

## Interpreting Taxing Statutes # 14L – Common Law

### Changes to common law must be express.

In accordance with the doctrine of Parliamentary sovereignty, Parliament may abolish, modify or displace any existing common law rule. But there remains a general presumption that Parliament does not intend to make changes to the common law.<sup>1</sup> It is clear that an Act of parliament may abolish, modify or displace existing common law rules, expressly or by implication.<sup>2</sup> In enacting a statute parliament must be presumed not to intend to change the common law.<sup>3</sup> It is a maxim in the common law that a statute made in the affirmative without any negative expressed or implied doth not take away the common law.<sup>4</sup> The more fundamental the relevant common law rule or principle the stronger the presumption against legislative interference is likely to be.<sup>5</sup> In *Leach v R* Lord Atkinson said: ‘the principle 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.’<sup>6</sup> Where some change is clearly contemplated by an Act but the presumption is not entirely rebutted, the courts will seek to minimise the degree of legislative interference, for example by preferring to treat an Act as regulating rather than replacing a common law rule. Parliament ‘can be presumed not to have altered the common law

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<sup>1</sup> Bennion 2019 p 665 Sec 25.6

<sup>2</sup> Bennion 2019 p 665

<sup>3</sup> Bennion 2019 p 665

<sup>4</sup> Bennion 2019 p 665

<sup>5</sup> Bennion 2019 p 666

<sup>6</sup> Bennion 2019 p 666

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farther than was necessary'.<sup>7</sup> The significance of the presumption against changes to the common law is less than it once was. The output of legislation in the past 200 years means that significant areas previously regulated by the common law are now the province of statute law. Changes in drafting practice also mean that there is perhaps a greater tendency in modern Acts to spell things out and to modify or abolish common law rules expressly.<sup>8</sup> Acts frequently contain provision expressly abolishing, modifying, displacing or codifying common law rules. The repeal of an enactment that abolishes a common law rule does not revive the rule itself, unless the contrary intention appears.<sup>9</sup> The doctrine of Parliamentary sovereignty means that Parliament has the power to make, unmake or change any law it chooses, whether written or unwritten. An Act may abolish or modify any aspect of the common law. It may displace the common law in relation to a limited class of matters. Or it may take over a previous common law rule or principle and replace it with an enacted version. These effects may come about by express provision or implication.<sup>10</sup> There are many examples of the abolition of common law rules by statute.<sup>11</sup> Perhaps even more common are statutory provisions modifying common law rules rather than abolishing them altogether.<sup>12</sup> The repeal of an enactment that abolishes a common law rule does not revive the common law rule, unless the contrary intention appears.<sup>13</sup> Sometime an Act will replace a common law rule by a

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<sup>7</sup> Bennion 2019 p 666

<sup>8</sup> Bennion 2019 p 666

<sup>9</sup> Bennion 2019 p 666 Sec 25.7

<sup>10</sup> Bennion 2019 p 667

<sup>11</sup> Bennion 2019 p 667

<sup>12</sup> Bennion 2019 p 667

<sup>13</sup> Bennion 2019 p 668

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corresponding rule in statutory form. This may be done without modification of the rule, in which case it amounts to straight codification. Alternatively, the newly created rule may, to a greater or lesser extent, differ from the common law rule that it replaces.<sup>14</sup>

**A common law rule that is inconsistent with the provisions of an Act may be impliedly abrogated or modified.**

A common law rule that is inconsistent with the provisions of an Act may be impliedly abrogated or modified. The principle relating to implied repeal, including the general presumption against implied repeal, apply equally to the abrogation of a common law rule by statute.<sup>15</sup> The principles relating to implied repeal apply equally to the abrogation of common law rules. So the basic test is whether a common law rule is so inconsistent with, or repugnant to, the provisions of the Act that the two cannot stand together. In the context of the common law, the presumption against implied abrogation is bound up with the presumption against legislative interference with the common law.<sup>16</sup> An Act may also impliedly modify the common law. For example, where an Act alters the basis on which a common law rule is founded it may be inferred that parliament intended to modify the rule.<sup>17</sup>

**An Act may impliedly displace the common law.**

An Act of Parliament may impliedly displace the common law. In considering whether an Act has this effect, the courts will consider the extent to which the legislative purpose would be

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<sup>14</sup> Bennion 2019 p 668

<sup>15</sup> Bennion 2019 p 668 Sec 25.8

<sup>16</sup> Bennion 2019 p 668-669

<sup>17</sup> Bennion 2019 p 669

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undermined by the common law continuing to operate alongside it.<sup>18</sup> Sometimes it is difficult to be ascertain whether an Act is intended to displace or modify the existing law or to sit alongside it. <sup>19</sup> There is nothing to prevent statutory and common law rules co-existing in the same area. For example, the enactment of a statutory duty does not extinguish a corresponding common law duty, unless an intention to do so appears. <sup>20</sup> It is of course open to the drafter of an Act to spell out the relationship with the common law expressly. Sometimes an Act will expressly save aspects of the common law, for example by providing that other causes of action are not affected. But more often than not an Act will remain silent on the issue. In some cases this is a deliberate decision. The view may be taken that the legislative intent is abundantly clear so that express provision is unnecessary. Or it may be impossible to predict, or to address, all of the possible ways in which a statute might potentially interact with the common law. In other cases silence may simply be the result of oversight or a mistaken understanding of the common law. Whatever the cause, the interpreter is left to grapple with the consequences.<sup>21</sup> The question whether an Act displaces the common law is ultimately one of construction, having regard to all relevant interpretative criteria (including the presumption against changes to the common law. <sup>22</sup> One test that the courts have used is to ask whether the existence of a common law rule or principle in relation to a particular matter would cut across the legislative scheme or undermine its legislative purpose. So, for example, where it is clear from a statute that the intention is that

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<sup>18</sup> Bennion 2019 p 669 Sec 25.9

<sup>19</sup> Bennion 2019 p 669

<sup>20</sup> Bennion 2019 p 669

<sup>21</sup> Bennion 2019 p 670

<sup>22</sup> Bennion 2019 p 670

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a creditor should not be entitled to recover money advanced this may, as a matter of construction, implicitly exclude common law remedies such as restitution: the courts will not override or outflank a statutory provision by substituting a common law remedy.<sup>^23</sup>

### **Implied displacement by statutory authority to act.**

No liability under the law of tort will arise from the carrying out of an activity in accordance with statutory authority (although this does not necessarily preclude liability for manners or circumstances in which it is exercised).<sup>^24</sup> Where an Act authorizes the carrying out of an activity that would otherwise constitute an actionable tort, it is clear that the common law is displaced so far as a person is carrying out the activity in accordance with that authority.<sup>^25</sup> In *R v Pease* the plaintiff suffered damage when his horse, on a road passing alongside the track of the Stockton and Darlington Railway, was frightened by the noise of the steam locomotive. It was held that in giving the railway company authority to build and operate its undertaking Parliament must be taken to have authorised the likely consequences.<sup>^26</sup>

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Where legislation forms a comprehensive statutory scheme for dealing with a matter this may be taken as an indication that there

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<sup>23</sup> Bennion 2019 p 670

<sup>24</sup> Bennion 2019 p 671 Sec 25.10

<sup>25</sup> Bennion 2019 p 671

<sup>26</sup> Bennion 2019 p 671

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is no intention for existing rights or remedies to apply in the same circumstances.<sup>27</sup> Where Parliament, by legislating comprehensively in an area, has demonstrated an intention that the area shall in future be dealt with entirely by the statutory provision, the common law will be treated by implication as displaced. The difficulty is that it is not always clear whether an Act is intended to be a comprehensive statutory scheme or to coexist with common law rights or remedies. The question is whether in all the circumstances parliament must have intended the common law rights and remedies to coexist with the statutory regime. In determining this question the courts will have regard to the purpose of the legislation and other relevant interpretative criteria as well as the practical implication of two coexisting systems.<sup>28</sup>

**Where a statute confers power on the President to do something, any common law or prerogative powers it had to do that thing are displaced.**

Where a statute confers power on the President to do something, any common law or prerogative powers it had to do that thing are displaced. But an Act can expressly preserve the prerogative by including appropriate savings.<sup>29</sup> Where a statute confers power on the Crown to do something within a particular field, any prerogative or common law power of the Crown to Act within that field is ousted.<sup>30</sup> Although prerogative powers are strictly speaking limited to those powers which are unique to the Crown, the term is sometimes also used in the authorities in this area to include the residual or common law powers of the Crown to do

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<sup>27</sup> Bennion 2019 p 672 Sec 25.11

<sup>28</sup> Bennion 2019 p 672

<sup>29</sup> Bennion 2019 p 673 Sec 25.12

<sup>30</sup> Bennion 2019 p 673

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anything that an individual may do. These latter powers are also often described by reference to the ‘Ram doctrine’, after advice given in 1945 by Sir Granville Ram, First Parliamentary Counsel, on the scope of Ministerial power.<sup>31</sup> Of course, Parliament can always indicate that it intends the prerogative to remain untouched.<sup>32</sup>

**There is no absolute bar to invoking the doctrine of estoppel to modify or prevent the normal application of a statute.**

There is no absolute bar to invoking the doctrine of estoppel to modify or prevent the normal application of a statute. Whether estoppel can be relied on will depend on the nature of the enactment, the purpose of the provision and the social policy behind it. An estoppel will not be permitted to undermine the legislative purpose. Similar considerations apply to abandonment.<sup>33</sup> While it has sometime been said that a party cannot set up an estoppels in face of a statute, there is no absolute rule to that effect. A clear public policy underlying a statute, such as the need to protect vulnerable persons dealing with moneylenders or landlords, may prevent an estoppels arising, but that does not prevent an estoppels in other circumstances from modifying or preventing the normal application of a statute.<sup>34</sup> ‘The general principle that a party cannot rely on an estoppels in the face of a statute depends upon the nature of the enactment, the purpose of the provision and the social policy behind it.’<sup>35</sup> An estoppels cannot be raised to prevent the exercise of a statutory discretion or excuse the non-performance of a statutory

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<sup>31</sup> Bennion 2019 p 673

<sup>32</sup> Bennion 2019 p 674

<sup>33</sup> Bennion 2019 p 675 Sec 25.13

<sup>34</sup> Bennion 2019 p 675

<sup>35</sup> Bennion 2019 p 675

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 duty. A statutory authority ‘cannot by estoppels surrender its discretions’. Similarly, the doctrine of estoppels may not be invoked to render valid a transaction which the legislature has, on grounds of public policy, enacted to be invalid.<sup>36</sup> The legal concepts of abandonment and waiver are closely allied to estoppels and similar considerations apply.<sup>37</sup>

**The statute has the same effect on the customary rules as it has on the common law rules.**

The statute has the same effect on the customary rules as it has on the common law rules.<sup>38</sup> Within the area where it applies, custom corresponds to common law. If an unwritten rule is universal, it is common law; if confined to one area or class it is custom. What is said above as to the effect of statute on common law rules applies equally to its effect on customary rules.<sup>39</sup> In earlier times it was not unusual for customary rights such as the right to take tolls to be superseded by local Acts. The effect was described by Lord Davey in *New Windsor Corpn v Taylor*:<sup>40</sup> ‘My Lords, I hold it to be an indisputable proposition of law that where an Act of Parliament has according to its true construction, to use the language of Little Dale J., “embraced and confirmed” a right which had previously existed by custom or prescription, that right becomes henceforward a statutory right, and that the lower title by custom or prescription is merged in and extinguished by the higher title derived from the Act of Parliament.’<sup>41</sup> The usage of a particular district cannot vary

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<sup>36</sup> Bennion 2019 p 676

<sup>37</sup> Bennion 2019 p 676

<sup>38</sup> Bennion 2019 p 677 Sec 25.14

<sup>39</sup> Bennion 2019 p 677

<sup>40</sup> Bennion 2019 p 677

<sup>41</sup> Bennion 2019 p 677



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general law. <sup>^42</sup> In the same way an Act overrides rules derived from a royal charter or franchise, or prescription. <sup>^43</sup>

**When an Act proceeds on the basis of a particular view of a common law rule it may influence the courts in determining the (purely common law) content of the rule.**

When an Act proceeds on the basis of a particular view of a common law rule it may influence the courts in determining the (purely common law) content of the rule.<sup>^44</sup> Where legislation is drafted on the basis of a particular assumption as to the common law, the courts will take this into account. This practice is not without difficulty. As discussed in Code s 26.8, there is a general principle of legal policy that the law should not be subject to casual change but only to change by a measured and considered process. The use of a statutory provision to inform the content of a common law rule seems to run counter to this principle: the assumptions upon which a statutory proposition is based are less susceptible to scrutiny than the statutory proposition itself. Moreover ‘it is axiomatic the assumptions of Parliament are not the same as its enactments’. It is probably fair to say that the courts are more likely to regard a legislative proposition as providing support for a particular view of the common law than they are to rely solely on assumptions made in legislation.<sup>^45</sup>

**An Act may have the effect of precluding the continued development of the common law in an area where the proposed development would be inconsistent with a statutory provision.**

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<sup>42</sup> Bennion 2019 p 677

<sup>43</sup> Bennion 2019 p 677

<sup>44</sup> Bennion 2019 p 678 Sec 25.15

<sup>45</sup> Bennion 2019 p 678

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An Act may have the effect of precluding the continued development of the common law in an area where the proposed development would be inconsistent with a statutory provision.<sup>46</sup> Where an area of law is heavily regulated by statute this has sometimes been regarded by the courts as precluding the future development of the common law.<sup>47</sup> It is for the courts to continue to develop the common law as they think appropriate, unless to do so would be inconsistent with statute.<sup>48</sup>

**The courts will sometimes develop the common law by analogy with statute.**

The courts will sometimes develop the common law by analogy with statute.<sup>49</sup> Sir Rupert Cross suggested that ‘in England, a legislative innovation is received fully into the body of the law to be reasoned from by analogy in the same way as any other rule of law’. Many examples may be found of cases where the courts have developed the common law by analogy with statute in much the same way as the reason by analogy with earlier case law. However, the courts have not always shown the same appetite to rely on statutory analogies.<sup>50</sup>

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<sup>46</sup> Bennion 2019 p 679 Sec 25.16

<sup>47</sup> Bennion 2019 p 679

<sup>48</sup> Bennion 2019 p 679

<sup>49</sup> Bennion 2019 p 680 Sec 25.17

<sup>50</sup> Bennion 2019 p 680