could not avail himself of the privilege of the Merchant Shipping Act 1854, s. 504, limiting liability in damages after a collision to the value of the ship and freight. The statute was not to be applied to foreign ships on the high seas, these being beyond the jurisdiction of our legislature.[53] But by an amending Act of 1862 the provision was extended to foreigners.[54]

In *The Zollverein*,[55] Dr. Lushington held that a foreigner could not set up against a British vessel with which his own ship had been in collision on the high seas the British vessel's violation of British statute law relating to navigation. The foreign ship would not be bound by such law, since it was beyond the powers of Parliament to make rules applicable to foreign vessels beyond British waters, and it would have been contrary to equity to permit the foreigner to succeed on the basis of a law to which he was not amenable.

In *Tomalin* v. *S. Pearson & Son, Ltd.*,[56] the Court of Appeal held that where an English workman in the employment of English contractors was sent out by them to work in Malta, and was fatally injured there, his widow had no claim to compensation under the Workmen's Compensation Act 1906. By section 1 (1), the Act applied "if in any employment personal injury by accident arising out of and in the course of the employment is caused to any workman," but the Court said that the statute could not be intended to apply universally, and applied the presumption stated in *Maxwell*[57] "that Parliament does not design its statutes to operate beyond the territorial limits of the United Kingdom." In this case, there was evidence in

[53] *Cope* v. *Doherty* (1858) 4 K. & J. 367.
[54] Merchant Shipping Act 1862, s. 54.
[55] (1856) Swab. 96.
[56] [1909] 2 K.B. 61.
[57] 4th ed., p. 213.

the statute itself that Parliament did not intend it to be of general application outside the jurisdiction, for section 7 specifically made provision for the payment of compensation to members of the crew of a British ship.

Cases in which foreigners have been allowed to take advantage of English statutes

In *Routledge* v. *Low*,[58] the House of Lords considered the meaning of the phrase "the author" in the Copyright Act 1842. The American author of a book which was first published in England moved temporarily from the United States to Canada in order to be resident within the British dominions at the time of that publication.[59] Residence within the dominions of the Crown was held to be sufficient: the question whether a foreigner resident outside the dominions at the time of publication could claim copyright under the British statute was left open. In a later case, however, the Court of Appeal held that it was not a necessary condition for the acquisition by a foreign author of a play of a title to the performing right under the 1842 Act that he should have been resident in British territory at the time of the first performance. It was enough that the play had first been performed here.[60]

In *The India*,[61] Dr. Lushington held that the provisions of the Admiralty Court Act 1861, which gave jurisdiction to the Court of Admiralty over, *inter alia*, any claim for salvage services and "over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs," were confined to British ships, on the ground that it was improbable that Parliament had intended to legislate for foreigners in foreign ports. But this case was subsequently overruled by the Court of Appeal, Lord Halsbury L.C. saying that he had searched "in vain throughout the statute for anything which can justify the construction that you must imply the words British or colonial ship in the fifth section."[62] But there was in this case evidence from the statute read as a whole that the relevant

[58] (1868) L.R. 3 H.L. 100.

[59] Lord Cairns L.C. said (at p. 111) that the decision in *Jefferys* v. *Boosey* (*ante*, pp. 177–178) "proceeded mainly, if not exclusively, on the wording of the preamble of the statute of Anne, and on a consideration of the general character and scope of the legislation of Great Britain at that period. The present statute has repealed that Act, and professes to aim at affording greater encouragement to the production of literary works of lasting benefit to the world."

[60] *Falcon* v. *Famous Players Film Co.* [1926] 2 K.B. 474.

[61] (1863) 32 L.J.P.M. & A. 185.

[62] *The Mecca* [1895] P. 95, at p. 105.

sections should apply to all ships, for certain other sections of the Act were expressly confined to British ships or ships in British waters.

The seamen of ships of any nation were held to be entitled to sue for their wages under section 10 of the same Act, which gave the Court of Admiralty jurisdiction over a claim for wages by any seaman.[63]

In *Davidsson* v. *Hill*,[64] Kennedy and Phillimore JJ. held[65] that the widow of a foreign seaman who was drowned on the high seas while a member of the crew of a Norwegian ship which was in collision with a British vessel could sue the owners of the British ship for damages under the Fatal Accidents Acts, which applied (by s. 1 of the 1846 Act) "whensoever the death of a person shall be caused by wrongful act, neglect, or default." Kennedy J. (at pp. 612, 614, 615) pointed out that, whereas statutes which had been held not to apply to foreigners had often dealt with "matter of a special and exceptional kind," the basis of the claim to which the Fatal Accidents Acts "give statutory authority is negligence causing injury, and that is a wrong which I believe the law of every civilised country treats as an actionable wrong." Looking at the subject-matter of the statutes, it was "more reasonable to hold that Parliament did intend to confer the benefit of this legislation upon foreigners": to hold otherwise would give rise to the anomaly "that if a foreigner and an Englishman serving on the same ship were both drowned on the high seas by the same collision negligently caused by an English vessel, the widow of the one could, and the widow of the other could not, obtain by suing the owners of the ship in fault *in personam* that reparation which our legislature in these statutes has declared to be a just reparation."

In *R.* v. *Inhabitants of Eastbourne*,[66] the Court of Queen's Bench held that an alien might gain a settlement under the poor laws in the same way as a British subject. An alien, said Lord Ellenborough C.J. (at p. 107), "may occupy a tenement of £10 a year, and carry on his trade there like any other person. Then if he may do so, he has that interest which enables him to gain a settlement by the provision of the Legislature. As to there being no obligation for maintaining poor foreigners before the statutes ascertaining the different methods of acquiring settlements, the law of humanity, which is anterior to all positive laws, obliges us to afford them relief, to save

[63] *The Nina* (1867) L.R. 2 Adm. & E. 44.
[64] [1901] 2 K.B. 606.
[65] Not following *Adam* v. *British & Foreign Steamship Co., Ltd.* [1898] 2 Q.B. 430.
[66] (1803) 4 East 103.

them from starving; and those laws were only passed to fix the obligation more certainly, and point out distinctly in what manner it should be borne."

Finally, and much more recently, it has been held that the High Court will exercise its jurisdiction under section 1 of the Variation of Trusts Act 1958 at the instance of persons domiciled abroad in relation to an English settlement,[67] and even in relation to a foreign settlement.[68]

Affiliation proceedings

An interesting series of cases concerns the right of a foreign woman to apply under an English bastardy statute for an affiliation order.

In 1849, in *R.* v. *Blane*,[69] the Court of Queen's Bench held that a single woman, a native of France and domiciled in that country, who had lived in England for thirteen years and become pregnant here, could not apply for an affiliation order in respect of her child, as it had been actually born in France. Lord Denman C.J. (at p. 772) was "clearly of opinion that children born out of this country are not the subject of our bastardy laws." And Coleridge J. (at p. 773) pointed out that in all the statutes dealing with illegitimate children "the Legislature . . . is obviously dealing with bastards born in some parish; that is, in this country. . . . If the word 'bastard' is . . . to comprehend any bastard born in any part of the world, an immense field of inquiry must be traversed respecting the status of children according to the different laws of different countries."

This decision was followed in cases dealing with children born abroad to foreign,[70] and even British,[71] women domiciled abroad. But it was not applied to children born in British ships on the high seas,[72] nor where children were conceived abroad and born in England,[73] nor where the mother was both domiciled and resident in England but the child was born out of the country.[74] And in 1963 the Divisional Court held that a Jamaican woman, ordinarily resident

[67] *Re Seale's Marriage Settlement* [1961] Ch. 574.
[68] *Re Paget's Settlement* [1965] 1 W.L.R. 1046. *Cf. Re Ker's Settlement Trusts* [1963 Ch. 553 (Northern Ireland marriage settlement).
[69] (1849) 13 Q.B. 769.
[70] *O'Dea* v. *Tetau* [1951] 1 K.B. 184.
[71] *R.* v. *Wilson, ex p. Pereira* [1953] 1 Q.B. 59.
[72] *Marshall* v. *Murgatroyd* (1870) L.R. 6 Q.B. 31.
[73] *Hampton* v. *Rickard* (1874) 43 L.J.M.C. 133.
[74] *R.* v. *Humphreys, ex p. Ward* [1914] 3 K.B. 1237.

but not domiciled in England, might make an application under the Affiliation Proceedings Act 1957 in respect of a child which had been conceived and born in England but which she had sent back to Jamaica,[75] thus leaving the decision in *R.* v. *Blane*[76] applicable to only one narrow class of case, namely, where both the child was born abroad and the mother was domiciled and resident abroad.

R. v. *Blane* has now been overruled by the Court of Appeal. In *R.* v. *Bow Road JJ., ex p. Adedigba*,[77] a man and a woman who had lived together in Nigeria and (though not lawfully married) had two sons there came to England with the children. Eventually, the mother left the father taking the boys with her, and it was held that she was entitled to apply for an order under the Affiliation Proceedings Act. She satisfied the literal words of section 1 of the Act: "a single woman . . . who has been delivered of an illegitimate child."

Lord Denning M.R. (at p. 1147) held "that the affiliation statutes cover children born abroad as well as those born in England: and . . . mothers domiciled abroad at the time of the birth as well as mothers domiciled in England." He was not troubled by the fact that *R.* v. *Blane* had stood for well over a century, for, quoting Lord Morris of Borth-y-Gest in *Conway* v. *Rimmer*,[78] " 'though precedent is an indispensable foundation upon which to decide what is the law, there may be times when a departure from precedent is in the interests of justice and the proper development of the law.' "

Salmon L.J. could find nothing in the statute to support the limitations which had been placed upon it in previous cases. He thought (at p. 1151) that the "principle of construction that the courts may presume that when there has been a decision upon the meaning of a statute, and the statute is re-enacted in much the same terms, it was the intention of Parliament to endorse the decision" should not be invoked in this case. He preferred to believe that Parliament had overlooked *R.* v. *Blane*.[79] Similarly, Edmund Davies L.J. (at p. 1153) thought that "the application of that decision to social conditions in the mid-twentieth century can lead to irrational and indeed unjust results." The courts should not be obliged to continue to arrive at decisions which are "both unjust to the private citizen and inimical

[75] *Buckeridge* v. *Hall* [1963] 1 Q.B. 614.
[76] (1849) 13 Q.B. 769.
[77] [1968] 2 Q.B. 572.
[78] [1968] A.C. 910.
[79] (1849) 13 Q.B. 769.

to the public weal simply because of something decided decades ago."

3. Presumption against a Violation of International Law

Under the general presumption that the legislature does not intend to exceed its jurisdiction, every statute is interpreted, so far as its language permits, so as not to be inconsistent with the comity of nations or the established rules of international law, and the court will avoid a construction which would give rise to such inconsistency unless compelled to adopt it by plain and unambiguous language.[80] But if the language of the statute is clear, it must be followed notwithstanding the conflict between municipal and international law which results.[81]

A striking illustration of this presumption in operation concerned an Act of Parliament which authorised the commanders of British ships of war to seize and prosecute "all ships and vessels" engaged in the slave trade. This was construed so as not to affect any right or interest of foreigners contrary to the law of nations. Its prohibition of the trade as contrary to the principles of justice and humanity applied only to British subjects,[82] and did not even prevent the enforcement in English courts by British subjects of contracts for the purchase of slaves to be performed abroad,[83] nor a foreigner from recovering in an English court damages for the seizure of a cargo of his slaves by a British man-of-war.[84]

Where an international agreement such as that represented by the Hague Rules is incorporated in an English statute, the statute will so far as possible be construed with a view to attaining uniformity in the different jurisdictions in which the agreement is operative.[85] It is desirable, said Lord Macmillan in connection with the Hague Rules, "that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation."[86]

[80] *Bloxam* v. *Favre* (1883) 8 P.D. 101, *per* Sir James Hannen P.
[81] *Niboyet* v. *Niboyet* (1878) 4 P.D. 1; *Mortensen* v. *Peters* (1906) 8 F. (J.) 93.
[82] *Madrazo* v. *Willes* (1820) 3 B. & Ald. 353, *per* Bayley J.
[83] *Santos* v. *Illidge* (1860) 8 C.B. (N.S.) 861.
[84] *Madrazo* v. *Willes*, *supra*.
[85] *Salomon* v. *Commissioners of Customs and Excise* [1967] 2 Q.B. 116; *Leesh River Tea Co., Ltd.* v. *British India Steam Navigation Co., Ltd.* [1967] 2 Q.B. 250; *Post Office* v. *Estuary Radio, Ltd.* [1967] 1 W.L.R. 1396.
[86] *Stag Line, Ltd.* v. *Foscolo Mango & Co., Ltd.* [1932] A.C. 328, at p. 350.

Cases in which the presumption has been applied

Foreign ambassadors (as well as foreign sovereigns and public property) are not subject to the jurisdiction of the courts of other countries according to general international law. Hence, it has been held that while the ambassador of a foreign state is in this country, a statutory limitation period does not begin to run against his creditors as he could not be served with process during that period.[87]

"If any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting. That is a rule based on international law by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory."[88] So the general language of a statute creating a criminal offence will normally be restricted in construction so as not to violate the principle of international law that a state has no jurisdiction over offences committed by a foreigner out of its territory. Section 8 of the Offences Against the Person Act 1828, which enacted that when any person feloniously injured abroad or at sea died in England, or having received the injury in England died at sea or abroad, the offence might be dealt with in the county or place in England where the death or injury occurred, was held not to authorise the trial in England of a foreigner who inflicted a wound at sea in a foreign ship, the sufferer afterwards having died in England.[89]

In *Schtraks* v. *Government of Israel*[90] it was argued that the phrase in article 1 of the Israel (Extradition) Order 1960, "offences . . . committed within the territory of the one party" did not cover offences committed in the Israeli-occupied part of Jerusalem because the United Kingdom recognised only a *de facto* sovereignty of the Israel government in that area. The House of Lords rejected the argument, Viscount Radcliffe (at p. 587) saying: "Extradition is a function of the international regard for the enforcement of law and order and, if a State is recognised by another State as having *de facto* authority in an area, I think that it would require clear words of exception to interpret an extradition agreement as excluding on the one hand its obligation to hand over fugitive criminals found within that area and,

[87] *Musurus Bey* v. *Gadban* [1894] 2 Q.B. 352.
[88] *R.* v. *Jameson* [1896] 2 Q.B. 425, *per* Lord Russell of Killowen C.J. at p. 430.
[89] *R.* v. *Lewis* (1857) 26 L.J.M.C. 104. *Cf.*, *ante*, pp. 173–175.
[90] [1964] A.C. 556.

on the other, its right to claim the surrender of such criminals in respect of offences committed there."

The Bretton Woods Agreements Order in Council 1946, Sch., Part 1, art. 8, s. 2 (*b*) refers to "exchange contracts." This term is to be "liberally construed having regard to the objects of the Bretton Woods Agreement to protect the currencies of the states who are parties thereto."[91]

A doubt as to the proper construction of a phrase in section 3 (2) of the Merchant Shipping (Liability of Shipowners and Others) Act 1958 was resolved on the basis that this country had fulfilled, rather than disregarded, its obligations under the International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships made at Brussels in 1957.[92]

In *Breen* v. *Breen*[93] Karminski J. (at p. 152) held that article 41, section 3 (3) of the Irish constitution did not, on its true construction, interfere with the former law of Ireland which recognised decrees of divorce pronounced by foreign courts where the parties were domiciled within the jurisdiction of those courts. "The principle of recognising the validity of a decree pronounced by the court of the domicile has long been established, and indeed forms an essential part of the comity of nations. Any depature from this principle is likely . . . to produce absurd results, which would be neither convenient nor logical. If the article intended to depart from this established principle, it could no doubt have done so; but it would have expressed the intention in clear and unequivocal terms."[93a]

Statutes clearly contrary to international law

But if a statute is clearly inconsistent with international law or the comity of nations, it must be so construed, whatever the effect of such a construction may be.[94] There is, for instance, no doubt that a right conferred on an individual by a treaty made with the Crown may be taken from him by act of the legislature.[95]

The leading modern case in point is that of *Collco Dealings, Ltd.* v. *I.R.C.*[96] The Finance (No. 2) Act 1955, s. 4 (2), referred to "a person

[91] *Sharif* v. *Azad* [1967] 1 Q.B. 605, *per* Diplock L.J. at p. 618.
[92] *The Annie Hay* [1968] P. 341.
[93] [1964] P. 144. *Cf. Mayo-Perrott* v. *Mayo-Perrott* [1958] I.R. 336.
[93a] *Cf. Corocraft, Ltd.* v. *Pan American Airways Inc.* [1969] 2 All E.R. 82.
[94] *Theophile* v. *Solicitor-General* [1950] A.C. 186, *per* Lord Porter. *Cf. Cheney* v *Conn (Inspector of Taxes)* [1968] 1 W.L.R. 242, *per* Ungoed-Thomas J.
[95] *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board* [1941] A.C. 308, *per* Viscount Simon L.C.
[96] [1962] A.C. 1.

entitled under any enactment to an exemption from income tax which extends to dividends on shares." It was held by the House of Lords that this included a company resident in the Irish Republic which was entitled, by virtue of section 349 of the Income Tax Act 1952, to the benefit of a double taxation agreement with the Irish Republic, and that consequently the provisions of section 4 (2) removed the exemption conferred by the agreement in respect of dividend-stripping operations carried out by the company. "It is said," said Viscount Simonds (at p. 19), "that the plain words of the statute are to be disregarded . . . in order to observe the comity of nations and the established rules of international law. I am not sure on which of these high-sounding phrases the appellant company chiefly relies. But I would answer that neither comity nor rule of international law can be invoked to prevent a sovereign state from taking what steps it thinks fit to protect its own revenue laws from gross abuse, or to save its own citizens from unjust discrimination in favour of foreigners. To demand that the plain words of the statute should be disregarded in order to do that very thing is an extravagance to which this House will not, I hope, give ear."

In another case counsel asked the Divisional Court to reject a particular interpretation of the Motor Vehicles (Driving Licences) Regulations 1950 and certain other provisions on the ground that the interpretation would show that the United Kingdom had failed to implement the international Agreement regarding the Status of Forces of Parties to the North Atlantic Treaty. But Lord Parker C.J. said that it was not for the court "to consider whether we have implemented the treaty agreement or not."[97]

And in the well-known Scottish case of *Mortensen* v. *Peters*[98] the Herring Fishery (Scotland) Act 1889 and regulations made thereunder were held to penalise persons fishing in certain waters outside the three-mile limit, notwithstanding that the imposition of a penalty on foreigners for acts done outside the jurisdiction was contrary to international law.

[97] *Urey* v. *Lummis* [1962] 1 W.L.R. 826, at p. 832.
[98] (1906) 8 F. (J.) 93.

CHAPTER 9

CONSTRUCTION TO AVOID COLLISION WITH OTHER PROVISIONS

Repugnancy to be avoided

If two sections of the same statute "are repugnant, the known rule is that the last must prevail."[1] But, on the general principle that an author must be supposed not to have intended to contradict himself, the court will endeavour to construe the language of the legislature in such a way as to avoid having to apply the rule, *leges posteriores priores contrarias abrogant*. For example, the provision in Order 47 of the County Court Rules 1936 that "the scale of costs in an action for the recovery of a sum of money only shall be determined . . . as regards the costs of the plaintiff, by the amount recovered" was not construed as peremptory, for this would have brought it out of harmony with the earlier provision in the same Order that "the costs of proceedings in a county court shall be in the discretion of the court."[2]

One way in which repugnancy can be avoided is by regarding two apparently conflicting provisions as dealing with distinct matters or situations.

Section 4 (2) (*f*) of the Vehicles (Excise) Act 1949 prescribed a rate for duty on vehicles "constructed and used on public roads for haulage solely," while other sections of the Act imposed a higher rate of duty on vehicles constructed or adapted for the conveyance of goods. Lord Evershed M.R. said that it was "proper to apply, as far as one can, common sense to the construction of these provisions, and I would start, at any rate, with the view that something which is quite clearly brought within one section to which one rate of duty is applicable ought not easily to be said to attract some other rate of duty because one might by some construction of the language bring it also into another section."[3]

By section 117 (1) (*x*) of the Settled Land Act 1925, "lease" is

[1] *Wood* v. *Riley* (1867) L.R. 3 C.P. 26, *per* Keating J. at p. 27.
[2] *Bourne* v. *Stanbridge* [1965] 1 W.L.R. 189. But see *I.R.C.* v. *Herdman* [1969] 1 All E.R. 495.
[3] *T. K. Worgan & Sons, Ltd.* v. *Gloucestershire County Council* [1961] 2 Q.B. 123, at p. 132.

defined as including any agreement for a lease, while section 90 (1) (iii) empowers a tenant for life to "contract to make any lease, and in making the lease vary the terms . . . but so that the lease be in conformity with this Act": to be in such conformity a lease must, *inter alia*, be made by deed. "The first question," said Wilberforce J., "is how to reconcile [these sections] . . . It is suggested, and I think correctly, that section 117 (1) (*x*) relates to such agreements for leases as in effect amount to a demise of the property, a kind of agreement for a lease which in equity is equivalent to a lease, and consequently that section 90 is dealing with a different type of agreement, namely, an executory type of agreement to make a lease, which is not equivalent to a demise."[4]

Section 158 (2) of the Housing Act 1957 empowered a local authority requiring possession of a building owned by them to obtain possession under the Small Tenements Recovery Act 1838, under which a notice of intention to apply for a warrant of possession could be signed by the landlord's "agent," which would include the authority's housing manager. By section 166 (2) of the Housing Act, "a notice, demand or other written document proceeding from a local authority under this Act shall be signed *by their clerk or his lawful deputy*." It was held by the Divisional Court that section 166 (2) did not apply to an authority proceeding under the earlier section.[5]

Collision may also be avoided by holding that one section, which is *ex facie* in conflict with another, merely provides for an exception from the general rule contained in that other.

So, rule 63 of the Matrimonial Causes Rules 1957 ("an application for attachment or committal shall be made to a judge") simply made inapplicable in appropriate cases that part of an earlier rule which provided that application in a matrimonial cause or matter should be made to a registrar and by summons.[6]

Sometimes it is difficult to decide whether provisions of the same enactment are overlapping or mutually exclusive.[7]

Section 54 of the Metropolitan Police Act 1839 created (by para. 6) an offence of obstructing the thoroughfare, and made it "lawful for any constable . . . to take into custody, without warrant, any person who shall commit any such offence within view of any such con-

[4] *Re Rycroft's Settlement* [1962] Ch. 263, at p. 268.
[5] *R.* v. *Forest Justices, ex p. Dallaire* [1962] 2 Q.B. 629.
[6] *Dent* v. *Dent* [1962] P. 187. *Cf. Whitehead* v. *Whitehead* [1963] P. 117.
[7] See, *e.g.*, *Fox* v. *Adamson* [1968] 1 Q.B. 765; aff. [1968] 3 W.L.R. 416; *R.* v. *Legal Aid Committee No. 14, ex p. Dhargalkar* [1968] 1 W.L.R. 97.

stable." By section 63: "It shall be lawful for any constable . . . to take into custody, without a warrant, any person who within view of any such constable shall offend in any manner against this Act, and whose name and residence shall be unknown to such constable, and cannot be ascertained by such constable." Lord Parker C.J. said that "it is reasonably plain that section 63 is in effect dealing with other offences than those which are covered by section 54."[8]

A contrasting case is one which dealt with section 37 of the Public Health Act 1936. This enables the local authority to make certain requirements as to the drainage of a building. By subsection (4), if a drain has to go more than one hundred feet to connect with a sewer, the authority may require the construction of the drain if they undertake to bear the cost in excess of one hundred feet. Section 38 deals with the drainage of buildings in combination, and confers certain powers on the local authority in cases where it "might under the last preceding section require each of two or more buildings to be drained separately into an existing sewer." It contained no provision about an undertaking by the authority to bear any part of the cost. The Divisional Court held that the two sections were not mutually exclusive, but that section 38 was really a special case arising out of section 37 where drainage in combination was thought desirable. It followed that where the council under section 38 required the construction of a drain beyond one hundred feet, it was not liable for any part of the cost in the absence of a formal resolution to bear the cost, for section 37 (4) in effect made such resolution a prerequisite to the council's liability, and section 38 was but a particular application of section 37 procedure.[9]

Construction of provisos

Difficulties sometimes arising in construing provisos.[10] It will, however, generally be found that inconsistencies can be avoided by applying the general rule that the words of a proviso are not to be taken "absolutely in their strict literal sense,"[11] but that a proviso is "of necessity . . . limited in its operation to the ambit of the section which it qualifies."[12] And, so far as that section itself is

[8] *Gelberg* v. *Miller* [1961] 1 W.L.R. 153, at p. 159.
[9] *Princes Investments, Ltd.* v. *Frimley and Camberley U.D.C.* [1962] 1 Q.B. 681.
[10] See the detailed discussion in *Craies on Statute Law*, 6th ed., pp. 217–224. See *Mapp* v. *Oram* [1968] 3 All E.R. 1. [11] *R.* v. *Dibdin* [1910] P. 57.
[12] *Lloyds & Scottish Finance, Ltd.* v. *Modern Cars & Caravans (Kingston), Ltd.*, [1966] 1 Q.B. 764, *per* Edmund Davies J. at p. 780.

concerned, the proviso again receives a restricted construction: where the section confers powers, "it would be contrary to the ordinary operation of a proviso to give it an effect which would cut down those powers beyond what compliance with the proviso renders necessary."[13]

By section 26 (1) of the Sale of Goods Act 1893, a writ of execution against goods "shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; . . . Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff." The enacting part of this section means that on delivery of the writ the sheriff acquires a legal right to seize sufficient of the debtor's goods to satisfy the amount specified in the writ. "The proviso, accordingly, does no more than protect a purchaser of the goods against that right of seizure if the stated conditions are fulfilled. . . . It has no scope for operation where an actual seizure of the debtor's goods has already been effected; and where this has occurred, it is immaterial whether or not the purchaser from the debtor had notice of the seizure, or even of the writ."[14]

Section 65 of the Newcastle-upon-Tyne Improvement Act 1865 contained a proviso that "nothing in this Act shall authorise the corporation . . . to do . . . any act . . . amounting to a nuisance." This was held to be limited in its operation to the group of sections (dealing with sewers and sanitary arrangements) of which section 65 formed part, and not to qualify the powers of the corporation under an earlier section of the Act to maintain posts, pillars and rails in any street.[15]

If, however, the language of the proviso makes it plain that it was intended to have an operation more extensive than that of the provision which it immediately follows, it must be given such wider effect.[16]

If a proviso cannot reasonably be construed otherwise than as

[13] *Re Tabrisky, ex p. Board of Trade* [1947] Ch. 565, *per* Lord Greene M.R. at p. 568.
[14] *Lloyds & Scottish Finance, Ltd.* v. *Modern Cars & Caravans (Kingston), Ltd.* [1966] 1 Q.B. 764, *per* Edmund Davies J. at p. 781.
[15] *Dormer* v. *Newcastle-upon-Tyne Corporation* [1940] 2 K.B. 204.
[16] *Piper* v. *Harvey* [1958] 1 Q.B. 439.

contradicting the main enactment, then the proviso will prevail on the principle that "it speaks the last intention of the makers."[17]

Repeal by implication not favoured

A later statute may repeal an earlier one either expressly or by implication.[18] But repeal by implication is not favoured by the courts.[19] "Forasmuch," said Coke, "as Acts of Parliaments are established with such gravity, wisdom and universal consent of the whole realm, for the advancement of the commonwealth, they ought not by any constrained construction out of the general and ambiguous words of a subsequent Act, to be abrogated."[20] If, therefore, earlier and later statutes can reasonably be construed in such a way that both can be given effect to, this must be done.[21] If, as with all modern statutes, the later Act contains a list of earlier enactments which it expressly repeals, an omission of a particular statute from the list will be a strong indication of an intention not to repeal that statute.[22] And when the later Act is worded in purely affirmative language, without any negative expressed or implied, it becomes even less likely that it was intended to repeal the earlier law.[23]

The Ecclesiastical Leases Act of 1571, which made void all charging of ecclesiastical property in ecclesiastical hands, was held not to be impliedly repealed by section 13 of the Judgments Act 1838 whereby a judgment against any person was to operate as a charge on all "lands, tenements, rectories, advowsons, tithes" and hereditaments in which the judgment debtor had an interest, by regarding the latter enactment as limited to the property of debtors who had the power of charging their property, that is, to lay rectories, advowsons and tithes.[24]

Section 6 of the Poor Relief Act 1815 imposed a penalty of £100, recoverable by the common informer by action, on any parish officer who, for his own profit, supplied goods for the use of a workhouse or the support of the poor. This applied only to a supply for the

[17] *Att.-Gen.* v. *Chelsea Waterworks Co.* (1731) Fitzg. 195.
[18] For repeal, see, *ante*, pp. 16–19.
[19] *Chorlton* v. *Tonge Overseers* (1871) L.R. 7 C.P. 178, *per* Keating J.
[20] *Dr. Foster's Case* (1614) 11 Rep. 56b, at p. 63a.
[21] *Re Chance* [1936] Ch. 266, *per* Farwell J.: "If it is possible it is my duty so to read the section . . . as not to effect an implied repeal of the earlier Act."
[22] See *R.* v. *Poor Law Commissioners, Re St. Pancras Parish* (1837) 6 Ad. & El. 1, *per* Coleridge J.
[23] *Co.Litt.* sect. 170. See, *e.g.*, *R.* v. *Ratcliffe* (1882) 10 Q.B.D. 74; *Muir* v. *Hore* (1877) 47 L.J.M.C. 17.
[24] *Hawkins* v. *Gathercole* (1855) 6 De G.M. & G.1.

poor generally,[25] and so was held to be unaffected by section 77 of the Poor Law Amendment Act 1834, which inflicted a fine of £5, recoverable summarily, half for the informer and half for the poor rates, on any such officer who for profit supplied goods to an individual pauper.[26]

An Act which authorised the quarter sessions to hear an appeal from a conviction by justices for a certain offence involved no inconsistency with an earlier one which provided that either party might have a case stated for the opinion of a superior court, and so did not repeal it by implication.[27]

A bye-law which referred to the election of "any person" as warden of a livery company was not deemed inconsistent with an earlier charter which required of the candidates a certain qualification. Again, there was no implied repeal, "any person" being construed as meaning any person eligible under the previous enactment.[28]

A local Act, in directing that the chimneys of buildings should be of such materials as the corporation approved, did not affect the requirement of section 6 of the earlier and general Chimneys Act 1840 that chimneys should be built of stone or brick.[29]

A bye-law made under the Elementary Education Act 1870, requiring children to attend school so long as it was open for instruction for children of the same sex, age and class, was held not to be contrary to section 14 of the Workshop Regulation Act 1867, which required that children under thirteen employed in a workshop should be sent to school for at least ten hours weekly.[30]

Section 18 of the Distress for Rent Act 1737 makes a tenant who gives notice of his intention to quit at a specified time, and who does not quit then, liable for double rent thereafter. Section 1 of the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915 provided that where the rent of a dwelling-house to which the Act applied was increased above the "standard rent," the excess should be irrecoverable. The Court of Appeal held that, in a situation in which both provisions were relevant, the later did not repeal the earlier. The "rent" dealt with in section 18 was not truly rent, but a penal sum: and section 18 really dealt with the tenancy after its

[25] *Proctor* v. *Mainwaring* (1819) 3 B. & Ald. 145.
[26] *Robinson* v. *Emerson* (1866) 4 H. & C. 352.
[27] *Muir* v. *Hore* (1877) 47 L.J.M.C. 17.
[28] *London Tobacco Pipe Makers' Co.* v. *Woodroffe* (1828) 7 B. & C. 838. *Cf. R* v. *Saddlers' Co.* (1863) 10 H.L.C. 404.
[29] *Hill* v. *Hall* (1876) 1 Ex.D. 411.
[30] *Bury* v. *Cherryholm* (1876) 1 Ex.D. 457.

determination, while section 1 applied to a tenancy which was still subsisting. "The two enactments," said Duke L.J., "might be written in one statute without the one influencing the other in the least."[31]

Section 191 (4) of the Municipal Corporations Act 1882 empowered the watch committee or any two justices to suspend at any time any constable whom they thought negligent in the discharge of, or unfit for, his duty. Regulations made under the Police Act 1919 required that a police officer should be given written information of any charge against him and should have an opportunity of being heard in reply to the charge, and provided for an adjudication by the chief constable. There was held to be no implied repeal, on the ground that the enactments dealt with distinct subjects. "Suspension and disciplinary procedure, followed by punishment," said Warrington L.J., "seem to me to be two entirely different things. Suspension is a power which in the nature of things has, if it is to be of any use, to be exercised summarily; procedure resulting in punishment may well be subject to more deliberate and formal process, and in my opinion it would be most disastrous if we were to hold that legislation dealing with procedure and the punishments for offences established in accordance with that procedure, were to repeal this summary power, given by the Act of 1882, to suspend a person pending inquiries as to his conduct."[32]

Section 44 of the Black Sluice Drainage Act 1765 provided that the commissioners under the Act "shall . . . scour out, deepen, and embank" various drains, dykes and becks. This was held by the Court of Appeal not to be inconsistent with certain provisions of the Land Drainage Act 1930. The 1765 Act imposed a duty, the 1930 Act conferred permissive powers, and there was no reason why the two should not co-exist.[33]

Examples of repeal by implication

If, however, "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,"[34] the earlier is abrogated by the later.

[31] *Flannagan* v. *Shaw* [1920] 3 K.B. 96, at p. 108.
[32] *Wallwork* v. *Fielding* [1922] 2 K.B. 66, at p. 74.
[33] *Rippingale Farms, Ltd.* v. *Black Sluice Internal Drainage Board* [1963] 1 W.L.R. 1347. *Cf. Garland & Flexman* v. *Wisbech Corporation* [1962] 1 Q.B. 151.
[34] *Kutner* v. *Phillips* [1891] 2 Q.B. 267, *per* A. L. Smith L.J. at p. 272; *Flannagan* v. *Shaw* [1920] 3 K.B. 96, *per* Scrutton L.J.

For instance, where one general Act exempted from licensing regulations the sale of a certain kind of beer (that sold for not more than 1½*d.* a quart) and a subsequent one enacted that no person should sell "any beer" without a licence, it was clearly impossible to save the former from the repeal implicit in the latter.[35]

The requirements of the Fines and Recoveries Act 1833, s. 40, which empowered a married woman to dispose of land which she held in fee provided that she did so with the concurrence of her husband and by deed acknowledged, were impliedly repealed by the Married Women's Property Act 1882, which enabled her in general terms to dispose of all real property as if she were a *feme sole*.[36]

The Nuisances Removal Act 1848, in providing that the cost of obtaining and executing an order of justices under the Act against an owner of premises should be recoverable in the county court, impliedly repealed, as regards such cases, the provision in section 58 of the County Courts Act 1846 that those courts should not take cognisance of cases where title to real property was in question, for it would have been inoperative if the court could not decide questions of ownership.[37]

An enactment that the Custos Rotulorum should nominate a fit person to be clerk of the peace *quamdiu se bene gesserit* impliedly repealed an earlier one which authorised the appointment *durante bene placito*, for a grant under the latter statute would be inconsistent with one under the former.[38]

Where a statute made it actionable to sell a pirated copy of a work with knowledge that it was pirated, and a subsequent Act contained a similar provision but without any mention of guilty knowledge, it was held that the earlier Act was so far abrogated that an action was maintainable for a sale made in ignorance of the piracy.[39]

The Wild Birds' Protection Act 1872 imposed a penalty of 5*s.* for killing or selling a wild bird between March 15 and August 1, unless (*inter alia*) it was proved that the bird had been brought from abroad before March 15. The Preservation of Wild Fowl Act 1876, after reciting that the 1872 Act was insufficient for the protection of wild birds during the breeding season, imposed a penalty of 20*s.* for kill-

[35] *Read* v. *Storey* (1861) 30 L.J.M.C. 110.
[36] *Re Drummond* [1891] 1 Ch. 524.
[37] *R.* v. *Harden* (1852) 22 L.J.Q.B. 299.
[38] *Owen* v. *Saunders* (1697) 1 Ld.Raym. 158.
[39] *West* v. *Francis* (1822) 5 B. & Ald. 737; *Gambart* v. *Sumner* (1859) 29 L.J.Ex. 98.

ing or "possessing" a wild bird between February 15 and July 10. In *Whitehead* v. *Smithers*,[40] it was held that the later Act impliedly repealed the proviso of the earlier, so that the excuse that the bird had been imported could no longer be admitted.

By section 7 of the Acquisition of Land (Assessment of Compensation) Act 1919: "The provisions of the Act or Order by which the land is authorised to be acquired, or of any Act incorporated therewith, shall, in relation to the matters dealt with in this Act, have effect subject to this Act, and in so far as inconsistent with this Act, those provisions shall cease to have or shall not have any effect." In *Ellen St. Estates, Ltd.* v. *Minister of Health*,[41] it was argued that, by reason of this provision, it was impossible for anything in the 1919 Act to be impliedly repealed by the Housing Act 1925. The submission was rejected by the Court of Appeal, Maugham L.J. saying (at p. 597) that the legislature "cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal."

A special rule applies to penal statutes. If a later statute again describes an offence created by an earlier one,[42] and affixes a different punishment to it, or varies the procedure applicable, the earlier statute is impliedly repealed by the later.[43]

Thus, the Stealing of Deer Act 1776, which imposed a pecuniary penalty on persons who hunted or killed deer was held to have repealed so much of the "Black Act" of 1722 as made that offence when committed in enclosed parks or in royal forests or by persons who went armed and with their faces blackened, capital.[44]

Section 75 of the General Paving (Metropolis) Act 1817 (commonly called "Michael Angelo Taylor's Act") prohibited the erection

[40] (1877) 2 C.P.D. 553.

[41] [1934] 1 K.B. 590. *Cf. Vauxhall Estates Ltd.* v. *Liverpool Corporation* [1932] 1 K.B. 733.

[42] *Aliter*, where the existing offence was a purely common law one, in which case any penalties prescribed by the statute will (subject to the Interpretation Act 1889, s. 33, *infra*) be cumulative: *R.* v. *Wigg* (1705) 2 Salk. 460; *R.* v. *Carlile* (1819) 3 B. & Ald. 161.

[43] *Michell* v. *Brown* (1858) 1 E. & E. 267; *Henderson* v. *Sherborne* (1837) 2 M. & W. 236. It is submitted that the rule is not affected by s. 33 of the Interpretation Act (by which, where an act constitutes an offence under two or more statutes, or both under statute and at common law, the offender shall not be liable to be punished twice: *post*, p. 362), since this deals merely with liability to punishment, and makes no mention of the doctrine of implied repeal. But see *Keep* v. *Vestry of St. Mary's, Newington* [1894] 2 Q.B. 524, *per* Kay L.J.

[44] *R.* v. *Davis* (1783) 1 Leach 271.

in any street of any hoard or scaffolding, or posts or rails, by way of enclosure, for the purpose of making mortar or of depositing or sifting any bricks, sand or other building material, without first obtaining a licence. The penalty for contravention of this prohibition was fixed by the section at 10*s.* a day during the time that the erection, etc., continues. Section 122 of the Metropolis Management Act 1855 contained a similar prohibition, while section 123 provided penalties different from, and more severe than, those found in Michael Angelo Taylor's Act, and there was also some difference in the provisions as to the pulling down of an offending structure. The Divisional Court held that, notwithstanding that the offence was not defined in identical terms in the two statutes, section 123 effected an implied repeal on the principle stated in the last paragraph but one above.[45]

Generalia specialibus non derogant

"Now if anything be certain it is this," said the Earl of Selborne L.C. in *The Vera Cruz*,[46] "that where 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." In a later case, Viscount Haldane said: "We are bound . . . to apply a rule of construction which has been repeatedly laid down and is firmly established. It is that wherever Parliament in an earlier statute has directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that if in a subsequent statute the Legislature lays down a general principle, that general principle is not to be taken as meant to rip up what the Legislature had before provided for individually, unless an intention to do so is specially declared.[47] A merely general rule is not enough, even though by its terms it is stated so widely that it would, taken by itself, cover special cases of the kind I have referred to."[48]

So, section 7 of the Admiralty Court Act 1861, which gave jurisdiction to that court "over any claim for damage done by any ship," was

[45] *Smith* v. *Benabo* [1937] 1 K.B. 518. *Cf. Fortescue* v. *Vestry of St. Matthew, Bethnal Green*, [1891] 2 Q.B. 170.
[46] (1884) 10 App.Cas. 59, at p. 68. *Cf. Hawkins* v. *Gathercole* (1855) 6 De G. M. & G. 1.
[47] See, *e.g.*, *R.* v. *Bridge* (1890) 24 Q.B.D. 609 *per* Fry L.J.; *Att.-Gen.* v. *Exeter Corporation* [1911] 1 K.B. 1092; *Harlow* v. *Minister of Transport* [1951] 2 K.B. 98.
[48] *Blackpool Corporation* v. *Starr Estate Co., Ltd.* [1922] 1 A.C. 27, at p. 34.

held not to relate to an action for damages for loss of life under the Fatal Accidents Act 1846, actions under that Act being in respect of a special class of claims involving numerous and important considerations which the legislature could not be supposed to have had in mind in using words of so general a character.[49]

Section 1 of the Public Authorities Protection Act 1893 laid down a six months' period of limitation for actions brought in respect of things done in execution of an Act of Parliament or of any public duty or authority. Under the Maritime Conventions Act 1911, ss. 8 and 9, no action is maintainable to enforce any claim against a vessel or her owners, or any other person responsible for the fault of the vessel, unless the proceedings are commenced within two years. In an action against an officer in charge of one of His Majesty's ships for damage by collision, it was held that the limitation period of six months was applicable, and that the 1893 Act had not been *pro tanto* repealed. Lord Sterndale M.R. said: "There may very well co-exist a general limitation of all actions in respect of maritime damage to two years, and a further limitation where the action is brought against persons of a specific class to six months in the case of those persons."[50]

In *Bishop of Gloucester* v. *Cunnington*,[51] the Court of Appeal held that certain provisions of the Pluralities Act 1838 regarding parsonage houses, and in particular section 59 (which makes any agreement for letting a parsonage house in which an incumbent may be ordered to reside by the bishop under the Act null and void unless it contains a condition for avoiding the agreement upon a copy of the bishop's order being served on the occupier), were not impliedly repealed by the Rent Restriction Acts. The relevant legislation showed that parsonage houses have been placed by Parliament in a special category by themselves, and they should not therefore be affected by general legislation affecting dwelling-houses.

In another case, it was held that the obligation imposed upon the London County Council by the London Open Spaces Act 1893 to maintain Hackney Marshes as an open space was not impliedly abrogated by the conferring upon them by the Housing Act 1925 of a power of appropriating any land vested in them for building purposes. The latter Act conferred powers on local authorities

[49] *Seward* v. *The Vera Cruz* (1884) 10 App.Cas. 59.
[50] *The Danube II* [1921] P. 183, at p. 188.
[51] [1943] K.B. 101.

generally, and did not affect earlier legislation dealing with one authority in particular.[52]

Similarly, a provision in the Blackpool Improvement Act 1917 whereby certain land was to be acquired by the Blackpool Corporation at a price to be determined as provided in that Act was not impliedly repealed by section 1 (1) of the Acquisition of Land (Assessment of Compensation) Act 1919, by which latter provision "where by or under any statute (whether passed before or after the passing of this Act) land is authorised to be acquired compulsorily by any Government Department or any local or public authority, any question of disputed compensation . . . shall be . . . determined" in the manner thereinafter provided.[53]

Similar considerations ought to apply to general Acts which follow upon personal, as to those which follow local, statutes. Thus, the Fines and Recoveries Act 1833 which, in the most comprehensive terms, authorised "every tenant in tail" to bar his entail would have no application to the tenant in tail of property entailed by special Act of Parliament, such as the Shrewsbury, Marlborough, Wellington, and other estates.[54]

[52] *R.* v. *Minister of Health, ex p. Villiers* [1936] 1 K.B. 29.
[53] *Blackpool Corporation* v. *Starr Estate Co., Ltd.* [1922] 1 A.C. 27. *Cf. Sowerby Bridge U.D.C.* v. *Stott* [1956] 2 Q.B. 596.
[54] See *Earl of Abergavenny* v. *Brace* (1872) L.R. 7 Ex. 145, dealing with the Real Property Limitation Act 1833.

Chapter 10

CONSTRUCTION MOST AGREEABLE TO JUSTICE AND REASON

1. Presumption Against Intending What is Inconvenient or Unreasonable

In determining either the general object of the legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice and legal principles should, in all cases of doubtful significance, be presumed to be the true one. "An intention to produce an unreasonable result is not to be imputed to a statute if there is some other construction available."[1] Where to apply words literally would "defeat the obvious intention of the legislation and produce a wholly unreasonable result" we must "do some violence to the words" and so achieve that obvious intention and produce a rational construction.[2] The question of inconvenience or unreasonableness must be looked at in the light of the state of affairs at the date of the passing of the statute, not in the light of subsequent events.[3]

Unreasonable and inconvenient results are to be avoided

Section 105 of the Highway Act 1835 gave an appeal to any person who though himself aggrieved by any order, conviction, judgment or determination of a justice under the Act. This was held not to apply to an informant who complained of an acquittal on a charge of obstructing the highway, for if it did the person acquitted would be liable to be twice vexed for the same offence.[4]

A statute which authorised a constable to enter licensed premises at all times to prevent or detect violations of the licensing laws was held

[1] *Artemiou* v. *Procopiou* [1966] 1 Q.B. 878, *per* Danckwerts L.J. at p. 888.
[2] *Luke* v. *I.R.C.* [1963] A.C. 557, *per* Lord Reid at p. 577: "this is not a new problem, though our standard of drafting is such that it rarely emerges."
[3] *Att.-Gen.* v. *Prince Ernest Augustus of Hanover* [1957] A.C. 436.
[4] *R.* v. *London Justices* (1890) 25 Q.B.D. 357.

not to entitle him to demand admission unless he had some reasonable ground for suspecting a breach of the law.[5]

Where a suggested construction of section 31 (2) of the Supreme Court of Judicature (Consolidation) Act 1925 would have given a defendant an absolute right of appeal but a plaintiff the right to cross-appeal only if leave were granted, Willmer L.J. (at p. 506) refused to accept this interpretation which he regarded as giving rise to "a very strange result."[6]

In *Harrison-Broadley* v. *Smith*,[7] it was argued that section 2 (1) of the Agricultural Holdings Act 1948 could operate in such a way that X, the owner of land, could grant a licence to a partnership consisting of himself and Y to occupy the land, so that the partnership would be tenant of the land and X would be in the extraordinary position of being his own tenant. "When one produces a result as bizarre as that," said Harman L.J. (at p. 872), "it is time to pause and consider whether the statute really obliges one to do so." The phrase "where a person is granted a licence to occupy land" was therefore construed as referring to persons other than the grantor of the licence.

By section 16 (2) of the Matrimonial Causes Act 1950, now section 14 (3) of the Matrimonial Causes Act 1965, in proceedings for a decree of presumption of death and dissolution of marriage, "the fact that for a period of seven years or upwards the other party to the marriage has been continually absent from the petitioner, and the petitioner has no reason to believe that the other party has been living within that time, shall be evidence that he or she is dead until the contrary is proved." It was held that "reason to believe" could only be derived from matters supervening during the seven year period, and that the start of the period was not postponed until such time as, on the common law rules of evidence, the spouse could be presumed to be dead. The latter construction would "produce inconvenience and hardship to a petitioner contrary to the apparent intentions of the legislature and would indeed reduce subsection (2) to an absurdity."[8]

By section 28 (1) of the Factories Act 1961, all passages and gangways are, so far as is reasonably practicable, to be "kept free from any obstruction." This section is "to be applied in a practical manner, dealing with conditions in a factory where ordinary work is

[5] *Duncan* v. *Dowding* [1897] 1 Q.B. 575.
[6] *Gordon* v. *Cradock* [1964] 1 Q.B. 503.
[1964] 1 All E.R. 867.
[8] *Thompson* v. *Thompson* [1956] P. 414, *per* Sachs J. at p. 423.

going on," and is not to be "construed as treating anything that happens to stop for a moment in the place defined for movement and transit as being an obstruction." Therefore the section was not infringed where a trolley was placed in a passageway for unloading in the normal course of working.[9]

When one-third of a hire-purchase price has been paid, "the owner shall not enforce any right to recover possession of the goods from the hirer otherwise than by action": Hire-Purchase Act 1938, s. 11 (1) (see now the 1965 Act, s. 34 (1)). A demand for the return of possession of the goods, followed by compliance, is not an "enforcement" within and contrary to this provision, for if it were it would "lead to very, very strange results which could hardly have been contemplated by Parliament": the service of a notice on the hirer was a necessary preliminary to an action, yet the owner, having served the notice, would have had to refuse to accept compliance with it.[10]

An adoption order can only be made in respect of an infant who "has been continuously in the care and possession of the applicant for at least three consecutive months immediately preceding the date of the order": Adoption Act 1958, s. 3 (1). Attendance at school does not vitiate the element of continuity required, and "it would be equally unreasonable to suppose that an applicant would be prevented from obtaining an order if he or she had on any occasion in the past three months left the child for a short time in the care of a servant, relation or neighbour or if the infant had paid a short visit to a friend."[11]

Artificiality and anomaly to be avoided

Where possible, a construction should be adopted which will facilitate the smooth working of the scheme of legislation established by the Act,[12] which will avoid producing or prolonging artificiality in the law, and which will not produce anomalous results.

In *Re Cohen, A Bankrupt*,[13] the result of a suggested construction of section 51 (2) of the Bankruptcy Act 1914 would have been that, while the trustee in bankruptcy would have had an absolute right to take from the bankrupt his enjoyment of the income of shares and

[9] *Marshall* v. *Ericsson Telephones, Ltd.* [1964] 1 W.L.R. 1367, *per* Sellers L.J. at p. 1371.
[10] *Mercantile Credit Co., Ltd.* v. *Cross* [1965] 2 Q.B. 205, *per* Willmer L.J. at p. 212.
[11] *Re B. (an infant)* [1964] Ch. 1, *per* Buckley J. at p. 5.
[12] *I.R.C.* v. *J. B. Hodge & Co. (Glasgow), Ltd.* [1961] 1 W.L.R. 1218; *Skelton* v. *Jones* [1962] 1 W.L.R. 840. *Cf. Delaroy-Hall* v. *Tadman* [1969] 2 W.L.R. 92; *Thomas* v. *Rose* [1968] 1 W.L.R. 1797. [13] [1961] Ch. 246.

real estate which he owned, he would have needed the leave of the court before taking rents and dividends to which the bankrupt was entitled as tenant for life under a settlement. Lord Evershed M.R. said (at p. 257) that "it would seem strange that there should be so marked a distinction, from the point of view of the interest of creditors, between the case where a man owns the income-producing asset, and the case where . . . he is entitled to a life interest therein," and he refused to adopt an interpretation which would give rise to such an "extravagant" anomaly.

Similarly, Ashworth J. said that[14] "it would be odd if a statement made when criminal proceedings are pending or anticipated is admissible in subsequent civil proceedings, whereas a statement made when civil proceedings are pending or anticipated is not," and in consequence he construed "proceedings" in section 1 (3) of the Evidence Act 1938 as referring to both civil and criminal proceedings.

"Suppose . . . a grant to landowner A that, if at any time landowner B or his successors in title should construct a road from point X on the border of A's land to point Y on the other side of B's land, A and his successors in title should be entitled to use the road and to construct and use a drain from their land running under it, then if [section 162 (1) (*d*) (iv) of the Law of Property Act 1925] means what the plaintiff says it means the grant of the right of drainage would be good although the grant of the right of way was bad." Cross J. refused to accept the construction thus put forward.[15]

Section 100 of the Public Health Act 1936 enables a local authority which is of opinion that summary proceedings would afford an inadequate remedy for a statutory nuisance to take proceedings in the High Court for its prohibition or abatement. In *Warwick Rural District Council* v. *Miller-Mead*,[16] the Court of Appeal held that it was unnecessary that the formal expression of the council's opinion under the section should have preceded the issue of the writ, provided that such formal opinion was expressed before the trial. The contrary construction, said Lord Evershed (at p. 454), would give a "result . . . in a high degree artificial. As pointed out in course of the argument, a material change in the composition of a local authority (and of its view on the relevant subject-matter) might well occur between the date of the commencement of an action and its trial."

[14] *W. & M. Wood (Haulage), Ltd.* v. *Redpath* [1967] 2 Q.B. 520, at p. 526.
[15] *Dunn* v. *Blackdown Properties, Ltd.* [1961] Ch. 433, at p. 441.
[16] [1962] Ch. 441.

Where a statute does unequivocally give rise to an unnatural state of affairs, it should be given "a working effect . . . without extending the operation of inference or imagination further than is necessary for" its purpose. So a person who purports to become a member of a company *after* it has been dissolved in consequence of having been struck off the register on the ground that it has ceased to carry on business is not a "member" of the company who may petition for its restoration to the register under the Companies Act 1948, s. 353 (6). The subsection, said Buckley J., involved "some degree of make-believe," and this should not be carried further than was absolutely necessary.[17]

The more reasonable construction to be adopted

Not only are unreasonable or artificial or anomalous constructions to be avoided: it appears to be an assumption (often unspoken) of the courts that where two possible constructions present themselves, the more reasonable one is to be chosen.

Thus where an Act gave an appeal to the "next" sessions, it was construed as referring to the next original Quarter Sessions for the county, not to the resumption of the current sessions which had been adjourned: convenience and justice, said Lord Kenyon C.J., were here "so obviously in conformity with the strict letter of the statute that there can be no doubt on the proper construction of it."[18]

The Workmen's Compensation Act 1897, s. 2 (1), provided that proceedings for the recovery of compensation under the Act should not be maintainable unless notice of the accident had been given as soon as practicable, and unless "the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury." The House of Lords held "the claim for compensation" to mean a notice of such a claim sent to the employer, and not the initiation of legal proceedings.[19]

The Building (Safety, Health and Welfare) Regulations "are addressed to practical people . . . [and] ought to be construed in light of practical considerations, rather than by a meticulous comparison of the language of their various provisions. . . . If the language is capable of more than one interpretation, we ought to discard the more natural meaning if it leads to an unreasonable result, and adopt

[17] *Re New Timbiqui Gold Mines, Ltd.* [1961] Ch. 319, at p. 326. *Cf. Re Roehampton Swimming Pool, Ltd.* [1968] 1 W.L.R. 1693. [18] *R.* v. *Sussex L.JJ.* (1797) 7 T.R. 107.
[19] *Powell* v. *Main Colliery Co., Ltd.* [1900] A.C. 366.

that interpretation which leads to a reasonably practicable result."[20]

Similarly, when faced with a provision which, with reference to both adults and infants, applied to a person "in the custody of a parent," Danckwerts L.J. said that we must "strain ourselves to give it a sensible meaning." It was therefore interpreted as not including a person merely of unsound mind who happened to live with his parents: "the draftsman must have had in mind the case of a harmless imbecile or mongol who could be expected to be actually in the custody of his parents."[21]

The West African (Appeal to Privy Council) Order in Council 1949, section 5, provided that "applications to the court for leave to appeal shall be made by motion or petition within 21 days from the date of the judgment to be appealed from, and the applicant shall give the opposite party notice of his intended application." Although the Judicial Committee thought that, on the literal construction of the section, notice to the opposite party would have to be given within the twenty-one days, it adopted the more reasonable interpretation that a copy of the notice of application should be "served on the opposite party as soon as possible and in any case a reasonable time before the date of the hearing."[22]

Dealing with procedure on the winding-up of a company, the Companies Act 1948, s. 268 (2), provides that "the court may examine [an officer of the company] on oath . . . and may reduce his answers to writing." It was argued that this required the registrar or shorthand-writer to read over to the person being examined the gist of each answer and then to take down what was so read out. But Pennycuick J. stigmatised such a procedure as "inconvenient to a degree," and held that the registrar had complied with section 268 (2) by having a transcript of the shorthand note made and requiring the officer to sign it.[23]

Quite often the judges rely on what they regard as a "sensible" or "common sense" interpretation in order to reach the true meaning of a statute. The Affiliation Proceedings Act 1957, for instance, refers to an application by "a single woman who is with child, or who has been delivered of an illegitimate child." The Divisional Court has held that the phrase "single woman" refers to the woman's condition

[20] *Gill* v. *Donald Humberstone & Co., Ltd.* [1963] 1 W.L.R. 929 *per* Lord Reid at pp. 933, 934.
[21] *Kirby* v. *Leather* [1965] 2 Q.B. 367. *Cf. Hewer* v. *Bryant* [1968] 3 W.L.R. 910.
[22] *Att.-Gen. of the Gambia* v. *N'Jie* [1961] A.C. 617, *per* Lord Denning at p. 635.
[23] *Re Milton Hindle, Ltd.* [1963] 1 W.L.R. 1032, at p. 1034.

at the time of the application, not the time of the birth. This was "fairly good common sense, because the question of whether the woman ought to receive money for the support of the child must surely depend on her circumstances at the time when she seeks the order."[24] In the same way, a provision for appealing to the High Court against "orders made after the commencement" of the Town and Country Planning Act was held to refer to orders effectively made, that is, those which had been confirmed by the Minister, so that an order made by a local authority before the commencement of the Act and confirmed by the Minister afterwards was caught by the section. This was the only "reasonable interpretation" of "made," for "the only order which can be appealed against and against which any person can have a grievance" would be one confirmed by the Minister.[25]

In much the same way, the Divisional Court refused to interpret a requirement that a school crossing patrol should exhibit a sign with the words "Stop Children Crossing" as meaning that the sign must be held precisely at right angles to oncoming traffic,[26] and Winn J. refused to construe the phrase "competent person" in the Quarries (General) Regulations 1956 as meaning the most competent person available or a person so competent that he never makes a mistake. It meant "a man who, on a fair assessment of the requirements of the task, the factors involved, the problems to be studied and the degree of risk of danger implicit" could fairly and reasonably be, and was in fact, regarded as competent.[27]

Unambiguous language

But convenience is not always a safe guide to construction.[28] However difficult it may be to believe that Parliament ever really intended the consequences of a literal interpretation, "we can only take the intention of Parliament from the words which they have used in the Act, and therefore the question is whether these words are capable of a more limited construction. If not, then we must apply them as they stand, however unreasonable or unjust the

[24] *Gaines* v. *W.* (*An Infant*) [1968] 1 Q.B. 782, 788. See also Legitimacy Act 1959, s. 4.
[25] *Iveagh* (*Earl of*) v. *Minister of Housing and Local Government* [1964] 1 Q.B. 395 *per* Lord Denning M.R. at p. 407. *Cf. R.* v. *Skinner* [1968] 2 Q.B. 700; *R.* v. *Holt* [1968] 1 W.L.R. 1942; *R.* v. *Gwilliam* [1968] 1 W.L.R. 1839.
[26] *Hoy* v. *Smith* [1964] 1 W.L.R. 1377.
[27] *Brazier* v. *Skipton Rock Co., Ltd.* [1962] 1 W.L.R. 471, at p. 474.
[28] *Edgwarebury Park Investments, Ltd.* v. *Minister of Housing and Local Government* [1963] 2 Q.B. 408.

consequences, and however strongly we may suspect that this was not the real intention of Parliament."[29]

So the House of Lords held that a provision in the Income Tax Act 1952 for a statutory penalty (for making an incorrect return of income) of £20 "and treble the tax which he ought to be charged under this Act" referred, not to the tax on the amount which the taxpayer had failed to declare, but to the whole tax which he ought to be charged for the relevant year, notwithstanding the extravagant consequences which flowed from giving the words their natural meaning.[30]

In a case on regulation 3 (2) (*a*) of the Betting (Licensed Offices) Regulations 1960, Lord Parker C.J. said that the court was "in no way concerned with what I may call the merits of the position. It may be thought very odd that you can, for instance, set out a list of the Derby runners, and yet that will offend if a space is provided for the prospective punter to put in his name and address. Be that as it may, I think that this court is merely concerned to construe the regulation according to its ordinary meaning."[31]

By regulation 21 of the Woodworking Machinery Regulations 1922: "The guards and other appliances required by these regulations . . . shall be constantly kept in position while the machinery is in motion, except when, *owing to the nature of the work being done*, the use of the guards or appliances is rendered impracticable." It was held by the Court of Appeal that the words italicised referred, *inter alia*, to the size of the work so that guards might be removed from a circular saw to allow big planks to be sawn, and that in order to test the impracticability of using guards one might not consider the availability of other, more suitable, machines. This conclusion was reached with great reluctance, as it made it possible for an employer "to use these extremely dangerous machines to do jobs for which they are not really suitable," without guards, "even although he has in the same factory a machine equipped with guards which could be used for that work."[32]

Section 24 of the Betting and Gaming Act 1960 dealt with the

[29] *I.R.C.* v. *Hinchy* [1960] A.C. 748, *per* Lord Reid at p. 767. *Cf. Luke* v. *I.R.C.* [1963] A.C. 557, *per* Lord Reid at p. 577: "It is only where the words are absolutely incapable of construction which will accord with the apparent intention of the provision and will avoid a wholly unreasonable result, that the words of the enactment must prevail."

[30] *I.R.C.* v. *Hinchy, supra. Cf. I.R.C.* v. *Henry Ansbacher & Co.* [1963] A.C. 191.

[31] *Heaney* v. *Smith* [1964] 1 W.L.R. 789, at pp. 793, 794.

[32] *Harriman* v. *Martin* [1962] 1 W.L.R. 739, *per* Upjohn and Diplock L.JJ. at p. 743.

provision of amusements with prizes, subsection (2) providing that the conditions set out in subsection (3) should be observed, breach of them being made an offence. Among the conditions in section 24 (3) were maximum amounts for stakes (1*s.*) and money prizes (1*s.*). It was held that justices had only power to permit gaming on these conditions or not at all, and could not attach other or different conditions, limiting the number of machines on any premises or fixing lower maxima for stakes and prizes. "If section 24 leads to the most fantastic—and I do not think that is too strong a word—results, it can be cured only by legislation. For my part, I consider that it does lead to fantastic results but leads to those results quite clearly and inescapably."[33]

Similarly, that a particular construction will give rise to anomalies will not turn the scales where the words used are plain.[34] And where both possible constructions of a statute fail to avoid anomalies, and the most that can be said is that one produces more than the other, arguments from inconvenience will be of little weight.[35]

In *R.* v. *Dooley*,[36] section 2 of the Road Traffic Act 1962 was held to give rise to "an entirely anomalous result" in the distinction between the procedure to be followed when a constable asked a motorist to provide a specimen of blood or urine and that which applied where the request was made by a medical practitioner. In *Re Duckett*,[37] the Court of Appeal held that, although allowances and gratuities payable to a teacher under the Teachers (Superannuation) Act 1925 could be made available to her creditors under section 51 (2) of the Bankruptcy Act 1914, the "sum equal to the balance of her contributions" to which she became entitled on leaving the profession could not: and Danckwerts L.J. (at p. 409) expressly admitted that this was "anomalous." And in construing the Double Taxation Relief (Taxes on Income) (Australia) Order 1947, Lord Evershed M.R. admitted that "the result may involve a certain artificiality in taxing provisions which, in this case, may also be said to work somewhat harshly upon the taxpayer; but the question for us is to interpret as best we can the taxing provisions which are relevant to the appeal." "Perfection in any system of double

[33] *Hewison* v. *Skegness U.D.C.* [1963] 1 Q.B. 584, *per* Salmon J. at p. 592.
[34] *Dunn* v. *I.R.C.* [1961] Ch. 453; *Rutherford* v. *Maurer* [1962] 1 Q.B. 16; *Duckering (Inspector of Taxes)* v. *Gollan* [1965] 1 W.L.R. 680.
[35] *Bowes-Lyon* v. *Green* [1963] A.C. 420, *per* Lord Reid.
[36] [1964] 1 W.L.R. 648, *per* Judge Chapman at p. 650.
[37] [1964] Ch. 398.

taxation relief," said Donovan L.J., "must be almost impossible to achieve."[38]

2. Presumption Against Intending Injustice or Absurdity

Injustice

A sense of the possible injustice of an interpretation ought not to induce judges to do violence to well-settled rules of construction, but it may properly lead to the selection of one rather than the other of two reasonable interpretations.[39] Whenever the language of the legislature admits of two constructions and, if construed in one way, would lead to obvious injustice, the courts act upon the view that such a result could not have been intended, unless the intention to bring it about has been manifested in plain words.[40] "If the court is to avoid a statutory result that flouts common sense and justice it must do so not by disregarding the statute or overriding it, but by interpreting it in accordance with the judicially presumed parliamentary concern for common sense and justice."[41] But the possibility of injustice which leads the court to adopt a particular construction must be a real one: if the injustices suggested in argument are purely hypothetical, and may never or only rarely occur in practice, the court will remain unmoved.[42]

Thus, where a bye-law authorised the Poulters' Company to fine "all" poulterers in London or "within seven miles round" who refused to be admitted into their company, it was held that, as no poulterer could legally belong to the company who was not also a freeman of the City, the bye-law was to be construed as limited to those poulterers who were freemen, so as to avoid the injustice of punishing men for refusing to enter into a company to which they could not legally belong.[43]

The East India Company Act 1780 protected magistrates in India from actions for any wrong or injury done by them in the exercise of the judicial office. This was held to exempt them from liability only

[38] *Imperial Chemical Industries, Ltd.* v. *Caro (Inspector of Taxes)* [1961] 1 W.L.R. 529, at pp. 534, 545.
[39] *Arrow Shipping Co. Ltd.* v. *Tyne Improvement Commissioners* [1894] A.C. 508, *per* Lord Herschell L.C.
[40] *Smith* v. *Great Western Ry.* (1877) 3 App.Cas. 165; *Countess of Rothes* v. *Kirkcaldy Waterworks Commissioners* (1882) 7 App.Cas. 702; *Railton* v. *Wood* (1890) 15 App.Cas. 363; *Coutts & Co.* v. *I.R.C.* [1953] A.C. 267.
[41] *Re Maryon-Wilson's Will Trusts* [1968] Ch. 268, *per* Ungoed-Thomas J. at p. 282.
[42] *Verdin* v. *Coughtrie (Inspector of Taxes)* [1961] A.C. 880, *per* Lord Denning.
[43] *Poulters' Co.* v. *Phillips* (1840) 6 Bing.N.C. 314.

when acting bona fide in cases in which, by mistake, they exceeded their jurisdiction.[44]

A statute which enacts that a person who has been convicted by justices of an assault and has suffered the punishment awarded for it shall be released from all other proceedings "for the same cause" would not be construed as exempting him from prosecution for manslaughter if the party assaulted afterwards died from the effects of the assault, as this would defeat the ends of justice.[45]

Section 14 (1) of the Finance Act 1894 provides that, in the case of property which does not pass to an executor as such, estate duty may be recovered "from the person entitled to any sum charged on such property." An estate was settled under a will, and the question was whether, on the death of the first life tenant, estate duty was payable by contingent reversionary legatees. Ungoed-Thomas J. accepted the argument that, as a matter of common sense and justice, the legatees' liability could not arise until they became entitled in possession: "entitled" in section 14 (1) meant entitled in possession to payment of the sum charged. The contrary construction would make legacies suitably framed "instruments of malevolence rather than beneficence."[46]

By section 155 (1) of the Factories Act 1961, "in the event of any contravention in or in connection with or in relation to a factory of the provisions of this Act . . . the occupier . . . of the factory shall . . . be guilty of an offence." Prima facie, section 155 (1) referred to any contravention under the Act, by whomsoever committed, so that an employer would be liable for offences committed by his employee. "I agree," said Lord Parker C.J., "that those are very wide words, but I feel constrained in the circumstances of the case to interpret them in a way which will only make the employer liable for all contraventions under the Act other than those in respect of which the sole obligation to perform is imposed on the employee. To give it the other meaning seems to me to conflict with the principle that a master is not vicariously liable for crimes of his servant."[47]

In proceedings for contribution, the amount recoverable from any person "shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage": Law Reform (Married Women and Tortfeasors)

[44] *Calder* v. *Halket* (1840) 3 Moo.P.C. 28.
[45] *R.* v. *Morris* (1867) L.R. 1 C.C. 90; *R.* v. *Miles* (1890) 24 Q.B.D. 423, *per* Hawkins J.
[46] *Re Maryon-Wilson's Will Trusts* [1968] Ch. 268, at p. 281.
[47] *Wright* v. *Ford Motor Co., Ltd.* [1967] 1 Q.B. 230, at pp. 236, 237.

Act 1935, s. 6 (2). The Court of Appeal held that these words only required the court to have regard to the liability of parties actually before the court, not that of all persons who might possibly be liable. The latter construction would mean that in a negligence case the court would have to make an assessment of the liability of a person who had no opportunity to give an explanation of the accident, which would be "fundamentally contrary to the ideas of justice as administered in these courts."[48]

The "reasonable cost of equivalent reinstatement" under section 2, rule (5), of the Acquisition of Land (Assessment of Compensation) Act 1919, now re-enacted in section 5, rule (5), of the Land Compensation Act 1961, is the reasonable cost on the earliest date on which reinstatement could reasonably have been effected, not on the date on which notice to treat was served. "It would be ridiculous and monstrously unjust to hold that compensation must now [1967] be assessed on what would have been the reasonable cost of reinstatement in 1947 when no site was available and no reinstatement could have been effected. Unless compelled to do so by direct and binding authority, I would refuse to make any such absurd and unjust finding."[49]

Where, however, the words of the statute plainly require a particular construction, the court must even effect to them: this is so even if the result is to subject a man to a second punishment for the one offence.[50]

Absurdity

The same general rule applies where the result of one of two interpretations would be to lead to an absurdity. The leading modern case is *Att.-Gen.* v. *Prince Ernest Augustus of Hanover*,[51] from which it is clear that the absurdity must be judged of as it would have appeared at the time of the passing of the Act. In 1705, it would not have appeared absurd that all the lineal descendants of the Princess Sophia of Hanover should be deemed "natural born Subjects of this Kingdom," and so the fact that in the mid-twentieth century a provision of the statute 4 & 5 Anne c. 16, literally interpreted, made most royal heads of Europe (including the late Kaiser) British subjects

[48] *Maxfield* v. *Llewellyn* [1961] 1 W.L.R. 1119, *per* Upjohn L.J. at p. 1123.
[49] *West Midland Baptist (Trust) Association (Inc.)* v. *Birmingham City Corporation* [1968] 2 Q.B. 188, *per* Salmon L.J. at p. 210.
[50] *Re R. Hampton & Sons* [1966] 1 Q.B. 135.
[51] [1957] A.C. 436. See also *Corocraft, Ltd.* v. *Pan American Airways Inc.* [1969] 1 All E.R. 82.

failed to persuade the House of Lords to retreat from a literal interpretation.

The provision of section 54 of the Public Health Act 1875, that where a local authority "supply water" within their district they shall have certain powers to carry mains, was not construed in the literal sense so as to involve the absurdity that they must actually have begun to supply some water before taking advantage of the power conferred: it was enough to have undertaken to supply water under the provisions of the Act.[52]

So Harman J. refused to place on section 47 (5) of the Administration of Estates Act 1925 a literal construction which would have had the effect of preferring on intestacy first cousins twice removed to nephews and nieces;[53] the Court of Appeal on section 104 (4) of the Agricultural Holdings Act 1948 a reading one consequence of which would be that "an officer or servant of a sub-committee or district committee [of the county agricultural executive committee] could hear representations, whereas an officer or servant of the county agricultural executive committee could not"[54] the Court of Criminal Appeal on section 23 (2) of the Firearms Act 1937 a literal interpretation which would have resulted in a person arrested on mere suspicion of having committed a scheduled offence being liable to a possible seven, instead of the usual two, years' imprisonment for having a firearm in his possession without lawful authority at the time of his apprehension;[55] and Cross J. on the word "premises" in the Landlord and Tenant Act 1954, s. 23 (1) a meaning which "would lead to the absurd result, for example, that a private car park used for business purposes would be outside the Act if it had no building on it, whereas if it had a hut in which the attendant sheltered from the rain or sat when he had no work to do, it would be within the Act."[56]

The offence of "continued wilful disobedience to lawful commands" under section 376 (1) (*e*) of the Merchant Shipping Act 1894 includes disobedience to a single order: for to hold otherwise would be to adopt the "astounding proposition that you could not have an unlawful combination to disobey [under paragraph (*g*)] if all you were doing was to disobey one command.[57]

[52] *Jones* v. *Conway Water Supply* [1893] 2 Ch. 603.
[53] *Re Lockwood (deceased)* [1958] Ch. 231.
[54] *R.* v. *Minister of Agriculture and Fisheries, ex p. Graham* [1955] 2 Q.B. 140, *per* Parker L.J. at p. 168.
[55] *R.* v. *Baker* [1962] 2 Q.B. 530.
[56] *Bracey* v. *Read* [1963] Ch. 88, at p. 93.
[57] *Page* v. *Williams* [1965] 1 W.L.R. 16, *per* Lord Parker C.J. at p. 20.

In a case on the meaning of the word "member" of a company as defined in section 255 (2) of the Income Tax Act 1952, the Court of Appeal refused to accept a construction which would have made certain debenture stockholders members. "The absurdities to which the contention would lead . . . destroy it. Thus a banker giving an overdraft to a company . . . and taking a charge as security, thereby becomes a 'member,' and if he is a private individual or a partner in a partnership, or if his bank is a private company, runs the risk of having to pay surtax on the borrowing company's undistributed profits." Yet a literal reading of the definition, "any person having a share or interest in the capital or profits or income of the company," would seem to include the debenture stockholders.[58]

But absurdity, like inconvenience or unreasonableness, is not a uniformly safe argument. It may be that the court will not agree that the words give rise to an absurdity:[59] and even if they do give rise to an admittedly incongruous state of affairs, they may still be plain, in which case the court will have no option but to place on them their natural meaning. "It is evident," said Cross J., that the Charitable Trusts (Validation) Act 1954 "would turn this trust into something totally different from anything which . . . the testator can be supposed to have envisaged; but the Act is a very odd one, and it is no answer to an argument founded on it that it produces a result which is surprising or even absurd."[60]

3. Presumption Against Impairing Obligations, or Permitting Advantage from One's Own Wrong

On the general principle of avoiding injustice and absurdity, any construction will, if possible, be rejected (unless the policy of the Act requires it) if it would enable a person by his own act to impair an obligation which he has undertaken, or otherwise to profit by his own wrong. "A man may not take advantage of his own wrong. He may not plead in his own interest a self-created necessity."[61]

Thus, an Act which authorised justices to discharge an apprentice from his indenture in certain circumstances "on the master's appearance" before them justified a discharge in his wilful absence. It would have been unreasonable to have construed the Act in such a

[58] *I.R.C.* v. *R. Woolf (Rubber), Ltd.* [1962] Ch. 35, *per* Donovan L.J. at pp. 44, 45.
[59] *Att.-Gen.* v. *Prince Ernest Augustus of Hanover* [1957] A.C. 436; *Green Cab Service Pty., Ltd.* v. *Whitfield* [1966] 1 W.L.R. 179.
[60] *Re Saxone Shoe Co., Ltd.'s Trust Deed* [1962] 1 W.L.R. 943, at p. 956.
[61] *Kish* v. *Taylor* [1911] 1 K.B. 625, *per* Fletcher Moulton L.J. at p. 634.

way that the master derived an advantage from his own obstinacy.[62]

For similar reasons, the Vaccination Act 1867, which authorised a justice to summon a parent "to appear with [his] child" before him, and "upon the appearance" to order that the child be vaccinated if it had not already been vaccinated, was held to authorise such an order without the appearance of the child when the parent refused to produce it. A literal construction, making the production of the child a condition precedent to the making of the order, would have involved the supposition that the legislature had intended to allow the parent to defeat its object by disobeying the summons which it had ordered.[63]

A parent who sent his child to the board school without also sending the school fees did not "cause the child to attend the school" within the meaning of section 74 of the Elementary Education Act 1870.[64]

In *Boulting* v. *Association of Cinematograph, Television and Allied Technicians*,[65] two Lords Justices expressed the opinion that section 4 of the Trade Disputes Act 1906, which prohibits actions "in respect of any tortious act *alleged to have been committed* by or on behalf of the trade union," does not prevent the court from granting an injunction to prevent an apprehended injury. "If a tort has been committed," said Upjohn L.J. (at pp. 643, 644), "the injured party is without remedy against the union. . . . I think . . . that a strict construction should be given to the section which, after all, is substantially interfering with the common law rights of the subject. . . . I think that unless prevented by clear words . . . the court should be especially astute to prevent the commission of an unlawful act where the tortfeasor can by statute escape the usual consequences of his aggression once committed."

In *Re A Debtor, No.* 612 *of* 1960,[66] a bankrupt whose "expansive *modus operandi* was in large part to obtain short-term credit to finance his increasing acquisition of shares quoted on the stock exchange" acquired a dormant company, dealings in the shares of which were later suspended by the Stock Exchange. He sought a "certificate to the effect that the bankruptcy was caused by misfortune

[62] *Ditton's Case* (1701) 2 Salk. 490.
[63] *Dutton* v. *Atkins* (1871) L.R. 6 Q.B. 373. *Cf. R.* v. *A Justice for the Cinque Ports* (1886) 17 Q.B.D. 191.
[64] *London School Board* v. *Wood* (1885) 15 Q.B.D. 415. *Cf. London School Board* v. *Wright* (1884) 12 Q.B.D. 578.
[65] [1963] 2 Q.B. 606.
[66] [1964] 1 W.L.R. 807, *per* Russell L.J. at p. 817.

without any misconduct on his part": Bankruptcy Act 1914, s. 26 (4). The Court of Appeal refused to grant a certificate, holding that where a person "deliberately placed himself in a position of vulnerability to insolvency should [the] shares become unmarketable due to action by the stock exchange . . . for a longer period than his creditors would tolerate," his loss could not be said to be due to his own "misfortune."

When an Act confers an unusual privilege, such as that of an exempt private company of not disclosing its balance sheets, "the court must see that anyone claiming the benefit of it does, without reasonable doubt, bring himself within the language conferring the exemption."[67] A strict construction is also applied to provisions for technical defences.[68]

If, however, the words of the Act are plain, the court must, as always, give effect to them. Section 6 (1) of the Moneylenders Act 1927 provides that no contract for the repayment by a borrower of money lent to him shall be enforceable unless a note or memorandum of the contract is "made and signed personally by the borrower." By section 6 (2), "the note or memorandum aforesaid shall contain all the terms of the contract." In *Edgware Trust, Ltd.* v. *Lawrence*,[69] a borrower gave a promissory note in favour of moneylenders: it contained a default clause. The terms of the default clause as printed in the promissory note were clear, but as printed in the memorandum they were unintelligible because certain words were omitted. Diplock J. (at p. 1359) held that "the whole purpose of section 6 . . . requiring . . . that the note or memorandum shall contain all the terms of the contract, would be defeated unless the document in the possession of the borrower contained all the terms of the contract. I find, therefore, with considerable reluctance, because the point is a technical one, that the [borrower's] defence on these grounds succeeds."

A distinction is drawn in the law of contract between contracts the very formation of which are rendered illegal by statute, and contracts which were legal when made but which, in the course of performance, became tainted by the commission of some act forbidden by statute. In the former case, no remedies are open to either party unless he can frame a cause of action which does not involve disclosure of illegality: in the latter, the innocent party may enforce the contract.[70]

[67] *Re Prenn's Settlement* [1961] 1 W.L.R. 569, *per* Lord Evershed M.R. at p. 572. But see now Companies Act 1967, s. 2.
[68] *Sanders* v. *Scott* [1961] 2 Q.B. 326.
[69] [1961] 1 W.L.R. 1354.
[70] See Cheshire and Fifoot, *Law of Contract*, 6th ed., pp. 283–295.

Into which class a contract falls is a question of construction of the statute concerned. "The question," said Devlin J. in *St. John Shipping Corporation* v. *Joseph Rank Ltd.*,[71] "always is whether the statute meant to prohibit the contract which is sued upon. One of the tests commonly used . . . is to inquire whether or not the object of the statute was to protect the public or a class of persons, that is, to protect the public from claims for services by unqualified persons or to protect licensed persons from competition . . . [But this] is one only of the tests. The fundamental question is whether the statute means to prohibit the contract." Thus statutes requiring carriers of goods to hold certain kinds of licence or suppliers of seed to deliver an invoice with the seed do not prohibit contracts of carriage where the carrier has not the required licence nor contracts for the sale of seed where the seller does not deliver an invoice: and in each case the party who has failed to comply with the statutory provisions will be unable to invoke his own breach in order to escape from his contractual obligations.[72] On the other hand, a contract penalising persons who acted as stockbrokers in London without having been admitted by the Lord Mayor and Aldermen was held by Parke B. to have as its object, not the pecuniary advantage of the Mayor and Aldermen, but the protection of the public, and consequently "to prohibit, by necessary inference, all contracts which such persons make for compensation to themselves for so acting."[73]

4. Retrospective Operation of Statutes

Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.[74]

[71] [1957] 1 Q.B. 267, at pp. 285, 287.
[72] *Archbolds (Freightage), Ltd.* v. *S. Spanglett, Ltd.* [1961] 1 Q.B. 374; *Marles* v. *Philip Trant & Sons, Ltd.* [1954] 1 Q.B. 29.
[73] *Cope* v. *Rowlands* (1836) 2 M. & W. 149, at p. 159.
[74] *West* v. *Gwynne* [1911] 2 Ch. 1, *per* Kennedy L.J. *Cf. Smith* v. *Callander* [1901] A.C. 297; *Re Snowdon Colliery Co., Ltd.* (1925) 94 L.J.Ch. 305.

The statement of the law contained in the preceding paragraph has been "so frequently quoted with approval that it now itself enjoys almost judicial authority."[75]

One of the most well-known statements of the rule regarding retrospectivity is contained in this passage from the judgment of R. S. Wright J. in *Re Athlumney*:[76] "Perhaps no rule of construction is more firmly established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only." The rule has, in fact, two aspects, for it "involves another and subordinate rule, to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary."[77]

If, however, the language or the dominant intention of the enactment so demands, the Act must be construed so as to have a retrospective operation, for "the rule against the retrospective effect of statutes is not a rigid or inflexible rule but is one to be applied always in the light of the language of the statute and the subject-matter with which the statute is dealing."[78] Those situations in which Acts will be construed so as to have a retrospective operation will be discussed later in this chapter.

Before the presumption against retrospectivity is applied, a court must be satisfied that the statute is in fact retrospective.[79] In the words of *Craies on Statute Law*,[80] a statute is retrospective "which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." Other statutes, though they may relate to acts or events which are

[75] *Carson* v. *Carson* [1964] 1 W.L.R. 511, *per* Scarman J. at p. 516. *Cf. Croxford* v. *Universal Insurance Co., Ltd.* [1936] 2 K.B. 253, *per* Scott L.J. at p. 281. "That page [of *Maxwell*] seems to me to contain an almost perfect statement of the principle that you do not give a statute retrospective operation unless there is perfectly clear language showing the intention of Parliament that it shall have a retrospective application."

[76] [1898] 2 Q.B. 551, at pp. 551, 552.

[77] *Lauri* v. *Renad* [1892] 3 Ch. 402, *per* Lindley L.J. at p. 421.

[78] *Carson* v. *Carson* [1964] 1 W.L.R. 511, *per* Scarman J. at p. 517.

[79] For the distinction between retrospective and *ex post facto* legislation, see the judgment of Willes J. in *Phillips* v. *Eyre* (1870) L.R. 6 Q.B. 1.

[80] 6th ed., p. 386.

past, are not *retrospective* in the sense in which the word is used for the purposes of the rule under consideration. The following cases illustrate this point.

By section 2 of the Poor Removal Act 1846: "No woman residing in any parish with her husband at the time of his death shall be removed . . . from such parish, for twelve calendar months next after his death, if she so long continue a widow." In *R.* v. *Inhabitants of St. Mary, Whitechapel*,[81] it was sought to remove within the twelve-month period a woman whose husband had died before the Act was passed, on the ground that to make the section apply in such a case was to construe it retrospectively, the right to remove being a vested right which had accrued on the man's death. But the court held otherwise, Lord Denman C.J. (at p. 127) saying "that the statute is in its direct operation prospective, as it relates to future removals only, and that it is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing." As the same judge said in another case, no one would class statutes of limitation or prescription as retrospective merely because the space of time which is essential for their operation may consist in part of time passed before the Act.[82]

The Wholesale Mantle and Costume Wages Council (Great Britain) Wages Regulation (Holidays) Order 1949 came into force on August 15, 1949. Paragraph 9 of the Schedule made provision for holiday remuneration, calculated on the basis of the normal wage, to accrue from May 1, 1948: this would be payable under paragraph 8 when a worker ceased to be employed after the Schedule became operative. It was argued that a provision for the accrual of remuneration before the Order came into force made the Order retrospective and hence *ultra vires* the statute under which it was made. But Somervell L.J. held that it was good: the fact that a prospective benefit is to be measured by antecedent facts does not necessarily make the provision for that benefit retrospective.[83]

Finally, on this point, there is the case of *Re A Solicitor's Clerk*.[84] The clerk was convicted in 1953 on four charges of larceny but the charges did not relate to money or property of his employer or employer's client, and so an order prohibiting solicitors from employing him could not be made under the provisions of section 16 of the

[81] (1848) 12 Q.B. 120.
[82] *R.* v. *Inhabitants of Christchurch* (1848) 12 Q.B. 149.
[83] *Master Ladies Tailors Organisation* v. *Minister of Labour* [1950] 2 All E.R. 525.
[84] [1957] 1 W.L.R. 1219.

Solicitors Act 1941. The Solicitors (Amendment) Act 1956, s. 11, amended section 16 so as to include convictions of larceny irrespective of ownership. The Divisional Court held that the amendment was not a true retrospective provision. "It enables an order to be made," said Lord Goddard C.J. (at pp. 1222, 1223), "disqualifying a person from acting as a solicitor's clerk in the future and what happened in the past is the cause or reason for the making of the order, but the order has no retrospective effect. It would be retrospective if the Act provided that anything done before the Act came into force or before the order was made should be void or voidable or if a penalty were inflicted for having acted in this or any other capacity before. . . . This Act simply enables a disqualification to be imposed for the future which in no way affects anything done by the appellant in the past."

Cases in which the presumption against retrospective operation has been applied

The rule under discussion has been applied chiefly in cases in which the statute in question, if it operated retrospectively, would prejudicially affect vested rights or the legality of past transactions, or would impair contracts, or would impose new duties or attach new disabilities in respect of past transactions.[84a]

Thus the provision of the Statute of Frauds, that no action should be brought to charge any person on any agreement made in consideration of marriage, unless the agreement were in writing, was held not to apply to an agreement made before the passing of the Statute.[85]

The Bills of Sale Act (1878) Amendment Act 1882, which made void bills of sale not registered within seven days of their execution, was held not to apply to instruments executed before the Act came into operation. It is evident that compliance would have been impossible in the case of a bill executed more than a week before the commencement of the Act.[86] Similarly, the provisions of the Patents, Designs and Trade Marks Act 1883 were held not to affect any patents granted before its commencement.[87]

The Bankruptcy Act 1849, which made a deed of arrangement "now or hereafter" entered into by a trader with six-sevenths of his

[84a] See now *R.* v. *Reah* [1968] 1 W.L.R. 1508.
[85] *Gilmore* v. *Shuter* (1678) 2 Lev. 227. [86] *Hickson* v. *Darlow* (1883) 23 Ch.D. 690.
[87] *Re Brandon's Patent* (1884) 9 App.Cas. 589.

creditors binding on the non-executing creditors at the expiration of three months after they should have notice of it, was held to apply only to deeds executed after the passing of the Act. To apply the statute to past transactions would have been so unjust that it was expedient to get rid of the apparent effect of the word "now" by any possible means: and it was accordingly understood as restricted to arrangements not completed, but yet binding in equity, at the time when the Act was passed.[88]

Section 23 of the Bankruptcy Act 1890 provided that "where a debt has been proved upon a debtor's estate under the principal Act and such debt includes interest . . . such interest . . . shall, for the purposes of dividend, be calculated at a rate not exceeding" five per cent. A debtor failed and his estate was assigned for the benefit of his creditors under a scheme accepted by them and approved by the court. One creditor proved for a debt which carried interest at a rate in excess of five per cent. The Act then came into operation. R. S. Wright J. held that the section was not "so expressed as to be plainly retrospective" and did not cut down the rights of the creditor under a contract made before it came into effect. No doubt the words used were capable of bearing a retrospective meaning, but the form "has been" was "often used to refer, not to a past which preceded the enactment, but to a time which is made past by anticipation—a time which will have become a past time only when the event occurs on which the statute is to operate."[89]

By section 13 of the Landlord and Tenant (War Damage) (Amendment) Act 1941, where a tenancy was deemed to have been surrendered under the Landlord and Tenant (War Damage) Act 1939, "the rent payable in respect of the period during which the surrender takes effect or the rent ceases to be payable . . . shall be apportionable, whether the rent under the lease is payable in advance or otherwise, *and any rent paid by the tenant in respect of that period in excess of the amount apportionable* to the part of the period preceding the date on which the surrender takes effect or the rent ceases to be payable . . . *shall be recoverable by him.*" It was argued that this had a retrospective operation so as to vest in the plaintiff-tenants a right to recover that part of a quarter's rent due and paid before the Act came into force. Particular reliance was placed on the words italicised, it being said that the preceding words were sufficient to confer on a tenant

[88] *Waugh* v. *Middleton* (1853) 8 Ex. 352.
[89] *Re Athlumney* [1898] 2 Q.B. 547, at p. 553.

who had paid rent in advance after the passing of the Act the right to recover any sum which, by virtue of some event happening after the date of payment, had ceased to be an obligation binding on him. But Stable J. held that the Act was not retrospective. The wording was not "such . . . as plainly to require me to give a retrospective effect to it," and the words in italics "may have been inserted, perhaps *ex abundanti cautela*, to make the tenant's right to recover beyond question."[90]

"Adultery which has been condoned shall not be capable of being revived": Matrimonial Causes Act 1963, s. 3, now Matrimonial Causes Act 1965, s. 42 (3). This was held by Scarman J. to effect a change in the substantive law and, since Parliament had neither expressly nor by necessary implication made it retrospective, it did not affect the revival of adultery by a desertion which took place before the Act came into force.[91]

In *Fairweather* v. *St. Marylebone Property Co., Ltd.*,[92] the House of Lords held that section 75 (1) of the Land Registration Act 1925, which makes special provision for the application of the Limitation Act to registered land, operates only on events occurring after the Land Registration Act came into force. And in *Re "Wonderland," Cleethorpes*,[93] the House held that the phrase "the tenant" in section 34 (*c*) of the Landlord and Tenant Act 1954 refers to the tenant in the capacity in which he applies to the court for a new lease of business premises, that is, under the current tenancy which he seeks to have renewed, with the consequence that the effect of improvements made during a prior tenancy are not required by section 34 (*c*) to be disregarded in calculating the rent for the new tenancy. The Act, said Viscount Simonds, operated retrospectively to deprive a landlord of his common law rights, and it would be "carrying [this retrospective operation] further to deprive him of the benefit of the improvements upon his land already vested in him upon the grant of" the expiring tenancy.[93a]

Pending actions

In general, when the substantive law is altered during the pendency of an action, the rights of the parties are decided according to the law

[90] *London Fan & Motor Co., Ltd.* v. *Silverman* [1942] 1 All E.R. 307, at p. 309. *Cf. Langford Property Co., Ltd.* v. *Pajzs* [1943] 2 All E.R. 687.
[91] *Carson* v. *Carson* [1964] 1 W.L.R. 511.
[92] [1963] A.C. 510. [93] [1965] A.C. 58.
[93a] *Cf. Gallaher, Ltd.* v. *Commissioners of Customs and Excise* [1968] 2 Q.B. 674.

as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights.

Thus section 32 of the Medical Act 1858, which, as amended, enacted that no person should, after January 1, 1861, recover any charge for medical treatment "unless he shall prove at the trial" that he was on the medical register, was held not to apply to an action for medical services commenced before that date, but tried after it.[94]

In *National Real Estate and Finance Co., Ltd.* v. *Hassan*,[95] a landlord served on a tenant a notice to repair under section 146 (1) of the Law of Property Act 1925 and subsequently issued a writ claiming possession of the premises on the ground of want of repair. Between the issue of the writ and the trial of the action, the Leasehold Property (Repairs) Act 1938 came into operation, its effect being that, after service of a counter-notice by the tenant, the landlord could proceed to enforce the forfeiture provisions of the lease only with the leave of the court which could be granted only in the circumstances specified in the Act. The Court of Appeal held that the 1938 Act did not affect the rights which the landlord had acquired by proceeding under the Law of Property Act.

But if the necessary intendment of a statute is to affect the rights of parties to pending actions, the court must give effect to the intention of the legislature and apply the law as it stands at the time of the judgment even though there is no express reference to pending actions. This principle was applied to the Landlord and Tenant (Rent Control) Act 1949 in *Hutchinson* v. *Jauncey*,[96] the Court of Appeal taking the view that Sir George Jessel M.R. had gone too far when he said that express terms alone could alter the rights of parties by taking away or conferring any pending right of action.[97]

The effect of a change in the law between a decision at first instance and the hearing of an appeal from that decision was discussed by the House of Lords in *Att.-Gen.* v. *Vernazza*.[98] Lord Denning said (at p. 978) that it was "clear that in the ordinary way the Court of Appeal cannot take into account a statute which has been passed in the interval since the case was decided at first instance, because the rights

[94] *Thistleton* v. *Frewer* (1862) 31 L.J.Ex. 230.
[95] [1939] 2 K.B. 61.
[96] [1950] 1 K.B. 574. *Cf. Jonas* v. *Rosenberg* [1950] 2 K.B. 52.
[97] *Re Joseph Suche & Co., Ltd.* (1875) 1 Ch.D. 48.
[98] [1960] A.C. 965.

of litigants are generally to be determined according to the law in force at the date of the earlier proceedings.[99] But it is different when the statute is retrospective either because it contains clear words to that effect or because it deals with matters of procedure only, for then Parliament has shown an intention that the Act should operate on pending proceedings, and the Court of Appeal are entitled to give effect to this retrospective intent as well as a court of first instance."[1] For this purpose, however, a statute which actually takes away the right of appeal is not to be regarded as affecting mere matters of procedure.[2]

Procedural Acts

The presumption against retrospective construction has no application to enactments which affect only the procedure and practice of the courts. No person has a vested right in any course of procedure,[3] but only the right of prosecution or defence in the manner prescribed for the time being, by or for the court in which he sues, and if an Act of Parliament alters that mode of procedure, he can only proceed according to the altered mode.[4] "Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be."[5]

Thus the provision of section 128 of the Common Law Procedure Act 1852, that the plaintiff might issue execution within six years from the recovery of a judgment without revival of the judgment, was held to apply to a judgment which had been signed more than a year and a day before the Act was passed, and which therefore could not have been put in force under the previous state of the law without revival.[6]

In *Craxfords (Ramsgate), Ltd.* v. *Williams & Steer Manufacturing Co., Ltd.*,[7] in January 1954 the plaintiffs issued a writ claiming damages for breach of an oral contract for the sale of goods which they were to supply to the defendants. In February, the defendants delivered their defence, pleading the absence of a note or memoran-

[99] *Re Debtor (No. 490 of 1935)* [1936] Ch. 237; *New Brunswick Ry. Co.* v. *British & French Trust Corp., Ltd.* [1939] A.C. 1.
[1] *Quilter* v. *Mapleson* (1882) 9 Q.B.D. 672; *Stovin* v. *Fairbrass* (1919) 88 L.J.K.B. 1004.
[2] *Colonial Sugar Refining Co., Ltd.* v. *Irving* [1905] A.C. 369.
[3] *Republic of Costa Rica* v. *Erlanger* (1874) 3 Ch.D. 62, *per* Mellish J.
[4] *Wright* v. *Hale* (1860) 39 L.J. Ex. 40, *per* Wilde B.
[5] *Gardner* v. *Lucas* (1878) 3 App.Cas. 582, *per* Lord Blackburn at p. 603.
[6] *Boodle* v. *Davis* (1853) 8 Ex. 351.
[7] [1954] 1 W.L.R 1130.

dum sufficient to satisfy section 4 of the Sale of Goods Act. In June section 4 was repealed by section 2 of the Law Reform (Enforcement of Contracts) Act 1954. The trial of the action was commenced in July, and Pilcher J. held that the defence failed since section 4 was of a procedural nature and had been repealed before the trial. By pleading the statute, the defendants had not acquired any vested right which might have survived its repeal.

Section 50 of the Companies Act 1967 provides that an answer given by a person in reply to a question put to him during an inspection of the affairs of a company under section 167 of the 1948 Companies Act may be used in evidence against him. This "is a procedural provision providing for the admissibility of evidence before a court when it comes to hear a case and deal with the evidence. It applies to future hearings after the Act of 1967 comes into operation; but it then applies even though the hearing be in respect of matters which arose before that Act was passed."[8]

In *Herridge* v. *Herridge*,[9] the parties were married in 1948. In August 1962, the wife left the husband because of his cruelty; on November 5 she returned to cohabit with him (this was alleged to be condonation); and on December 4, because of his alleged renewed cruelty, she left him for good. By section 2 (1) of the Matrimonial Causes Act 1963, now section 42 (2) of the Matrimonial Causes Act 1965, "adultery or cruelty shall not be deemed to have been condoned by reason only of a continuation or resumption of cohabitation" with a view to effecting a reconciliation, if it did not last more than three months. Did this apply to the events in the case? The Court of Appeal held that it did. Willmer L.J. said (at p. 1510) that section 2 (1) "is properly to be regarded as a procedural section dealing with what evidence may or may not be adduced in relation to an allegation of condonation in any trial taking place after the Act came into force, even though that evidence may relate to events which took place before the Act. That being so, it is plain that the section must be relevant to be considered in this case."

In *Att.-Gen.* v. *Vernazza*,[10] in April 1959, at the suit of the Attorney-General under the Supreme Court of Judicature Act 1925, the High Court made an order prohibiting Vernazza, as a vexatious litigant, from *instituting* new proceedings without leave. In May, the

[8] *Selangor United Rubber Estates, Ltd.* v. *Cradock (No. 2)* [1968] 1 W.L.R. 319, *per* Ungoed-Thomas J. at p. 321.
[9] [1965] 1 W.L.R. 1506. *Cf. Blyth* v. *Blyth* [1965] P. 411.
[10] [1960] A.C. 965.

Supreme Court of Judicature (Amendment) Act was passed, and section 1 (1) gave the High Court power to prohibit the *continuance* of existing proceedings without leave. The House of Lords held that under section 1 (1) the Court of Appeal would have power, on Vernazza's appeal against the original order, to make the new kind of order with regard to existing proceedings. Lord Denning regarded section 1 (1) as procedural only, for it did not prevent a litigant from pursuing any remedy which was properly open to him, but only from carrying on proceedings which were an abuse of the process of the court.

Statutes affecting costs are of a procedural nature for the purposes of the rules about retrospectivity. Section 34 of the Common Law Procedure Act 1860, which deprived a plaintiff in an action for a wrong of costs if he recovered by the verdict of a jury less than £5, unless the judge certified in his favour, was held to apply to actions begun before the Act had come into operation but tried afterwards,[11] and a similar effect was given to section 10 of the County Courts Act 1867 which dealt with orders for security for costs in county court actions.[12]

Declaratory statutes

If a statute is in its nature a declaratory Act, the argument that it is not to be construed so as to take away previously vested rights is inapplicable.

Section 11 of the Customs and Inland Revenue Act 1889 declared that the provisions of the Customs and Inland Revenue Act 1881, s. 38, with regard to the imposition of stamp duties upon personal property passing under "voluntary settlements" should be construed as if that expression included any trust in favour of a volunteer. It was held that section 11 was retrospective, and that the construction provided by it must be applied even though the property sought to be taxed had passed to the beneficiaries and proceedings to recover the duty had been taken before the 1889 Act came into force.[13]

Similarly, section 6 of the Finance Act 1898 provided, for the removal of doubt, that the definition of "conveyance on sale" in the

[11] *Wright* v. *Hale* (1860) 30 L.J. Ex. 40.
[12] *Kimbray* v. *Draper* (1868) L.R. 3 Q.B. 160. *Cf. R.* v. *Reah* [1968] 1 W.L.R. 1508.
[13] *Att.-Gen.* v. *Theobald* (1890) 24 Q.B.D. 557.

Stamp Act 1891 included an order for foreclosure. It was held that section 6 was declaratory and therefore retrospective, so that an order of 1896 foreclosing a legal mortgage required stamping as a conveyance on sale.[14]

Statutes plainly retrospective

The rule against retrospective operation is a presumption only, and as such it "may be overcome, not only by express words in the Act but also by circumstances sufficiently strong to displace it."[15] And this, like the presumption itself, is in accord with the theoretical intention of Parliament for "allowing the general inexpediency of retrospective legislation, it cannot be pronounced naturally or necessarily unjust. There may be occasions and circumstances involving the safety of the state, or even the conduct of individual subjects, the justice of which, prospective laws made for ordinary occasions and the usual exigencies of society for want of prevision fail to meet, and in which the execution of the law as it stood at the time may involve practical public inconvenience and wrong."[16]

Thus in the *Vernazza* case,[17] Lord Denning held (at p. 977) that even if the 1959 Supreme Court of Judicature (Amendment) Act did affect substantive rights, it contained clear words to show that Parliament intended it to be retrospective, for it empowered the High Court to make an order that "any legal proceedings instituted by [the vexatious litigant] in any court *before the making of the order* shall not be continued by him" without leave.

The *Sunshine Porcelain Potteries* case[18] provides an illustration of the presumption against retrospectivity being rebutted, not by express words, but by the circumstances of the case. Section 12 (1) of the Victoria Workers' Compensation Act 1951, which was a consolidating statute, had first been enacted in 1946 by way of amendment to an Act of 1928: "Where—(*a*) a medical practitioner certifies that a worker is suffering from a disease and is thereby disabled from earning full wages at the work at which he was employed . . . (*b*) . . . and the disease is due to the nature of any employment in which the

[14] *In re Lovell and Collard's Contract* [1907] 1 Ch. 249.
[15] *Sunshine Porcelain Potteries Pty., Ltd.* v. *Nash* [1961] A.C. 927, *per* Lord Reid at p. 938.
[16] *Phillips* v. *Eyre* (1870) L.R. 6 Q.B. 1, *per* Willes J. at p. 27.
[17] *Supra*, pp. 221–222.
[18] [1961] A.C. 927.

worker was employed at any time prior to the date of the disablement," compensation should be payable. The respondent was employed by the appellants between 1931 and 1938; during her work she was exposed to dust containing silica; and the first symptoms of silicosis appeared in 1950. It was held that the presumption against retrospectivity was displaced by the circumstances, and that the respondent could claim under section 12 (1). "Notoriously," said Lord Reid (at p. 938), "silicosis is a disease of slow onset; it may result from the inhalation of noxious matter over a long period of years, there is no certainty as to when that inhalation reaches the danger point, and after the damage has been done a long period may elapse . . . before the disease manifests itself. It cannot be supposed that the legislature intended that every worker disabled by this disease after 1946 must prove that the disease was contracted or that the damage was done to him after 1946, because that would involve there being a period of many years of uncertainty," since there would be doubt in many cases as to whether disablement resulted from a state of things already in existence in 1946.

Section 3 of the Law Reform (Married Women and Tortfeasors) Act 1935 abolished the vicarious liability of a husband for his wife's contracts and torts. The Court of Appeal held that it was retrospective, Scott L.J. saying that its "dominant intention" was clear and doubting whether the rule against retrospective operation was "properly applicable to such a statute abolishing legal fictions any more than to a purely procedural statute." He regarded the "inhibition of the rule" as a matter of degree, which would "vary *secundum materiam*."[19]

The presumption is rebuttable even in the case of a penal enactment. So in *D.P.P.* v. *Lamb*,[20] a provision increasing penalties for contravention of the Defence (Finance) Regulations 1939 was held applicable to all convictions after the new provision came into force, even though they were for offences completed before.

In *Re Athlumney*,[21] R. S. Wright J. referred to a suggested exception to the presumption against retrospective operation: where a statute contains a clause suspending the commencement of its operation for a time, this would indicate that no further restriction on retrospective operation was intended. "This exception," he said,

[19] *Barber* v. *Pigden* [1937] 1 K.B. 664, at p. 678.
[20] [1941] 2 K.B. 89. *Cf. Buckman* v. *Button* [1943] 1 K.B. 405; *R.* v. *Oliver* [1944] K.B. 68.
[21] [1898] 2 Q.B. 547.

"seems never to have been suggested except in relation to statutes affecting procedure, such as Statutes of Limitation, and even in relation to them it is questioned in *Moon* v. *Durden*."[22] While his rejection of the suggested exception may be couched in terms somewhat broader than the authorities justify, it does seem that the exception, if it does exist, is not of any wide application.[23]

[22] (1848) 2 Ex. 22.
[23] See *Craies on Statute Law*, 6th ed., pp. 392–393, and *Odgers on the Construction of Deeds and Statutes*, 5th ed., pp. 290–291.

Chapter 11

EXCEPTIONAL CONSTRUCTION

1. Modification of the Language to Meet the Intention

Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity which can hardly have been intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence.[1] This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, or by rejecting them altogether, on the ground that the legislature could not possibly have intended what its words signify, and that the modifications made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used.[2] Lord Reid has said that he prefers to see a mistake on the part of the draftsman in doing his revision rather than a deliberate attempt to introduce an irrational rule: "the canons of construction are not so rigid as to prevent a realistic solution."[3]

What is, then, being discussed here are instances in which the courts will depart from the literal rule. Such instances are, however, exceptional, and it is impossible to lay down any categories of cases in which ordinary grammatical interpretation will inevitably be abandoned: the courts are very reluctant to substitute words in a statute or to add words to it,[4] and it has been said that they will only do so where there is a repugnancy or something which is opposed to good sense.[5]

[1] See *Att.-Gen.* v. *Lockwood* (1842) 9 M. & W. 378, *per* Alderson B.; *Jubb* v. *Hull Dock Co.* (1846) 9 Q.B. 443, *per* Lord Denman C.J.; *Becke* v. *Smith* (1836) 2 M. & W. 191, *per* Parke B.; *Norman* v. *Norman* [1950] 1 All E.R. 1082.

[2] *Salmon* v. *Duncombe* (1886) 11 App.Cas. 627; *R.* v. *Vasey* [1905] 2 K.B. 748; *R.* v. *Ettridge* [1909] 2 K.B. 24.

[3] *Cramas Properties, Ltd.* v. *Connaught Fur Trimmings, Ltd.* [1965] 1 W.L.R. 892, at p. 899.

[4] See *R.* v. *Trafford* (1850) 15 Q.B. 200, *per* Lord Campbell C.J.; *ante*, pp. 33–39.

[5] *Fredericks* v. *Payne* (1862) 1 H. & C. 584, *per* Bramwell B.

Obvious oversights

Section 374 of the Merchant Shipping Act 1854, which enacted that no licence granted by Trinity House to pilots "shall continue in force beyond the 31st of January" after its date, but that "the same may . . . be renewed on such 31st day of January in every year, or any subsequent day," was construed as meaning, not that the renewed licences must be actually issued on or after that day, but that they should take effect from January 31. This departure from the strict letter was justified by the great inconvenience which would have resulted from a rigid adherence to it, since it would have left a whole district for days or even weeks without qualified pilots.[6]

In section 7 of the Railway and Canal Traffic Act 1854, making companies liable for the loss of or injury to "any horse, cattle, or other animal" (which would include a dog) entrusted to them for carriage, with the proviso that no greater damage should be recovered for the loss of, or injury done to "any of such animals" beyond the sums thereinafter mentioned—specifying certain sums for horses, neat-cattle, sheep and pigs, but making no mention of dogs—the proviso was read as dealing only with "any *of the following* of such animals," and so as not restricting the generality of the preceding words.[7]

Where a railway company was made liable to make good the deficiency in the parochial rates arising from its having to take rateable property under the provisions of the Act "until the railway or the works thereof are completed and assessed, or liable to be assessed," the House of Lords held that the intention was that the liability should cease as regards any one parish as soon as that portion of the line which ran through it was completed: the Act was to be read as fixing the liability when "its works *in the parish* were completed."[8]

A more recent example of interpolation occurred in *Adler* v. *George*.[9] A prohibition upon being "in the vicinity of any prohibited place" and obstructing certain persons on duty there was construed as referring to being "in or in the vicinity of" the place. An accused person thus failed to escape conviction by pleading that, while actually within the perimeter of a Royal Air Force

[6] *The Beta* (1869) 3 Moo.P.C. (N.S.) 23.
[7] *Harrison* v. *London & Brighton Railway* (1862) 29 L.J.Q.B. 209.
[8] *East London Railway Co.* v. *Whitechurch* (1874) L.R. 7 H.L. 81.
[9] [1964] 2 Q.B. 7.

station, he had not literally been in its vicinity or neighbourhood.

Just as the court will occasionally fill omissions, so it will sometimes—contrary to the general principle that effect must be given to every word in a statute—read a section, and while doing so ignore certain words.

Section 1 of the Carriers Act 1830 provided that a carrier should not be responsible for the loss of certain articles delivered for carriage, in the absence of a declaration of their value and nature by the sender, "at the office" of the carrier. In *Hart* v. *Baxendale*,[10] the words "at the office" were ignored, and section 1 was regarded as protecting the carrier where the parcel was delivered to his servant elsewhere than at the office and no declaration was made either there or elsewhere, the paramount object of the legislature being that the carrier should in all cases be free from liability unless he were apprised of the nature and value of the thing entrusted to him.

In *Re Lockwood, deceased*,[11] Harman J. ignored certain words in section 47 (5) of the Administration of Estates Act 1925, when to have taken them into account would have resulted in preferring first cousins twice removed to the nephews and nieces of an intestate.

Mere clerical errors, or slips in drafting, will sometimes be corrected. Section 33 of the Fines and Recoveries Act 1833, for instance, in providing that if the protector of a settlement should be a lunatic, or convicted of felony, or an infant, the Court of Chancery should be the protector in lieu of the lunatic or infant, failed to mention the case of the convicted felon: Lord Lyndhurst held that the omission should be supplied, in order to give effect to the obvious intention.[12] Again, a reference to the "testamentary" expenses of an intestate being obviously a slip in drafting, it was read as referring to the expenses of obtaining letters of administration and of administration generally.[13]

Where an Act referred to another statute by title and date, mistaking the date, the court was prepared to read the error as corrected.[14] And where a word appears in a consolidating statute but was not to be found in the Acts consolidated, the court may treat it as inserted *per incuriam*.[15]

[10] (1852) 6 Ex. 769.
[11] [1958] Ch. 231.
[12] *Re Wainewright* (1843) 1 Phil. 258.
[13] *Re Twigg's Estate* [1892] 1 Ch. 579.
[14] *R.* v. *Wilcock* (1845) 7 Q.B. 317; *Re Boothroyd* (1846) 15 L.J.M.C. 57.
[15] *The Arabert* [1963] P. 102.

In *Wynn* v. *Skegness Urban District Council*,[16] Ungoed-Thomas J. (at p. 54) was prepared to treat a word as otiose. Section 11 (1) (*a*) of the Rating and Valuation Act 1961 referred to a "hereditament occupied . . . by trustees for, a charity and wholly or mainly used for charitable purposes . . . of that charity. . . . " Subsection (9) defined "charity" as "an organisation established for charitable purposes only." "It would seem to follow from subsection (9) that a charity within subsection (1) is limited to an organisation with charitable purposes and no non-charitable purposes. It was nevertheless submitted that a charity within subsection (1) could have a non-charitable purpose. The argument was that if a charity within subsection (1) were limited to organisations with charitable purposes only, then there was no need in that subsection to qualify the word 'purposes' by the word 'charitable.' I agree that the word 'charitable' there is otiose, but it is preferable to accept a word as otiose, which is a minute criticism of statutory drafting, rather than to run counter to the meaning of 'charity' spelt out in another subsection of this very section."

Substitution of words

Sometimes, where the sense of the statute demands it or where there has been an obvious mistake in drafting, a court will be prepared to substitute another word or phrase for that which actually appears in the text of the Act.

The Ecclesiastical Leases Act 1571 refers to leases made by colleges, deans and chapters, masters or guardians of hospitals, and any "parson, vicar, or any other having any spiritual or ecclesiastical living, *or* any houses, lands, tithes, tenements, or other hereditaments." Wilberforce J. said that it was quite clear that the word italicised was a mistake for "of," and proceeded to apply the Act on that assumption.[17]

Lord Parker C.J. has said that the words of section 44 (3) of the National Assistance Act 1948, "in any proceedings on an application under the last foregoing subsection" should be read as meaning "in any proceedings arising out of an application," etc.[18]

Section 3 (1) (*b*) of the Kenya Money-Lenders Ordinance provided that the provisions of the Ordinance should not apply "to any

[16] [1967] 1 W.L.R. 52.
[17] *Eton College* v. *Minister of Agriculture, Fisheries and Food* [1964] Ch. 274.
[18] *Clapham* v. *National Assistance Board* [1961] 2 Q.B. 77.

money-lending transaction where the security for repayment of the loan and/or interest thereon is effected by execution of a legal or equitable mortgage upon immovable property or of a charge upon immovable property." Paragraph (*a*) excluded from the Ordinance cases in which the security was a chattels transfer with interest not exceeding nine per cent. In *Coast Brick & Tile Works, Ltd.* v. *Premchand Raichand, Ltd.*,[19] the Judicial Committee had to interpret the words "the security" in paragraph (*b*). "A possible meaning grammatically,' said Lord Upjohn (at pp. 202-204) "is 'the sole security,' but this would lead to the result that, if there was only one security for repayment of the loan which fell either within sub-paragraph (*a*) or sub-paragraph (*b*) the transaction would be exempt from the provisions of the Ordinance, but if the money-lender took two securities, one of which fell within sub-paragraph (*a*) and the other within sub-paragraph (*b*), the transaction would not be exempt and Parliament cannot have intended that. The possible alternative ways of construing the section are either to read 'the' as 'a' or to omit 'the' altogether. . . . The Money-Lenders Ordinance is designed to protect the public from money-lenders, but it seems reasonably clear that Parliament thought that the borrower would require no such protection if the security was of a chattel interest and interest was limited to 9 per cent. per annum or without such limitation of interest if the security was upon immovable property; no doubt because in such a case the borrower would almost invariably be advised by his solicitor and the exact terms of repayment would be apparent on the face of the mortgage or charge. In the result their lordships are of opinion that 'the security' should be read as 'a security,' a variation which in a poorly drawn section does not do great violence to the language used."

Two instances of substitution are particularly important: they concern the conjunctions "and" and "or," and the verbs "may" and "must."

"And" and "or"

In ordinary usage, "and" is conjunctive[20] and "or" disjunctive.[21] But to carry out the intention of the legislature[21a] it may be

[19] [1967] 1 A.C. 192. [20] *J. W. Dwyer, Ltd.* v. *Met. Pol. Receiver* [1967] 2 Q.B. 970.
[21] *Uddin* v. *Associated Portland Cement Manufacturers, Ltd.* [1965] 2 Q.B. 582; *R.* v. *Surrey Quarter Sessions, ex p. Commissioner of Metropolitan Police* [1963] 1 Q.B. 990.
[21a] See *Anisminic, Ltd.* v. *Foreign Compensation Commission* [1969] 2 W.L.R. 163.

necessary to read "and" in place of the conjunction "or," and vice versa.

The Disabled Soldiers Act 1601, for example, in speaking of property to be employed for the maintenance of "sick and maimed soldiers," referred to soldiers who were either sick or maimed, and not only to those who were both.[22]

The expression "local and public authorities" in section 4 (2) of the Prevention of Corruption Act 1916 has been held by Winn J. not to "mean authorities which are both local and public . . . [but] authorities which are either local or public."[23]

By section 48 (1) of the Mines and Quarries Act 1954: "It shall be the duty of the manager of every mine to take, with respect to every road and working place in the mine, such steps by way of controlling movement of the strata in the mine *and* supporting the roof and sides of the road or working place as may be necessary for keeping the road or working place secure." Lord Reid said that he could not "suppose that it was intended that in every case the manager must both attempt to control movement of the strata and provide support. . . . The natural meaning of the words of the section is that one or other of the prescribed methods must be adopted in every case."[24]

Conversely, the court may substitute "and" for "or." An example is provided by the Bankrupts Act 1603, which made it an act of bankruptcy for a trader to leave his dwelling-house "to the intent, *or* whereby his . . . creditors . . . shall or may be defeated or delayed." If construed literally, this would have exposed to bankruptcy every trader who left his home, even for an hour, if a creditor called during his absence for payment. This absurd consequence was avoided by reading "or" as "and" so that an absence from home was an act of bankruptcy only when coupled with the design of delaying or defeating creditors.[25]

By section 26 (2) of the Bankruptcy Act 1914, which deals with an application for an order of discharge: "where the bankrupt has committed any misdemeanour under this Act . . . the court shall *either* . . . *or* (ii) suspend the discharge for such period as the court thinks proper . . . *or* (iv) require the bankrupt as a condition of his discharge to consent to judgment being entered against him by the official receiver or trustee" for debts provable under the bankruptcy

[22] Duke, *Charitable Uses*, p. 127.
[23] *R.* v. *Newbould* [1962] 2 Q.B. 102.
[24] *John G. Stein & Co., Ltd.* v. *O'Hanlon* [1965] A.C. 890, at p. 904.
[25] *Fowler* v. *Padget* (1798) 7 T.R. 509. *Cf. R.* v. *Mortlake* (1805) 6 East 397.

and remaining unsatisfied. The Divisional Court of the Chancery Division held in *Re Mills*[26] that under this provision a county court judge had jurisdiction to suspend a bankrupt's discharge for three years subject to a condition that the bankrupt should consent to judgment being entered against him for £400: in other words, he was not limited to acting either under paragraph (ii) or under paragraph (iv), but could apply both together.

The fact that an enactment is penal does not, it appears from *R.* v. *Oakes*,[27] necessarily prevent the statute from reading one conjunction in place of another even though this produces a result which is unfavourable to an accused person. In that case, "or" was substituted for "and" in the words of section 7 of the Official Secrets Act 1920: "Any person who . . . aids or abets *and* does any act preparatory to the commission of an offence . . . shall be guilty of a felony."

"May" and "must"

In ordinary usage, "may" is permissive and "must" is imperative, and, in accordance with such usage, the word "may" in a statute will not generally be held to be mandatory.[28] In some cases, however, it has been held that expressions such as "may," or "shall have power," or "shall be lawful," have—to say the least—a compulsory force,[29] and so their meaning has been modified by judicial exposition.[30]

In an early case, where it was contended that section 18 of the Poor Relief Act 1662, in enacting that the churchwardens and overseers "shall have power and authority" to make a rate to reimburse parish constables certain expenses (those of "relieving . . . and carrying rogues, vagabonds and sturdy beggars" to houses of correction and workhouses) left it optional with them to make it or not, the court held that it was obligatory on them to make it whenever disbursements had been made and not been paid.[31]

Section 13 of the Weights and Measures Act 1889, which provided that an inspector "may take in respect of the verification and stamp-

[26] [1967] 1 W.L.R. 580.
[27] [1959] 2 Q.B. 350.
[28] *Nicholl* v. *Allen* (1862) 31 L.J.Q.B. 283; *Cooper* v. *Hall* [1968] 1 W.L.R. 360.
[29] *R.* v. *Tithe Commissioners* (1850) 14 Q.B. 474; *Border R.D.C.* v. *Roberts* [1950] 1 K.B. 716, *per* Somervell L.J.
[30] See *Re Shuter* [1960] 1 Q.B. 142; *R.* v. *Governor of Brixton Prison, ex p. Enahoro* [1963] 2 Q.B. 455.
[31] *R.* v. *Barlow* (1693) Carth. 293; *R.* v. *Inhabitants of Derby* (1694) Skin. 370.

ing of weights, measures, and weighing instruments the fees specified," was held to be obligatory and to impose on the inspector a duty to take the fees in all cases.[32]

An Act which made it "lawful" for a court to stay proceedings in actions against companies under liquidation until proof of the plaintiff's debt,[33] and a rule of court which provided that where the court has given no directions as to the disallowance of the costs of improper or unnecessary proceedings, "the taxing master may look into the same for the purpose aforesaid,"[34] were held equally imperative.

By section 56 of the Corrupt and Illegal Practices Prevention Act 1883, jurisdiction conferred by the Act "may" be exercised by one of the judges for the time being on the rota for the trial of election petitions. "May" was read as equivalent to "must," so that the jurisdiction could not be exercised by any other judge.[35]

Under section 130 (1) of the Local Government Act 1933, a person surcharged may apply to a tribunal for a declaration that he acted reasonably or in the belief that his action was authorised by law, and the tribunal "if satisfied that there is proper ground for doing so, may make a declaration to that effect." Lord Parker C.J. has said that (although section 130 (1) confers a discretion on the court) "may" here should probably be construed as "must": though the following subsection, which empowers the tribunal to relieve the person surcharged wholly or in part from personal liability, gives it a wide discretion, "may" there really meaning "may."[36]

Finally, there is section 134 (1) of the Income Tax Act 1952: "Subject to the provisions of this section, all income in respect of which a person is chargeable under Case IV of Schedule D or under Case V of Schedule D may respectively be assessed and charged in one sum." "It is well established," said Pennycuick J. in *Baron Inchyra* v. *Jennings* (*Inspector of Taxes*),[37] "that, in subsection (1), the word 'may' should be read as mandatory. The effect of these provisions is that income in respect of all foreign possessions is lumped together and comprised in a single assessment. . . . "

[32] *R.* v. *Roberts* [1901] 2 K.B. 117.
[33] *Marson* v. *Lund* (1849) 13 Q.B. 664.
[34] *Baines* v. *Wormsley* (1878) 47 L.J.Ch. 844.
[35] *Shaw* v. *Reckitt* [1893] 1 Q.B. 779.
[36] *Annison* v. *District Auditor for St. Pancras Borough Council* [1962] 1 Q.B. 489.
[37] [1966] Ch. 37, as reported in [1965] 2 All E.R. 714, at p. 723.

2. Equitable Construction

Previous editions of *Maxwell* have contained a considerable amount of material on the subject of equitable construction.[38]

By "equitable construction," the judges have sometimes meant nothing more than construction in accordance with the intention of the legislature.[39] " 'Within the equity'," said Byles J., "means the same thing as 'within the mischief' of the statute."[40] In this sense, equitable construction is unobjectionable and is still common: in the application of the mischief rule, for instance;[41] in a "beneficial" or broadly liberal approach to problems of interpretation;[42] and in the practice of construing a statute in such a way as to prevent evasion of its terms.[43]

Older works, however, use the term "equitable construction" in a much broader sense. In the construction of old statutes, it has been understood as extending to general cases the application of an enactment which, literally, was limited to a special case, on the ground, in the words of Coke, that "it was the wisdom of ancient parliaments to comprehend much matter in few words."[44] Equity, according to Plowden, "enlarges or diminishes the letter according to its discretion. . . . Experience shows us that no lawmakers can foresee all things which may happen, and therefore it is fit that if there be any defect in the law, it should be reformed by equity. . . . It is a good way, when you peruse a statute, to suppose that the lawmaker is present, and that you have asked him the question you want to know touching the equity, then you must give yourself such an answer as you imagine he would have done, if he had been present."[45]

So a provision of the Statute of Westminster I, that a vessel should not be adjudged a wreck if a man, a dog or a cat escaped from it, was construed as exempting a vessel from such adjudication if any other animal escaped.[46]

The Statute of Westminster II gave the bill of exceptions to the rulings of the judges of the Common Pleas. This was held applicable,

[38] 11th ed., pp. 244–252. *Cf.* C. K. Allen, *Law in the Making*, 7th ed., pp. 451–456.
[39] *R.* v. *Williams* (1758) 1 W.Bl. 93.
[40] *Shuttleworth* v. *Le Fleming* (1865) 19 C.B. (N.S.) 687, *arguendo* at p. 703.
[41] *Ante*, pp. 40–43.
[42] *Ante*, pp. 92 *et seq.*
[43] *Ante*, pp. 137–143.
[44] 2 Inst. 401.
[45] *Eyston* v. *Studd* (1574) 2 Plow. 459: many examples are given in this case.
[46] 2 Inst. 167–168.

not only to the judges of the other superior courts, but also to those of inferior courts, their judges being still more likely to err.[47]

The Prisoners for Debt Act 1377, forbidding the Warden of the Fleet to suffer his prisoners for judgment debts to go at large until they had satisfied their debts, was held to include all gaolers.[48] Similarly, the Statute of Gloucester, in speaking of London, was considered as intending to include all cities and boroughs,[49] and the statute or writ *Circumspecte Agatis*, which directed the judges not to interfere with the Bishop of Norwich or his clergy in spiritual suits, was construed as protecting all other prelates, the Bishop of Norwich being put but for an example.[50]

This kind of construction would not be tolerated today.[51] It was condemned by Sir Francis Bacon, who declared that *non est interpretatio, sed divinatio, quae recedit a litera*;[52] Lord Tenterden lamented it,[53] and pronounced it dangerous,[54] and it may now be considered as altogether discarded in the construction of modern statutes.[55] Indeed, the reasons which were formerly advanced to justify it have largely disappeared, for modern statutes are no longer framed in the very concise language of ancient statutes,[56] nor are they drafted on the assumption that lax methods will be employed in their interpretation.[57] Equitable construction used also to be accounted for by the fact that the dividing line between the legislature and the judiciary was feebly drawn in early times.[58] When the judges drew the statutes from the petitions of the Commons and the answers of the King,[59] they would be disposed to construe the language with freedom.

One other use of the term "equity" in connection with statutes should be noted. It was at one time asserted that a statute contrary to natural equity or reason (such as one which made a man judge in

[47] 2 Inst. 427; *Strother* v. *Hutchinson* (1838) 4 Bing. N.C. 83.
[48] *Platt* v. *Sheriffs of London* (1550) 1 Plow. 35.
[49] 2 Inst. 322: "London was named for excellency."
[50] 2 Inst. 487: "the Bishop of Norwich is here put but for an example."
[51] *Miller* v. *Salomons* (1853) 7 Ex. 475, *per* Pollock C.B.
[52] *Advancement of Learning*.
[53] *R.* v. *Inhabitants of Turvey* (1819) 2 B. & Ald. 520.
[54] *Brandling* v. *Barrington* (1827) 6 B. & C. 467.
[55] Except, perhaps, where a modern statute is strictly *in pari materia* with one which has already received an equitable construction: *Maxwell*, 11th ed., p. 250, citing *Sturgis* v. *Darell* (1860) 29 L.J.Ex. 472.
[56] 2 Inst. 401; 10 Rep. 30b; *Gwynne* v. *Burnell* (1840) 6 Bing N.C. 453, *per* Lord Brougham.
[57] See *Wilson* v. *Knubley* (1806) 7 East 128, *per* Lord Ellenborough C.J.
[58] See *Bradlaugh* v. *Clarke* (1883) 8 App.Cas. 354, *per* Earl of Selborne L.C.
[59] Co.Litt. s. 464. So Hengham C.J. told counsel that he knew better than counsel the meaning of a statute, having made it himself: Y.B. 33 Edw. 1, 82.

his own cause), or contrary to *Magna Carta*, was void, for, it was said, *jura naturae sunt immutabilia*, they are *leges legum*, and an Act of Parliament can do no wrong.[60] So Keble J. said in 1653 that whatever was contrary to Scripture, or to "right reason which is maintained by Scripture," could not be "the law of England, but the error of the party which did pronounce it."[61] But this doctrine too has gone. Dr. C. K. Allen was unable to find "a single example in our books of the courts rejecting the plain and express provisions of a statute on the ground that it was contrary to any ethical principle."[62] And in 1871 Willes J. said: "It was once said . . . that, if an Act of Parliament were to create a man judge in his own cause, the Court might disregard it. That dictum, however, stands as a warning, rather than an authority to be followed. We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by parliament with the consent of the Queen, lords, and commons? I deny that any such authority exists. . . . The proceedings here are judicial, not autocratic, which they would be if we could make laws instead of administering them."[63]

3. Strict Construction of Penal Laws

The rule that statutes imposing criminal or other penalties[64] should be construed narrowly in favour of the person proceeded against was more rigorously applied in former times when the number of capital offences was still very large, when it was still punishable with death to cut down a cherry-tree in an orchard or to be seen for a month in the company of gipsies.[65] The degree of strictness applied in the interpretation of the words of penal laws is illustrated by Hale's mention of the statute 1 Edw. 6, c. 12. This made the stealing of horses (in the plural) a capital offence, and gave rise to a doubt, which it was thought necessary to remove by enactment in the following session of Parliament, whether it included the theft of one horse

[60] *Bonham's Case* (1609) 8 Rep. 114a; *City of London* v. *Wood* (1701) 12 Mod. 669; *Day* v. *Savadge* (1614) Hob. 85; *Mercers' Co.* v. *Bowker* (1725) 1 Stra. 639; 3 Inst. 111. So enacted as to any statutes made contrary to *Magna Carta* by 42 Edw. 3, c. 1; Co.Litt. 81a.

[61] *R.* v. *Love* (1651) 5 State Trials 43, at p. 172.

[62] *Op. cit.*, p. 450.

[63] *Lee* v. *Bude & Torrington Junction Rly. Co.* (1871) L.R. 6 C.P. 576, at p. 582.

[64] For a lengthy discussion of the term "penal Act," see *Craies on Statute Law*, 6th ed., pp. 525–529.

[65] 4 Bl. Comm. 4: "to be seen for one month in the company of persons who call themselves, or are called, Egyptians."

only.[66] Perhaps the same spirit may be seen in the nineteenth-century decisions that a court was not bound to know that a colt was a horse within the meaning of an Act against horse-stealing,[67] and that an enactment which made it a felony to "stab, cut or wound" did not reach the case of biting off a nose or finger because the injury thus inflicted was not (as the words seemed to require) caused by an instrument.[68]

The principle applied in construing a penal Act is that if, in construing the relevant provisions, "there appears any reasonable doubt or ambiguity," it will be resolved in favour of the person who would be liable to the penalty.[69] "If there is a reasonable interpretation which will avoid the penalty in any particular case," said Lord Esher M.R., "we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections."[70] Or, as Plowman J. has said more recently: "In every case the question is simply what is the meaning of the words which the statute has used to describe the prohibited act or transaction? If these words have a natural meaning, that is their meaning, and such meaning is not to be extended by any reasoning based on the substance of the transaction. If the language of the statute is equivocal and there are two reasonable meanings of that language, the interpretation which will avoid the penalty is to be adopted."[71] The court must always see that the person to be penalised comes fairly and squarely within the plain words of the enactment. It is not enough that what he has done comes substantially within the mischief aimed at by the statute: "the sooner this misunderstanding is dispelled and the supposed doctrine given its quietus the better it will be for all concerned, for the doctrine seems to involve substituting 'the incertain and crooked cord of discretion' for 'the golden and straight metwand of the law.' "[72]

The strict construction of penal statutes seems to manifest itself in

[66] 2 Hale 365. Now, by s. 1 (1) of the Interpretation Act 1889, words in the singular include the plural, and vice-versa, unless the contrary intention appears: *post* pp. 306–308.

[67] *R.* v. *Beaney* (1820) Russ. & Ry. 416.

[68] See *R.* v. *Stevens* (1834) 1 Moo.C.C. 409; *R.* v. *Harris* (1836) 7 C. & P. 446; *R.* v. *Jeans* (1844) 1 C. & K. 539.

[69] *London & Country Commercial Properties Investments, Ltd.* v. *Att.-Gen.* [1953] 1 W.L.R 312, *per* Upjohn J. at p. 319.

[70] *Tuck & Sons* v. *Priester* (1887) 19 Q.B.D. 629, at p. 638.

[71] *Re H.P.C. Productions, Ltd.* [1962] Ch. 466, at p. 485.

[72] *I.R.C.* v. *Duke of Westminster* [1936] A.C. 1, *per* Lord Tomlin at p. 19, quoting 4 Inst. 41. But see, *ante*, pp. 140–143.

four ways: in the requirement of express language for the creation of an offence; in interpreting strictly words setting out the elements of an offence; in requiring the fulfilment to the letter of statutory conditions precedent to the infliction of punishment; and in insisting on the strict observance of technical provisions concerning criminal procedure and jurisdiction.

Express language necessary for creation of criminal offences

In the first place, no act is to be deemed criminal unless it is clearly made so by the words of the statute concerned. Thus a mere declaration that "all lotteries are unlawful" does not create any offence on which a prosecution can be based.[73] And an exemption clause, setting out conditions on which acts which are made punishable under other provisions of the statute may be done, does not *per se* operate to make non-observance of the conditions criminal.[74]

An act or omission may, however, constitute an offence without any particular penalty being specified in the statute concerned.[75]

Strict construction of words setting out the elements of an offence

If there is any ambiguity in the words which set out the elements of an act or omission declared to be an offence, so that it is doubtful whether the act or omission in question in the case falls within the statutory words, the ambiguity will be resolved in favour of the person charged. This is, in practice, by far the most important instance of the strict construction of penal statutes.

Thus the Riot Act 1714, which made it a felony for rioters to remain assembled for more than an hour after the reading of the proclamation set out in the Act, was held to fail to have effect if the proclamation was not made precisely as it stood in the Act, so that the omission of the concluding words, "God save the King [Queen]" was fatal.[76]

An enactment which made it a misdemeanour by a bankrupt to commit certain acts within four months next before "the presentation of a bankruptcy petition *against* him" did not have that effect where the petition was presented by the bankrupt himself.[77]

[73] *Sales-Matic, Ltd.* v. *Hinchcliffe* [1959] 1 W.L.R. 1005.
[74] *R.* v. *Staincross Justices, ex p. Teasdale* [1961] 1 Q.B. 170.
[75] *Rathbone* v. *Bundock* [1962] 2 Q.B. 260. See, *post*, pp. 334–335.
[76] *R.* v. *Child* (1830) 4 C. & P. 442. *Quaere*, as to the position in countries which have left the Commonwealth but where the Act remains in force.
[77] *Re Burden* (1888) 21 Q.B.D. 24.

A provision penalising the personation of "any person entitled to vote" was not violated by personating a deceased voter.[78]

By section 121 (1) of the Highways Act 1959: "If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he shall be guilty of an offence." For a charge under this provision to succeed, it has been held essential that there be proof that the obstruction was an unreasonable one.[79]

In *Smaje* v. *Balmer*,[80] the question before the Liverpool Crown Court was whether a stone came within the words "any dangerous or offensive weapon or instrument" in section 28 (1) of the Larceny Act 1916. The learned judge said that one had "got to consider these provisions strictly, having regard to the offences which are being created." He held that a stone did not fall within the words, which were "dealing with weapons or instruments adapted or intended for causing injury to a human being."

In *R.* v. *Munks*,[81] M arranged an electrical device consisting of two wires which would cause a very severe shock, the object being to keep his wife out of his house. He was charged under section 31 of the Offences against the Person Act 1861 which penalises "whosoever shall set or place . . . any spring gun, man trap, or other engine calculated to destroy human life or inflict grievous bodily harm," with the intent specified in the Act. It was argued that "engine" should be given its general meaning (derived from the Latin *ingenium*) of any instance or product of ingenuity, a contrivance or device. But the Court of Criminal Appeal (at p. 307) came "to the conclusion that, particularly as this is a penal statute, the meaning to be given to it . . . is the more limited meaning of . . . a mechanical contrivance."

In *Holm* v. *Royal Borough of Kensington and Chelsea*,[82] the whole of the living accommodation in question was let to A, who himself occupied one floor with his wife, while A's son and daughter-in-law and their two children lived on the other floor. Was the house "occupied by members of more than one *family*" within sections 15 and 16 of the Housing Act 1961? The Court of Appeal held that it

[78] *Whiteley* v. *Chappell* (1869) 38 L.J.M.C. 51.
[79] *Nagy* v. *Weston* [1965] 1 W.L.R. 280. *Cf. W. R. Anderson (Motors), Ltd.* v. *Hargreaves* [1962] 1 Q.B. 425.
[80] [1965] 2 All E.R. 248, *per* Judge Chapman at p. 248.
[81] [1964] 1 Q.B. 304, *per* Lord Parker C.J.
[82] [1968] 1 Q.B. 646.

was not. Edmund Davies L.J. pointed out (at pp. 654, 655) that the service of notices on the landlord under sections 15 and 16, which could take place if the question was answered in the affirmative, could have very burdensome consequences for him: a fine of £100 or (on a second conviction) three months in prison, if he failed to comply. "Having regard to such consequences, any ambiguity in the statutory provisions should be resolved by adopting that interpretation which is most benevolent to the person being proceeded against."

In another case, newly-baked loaves were in a bakery company's despatch area, where they were checked for weight by a supervisor before they were passed to the loading bay. Some of them were under weight. It was held that they were not in the company's "possession for sale" for the purposes of section 22 (2) (*a*) of the Weights and Measures Act 1963 until they had been checked and sorted, and it had been decided which of them would be sold.[83]

The "husband" in a case of bigamy whose first marriage was potentially polygamous, having taken place according to Sikh law in India, was held not to be a person "being married" within section 57 of the Offences against the Person Act 1861.[84]

An extremely narrow interpretation was placed on certain sections of the Obscene Publications Act 1959 in *R.* v. *Clayton*.[85] By section 1 (1): "For the purposes of this Act an article shall be deemed to be obscene if its effect . . . is . . . such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it." By section 2 (6): "In any proceedings against a person under this section the question whether an article is obscene shall be determined without regard to any publication by another person unless it could reasonably have been expected that the publication by the other person would follow from publication by the person charged." Lord Parker C.J. (at p. 167) said that the effect of these provisions was "that, in the case of the publication of an article by way of sale to a particular person, the test of obscenity is whether the effect of the article in question was such as to tend to deprave or corrupt *him*." Therefore, the Court of Criminal Appeal held, sale to two experienced police

[83] *Ben Worsley, Ltd.* v. *Harvey* [1967] 1 W.L.R. 889.
[84] *R.* v. *Sarwan Singh* [1962] 3 All E.R. 612.
[85] [1963] 1 Q.B. 163. *Cf. R.* v. *Barker* [1962] 1 W.L.R. 349.

officers who were engaged in examining literature alleged to be obscene and in whom no feelings were aroused by such literature did not constitute publication of an obscene article.[85a]

By section 1 (3) of the same Act, "a person publishes an article who . . . in the case of an article containing or embodying matter to be looked at or a record, shows, plays or projects it." A photographic negative was held not to be an article capable of publication within the Act "because it is not shown, played or projected in the sense there conveyed, which must be a showing, playing or projecting it to some member of the public, not merely a projection in the dark-room."[86]

Omissions will not readily be supplied in a penal Act. So, the Weights and Measures Act 1835, s. 28, which empowered inspectors to examine "weights, measures, and scales" in shops and, if upon examination it appeared that "the said weights or measures" were light or unjust, to seize them, was held not to authorise a seizure of scales.[87]

The Municipal Corporations Act 1835, after empowering the borough justices to appoint a clerk to the justices, provided that it should not be lawful to appoint to that office any alderman or councillor, that the clerk should not prosecute any offender committed for trial, and that any person "being an alderman or councillor" who should act as clerk to the justices or "otherwise offend in the premises" should forfeit £100, recoverable by action. This clearly did not reach a clerk who prosecuted offenders committed by the justices if he were not an alderman or councillor, and yet the manifest intention seemed to be that he should be subject to the penalty for either or both offences, of acting if disqualified, and of prosecuting. But to effectuate this intention it would have been necessary to insert the words "any person who" before "shall otherwise offend," and the court would not so bring a person within the enactment.[88]

The courts have sometimes refused to extend penal Acts to things not *in esse* when the Act was passed.[89] Thus the Stock Jobbing Act 1733, which, after referring in the preamble to the great inconveniences which had arisen, and daily arose, by the wicked practice of stock jobbing—diverting men from their ordinary pursuits, ruining

[85a] *Cf. R.* v. *Calder and Boyars, Ltd.* [1969] 1 Q.B. 151.
[86] *Straker* v. *D.P.P.* [1963] 1 Q.B. 926, *per* Lord Parker C.J. at p. 932.
[87] *Thomas* v. *Stephenson* (1853) 22 L.J.Q.B. 258.
[3] *Coe* v. *Lawrance* (1853) 22 L.J.Q.B. 140.
[89] For the application of old laws to new things, see, *ante*, pp. 102–103.

families, discouraging industry, and injuring commerce—declared void all such contracts "in any public or joint stock, or other public securities whatsoever," was held not to apply to transactions in foreign funds[90] or railway shares.[91] The reason was that the former were not dealt in in England, and the latter were unknown, at the time when the Act was passed.[92]

Punishments

Punishments can be imposed only if the circumstances of the case fall clearly within the words of the enactment. Thus disqualification from holding a driving licence could not be imposed under the Road Traffic Act 1930, s. 6 (1), on a person convicted of stealing a car who was not also convicted of taking and driving away (for the latter offence, but not the former, was in the relevant Schedule), even though he asked for other offences, including that of taking and driving away, to be taken into consideration.[93]

Section 44 (1) of the Merchant Shipping (Safety and Load Line Conventions) Act 1932 requires a ship to have a load line. Section 44 (2) provides that for each offence of contravening the section, the owner or master shall be liable to a fine of £100 "and to such additional fine, not exceeding the amount hereinafter specified, as the court thinks fit to impose having regard to the extent to which the earning capacity of the ship was, or would have been, increased by reason of the submersion." Section 44 (3) specifies this additional amount as £100 for each inch or part thereof by which the load line was submerged. It has been held that a court has no jurisdiction to impose an additional fine under section 44 merely because it is proved that the ship was engaged in a commercial venture and that the submersion had increased the earning capacity of the ship: to impose the additional fine the court must actually have evidence as to the extent to which the earning capacity was, or would have been, increased by the submersion.[94]

By section 24 (3) of the Town and Country Planning Act 1947,

[90] *Henderson* v. *Bise* (1822) 3 Stark. 158.
[91] *Hewitt* v. *Price* (1842) 11 L.J.C.P. 292.
[92] See *Wells* v. *Porter* (1836) 5 L.J.C.P. 250, *per* Tindal C.J.
[9] *R.* v. *Williams* [1962] 1 W.L.R. 1268. But see *R.* v. *Assa Singh* [1965] 2 Q.B. 312: by s. 9 (1) of the Homicide Act 1957 the sentence in a case of non-capital murder was made imprisonment for life, but an order for deportation under the Commonwealth Immigrants Act 1962 is not a sentence, and could therefore be coupled with a sentence under s. 9 (1). See also *R.* v. *Walters* [1969] 1 Q.B. 255.
[94] *Rutberg* v. *Williams* [1962] 1 Q.B. 12.

using land in contravention of an enforcement notice was made an offence, and continuing the use after conviction a further offence punishable with "a fine not exceeding £20 for every day on which the offence is so continued." This created not a single offence, but one occurring from day to day. By section 104 of the Magistrates' Courts Act 1952 the justices only had jurisdiction to deal with offences committed within six months previous to the laying of the information. It was argued that the penalty prescribed by section 24 (3) was no more than a measuring rod to determine the maximum penalty for the offences, and on proof of an offence within the last six months the penalty could be calculated for the whole period since the last conviction. But the Divisional Court rejected this argument, holding that the expression "fine . . . for every day" connoted a fine for an offence on a day falling in point of date within the trial jurisdiction rather than a daily factor for calculating the total. "In our judgment," said Widgery J., "a penal provision of this kind should not be given a wider interpretation in the absence of clear words, and we prefer a construction which avoids the possible duplication of penalties . . . even though we recognise that Parliament may have intended to increase the severity of successive sentences as a deterrent to the persistent offender."[95]

Jurisdiction and procedure

Similarly, statutes dealing with jurisdiction and procedure are, if they relate to the infliction of penalties, strictly construed: compliance with procedural provisions will be stringently exacted from those proceeding against the person liable to be penalised,[96] and if there is any ambiguity or doubt it will, as usual, be resolved in his favour.[97] This is so, even though it may enable him to escape upon a technicality.[98]

Thus a statute which imposed a penalty where sacks of coal upon being weighed should be found deficient in weight of coal, and prescribed that, in the weighing, the sacks were to be weighed both with and without the coals therein, was not complied with by putting the full sacks successively into one scale and an empty sack with the appropriate weights in the other, and consequently the statutory

[95] *R.* v. *Chertsey Justices, ex p. Franks* [1961] 2 Q.B. 152, at p. 161. *Cf. R.* v. *Lewis* [1969] 2 W.L.R. 55.
[96] *R.* v. *Jones, ex p. Daunton* [1963] 1 W.L.R. 270; *R.* v. *Clarkson* [1961] 1 W.L.R. 347.
[97] *R.* v. *Bullock* [1964] 1 Q.B. 481. [98] *R.* v. *Clarkson, supra.*

penalty was held not recoverable by the buyer in such a case, the precise procedure laid down not having been followed.[99]

In *R.* v. *Norham and Islandshire Justices*,[1] summonses were issued for offences against the Motor Vehicles (Construction and Use) Regulations 1955. The procedure under the Magistrates' Courts Act 1957, s. 1 (pleading guilty by letter) was invoked, the magistrates notifying the accused of the procedure. The accused were at first minded to resist the charges but at the last moment, one of their witnesses being ill, decided to plead guilty by letter. The letter was received by the court on the day of the hearing when the prosecution witnesses had already arrived, and the court did not deal with the case under section 1 (by subsection (2), proviso (iii), of which no evidence is to be given for the prosecution other than the statement of alleged facts which has been served on the accused) but heard evidence from the police and the Traffic Commissioner's Department. It was held that once the procedure under section 1 had been invoked, the accused had a right to plead guilty up to the time of trial; accordingly, by admitting the evidence mentioned without adjourning and giving the accused an opportunity of being present, the court had broken the condition of section 1 (2), proviso (iii).

Wide sense given to words

The effect of the rule of strict construction might be summed up by saying that, where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself.[2] If there is no ambiguity, and the act or omission in question falls clearly within the mischief of the statute, the construction of a penal statute differs little, if at all, from that of any other.

This is well illustrated by the case of *Bowers* v. *Gloucester Corporation*.[3] Bowers was a licensed hackney carriage proprietor, and under the Town Police Clauses Act 1847 the Corporation had power to revoke his licence if he were convicted for "the second time . . . for any offence" under the Act or bye-laws. The Recorder of Gloucester

[99] *Meredith* v. *Holman* (1847) 16 L.J.Ex. 126. And see *Scott* v. *Baker* [1968] 3 W.L.R. 796.
[1] [1961] 1 W.L.R. 364.
[2] *R.* v. *Chapman* [1931] 2 K.B. 606.
[3] [1963] 1 Q.B. 881.

held that a possible construction of the Act was that it applied only to a conviction for the second time *of the same offence*, that the Act was ambiguous, and that, having regard to such ambiguity, it should be construed in favour of Bowers. The Divisional Court allowed the Corporation's appeal.

"When I first read these words," said Lord Parker C.J. (at pp. 886, 887) "it seemed to me that 'any offence' means what it says, 'any offence.' . . . That is so on general principles of construction. . . . This is a typical case where . . . a confusion has arisen between a provision which is ambiguous and a provision which is difficult to interpret. It may well be that many sections of Acts are difficult to interpret, but can be interpreted by the proper canons of construction. A provision can only be said to be ambiguous, in the sense that if it be a penal section it would be resolved in a manner most favourable to the citizen, where having applied all the canons of interpretation the matter is still left in doubt."[3a]

Applying various canons of interpretation to the words "any offence," the matter was left in no doubt: (i) their ordinary or literal meaning was clear; (ii) it was confirmed by the mischief aimed at, which was "clearly that a strict control should be kept on taxicab drivers and proprietors"; and also by (iii) "the complete absurdity which arises . . . if a man can show himself to be utterly unfitted to be a . . . driver or proprietor by committing 30, 40 or 50 offences, and yet not have his licence revoked because he has always committed a different offence."[3b]

There are many examples of words in penal statutes being given a wide construction.

The "breaking" required to constitute burglary includes acts which would not be so regarded in popular language, such as lifting the flap of a cellar,[4] or raising a latch,[5] or coming down a chimney.[6] Indeed, the burglar "breaks" into a house if he gains admittance by inducing the householder to open the door by a trick, as by pretending to be an employee of the British Broadcasting Corporation investigating interference on the radio.[7]

A threatening letter is "sent" when it is dropped in the way of the person for whom it is destined, so that he may pick it up;[8] or is

[3a] *Cf. D.P.P.* v. *Ottewell* [1968] 3 W.L.R. 621, *per* Lord Reid at p. 627.
[3b] *Cf. R.* v. *Flanders* [1969] 1 Q.B. 148.
[4] *R.* v. *Russell* (1833) 1 Moo. C.C. 377.
[5] *R.* v. *Jordan* (1836) 7 C. & P. 432.
[6] *R.* v. *Brice* (1821) Russ. & Ry. 450.
[7] *R.* v. *Boyle* [1954] 2 Q.B. 292.
[8] *R.* v. *Jepson* (1767) 2 East P.C. 1115; *R.* v. *Lloyd* (1767) 2 East P.C. 1122.

affixed in some place where he would be likely to see it;[9] or is dropped on a public road near his house so that it may, however indirectly, reach him, which it eventually does after passing through several hands:[10] although in none of these cases would the paper colloquially be said to have been "sent."

To alter the signals and thereby to bring a train to a stop on a railway was held to be within an enactment which made it an offence to "obstruct" any engine or carriage using a railway.[11]

The employment of an English steam tug in towing a prize which has been driven by stress of weather into English waters to the captor's port is a breach of the provision of the Foreign Enlistment Act 1870 against "dispatching a ship to be employed in the military or naval service of a foreign state."[12]

By section 232 (2) of the Road Traffic Act 1960: "Where the driver of a vehicle is alleged to be guilty of an offence to which this section applies—(*a*) the owner of the vehicle shall give such information as to the identity of the driver as he may be required to give . . . and (*b*) *any other person* shall if required . . . give any information which it is in his power to give and may lead to the identification of the driver." Was the person who in fact was the driver "any other person"? It was argued that the section should be construed in favour of the subject and not in such a way as to make a man incriminate himself. It was held, however, that the section was not ambiguous, that the words were plain, and that "any other person" meant any person other than the owner and so included the driver. Lord Parker C.J. relied on the object of the provision: "The clue . . . is that the driver is unknown. The whole object of the section is to discover the identity of the driver. Accordingly, it seems to me nonsense to say that "any other person" means any other person than a person whose identity you are trying to discover and whom you do not know.[13]

By section 13 of the Sexual Offences Act 1956 "it is an offence for a man to commit an act of gross indecency with another man." The Court of Criminal Appeal held that "with" does not mean "with the consent of," but has the somewhat looser meaning of "against" or "directed towards."[14]

[9] *R.* v. *Williams* (1843) 1 Cox C.C. 16. [10] *R.* v. *Grimwade* (1844) 1 Den. 30.
[11] *R.* v. *Hadfield* (1870) L.R. 1 C.C.R. 253.
[12] *Dyke* v. *Elliott* (1872) L.R. 4 P.C. 184.
[13] *Bingham* v. *Bruce* [1962] 1 W.L.R. 70, at p. 73. *Cf. R.* v. *Price* [1968] 1 W.L.R. 1853, (Road Safety Act 1967, s. 2 (1))
[14] *R.* v. *Hall* [1964] 1 Q.B. 273, *per* Lord Parker C.J. S. 13 was amended by the Sexual Offences Act 1967.

By section 7 of the Forgery Act 1913: "Every person shall be guilty of felony . . . who, with intent to defraud . . . obtains . . . property . . . (*a*) under, upon, *or by virtue of* any forged instrument whatsoever, knowing the same to be forged." It was argued in one case that "by virtue of" meant that the forged instrument must (as in the case of false pretences) have wholly or partially induced the person deceived to part with the property. But the Court of Criminal Appeal came to "the conclusion that those words 'by virtue of' . . . should be given the very widest meaning. It seems to this court that if with intent to defraud a man uses an instrument to his knowledge forged to start a train of events whereby he intends to obtain and does obtain property, he is guilty of an offence."[15]

Regulations regarding traffic and parking usually receive a broad construction. A person who parked his car outside his flat and fetched his wife and two parcels from the flat was not merely causing his vehicle to wait so long as might be necessary "to enable any person to board or alight" within regulation 4 (*a*) of the London Parking Zones (Waiting and Loading) (Restriction) Regulations 1960.[16] A charge of failing to pay the initial charge for parking at a meter which charge was "payable on the leaving of the vehicle in the parking place" (article 8 (1) of the Parking Places (Westminster) (No. 1) Order 1959) succeeded, even though the short interval which admittedly elapsed between the parking of the car and the insertion of the money in the meter was taken up by the driver's genuine and successful effort to obtain the necessary change.[17] And a bus-driver who, at the end of his spell of duty, left his vehicle as usual outside the bus station where, because of the late arrival of the relief driver who was to take over, it caused a traffic hold-up was held, with regret, to be guilty of causing the bus to remain stationary on a road longer than was reasonably necessary to pick up or set down passengers (Public Service Vehicles (Conduct of Drivers, Conductors and Passengers) Regulations 1936, reg. 7), and causing it to stand on a road so as to cause an unnecessary obstruction thereof (Motor Vehicles (Construction and Use) Regulations 1955, reg. 89).[18] In none of these cases would the court countenance the introduction of any notion of a "reasonable time" into its exegesis of the provisions.[18a]

A car which was kept standing on a road, and the engine of which

[15] *R.* v. *Hurford* [1963] 2 Q.B. 398, *per* Lord Parker C.J. at p. 407.
[16] *Clifford-Turner* v. *Waterman* [1961] 1 W.L.R. 1499.
[17] *Strong* v. *Dawtry* [1961] 1 W.L.R. 841.
[18] *Ellis* v. *Smith* [1962] 1 W.L.R. 1486. [18a] But see *R.* v. *Sharp* [1968] 2 Q.B. 564.

had been stolen by a person unknown, was held to be a "mechanically propelled vehicle" for which a licence should have been in force: Vehicles (Excise) Act 1949, s. 15.[19]

By section 28 of the Town Police Clauses Act 1847: "Every person who in any street, *to the obstruction*, annoyance or danger *of the residents or passengers*, commits any of the following offences, shall be liable to a penalty. . . . Every person who places, hangs up, or otherwise exposes to sale any goods, wares, merchandise, matter, or thing whatsoever, so that the same project into or over any footway, or beyond the line of any house, shop or building at which the same are so exposed, *so as to obstruct or incommode the passage of any person* over or along such footway." Under this section, "any unlawful encroachment on a footway must be deemed to obstruct and, *a fortiori*, to incommode, the passage of persons over and along such footway, and, accordingly, . . . it is not necessary to allege or to call evidence to prove that any particular person was in fact so obstructed or incommoded."[20]

In *R.* v. *Evans*,[21] the question was whether, when a test certificate was issued under regulations made pursuant to section 65 (2) of the Road Traffic Act 1960, it spoke to the condition of the vehicle at the date of examination or at the date of issue. "It has been stressed quite rightly," said Lord Parker C.J. (at p. 1393), "that this is a penal statute; that only means that if there is any real ambiguity, the matter must be decided in favour of the subject. But in the opinion of this court, however, when one bears in mind the mischief aimed at by the Act, the very object of the certificate, it is impossible to say that the certificate is speaking as to any other date than the date when it is issued."[21a]

Finally, *Rosenbaum* v. *Burgoyne*[22] concerned section 17 (2) (*b*) of the Betting and Gaming Act 1960 which, in setting out the conditions on which gaming should be lawful, required "that the stake required to be hazarded . . . to play the game once does not exceed sixpence." The whole case turned on the meaning of "required": the fruit machine in question could be operated by inserting any number

[19] *Newberry* v. *Simmonds* [1961] 2 Q.B. 345. *Cf. Lawrence* v. *Howlett* [1952] 2 All E.R. 74: pedal cycle with an auxiliary motor from which the cylinder piston and connecting-rod had been removed held to be in use at the material time only as a pedal cycle.

[20] *Wolverton U.D.C.* v. *Willis* [1962] 1 W.L.R. 205, *per* Slade J. at p. 209. *Cf. Seekings* v. *Clarke* (1961) 59 L.G.R. 268.

[21] [1964] 1 W.L.R. 1388. [21a] *Cf. R.* v. *King's Lynn JJ., ex p. Carter* [1968] 3 W.L.R. 1210. [22] [1965] A.C. 430.

of sixpences from one to five, and the prize money obtainable varied accordingly.

The Divisional Court held that there had been a breach of section 17 (2) (*b*). It looked upon the proprietor as offering to those who wished to use his machine alternative sets of rules depending on the amount of the stake inserted. "It seems to me," said Widgery J. (at p. 436), "that any player who, coming to this machine, elects to put five sixpences in the machine, is adopting a set of rules which, in order that he may earn certain rewards, requires him to hazard that sum, and on that view of the section it seems to me that the machine as used resulted in gaming facilities being provided which were not in accordance with section 17 (2), in that in accordance with some of the alternative sets of rules offered, a stake in excess of sixpence was required in order to earn the rewards which those rules contemplate."

This decision was reversed by the House of Lords, Lord Reid (at p. 440) stigmatising it as involving "a very artificial construction. I cannot think of any case where it would normally be said that if you double the stake you are playing a different game." If only one game could be played with the machine "then it appears to me that the only stake 'required' to be hazarded is sixpence. Neither the nature of the mechanism nor any rule made by the appellant requires any larger sum to be hazarded. Whether or not to insert more than one sixpence in the course of one game is entirely dependent on the choice of the player. If the intention had been to enact that the maximum stake permissible in any one game should not exceed sixpence, it would have been easy to say so. I can find nothing in the context to suggest that 'required' must be given any other than its natural meaning, and, as this is a penal provision, it would be necessary to find some compelling reason before that could be done."

4. Statutes Encroaching on Rights or Imposing Burdens

Encroachment on rights

Statutes which encroach on the rights of the subject, whether as regards person or property, are subject to a strict construction in the same way as penal Acts. It is a recognised rule that they should be interpreted, if possible, so as to respect such rights,[23] and if there is any ambiguity the construction which is in favour of the freedom of

[23] *Walsh* v. *Secretary of State for India* (1863) 10 H.L.C. 367, *per* Lord Westbury L.C.; *Hough* v. *Windus* (1884) 12 Q.B.D. 224, *per* Bowen L.J.

the individual should be adopted.[24] One aspect of this approach to legislation is the presumption that a statute does not retrospectively abrogate vested rights;[25] another is the presumption that proprietary rights are not taken away without provision being made for compensation.[26]

"If there is any ambiguity about the extent of [the] derogation [by a statute from common law rights], the principle is clear that it is to be resolved in favour of maintaining common law rights unless they are clearly taken away."[27] "The well-established presumption is that the legislature does not intend to limit vested rights further than clearly appears from the enactment."[28]

This strict method of construction may be seen, first of all, in the courts' attitude to statutes which encroach on the individual's rights in his person and liberty.

In *Metropolitan Police Commissioner* v. *Hammond*,[29] the House of Lords had to consider various statutes concerning the indorsement and execution of Irish warrants in England. One of these was the Petty Sessions (Ireland) Act 1851, s. 27 (3) of which made it mandatory for a warrant to be indorsed in Ireland by the inspector general, deputy inspector general or assistant inspector general of the Irish constabulary. The Royal Irish Constabulary was disbanded on the setting up of the Irish Free State and replaced by a body known as the Garda Siochana, in which none of the offices mentioned in section 27 (3) was known. It was held that the requirements of section 27 (3) must be carried out to the letter, and so the backing of a warrant by the deputy commissioner of the Garda Siochana was ineffective.

By section 223 of the Road Traffic Act 1960: "A person driving a motor vehicle on a road . . . shall stop the same on being so required by a police constable in uniform." Did this authorise a policeman to detain a car parked in a market place, which had been involved in an accident earlier in the day? The Court of Criminal Appeal held that it did not. "It is to be observed," said Ashworth J., "that the section is merely giving a power as opposed to laying down a duty. It seems

[24] *David* v. *Da Silva* [1934] A.C. 106. [25] *Ante*, pp. 215 *et seq.*

[26] *Att.-Gen.* v. *Horner* (1884) 14 Q.B.D. 245, *per* Brett M.R.; *Belfast Corporation* v. *O.D. Cars, Ltd.* [1960] A.C. 490. But this is no more than a presumption and may sometimes be inappropriate: *Westminster Bank, Ltd.* v. *Beverley Borough Council* [1968] 3 W.L.R. 671.

[27] *Re "Wonderland," Cleethorpes* [1965] A.C. 58, *per* Viscount Simonds at p. 71.

[28] *Re Metropolitan Film Studios Application* [1962] 1 W.L.R. 1315, *per* Ungoed-Thomas J. at p. 1323. [29] [1965] A.C. 810. *Cf. R.* v. *East Grinstead JJ., ex p. Doeve* [1969] 1 Q.B. 136, and *R.* v. *Governor of Brixton Prison, ex p. Havlide* [1969] 1 W.L.R. 42.

to the court that it would be an invalid exercise of the power given by the section if, as here, the object of its exercise was to do something . . . which . . . the constable had in the circumstances [*i.e.*, at common law] no right to do."[30]

By the Rules of the Supreme Court, Ord. 50, r. 3, "it shall be lawful for the court or a judge, upon the application of any party to a cause or matter . . . to make any order for the detention, preservation or inspection of any property or thing . . . as to which any question may arise therein . . . and . . . to authorise any samples to be taken, or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence." In a suit for a decree of nullity on the ground that the respondent had been pregnant by a man other than the petitioner at the time of the marriage, the petitioner relied on the literal wording of this rule in asking the court to order blood tests on himself, the respondent, and their child. Cairns J., whose decision was affirmed by the Court of Appeal, refused. If the petitioner's argument were right, "it would mean that in the case of a plaintiff alleging that he had suffered some internal injury by the defendant's negligence, it would be open to the court to direct that an extensive exploratory operation should be made by a surgeon on the plaintiff's body against his will. . . . I do not consider that the word 'thing' in the context of that rule includes the body or blood of a living person, nor that the taking of a sample includes the taking of a sample of blood from the veins of an unwilling human being. In my opinion, far more precise wording would be needed to enable the court to authorise any such interference with a person's body."[31]

A similarly restrictive construction is placed on statutes which interfere with rights of property.

A local Harbour Act, which imposed a penalty on "any person" who placed articles "on any quay, wharf, or landing-place, within ten feet of the quay-head, or on any space of ground immediately adjoining to the said haven, and within the space of ten feet from high-water mark" so as to obstruct the free passage over it was held to apply only to ground over which there was already a public right of way, but not to private property not subject to any such right and in the occupation of the person who placed the obstruction on it. Notwithstanding the comprehensive nature of the general words

[30] *R.* v. *Waterfield* [1964] 1 Q.B. 164, at p. 172.
[31] *W.* v. *W.* (*1963*) [1964] P. 67, at pp. 70, 71. See now *Re L.* [1968] 1 All E.R. 29.

used, it was not to be inferred that the legislature contemplated such an interference with rights of property as would have resulted from construing the words so as to create in effect a right of way.[32]

Provisions of the Partnership Act 1865 to the effect that, when a loan to a trader bore interest varying with the profits of the trade, the lender should not, if the trader became bankrupt, "recover any portion of his principal" until the claims of the other creditors were satisfied, did not deprive the creditor of any rights acquired by mortgage. Though he could not recover, he was still entitled to retain.[33]

By section 9 of the Factors Act 1889: "Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale . . . to any person receiving the same in good faith" and without notice of any right of the original seller has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title. "Before one takes too favourable a view for the sub-buyer and too harsh a view against the true owner of the goods as to the cases where section 9 can be invoked, one must remember that it is taking away the right which would have existed at common law, and for myself I should not be prepared to enlarge it more than the words clearly permitted and required. It seems to me that all that section 9 can be said clearly to do is to place the buyer in possession in the position of a mercantile agent when he has in fact in his possession the goods of somebody else, and it does no more than clothe him with that fictitious or notional position on any disposition of those goods. Section 2 (1) makes it clear that the sub-buyer from a mercantile agent, to whom that section applies, has in order to obtain the full advantage of the subsection, to establish that the mercantile agent was acting in the ordinary course of business."[34]

By section 29 (1) of the Bankruptcy Act 1914, where it is proved to the satisfaction of the court that the debts of a bankrupt are paid in full, the court may, on the application of any person interested, annul the adjudication. What is the effect of this annulment on those creditors who had not proved for their debts? Cross J., distinguish-

[32] *Harrod* v. *Worship* (1861) 30 L.J.M.C. 165.
[33] *Ex p. Sheil* (1877) 4 Ch.D. 789.
[34] *Newtons of Wembley, Ltd.* v. *Williams* [1965] 1 Q.B. 560, *per* Sellers L.J. at pp. 574–575.

ing a decision of Du Parcq L.J.[35] on the ground that it had turned on the particular arrangement made between the parties to the case and not on the construction of section 29, held "that their right to sue the debtor which had been suspended during the bankruptcy . . . revived as soon as the bankruptcy was annulled because the debtor ought not to have been adjudged bankrupt."[36]

In *R.* v. *Evans*,[37] the defendant was convicted of obtaining by false pretences by the magistrates, placed on probation and ordered to pay compensation. He was subsequently brought before quarter sessions for breach of the probation order and sentenced to imprisonment, whereupon under section 5 (4) of the Criminal Justice Act 1948 the probation order ceased to have effect. The full Court of Criminal Appeal held that the compensation order remained in force and did not lapse with the probation order. "An order for payment of compensation," said Glyn-Jones J. (at p. 989), "vests in the victims of the crime in whose favour the order is made a right to enforce the order for their own benefit, and the court cannot attribute to Parliament an intention to take away that right in the absence of clear words having that effect."

In *Minister of Housing and Local Government* v. *Hartnell*,[38] the House of Lords had to consider the rather obscure provisions of section 17 (2) of the Caravan Sites and Control of Development Act 1960, dealing with applications in respect of existing sites not covered by planning permission. Lord Wilberforce (at pp. 1172, 1173), said: "Simply as a matter of construction of the Act I should be strongly predisposed to the conclusion that it can never have been intended by the Act of 1960 to confer on the planning authority power by the imposition of conditions to derogate from any right of an owner previously established under the planning legislation to use his existing site as he was using it at the time of his application."

Section 1 (3) of the Leasehold Property (Repairs) Act 1938 provides that, when a tenant has served a counter-notice under the section, the landlord shall not proceed to enforce the covenant to repair without the leave of the court. By section 1 (5), leave shall not be given unless the landlord proves the existence of one of five factual situations there specified. In *Re Metropolitan Film Studios, Ltd.'s Application*,[39] Ungoed-Thomas J. had to consider at what time these facts must

[35] *John* v. *Mendoza* [1939] 1 K.B. 141.
[36] *More* v. *More* [1962] Ch. 424, at p. 430.
[37] [1963] 1 Q.B. 979. [38] [1965] A.C. 1134.
[39] [1962] 1 W.L.R. 1315.

exist: he held (at p. 1320) that the requirements of section 1 (5) were satisfied where the facts were established at the time of the hearing in court. However, this finding was not unqualified: "Those tests are such that the lessee may by carrying out repairs make it impossible for the lessor to satisfy them, so that if the date of the tests is the date of hearing the lessor may be defeated by the lessee's taking advantage of delays in the course of the proceedings for which the lessor may be in no way responsible. If the lessee took such action, the lessor would be barred, without occasion for any discretion arising in the court at all, and a lessor who had a case when he issued the summons would find it had disappeared by the hearing. It seems to me that the section should not be so construed as to subject the lessors' vested rights to being automatically barred by action of the lessee subsequent to the summons."

Statutes imposing burdens

Statutes which impose pecuniary burdens are subject to the same rule of strict construction. It is a well-settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties: the subject is not to be taxed unless the language of the statute clearly imposes the obligation,[40] and language must not be strained in order to tax a transaction which, had the legislature thought of it, would have been covered by appropriate words.[41] "In a taxing Act," said Rowlatt J., "one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."[42] But this strictness of interpretation may not always enure to the subject's benefit, for "if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be."[43]

So, under the Income Tax Act 1952 tax is charged under Case II of Schedule D on the profits of a profession or vocation. Where a well-known film actor, in order to assist in the promotion of a film

[40] *Russell* v. *Scott* [1948] A.C. 422, *per* Lord Simonds; *D'Avigdor-Goldsmid* v. *I.R.C.* [1953] A.C. 347.
[41] *I.R.C.* v. *Wolfson* [1949] 1 All E.R. 865, *per* Lord Simonds.
[42] *Cape Brandy Syndicate* v. *I.R.C.* [1921] 1 K.B. 64, at p. 71, approved by Viscount Simon L.C. in *Canadian Eagle Oil Co., Ltd.* v. *R.* [1946] A.C. 119.
[43] *Partington* v. *Att.-Gen.* (1869) L.R. 4 H.L. 100, *per* Lord Cairns at p. 122.

in which he played the leading role, entered into a deed of covenant whereby he received £15,000 in consideration of a promise not to act in any film other than for the covenantee company for eighteen months, it was held that the sum was not taxable.[44]

Regulation 12 of the Purchase Tax Regulations 1945 provided that if any person failed to furnish the return required by the Regulations the Commissioners of Customs and Excise might "determine the amount of the tax appearing to them to be due . . . and demand payment thereof." An assistant secretary of the Commissioners, who by virtue of the Customs and Excise Act 1952, s. 4 (1), was a person authorised to make determinations and demands under regulation 12, approved a determination and letter of demand relating to certain taxpayers. He signed a document stating that returns made by them were incomplete and stating the Commissioners' determination of amounts appearing to them to be due, and he handed the letter of demand to the chief executive officer responsible for the recovery of purchase tax, who was not a person authorised under section 4 (1): in accordance with office practice, this officer signed the letter of demand. It was held that it was not a lawful demand within section 4 (1) for the purposes of regulation 12 because, though *authorised* by a person empowered to make demands on behalf of the Commissioners, it was *made* by a person not so authorised. The statutory procedure for collecting the tax must be strictly observed.[45]

But if the words are clear they must be given full effect.[45a] In one case, certain farmers formed a syndicate to work a grain drying plant. The machinery was bought and installed on land conveyed to trustees, where it was managed by a committee in accordance with written rules. Was the plant exempt from rates as being an agricultural building "occupied together with agricultural land . . . and . . . used solely in connection with agricultural operations thereon" within section 2 (2) of the Rating and Valuation (Apportionment) Act 1928? The Court of Appeal held that the occupiers of the plant for rating purposes were the management committee, and accordingly the plant was neither occupied "together with agricultural land" nor used solely "in connexion with agricultural operations thereon," that is on the farmers' farms, as the committee did not conduct any agricultural operations on the farms and the farms were not in their

[44] *Higgs (Inspector of Taxes)* v. *Olivier* [1952] Ch. 311 (Income Tax Act 1918).
[45] *Commissioners of Customs and Excise* v. *Cure and Deeley, Ltd.* [1962] 1 Q.B. 340. *Cf. Record Tower Cranes, Ltd.* v. *Gisbey* [1969] 1 All E.R. 418.
[45a] See *Westward Television* v. *Hart* [1968] 3 W.L.R. 480, as to "relief" (at p. 488).

occupation. "It may well be," said Lord Evershed M.R., "that, in a desire to encourage co-operative enterprise in the farming industry, Parliament may think fit to revise the present language of section 2 (2) . . . but until it is done. . . . I do not think that the so-called syndicate can say that they are the occupiers."[46]

One very striking instance of strict construction concerned Part IV of the Prices and Incomes Act 1966. By section 29 (4), "an employer shall not pay remuneration to which this section applies for work for any period while the order [made by the Secretary of State] is in force which exceeds the rate of remuneration *paid* by him for the same kind of work before July 20, 1966." The Court of Appeal held that "paid" meant "contracted to be paid," and that therefore where a pay increase had been agreed but not implemented before July 20, 1966, the increased rate was the rate which was not to be exceeded under section 29 (4). "If I were wrong in this view," said Lord Denning M.R., "I am clear that, at any rate, the requirement in the statute is ambiguous and uncertain: in which case the rights under the contract must prevail. No man's contractual rights are to be taken away on an ambiguity in a statute: nor is an employer to be penalised on an ambiguity."[47]

By section 144 (1) of the Highways Act 1959: "If, *in or on any land* adjoining a street, there is an unfenced or inadequately fenced source of danger to persons using the street," the local authority may require the owner or occupier to take steps to obviate the danger. The Divisional Court held that the danger arising from the fact that someone might inadvertently step off the highway and drop some fifteen or sixteen inches on to a lawn was not within the section. Lord Parker C.J. said that he approached "the case with the idea firmly in my mind that it would require very express words to put the alleged burden on to the owner of the adjoining land. . . . It is stretching the language to say that the difference in levels here is in or on the land. It is just as much in or on the highway."[48]

Statutes conferring powers

Where a statute confers a power, and particularly one which may be used to deprive the subject of proprietary rights, the courts will confine those exercising the power to the strict letter of the statute.

[46] *Farmers' Machinery Syndicate (11th Hampshire)* v. *Shaw (Valuation Officer)* [1961] 1 W.L.R. 393, at p. 398.
[47] *Allen* v. *Thorn Electrical Industries, Ltd.* [1968] 1 Q.B. 487, at p. 503.
[48] *Myers* v. *Harrow Corporation* [1962] 2 Q.B. 442, *per* Lord Parker C.J. at pp. 447, 448.

So, in discussing the Town and Country Planning Act 1947, Viscount Simonds approved the proposition that it "was highly technical and, as it encroached on private rights, the court must insist on strict and rigid adherence to formalities."[49]

So the power given to justices by the Poor Relief Act 1601 to appoint "four, three or two substantial householders" as parish overseers was not well executed by appointing more than four,[50] or by appointing a single one even where he was the only householder in the parish.[51]

Section 21 of the Housing Act 1957 provides that "a demolition order . . . shall require (*a*) that the premises shall be vacated within a period to be specified in the order, not being less than twenty-eight days from the date on which the order becomes operative, and (*b*) that the premises shall be demolished within six weeks after" the expiration of that period or such longer period as the local authority should deem reasonable. This was held not to authorise a county court judge to order that the premises be demolished within seven years: "to make such an order is to fly in the face of the Act."[52]

The Queen's Remembrancer Act 1859, s. 26, which empowered the Barons of the Exchequer to make rules as to the process, practice and pleading of their court in revenue cases, was held not to authorise them to make rules granting an appeal to the Exchequer Chamber and the House of Lords. A different construction would, in effect, have given the Barons authority to confer jurisdiction on two superior courts and to impose on them the duty of hearing appeals.[53] So also the power to make rules conferred by section 99 (1) of the Supreme Court of Judicature (Consolidation) Act 1925 applies only to matters of practice and procedure, and in so far as a rule purports to override the power of the executive to intervene in litigation to veto the production of documents it is *ultra vires*, for this power of the executive is a matter of substantive law and not one of mere procedure.[54]

Birmingham and Midland Motor Omnibus Co., Ltd. v. *Worcestershire County Council*[55] contains no less than three instances of a body

[49] *East Riding County Council* v. *Park Estate (Bridlington), Ltd.* [1957] A.C. 223.
[50] *R.* v. *Loxdale* (1758) 1 Burr. 445.
[51] *R.* v. *Cousins* (1864) 33 L.J.M.C. 87. *Cf. R.* v. *Inhabitants of Clifton* (1794) 2 East 168.
[52] *Pocklington* v. *Melksham U.D.C.* [1964] 2 Q.B. 673, at p. 681.
[53] *Att.-Gen.* v. *Sillem* (1864) 10 H.L.C. 704. *Cf. Hotel and Catering Industry Training Board* v. *Automobile Proprietary, Ltd.* [1968] 1 W.L.R. 1526.
[54] *Re Grosvenor Hotel, London (No. 2)* [1965] Ch. 1210. See now *Conway* v. *Rimmer* [1968] A.C. 910. And *cf. Maynard* v. *Maynard* [1969] 2 W.L.R. 22.
[55] [1967] 1 W.L.R. 409.

acting in excess of its statutory powers. The county council were the highway authority for a dual carriageway by-pass. Where the by-pass joined the old road there was a junction which enabled traffic to pass over the by-pass in several directions, and this junction was a danger and hindrance to traffic using the by-pass. Therefore the council blocked up the intersections in the centre of the carriageway with wooden blocks, thus making the carriageway continuous so that traffic which used to go across the carriageway now had to make a detour of one and three-quarter miles, and put up a "Dual Carriageway" sign at one of the intersections.

(i) For closing the intersections in the centre, they relied on section 65 (1) (*a*) of the Highways Act 1959, which entitled them to maintain works "along any length of the highway, for separating a part of the carriageway which is to be used by traffic moving in one direction from a part of the carriageway which is to be used . . . by traffic moving in the other direction." The Court of Appeal held that they had acted *ultra vires* this provision. "It is one thing," said Lord Denning M.R. (at p. 419), "to separate lines of traffic. It is another thing to prevent it moving in its desired direction at all."

(ii) Next, again for blocking the intersections, they relied on section 65 (1) (*b*), which empowered them to maintain works "at cross roads or other junctions, for regulating the movement of traffic." This too was exceeded. A power to regulate implies the continued existence of that which is to be regulated. A roundabout or short diversion would have been *intra vires*, but a work which "forces the traffic to go 1¾ miles out of its way . . . ceases to be 'regulating' the traffic. It is equivalent to prohibiting it."

(iii) In putting up the "Dual Carriageway" sign, the highway authority had acted under the Traffic Signs Regulations and General Directions 1964. "By virtue of this sign the highway authority can point out to traffic the direction in which it is to go along the dual carriageway; but [it] is not entitled by this sign to stop traffic using a highway altogether, even though it is only an intersecting highway." Here, once again, the county council had acted *ultra vires*.

Every petition for the winding-up of a company is to be verified by an affidavit, made (where the petitioner is a corporation) "by some director, secretary, or other principal officer thereof": Companies (Winding-Up) Rules 1949, r. 30. A petition presented by Shell-Mex and B.P., Ltd. was supported by an affidavit sworn by a divisional manager. The company had thirty-two divisional managers.

Pennycuick J. said that it was "better to keep to the literal terms of the rule unless there are special circumstances making a departure from the terms of the rule desirable," and he did not find it possible "to say that all these 32 gentlemen are principal officers of the company."[56]

Section 178 (2) of the Highways Act 1959 empowers magistrates to hear and determine objections made to proposals of a local authority to execute works in a private street on the ground, *inter alia*, that (section 177 (1) (*c*)) "the proposed works are insufficient or unreasonable." Lord Parker C.J. said that "under this scheme of legislation, the justices in considering whether the works are reasonable or unreasonable or sufficient or insufficient, are limited to the reasonableness of the works to carry out the original scheme or object as set out in the original resolution. Their powers in no way extend to a criticism of that original resolution,"[57] and therefore they had no power to say that sewering proposed could only be carried out if the work was done in conjunction with the sewering of other roads.

Under article 5, paragraph 8 of the Town and Country Planning General Development Order 1950: "The period within which the local planning authority shall give notice to an applicant of their decision or determination . . . shall be the following period from the date of receipt of the application, namely . . . (*c*) . . . two months, or such extended time as may at any time be agreed upon in writing between the applicant and the local planning authority." This provision was held to be mandatory, so that where a notice of refusal to grant planning permission was not given within the period allowed, the notice was void, and the enforcement order which had been served was no longer valid.[58]

In the case of planning notices, however, there has recently been a movement away from the strict exaction of compliance with technical requirements. Lord Denning M.R. has said that a good deal of water has flowed under the bridges since *East Riding County Council* v. *Park Estate (Bridlington), Ltd.*,[59] in which Viscount Simonds said that there must be strict and rigid adherence to formalities. "We found that many people were taking an undue advantage of that statement. Formalities were being used to defeat the public good. So we no longer favour them . . . [*Miller-Mead* v. *Minister of Housing and Local*

[56] *Re Vic Groves & Co., Ltd.* [1964] 1 W.L.R. 956, at pp. 957, 959. *Cf. Registar of Restrictive Trading Agreements, Ltd.* v. *W. H. Smith & Son, Ltd.* [1968] 1 W.L.R. 1541.

[57] *Bognor Regis U.D.C.* v. *Boldero* [1962] 2 Q.B. 448, at p. 456.

[58] *Edwick* v. *Sunbury on Thames U.D.C.* [1962] 1 Q.B. 229.

[59] [1957] A.C. 223.

Government][60] was the turning-point. We now reject technicalities and apply the simple test enunciated by Upjohn L.J. in that case: 'Does the notice tell him fairly what he has done wrong and what he must do to remedy it?' "[61]

Private Acts

Perhaps most strictly construed of all enactments are local and personal statutes which, by their very nature, create exceptions to the general law of the realm. The court is entitled to notice that such Acts are framed by those who benefit under them,[62] and to treat them as contracts between their promoters (or that portion of the public which might be directly interested in them) and the legislature.[63] It follows that the maxim, *verba cartarum fortius accipiuntur contra proferentem* (which is ordinarily inapplicable to statutory construction) is relevant in the context of this class of statute.

It was applied in *Langham* v. *Mayor, etc., of the City of London*,[64] where it was held that the duty cast upon the promoters of a local Act to compensate those suffering "substantial" detriment to their livelihood was not dependent upon the amount of income owned or enjoyed by the person to be compensated: "substantial" was, in effect, construed as meaning no more than "not trivial."

Similarly, in two other cases, it was held that a private Act conferring exemption from "all taxes whatsoever" applied only to such taxes as were in force at the time of the passing of the Act, and not to those subsequently introduced.[65]

In *Bournemouth-Swanage Motor Road and Ferry Co.* v. *Harvey and Sons*,[66] the plaintiffs, who had promoted a statute which empowered them to operate a "ferry," failed to maintain that the use of this word implied that they had been authorised to operate what a ferry would be at common law, namely, a monopoly or franchise ferry.

In *Barton* v. *Moorhouse*,[67] land had been settled in tail by a will which contained no power to sell or lease the land. The trustees

[60] [1963] 2 Q.B. 196.
[61] *Munnich* v. *Godstone R.D.C.* [1966] 1 W.L.R. 427, at p. 435.
[62] "The language of these acts of parliament is to be treated as the language of the promoters of them": *Parker* v. *Great Western Ry. Co.* (1844) 7 Man. & G. 253, *per* Tindal C.J. at p. 288.
[63] See *Milnes* v. *Mayor, etc., of Huddersfield* (1886) 11 App.Cas. 511, *per* Earl of Selborne; *Perchard* v. *Heywood* (1800) 8 T.R. 468, *per* Lord Kenyon C.J.
[64] [1949] 1 K.B. 208.
[65] *Perchard* v. *Heywood, supra; Sion College* v. *London (Mayor)* [1901] 1 K.B. 617.
[6] [1929] 1 Ch. 686.
[67] [1935] A.C. 300.

under the settlement obtained a private Act from the New Zealand legislature, the Rhodes Trust Act 1901, s. 5 of which provided that moneys received by the trustees upon the exercise of their powers of selling and leasing under the Act were to be invested, and that all the income arising from such investments should be paid to the person "who but for such sale or lease would have been for the time being beneficially entitled to the occupation of the land." The Court of Appeal of New Zealand held that section 5 had the effect of creating a series of life interests in the persons who were beneficiaries under the entail. This decision was upset on appeal, the Judicial Committee holding that the fund representing the proceeds of a sale should be paid to the person at present tenant in tail in possession who, in accordance with the ordinary rule under which trusts of personalty will follow as nearly as possible the corresponding trusts of realty, would take absolutely. Lord Tomlin (at pp. 306, 307) said: "It is to be observed that this is a private Act of Parliament passed with a strictly limited purpose, as indicated in the preamble, and accordingly it would be contrary to accepted canons of construction to give to the Act, unless compelled by unambiguous language, an effect which would alter unnecessarily the rights of the parties if the language employed is capable of any other construction. The meaning which has been put upon section 5 by the Court of Appeal of New Zealand certainly alters the rights of the parties to an extent which is beyond anything required for conferring on the trustees powers of sale and leasing, and does not seem to their Lordships to be clearly demanded by the language used."

It should, however, be noticed that in two modern cases on private statutes there has been no reference to this principle of strict construction, even though this principle might have provided a short answer to the question at issue. In one case, the words "all lands common or waste" were interpreted as meaning "all lands or common or waste," not "all common or waste lands," despite this being favourable to the promoters of the Act (who were nature conservators), and so prejudicial to the vested interests of private persons.[68] In the other case, *Garland and Flexman* v. *Wisbech Corporation*,[69] Diplock J., in finding that there was no inconsistency between a public and a private Act, did not rely upon strict interpretation of the latter: again, the promoters were a public representative body.

[68] *Pyx Granite Co., Ltd.* v. *Ministry of Housing and Local Government* [1960] A.C. 260.
[69] [1962] 1 Q.B. 151.

Chapter 12

SUBORDINATE PRINCIPLES

1. Usage and "Contemporanea Expositio"

It is said that the best exposition of a statute or any other document is that which it has received from contemporary authority. *Optima est legum interpres consuetudo.*[1] *Contemporanea expositio est fortissima in lege.* Where this has been given by enactment or judicial decision, it is of course to be accepted as conclusive. But, further, the meaning publicly given by contemporary or long professional usage is presumed to be the true one, even where the language has etymologically or popularly a different meaning. It is obvious that the language of a statute must be understood in the sense in which it was understood when it was passed, and those who lived at or near the time when it was passed may reasonably be supposed to be better acquainted than their descendants with the circumstances to which it had relation, as well as with the sense then attached to legislative expressions. Moreover, the long acquiescence of the legislature in the interpretation put upon its enactment by notorious practice may, perhaps, be regarded as some sanction and approval of it.

The whole of the last paragraph was cited in the judgment of the Court of Criminal Appeal in the case of *R.* v. *Casement.*[2] "Serjeant Sullivan has asked us," said Darling J. (at p. 138), "simply to take the [Statute of Treasons 1351] and read it as though we had seen it for the first time. . . . But I do not know that the rule which Serjeant Sullivan lays down is altogether an acceptable one." Then, having quoted *Maxwell,* he continued (at p. 139): "This statute has been understood long before today, has been understood by lawyers of great learning, and lawyers of very exceptional erudition who have been members of the King's Bench, and understood in the sense in which we have today said we understand it. . . . If we were to accede to the argument of Serjeant Sullivan we should have absolutely to disregard the opinion of Lord Coke, the opinion of Mr. Serjeant Hawkins, and the opinion of Sir Matthew Hale, all great names in

[1] Dig. I, 3, 37.
[2] [1917] 1 K.B. 98.

the law, and persons whose opinions have long been followed in many questions of extreme difficulty which have puzzled lawyers for many generations."

"It cannot be denied," said Lord Cottenham L.C. in an earlier case, "that in some cases the plain meaning of an Act of Parliament has been changed by a course of judicial decisions, each going a little and a little further, so that at length the courts have adopted a construction widely different from that which would, but for such interpretations, have been put upon the plain intent of the words. In all such cases you are to take into consideration, not merely the words of the Act of Parliament, but the decisions on them, which may be said to have been all but imported into the words of the Act."[3] There are many other judicial *dicta* to the same effect.[4]

The application of the principle of *contemporanea expositio* is not limited to cases in which questions of title to property or contractual rights are dependent on the previous construction put upon the statute: it extends also, according to Lord Buckmaster in *Bourne* v. *Keane*,[5] to "decisions that affect the general conduct of affairs, so that their alteration would mean that taxes had been unlawfully imposed, or exemption unlawfully obtained, payments needlessly made, or the position of the public materially affected." It is, however, dependent on there being a series of decisions or a continuous practice. A single decision cannot impose a particular construction on an Act of Parliament for all time: *a fortiori*, when there has been no decision at all, but merely the expression of their opinion on one occasion by the judges acting in an advisory capacity.[6]

Cases in which the principle of *contemporanea expositio* has been applied

Section 1 (1), proviso, of the Larceny Act 1916 (replacing an earlier enactment) referred to larceny by a "bailee." Did "bailee" there include all those cases in which a man has those special rights and duties which arise from his having the lawful possession of goods of which he is not the actual owner, or did it refer only to that limited class of

[3] *Earl of Waterford's Claim* (1832) 6 Cl. & F. 133, at p. 172.
[4] See, especially, *Bourne* v. *Keane* [1919] A.C. 815, where many of the judicial statements on this subject are quoted. *Cf. Morgan* v. *Crawshay* (1871) L.R. 5 H.L. 304, *per* Martin B. and Lord Westbury; *Gorham* v. *Bishop of Exeter* (1850) 15 Q.B. 52, *per* Lord Campbell C.J.; *Dublin Corporation* v. *Trinity College* (1903) 88 L.T. 308 *per* Earl of Halsbury L.C.
[5] [1919] A.C. 815, at p. 874.
[6] *Earl of Waterford's Claim* (1832) 6 Cl. & F. 133.

persons who have received into their possession goods from some other person on express or implied terms as to that possession? In 1873, in *R.* v. *Matthews*,[7] the Court of Crown Cases Reserved had adopted the latter solution. In 1965, in *Thompson* v. *Nixon*,[8] the Divisional Court would have preferred the former solution, for it was "not only odd but also wrong that those who find goods and who, at the time of the finding, have honest intentions towards them cannot be held to have committed any crime at all if later they dishonestly appropriate those goods." However, *R.* v. *Matthews*[9] "having been quoted in the textbooks ever since, no writer had ever suggested that it was bad law. Moreover, the view taken in it corresponds with that of many learned authorities as to what in law constitutes a true bailment as opposed to a quasi bailment. Dealing . . . with a statute that affects the liberty of the subject, it does not seem . . . permissible to adopt a different construction of the words to that which has so long stood as law."

An Act of 1391 expressly provided that the Admiralty should have no jurisdiction over contracts made in the bodies of counties: nevertheless, on the ground of long usage, seamen contracting in England were admitted to sue in that court where the remedy was better than in the common law courts.[10] This was, according to Holt C.J., "against the statute expressly, though now *communis error facit jus*."[11] Similarly, the Central Criminal Court Act 1834, which empowered the judges of that court, or any "two or more" of them, to try all offences which might be tried under a commission of oyer and terminer for London or Middlesex, was construed to authorise a single judge to try such cases, such having been the universal practice of other superior courts of criminal jurisdiction held under commissions of oyer and terminer, as well as the established practice of the Central Criminal Court since the passing of the Act.[12]

The question whether a person convicted at one time of several offences could be considered, at the time of the adjudication, as "in prison undergoing imprisonment" within section 25 of the Summary Jurisdiction Act 1848 (which authorised a convicting justice, in that case, to make the period of imprisonment for the second offence

[7] (1873) 12 Cox C.C. 489.
[8] [1966] 1 Q.B. 103, *per* Sachs J. at pp. 109, 110.
[9] (1873) 12 Cox C.C. 489.
[10] *Alleson* v. *Marsh* (1690) 2 Vent. 181.
[11] *Clay* v. *Sudgrave* (1700) 1 Salk. 33.
[12] *Leverson* v. *R.* (1869) L.R. 4 Q.B. 394.

begin from the expiration of that for the first), was decided in the affirmative in *R.* v. *Cutbush*.[13] One of the reasons was the practice of the courts in the matter within living judicial memory, which afforded "a contemporaneous exposition of the effect of" the Act.

More recently, Megarry J. has held that where the court makes an order approving an arrangement under section 1 of the Variation of Trusts Act 1958, it is the arrangement which varies the trusts, not the order of the court. This was not "the most natural" construction of the statute, but it was in accordance "with the practice which has been relied upon for many years in some thousands of cases."[14]

Ecclesiastical cases are probably the most important single class of case in which the principle of *contemporanea expositio* is applied. In *Gorham* v. *Bishop of Exeter*,[15] the question was whether appeals in certain ecclesiastical matters should, under statutes of the reign of Henry VIII, go from the Archbishop's Court to the Upper House of Convocation or to the Court of Chancery. Holding that they should go to Chancery, Lord Campbell C.J. said (at pp. 69, 73, 74): "In practice, such is the construction that has been invariably put upon the statute for above three centuries, without any doubt being started upon the subject till the present motion was made. . . . Were the language of stat. 25 H. 8, c. 19, obscure instead of being clear, we should not be justified in differing from the construction put upon it by contemporaneous and long continued usage."

In *Hebbert* v. *Purchas*,[16] in discussing the legality of certain vestments under Tudor and Stuart ritual legislation, the Judicial Committee of the Privy Council relied heavily on historical evidence as to what had been done by the clergy after the passing of each enactment. "Their Lordships," said Lord Hatherley L.C. (at pp. 649, 650), "attach great weight to the abundant evidence which now exists that from the days of Elizabeth to about 1840, the practice is uniformly in accordance with this view [that the cope was to be worn at the Eucharist in cathedral and collegiate churches on festivals, and the surplice at other times and places]; and is irreconcilable with either of the other views. Through the researches that have been referred to in these remarks a clear and abundant *expositio contemporanea* has been supplied, which compensates for the scantiness of some other materials for a judgment." And in a later case Lord Cairns L.C.

[13] (1867) L.R. 2 Q.B. 379, *per* Cockburn C.J. at p. 382.
[14] *Re Holt's Settlement* [1969] 1 Ch. 100, at p. 115.
[15] (1850) 15 Q.B. 52.
[16] (1871) L.R. 3 P.C. 605.

said: "A Church Rubric, taking the form of directions to be acted on by large numbers of persons from week to week, and from day to day, is a subject above all others for exposition by contemporaneous and continual usage."[17]

A final example is provided by *Martin* v. *Mackonochie*.[18] Holding that lighted candles not necessary for the purpose of giving light were not lawful within the Ornaments Rubric, Lord Cairns said (at p. 391): "Their Lordships have not referred to the usage as to lights during the last three hundred years; but they are of opinion that the very general disuse of lights after the Reformation (whatever exceptional cases to the contrary might be produced), contrasted with their normal and prescribed use previously, affords a very strong contemporaneous and continuous exposition of the law upon the subject."

Cases in which *contemporanea expositio* will not be decisive

But *contemporanea expositio* will not always be decisive of a question of construction. Where the previous decisions "are plainly wrong, and especially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based, and practical injustice in the consequences that must flow from them," they will be overruled.[19]

In the *Earl of Waterford's Claim*,[20] Lord Brougham L.C. had to consider the opinion of Coke and other judges (given, however, in an advisory rather than a judicial capacity) that an Irish Act of Henry VIII which vested in the King all honours, manors and jurisdictions in Ireland also took away personal dignities such as the Earldom of Waterford. "Undoubtedly," said Lord Brougham (at p. 173), "with the opinion of so great a lawyer as Lord Coke, upon the subject, one cannot help distrusting his own, if it happen to differ from that of so great a Judge; but when the reasons for the opinion expressed are also given in the report, it is the bounden duty of those who are called upon to review that opinion, to investigate those reasons, and to see how far the opinion is borne out by them, and by any case which is referred to." Coke's opinion was, in the event, not adopted.

A similar case is *Bourne* v. *Keane*,[21] in which the House of Lords held, overruling the series of decisions beginning with *West* v.

[17] *Ridsdale* v. *Clifton* (1877) 2 P.D. 276, at p. 331.
[18] (1868) L.R. 2 P.C. 365. *Cf. Read* v. *Bishop of Lincoln* [1892] A.C. 644.
[19] *West Ham Union* v. *Edmonton Union* [1908] A.C. 1, *per* Lord Loreburn L.C. at p. 5.
[20] (1832) 6 Cl. & F. 133.
[21] [1919] A.C. 815.

Shuttleworth,[22] that the Chantries Act 1547 did not make gifts for the celebration of masses for the dead illegal on the ground that such gifts were for "superstitious uses." Lord Buckmaster (at p. 874) said that the principles of *contemporanea expositio* did not "compel acceptance as accurate of a doctrine plainly outside a statute and outside the common law, when no title and no contract will be shaken, no person can complain, and no general course of dealing be altered by the remedy of a mistake. For over eighty years [since *West* v. *Shuttleworth*] Roman Catholics have been unlawfully restricted in the disposal of their property; that seems to me no reason why the restrictions should continue to be imposed."

The leading modern case on *contemporanea expositio* is the *Campbell College* case,[23] in which the House of Lords has made it clear that the doctrine is to be applied only to the construction of ambiguous language in very old statutes. The view expressed by Lord Watson last century, that *contemporanea expositio* could have no application to a modern Act, is thus confirmed.[24]

The statutory provision in question in the *Campbell College* case was section 2 of the Valuation (Ireland) Act Amendment Act 1854 which required the Commissioner of Valuation, when making out the valuation lists, to "distinguish all hereditaments . . . of a public nature, or used for charitable purposes, or for the purposes of science, literature and the fine arts." Was "charitable" here used in its legal sense,[25] or in its popular sense as including, in the case of educational charities, only schools of an eleemosynary nature? The Crown argued that the latter was the solution; that at the time of the passing of the Act "charitable purposes" were understood to include only eleemosynary ones; that this had been settled in *O'Neill* v. *Commissioner of Valuation*;[26] and that this case had been accepted in Northern Ireland for more than fifty years and more than once followed in Eire.

The House of Lords rejected this argument. Lord Upjohn said (at p. 941), that the principle of *contemporanea expositio* could have no application to "a statute, although it was passed over 100 years ago, [whose] language is plain and unambiguous and . . . was not mis-

[22] (1835) 2 My. & K. 684.
[23] *Campbell College, Belfast (Governors)* v. *Commissioner of Valuation for Northern Ireland* [1964] 1 W.L.R. 912.
[24] *Clyde Navigation Trustees* v. *Laird* (1882) 8 App.Cas. 658.
[25] As defined in *Commissioners of Income Tax* v. *Pemsel* [1891] A.C. 531.
[26] [1914] 2 I.R. 447.

construed until the decision in the *Alexandra College* case[27] 60 years later." The principle of *stare decisis* had also been put forward by the Crown, but Lord Upjohn said (at p. 942) that it here conflicted with another principle, namely, "that, where rates or taxes have been illegally demanded and paid upon a clearly wrong construction," justice demands the reversal of the illegal imposition. "If I thought," said Viscount Radcliffe (at pp. 930, 931), "that a decision in favour of the appellants would be likely to have a far-reaching and disturbing effect upon the rating system and the distribution of the rating burden in Northern Ireland, I would be disposed to leave ill alone, whatever my personal views as to the law of the matter. But . . . our inquiries suggest that no such large-scale disturbance is to be anticipated. If that is so, I think that the balance of convenience inclines towards declaring now what we believe the law to be and always to have been."

2. Construction Imposed by Statute

Definition sections

It is common for a statute to contain a provision that certain words and phrases shall, when used in the statute, bear particular meanings.

Sometimes, it is provided that a word shall "mean" what the definition section says it shall mean: in this case, the word is restricted to the scope indicated in the definition section.[28] Sometimes, however, the word "include" is used "in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include."[29] In other words, the word in respect of which "includes" is used bears both its extended statutory meaning and "its ordinary, popular, and natural sense whenever that would be properly applicable."[30]

Thus, by section 10 (1) of the Income Tax Ordinance of Trinidad and Tobago: "For the purpose of ascertaining the chargeable income

[27] *O'Neill* v. *Commissioner of Valuation*, *supra*.
[28] See, *e.g.*, *R.* v. *Britton* [1967] 2 Q.B. 51.
[29] *Dilworth* v. *Commissioner of Stamps* [1899] A.C. 99, *per* Lord Watson at pp. 105, 106.
[30] *Robinson* v. *Barton-Eccles Local Board* (1883) 8 App.Cas. 798, *per* Earl of Selborne L.C. at p. 801.

of any person, there shall be deducted all outgoings and expenses wholly and exclusively incurred during the year preceding the year of assessment by such person in the production of the income, including— . . . (*f*) annuities or other annual payments whether payable within or out of the colony." The Judicial Committee held that an annual payment might be deducted under paragraph (*f*) notwithstanding that it was not an expense incurred in the production of income, the effect of "including" being to comprehend in "outgoings and expenses incurred in the production of income" payments which would not fall within the natural meaning of those words.[31]

By section 74 (1) of the Shops Act 1950: "'retail trade or business' includes the business of a barber or hairdresser, the sale of refreshments or intoxicating liquors, the business of lending books or periodicals when carried on for purposes of gain, and retail sales by auction, but does not include the sale of programmes and catalogues and other similar sales at theatres and places of amusement." "I think it is plain," said Somervell L.J., "that the words which follow 'includes' describe activities about which, at any rate, there might have been disputes whether they came within the words 'retail trade or business.'" The words therefore comprehended both what they naturally meant (primarily, because of the word "retail," the supply of goods rather than services) and those activities specially mentioned in the definition section.[32]

A provision defining the meaning of a word in a statute does not necessarily govern that word when it appears in regulations made under the statute.[33]

Construction by reference to other statutes

The relevance of provisions in statutes other than the one to be interpreted, and of the construction which has been placed on these provisions by the courts, has already been considered at length.[34]

Statutes proceeding upon erroneous assumptions

But reference to statutes *in pari materia*, and to the law as declared by the courts in interpreting them, will be of little value if Parliament has proceeded upon a mistaken view of the existing state of the law. The rule is that Parliament does not alter the law merely by betraying

[31] *Reynolds* v. *Commissioner of Income Tax for Trinidad and Tobago* [1967] 1 A.C. 1.
[32] *M. & F. Frawley, Ltd.* v. *Ve-Ri-Best Co., Ltd.* [1953] 1 Q.B. 318, at p. 323.
[33] *Brown* v. *Anderson* [1965] 1 W.L.R. 528.
[34] *Ante*, pp. 64–74.

an erroneous opinion of it.[35] In *Earl of Shrewsbury* v. *Scott*,[36] Sir Alexander Cockburn C.J. said (at p. 53): "I quite concur in the argument that a mistake as to the state of the law on the part of the legislature in a private act of parliament—nay, I may say, upon the authority of the case [*ex p. Lloyd*,[37]] even in a public act—and legislation founded on such mistake, would not have the effect of making that the law which the legislature had erroneously assumed to be so." "Subsequent legislation," said Lord Sterndale M.R., "if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation."[38] One must not confuse an express enactment by Parliament that the existing law shall be altered, with an expression of opinion as to what that law is.[39] But the fact that Parliament has mistaken the existing law will not prevent the enactment in which the error has been made from altering the law *proprio vigore*, if it contains words capable of having this effect.[40]

The Shop-books Evidence Act 1609, which enacted that shop-books should not be evidence "above one year before the . . . action brought" did not make them evidence of transactions within the year, though the enactment was obviously passed under the impression that they were admissible.[41]

An Act which provided that no more than 6*d.* in the £ should be paid for appraisement in cases of distress for rent, "whether by one broker or more," did not alter the earlier law which required that goods distrained for rent should be appraised by two brokers.[42]

A passage in an Act which showed that the legislature assumed that a certain kind of beer might be lawfully sold without a licence could not be treated as an enactment that such beer might be sold when the law imposed a penalty on every unlicensed person who sold any beer.[43]

[35] *Dore* v. *Grey* (1788) 2 T.R. 358; *Ormond Investment Co., Ltd.* v. *Betts* [1928] A.C. 143; *Camille & Henry Dreyfus Foundation Inc.* v. *I.R.C.* [1954] Ch. 672, affirmed [1956] A.C. 39; *John Hudson & Co., Ltd.* v. *Kirkness* [1954] 1 W.L.R. 40; *I.R.C.* v. *Butterley Co., Ltd.* [1957] A.C. 32; *Re MacManaway* [1951] A.C. 161.

[36] (1859) 29 L.J.C.P. 34.

[37] (1851) 1 Sim. (N.S.) 248: "Though the Legislature may declare the law by enactment; yet they are not interpreters of the law: and Courts of Justice are not bound by a mistake of the Legislature as to what the existing law is"—*per* Lord Cranworth V.-C.

[38] *Cape Brandy Syndicate* v. *I.R.C.* [1921] 2 K.B. 403, at p. 414.

[39] See *I.R.C.* v. *Dowdall, O'Mahoney & Co., Ltd.* [1952] A.C. 401, *per* Lord Reid.

[40] *Clixby* v. *Pountney* (*Inspector of Taxes*) [1968] Ch. 719.

[41] *Pitman* v. *Maddox* (1699) 2 Salk. 690.

[42] *Allen* v. *Flicker* (1839) 10 Ad. & E. 640: the headnote is misleading.

[43] *Read* v. *Storey* (1861) 30 L.J.M.C. 110.

Section 70 (1) of the London Building Acts (Amendment) Act 1939 provided for the making of a court order fixing the amount of the expenses recoverable by the London County Council in respect of any dangerous or neglected structure. Section 70 (2) (*a*) provided that any such order was registrable under the Land Charges Act 1925 as a local land charge, and section 70 (2) (*b*) provided that for the purpose of enforcing any such charge arising out of an order "the council shall have all the same powers and remedies under the Law of Property Act 1925, and otherwise, as if they were mortgagees by deed." Upjohn J. stated: "Subsection 2 (*b*) of section 70 appears to proceed upon the footing that registration under the Land Charges Act 1925 puts the council in the position of a mortgagee, but it is important to observe that the subsection in itself created no charge. If the section proceeds upon an erroneous view of the law it cannot be construed otherwise than in its ordinary meaning so as to attain the result which it thought was achieved by registration under the Land Charges Act 1925; if the view be truly erroneous the section has misfired." The 1925 Act only created a charge if successive owners were liable, "and section 66 of the Act of 1939 [which deals with the payment of the council's expenses in respect of dangerous structures] only provides that the expenses incurred shall be paid 'by the owner of the structure.' I am not convinced that that section imposes on successive owners any obligation to pay."[44]

In *Inland Revenue Commissioners* v. *Dowdall, O'Mahoney and Co., Ltd.*,[45] the question was whether a company resident in Eire and carrying on business at two branches in England could deduct a proportion of the taxes paid by it in Ireland in computing the profits of its English branches for assessment to United Kingdom excess profits tax. This in turn depended on whether taxes paid abroad fell within the statutory phrase, "wholly and exclusively laid out or expended for the purposes of the trade." By the Finance (No. 2) Act 1939, Sched. VII, Part I, para. 5: "The provisions of subsection (4) of section 27 of the Finance Act 1920 (which disallows deductions on account of the payment of Dominions income tax) shall not apply." This was said to indicate a belief on the part of the legislature that some right of deduction in respect of foreign taxes already existed, but Lord Reid felt (at p. 420) "bound to hold that that belief was

[44] *Re County of London (Devons Road, Poplar) Housing Confirmation Order 1945* [1956] 1 W.L.R. 499, at p. 503.
[45] [1952] A.C. 401.

erroneous. So the question is whether the terms of those paragraphs are such as merely to indicate a belief or whether they can be interpreted as enacting by implication that which Parliament, having its erroneous belief, did not find it necessary to enact expressly." He held (at p. 421) that paragraph 5 contained no such implied enactment. "Paragraph 5 is very misleading, but to mislead a taxpayer is not the same thing as to entitle him to relief." The result, about which the House of Lords felt unable to do anything, was "great injustice. If taxpayers have to pay excess profits tax in two countries without being entitled to . . . a deduction they may have to pay in taxation much more than their total profits."

In section 175 (1), the Law of Property Act 1925 extended the rule under which certain gifts in wills carry the intermediate income of the property to "a contingent or future specific devise or bequest of property, whether real or personal, and a contingent residuary devise of freehold land, and a specific or residuary devise of freehold land to trustees upon trust for persons whose interests are contingent or executory." It did not make any provision for residuary bequests expressly deferred to a future date, apparently assuming (a view supported by statements in textbooks and even judgments) that such gifts carried intermediate income. Later cases, however, have decided that the rule about intermediate income does not apply to such residuary bequests, and the courts are powerless to cure the anomaly.[46]

With regard to statements of fact, the rule is that a recital of matters of fact in a public or private Act is not conclusive, but is merely evidence (which may be controverted) of the existence of the facts as stated.[47]

3. Construction of Words "in Bonam Partem"

Words are prima facie to be taken in their lawful and rightful sense. Where an Act, for instance, gave a certain efficacy to a fine levied on land, it referred only to a fine lawfully levied.[48] The landlord's claim to recover arrears of rent out of goods seized in execution by the bailiff of a county court under section 160 of the County Courts Act 1888 depended upon whether the seizure was lawful: if the goods did not belong to the debtor, and the seizure was consequently unlawful,

[46] *Re McGeorge, deceased* [1963] Ch. 544.
[47] See the discussion in *Craies on Statute Law*, 6th ed., pp. 515, 516.
[48] Co.Litt., sect. 728.

the claim under the section could not arise.[49] A similar principle was applied to the construction of a covenant by a tenant to pay all parliamentary taxes: it included only such as he might lawfully pay, and not the landlord's property tax which it would have been illegal for him to agree to pay.[50]

R. v. *Hulme*[51] is a leading case on the construction of words *in bonam partem*. A statute provided that "where any witness shall answer every question relating to the matters aforesaid," commissioners appointed to inquire into corrupt election practices should issue him with a certificate which would entitle him to certain immunities. The case turned on the meaning of the words, "shall answer every question." "Does that mean," asked Blackburn J. (at pp. 384, 385), "if he shall give an answer in fact, though it may be false to his knowledge; though it may be palpably false to the knowledge of every person who stands by; though it may be a matter of ridicule, and turning the whole commission and inquiry into contempt, can it be intended that if the witness gives an answer which is transparently false, he should get the immunity?" It was held that it was not so intended. "Whenever the legislature in this Act requires a person to answer questions, the meaning is that he shall answer them truly, to the best of his knowledge and belief." Only then would he be entitled to the statutory certificate.

This principle, that where an Act refers to a thing being done, it is to be taken as referring to the thing being lawfully done, has been applied in several recent cases.

Section 12 (5) of the Town and Country Planning Act 1947 provided that "permission shall not be required under this Part . . . (*c*) in the case of land which on the appointed day is unoccupied, in respect of the use of the land for the purpose for which it was last used." The use in question in *Glamorgan County Council* v. *Carter*[52] involved the commission of an offence under the Cardiff Rural Town Planning Scheme. Salmon J. said (at p. 5): "It seems to me plain on principle that [the occupier] could not acquire any legal right by the illegal uses to which she was putting the land. In my view it is plain that the use referred to in section 12 (5) (*c*) . . . must mean lawful use, at any rate in this sense, that it cannot include use which constitutes the commission of a criminal or quasi-criminal offence."

[49] *Hughes* v. *Smallwood* (1890) 25 Q.B.D. 306, *per* Wills J.
[50] *Gaskell* v. *King* (1809) 11 East 165.
[51] (1870) L.R. 5 Q.B. 377.
[52] [1963] 1 W.L.R. 1.

One of the grounds of opposition to the granting of a new tenancy of business premises under the Landlord and Tenant Act 1954 is, by virtue of section 30 (1) (*f*), that the landlord intends to carry out substantial work on the holding "and that he could not reasonably do so without obtaining possession of the holding." "I conceive," said Lord Evershed M.R., "that that must mean: 'could not reasonably do it as a matter of right without obtaining possession'."[53]

Section 41 (1) of the Solicitors Act 1957 requires a solicitor who has not been "in continuous practice" for a period of five years to obtain the special leave of the Law Society before he takes an articled clerk. Over a five-year period, in four of the years a solicitor had been just over a month late in applying for his practising certificate, so that it did not date back retrospectively to the expiry of the certificate for the previous year. Pennycuick J. held that "in continuous practice" meant "in continuous lawful practice," and since during a relatively short period in each of four years the solicitor had been practising unlawfully, he required the consent of the Law Society before taking an articled clerk.[54]

Where possible the words of an Act will be construed so as not to involve innocent persons in illegality.[55] The Milk and Dairies (General) Regulations 1959 provided, by regulation 27 (1), that "every dairy farmer or distributor shall ensure that every vessel (including the lid) used for containing milk shall, immediately before use by him, be in a state of thorough cleanliness." In one case,[56] milk was obtained by a dairy ("the distributors") from farmers ("the producers") which was put into the distributors' bottles by the producers and firmly capped. Did the absolute obligation imposed by the regulation rest on the distributors as well as on the producers? It was argued that it did, on the ground that the word "use" in the regulation should be given a wide meaning, applying to any point of time when the bottle was being used for any purpose. It was held, however, that the regulation referred only to the point of time immediately before the bottle was filled, and so in this case the only obligation which it imposed was on the producers: "use" here had a narrow meaning of "use for containing milk." Lord Parker C.J. said (at p. 445) that the rival construction "would involve this, that at that point of time when the distributors . . . had to ensure that the

[53] *Whittingham* v. *Davies* [1962] 1 W.L.R. 142, at pp. 147, 148.
[54] *Adlam* v. *The Law Society* [1968] 1 W.L.R. 6.
[55] *Brown* v. *Roberts* [1965] 1 Q.B. 1; *Goodfellow* v. *Johnson* [1966] 1 Q.B. 83.
[56] *United Dairies (London), Ltd.* v. *Beckenham Corporation* [1963] 1 Q.B. 434.

bottle was clean, it was not only impossible for them to do so because the bottle was firmly capped and sealed, but also because it was illegal for them to do so under the [Milk (Special Designation) (Raw Milk) Regulations 1949 which provided] that distributors must not tamper with the seals."

Statutory provisions concerning obedience to orders refer only to orders lawfully given. Thus a highway surveyor, who was required by section 16 of the Highway Act 1862 "in all respects [to] conform to the orders of the board in the execution of his duties," was bound to obey only lawful orders which his superior had authority to give, so that he was personally liable for an act if the board had no jurisdiction to make the order under which he did it.[57] And Lord Kingsdown, in discussing the oath of canonical obedience sworn by a priest at his ordination, said that it did "not mean that the Clergyman will obey all the commands of the Bishop against which there is no law, but that he will obey all such commands as the Bishop by law is authorised to impose."[58]

Illegal trading and the Income Tax Act

A major exception to the rule requiring words to be construed *in bonam partem* is found in decisions about the assessment to tax of the profits of a "trade, profession or vocation."

Where in the course of his business as an amusement caterer a taxpayer provided licensed victuallers and others with automatic machines for use for illegal gaming, it was held that, although the profits derived from these transactions were the profits of an illegal trade, they were chargeable to income tax.[59] The same applies to the profits of illegal street-betting.[60]

In *Minister of Finance* v. *Smith*[61] profits arising in Ontario from illicit traffic in liquor carried on there contrary to provincial legislation were held to be "income" under a Dominion statute, as "there is nothing in the Act which points to any intention to curtail the statutory definition of income, and it does not appear appropriate under the circumstances to impart any assumed moral or ethical standard as controlling in a case such as this the literal interpretation of the language." It would not be a natural construction of a tax Act

[57] *Mill* v. *Hawker* (1875) L.R. 10 Ex. 92.
[58] *Long* v. *Gray* (1863) 1 Moo. P.C. (N.S.) 411, at p. 465.
[59] *Mann* v. *Nash* [1932] 1 K.B. 752.
[60] *S. Southern (Inspector of Taxes)* v. *A.B.* [1933] 1 K.B. 713.
[61] [1927] A.C. 193, *per* Viscount Haldane at p. 197.

to read it as permitting persons who came within its terms to defeat it by setting up their own wrong.

A different solution and one which, it is respectfully submitted, it is difficult to justify on the basis of the words of the Act has been adopted in Ireland. It has been held by Davitt P. that profits derived from the ownership of illegal gaming machines, the ownership of which is known to the Revenue authorities, are not assessable to tax: but *semble* that if the illegality is not so known, the taxpayer will not be able to set it up on appeal from assessment on the principle, *nemo allegans suam turpitudinem est audiendus.*[62]

4. Change of Language

Identical expressions

It has been justly remarked that, when precision is required, no safer rule can be followed than always to call the same thing by the same name. It is, at all events, reasonable to presume that the same meaning is implied by the use of the same expression in every part of an Act.[63] Accordingly, in ascertaining the meaning to be attached to a particular word in a section of an Act, though the proper course would seem to be to ascertain that meaning from a consideration of the section itself if possible, yet, if the meaning cannot be so ascertained, other sections may be looked at to fix the sense in which the word is there used.[64] Furthermore, "where a word has been construed judicially in a certain legal area, it is, I think, right to give it the same meaning if it occurs in a statute dealing with the same general subject-matter, unless the context makes it clear that the word must have a different construction."[65]

So the word "proceedings" was held to bear the same meaning in the several paragraphs of section 2 (2) of the Legal Aid and Advice Act 1949 in which it occurs.[66] And in *I.R.C.* v. *Henry Ansbacher & Co.*,[67] the House of Lords refused to attribute to the word "security" (in Sched. 1 to the Stamp Act 1891) different meanings in different parts of the same statute. In *Coward* v. *Motor Insurers' Bureau*,[68] the

[62] *Collins* v. *Mulvey* [1956] I.R. 233.
[63] *Courtauld* v. *Legh* (1869) L.R. 4 Ex. 126, *per* Cleasby B.; *R.* v. *Poor Law Commissioners* (1837) 6 A. & E. 56, *per* Lord Denman C.J.; *Re Kirkstall Brewery Co., Ltd.* (1877) 5 Ch.D. 535 (different statutes).
[64] *Spencer* v. *Metropolitan Board of Works* (1882) 22 Ch.D. 142, *per* Jessel M.R.
[65] *Beaman* v. *A.R.T.S.* [1949] 1 K.B. 550, *per* Somervell L.J. at p. 567.
[66] *Mills* v. *Mills* [1963] P. 329.
[67] [1963] A.C. 191.
[68] [1963] 1 Q.B. 259.

Court of Appeal held that the words "for hire or reward" in section 36 (1) (*b*) (ii) of the Road Traffic Act 1930 contemplated a situation in which there was a legally enforceable agreement between the parties: the phrase was found in other sections of the same Act, and prima facie should bear the same meaning throughout. And in another case, the Divisional Court reached a conclusion on the meaning of the phrase "constructed or adapted" for a particular use in the Vehicles (Excise) Act 1949, s. 27 (1) by following a decision[69] on similar words in section 4 (3) of the Customs and Inland Revenue Act 1888.[70]

This presumption as to identical meaning is, however, not of much weight. The same word may be used in different senses in the same statute[71] and even in the same section,[72] especially in a consolidating statute where the word derives from two earlier enactments.[73] So in the enactment which makes it a felony for anyone, "being married," to "marry" again while his former marriage in subsisting, the same word has obviously two different meanings, necessarily implying the validity of the marriage in the one case and as necessarily excluding it in the other.[74] And though, by section 27 (2) of the Metropolitan Building Act 1855, separate sets of chambers in large buildings were to be deemed to be separate buildings and were accordingly to be separated by fireproof floors and proper party-walls, yet it was held that they were not separate buildings within a Schedule to the Act under which the district surveyor was entitled to charge a fee in respect of "every" new "building" surveyed by him.[75]

There are many modern examples of the same word being given distinct meanings. "Maliciously" does not have the same import throughout the Offences against the Person Act 1861, sometimes adding nothing to the statutory definition of an offence, sometimes requiring a particular state of mind on the part of a person inflicting a wound;[76] "premises" in some sections of the Landlord and Tenant Act 1954 has its popular meaning of buildings, and in others its technical meaning which comprises anything which can be the subject-

[69] *Minty* v. *Glew* (1913) 110 L.T. 340.
[70] *Taylor* v. *Mead* [1961] 1 W.L.R. 435.
[71] *Whitley* v. *Stumbles* [1930] A.C. 544; *Carter* v. *S.U. Carburettor Co.* [1942] 2 K.B 288.
[72] *Doe* v. *Angell* (1846) 9 Q.B. 328.
[73] *R.* v. *Burt, ex p. Presbury* [1960] 1 Q.B. 625.
[74] *R.* v. *Allen* (1872) L.R. 1 C.C.R. 367.
[75] *Moir* v. *Williams* [1892] 1 Q.B. 264.
[6] *R.* v. *Mowatt* [1968] 1 Q.B. 421.

matter of the habendum in a lease.[77] "Allegation" does not carry the same meaning throughout the Matrimonial Causes Rules 1957;[78] and in the same subsection of the Local Government Act 1948 "requiring" means "asking," while "required" means "necessary."[79]

The usual reason for attributing different meanings to the same word is simply that it occurs in different contexts.[80] Although a machine, for instance, may not be "in motion" within a section of the Factories Act which deals with the ordinary running of the machine, yet some of it may be "a moving part" within a section which deals with its cleaning.[81]

Section 66 (4) of the Landlord and Tenant Act 1954 provides that section 23 of the Landlord and Tenant Act 1927 shall apply for the purposes of the 1954 Act. Section 23 deals with the service of notices, and, in defining what is a sufficient service, subsection (1) refers to "leaving it for him at his last known place of abode in England and Wales." In a case in which A held business premises under a lease from B, B left a notice terminating the tenancy for A at A's business premises, apparently not realising that A lived elsewhere. The Court of Appeal held that the notice had been served at A's "place of abode." It was contended for A that the phrase should be confined to places of personal residence because section 23 was imported into the 1954 Act both for the purpose of Part 2 (business premises) and for those of Part 1 (residential premises): and, under the rules of construction, the phrase should bear the same meaning throughout. But, said Danckwerts L.J., "I do not think that that principle is necessarily conclusive. . . . In the present case the phrase must be construed with reference to the subject-matter with which in the particular case it is concerned." Where the phrase was concerned with residential premises, it should be construed narrowly; but where business premises were being legislated about, "the most sensible and natural meaning" was not the tenant's residence (of which the landlord might be entirely ignorant), but the business place (where the landlord would be much more likely to be able to find him).[82]

The word "may" was given different meanings in construing sections 6 and 7 of the Fugitive Offenders Act 1881. By section 7, where

[77] *Bracey* v. *Read* [1963] Ch. 88.
[78] *Laxton* v. *Laxton* [1962] 1 W.L.R. 729.
[79] *Watney Mann, Ltd.* v. *Langley* [1966] 1 Q.B. 457.
[80] *Rye* v. *Rye* [1962] A.C. 496; *Maddox* v. *Storer* [1963] 1 Q.B. 451; *Burns* v. *Currell* [1963] 2 Q.B. 433.
[81] *Kelly* v. *John Dale, Ltd.* [1965] 1 Q.B. 185.
[82] *Price* v. *West London Investment Building Society, Ltd.* [1964] 1 W.L.R. 616, at p. 622.

a fugitive had been committed to prison under the Act to await his return and had not been conveyed out of the part of the Commonwealth in which he was confined within one month after his committal, a superior court "may, unless sufficient cause is shown to the contrary, order the fugitive to be discharged out of custody." "May" here is mandatory,[83] for "section 7 . . . is dealing with the liberty of the subject, and the prevention of his being detained for an unduly long period."[84] By section 6, fifteen days after the fugitive was committed to prison to await his return, or after the decision of a superior court upon a *habeas corpus* with reference to the fugitive, "a Secretary of State . . . may, if he thinks it just, by warrant under his hand order that fugitive to be returned to the part of Her Majesty's dominions from which he is a fugitive." It was argued that, just as "may" in section 7 was mandatory, so also it was mandatory in section 6. But Lord Parker C.J. said: "Section 6, on the other hand, so far as time is concerned, is not saying that something must happen after a certain time, but is saying that something shall not happen before a certain time has expired, namely, the person is to be allowed 15 days after a committal or the termination of *habeas corpus* proceedings before the Secretary of State can take any steps, and I can see no reason for giving 'may' a mandatory meaning in that connection."[85]

Another reason why the same word or phrase sometimes receives two different constructions is that the sections in which it occurs are derived from two distinct enactments.[86] Thus, section 6 (1) of the Costs in Criminal Cases Act 1952 gave magistrates power, on a summary conviction, to order the payment of such "costs" as the court thought just and reasonable. In section 1 (2), which was dealing with costs to be awarded by assizes and quarter sessions, reference was made to "costs" in terms which indicated that they were to be awarded only with reference to expenses actually incurred, and not for trouble or loss of time. It was held that "costs" in section 6 (1) was not to be restricted in meaning by the use of the word in section 1 (2). The provisions for payments out of local funds in section 1 could "be traced to a series of Act beginning in 1752 and culminating in the Costs in Criminal Cases Act 1908," while "section 6 derives

[83] *Re Shuter* [1960] 1 Q.B. 142.
[84] *R.* v. *Governor of Brixton Prison, ex p. Enahoro* [1963] 2 Q.B. 455, *per* Lord Parker. C.J.
[85] *R.* v. *Governor of Brixton Prison, ex p. Enahoro* [1963] 2 Q.B. 455, *per* Lord Parker C.J. at p. 465.
[86] See *Gartside* v. *I.R.C.* [1968] A.C. 553.

directly from the Summary Jurisdiction Act 1848, s. 18. It is quite clear . . . that those are two completely separate codes, and, the Costs in Criminal Cases Act 1952, the present Act, being an Act made under the Consolidation of Enactments (Procedure) Act 1949, there is no reason whatsoever for reading 'costs' in one part of the Act as meaning the same as 'costs' in another part of the Act."[87]

Change of language

From the general presumption that the same expression is presumed to be used in the same sense throughout an Act or a series of cognate Acts, there follows the further presumption that a change of wording denotes a change in meaning.[88] "Where the Legislature," said Lord Tenterden C.J., "in the same sentence uses different words, we must presume that they were used in order to express different ideas."[89]

So it was held that where section after section of an Act relating to the winding up of companies was limited to winding up by the court, the absence of any such limitation in another section which contained provisions as to procedure "if the winding up of a company is not concluded within one year after its commencement" indicated an intention on the part of the legislature that the latter action should apply also to cases of voluntary winding up.[90]

Similarly, where one section of the Adulteration of Foods and Drugs Act 1872 imposed a penalty for selling, as unadulterated, articles of food which were adulterated, and another provided that the seller of an article of food who, knowing that it was mixed with a foreign substance, with intent fraudulently to increase its bulk or weight, did not declare the admixture to the purchaser should be deemed to have sold an adulterated article, the former section reached a seller who was ignorant of the adulteration: for, where knowledge was intended to be an element in an offence under the Act, the legislature had conveyed its intention in plain terms.[91]

In the famous case of *Bradlaugh* v. *Clarke*,[92] where by earlier enactments penalties on Members of Parliament for sitting and voting before being sworn were expressly made recoverable by com-

[87] *R.* v. *Burt, ex p. Presbury* [1960] 1 Q.B. 625, *per* Lord Parker C.J. at p. 632.
[88] *Ricket* v. *Metropolitan Railway Co.* (1867) L.R. 2 H.L. 175, *per* Lord Westbury; *ex. p. Haines* [1945] K.B. 183; *Evans* v. *Evans* [1948] 1 K.B. 175.
[89] *R.* v. *Inhabitants of Great Bolton* (1828) 8 B. & C. 71, at p. 74.
[90] *Re Stock & Share Auction & Banking Co.* [1894] 1 Ch. 736.
[91] *Fitzpatrick* v. *Kelly* (1873) L.R. 8 Q.B. 337.
[92] (1883) 8 App.Cas. 354.

mon informers, and by the repealing Parliamentary Oaths Act 1866, s. 5, the penalties were made recoverable by action without saying by whom, it was held that the common informer could not sue, but only the Crown.

Again, in the Settlement of the Poor Act 1819, which provided that no person should acquire a settlement in a parish by a forty days' residence in a tenement rented by him, unless, if a house, it was "held" and, if land, was "occupied" by him for a year, effect was given to the two different words as expressing different ideas by holding that a house need not be "occupied" for the purpose of acquiring a settlement,[93] though, it was observed, this was probably not what the legislature really intended.[94]

There are many modern cases on change of wording, and they fall roughly into three groups, according to whether the language alters (i) within the same section, (ii) within the same Act, (iii) from one statute to another.

(i) Regulation 19 of the Docks Regulations 1934 required equipment to be "tested and examined" before use in hoisting or lowering, and to be "inspected" every three months. "One would expect," said Cantley J., "that when two different words, although practically synonymous in ordinary use, are employed in different parts of the same regulation dealing with the same kind of topic, they are intended to have some different meaning. It seems to me . . . that 'examination' . . . is a more thorough and scientific process than 'inspection' under those regulations. Indeed, 'examination' . . . may require technical qualifications."[95]

Section 102 (1) of the Mental Health Act 1959 refers to "(*b*) . . . the maintenance or other benefit of members of the patient's family, (*c*) . . . making provision for other persons or purposes for whom or which the patient might be expected to provide if he were not mentally disordered." "The contrasting language of subclauses (*b*) and (*c*) suggests . . . that the legislature considered that the word 'family' consisted of persons for all of whom the patient might prima facie be expected to make some provision. This, I think, indicates that the word does not include collateral relatives."[96]

[93] *R.* v. *Inhabitants of North Collingham* (1823) 1 B. & C. 578; *R.* v. *Inhabitants of Great Bolton* (1828) 8 B. & C. 71.

[94] *R.* v. *North Collingham, supra, per* Best J.

[95] *Gibson* v. *Skibs A/S Marina and Orkla Grobe A/B and Smith Coggins, Ltd.* [1966] 2 All E.R. 476, at p. 478.

[96] *Re D.M.L.* [1965] Ch. 1133, *per* Cross J. at p. 1137.

Section 2 (5) of the Road Traffic Act 1962 provided that a constable "requesting any person . . . to provide a specimen of . . . urine for analysis shall offer to supply to him . . . part of the specimen." The Court of Criminal Appeal held that the offer must be made more or less simultaneously with the request. This conclusion was fortified by the reference in subsection (5) to "another specimen [of blood] which he may consent to have taken," for "which he may consent" was "in the ordinary usage of English a tense which contemplates something happening *in futuro*, subsequent to the offer."[97]

(ii) By section 164 of the Companies Act 1948, the Board of Trade "may" appoint an inspector to investigate the affairs of a company, while section 165 provides that the Board "shall appoint one or more competent inspectors" in the circumstances there defined. It was held, contrasting the permissive language of section 164, that where the specified circumstances occurred, the Board was bound to appoint an inspector under section 165.[98]

Section 23 (1) of the Sexual Offences Act 1956 makes it an offence "to procure a girl under the age of twenty-one to have unlawful sexual intercourse in any part of the world with a third person." The Court of Criminal Appeal held that it was an essential element of this offence that unlawful intercourse should in fact have taken place, for "when Parliament does wish to make intention or 'for the purposes of' the conclusive factor, it does so expressly, *e.g.*, in paragraphs (*b*) and (*c*) of subsection (1) of section 22."[99]

Section 37 of the Mines and Quarries Act 1954 deals with vehicles "running" in a mine, section 41 with vehicles "running away." Calling attention to the difference in wording, Nield J. held that the words of section 41 "postulate some undesigned movement of the vehicle," so that trams travelling as intended without power or manhandling down a gradient were not within the section.[1]

(iii) Finally, there are the many cases on the contrasting language of different statutes.[2]

The Coal Mines Act 1911, for instance, provided for a defence in

[97] *R.* v. *Price* [1964] 2 Q.B. 76. *Cf. Kidd* v. *Kidd* [1968] 3 W.L.R. 734.
[98] *R.* v. *Board of Trade, ex p. St. Martins Preserving Co., Ltd.* [1965] 1 Q.B. 603.
[99] *R.* v. *Johnson* [1964] 2 Q.B. 404, *per* Lord Parker C.J. at p. 408.
[1] *Jones* v. *N.C.B.* [1965] 1 W.L.R. 532. *Cf. R.* v. *Bow St. Magistrate, ex p. Kray* [1968] 3 W.L.R. 1111.
[2] *Att.-Gen. for Northern Ireland* v. *Gallagher* [1963] A.C. 349; *B.* v. *B. and H.* (*L. intervening*) [1962] 1 All E.R. 29; *Re P.* (*infants*) [1962] 1 W.L.R. 1296; *Irwin* v. *White, Tomkins and Courage, Ltd.* [1964] 1 W.L.R. 387; *Att.-Gen. of the Duchy of Lancaster* v. *Simcock* [1966] Ch. 1; *Seabridge* v. *H. Cox & Sons (Plant-Hire), Ltd.* [1968] 2 Q.B. 46; *Wild* v. *Wild* [1968] 3 W.L.R. 1148.

an action for breach of statutory duty, that it was "not reasonably practicable" to avoid or prevent the contravention. The Mines and Quarries Act 1954 contained a similar provision, but substituting the word "impracticable." In *Jayne* v. *National Coal Board*,[3] Veale J. said (at p. 224) that this had altered the law. The distinction between the two phrases would not be easy to draw in practice: the gap between "impossibility" and "impracticability" might not be wide, but it was wider than that between "impracticability" and "not being reasonably practicable."

Section 5 (3) of the Regulation of Railways Act 1889 penalises any person who "travels or attempts to travel *on a railway* without having previously paid his fare, and with intent to avoid payment thereof." It was held by the Divisional Court that a man did not cease to travel on a railway upon alighting from the carriage but continued to do so until, at any rate, he reached the barrier on the platform, so that it was sufficient if he had formed the intent to avoid payment by this time. Lord Parker C.J. pointed to the contrasting language of section 103 of the repealed Railways Clauses Consolidation Act 1845, which referred to a person travelling or attempting to travel "*in any carriage* of the company" with intent to avoid payment. The change of language clearly enlarged the scope of what had been section 103.[4]

By section 6 (3) of the Copyright Act 1911, in an action for infringement of copyright, "the work shall be presumed to be a work in which copyright subsists and the plaintiff shall be presumed to be the owner of the copyright," and the person whose name is printed as author or publisher shall "be presumed to be the owner of the copyright in the work for the purposes of proceedings for the infringement of copyright therein." This was replaced by section 20 (4) of the Copyright Act 1956, which made various changes in the wording: the words were no longer "shall be presumed to be," but "shall be presumed to have been . . . at the time of publication"; it provided that "copyright shall be presumed to subsist in the work," omitting the reference to the plaintiff; and the words "for the purposes of proceedings," etc., were also left out. Plowman J. held that the inference from these changes was that "Parliament deliberately decided to broaden the scope of the presumption."[5]

[3] [1963] 2 All E.R. 220. *Cf. Brown* v. *National Coal Board* [1962] A.C. 574.
[4] *Bremme* v. *Dubery* [1964] 1 W.L.R. 119.
[5] *Warwick Film Productions, Ltd.* v. *Eisinger* [1967] 3 W.L.R. 1599, at p. 1610.

Cases in which a change of language has not changed the meaning

Just as the presumption that the same meaning is intended for the same expression in every part of an Act is not of much weight, so the presumption of a change of intention from a change of language—which is of no great weight in the construction of documents—seems entitled to less weight in the construction of a statute than in any other case: for the variation is sometimes to be accounted for by the draftsman's concern for "the graces of the style" and his wish to avoid the repeated use of the same words,[6] sometimes by the circumstance that the Act has been compiled from different sources, and sometimes by the alterations and additions from various hands which Acts undergo in their progress through Parliament. Though the statute is the language of the three estates of the realm, it seems legitimate in construing it to take into consideration that it may have been the production of many minds and that this may better account for any variety of style and phraseology which is found than a desire to convey a different intention.[7] Even where the variation occurs in different statutes, the change is often not indicative of a change of intention.[8]

In a leading modern case on the subject, Lord Reid said: "There is undoubtedly a presumption that Parliament (or the draftsman) will use the same or similar language throughout an Act when meaning the same thing . . . [But] this presumption is only a presumption and one must always remember that the object in construing any statutory provision is to discover the intention of Parliament and that there is an even stronger presumption that Parliament does not intend an unreasonable or irrational result."[9]

So, "stream" and "river" in two sections of the Salmon Fishery Act 1861 have been held to mean the same,[10] as have "ordinary luggage" in a statute and "personal luggage" in a bye-law made under it.[11] "Suffering" and "knowingly suffering" persons to gamble

[6] *Hadley* v. *Perks* (1866) L.R. 1 Q.B. 444, *per* Blackburn J.; *R.* v. *Frost* (1839) 9 C. & P. 129, *per* Lord Abinger C.B.; *Brace* v. *Abercarn Colliery Co.* [1891] 2 Q.B. 699, *per* Lindley L.J.

[7] *Lines* v. *Hersom* [1951] 2 K.B. 682, *per* Lord Goddard C.J.

[8] *Hadley* v. *Perks* (1866) L.R. 1 Q.B. 444; *Hopes* v. *Hopes* [1949] P. 227, *per* Denning L.J.

[9] *Cramas Properties, Ltd.* v. *Connaught Fur Trimmings, Ltd.* [1965] 1 W.L.R. 892, at pp. 897, 898.

[10] *Rolle* v. *Whyte* (1868) L.R. 3 Q.B. 286.

[11] *Hudston* v. *Midland Railway Co.* (1869) L.R. 4 Q.B. 366, discussed in *Macrow* v. *Great Western Railway Co.* (1871) 40 L.J.Q.B. 300.

in a public-house apparently amount to the same thing,[12] and to "turn cattle loose" on a public thoroughfare contrary to section 54 of the Metropolitan Police Act 1839 was substantially identical with permitting them to be there "without a keeper" contrary to section 74 of the Highway Act 1835.[13] In the same way, the definition in the London Hackney Carriage Act 1843 of a hackney carriage as a carriage plying for hire "at any place" within the City of London and the Metropolitan Police District was held to be identical in meaning with its definition in the London Hackney Carriage Act 1831 as plying for hire in any "public street or road."[14]

Again, there are many modern decisions. By section 268 (2) of the Companies Act 1948, "the court may examine [the officer of a company] on oath . . . and may reduce his answers to writing and require him to sign them." Section 270 (7), dealing with the public examination of promoters and officers, requires that "notes of the examination shall be taken down in writing, and shall be read over to or by, and signed by, the person examined." Although no wholly satisfactory explanation for the difference in wording could be found, Pennycuick J. held that it did not give rise to different modes of procedure.[15]

Section 217 (4) of the Road Traffic Act 1960 empowers a police constable to arrest "a person reasonably suspected by him of having committed or of attempting to commit" the offence of taking and driving away a motor vehicle without lawful authority. Section 6 (4) empowers him to arrest "a person committing" the offence of driving while unfit through drink. The Court of Appeal held that the different language did not mean that there was no power of arrest on suspicion under section 6 (4). Lord Denning M.R. said that different considerations applied to the two provisions. "Section 217 deals with offences where the power of arrest may be exercised some time after the offence has been committed. It may be based, not on the constable's own observation, but on information received from others. Whereas section 6 deals with offences where the power of arrest is to be exercised at the very time when a person is committing the offence or very soon afterwards, so much so that the constable acts on his own observations." This would account for the difference in wording.[16]

[12] *Bosley* v. *Davies* (1876) 1 Q.B.D. 84.
[13] *Sherborn* v. *Wells* (1863) 32 L.J.M.C. 179.
[14] *Skinner* v. *Usher* (1872) L.R. 7 Q.B. 423.
[15] *Re Milton Hindle, Ltd.* [1963] 1 W.L.R. 1032.
[16] *Wiltshire* v. *Barrett* [1966] 1 Q.B. 312, at p. 322. *Cf. Hammond* v. *Hall and Ham River, Ltd.* [1965] A.C. 1049.

Further, it is not to be expected that an international convention will be worded precisely the same as a statutory instrument dealing with the same subject, for such conventions do not employ the terms of art of the municipal law of any single country;[17] and the fact that inelegant language would result from repetition of the same phrase may be enough to explain a change of wording.[18]

Even a change in language from one statute to another may not be decisive.[19] Lord Uthwatt said that "the introduction of new words into an existing section may alter the meaning of words already there. But no such alteration can result unless (1) the requirements of the English language demand it, or (2) those requirements permit it and the sense of the section demands it."[20]

So, "development" having been defined in the Town and Country Planning Act 1932 as including "any use of the land or any building thereon for a purpose which is different from the purpose for which the land or building was last being used," and in the 1947 Act as "the making of any material change in the use of any buildings or other land," the Divisional Court held that the change in language did not signify any change in the criteria to be applied. The word "material" had come in for the first time in 1947, "but that must be referring to material as material for planning purposes, and although the word does not appear in . . . the Act of 1932, it is clear and conceded that in considering what is a different purpose in that connection planning considerations must be regarded."[21]

The Local Government Act 1933 provided that a poll might be demanded, before the conclusion of a parish meeting, "on any question arising thereat." This replaced a provision in the Local Government Act 1894 for a poll on any "resolution." The Court of Appeal held that the 1933 provision applied only to questions which had been formally put to the meeting by way of resolution or amendment to resolution, and then voted on. Russell L.J. said that the 1933 wording was "not sufficiently plain to indicate an intention to depart

[17] *Post Office* v. *Estuary Radio Ltd.* [1967] 1 W.L.R. 1396.
[18] *Hobhouse* v. *Wall* [1963] 2 Q.B. 124.
[19] *Dunn* v. *I.R.C.* [1961] Ch. 453.
[20] *Lord Howard de Walden* v. *I.R.C.* [1948] 2 All E.R. 825, at p. 830. But an avowedly amending Act may have a different effect, for "when an amending Act alters the language of the principal statute, the alteration must be taken to have been made deliberately": *D. R. Fraser & Co., Ltd.* v. *Minister of National Revenue* [1949] A.C. 24, *per* Lord Macmillan at p. 33.
[21] *East Barnet U.D.C.* v. *British Transport Commission* [1962] 2 Q.B. 484, *per* Lord Parker C.J. at p. 490.

entirely from the basic conception of the Act of 1894, that only resolutions were liable to a poll demand."[22]

The old Rules of the Supreme Court provided that "in the absence of any statutory provision regulating service of process" a writ issued against a corporation aggregate might be served on specified officers: "and where by any statute provision is made for service of any writ" upon any corporation, "every writ may be served in the manner so provided." The new Rules (Ord. 67, r. 3) left out the latter sentence, and simply provided that "personal service of a document on a body corporate may, in cases for which provision is not otherwise made by any enactment, be effected" by serving it, in the case of a company, on an officer of the company. Wilberforce J. held that the superseding of the old rule did not "cut out the normal and long established method" of serving a writ on a company by sending it by post to the company's registered office in accordance with section 437 of the Companies Act 1948.[23]

5. Understanding Associated Words in a Common Sense, and the "Expressio Unius" Rule

Noscitur a sociis

Where two or more words which are susceptible of analogous meaning are coupled together, *noscuntur a sociis*. They are understood to be used in their cognate sense. They take, as it were, their colour from each other, the meaning of the more general being restricted to a sense analogous to that of the less general. (One application of this general principle is the *ejusdem generis* rule, which is discussed in the next section of this chapter.)

Thus, in section 6 of the Refreshment Houses Act 1860, dealing with houses "for public refreshment, resort and entertainment," the last word was understood, not as a theatrical or musical or similar performance, but as "something connected with the enjoyment of refreshment-rooms," the "reception and accommodation of the public who resort to the place in question."[24]

The Tithes in London Act 1545, which exempted "great men and noblemen and noblewomen" from tithes was held not to extend to an ecclesiastical magnate such as a dean, but to apply only to "persons

[22] *Bennett* v. *Chappell* [1966] Ch. 391, at p. 399.
[23] *Addis, Ltd.* v. *Berkeley Supplies, Ltd.* [1964] 1 W.L.R. 943, at p. 945. *Cf. Heaven* v. *Road and Rail Wagons, Ltd.* [1965] 2 Q.B. 355.
[24] *Muir* v. *Keay* (1875) L.R. 10 Q.B. 594, *per* Lush and Blackburn J.J. at pp. 597, 598.

superior, in certain respects to noblemen and noblewomen, of which description there are certainly persons in this country." The order of the words was here significant.[25]

In the Thames Conservancy Act 1857, which, after (by s. 53) empowering the conservators to license the construction of jetties in the river, provided (in s. 179) that this should not take away any "right, claim, privilege, franchise, exemption, or immunity" to which the occupiers of land on the banks were entitled, the word "right" was limited by the associated words to vested rights of property and did not include the right of navigation which the occupiers enjoyed in the same way as members of the public generally.[26]

In section 1 of the Prescription Act 1832, the expression "any right of common" was similarly restricted by the succeeding words, "or other profit or benefit to be taken and enjoyed from or upon any land," so as not to include rights in gross, but only those usual rights of common and profits *a prendre* which were in some way appurtenant to the land and limited to the requirements of a dominant tenement.[27]

An Act which made it a felony to break and enter into "any shop, warehouse, or counting-house" was held not to include a workshop, but only that kind of shop which had some analogy with a warehouse, that is, one for the sale of goods.[28]

A statutory prohibition on the conveyance of gunpowder into a mine except in a "case or canister" would prevent the use of such a case as a linen bag which is not of the same solid and substantial description as a canister.[29] And an Act which prohibited the "having or keeping" of more than a certain quantity of gunpowder did not apply to a person who "had" gunpowder for a merely temporary purpose (as a carrier), the kind of "having" intended by the Act being explained by the word "keeping" with which it was associated.[30]

The *noscitur a sociis* rule was applied to the construction of the Offences against the Person Act 1837, which made it felony to shoot at or to "stab, cut or wound" any person. The word "wound" was held to be restricted by the words which preceded it to injuries inflicted by an instrument, and consequently to bite off a finger or

[25] *Warden of St. Paul's* v. *Bishop of Lincoln* (1817) 4 Price 65, *per* Richards C.B. at p. 79.
[26] *Kearns* v. *Cordwainers' Co.* (1859) 28 L.J.C.P. 285.
[27] *Shuttleworth* v. *Le Fleming* (1865) 34 L.J.C.P. 309.
[28] *R.* v. *Sanders* (1839) 9 C. & P. 79. But see *R.* v. *Carter* (1843) 1 C. & K. 173.
[29] *Foster* v. *Diphwys Casson Slate Co.* (1887) 18 Q.B.D. 429.
[30] *Biggs* v. *Mitchell* (1862) 31 L.J.M.C. 163.

a nose, or to burn the face with vitriol, was not to wound within the meaning of the Act.[31]

"Section 28 (1) of the Factories Act 1961 deals with five different parts of the factory 'floors, steps, stairs, passages and gangways,' which are to be kept free from obstruction. It will be observed that the last four are places used for the purpose of passage. The expression 'floors' in this context and in the light of the word 'obstruction,' which means 'blocking or being blocked: making or becoming more or less impassable,' is, in my view, limited to those parts of the factory floor upon which workmen are intended or likely to pass and repass." It does not, therefore, include parts of the factory floor properly used for purposes of storage.[32]

The Town and Country Planning (Use Classes) Order 1950, Schedule, Class V: "Use for any work which is registrable under the Alkali, etc., Works Regulation Act 1906. . . . Use for any of the following processes . . . (ii) converting, re-heating, annealing, hardening or carburising, forging or casting, of iron or other metals; . . . (iv) recovering of metal from scrap; (v) pickling or treatment of metal in acid." Did a proposed use of land for the reception of scrap metal, the separation and grading of different scrap metals, and their burning or shearing or compression into briquettes to be sold to trade customers for use in furnaces, come within class V (iv)? In *George Cohen* 600 *Group, Ltd.* v. *Minister of Housing and Local Government*,[33] although, in its natural meaning, paragraph (iv) might be said to cover any getting back from scrap of metal in whatever form, even if the result of the process was scrap metal, Lord Parker C.J. accepted the argument of the Minister that "metal" in paragraph (iv) did not include scrap metal, but meant metal in a form ready for working. The reasons were that, reading class V as a whole, "metal" there seemed, as in paragraphs (ii) and (v), to be referring to something other than scrap metal; and that, by virtue of the reference to the 1906 Act, there was a common denominator in class V. The Act dealt with the escape of noxious and offensive gases, and class V was apparently dealing with processes involving atmospheric pollution.[33a]

There is a reference in Schedule A, para. 1, of the Income Tax Act 1952 to: "(*a*) quarries of stone, slate, limestone or chalk; and (*b*) mines of coal, tin, lead, copper, mundic, iron and other mines; and

[31] *R.* v. *Harris* (1836) 7 C. & P. 446; *R.* v. *Stevens* (1834) 1 Moo. C.C. 409; *R.* v. *Murrow* (1835) 1 Moo. C.C. 456; *Jenning's Case* (1838) 2 Lewin C.C. 130.
[32] *Pengelley* v. *Bell Punch Co. Ltd.* [1964] 1 W.L.R., 1055 *per* Diplock L.J. at p. 1059.
[33] [1961] 1 W.L.R. 944. *Cf. Markham* v. *Stacey* [1968] 1 W.L.R. 1881.

(*c*) ironworks, gasworks" and a variety of other concerns. Stamp J. held that fluorspar gotten by pick and shovel and a tractor-loader and without any underground operations, was not a "mine" within paragraph 1 (*b*). The common denominator of all the substances mentioned in (*b*) was that they were normally worked and won by mining and not by quarrying: the fact that an open-cast working of coal was prima facie a mine of coal within the paragraph was said to be irrelevant, because coal was a substance specifically mentioned there.[34]

In *I.R.C.* v. *Frere*,[35] the House of Lords held that the word "interest" in the phrase "interest, annuities or other annual payments" in the Income Tax Act 1952 meant annual interest.

In *Rye* v. *Rye*,[36] the House had to consider the definition of "conveyance" in section 205 (1) (ii) of the Law of Property Act 1925 as including "a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will." Lord MacDermott (at p. 508) said "that, in construing this definition, the words 'and every other assurance . . . by any instrument' cannot be related solely to the word 'release' and must be read as referring also to the earlier words, including 'lease,' so as to make of them a catalogue of instruments. In this context 'instrument' must connote a document, and I therefore conclude that an oral tenancy will not be a 'lease' within the definition."

Where, however, a statute defines a thing as including certain matters, it will not always be "right to seek to interpret the general words in the light of the particular instances given in the section. It is a familiar device of a draftsman to state expressly that certain matters are to be treated as coming within a definition to avoid argument on whether they did or not."[37]

And "the maxim *noscitur a sociis* is always a treacherous one unless you know the *societas* to which the *socii* belong." Where a statute referred to "negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision)," it was suggested that because the cause of action in both nuisance and negligence included the infliction of actual damage as

[34] *Rogers* (*Inspector of Taxes*) v. *Longsdon* [1967] Ch. 93.
[35] [1965] A.C. 402.
[36] [1962] A.C. 496.
[37] *I.R.C.* v. *Parker* [1966] A.C. 141, *per* Viscount Dilhorne at p. 161.

an essential element, "breach of duty" should be understood as confined to causes of action in which actual damage was likewise essential. It was, however, clear, said Diplock L.J., "that breach of duty cannot be [so] restricted . . . for the words in parenthesis expressly extend to a duty which exists by virtue of any contract and the infliction of actual damage is not an essential element in an action for breach of contractual duty."[38]

Occasionally, the actual order of words may be decisive, one word taking its colour from those with which it happens to be in juxtaposition. In *Stone* v. *Commercial Railway Co.*,[39] Sir Lancelot Shadwell V-C. had to consider the words "any house, garden, yard, warehouse, building or manufactory" in a Railway Act. Commenting that "house" and "garden" came before "yard," he said (at p. 627) that "the mere collocation of the words does show that the terms, 'yard' or 'garden,' are to be taken in connection with a house," and he held therefore that the only kind of "yard" to which the Act applied was one connected with a messuage. But, where there was a reference in the Vagrancy Act 1824, s. 4, to "any dwelling-house, warehouse, coach-house, stable, or outhouse, or any inclosed yard, garden or area," the Divisional Court of the Queen's Bench Division held that there was nothing in the language to exclude from the ambit of the section a yard which was part of an industrial hereditament.[40]

Expressio unius exclusio alterius

By the rule usually known in the form of this Latin maxim, mention of one or more things of a particular class may be regarded as silently excluding all other members of the class: *expressum facit cessare tacitum.* Further, where a statute uses two words or expressions, one of which generally includes the other, the more general term is taken in a sense excluding the less general one: otherwise there would have been little point in using the latter as well as the former.

A classic example of this occurred in the Statute of Uses 1535, s. 1. This provided that where "any Person or Persons" should be seised of any lands to the use of "any other Person or Persons, or of any Body Politick," the latter person or persons or body politic should

[38] *Letang* v. *Cooper* [1965] 1 Q.B. 232. *Cf. Long* v. *Hepworth* [1968] 1 W.L.R. 1299.
[39] (1839) 9 Sim. 621. *Cf. Warden of St. Paul's* v. *Bishop of Lincoln* (1817) 4 Price 65, *ante*, 289–290.
[40] *Goodhew* v. *Morton* [1962] 1 W.L.R. 210. *Cf. Stephens* v. *Cuckfield R.D.C.* [1960] 2 Q.B. 373, *per* Upjohn L.J.

be deemed to be in lawful seisin, estate and possession of the lands for the same estate as they formerly had in the use. "Person" would normally include corporations as well as natural persons: but since corporations were specially mentioned in the part of the statute dealing with *cestuis que usent*, but omitted from the first part of the section dealing with the feoffees to uses, it was held that the Statute did not operate where a corporation was seised of land as feoffee to uses: such uses were, therefore, not executed by section 1, and the corporation-feoffee retained the legal estate as it would have done before the Statute.[41]

So too, although the words "cows," "sheep" and "horses" standing alone would comprehend heifers, lambs and ponies respectively, they would be understood as excluding them if the latter words were coupled with them.[42]

The word "land" is generally understood as including buildings, but if, after imposing a rate on houses, buildings, works, tenements and hereditaments, an Act exempted "land," this word would be restricted to land unburdened with houses, buildings or works which would otherwise have been unnecessarily enumerated.[43]

In the Poor Relief Act 1601, s. 1, which imposed a poor rate on the occupiers of "lands," houses, tithes and "coal mines," the same word was similarly limited as not including mines other than coal mines: the mention of one kind of mine showed that the legislature understood the word "land," which would usually comprehend all kinds of mine, as here not including any.[44]

Where section 2 (2) of the Rating and Valuation (Apportionment) Act 1928 provided definitions of both "agricultural land" and "agricultural buildings," the definition of the former including "land exceeding one quarter of an acre used for the purpose of poultry farming," it was held by the Court of Appeal that a broiler house fell outside the definition of agricultural land. "The Act," said Lord Denning M.R., "draws a clear distinction between 'buildings' and 'land' and those terms are mutually exclusive here. . . . I have no doubt that the whole of a broiler house, including the earth on which it stands, is a 'building' and not 'land'."[45]

[41] Bacon, *Reading on the Statute of Uses.*
[42] *R.* v. *Cook* (1774) 2 East P.C. 616; *R.* v. *Loom* (1827) 1 Moo. C.C. 160.
[43] *R.* v. *Midland Railway Co.* (1855) 4 E. & B. 958; *Crayford Overseers* v. *D. & C. Rutter* [1897] 1 Q.B. 650. [44] *R.* v. *Inhabitants of Sedgley* (1831) 2 B. & Ad. 65.
[45] *Gilmore* (*Valuation Officer*) v. *Baker-Carr* [1962] 1 W.L.R. 1165, at p. 1172. *Cf. W. & J. B. Eastwood Ltd.* v. *Herrod* [1968] 2 Q.B. 923.

By section 1 (1) of the Administration of Justice Act 1956: "The Admiralty jurisdiction of the High Court shall be as follows . . . (*a*) any claim to the possession or ownership of a ship." By section 1 (4): "The preceding provisions of this section apply (*a*) in relation to all ships or aircraft, whether British or not and whether registered or not and whatever the residence or domicile of their owners may be." It was argued that, by virtue of subsection (4), subsection 1 (*a*) gave the court jurisdiction to issue a warrant of arrest against a glider in the United Kingdom. But Hewson J. decided that it did not. The paragraphs of subsection (1) ran from (*a*) to (*s*) and in all of them the word "ship" was either expressed or necessarily implied: in only three, (*j*) (salvage), (*k*) (towage), and (*l*) (pilotage), did the word "aircraft" appear, and this led the judge to hold that the aircraft referred to in section 1 (4) were there referred to for the purposes of paragraphs (*j*), (*k*), and (*l*) alone.[46]

Order 15, rule 17, of the Rules of the Supreme Court provides that no proceeding shall be open to objection on the ground that a merely declaratory order is sought. By section 21 of the Supreme Court of Judicature (Consolidation) Act 1925: "The High Court shall have such jurisdiction . . . with respect to declarations of legitimacy . . . as is hereinafter in this Act provided." By section 188 provision was made for the granting of declarations of legitimacy, and this was eventually replaced by section 39 of the Matrimonial Causes Act 1967 which (so far as relevant here) applied to declarations of legitimacy of the petitioner himself and of the validity of his own, or his parents', or grandparents', marriages. In *Aldrich* v. *Att.-Gen.*,[47] the petitioner sought a declaration under Ord. 15, r. 17 (now r. 16), that a woman who had died abroad was his legitimate daughter. "I find it quite impossible," said Ormrod J. (at p. 420), "to construe this section [39] as meaning that the court has also a jurisdiction to grant declarations of legitimacy under the Rules of the Supreme Court. If this were the effect of the rule it would be inconsistent with the section. . . . In my judgment the principle *expressio unius est exclusio alterius* must apply, with the result that the jurisdiction of the court in this connection is limited to cases falling within the provisions of section 39."[47a]

But the rule, *expressio unius*, may not always provide the answer to problems of construction. "It is," said Lopes L.J., "often a valuable servant, but a dangerous master to follow in the construction of

[46] *Re The Glider Standard Austria S.H. 1964* [1965] P. 463. [47] [1968] P. 281.
[47a] *Cf. Candy Maid Confections, Ltd.* v. *Commissioners of Customs and Excise* [1968] 3 W.L.R. 1196.

statutes or documents. The *exclusio* is often the result of inadvertence or accident, and the maxim ought not to be applied when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice."[48] More recently, Russell J. refused to apply the rule where to have done so would have produced "a wholly irrational situation."[49]

In *Colquhoun* v. *Brooks*,[50] a statute imposed a tax "in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere." Where the partner of a business carried on in Australia resided in England, were profits of the business accruing to him in Australia and kept there, not being transmitted to him in England, taxable under this provision? The Crown pointed to an express provision in the same statute that interest on foreign or colonial securities was only chargeable to tax if it was actually received in the United Kingdom:[51] this was said to show, on the *expressio unius* principle, that the profits of a business carried on abroad and accruing to a person resident in England were taxable whether or not he actually received them there. The Court of Appeal, by a majority, rejected the argument, Lopes L.J. saying (at p. 65): "I think a rigid observance of the maxim in this case would make other provisions of the statute inconsistent and absurd, and result in injustice. I cannot, therefore, permit it to govern my decision."

Lastly, in *Dean* v. *Wiesengrund*,[52] the provision in question was section 14 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920. This referred to rent made irrecoverable by the landlord by section 1, but which in fact been paid to him by the tenant: "the sum so paid shall be recoverable from the landlord . . . who received the payment or his legal personal representative by the tenant." On the strength of the inclusion of a reference to the landlord's personal representative and the omission of a reference to the

[48] *Colquhoun* v. *Brooks* (1888) 21 Q.B.D. 52, at p. 65.
[49] *Re Newspaper Proprietor's Agreement* (1962) L.R. 3 R.P. 81, at p. 95. And see *Prestcold (Central), Ltd.* v. *Minister of Labour* [1969] 1 W.L.R. 89.
[50] (1888) 21 Q.B.D. 52.
[51] See, *ibid.*, at p. 55. [52] [1955] 2 Q.B. 120.

tenant's, the landlord in this case argued that the tenant's right of recovery was personal to, and died with, him. This argument was rejected by the Court of Appeal. "This maxim is," said Jenkins L.J. (at pp. 130, 131), "after all, no more than an aid to construction, and has little, if any, weight where it is possible, as I think it is in the present case, to account for the *inclusio unius* on grounds other than an intention to effect the *exclusio alterius*. In this connection, I think that there is force in the suggestion . . . that the express reference to the legal personal representative of the landlord might . . . have been intended to meet the case of an overpaid landlord dying before the commencement of the Act, whose estate might otherwise have escaped liability on the ground that he had never been liable himself. . . . In my opinion the application of the maxim here would lead to inconsistency and injustice, and would make section 14 (1) of the Act of 1920 uncertain and capricious in its operation."

6. Generic Words Following More Specific

The *ejusdem generis* rule

In the abstract, general words, like all others, receive their full and natural meaning, and the courts will not impose on them limitations not called for by the sense or objects of the enactment.[53] Thus section 3 of the Civil Procedure Act 1833, which limited the time for suing "upon any bond or other specialty" comprehended, under the last expression, every kind of specialty including a statute.[54]

But the general word which follows particular and specific words of the same nature as itself takes its meaning from them and is presumed to be restricted to the same genus as those words.[55] For "according to a well established rule in the construction of statutes, general terms following particular ones apply only to such persons or things as are *ejusdem generis* with those comprehended in the language of the Legislature."[56] In other words, the general expression is to be read as comprehending only things of the same kind as that designated by the preceding particular expressions, unless there is something to show that a wider sense was intended,[57] as where there

[53] See *Att.-Gen. for Palestine* v. *Fakhry Ayyas* [1947] A.C. 332; *Roe* v. *Hemmings* [1951] 1 K.B. 676.
[54] See *Cork & Bandon Ry. Co.* v. *Goode* (1853) 22 L.J.C.P. 198.
[55] *Fenwick* v. *Schmalz* (1868) L.R. 3 C.P. 313, *per* Willes J. (charterparty); *Thames & Mersey Marine Insurance Co.* v. *Hamilton Frazer & Co.* (1887) 12 App.Cas. 484 (insurance policy).
[56] *R.* v. *Cleworth* (1864) 4 B. & S. 927, *per* Cockburn C.J. at p. 932.
[57] *R.* v. *Edmundson* (1859) 28 L.J.M.C. 213.

is a provision specifically excepting certain classes clearly not within the suggested *genus*.[58]

An example of the application of the *ejusdem generis* rule is to be found in the decision of Vaisey J. in *Eton Rural District Council* v. *River Thames Conservators*.[59] By section 9 (1) of the Land Drainage Act 1930: "It shall be the duty of every catchment board to take steps for the commutation of all obligations imposed on persons by reason of tenure, custom, prescription or otherwise, to do any work . . . in connection with the main river." It was held that the words "or otherwise" had a meaning *ejusdem generis* with "tenure, custom, prescription," and hence that the obligations referred to were ones imposed on land and did not include purely contractual obligations.

Many other examples of the operation of the rule will be found in the following pages. First, however, some general points must be made.

The rule applies only to general words *following* words which are less general. "I know of no authority," said Lord Cave L.C., "for applying that rule to . . . a case where, to begin with, the whole clause is governed by the initial general words."[60] So the Judicial Committee of the Privy Council held that the circumstances that the general words in section 35 (13) of the Canadian Transport Act 1938, "on any application under this section, the Board [of Transport Commissioners] shall have regard to all considerations which appear to it to be relevant," are followed by a specific direction to the Board to have regard in particular to two matters did not in any way detract from the generality of the Board's discretion.[61] By section 28 (1) of the Law of Property Act 1925: "Trustees for sale shall, in relation to land or to manorial incidents and to the proceeds of sale, have all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act 1925." It had been argued, said Lord Greene M.R., "that those opening words which I have read must be construed as saying that trustees for sale are to have, in relation to land and also 'in relation to land with regard to the proceeds,' the powers set out. That would limit the powers to powers in respect of what I may call, for want of a better phrase, the administration of

[58] *Allen* v. *Emmerson* [1944] K.B. 362.
[59] [1950] Ch. 540.
[60] *Ambatielos* v. *Anton Jurgens Margarine Works* [1923] A.C. 175, at p. 183.
[61] *Canadian National Railways* v. *Canadian Steamship Lines, Ltd.* [1945] A.C. 204.

land, and not extend them to the application of the proceeds at large. That is a construction which I do not find myself able to accept."[62]

Unless there is a genus or class or category, there is no room for any application of the *ejusdem generis* doctrine.[63] Plate, linen and chattels in the premises, including the coach-house and stables, do not make up a category excluding horses.[64] Nor do the words "theatres and other places of public entertainment" create a genus.[65] And in the case of the *Owners of s.s. Magnhild* v. *Macintyre Brothers and Co.*[66] McCardie J. was unable to find in the words "loss of time from deficiency of men or owners' stores, breakdown of machinery, or damage to hull or other accident preventing the working of the steamer" which occurred in a charterparty such a common denominator as would admit the principle.

In a modern Privy Council case, it has been said that there must be more than one species mentioned to constitute a genus: "The mention of a single species—for example, water rates—does not constitute a genus."[67] But the authority for this is very slight, and there are many instances of the rule being applied to two-word phrases.[68] So, in *Hadley* v. *Perks*,[69] the Court of Queen's Bench had to consider section 24 of the Metropolitan Police Courts Act 1839, which referred to a person brought before a metropolitan magistrate charged with "having in possession or conveying in any manner anything" which might reasonably be suspected of having been stolen. "Having or conveying," said Blackburn J. (at p. 457), "I think must be limited, making the one co-extensive with the other, and confining it to 'having' *ejusdem generis* with 'conveying'."

In another case, the House of Lords had to consider the statement in a Memorandum of Association that one of the objects of the company was "to carry on the business of mechanical engineers and general contractors." Lord Cairns L.C. said that the generality of the expression "general contractors" was limited by the previous

[2] *Re Wellsted's Will Trusts* [1949] Ch. 296, at p. 305.
[63] *Tillmanns & Co.* v. *SS. Knutsford, Ltd.* [1908] 2 K.B. 385, *per* Farwell L.J.; *Ridge* v. *Baldwin* [1964] A.C. 40, *per* Lord Evershed.
[64] *Anderson* v. *Anderson* [1895] 1 Q.B. 749 (deed).
[65] *Allen* v. *Emmerson* [1944] K.B. 362.
[66] [1921] 2 K.B. 97.
[67] *United Towns Electric Co., Ltd.* v. *Att.-Gen. for Newfoundland* [1939] 1 All E.R. 423, *per* Lord Thankerton at p. 428.
[68] See *Alexander* v. *Tredegar Iron and Coal Co., Ltd.* [1944] K.B. 390, [1945] A.C. 286; and *L.C.C.* v. *Tann* [1954] 1 W.L.R. 371. *C*. 70 L.Q.R. 172, where the relevant cases are discussed.
[69] (1866) L.R. 1 Q.B. 444.

words "mechanical engineers," and that it ought to be confined to the making of contracts connected with that business.[70]

Likewise, section 11 (1) of the Customs and Inland Revenue Act 1889 referred to gifts "retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise," and in *Att.-Gen.* v. *Seccombe*,[71] it was held that the words "or otherwise" meant some arrangement *ejusdem generis* with contract, that is, an enforceable arrangement.

Lastly, there is *Humber Conservancy Board* v. *Federated Coal and Shipping Co., Ltd.*[72] The question was whether Spurn (at the mouth of the Humber) was a "port" within section 11 (1) of the Pilotage Act 1913: by section 742 of the Merchant Shipping Act 1894 (which was incorporated with the Pilotage Act), " 'port' includes 'place.' " Scrutton L.J. said (at pp. 495, 496): "Spurn appears to be a very good place for a rest cure; it is at the extreme end of a spit of sand with no road but with a trolley line to it, with four inhabitants, a Lloyd's signalling station and a lighthouse, and it has been argued that, whatever else it is, it is a 'place,' and as 'port' includes 'place,' the *Maud Llewellyn*, when she received signals from it, was making use of a 'place' which is the same as 'port.' In my view that is putting much too wide a meaning on the word 'place.' I think that 'place' following 'port' must be interpreted as *ejusdem generis* with 'port,' as a locality having some or many of the characteristics of a port, though by reason of the absence of charter or other reasons one would not speak of it as a port. I am quite clear that Spurn is not a port. I am equally clear that it is not *ejusdem generis* with a port."

The rule of *ejusdem generis* may apply despite the absence of the word "other" at the end of the list of things specified. By section 21 of the Town Police Clauses Act 1847: "The commissioners may from time to time make orders for the route to be observed by all carts, carriages, horses, and persons, and for preventing obstruction of the streets . . . in all times of public processions, rejoicings, or illuminations, and in any case where the streets are thronged or liable to be obstructed."

In *Brownsea Haven Properties, Ltd.* v. *Poole Corporation*,[73] the Court of Appeal held that this did not enable the corporation to

[70] *Ashbury Railway Carriage & Iron Co.* v. *Riche* (1875) L.R. 7 H.L. 653.
[71] [1911] 2 K.B. 688.
[72] [1928] 1 K.B. 492.
[73] [1958] Ch. 574.

make an order prescribing a one-way traffic system in two streets for a period of six months. The words "in any case," etc., should be confined to special events, that is, occasions strictly similar to public processions, rejoicings or illuminations, or at most to short periods of time when the ordinary day-to-day traffic conditions are liable to be dislocated or obstructed by crowds of pedestrians or streams of vehicles. Romer L.J. said (at p. 610): "The doctrine of *ejusdem generis* is only part of a wider principle of construction, namely, that, where reasonably possible, some significance and meaning should be attributed to each and every word and phrase in a written document. That being the object of the doctrine, it is difficult to see what difference it can make whether the word 'other' is or is not used, provided—and this is essential—that the examples which have been given are referable to a clearly ascertainable genus."

Examples of the application of the *ejusdem generis* rule

The Sunday Observance Act 1677, which enacts that "no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's Day" was held not to include a coach proprietor,[74] a farmer[75] or a barber,[76] the word "person" being confined to callings like those specified by the preceding words.

The Metropolitan Building Act 1855, which entitled a district surveyor "or other person" to a month's notice of action for anything done under the Act, was held, on the same principle, to give that privilege, not to every person sued, but only to persons *ejusdem generis* with a district surveyor, that is, persons having an official duty.[77]

In an Act imposing on unqualified persons navigating "any wherry, lighter, or other craft," the last word would include only vessels of the same kind as wherries or lighters, and not steam tugs which carried neither passengers nor goods.[78] But the same word following "boats and vessels" would be more comprehensive.[79]

The Distress for Rent Act 1737, which by section 8 authorises the distress for rent of "all sorts of corn and grass, hops, roots, fruits,

[74] *Sandeman* v. *Breach* (1827) 5 L.J. (O.S.)K.B. 298.
[75] *R.* v. *Cleworth* (1864) 4 B. & S. 927.
[76] *Palmer* v. *Snow* [1900] 1 Q.B. 725.
[77] *Williams* v. *Golding* (1865) L.R. 1 C.P. 69.
[78] *Reed* v. *Ingham* (1854) 32 L.J.M.C. 156.
[79] *Tisdell* v. *Combe* (1838) 7 A. & E. 788.

pulse, or other product whatsoever" growing on the demised lands, includes only products similar to grass and corn and not trees and shrubs in a nursery, which, though unquestionably products of the land, are of a different character from the products specified by the earlier words.[80] Similarly, young trees were not included in a provision which punished the stealing of "any plant, root, fruit, or vegetable production growing in any garden, orchard, nursery ground, hothouse, greenhouse or conservatory."[81]

An Act which prohibited playing or betting in any street "at or with any table or instrument of gaming" was held not to include, under the last general words, half-pence used for tossing for money.[82]

The enactment which prohibited the establishment, without licence, of "the business of a blood-boiler, bone-boiler, fellmonger, slaughterer of cattle, horses, or animals of any description, soap-boiler, tallow-melter, tripe-boiler, or other noxious or offensive business, trade or manufacture" was held not to include under the final general terms any employment not connected, as all the specified trades were, with animal matter. So it did not reach brick-making,[83] nor a small-pox hospital.[84]

Section 169 (4) of the Companies Act 1948 referred to "any fraud, misfeasance or other misconduct in connection with the promotion or formation" or management of a company. In one case, Goff J. decided that "other misconduct" must be construed as *ejusdem generis* with fraud and misfeasance, and so as including some kind of moral turpitude:[85] but he subsequently held that this imposed "too narrow" a construction on the language because of a decision of the Court of Appeal which had not previously been cited before him.[86]

By section 7 of the Public Bodies Corrupt Practices Act 1889: "The expression 'public body' means any council of a county or county of a city or town, any council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to act under and for the purposes of any Act relating to local government." By section 4 (2) of the Prevention of Corruption Act 1916, in both the Act itself and the 1889 Act, "the expression 'public

[80] *Clark* v. *Gaskarth* (1818) 8 Taunt. 431.
[81] *R.* v. *Hodges* (1829) Moo. & M. 341.
[82] *Watson* v. *Martin* (1865) 34 L.J.M.C. 50.
[83] *Wanstead Local Board of Health* v. *Hill* (1863) 32 L.J.M.C. 135.
[84] *Withington Local Board of Health* v. *Manchester Corporation* [1893] 2 Ch. 19.
[85] *S.B.A. Properties, Ltd.* v. *Cradock* [1967] 1 W.L.R. 716.
[86] *Selangor United Rubber Estates, Ltd.* v. *Cradock* [1967] 1 W.L.R. 1168, at p. 1174.

body' includes, in addition to the bodies mentioned in the last-mentioned Act, local and public authorities of all descriptions." In *R.* v. *Newbould*,[87] Winn J. held that the National Coal Board was not a public authority within section 4 (2), saying (at p. 106): "It would be a bold and—for the purpose of a criminal trial—an unjustifiable, interpretation of the wording . . . to extend it beyond the limits indicated by the application to the wording of the guide to construction known as the *ejusdem generis* rule. . . . A rational and sufficient connotation can be given to the words if they are taken to comprise no more than local authorities and public authorities of the general kind, character, genus referred to in the earlier phrase contained in section 7 [of the Act of 1889]."

In considering the words "building, engineering, mining or other operations" in section 12 (1) of the Town and Country Planning Act 1947, Widgery J. said: "It is not disputed that the reference to 'other operations' there must be construed *ejusdem generis* with building, engineering and mining; and, without attempting to define the genus in detail, it seems clear to me that it is restricted to operations of the scale, complexity and difficulty which require a builder or an engineer or some mining expert."[88]

Section 8 (4) of the Finance Act 1894, referring to property passing on death, mentions "every trustee, guardian, committee, or other person in whom any interest in the property" passing is vested. Wilberforce J. held that the words "or other person" are to be construed *ejusdem generis* with "trustee, guardian, committee" so as to exclude persons beneficially interested: they are limited to those in a fiduciary capacity.[89]

General words construed generally

But the restricted meaning which prima facie attaches to the general word in such circumstances is rejected when there are adequate grounds to show that it has not been used in the limited order of ideas to which its predecessors belong. The *ejusdem generis* doctrine is by no means an absolute one, and if it can be seen from a wider inspection of the scope of the legislation that the general

[87] [1962] 2 Q.B. 102.

[88] *Coleshill and District Investment Co., Ltd.* v. *Minister of Housing and Local Government* [1968] 1 All E.R. 62, at pp. 65, 66; reversed on the ground that the operations in question were in fact on a scale *ejusdem genesis* with building and mining: [1968] 1 W.L.R. 600.

[89] *Re Latham deceased* [1962] Ch. 616.

words ought to be construed generally, they are so construed notwithstanding that they follow more particular expressions.

A good example of this is to be found in *Rands* v. *Oldroyd*.[90] By section 76 (1) of the Local Government Act 1933, a member of a local authority who "has any pecuniary interest, direct or indirect, in any contract or proposed contract or other matter" and who is present at a meeting at which the matter is considered is bound to disclose his interest and to refrain from voting in the matter. It was held that the words "or other matter" were to be read, not *ejusdem generis* with what went before, but in "a very general way." Having referred to the object of the enactment, which was to prevent conflicts of duty and interest arising in members of local authorities, the Lord Chief Justice said (at p. 212): "Whereas, of course, a consideration of the mischief aimed at does not enable the court to construe the words in a wider sense than they appear, it at least means that the court would not be acute to cut down words otherwise wide merely because this was a penal statute."

Section 10 of the Frauds by Workmen Act 1777 which, after reciting that stolen materials used in certain manufactures are often concealed in the possession of persons who have received them with guilty knowledge, and that the discovery and conviction of the offenders is in consequence difficult, authorised justices to issue search warrants for purloined materials suspected of being concealed "in any dwelling-house, outhouse, yard, garden, or other place." This was held to include, under the last words, a warehouse which was a mile and a half from a manufacturer's dwelling-house. Though such a warehouse would probably not be usually considered as *ejusdem generis* with "dwelling-house" and its enumerated dependencies, it was reasonable, having regard to the preamble and the general object of the statute, to think that a warehouse was within the contemplation of the legislature, as it was a very likely place for the concealment against which the Act was directed and a narrow construction would have restricted the effect of the statute.[91]

The requirement of section 32 of the Municipal Corporations Act 1835 that municipal voting papers should be signed by the voter, and state the name of the "street, lane, or other place" in which the property in respect of which he claimed to vote was situated, was considered satisfied by a statement of the parish where the property

[90] [1959] 1 Q.B. 204, *per* Lord Parker C.J.
[91] *R.* v. *Edmundson* (1859) 28 L.J.M.C. 213.

lay, the object of the provision apparently being the identification of the voter.[92]

The wording of the statute may also show that general language is to be construed generally. Thus, where an inspector of nuisances was authorised to inspect articles of food deposited in "any place" for sale and a penalty was imposed on persons who prevented him from entering any "slaughter-house, shop, building, market, or other place" where any carcase was deposited for sale, it was held that the latter word was not to be construed as limited to places *ejusdem generis* with those which preceded it. The earlier passage which gave authority to enter "any place" obviously required that the same word should receive an equally extensive meaning in the subsequent passage.[93]

Similarly, where an Act imposed a rate on a variety of tenements and buildings which were enumerated, and on "other buildings and hereditaments . . . meadow and pasture ground excepted," the exception appended to the concluding general words showed that they were used in their widest sense and were not limited in meaning by the particular terms which preceded them.[94]

Words of rank

Analogous to the rules which have been considered so far in this chapter is the curious rule that when words descriptive of persons or things are used in an order descending by rank, general words at the end of the list do not include (although, standing alone, they would) persons or things of a higher rank than the highest named, if there be any lower species to which they can apply. In such a case, the general word is not taken as generic, but as including only what is lower in the genus than the lowest specified.

So a statute which avoided conveyances by masters and fellows of colleges, deans and chapters of cathedrals, parsons, vicars, and "others having any spiritual or ecclesiastical living" was held not to include bishops.[95]

The imposition of duties on copper, brass, pewter and tin, and on all other metals not enumerated would not include the precious metals of gold and silver.[96]

[92] *R.* v. *Spratley* (1856) 6 E. & B. 363, *per* Lord Campbell C.J. and Crompton J.
[93] *Young* v. *Grattridge* (1868) L.R. 4 Q.B. 166.
[94] *R.* v. *Shrewsbury Gas Co.* (1832) 1 L.J.M.C. 18.
[95] *Archbishop of Canterbury's Case* (1596) 2 Rep. 46a.
[96] *Casher* v. *Holmes* (1831) 2 B. & Ad. 592.

A prohibition upon salmon-fishing in "the waters of the Humber, Ouse, Trent . . . and all other waters wherein salmons be taken" was considered as including, in the final general expression, only rivers inferior to those enumerated, and therefore as not comprising the Thames.[97] And a statute which punished cruelty to any "horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep, or other cattle" was held not to include a bull: not that a bull is to be regarded as superior to a horse, but he is superior to all the animals mentioned in that part of the provision which begins "ox, cow," etc.[98]

7. Meaning of Some Particular Expressions

Rules as to gender and number

By section 1 (1) of the Interpretation Act 1889, in every Act passed after the year 1850, "unless the contrary intention appears, (*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, and particularly paragraph (*b*), is frequently applied by the courts.[99] The difficulty to which it gives rise is: when precisely does an Act manifest a "contrary intention"? In a case which dealt with the corresponding provisions of the Interpretation Ordinance of Hong Kong, Lord Pearce approved the statement of Sir Michael Hogan C.J. that: "To discover whether a contrary intention is implied one must, I think, look, not at the form of particular expressions, but at the substance and tenor of the legislation as a whole."[1]

So, in *Chorlton* v. *Lings*,[2] where the Court of Common Pleas was required to construe a statute which conferred the parliamentary franchise on "every man" possessing certain qualifications and registered as a voter, Bovill C.J., having regard to the subject-matter of the Act and to the important and striking nature of the departure

[97] 2 Inst. 478.

[98] *Ex p. Hill* (1827) 3 C. & P. 225.

[99] For modern instances, see *Re Earl of Feversham's Contract* [1942] Ch. 33; *Jarvis Motors (Harrow), Ltd.* v. *Carabott* [1964] 1 W.L.R. 1101; *Page* v. *Williams* [1965] 1 W.L.R. 16; *Annicola Investments, Ltd.* v. *Minister of Housing and Local Government* [1968] 1 Q.B. 631; *The Queen of the South* [1968] P. 449.

[1] *Sin Poh Amalgamated (H.K.), Ltd.* v. *Att.-Gen.* [1965] 1 W.L.R. 62, p. 66. *Cf. Shanmugam* v. *Commissioner for Registration of Indian and Pakistani Residents* [1962] A.C. 515; *Re Royal Victoria Pavilion, Ramsgate* [1961] Ch. 581 (Law of Property Act 1925, s. 79 (1)).

[2] (1868) L.R. 4 C.P. 374. *Cf. Nairn* v. *St. Andrews University* [1909] A.C. 147; *Bebb* v. *Law Society* [1914] 1 Ch. 286; *Viscountess Rhondda's Claim* [1922] 2 A.C. 339; *Edwards* v. *Att.-Gen. for Canada* [1930] A.C. 124.

from the common law involved in extending the franchise to women, declined to accept the view that Parliament had made that change by using the word "man" and held that the word was intentionally used expressly to designate the male sex.

In *Re Clayton's Settled Estate*,[3] Russell J. held that the expression "vesting deed" in Schedule 2, paragraph 1 (2) to the Settled Land Act 1925 included the plural. A reference in various sections of the Act to "the last or *only* principal vesting instrument" was not sufficient to exclude the application of the Interpretation Act.

The statute 21 Henry 8, c. 5, s. 2, provides that on an intestacy administration is to be granted "to the widow of the same person deceased," and section 3 of the Statute of Distribution 1670 gives "one third part of the said surplusage to the wife of the intestate." These statutes are subject in Ghana to rules similar to those found in section 1 of the Interpretation Act: Interpretation Ordinance (Laws of the Gold Coast 1951, c. 1). Lord Tucker said that in an English court prior to the Interpretation Act "wife" and "widow" could not have been read as including "wives" and "widows." But here these statutes were "to be construed in their application to Ghana so that words in the singular include the plural unless there is something in the subject or context repugnant to such construction, which is clearly not the case, the subject and context being the distribution of the personal property of an intestate validly married by the native law and custom of Ghana which recognises the existence of more than one widow."[4]

"The expression 'tenant' includes the widow of a tenant who was residing with him at the time of his death, or, where a tenant leaves no such widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court": Increase of Rent and Mortgage Interest (Restrictions) Act 1920, s. 12 (1) (*g*). The Court of Appeal held that "member" here cannot be read as "members," there being a "contrary intention" sufficient to exclude the application of the Interpretation Act. "To my mind," said Harman L.J., "a fearful confusion ensues once it is supposed that there can be a plurality of 'members' who may agree together, and so have a sort of tontine which will last for so long as the survivor of them is in existence. I think that under the Rent Acts a tenant must be a single person because it is a status of

[3] [1926] Ch. 279.
[4] *Coleman* v. *Shang* [1961] A.C. 481, at p. 492.

irremovability which belongs to him, and I do not think to anyone but him."[5] On the other hand, two or more joint beneficial owners can together constitute a "landlord" for the purposes of the Rent Acts.[6]

Where the Interpretation Act has not been expressly applied to statutory regulations,[7] it may still affect the construction of these regulations: for where words used in the regulations are identical with expressions contained in the Act under which the regulations were made, the maker of the regulations must be taken to have intended a construction identical with the statutory construction, and so, to this extent, singular words in the regulations will include the plural, and vice versa.[8]

Time

By section 1 (1) of the British Standard Time Act 1968, the time for general purposes in the United Kingdom (to be known as "British Standard Time") is to be one hour in advance of Greenwich mean time throughout the year, and any reference to a specified point of time in any enactment, whether passed before or after the commencement of the 1968 Act, is to be construed accordingly unless it is otherwise expressly provided.[9]

The word "year" when used in a statute may mean either the calendar year running from January 1 to the following December 31,[10] or some other period of 365 days:[11] in each case, the court will have to decide which kind of period was in the contemplation of the legislature. "Financial year" in a statute relating to financial or fiscal matters means the twelve months ending on March 31.[12]

The word "month" in a statute passed before 1851 generally means

[5] *Dealex Properties, Ltd.* v. *Brooks* [1966] 1 Q.B. 542, at p. 551. *Cf. Jacobs* v. *Chaudhuri* [1968] 2 Q.B. 470.

[6] *Baker* v. *Lewis* [1947] K.B. 186.

[7] For a case in which the Act was so applied, see *R.* v. *Industrial Disputes Tribunal, ex p. Queen Mary College*, as reported in [1957] 2 All E.R. 776.

[8] *Potts or Riddell* v. *Reid* [1943] A.C. 1.

[9] This provision remains in force only until 2 a.m. (Greenwich mean time) on October 31, 1972, unless made permanent by Order in Council made after appropriate resolutions have been passed by both Houses of Parliament: s. 4 (2)–(4). If this provision should expire, by Sched. 1, para. 2, the enactments repealed by the Act shall revive: the result would be that time would be taken as Greenwich mean time (Statutes (Definition of Time) Act 1880, s. 1) or "summer time" (Summer Time Act 1922, s. 1 (2)), as appropriate.

[10] *Gibson* v. *Barton* (1875) L.R. 10 Q.B. 329.

[11] *Horton* v. *Penn* [1907] 1 K.B. 561.

[12] Interpretation Act 1889, s. 22. Note that the income tax year ends on April 5: Income Tax Act 1952, s. 3.

a lunar month, that is, twenty-eight days,[13] but in an Act passed after 1850 it means a calendar month unless the contrary intention appears.[14] So, where a taxpayer arrived in the United Kingdom at about 2 p.m. on June 2, 1947 and left at about 10 a.m. on the following December 2, it was held that (although he had been in the country for 182 days) he had not "actually resided in the United Kingdom . . . for a period equal in the whole to six months in any year of assessment": Income Tax Act 1918, Sched. D, Miscellaneous Rules, r. 2.[15]

A "week" may, according to context, be a calendar week beginning on Sunday and ending on Saturday (as in a Scottish case where publication of a notice was required for two successive weeks),[16] or any period of seven days (as in an Australian case where "week" in a Factories Act was held to mean a week of work).[17]

Where a statutory period runs "from" a named date "to" another, or the statute prescribes some period of days or weeks or months or years within which some act has to be done, although the computation of the period must in every case depend on the intention of Parliament as gathered from the statute,[18] generally the first day of the period will be excluded from the reckoning,[19] and consequently the last day will be included.

By section 14 of the Cruelty to Animals Act 1849, for example, a complaint under the Act had to be made "within one calendar month after the cause of complaint shall arise." It was held that an information preferred on June 30, 1891 alleging ill-treatment of a certain sheep on the preceding May 30 was laid in time.[20]

Similarly, where a motorist on January 25, 1951 received a notice of intended prosecution in respect of alleged careless driving on January 11, 1951, the Divisional Court held that the notice had been served within fourteen days of the commission of the offence as required by section 21 (*c*) of the Road Traffic Act 1930.[21]

[13] *Crooke* v. *M'Tavish* (1823) 1 Bing. 307.
[14] Interpretation Act 1889, s. 3.
[15] *Wilkie* v. *I.R.C.* [1952] Ch. 153.
[16] *Aberdeen (City)* v. *Watt* (1901) 3 F. 787.
[17] *Bishop* v. *Hooper* [1905] V.L.R. 220.
[18] See *Lester* v. *Garland* (1808) 15 Ves. 248, *per* Sir William Grant M.R.; *Re North, ex p. Hasluck* [1895] 2 Q.B. 264, *per* Lord Esher M.R.
[19] *Hardy* v. *Ryle* (1829) 9 B. & C. 603; *Williams* v. *Burgess* (1840) 12 Ad. & El. 635; *Marren* v. *Dawson Bentley & Co., Ltd.* [1961] 2 Q.B. 135, not following *Gelmini* v. *Moriggia* [1913] 2 K.B. 549; *Goldsmith's Co.* v. *West Metropolitan Ry. Co.* [1904] 1 K.B. 1. *Cf. Queen Anne's Bounty* v. *Tithe Redemption Commission* [1939] Ch. 155.
[20] *Radcliffe* v. *Bartholomew* [1892] 1 Q.B. 161.
[21] *Stewart* v. *Chapman* [1951] 2 K.B. 792.

A case in which this general rule was not applied was *Hare* v. *Gocher*,[22] where the question was whether an application made on October 29, 1960 was made "within the period of two months beginning with the commencement of this Act": Caravan Sites and Control of Development Act 1960, s. 14. The Act had received the royal assent on July 29, 1960, and by section 50 (4) came into force "at the expiration of a period of one month beginning with the date on which it is passed." Winn J. said (at p. 646) that the words of the Act were intended to avoid equivocation and to exclude the application of the general rule that the first day of a period should be excluded from a computation. "Any month of the calendar begins with the first of that month and does not include the first of the next month. In my judgment, therefore, the words have the effect that the Act came into operation immediately after midnight of August 28-29, 1960. From that same point of time there is to be calculated for the purpose of section 14 of the Act a period of two months beginning with August 29, 1960 and it appears to me, and I would hold, that such a period expired at midnight on October 28, 1960. Accordingly, hard as it may be for the defendant, he was 12 hours late when he delivered his application at noon on the following day, October 29, 1960. Statutes have to be applied according to their terms where the terms are clear."

Where something has to be done so many days or weeks "before" a particular date, another rule is applied, namely, that both the day on which the thing is done and the day by which it has to be done are excluded from the computation, so that there is a "clear" period of so many days or weeks intervening. So a provision that a notice should be given three days before a trial means that there must be three clear days between the giving of the notice and the trial.[23] And a provision that a notice to quit must be given "not less than four weeks before the date on which it is to take effect" (Rent Act 1957, s. 16) was held to invalidate a notice given on Friday, May 15, to expire on Friday, June 12, for the period between these dates, though four weeks, was not four clear weeks.[24] This last decision was, however, overruled on the ground that the statute should have been "construed in accordance with the usual understanding of landlord and tenant."[25]

[22] [1962] 2 Q.B. 641. *Cf. Hodgson* v. *Armstrong* [1967] 2 Q.B. 299; *Trow* v. *Ind Coope, Ltd.* [1967] 2 Q.B. 899; *Ladyman* v. *Wirral Estates, Ltd.* [1968] 2 All E.R. 197.
[23] *R.* v. *Long* [1960] 1 Q.B. 681.
[24] *Thompson* v. *Stimpson* [1961] 1 Q.B. 195.
[25] *Schnabel* v. *Allard* [1967] 1 Q.B. 627, *per* Lord Denning M.R. at p. 632.

In *Re Hector Whaling, Ltd.*,[26] Bennett J. had to consider the wording of section 117 (2) of the Companies Act 1929, which referred to a general meeting "of which not less than twenty-one days' notice . . . has been duly given." In giving judgment, he said (at p. 210): "In the interests of everybody it is of importance that there should be no doubt as to the meaning of a phrase in a section of almost daily use. I do not think there is any doubt about its meaning, and I propose to found my decision on *R.* v. *Turner*[27] and *Chambers* v. *Smith*[28] and to decide that the phrase means twenty-one clear days exclusive of the day of service and exclusive of the day on which the meeting is to be held."

Sometimes a statute requires an act to be done "forthwith" or "immediately." " 'Forthwith,' " Harman L.J. has said, "is not a precise time and, provided that no harm is done, 'forthwith' means any reasonable time thereafter. . . . It may involve action within days: it may not involve action for years."[29] Where notice of appeal from the order of a county court in bankruptcy was required to be given to the registrar of the court "forthwith" once the appeal had been entered, three days' delay was held to be fatal.[30] On the other hand, a requirement that a demolition order be made "forthwith," certain notices having first been served (Housing Act 1957, s. 17 (1)), was held to be satisfied even though the order was made half a year after the service of the notices: the circumstances of the case were that the local authority had nowhere to house the people living in the premises concerned, and the delay was in fact an advantage to the owner of the premises, because he "continued to collect rents from these horrible places for a year after he should not have been entitled to do so."[31]

It used to be laid down as a general rule that courts refused to take notice of "all fractions and divisions of a day, for the uncertainty, which is always the mother of confusion and contention":[32] so a person who was keeping a dog at noon without a licence would not escape conviction by procuring a licence at 1 p.m.[33] Moreover, in

[26] [1936] Ch. 208.
[27] [1910] 1 K.B. 346.
[28] (1843) 12 M. & W. 2.
[29] *Hillingdon London Borough Council* v. *Cutler* [1968] 1 Q.B. 124, at p. 135.
[30] *Re Muscovitch* [1939] Ch. 694. *Cf. ex p. Lamb Re Southam* (1881) 19 Ch.D. 169 (three hours before last post on day in question not availed of: letter not posted in time).
[31] *Hillingdon London Borough Council* v. *Cutler* [1968] 1 Q.B. 124, *per* Harman L.J. at p. 135. *Cf. R.* v. *Price* [1968] 1 W.L.R. 1853.
[32] *Clayton's Case* (1585) 5 Rep. 1a, p. 1b.
[33] *Campbell* v. *Strangeways* (1877) 3 C.P.D. 105.

civil cases, a judicial act is taken conclusively to have been done at the first moment of the day on which it was performed.[34]

Fractions of a day will, however, be noticed where it is necessary to decide which of two events first happened,[35] but where the titles of the Crown and of a subject accrue on the same day fractions will not be taken into account, the Crown's title being always preferred.[36]

Where it was necessary in a tax case to decide the length of time for which a taxpayer had resided in the United Kingdom, Donovan J. took account of the hours for which he had been resident on the days on which he entered and left the country.[37]

The word "daily" includes Sundays,[38] and for procedural purposes Sundays are included in computations of time, except when the period in question is seven days or less, in which case the Sunday is excluded.[39] Acts which are judicial (as opposed to purely ministerial) cannot be done on a Sunday, unless there is express statutory provision to the contrary.[40]

Where a statute refers to the age of any person, the common law rule usually applies that he attains that age at the first moment of the day preceding the anniversary of his birth.[41] But for some purposes the age is reached on the birthday itself.[42]

Distances

Distances were formerly measured by the nearest and most usual road or way,[43] and this is undoubtedly the popular manner of measuring them.[44] But "in the measurement of any distance for the purposes of any Act passed after" January 1, 1890 "that distance shall, unless the contrary intention appears, be measured in a straight line on a horizontal plane."[45] And this solution has, on grounds of

[34] *Wright* v. *Mills* (1859) 28 L.J.Ex. 223; *Kruhlak* v. *Kruhlak* (*No. 2*) [1958] 1 W.L.R 606.
[35] *Chick* v. *Smith* (1840) 8 Dowl. 337, *per* Patteson J.; *Tomlinson* v. *Bullock* (1879) 4 Q.B.D. 230.
[36] *Edwards* v. *R.* (1853) 9 Ex. 628.
[37] *Wilkie* v. *I.R.C.* [1952] Ch. 153. But see *R.* v. *Adams* [1969] 1 W.L.R. 106.
[38] *L.C.C.* v. *South Metropolitan Gas Co.* [1904] 1 Ch. 76.
[39] R.S.C. Ord. 3, r. 2 (5): likewise Saturdays, Bank Holidays, Christmas Day and Good Friday. Where a time prescribed by the rules for doing an act at an office of the Supreme Court expires on a Sunday, the act is done in time if done on the following day: R.S.C., Ord. 3, r. 4.
[40] *Re N.* (*infants*) [1967] Ch. 512.
[41] See *R.* v. *Clifford* [1939] 1 All E.R. 352.
[42] See, *e.g.*, National Insurance Act 1946, s. 78 (4) (*c*).
[43] 1 Hawkins' *Pleas of the Crown*, Chap. 12, sect. 15.
[44] *Lake* v. *Butler* (1855) 5 E. & B. 92, *per* Coleridge J.
[45] Interpretation Act 1889, s. 34.

convenience, been applied to older statutes as well.[46] For if we are to take "the nearest practicable road . . . does that mean a footway or a carriageway? Or, if a footway will not do, will a bridle path? In an aquatic country are we to take a boat? All these are questions of doubt avoided by the simple rule now adopted."[47]

[46] *R.* v. *Inhabitants of Saffron Walden* (1846) 9 Q.B. 76; *Lake* v. *Butler* (1855) 5 E. & B. 92.
[47] *Lake* v. *Butler*, *supra*, *per* Erle J. at p. 98.