Statute Law

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Note

For the convenience of readers this article, like the corresponding articles in previous editions of the All ER Annual Review, 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.

Introductory

As in previous years, attention is drawn at the outset to ignorance of statute law principles displayed in certain cases reported during the year. These are referred to in the notes below respectively related to Code ss 171, 244, 271, 323, 396.

The tort of breach of statutory duty (Code s 14)

Where Act solely creates a criminal offence

Even though an enactment does no more than state that a certain act constitutes a criminal offence it may be taken to indicate that a person injuriously affected by the commission of the offence is intended to have a civil remedy. *Rickless v United Artists Corpn* [1987] 1 All ER 679 concerned the Dramatic and Musical Performers' Protection Act 1958, s2, which renders it a criminal offence to make a cinematograph film by use of a dramatic performance without the consent of the performer, but does not refer to any civil remedy. The Court of Appeal held that since the Act was stated to be for the protection of performers a civil remedy was to be inferred. It was assisted in reaching this conclusion by the fact that the Performers' Protection Act 1963, which extended the protection given by the 1958 Act to other types of performer, was stated to have the purpose of enabling effect to be given to the 1961 International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organisations (Cmnd 2425), and the Convention requires a civil remedy to be made available.

The court reached this result not withstanding the ruling by Sir Nicolas Browne-Wilkinson V-C (ibid at 685) that 'it is easier to spell out a civil right if Parliament has expressly stated the act is generally unlawful rather than merely classified it as a criminal offence'. It may in any case be doubted whether this ruling is correct. The former practice by which parliamentary draftsmen usually declared proscribed acts to be 'unlawful' has been

abandoned in favour of declaring them merely to be 'an offence'. Indeed it is common in modern times for the draftsman to refrain even from this, and merely state that if a person does a specified act he shall be liable to a specified penalty.

Negligence

Under the rule in *Anns v Merton London Borough* [1977] 2 All ER 492 a breach of statutory duty may give rise to a cause of action in negligence. The House of Lords distinguished this in *Curran v Northern Ireland Co-ownership Housing Association Ltd* [1987] 2 All ER 13. The respondent's predecessor in title to a dwelling-house had caused to be built an extension to the house with the aid of an improvement grant made by the appellants under the Housing (Northern Ireland) Order 1976, art 60(5). The construction was defective. The respondent claimed in negligence against the appellants on the ground that they were in breach of a statutory duty under art 60(5), which states that payment of a grant 'shall be conditional upon the works... being executed to the satisfaction of the Executive'. *Held* No duty of care was owed because the condition imposed by art 60(5) was to protect public funds, and the appellants had no control over the building operations once approval for a grant was given.

Lord Bridge said (ibid at 19) that for the rule in *Anns* to apply 'the statutory power which the authority is alleged to have negligently failed to exercise or to have exercised in a negligent way must be specifically directed to safeguarding the public, or some section of the public of which the plaintiff asserting the duty of care is a member, from the particular danger which has resulted' (cf Code pp 38-41).

Dynamic processing of legislation (Codes 26)

Decisions arrived at per incuriam

In *Duke v Reliance Systems Ltd* [1987] 2 All ER 858 at 860 Sir John Donaldson MR said:

> 'I have always understood that the doctrince of per incuriam only applies where another division of this court has reached a decision in the absence of knowledge of a decision binding on it or a statute, and that in either case it has to be shown that, had the court had this material, it *must* have reached a contrary decision... I do not understand the doctrine to extend to a case where, if different arguments had been placed before it, it *might* have reached a different conclusion.'

It is submitted with respect that this dictum is of doubtful correctness. It is rarely possible to say that, on a certain hypothesis, a court *must* have arrived at a given conclusion. The basis of the per incuriam doctrine is that a decision given in the absence of relevant information cannot safely be relied on. This applies whenever it is at least probable that if the information had been known the decision would have been affected by it. The doctrine of course applies in the Court of Appeal not only in relation to previous decisions of that court but in relation to those of the House of Lords also. It also applies in relation to merely persuasive authority.

Drafting of enactment presumed competent (Code s 77)

The corollary of the presumption that the draftsman of an enactment exercised due competence is that a less formal document such as the rules of a trades union will not be interpreted according to the principles applicable to statutory interpretation because its draftsman is unlikely to have possessed the skill and knowledge of a legislative draftsman. This was held in *Jacques v Amalgamated Union of Engineering Workers* [1987] 1 All ER 621, applying the following dictum of Lord Diplock in *Porter v National Union of Journalists* [1980] IRLR 404 at 407:

> 'I turn to the interpretation of the relevant rules bearing in mind that their purpose is to inform the members of the NUJ of what rights they acquire and obligations they assume vis-a-vis the union and their fellow members, by becoming and remaining members of it. The readership to which the rules are addressed consists of ordinary working journalists, not judges or lawyers versed in the semantic technicalities of statutory draftsmanship.'

Warner J said ([1987] 1 All ER at 628):

> 'The effect of the authorities may I think be summarised by saying that the rules of a trade union are not to be construed literally or like a statute, but so as to give them a reasonable interpretation which accords with what in the court's view they must have been intended to mean, bearing in mind their authorship, their purpose and the readership to which they are addressed.'

Role of counsel in statutory interpretation (Code s 84)

When deciding on the sources to be consulted to arrive at the legal meaning of an enactment the court, at least in civil cases, still tends to be constrained by the submissions of counsel. See the note concerning *Aswan Engineering Establishment Co v Lupdine Ltd (Thurgar Bolle Ltd, third party)* [1987] 1 All ER 135 on P250 below, related to Code s244.

Finding of implications: interstitial articulation by the court (Code SI14)

An example of interstitial articulation to supply an ellipsis is furnished by the Court of Appeal decision in *R v Immigration Appeal Tribunal, ex p Swaran Singh* [1987] 3 All ER 690. The court was called on to construe the phrase 'without other close relatives in their own country to turn to' in the Statement of Changes in Immigration Rules (HC Paper (1982-83) (no 169) para 52). Dillion LJ (ibid at 692) articulated the missing words at the end by saying he read the phrase 'as importing "to turn to in case of need", ie any sort of need which may afflict elderly parents...' He went on to give a lengthy description of the needs in question.

Rules of interpretation laid down by statute (Code s 125)

Potency of the term defined

An example of the way the comprehensive statutory definition of a pre-existing legal term may be held to be cut down in meaning by the potency

of the term defined (see Code P276) is given by *Claydon v Bradley* [1987] 1 All ER 522. Here the Court of Appeal held that the definition of 'promissory note' in s 83 of the Bills of Exchange Act 1882, a codifying Act, could not be given its wide literal meaning so as to extend it to a document which was meant as a receipt and was never intended to be negotiable. Neill LJ cited the dictum of Lord Atkin in *Akbar Khan v Attar Singh* [1936] 2 All ER 545 at 550 that receipts 'are not intended to be negotiable, and serious embarrassment would be caused in commerce if the negotiable net were cast too wide'.

Land

The term 'land' as defined by the Interpretation Act 1978, Sch 1 includes a restrictive covenant. See the note on *R v Hammersmith and Fulham LBC, exp Beddowes* [1987] 1 All ER 369 at P254 below, related to Code s 333.

Service by post

In *R v Secretary of State for the Home Department, exp Yeboah* [1987] 3 All ER 999 notice of a deportation decision was sent by recorded delivery but not in fact delivered. It was held by the Court of Appeal that where the Interpretation Act 1978, s 7 (service of document deemed to be effected by posting it and, unless the contrary is proved, to be effected at normal time of delivery) applies to the giving of notice under an enactment its effect must depend on the wording of the enactment. Here the decision in *R v Appeal Committee of County of London Quarter Sessions, ex p Rossi* [1956] 1 QB 682 (where date of receipt crucial, s 7 does not deem notice to have been received when in fact it was not received) was inapplicable because of the wording of the relevant regulations.

Principle that law should be predictable (Code s 130)

For authority supporting the proposition that a lay person cannot be expected to understand statutes and that their intended audience is the skilled lawyer see the note on p 246 above related to Code s 77.

Principle that municipal law should conform to public international law (Code s 134)

For an application of this doctrine see the note on p 249 below concerning *Re International Tin Council* [1987] 1 All ER 890 related to Code s222.

Presumptions as to legislative intention: that errors to be rectified (Code s 142)

Casus ommissus

In *R v Corby Juvenile Court, exp M* [1987] 1 All ER 992 the Divisional Court was faced with an error by the draftsman of the Health and Social Services and Social Security Adjudications Act 1983 in so far as it amends the Child Care Act 1980, **S3** (which reproduces the provisions of the Children

and Young Persons Act 1948, **S 2).** The amendment gives parents an opportunity of a court hearing before they can be deprived of access to a child in care. It thus, as Waite J held (ibid 995), has constitutional significance 'establishing as it does the right not to be deprived of access to a child without a hearing as one of the ordinary liberties enjoyed by every subject'.

In listing the types of care order to which the new right applies, the transitional provisions in the 1983 Act inadvertently omit the case of children who are in care as a result of a resolution passed before the commencement of the 1980 Act. They contain however a saving for the Interpretation Act 1978, s 17(2), which states that where an Act repeals and re-enacts a previous enactment then, unless the contrary intention appears, in so far as any subordinate legislation made or other thing done under the repealed enactment could have been made or done under the provision re-enacted it shall have effect as if so made or done.

WaiteJ began by saying (ibid at 993) that there is a particular harshness in requiring people whose lives are most closely affected by the law of child care, in addition to their other difficulties, 'to undergo the ordeal of taking part as bewildered amateurs in a game whose rules are understood only by those who play it professionally'.

The respondent pointed out that the transitional provisions, construed literally, denied the applicant the benefit of the amendment. He argued that s 17(2) of the 1978 Act did not affect the position because a resolution taking a child into care was not within its wording, not being of the same genus as 'subordinate legislation'.

WaiteJ found for the applicant. He said (ibid at 997-98):

> 'Parliament cannot have intended... to have allowed a whole section of the child population to vanish from legislative view as though they had gone off at the heels of the Pied Piper. It may well be that the draftsman did indeed stumble... The deliberate reference in the transitional provisions... to s 17 of the [Interpretation Act 1978]... seems to me, however, to show Parliament contemplating expressly that such an oversight might occur, and making appropriate provision for it. The legislative intention is plain. Parliament intended the parents of all children in compulsory care, with the exception of those specifically excluded, to benefit from the important and valuable rights introduced... The fact that the draftsman had made an unsuccessful attempt to enumerate exhaustively all the prior enactments thought to be affected by new or amending legislation cannot be enough... to amount to a "contrary intention" for the purposes of s 17(2) of the 1978 Act.'

He further held that the words 'or other thing done' in the 1978 Act are not to be construed ejusdem generis with 'subordinate legislation'.

Textual amendment (Code s 171)

Rule in A-G v Lamplough

The rule in *A-G v Lamplough* (1878) 3 Ex D 214 requires that where some only of the words of an enactment have been repealed the remaining unaltered words must be given the same meaning they had before the repeal, unless the contrary intention appears from the amending Act (see Code P420 and All ER Rev 1986, P276). Although not referred to as such

the rule was followed in *R v Greater Manchester North District Coroner, ex p Worch* [1987] 3 All ER 661 at 668 where Slade LJ said:

> 'The original s 21(2) of the [Coroners (Amendment) Act 1926] is no longer law, since it has been replaced by s 32(3) of the Births and Deaths Registration Act 1953. Nevertheless, the original subsection is admissible in construing the section as a whole and, in our judgment, throws light on its construction. It demonstrates that the section as a whole contemplates a two-stage process.'

Retrospective operation: general presumption against (Code s 190)

Nature of retrospectivity

Where an enactment clearly sets out to modify accrued rights there can be no room for the presumption against doubtful penalisation. In *Chebaro v Chebaro* [1987] 1 All ER 999 the Court of Appeal upheld the decision in the court below to the effect that the right conferred by the Matrimonial and Family Proceedings Act 1984, s 12(1) to apply for financial relief where a marriage 'has been' dissolved by a foreign decree applies to a decree pronounced before the commencement of that Act. The judgments, particularly that of Balcombe LJ, confirm the analysis of that decision in All ER Rev 1986, pp. 279-280.

Application of Act: foreigners and foreign matters within the territory (Code s 222)

International organisations

In accordance with the principle of exterritoriality (Code P494), the power conferred by the Companies Act 1985, ss 665 to 674 to order the winding up of an unregistered company was held in *Re International Tin Council* [1987] 1 All ER 890 not to apply to the international organisation known as the International Tin Council even though that body fell within the literal meaning of 'unregistered company' set out in s 665 and its headquarters were within the United Kingdom. The Council was set up under treaty, and Millet J said (ibid at 902):

> 'Parliament cannot be taken to have intended to confer, by general words alone, the jurisdiction to interpret the terms of an international treaty and to enforce the obligations arising thereunder between independent sovereign states, a jurisdiction at once unprecedented and incompatible with basic principles of English law.'

The decision complies with the doctrine that enactments should be presumed to be intended to conform to public international law (Code si34)-

Pre-enacting history: the earlier law (Code S231)

Use of processed term

Where an Act uses a term which appeared in an earlier repealed Act dealing with the same subject-matter and, as it appeared in that earlier Act had

been processed (that is defined by the court) before the passing of the later Act, it is likely that the draftsman of the later Act intended it to bear the processed meaning.

In *R v Thorpe* [1987] 2 All ER 108 the Court of Appeal considered the meaning of the term *lethal* in the Firearms Act 1968, s 57(1), which defines a firearm as 'a lethal barrelled weapon'. Two pre-1968 cases were cited which ruled on the meaning of that term as used in similar provisions of the (repealed) Firearms Act 1937. *Held* Those rulings should be applied to the 1968 Act definition. Kenneth Jones J referred (ibid at 112) to 'the obvious inference that the draftsman of the 1968 Act had well in mind the decisions in those two cases'.

Enacting history: international treaties (Codes 242)

For a case where the interpretation of an enactment was influenced by a treaty see the note on P244 above related to Code s 14 and describing *Rickless v United Artists Corpn* [1987] 1 All ER 679.

Enacting history: inspection by court (Code s 244)

Although the court has power to inspect whatever enacting history it thinks fit it will, at least in civil cases, be governed by the submissions of the counsel on either side, at least where they are in agreement. In *Aswam Engineering Establishment Co v Lupdine Ltd (Thurgar Bolle Ltd, third party)* [1987] 1 All ER 135 at 146 Lloyd LJ said:

> 'We invited counsel for Thurgar Bolle to refer us to the Law Commission Report on Exemption Clauses in Contracts (Law Com no 24 (1969)), which preceded the enactment of [the Supply of Goods (Implied Terms) Act 1973], and also to the Law Commission working paper on the Sale and Supply of Goods (no 85 (1983)). But counsel for the appellants objected. I can see no conceivable reason why we should not have been referred to the Law Commission papers, and good reason why we should... In my judgment it is not only legitimate but highy desirable to refer to Law Commission reports on which legislation has been based. But since counsel for Thurgar Bolle concurred in counsel for the appellants' objection, I say no more about it.'

This dictum reflects the still-lingering idea that civil litigation is a kind of joust between the parties, where the Court does little more than hold the ring. It is surely wrong that any court, as an emanation of the Crown, should apply what is not truly the law. To find out what the law is, the court is not merely entitled but under a duty to have recourse to all legitimate sources.

If it hands down a judgment based on anything but what is truly the law, a court denies it function. Moreover the judge or judges involved contravene the judicial oath or affirmation requiring them to apply in their judgments 'the law and usages of this realm' (Promissory Oaths Act 1868, s 4).

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

The court will not only be guided by later Acts, but by later delegated legislation which is in pari materia with the enactment being construed. In J? f *Newcastle upon Tyne City Justices, ex p Skinner* [1987] 1 All ER 349 the Divisional Court was called on to construe the Magistrates' Court Act 1980, s 114, This says that magistrates shall not be required to state a case until the applicant for this has entered into a recognizance to prosecute the appeal by case stated. The section says nothing about how the amount of the recognizance is to be fixed, or the means of the applicant. *Held* Guidance is to be sought from the Crown Court Rules 1982, r26. This rule, governing appeals by case stated from the Crown Court, a higher court than the magistrates' court, says that a recognizance shall be fixed 'in such sum as the Crown Court thinks proper, *having regard to the means of the applicant'.* Glidewell LJ said (ibid at 351):

> 'One finds there the requirement that the Crown Court shall have regard to the means of the applicant. In our view, although the same phrase is not to be found in s 114 of the 1980 Act, the same principle must necessarily apply to magistrates as it does to the stating of a case by the Crown Court.'

The proviso (Code s 268)

It is for the defendant in a criminal case, whether tried on indictment or summarily, to raise and prove an *exception,* whether or not it is expressed in the form of a proviso. See the note on P255 below (related to Code s 341) concerning the House of Lords decision in *R v Hunt* [1987] 1 All ER 1.

Long title of Act (Code s 271)

In *R v Galvin* [1987] 2 All ER 851 the Court of Appeal rejected the argument that the wide words of the Official Secrets Act 1911, s 2 are to be treated as narrowed by the long title to the Act. Lord Lane CJ said (ibid at 855):

> 'One can have regard to the title of a statute to help resolve an ambiguity in the body of it, but it is not, we consider, open to a court to use the title to restrict what is otherwise the plain meaning of the words of the statute simply because they seem to be unduly wide.'

However this dictum must be regarded as erroneous and given per incuriam. It is contrary to the decision of the Court of Appeal in *Watkinson v Hollington* [1943] 2 All ER 573 (see Code pp577 and 676), which was not cited to the court.

Principle against doubtful penalisation: danger to human life or health (Code s 289)

In *Bugdaycay v Secretary of State for the Home Department* [1987] **1** All ER 940 the House of Lords allowed the appeal of an applicant for refugee status, and quashed the Secretary of State's refusal of such status, on the ground that the latter had not taken into account or adequately resolved whether the applicant would, if returned to Kenya, be sent back to Uganda (where he

would be in danger). Lord Templeman said in relation to judicial review (ibid at 956) that 'where the result of a flawed decision may imperil life... a special responsibility lies on the court in the examination of the decision-making process'.

Principle against doubtful penalisation: physical restraint of the person (Code s 290)

In *Bugdaycay v Secretary of State for the Home Department* [1987] 1 All ER 940 the House of Lords allowed the appeal of an applicant for refugee status, and quashed the Secretary of State's refusal of such status, on the ground that the latter had not taken into account or adequately resolved whether the applicant would, if returned to Kenya, be sent back to Uganda (where he would be in danger). Lord Templeman said in relation to judicial review (ibid at 956) that 'where the result of a flawed decision may imperil... liberty a special responsibility lies on the court in the examination of the decision-making process'.

Principle against doubtful penalisation: protection of property rights (Code s 295)

The propensity of the law to protect property rights is illustrated by two 1987 decisions.

In *Ruleless v United Artists Corpn* [1987] 1 All ER 679 the Court of Appeal ruled that the civil right it held to be conferred on performers by the Dramatic and Musical Performers' Protection Act, s 2 survived the death of the performer. Sir Nicolas Brown-Wilkinson V-C said (ibid at 688):

> 'It has been held that prima facie a right conferred on a man by statute survives his death and that clear words are required if it is to be held that the right dies with the person given that right: see *Dean v Wiesengrund* [1955] **2** QB **120.'**

(As to *Rickless v United Artists Corpn* see further the note on p 244 above related to Code s 14.)

In *Chilton v Telford Development Corpn* [1987] 3 All ER 992 the Court of Appeal held that, having regard to the fact that the New Towns Act 1965, s 7 confers statutory power to deprive a citizen of his title and right of occupation of his land and to the fact that Sch6, para 4(2) of the Act provides protection for an owner or occupier who is subjected to that draconian power, the Act is to be construed in favour of the owner or occupier rather than the acquiring authority.

Principle against doubtful penalisation: impairment of legal rights (Code s 298)

In *R v Corby Juvenile Court, exp M* [1987] 1 All ER 992 the Divisional Court held that the amendment of the Child Care Act 1980, s 3 effected by the Health and Social Services and Social Security Adjudications Act 1983, by giving parents an opportunity of a court hearing before they can be deprived of access to a child without a hearing as one of the ordinary

liberties enjoyed by every subject. The court regarded this as a powerful reason for giving a strained construction to the defective transitional provisions of the latter Act. (For details of the case see note on P247 above related to Code s 142.)

Nature of purposive construction (Code s 313)

Retrospective alteration of an Act's purpose

A later Act *in pari materia* may have the effect of retrospectively altering an Act's purpose. In *R v Hammersmith and Fulham LBC, exp Beddowes* [1987] 1 All ER 369 at 379-80 Fox LJ said:

> 'Historically, local authority housing has been rented. But a substantial inroad on that was made by Pt I of the Housing Act 1980, which gave municipal tenants the right to purchase their dwellings. In the circumstances it does not seem to me that a policy which is designed to produce good accommodation for owner-occupiers is now any less within the purposes of [the Housing Acts 1957 and 1985], than the provision of rented housing ...'

For further details of this case see the note on P254 below related to Code S333-

Purposive-and-strained construction (Code s 315)

An example of purposive-and-strained construction effected by the court's artificially prolonging the critical time posited by the relevant enactment is furnished by the decision of the House of Lords in *D (a minor) v Berkshire CC* [1987] 1 All ER 20.

The Children and Young Persons Act 1969, s 1 empowers a court to make a care order in respect of a child if of opinion that 'his proper development *is* being avoidably prevented or neglected or his health *is* being avoidably impaired or neglected or he *is* being ill-treated'. In this case a care order had been made in respect of a baby which had suffered withdrawal symptoms during the period following its birth because of drug-taking by the mother during pregnancy. Since the baby had never returned to the mother it could not be said of any period during its lifetime that the condition was literally met that its health 'is' being impaired etc.

Held To achieve the purpose of the enactment it was necessary to postulate a continuous period beginning before birth and continuing at the time of the order. The word 'is' in the enactment had then to be applied to that period *taken as a whole.* The care order was therefore valid.

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

For an example of a construction designed to avoid commercial inconvenience see the note on *Claydon v Bradley* [1987] 1 All ER 522 on P247 above related to Code s 125.

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

Remedy not available in like cases

The decision of Sheen J in *Coltman v Bibby Tankers Ltd* [1986] 2 All ER 65 (All ER Rev 1986, p 282) (to hold for the purpose of determining an employer's liability for defects that a ship is not 'equipment' when an aircraft or vehicle clearly is 'leads to absurd distinctions and anomalies'), having been reversed by the Court of Appeal (Lloyd LJ dissenting) in *Coltman v Bibby Tankers Ltd* [1987] 1 All ER 932, was restored by the House of Lords in *Coltman v Bibby Tankers Ltd* [1987] 3 All ER 1068. Despite the comments at All ER Rev 1986, P283 drawing attention to them in this connection, the House of Lords, like the courts below, failed to refer either to the rank principle (Code s 386) or the expressio unius principle (Code ss 388-394).

The decision in *Sherdley v Sherdley* [1986] 2 All ER 202 (All ER Rev 1986, p 283) was reversed by the House of Lords in *Sherdley v Sherdley* [1987] 2 All ER 54 on the ground that in the case of divorce it would be anomalous for a tax advantage to be obtainable in respect of the school fees of children of the marriage where they lived with the mother (who could obtain a maintenance order under the Matrimonial Causes Act 1973, **S23**(i)(d) against the father) but not where they lived with the father. Although it was artificial (see Code s 325) to allow the father to obtain a maintenance order against himself (described by Donaldson MR in *Sherdley v Sherdley* [1986] 2 All ER 202 at 209 as 'curial antics') this was outweighed by other interpretative factors, namely that just mentioned and also the need for the court to safeguard the interests of minors (see Code p 772).

Construction which defeats legislative purpose (Code s 333)

Construction enabling persons to truncate statutory functions

A construction will not be allowed which .would enable persons charged with a statutory power or function to act in such a way as to truncate or otherwise modify what the legislature intended. On the other hand the exercise of a statutory power, for example to enter into a restrictive covenant, may be held legitimate notwithstanding that its future consequence will be to narrow the operation of some other statutory power in relation to the subject-matter affected.

In *R v Hammersmith and Fulham LBC, exp Beddowes* [1987] 1 All ER 369 a local authority, on the sale to a developer of part of a block of rented housing owned by it, entered into restrictive covenants as to the use of the part it retained. *Held* In view of the definition of 'land' in the Interpretation Act 1978, Sch 1, the power to dispose of land conferred on the authority by the Housing Act 1957, s 104 (see now the Housing Act 1985, **S32)** included entering into a restrictive covenant. Although the covenants, encroached on the authority's statutory powers under the 1957 Act regarding the use of the retained land for housing purposes this did not prevent the entering into of the covenants from being a legitimate exercise of the statutory power of disposal. Fox LJ said (ibid at 379-80):

> 'What we are concerned wth in the present case are overlapping or conflicting powers. There is a power to create covenants restrictive of the use of the retained land and there are powers in relation to the user of the retained land for housing purposes... The policy, it is true, is designed to produce owner-occupancy and not rented accommodation. Historically, local authority housing has been rented. But a substantial inroad on that was made by Pt I of the Housing Act 1980, which gave municipal tenants the right to purchase their dwellings. In the circumstances it does not seem to me that a policy which is designed to produce good accommodation for owner-occupiers is now any less within the purposes of the 1957 and 1985 Acts, than the provision of rented housing... we were referred to the decision in *Ayr Harbour Trustees v Oswald* (1883) 8 App Cas 623. But that was a case where the trustees simply "renounced part of their statutory birthright".'

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

Human rights provisions

There is an implication that statutory powers and duties are intended by the legislature to be exercised in conformity with constitutional provisions laying down human rights.

In *R v Secretary of State for the Home Department, exp Herbage (No 2)* [1987] 1 All ER 324 a prisoner sought judicial review on the ground that there had been illegality in the performance of the statutory powers and duties of the Home Secretary and the prison governor. This was founded on the allegation that there had been a breach of the requirement of the Bill of Rights (1688) against the infliction of cruel and unusual punishments.

The Court of Appeal held that this would be a ground for granting judicial review. Purchas LJ said (ibid at 337):

> 'The argument is... that if in a notorious case, as the applicant's is, it were to be established that serious breaches of the Bill of Rights were occurring then there is a foundation of an allegation that the Secretary of State had failed to perform his duties of supervision imposed generally on him by [the Prison Act 1952, **54**(2)]... counsel for the applicant emphasized that the case against the governor... was not based merely on breaches of [the Prison Rules 1964] but on an alleged breach of the provision of the Bill of Rights, namely that the applicant was entitled not to be inflicted with "cruell and unusuall punishments". This is a fundamental right which, in my judgment, goes far beyond the ambit of the 1964 rules. For my part, if it were established that a prison governor was guilty of such conduct, it would be an affront to common sense that the court should not be able to afford relief [by way of judicial review] under Ord 53.'

Implied application of rules of evidence (Code s 341)

The exceptions rule

In *R v Hunt* [1987] 1 All ER 1 the House of Lords clarified what may be called the exceptions rule, which Lord Wilberforce referred to in *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107 at 130 as 'the orthodox principle (common to both the criminal and the civil law) that exceptions, etc, are to be set up by those who rely on them'. *R v Hunt* was concerned only with

the criminal law aspect of this rule of evidence and pleading (as to its application to civil pleading cf RSC Ord 18, r 8).

The House of Lords was faced with an argument by the appellant that the burden of proof in the case of statutory exceptions varies according to whether the offence is triable on indictment or summarily. Whereas r 6(c) of the Indictment Rules 1971 states merely that it is not necessary for the statement of offence and particulars in an indictment 'to specify or negative an exception, exemption, proviso, excuse or qualification' the corresponding provision enacted in relation to summary trials by the Magistrates' Courts Act 1980, s 101 goes further. It says:

> 'Where the defendant to an information or complaint relies on his defence on any exception, exemption, proviso, excuse or qualification, whether or not it accompanies the description of the offence or matter of complaint in the enactment creating the offence or on which the complaint is founded, the burden of proving the exception, exemption, proviso, excuse or qualification shall be on him; and this notwithstanding that the information or complaint contains an allegation negativing the exception, exemption, proviso, excuse or qualification.'

The House of Lords, rejecting the appellant's argument, held that the common law and r 6(c) combined apply precisely the same exceptions rule to indictments as s 101 does to summary trials, thus confirming *R v Edwards* [1975] QB 27.

In the light of *R v Hunt,* the exceptions rule as it now applies both to trials on indictment and summary trials may be stated in the following propositions.

1. It is not necessary for the indictment or information to specify or negative an exception (as defined in paras 4 to 8 below).
2. Where the defendant relies on such an exception, the burden of proving that it applies is on him.
3. This burden of proof is a 'persuasive' burden, not an 'evidential' burden, and the civil standard of proof, namely that on the balance of probabilities, applies.
4. For the purpose of the exceptions rule, an 'exception' is a statutory exception, exemption, proviso, excuse or qualification, whether or not accompanying the description of the offence in the enactment creating the offence. Here 'excuse' includes the case where a necessary licence, permission or authority has been obtained.
5. A provision which linguistically forms part of the formulation of the offence is less likely to be an exception than one which stands apart from that formulation.
6. A provision which is prefaced or terminated by such terms of separation as *except* or *provided that* is likely to be an exception.
7. In case of doubt whether a provision is or is not an exception regard must be had to the comparative ease or difficulty that the respective parties would encounter in discharging the burden of proving the fact in question. It is against the public interest either that the prosecution should be required to prove a fact peculiarly within the knowledge of the defendant or that the defendant should be placed under an onerous duty to prove his innocence.

8. It may also be relevant to consider the mischief at which the enactment creating the offence is directed. The more grave the offence the more important it is that the prosecution should be required to prove its entire case beyond reasonable doubt.

Finally it may be pointed out that in deciding whether a provision is an exception the basic rule of statutory interpretation must always be borne in mind, namely that it is taken to be the legislator's intention that an enactment shall be construed in accordance with the general guides to legislative intention laid down by law; and that where these conflict the problem is to be resolved by weighing and balancing the factors concerned (see Code s 117).

(For a fuller account see Bennion, 'Statutory Exceptions: A Third Knot in the Golden Thread?' [1988] Crim LR 31.)

Reliance on illegality (allegans suam turpitudinem non est audiendus) (Code s 345)

The decision in *Phoenix General Insurance Co of Greece SA u Halvanon Insurance Co Ltd* **[1986] 1** All ER 908 (All ER Rev **1986,** p **286)** was reversed by the Court of Appeal in *Phoenix General Insurance Co of Greece SA v Administratia Asigurarilor de Stat* **[1987] 2** All ER 152. Since the Court of Appeal gave leave to appeal to the House f Lords, and it is understood that an appeal is pending, the somewhat complex reasons for the Court of Appeal's decision are not discussed here.

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

Oral representations

Though it will usually be a breach of fairness to refuse the opportunity of making oral representations, the like principle does not apply where no request for this was made. In *Lloyd v McMahon* **[1987] 1** All ER 1118 the House of Lords held that the decision of the District Auditor surcharging certain Liverpool councillors for failing to set a rate could not be impugned on judicial review where he had not volunteered an opportunity to make oral representations and the councillors had not asked for one, but had instead made voluminous written submissions.

Term with both ordinary and technical meaning (Code s 368)

Where a term is used which has both an ordinary and a technical meaning it is permissible, in order to determine which meaning was intended, to seek guidance from the pre-enacting history. *R v Nanayakkara* [1987] 1 All ER 650 concerned the question whether 'acceptance' of a valuable security in the Theft Act **1968, s20(2)** meant acceptance in its ordinary meaning or in its technical meaning under the law relating to bills of exchange. In holding that the latter was the case the court was guided by the fact that the technical meaning had clearly been intended in earlier similar enactments such as the Larceny Act 1861, **S90** and the Larceny Act **1916, 532(2).** The court also referred to the Criminal Law Revision Committee's Eighth Report, Theft

and Related Offences (Cmnd 2977 (1966)) para 107 in support of the view that Parliament intended no alteration in the 1968 Act.

Archaisms (Code S370)

The Civil Evidence Act 1968, s 8(2)(b) provides for enabling a party to require a person to be called as a witness unless he is 'beyond the seas', a phrase which also occurs in the Criminal Evidence Act 1965, si(i)(b). In *Rover International Ltd v Cannon Film Sales Ltd (No 2)* [1987] 3 All ER 986, HarmanJ said of this phrase:

> 'It is a phrase which seems to me to be entirely archaic today. It has splendid overtones of Elizabeth I's reign and suchlike matters but is not a matter, I would think, of current speech or even lawyers' speech... However Parliament in its wisdom has chosen to use that phrase and I have to wrestle with it.'

HarmanJ went on to cite *Lane v Bennei* (1836) 1 M & W 70, 150 ER 350 as authority for saying that the phrase meant beyond the four seas surrounding the British Isles, namely the English Channel, the North Sea, the Irish Sea and the Arctic Ocean. He upheld this meaning on the ground, based on the purpose of the 1968 Act, that the phrase should be applied in the light of 'the powers of the court to make people come and give evidence here'. He added (ibid at 990) 'in my view the phrase means "beyond the seas" in the old sense and not "abroad" or "beyond the British Islands".'

Ejusdem generis principle: single genus-describing term (Code s 380)

In *R v Corby Juvenile Court, exp M* [1987] 1 All ER 992 the Divisional Court held that the words 'or other thing done' in the Interpretation Act 1978, s 17(2) are not to be construed ejusdem generis with 'subordinate legislation'. For details of the case see the note on P247 above related to Code s 142.

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

Cases where on the facts a relevant statutory description is partly but not entirely met continue to give trouble (for previous instances see All ER Rev 1985, pp 268-269, All ER Rev 1986, P289).

This is largely because the courts fail to recognize this as a distinct type of problem and do not apply the correct principle, which is to base the decision on whether or not there is *substantial* conformity with the statutory description.

In *Debenhams plc v Westminster CC* [1987] 1 All ER 51 the House of Lords was faced with a difficulty which arose, as Lord Keith said (ibid at 56), 'owing to the draftsman, as it would appear, not having kept in view the distinction between a hereditament and a building'. The General Rate Act 1967, Sch 1 para 2(c), as amended by the Town and Country Planning Act 1971, S291 and Sch23, exempts from rates 'a *hereditament*... [listed] as a building of architectural or historic interest'. The statutory power to list is however in terms of buildirigs not hereditaments.

In the instant case a hereditament consisted of two buildings, only one of which was listed. *Held* The exemption from rates did not apply to the hereditament. Instead of applying the correct test of whether or not the listed building formed the *predominant* part of the hereditament, Lord Keith based himself (ibid at 57) on the inadequate ground that 'if Parliament had intended to afford the exemption to such a hereditament it would have done so in express terms'.

The ground is inadequate because, as mentioned above, Lord Keith had already found the draftsman had erred in failing to distinguish between buildings and hereditaments. It thus could not plausibly be assumed that this particular draftsman (already found to be deficient) had in mind the more abstruse possibility that a hereditament might be partly but not wholly listed. Failure to foresee such possibilities is a frequent error of draftsmen. The courts need to recognise this and use an adequate interpretative technique to deal with it.