Statute Law

FRANCIS BENNION, MA (OXON)
Barrister, Research Associate of Oxford Centre for Socio-Legal Studies, member of the Law Faculty of Oxford University, former UK Parliamentary Counsel

Note

For the convenience of readers, this article is arranged in conformity with the Code set out in the author's book *Statutory Interpretation* (Butterworths 1984), a reference to the relevant section of the Code being given after each heading.

Statutes as specialties (Code s 8)

A right conferred by statute is a form of specialty, and therefore falls within the Limitation Act 1980, s8 (which in general provides for a limitation period of 12 years for specialties): *Collin v Duke of Westminster* [1985] 1 All ER 463.

Ignorantia juris neminem excusat (Code s 9)

A person is not excluded from the operation of the principle that ignorance of law affords no excuse for contravention by the fact that the operative ignorance is that of his professional adviser rather than himself: *Turner & Goudy (a firm) v McConnell* [1985] 2 All ER 34 at 36.

Mandatory and directory requirements (Code s 10)

The same section of an Act may contain both mandatory and directory requirements. Thus where a notice is required to be served at a particular time this may be treated as mandatory so far as concerns the need to serve the notice at *some* time, but directory as regards the precise time. In *Hughes (Inspector of Taxes) v Viner* [1985] 3 All ER 40 Walton J considered the requirement imposed by the Taxes Management Act 1970, s 56(5):

> 'At or before the time when he transmits the case to the High Court, the party requiring it shall send notice in writing of the fact that the case has been stated on his application, together with a copy of the case, to the other party.'

He held that, while the duty to give notice is mandatory, the period requirement is merely directory. Accordingly a notice given six days *after* transmission of the case to the High Court sufficed.

It seems that the headnote to the report of this case is inaccurate in stating that s 56(5) is not a mandatory provision. While the statement appears to be supported by passages in the judgment of Walton J, a close examination of the judgment indicates an acceptance by the learned judge of the fact that it is mandatory to give notice *at some time.* Thus he says—

> 'It is quite clear that sub-s (5) is intended to ensure that the respondent should have adequate notice of the appeal before it is heard by the High Court, but that that notice should be given him at any particular time, save that obviously it must not be too long delayed, does not seem in my view in the slightest necessary' ([1985] 3 All ER 40 at 47).

Acting 'in the execution of an Act (Code s 17)

A constable or other functionary is not acting in the execution of a particular Act where, in relation to the Act, he carries out duties conferred not by the Act but by general powers. This principle is established by *R v Clarke* [1985] 2 All ER 777, where a suspected illegal immigrant who responded untruthfully to questioning by a constable was held not guilty under the Immigration Act 1971, S26(i)(c) of making false statements to a person lawfully acting in the execution of the Act.

Appeal from exercise of statutory discretion (Code s 23)

In *G v G* [1985] 2 All ER 225 the House of Lords stressed the importance of preserving the distinction, admittedly fine, between the grounds on which a court will reverse the exercise of a *judicial* discretion and those, slightly more extreme, on which it will be prepared to reverse the exercise of an *administrative* discretion. The former will be done where the decision is clearly wrong; the latter only in accordance with the more stringent test imposed by the *Wednesbury* principle. (See *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, discussed in Code S24.) This ruling reflects the fact that in relation to judicial discretion an appellate court is supervising one of its own, whereas in relation to administrative discretion the court is intruding on a different constitutional sphere.

Court's inherent jurisdiction (Code S32)

Where an Act confers on the court a jurisdiction which corresponds to its inherent jurisdiction the latter is removed, but only *pro tanto*. It can still be used to fill a gap in the Act or avoid injustice. See *Symbol Park Lane Ltd v Steggles Palmer (a firm)* [1985] 2 All ER 167 (effect of Solicitors Act 1970, s 70 on court's inherent jurisdiction to tax solicitors' costs). Compare the effect of statutory enactments on *the parens patriae* or wardship jurisdiction of the courts (see the note p 264 below related to Code s 334).

Royal prerogative (Code s 32)

Where a right equivalent to a franchise, grant, or other prerogative right is expressed to be conferred by statute, it is presumed that Parliament intended the like attributes to accompany it. See *Halton BC v Cawley* [1985] 1 All ER 278 (statutory market held intended to possess the same legal attributes as a franchise market).

Henry VIII clauses (Code s 50)

In *Lees v Secretary of State for Social Services* [1985] 2 All ER 203 at 205 Lord

Scarman described as 'startling' the power conferred by the Social Security Act 1975, s 37A to limit the scope of the Act by delegated legislation.

Doctrine of ultra vires (Code s 58)

Where an item of delegated legislation is ambiguous, one possible meaning being ultra vires and the other intra vires, preference should be given to the latter construction: *R v O'Brien* [1985] 1 All ER 971 at 975.

Selective comminution (Code s 74)

The growing judicial use of the technique of selective comminution, or the splitting up of a statutory provision into its constituent phrases for purposes of analysis and reference, is illustrated by *R v Anderson* [1985] 2 All ER 961 at 964. Reciting verbatim the definition of criminal conspiracy laid down by the Criminal Law Act 1977, s 1(1), Lord Bridge of Harwich said:

> 'For purposes of analysis it is perhaps convenient to isolate the three clauses each of which must be taken as indicating an essential ingredient of the offence as follows: (1) "if a person agrees with any other person or persons that a course of conduct shall be pursued" (2) "which will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement" (3) "if the agreement is carried out in accordance with their intentions".'

Lord Bridge then proceeded to analyse the legal meaning of S I (I) by reference to each of these three clauses in turn.

Act's mistaken view of the law (Code s 90)

In two cases under the Magistrates' Courts Act 1980 the court had to 'correct' the draftsman's erroneous assumption that in summary prosecutions there would always be a trial (overlooking the possibility of a guilty plea). In each case the court held that the enactment must be read as modified so as to limit its apparently universal application to cases where the plea was not guilty.

The first of these cases was *Chief Constable of West Midlands Police v Gillard* ['98s] 3 AH ER 634. This concerned the power conferred on the court by the Magistrates' Courts Act 1980, 525(2) to discontinue a summary trial 'at any time before the conclusion of the evidence for the prosecution'. In the case of a guilty plea there would strictly be no evidence adduced by the prosecution. The House of Lords, declining to treat as falling within these words facts recited to the court on the question of sentence, or evidence given by the prosecution in rebuttal, held that once a guilty plea had been entered the summary trial could not be discontinued under s 25(2).

The second case was *R v Birmingham Justices, ex p Hodgson* [1985] 2 All ER 193, where the court had to construe the requirement imposed on magistrates by s 20 of the 1980 Act to inform the accused that he may elect to be tried either summarily or by a jury. This can have no application in the case of a guilty plea.

Finding of implications (legitimacy of) (Code s 109)

It is always proper to find some implication where the express language of the enactment is insufficiently precise to determine the point at issue, though the problem will frequently be to decide which of various competing implications is the true one. Thus in *Southern Water Authority v Carey* [1985] 2 All ER 1077 it was necessary to extract the correct implication from the phrase in the Law Reform (Married Women and Tortfeasors) Act 1935, s6(i)(c) enabling a tortfeasor to claim contribution from 'any other tortfeasor who... would *if sued* have been liable'. The case concerned a party who had in fact been sued, but had in that action been held absolved by a supervening contractual term which would not have saved him if he had been sued in tort before the contract was made. Did the statutory hypothesis exclude the case of a tortfeasor who had in fact been sued? What was the position where there would be liability if the tortfeasor were sued at one point in time but not if he were sued at another?

Basing himself on *George Wimpey & Co Ltd v British Overseas Airways Corpn* [1955] AC 169, Judge David Smout QC held that the correct implication was that a tortfeasor who has been sued and found not liable is not within s 6(1) (c) if he would likewise have been found not liable if sued either when the tortfeasor claiming contribution was sued or when the claim for contribution was made.

Finding of implications (statutory analogy) (Code s no)

The court followed the analogy of a rule laid down by statute in finding an implication in *Lawrence v Lawrence* [1985] 1 All ER 506 at 512 (affd [1985] 2 All ER 733, CA). In preferring the doctrine that the law is to be applied of the country with which a marriage has the most real and substantial connection, Anthony Lincoln J remarked that this was an extension by analogy of the Recognition of Divorces and Legal Separations Act 1971, s 7.

Dynamic processing by the court (stare decisis) (Code s in)

An example of the way courts lay down sub-rules by filling in the detail of legislation is furnished by *Re Unit 2 Windows Ltd* [1985] 3 All ER 647. In providing that where there are cross-debts between a bankrupt and his creditor each shall be set off against the other, the Bankruptcy Act 1914, s 31 fails to say what is to happen where some debts owed to the creditor by the bankrupt are preferential and some are not. *Held* The court is required to decide what accounting method should be applied in such cases, and would order the amount owed by the creditor to be set off rateably against the preferential and non-preferential debts owed to him by the bankrupt.

Rules of construction: rules laid down by statute (Code s 125)

The term 'person'

Where the intention is to confine the statutory reference to natural persons, the drafting practice is to use the term individual'. Even this term however will include a corporation where the context so allows: *Societe United Docks*

v Government of Mauritius [1985] 1 All ER 864, per Lord Templeman at 871. Under modern British drafting practice the context is unlikely so to allow.

Number

The rule laid down by the Interpretation Act 1978, s 6 that plural references include the singular is frequently overlooked in practice. This is illustrated by *Steam v Twitchell* [1985] 1 All ER 631. Here a single letter was, probably erroneously, held not to be 'correspondence' within the meaning of the Law of Property Act 1925, s46. The judgment contained no reference to s6.

Land

As to contrary intention disapplying the definition of 'land' in the Interpretation Act 1978, s 5 and Sch 1 see *Payne (Inspector of Taxes) v Barratt Developments (Luton) Ltd* [1985] 1 All ER 257.

Powers and duties

An example of how the Interpretation Act 1978, s 12 (powers and duties deemed to be exercisable from time to time) is overlooked in practice arose in *Wilson v Colchester Justices* [1985] 2 All ER 97 (see note pp 267, 268 below related to Code s 389).

Service by post

Under the Interpretation Act 1978, s7 service by post is deemed to be effected, unless the contrary is proved, at the time at which the letter would be delivered in the ordinary course of post. A practice direction states that in the case of first class mail this time is to be taken as the second working day after posting, and in the case of second class mail the fourth working day after posting. See *Practice Direction* [1985] 1 All ER 889. Although confined in its strict application, the direction is likely to be accepted as a general guide.

The nature of legal policy (Code s 126)

The integrity of legal doctrines should be safeguarded when courts construe legislation. Thus in *Mutual Shipping Corpn of New York v Bayshore Shipping Co of Monrovia* [1985] 1 All ER 520 at 532 it was held that the wide discretion given by the literal meaning of the Arbitration Act 1950, s 22 was subject to severe implied restrictions so as to preserve the finality of arbitration awards.

Construction in bonam partem (Code s 127)

In *Hipperson v Electoral Registration Officer for the District of Newbury* [1985] 2 All ER 456 it was held that a residential qualification for the franchise did not by implication require the residence to be lawful, though it did require that it should not be in breach of a court order.

The principle that law should be coherent and self-consistent (Code s 132)

Where a literal construction of the phrase 'a matter relating to trial on indictment' in the Supreme Court Act 1981, 329(3) would have had the result that no appeal lay from certain Crown Court decisions, the House of Lords avoided this by applying a narrower meaning: *Smalley v Crown Court at Warwick* [1985] 1 All ER 769.

Respect for the common law (Code s 133)

Courts prefer to treat an Act as regulating rather than replacing a common law rule: *Lee v Walker* [1985] 1 All ER 781 (power to suspend committal orders in contempt proceedings).

Alteration of the common law is presumed not to be intended unless this is made clear: *Basildon DC v J E Lesser (Properties) Ltd* [1985] 1 All ER 20, per Judge John Newey QC at 30 ('it would be surprising if Parliament when limiting the effect of contributory negligence in tort [in the Law Reform (Contributory Negligence) Act 1945] introduced it into contract').

Consequential construction (Code s 140)

Judges are particularly ready to apply a strained construction on consequential grounds where the work of the courts is involved. Thus in *R v Stratford-on-Avon DC, ex p Jackson* [1985] 3 All ER 769 the Court of Appeal held that, although the literal meaning of RSC Ord 53, r4 is to lay down a time-limit for making substantive applications for judicial review, it should be construed instead as referring to applications for *leave* to make such substantative applications. This reading confirmed the existing practice of the courts, which is 'the only sensible course from a practical point of view' (P772).

Corresponding date rule (Code s 144)

Use in an enactment of a concept, eg relating to age, time or status, attracts general legal rules applying to that concept. Thus the statement in the Landlord and Tenant Act 1954, 829(3) that no application under S24(i) of the Act shall be entertained 'unless it is made not less than two. .. months after the giving of the landlord's notice' under S25 attracts the 'corresponding date rule'. Under this, if the relevant period is a specified number of months after the relevant event the period ends on the corresponding day of the subsequent month: see *Riley (EJ) Investments Ltd v Eurostile Holdings Ltd* [1985] 3 All ER 181.

Construction as a whole (Code s 149)

An Act or other instrument must be read as a whole. Thus in *South West Water Authority v Rumble's* [1985] 1 All ER 513 at 516 Lord Scarman said of paras (a) and (b) of the Water Act 1973, S30: 'It is not... possible to

determine their true meaning save in the context of the legislation read as a whole'.

It follows that a general term used in one provision of an Act may by implication be cut down by another provision elsewhere in the Act: *Cooper v Motor Insurer's Bureau* [1985] 1 All ER 449 ('any person' in the Road Traffic Act 1972, s 145(3)(a) cut down by an implication arising from s 143(1)).

In *R v Millward* [1985] 1 All ER 859 the Court of Appeal rejected the appellant's argument that the Perjury Act 1916, s 1(1) applies only where the witness believes his false statement to be material, because this reading would render s 1(6) of the Act meaningless.

Two enactments intended to have the same meaning may use different words where the draftsman of the later provision was unaware of the former. This is particularly likely with tax enactments. Thus the Income and Corporation Taxes Act 1970, ss 428 and 455, reproducing provisions of the Finance Act 1938, achieve results similar to those of the Finance Act 1973, s 16, though by a different form of words. On this Lord Templeman said in *Carver v Duncan (Inspector of Taxes)* [1985] 2 All ER 645 at 656:

> '... the Income Tax Acts are a vast patchwork begun in the nineteenth century and doomed never to be completed. It is useless to speculate why the draftsman in 1973 used words different from those employed by the draftsman in 1938. Oversight, or some difficulty, real or imagined, may have played a part.'

Interpretation of broad terms (Code s 150)

Of the term 'pending land action' as defined in the Land Charges Act 1972, s 17(1), Scott J said 'those words are very broad and cannot be given their full literal meaning': *Regan & Blackburn Ltd v Rogers* [1985] 2 All ER 180 at 182.

Strict and liberal construction (Code s 154)

It is said to be a principle of statutory interpretation that 'a domestic statute designed to give effect to an international convention should, in general, be given a broad and liberal construction': *The Antonis P Lemos* [1985] 1 All ER 695, per Lord Brandon at 703.

This overlooks the need to weigh other relevant factors in addition to the desirability (explained in Code s 134) of conforming to treaty obligations. Thus in *Re Asbestos Insurance Coverage Cases* [1985] 1 All ER 716 the House of Lords gave a *strict* construction to the Evidence (Proceedings in Other Jurisdictions) Act 1975, s 2(4) in order to preclude 'fishing' expeditions.

Generalia specialibus non derogant (Code s 181)

In *Parker v Camden London BC* [1985] 1 All ER 141 it was held that the general power to appoint a receiver conferred by the Supreme Court Act 1981, s 37 is not exercisable so as to displace specific local authority management powers under the Housing Act 1957, s 111.

Retrospective operation: general presumption against (Code s 190)

European Court

The principle laid down by the European Convention on Human Rights, Art 7 that no one should be punished by an *ex post facto* law is common to all the legal orders of the member states. It is among the general principles of law whose observance is ensured by the European Court: *R v Kirk* [1985] 1 All ER 453 at 462.

Retrospective operation: delegated powers (Code s 193)

Where an enactment gives power to make an executive instrument having retrospective effect, such an instrument does not bind persons other than those to whom it directly applies. So for example the power under the Matrimonial Causes Act 1973, s 31(1) to vary retrospectively the beneficiary of a maintenance order does not mean that income tax paid in past years by the former beneficiary is to be refunded. When this claim was made in *Morley-Clark v Jones (Inspector of Taxes)* [1985] 3 All ER 193 the Court of Appeal disallowed it, Oliver LJ saying:

> 'A retrospective order cannot, any more than a retrospective agreement, undo the past and convert something that has already happened, and to which legal consequences have already attached, into something else which never did happen' ([1985] 3 All ER 193 at 199).

Application of Act: foreigners outside the territory (Code s 223)

Trustees

If it is clear that Parliament intended foreign trust property to bear UK tax (for example because the beneficiary is domiciled in the UK) it will be presumed that the intention extended to machinery provisions necessary for collecting the tax, notwithstanding that the trustees who are required to comply with them are non-resident: *Re Clore (deed) (No 3)* [1985] 2 All ER 819 (duty to deliver capital transfer tax accounts imposed on trustees by Finance Act 1975, s 19(2) and Sch 4, para 2(1) applies to non-resident trustees).

Application of Act: deemed location of an omission (Code s 226)

Where an act might effectively have been done (but with different legal results) in either of two places, an omission to do the act is treated as done in each of the places. In *Bell v Secretary of State for Defence* [1985] 3 All ER 661 an army doctor might effectively have supplied case notes to a civilian hospital while the patient (a soldier) was still on army premises or after he had arrived at the hospital. The omission to supply them therefore occurred at both places, so that for the purposes of Crown liability in tort under the Crown Proceedings Act 1947, s 10(1)(a) it could be said to have occurred off army premises.

Pre-enacting history: consolidation Acts (Code S232)

Where a consolidation Act changes the original wording, the court must construe the actual wording of the consolidation Act as it stands. It is therefore not appropriate, just because the long title suggests that the Act is a straight consolidation, to treat it as if it had instead reproduced the original wording: *Pocock v Steel* [1985] 1 All ER 434, per Dillon LJ at 437. This does not mean that a change in wording in a straight consolidation should be treated as intended to change the meaning, since in principle such a change should not occur.

Pre-enacting history: codifying Acts (Code s 233)

Codification consists in the useful reduction of scattered enactments and judgments on a particular topic to coherent expression within a single formulation. It may therefore condense into one Act rules both of common law and statute. The codifying Act may also embrace custom, prerogative, and practice. In *Mutual Shipping Corpn of New York v Bayshore Shipping Co of Monrovia* [1985] 1 All ER 520 at 532 Sir Roger Ormrod remarked that codification 'converts a practice into a discretion and subtly changes its complexion.'

Enacting history: international treaties (Code s 242)

The court is entitled, in construing a treaty and any enactment based on it, to make cautious reference to the preparatory work of the treaty: *Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co* [1985] 1 All ER 129.

Enacting history: to ascertain the mischief (Code s 248)

In *R v Allen* [1985] 2 All ER 641 at 644 Lord Hailsham of St Marylebone LC said that the present practice is for courts to look at committee reports 'for the purpose of defining the mischief of the Act but not to construe it'.

Post-enacting history: later Acts (Code s 255)

Where Parliament passes an Act which on one (but not the other) of two disputed views of the existing law is unnecessary, this suggests that the other view is correct. Thus in *Murphy v Duke* [1985] 2 All ER 274 it was held that since the meaning of the House to House Collections Act 1939 which was applied in *Emanuel v Smith* [1968] 2 All ER 529 would render the Trading Representations (Disabled Persons) Act 1958 unnecessary the latter case must be held to have been decided per *incuriam*.

Operative components of Act: the proviso (Code s 268)

As Mervyn Davies J said in *Re Memco Engineering Ltd* [1985] 3 All ER 267 at 274, 'a proviso is usually construed as operating to qualify that which precedes it'.

The mischief and its remedy: the legal mischief (Code s 303)

One type of legal mischief is a drafting defect in an enactment. The Water Act 1973 introduced a new system, to be financed by water rates, for the management of the nation's water resources. The Act was silent on the important question of who was to be liable to pay these rates (see *Daymond v South West Water Authority* [1976] AC 609). This 'mischief of omission', as Lord Scarman called it in *South West Water Authority v Rumble's* [1985] 1 All ER 513 at 516, was remedied by the Water Charges Act 1976, s 2.

Construction against 'absurdity': avoiding an inconvenient result (Code s 322)

A construction requiring a litigant to pursue separate and distinct courses of appeal against various decisions arrived at in the same proceedings will if possible be avoided: *Allen v Allen* [1985] 1 All ER 93 (appeals against refusal of magistrates (a) to vary maintenance order and (b) to remit arrears).

Construction against 'absurdity': avoiding an anomalous or illogical result (Code s 323)

Remedy not available in like cases

The Limitation Act 1980, s 7 provides that an action to enforce an arbitration award shall not be brought after the expiration of six years from the date on which the cause of action accrued. Where the arbitration concerns a breach of contract, does this mean the date of the breach or the date of the award? In *Argomet Motoimport Ltd v Maulden Engineering Co (Beds) Ltd* [1985] 2 All ER 436 the latter meaning was preferred, since otherwise an arbitration award would from the start be time-barred if (as might well happen) it were made more than six years after the breach to which it related.

Where anomaly intended

If an anomaly has remained on the statute book for a lengthy period, during which Parliament has had opportunities to rectify it but has neglected to do so, this may indicate that the anomaly is intended. Thus where an anomalous distinction between the relative powers of the High Court and the county court in relation to relief against forfeiture had existed for well over a century, the Court of Appeal declined to place any interpretative weight on the fact that it was anomalous: *Di Palma v Victoria Square Property Co L&/* [1985] 2 All ER 676.

Construction against 'absurdity': avoiding an artificial result (Code S325)

An artificial result is unlikely to represent Parliament's intention. Thus when in *R v Cash* [1985] 2 All ER 128 it was argued that the Theft Act 1968, S22(i) required the prosecution to prove that an alleged handling was not done in the course of stealing, the Court of Appeal rejected the argument on

the ground that it would require the court to engage in artificial reasoning. Lord Lane CJ said (p 123): 'We do not believe that this tortuous process, leading in some cases to such an artificial verdict, could have been the intention of Parliament'.

Construction against evasion: what must not be done directly should not be done indirectly (Code s 329)

The Rent Act 1977 prohibits, with some exceptions, the eviction of a tenant. It also prohibits the unrestricted raising of his rent. These prohibitions cannot be evaded by inducing a person who enters into what is in substance a tenancy agreement to accept the inclusion of a term stating that the agreement is a mere licence. This attempt by the landlord to achieve indirectly the common law right to evict or raise the rent came before the House of Lords in *Street v Mountjord* [1985] 2 All ER 289. *Held* The agreement was a tenancy, and the Rent Act 1977 applied. Lord Templeman said (P299):

> 'Although the Rent Acts must not be allowed to alter or influence the construction of an agreement, the court should, in my opinion, be astute to detect and frustrate sham devices and artificial transactions whose only object is to disguise the grant of a tenancy and evade the Rent Acts.'

Implied application of rules of constitutional law (Code s 334)

Parens patriae doctrine

Despite statutory interventions, the wardship jurisdiction of the Crown, exercised through the High Court, remains available to fill any lacuna in child welfare legislation: *Re M (a minor)* [1985] 1 All ER 745. Compare *W v Hertfordshire CC* [1985] 2 All ER 301 (discussed in note p268 below related to Code s393).

This is in line with the presumption that Parliament intends to safeguard the welfare of minors: *Rogers v Essex CC* [1985] 2 All ER 39 ('nearest available route' in Education Act 1944, 539(5) does not include a route which at times might be unsafe for a child to use).

Implied application of decision-making rules of natural justice, etc (Code s335)

Duty to give reasons

Save in exceptional cases, Parliament when conferring a statutory discretion on a judge is presumed to intend that he shall give reasons for his decision: *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119, per Griffiths LJ at 122. One exceptional case concerns the awarding of costs, where reasons need not be given unless the award is unusual (ibid). Another is where a judge refuses leave to appeal to the Court of Appeal, having refused leave to appeal from an arbitrator: *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1984] 3 All ER 229, per Lord Diplock at 237.

Where a decision-maker is required to give reasons, these must be 'proper, adequate and intelligible': *Great Portland Estates pic v Westminster City Council* [1984] 3 All ER 744, per Lord Scarman at 752. Another test, to the like effect, was given by Donaldson P in *Alexander Machinery (Dudley) Ltd v Crabtree* [1974] ICR 120, 122: 'The overriding test must always be: is the tribunal providing the parties with materials which will enable them to know that the tribunal has made *no error of law* in reaching its finding of fact?' (emphasis added). This latter dictum was cited in *R v Mental Health Review Tribunal, ex p Clatworthy* [1985] 3 All ER 699 at 703.

Implied application of rules of criminal law (Code s 340)

Mens rea

A distinction is drawn between the mental element deemed to be required in statutory offences of a truly criminal character, where the forbidden act is regarded as *malum in se,* and that needed for regulatory offences which are quasi-criminal and concern mere *malum prohibitum.* The latter are often treated as intended to be absolute offences, not requiring mens rea.

This is particularly so where the enactment in question deals with an issue of acute social concern, such as public safety. Even here, however, the presumption that mens rea is required stands unless it is shown that strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act: *Gammon (Hong Kong) Ltd v A-G of Hong Kong* [1984] 2 All ER 503, per Lord Scarman at 508.

Thus in *Pharmaceutical Society of Great Britain v Storkwain Ltd* [1985] 3 All ER 4 the Medicines Act 1968, s58(2) (which limits the supply of certain medicinal products to cases where there is a prescription given by an appropriate practitioner) was held to create a regulatory offence where mens rea was not required.

Implied application of rules of jurisdiction, evidence and procedure (Code s 341)

Ouster clauses

In *R v Registrar of Companies, ex p Esal Commodities Ltd (in liq)* [1985] 2 All ER 79 it was held that the statement in the Companies Act 1948, s 98(2) (see now the Companies Act 1985, s401(2)) that the registrar's certificate 'shall be conclusive evidence' applied only in ordinary litigation, and did not preclude judicial review.

Similarly it was held in *R v Hallstrom, exp* ^ [1985] 3 All ER 775 that the exclusion of mental care officers from liability to 'civil or criminal proceedings' effected by the Mental Health Act 1983, s 139(1) did not extend to judicial review. (Cf *R v Greenwich London BC, exp Patel* (1985) SJ 654, where it was held by the Court of Appeal that the Town and Country Planning Act 1971, s243 was so worded as effectively to oust the jurisdiction of the court.)

Evidence

In order to determine whether a statutory criterion is satisfied, expert evidence may be admissible. Thus in *R v Skirving* [1985] 2 All ER 705 it was held that where the question was whether a book on the use of cocaine was an obscene article within the meaning of the Obscene Publications Act 1959, s 1 the prosecution might call expert evidence as to the effect of cocaine on users, since this was not within the experience of ordinary members of a jury.

The implied application of rules of evidence for purposes of an enactment is strikingly illustrated by *R v Horsham Justices, exp Richards* [1985] 2 All ER 1114. The Powers of Criminal Courts Act 1973, s 35 was amended by the Criminal Justice Act 1982, s 67(a) with the apparent intention of reversing the decision in *R v Vivian* [1979] 1 All ER 48 that for a compensation order to be made in criminal proceedings the defendant's liability, if not accepted by him, must be proved. Despite this the Divisional Court held that the court still had no jurisdiction to make a compensation order without receiving any evidence if real issues were raised as to the existence or amount of the loss. Neill LJ said (p 1120): 'In such a case as the present, where there are plain issues as to liability, it is for the prosecution to place evidence before the court'.

Hearing both sides (audi alterem partem) (Code s 346)

Oral representations

It is an aspect of the rule of natural justice requiring both sides to be heard that reasonable facilities be allowed for the making of representations. Unless there is some reason to the contrary, these must include oral representations. Even a party's own legal representative may not override this by his acquiescence (at least where he lacks his client's explicit consent). Thus where a solicitor or other legal representative advises or agrees to a non-oral hearing, denial of an oral hearing may nevertheless constitute a remediable injustice: *R v Diggines, ex p Rahmani* [1985] 1 All ER 1073.

Secret communications

It is another aspect of the *audi alterem partem* rule that one side must not be heard behind the other's back. Thus a litigant cannot both use a document as evidence and claim privilege from its disclosure, since one party may not make secret communications to the court: *Pamplin v Express Newspapers Ltd* [1985] 2 All ER 185.

De minimis principle (Code s 348)

The definition of 'agricultural land' in the General Rate Act 1967, s 26(3) excepts 'land used as a racecourse' (with the effect that land so used does not share in agricultural derating). In *Hayes (Valuation Officer) v Loyd* [1985] 2 All ER 313, following *Wimhorne and Cranborne RDC v East Dorset Assessment Committee,* [1940] 2 KB 420, it was held that, under the principle of the maxim *de minimis non curat lex,* land of which the use as a racecourse was

merely trifling was not within the definition. (See further the note pp 268, 269 below related to Code s 396-)

Presumption of correctness (Code s 355)

Mechanical devices

In the absence of evidence to the contrary, the court will presume that a mechanical device used for determining whether breach of a statutory duty had occurred was in proper working order at the material time: *Castle v Cross* [1985] 1 All ER 87 (automatic breath-testing device).

Ordinary meaning of words (Code s 363)

Judicial exegesis

In *R v Moloney* [1985] 1 All ER 1025 the House of Lords held that normally the meaning of *intent* or *intention* should be left to the jury without judicial elaboration.

Constructive meaning

The court will apply a statutory term in a sense wide enough to include constructive meanings of the term. Thus in *Re Clore (deed) (No 3)* [1985] 2 All ER 819 it was held that the provision in the Finance Act 1975, Sch 4, para 2(1) requiring a trustee to deliver an account specifying certain information 'to the best of his knowledge' extended to information contained in documents, etc within the trustee's possession or control, even though not present to his mind.

Terms applied in a foreign context

In *Lawrence v Lawrence* [1985] 2 All ER 733 the Court of Appeal held that there was no reason to suppose that the word 'divorce', as used in the Recognition of Divorces and Legal Separations Act 1971, did not, when applying to a foreign marriage, have its usual meaning of a dissolution of marriage with the consequent right to marry again.

Expressio unius principle (nature of) (Code s 389)

Different Acts

All draftsmen do not take the same view about the need to specify a matter rather than leaving it to implication. Thus the fact that one Act specifies a particular matter, whereas another is silent on the point, does not necessarily mean that the *expressio unius* principle should be applied. There is increased danger of misconception on this head where two such contrasting Acts are later consolidated into one Act

In *R v Clerkenwell Stipendiary Magistrate, exp Mays* [1975] 1 All ER 65 the Divisional Court had held that, since the Act was silent on the point, there was no power enabling the court to vary conditions imposed by an order

made under the Magistrates' Courts Act 1952, s65(2), the principal judgment being delivered by Bridge J (as he then was). As Lord Roskill put it in *Wilson v Colchester Justices* [1985] 2 All ER 97 at 102:

> 'Bridge J contrasted this statutory silence with an express power of variation conferred by s 18(1) of the Maintenance Orders Act 1958 and drew from this silence the conclusion that, as one statute conferred an express power, the other statute which was silent could not be properly construed as impliedly conferring a similar power.'

The latter case overruled the earlier decision on the ground that the Divisional Court had overlooked the general power conferred by the Interpretation Act 1889, s32(1). (This is now the Interpretation Act 1978, s 12(1): see the note p258 above related to Code s 125.) The inference that had been drawn by Bridge J was in any case incorrect for the reason given above in this note.

Expressio unius principle (words providing remedies) (Code s 393)

An important application of the principle *expressio unius est exclusio alterius* concerns cases where Parliament has laid down a statutory scheme overlapping an area dealt with at common law. Here it is presumed that the common law powers are no longer intended to be available.

In *A v Liverpool City Council* [1982] AC 363 the House of Lords ruled that this presumption applied in the case of the wardship jurisdiction of the High Court. In *W v Hertfordshire CC* [1985] 2 All ER 301 the House of Lords emphasised that the *Liverpool* decision meant that, except where judicial review lay, the courts could not, by virtue of the wardship jurisdiction, exercise supervision over decisions taken by local authorities in child care cases. Lord Scarman said; 'The High Court cannot exercise its powers, however wide they may be, so as to intervene *on the merits* in an area of concern entrusted by Parliament to another public authority' (p 304: emphasis added).

Implication by oblique reference (Code s 395)

In making orders, following divorce, for financial provision or property adjustment, the court is required by the Matrimonial Causes Act 1973, s25(1) 'to have regard to all the circumstances of the case'. The House of Lords held in *Livesey (formerly Jenkins) v Jenkins* [1985] 1 All ER 106 that by implication this placed a *duty of disclosure* on the parties, and empowered the court to set aside an order obtained without due disclosure.

Implication where statutory description only partly met (Code s 396)

There must be substantial correspondence with a statutory description even though on a quantative basis the correspondence appears slight. Thus in *Hayes (Valuation Officer) v Loyd* [1985] 2 All ER 313 it was held that certain agricultural land complied with the description 'land used as a racecourse' within the meaning of the General Rate Act 1967, s26(3) even though racing took place on one day a year only. The racing took place at Easter

and was attended by some 10,000 people. It could not therefore be said to be de minimus, as other one-day-a-year racing might well be (see note pp 266, 267 above related to Code s 348).