Statute Law

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Introductory note

For the convenience of readers this section, like its predecessors in the All ER Annual Review series, conforms to the Code set out in the author's book *Statutory Interpretation* (1984, Supp 1989). A reference to the relevant section of the Code is given after each heading in the notes below.

As previously, attention is drawn in the notes below to examples of statute law principles being overlooked or ignored in cases reported during the year (see notes respectively related to Code ss 14, 125 (potency of the term defined), 125 (number), 125 (powers and duties), 281 and 284).

Civil sanction for disobedience to statute (Code s 14)

Liability in negligence

In *Murphy v Brentwood District Council* [1990] 2 All ER 908 (see also pp 303-307 below) the House of Lords overruled *Anns v Merton London Borough* [1977] 2 All ER 492, [1978] AC 728, Supp pp 6-8. As a result, the position regarding liability in negligence may now be summarised as follows (replacing the passage under the heading Page 41 in Supp pp 6-8).

It may be that, by an anomalous development of case law, negligent contravention of a statute gives rise to liability for the tort of negligence as distinct from the tort of breach of statutory duty. The basis of this liability appears to be that the mere existence of a statutory duty raises a duty of care of the kind postulated by the tort of negligence, and that this is apart from, and additional to, the duty to comply directly with the requirements of the statute.

This liability in negligence has been recognised in a long line of authorities culminating in *Murphy v Brentwood District Council,* which concerned the negligent failure of a local authority to observe building regulation requirements. In it the House of Lords restricted the scope of the alleged liability in negligence by overruling its own previous *decision* in *Anns v Merton London Borough.* In consequence, if it exists at all the liability is now probably limited to injury to the person or to health.

It is noteworthy that the previous authorities mainly concerned the scope and extent of the liability in negligence, rather than its existence. The obligation would inevitably be anomalous because in principle the existence and scope of liability for breach of a statutory duty should depend on the intention of Parliament as indicated in the statute, rather than on judicial application of an extraneous common law doctrine such as the tort of negligence.

However, the idea that such liability exists had secured such a tenacious hold in the profession that in *Murphy* counsel for the party in whose interest it would have been for the court to hold that the liability does not exist failed to argue the point. Nevertheless, the House was clearly uneasy about its existence. Stating that he expressed no opinion on the point, Lord Mackay of Clashfern LC (at 912, echoed by Lord Oliver at 938) pointed out that Parliament had itself made provision regarding liability of this kind in the Defective Premises Act 1972. He added that for the House in its judicial capacity to create a large new area of responsibility on local authorities in this respect would not be a proper exercise of judicial power. Lord Keith said (at 917):

> 'Not having heard argument on the matter, I prefer to reserve my opinion on whether any duty at all exists. So far as I am aware, there has not yet been any case of claims against a local authority based on injury to person or health through any failure to secure compliance with building byelaws. If and when such a case arises, that question may require further consideration.'

Lord Jauncey (at 938) similarly declined to express a view on whether the duty not to be negligent existed. The speeches in *Murphy* appear to be a clear invitation to challenge in some future case the argument that it does.

Enforcement agencies: administrative agencies (Code s 15)

Delegation by minister

In *Oladehinde v Secretary of State for the Home Department* [1990] 3 All ER 393 the House of Lords recognised what it called the *Carltona* principle regarding delegation by a minister to his officials. This was laid down by Lord Greene MR in *Carltona Ltd v Comrs of Works* [1943] 2 All ER 560 at 563 in the following words:

> 'In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them . . . The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament.'

After citing this dictum in the court below, Lord Donaldson MR said:

> 'Lord Greene MR contemplated that, in devolving authority to take decisions on his behalf, the Secretary of State would only be answerable to Parliament, but it is conceded that, at least in recent times, such a course of action would also be susceptible to judicial review.' *(R v Secretary of State for the Home Department, exp Oladehinde* [1990] 2 All ER 367 at 381).

In Oladehinde the House of Lords recognised that the *Carltona* principle could be displaced by a contrary intention in a particular Act. Lord Griffiths (at 401) found three instances of this in the Immigration Act 1971. For example s 13(5) refers to a certificate 'given by the Secretary of State (and not by a person acting under his authority)'. In a reference to the linguistic canon of construction *expressum facit cessare taciturn* (Code s 388), Lord Griffiths added (at 402): 'Where I find in a statute three explicit limitations on the Secretary of State's power to devolve I should be very slow to read into the statute a further implicit limitation.'

Discretion

In Rv Secretary of State for the Home Department, ex p Oladehinde [1990] 2 All ER 367 (affirmed, *Oladehinde v Secretary of State for the Home Department* [1990] 3 All ER 393: see previous note) Lord Donaldson MR referred (at 379) to what he called the *'Padfield* approach' to the construction of an enactment conferring a discretion. This was stated by Lord Reid in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] 1 All ER 694 at 699 as follows:

> 'Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole ... if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.'

Enforcement agencies: adjudicating authorities with appellate jurisdiction (Code s 23)

House of Lords (Code pp 65-67)

For an example of the overruling by the House of Lords of its own previous decision see *Murphy v Brentwood District Council* [1990] 2 All ER 908, described in the note on p 250 above related to Code s 14.

Enforcement agencies: judicial review (Code s 24)

Irrationality

(i) In *Champion v Chief Constable of the Gwent Constabulary* [1990] 1 All ER 116 at 127, Lord Lowry suggested that in the *Wednesbury* test as originally formulated by Lord Greene MR (set out at Code p 69) the words 'acting reasonably' should be inserted after 'authority' in the phrase 'a decision ... so unreasonable that no reasonable authority could ever have come to it'. This would make clear that a normally reasonable authority may on rare occasions suffer a lapse and act unreasonably. It would avoid the undesirable implication that an authority against whom judicial review is ordered must for that reason be regarded as usually unreasonable in its behaviour.

(ii) In *R v Secretary of State for the Home Department, exp Brind* [1990] 1 All ER

469 at 480-481 Lord Donaldson MR said that the doctrine of 'proportionality', under which administrative action may be attacked if it is out of proportion to the mischief addressed (using a sledgehammer to crack a nut), is not a separate head of judicial review but an aspect of irrationality. He added:

> '. . . acceptance of "proportionality" as a separate ground for seeking judicial review rather than a facet of "irrationality" could easily and speedily lead to courts forgetting the supervisory nature of their jurisdiction and substituting their view of what was appropriate for that of the authority whose duty it was to reach that decision.'

As to this case, which was followed by the Court of Appeal in *R v General Medical Council, ex p Colman* [1990] 1 All ER 489, see also the note on p 260 below related to Code s 134.

Procedural impropriety

(i) Unfairness as a ground for judicial review falls within the category of procedural impropriety: *R v Inland Revenue Commissioners, ex p Taylor (No 2)* [1989] 3 All ER 353 at 357-358 (**A11ER** Rev 1989, pp 289-290 and discussed in Taxation, p 135 below). This category has also been described as the requirement of procedural due process: *R v Governor of Pentonville Prison, ex p Naghdi* [1990] 1 All ER 257 at 260, discussed in Extradition, pp 134-135 above.

(ii) It was held in i? *v Board of Inland Revenue, exp MFK Underwriting Agencies Ltd* [1990] 1 All ER 91, following *Preston v IRC* [1985] 2 All ER 327, [1985] STC 282, that what Bingham LJ (at no) called 'the valuable developing doctrine of legitimate expectation' is an aspect of the treatment of unfairness, and that where (which was not the case here) a statutory body such as the Inland Revenue abuses its power unfairly, as by defeating the legitimate expectation of taxpayers who had relied on its pronouncements, judicial review will lie despite the availability of statutory appeal procedures.

Enforcement agencies: dynamic processing of legislation by
(Code s 26)

Overruling of processing decisions

Even though there exists a long line of authority as to the legal meaning of a term or enactment, a higher court may decide to reverse this where it considers it to be based on defective reasoning. The decision of the Court of Appeal in *Cook v Southend Borough Council* [1990] 1 All ER 243 on enactments giving a right of appeal to a 'person aggrieved' affords an example. A line of cases held that, contrary to its natural meaning, the term was not intended to include a local authority whose decision had been impugned. Woolf LJ (at 254) held that in the key case, i? ***V*** *London Sessions Appeal Committee, ex p Westminster City Council [1951]* 1 All ER 1032, 2 KB 508, the Divisional Court had taken a 'wrong turning'. He went on:

> 'As the present case illustrates, the question of who is a "person aggrieved" is still very much alive in many statutory situations. It therefore appears to me to be important for this court to intervene so that in future the decisions in the 1950s will not continue to cause the courts unduly to restrict the right of local authorities to appeal. I have therefore come to the conclusion that *Ex p Westminster City Council* should be regarded as having been wrongly decided and should no longer be followed.'

Decisions arrived at per incuriam

In *Rakhit v Carty* [1990] 2 All ER 202 (see also pp 176-177 above) the Court of Appeal held that its decision in *Kent v Millmead Properties Ltd* (1982) 44 P & CR 353 had been arrived at per incuriam, since it was given in ignorance or forgetfulness of an inconsistent statutory provision, namely the Rent Act 1977, s 67(3). Accordingly, the court declined to follow it even though it had previously followed it in *Cheniston Investments Ltd v Waddock* [1988] 2 EGLR 136.

Act of Parliament: definition (Code s 27)

Control over procedure (Code pp 83-84)

In *Rost v Edwards* [1990] 2 All ER 641 Popplewell J ruled that in the light of authority he was compelled to find that the effect of art 9 of the Bill of Rights (1688) is that whatever was said or done in either House of Parliament could not be enquired into in a court of law, even though the enquiry did not in any sense challenge what had been said or done (see pp 332—333 above).

Act of Parliament: overriding effect of (Code s 32)

Court's inherent jurisdiction

In *Harrison v Tew* [1990] 1 All ER 321 the House of Lords considered the position where an Act of Parliament makes comprehensive provision in an area previously forming part of the court's inherent jurisdiction, but does not expressly state whether or not that jurisdiction is to remain effective. The case concerned the court's inherent jurisdiction to tax the bill of costs submitted by a solicitor (based on the fact that a solicitor is an officer of the court) having regard to the fact that a series of Acts beginning with 3 Jac 1 c 7 (1605) has set up a statutory system for the taxation of solicitors' costs. *Held* The court retains no inherent jurisdiction over solicitors in relation to the taxation of costs since the jurisdiction has by implication been ousted and replaced by this series of enactments, of which the one now current is the Solicitors Act 1974, s 70.

Lord Lowry (at 329) cited Coke's statement that 'it is a maxime in the common law, that a statute made in the affirmative, without any negative expressed or implyed, doth not take away the common law' (2 Co Inst (1817) 200). He held that s 70(4) of the 1974 Act (which states that the power to order taxation *conferred by sub-s (2)* shall not be exercisable after a stated period) is a negative enactment in Coke's sense. Although the italicised

words might seem to contradict this, it is to be noted that they are a modern consolidated version of the Solicitors Act 1843, s 41, which imposed a time limit in general words. Taken together, these, said Lord Lowry (at 329) 'were negative enactments which in my clear opinion ousted the inherent jurisdiction to refer a bill for taxation in conflict with what they lay down'. *(Note-* The reference at Suppp 13 to *Symbol Park Lane Ltd v Steggles Palmer (a firm)* [1985] 2 All ER 167 (All ER Rev 1985, pp 236, 250, 255), a decision which is criticised by Lord Lowry (at 328), needs to be read in the light of *Harrison v Tew.)*

Whether Crown bound by Act (Code s 34)

In *Lord Advocate v Dumbarton District Council* [1990] 1 All ER 1 (discussed in Town and Country Planning, pp 348-349 below) the House of Lords reviewed the doctrine of Crown immunity from the operation of Acts of Parliament. The following points emerge from the principal opinion, delivered by Lord Keith:

1. A statute must, in the absence of some particular provision to the contrary, bind the Crown either generally or not at all, since there is no logical room for the view that it binds the Crown when the Crown is acting without any right to do so but not when the Crown does have such right. This view of Lord Keith's was expressly supported by Lord Jauncey, who said (at 18):

   > 'Any other approach would mean that the applicability of a particular statute to the Crown in any given circumstances could depend not on the terms of the statute but on matters extraneous thereto, namely the relevant common law rights of the Crown at the time.'

2. The conclusion that the provisions of a particular Act do not bind the Crown is not controverted by the fact that a section of the Act states expressly that that section shall not bind the Crown, since such saving provisions are commonly inserted *ex abundanti cautela* and do not support the inference that the Crown was in other respects intended to be bound by the Act.
3. It is desirable that Acts should always state explicitly whether or not the Crown is intended to be bound by any, and if so which, of their provisions. It may be remarked of the last of these points that legislative drafters are unlikely to comply with it. This is because Bills are usually drafted in too much of a hurry to permit the weighing of points such as this, which often have difficult aspects.

Act of Parliament: challenges to Act's validity (Code s 47)

Bill of Rights (Code p 128)

In *Rost v Edwards* [1990] 2 All ER 641 Popplewell J ruled that in the light of authority he was compelled to find that the effect of art 9 of the Bill of Rights (1688) is that whatever was said or done in either House of Parliament could not be enquired into in a court of law, even though the enquiry did not in any sense challenge what had been said or done (see pp 332-333 above).

Delegated legislation: doctrine of ultra vires (Code s 58)

Severance (Code pp 144-145)

In *Director of Public Prosecutions v Hutchinson* [1990] 2 All ER 836 (see also Administrative Law, pp 6—7 above) the House of Lords reversed the decision in the court below ([1989] 1 **A11ER** 1060 (All ER Rev 1989, pp 290-291)). The case concerned byelaws made with respect to common land under the Military Lands Act 1892, s 14(1) (which states that no byelaw made under it shall authorise interference with rights of common). The applicant, who was convicted of an offence under the byelaws, possessed no right of common in respect of the land. The byelaws thus interfered with no rights of common of hers, even though they interfered with rights of common possessed by other persons. *Held* The conviction was unlawful. In so far as they affected the rights of commoners, the byelaws were ultra vires. To treat them as nevertheless valid in relation to non-commoners would be to enforce provisions of a totally different character from those in fact made.

Lord Bridge, with whom three of the other four law lords agreed, said (at 839-840) that the cases where part but not the whole of an item of delegated legislation exceeds the powers under which it was purported to be made, and the valid portion is severable, can be divided into cases of *textual severability* (where the so-called blue-pencil test can be applied) and those *of substantial severability* (where it cannot). Lord Bridge said:

> 'A legislative instrument is textually severable if a clause, a sentence, a phrase or a single word may be disregarded, as exceeding the lawmaker's power, and what remains of the text is still grammatical and coherent. A legislative instrument is substantially severable if the substance of what remains after severance is essentially unchanged in its legislative purpose, operation and effect.'

Grammatical meaning: semantic obscurity and the 'corrected version' (Code s 90)

(i) The Animals Act 1971, s 2(2) *(b),* imposes liability where damage is caused by an animal if 'the likelihood of the damage or of its being severe was due to [certain] characteristics of the animal' and other stated requirements are met. In *Curtis v Betts* [1990] 1 All ER 769 the Court of Appeal held that because this wording was obscure it was necessary to construe the provision with the substitution of the simple phrase 'the damage' for the words 'the likelihood of the damage or of its being severe'. This is a good example of the express statement by the court of construction of what is to be treated as the 'corrected version' of the enactment where the court considers it necessary to apply a rectifying construction (see also Tort, pp 334-335 below). (For the presumption that errors in legislation are to be rectified by the court of construction see Code s 142.)

(ii) For a 'corrected version' found by the House of Lords see the note, related to Code s 142, on *McMonagle v Westminster City Council* [1990] 1 All ER 993 at pp 261-262 below.

(iii) For a case where it is submitted the court found fhe wrong 'corrected

version' see the note on *R v Brentwood Justices, ex p Nicholls* [1990] 3 All ER 516 at pp 258-259 below, related to Code s 125 (also discussed in the chapter on Criminal Procedure, p 86 above).

Filling in the detail: implications (when legitimate) (Code s 109)

Implied ancillary powers

Under the rule in *A-G v Great Eastern Rly Co* (1880) 5 App Cas 473, as stated by Lord Blackburn (at 481), 'those things which are incident to, and may reasonably and properly be done under the main purpose [of an enactment], though they may not be literally within it, would not be prohibited'. Or, as stated by Lord Selborne LC (at 478), 'whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires'.

The rule was considered by the Court of Appeal in *R v Richmond upon Thames London Borough Council, ex p McCarthy & Stone (Developments) Ltd* [1990] 2 All ER 852 when ruling upon the legal meaning of the codification of the rule in relation to local authorities in the Local Government Act 1972, s **111(1)**. This empowers a local authority 'to do any thing . . . which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions'. As to the latter case see further the note at p 267 below related to Code s 334, and the discussion in Town and Country Planning at PP 353-354 below.

Filling in the detail: implications affecting related law (Code s no)

(i) For a case where the House of Lords acknowledged that Parliament had in legislation recognised profound changes in public perceptions of sexual morality see the description, related to Code s 142, *oi McMonagle v Westminster City Council* [1990] 1 All ER 993 at pp 261-262 below.

(ii) In *Kirkham v Chief Constable of the Greater Manchester Police* [1990] 3 All ER 246 the Court of Appeal upheld the decision in the court below ([1989] 3 All ER 882 (All ER Rev 1989 p 292)).

Rules: the commonsense construction rule (Code s 122)

For an example of commonsense construction see the description, related to Code s 142, of the important decision of the House of Lords in *McMonagle v Westminster City Council* [1990] 1 All ER 993 at pp 261-262 below.

Statutory definitions (Code s 125)

Application to ancillary documents

Where an Act contains a definition of a term, there is a presumption that when the term is used in a document issued under, or for the purposes of, the Act its meaning in that document is intended to be that given by the definition, rather than its ordinary meaning. In *Wyre Forest District Council v*

Secretary of State for the Environment [1990] 1 All ER 780 (also discussed at pp 347-348 below) the House of Lords had to decide whether the word 'caravan' as used in a planning application had its ordinary meaning or the wider meaning assigned to it by the Caravan Sites and Control of Development Act 1960, s 29(1). HeWThe latter was the case. Lord Lowry said (at 785):

> '. . . if Parliament in a statutory enactment defines its terms (whether by enlarging or by restricting the ordinary meaning of a word or expression), it must intend that, in the absence of a clear indication to the contrary, those terms as defined shall govern what is proposed, authorised or done under or by reference to that enactment.'

Elsewhere, (at 788) Lord Lowry referred to a defined term used in 'a formal document under the planning Acts' as prima facie having the meaning assigned by the statutory definition. The principle clearly applies also to a term as used in a document created for the purposes of an Act where, while not being defined by the Act, the term has a distinct meaning in the Act. Prima facie it would have the same meaning in the document.

Potency of the term defined (Code pp 276-277)

It is pointed out at Code p 276 that the natural meaning of a defined term may have a potency sufficient to override the literal meaning of the statutory definition (see also Supp pp 24-25 and All ER Rev 1989, p 293). Although illustrations of this principle arise frequently in practice, the profession is slow to accept it as a distinct type of interpretative problem. *Esso Petroleum Co Ltd v Ministry of Defence* [1990] 1 All ER 163 furnished one more example. It concerned the definition of 'public revenue dividends' in the Income and Corporation Taxes Act 1970, s 107. Without mentioning the principle, the court held that although the definition of 'dividends' stated that the term included 'interest', and was thus literally wide enough to include interest on damages for a tort committed by a government department, the intrinsic meaning of 'dividends' required the general word 'interest' to be limited to interest on securities.

Number: Interpretation Act igy8, s 6(c) (Code p 284)

The Interpretation Act 1978, s *6(c),* provides that unless the contrary intention appears words in the singular include the plural. This causes difficulty when the drafter forgets that his enactment drafted in terms of what one person does may not work for plural cases, since the people concerned may choose to do different things (for previous examples of these difficulties see *Bennion on Statute Law* (3rd edn) pp 269-270).

The problem arose once more in *R v BrentwoodJustices, exp Nicholls* [i99°] 3 All ER 516, where the Divisional Court had to construe the Magistrates' Courts Act 1980, s 20(3). This says that in certain circumstances the court, after explaining specified matters to 'the accused', shall 'ask him whether he consents to be tried summarily or wishes to be tried by a jury'. The subsection goes on to say that 'if he consents to be tried summarily' the court shall proceed to do this. On the other hand 'if he does not so consent' the court must inquire into the information as examining justices. In *Nicholls*

three defendants, Nicholls (the applicant for judicial review), Carr and Willbourne were jointly charged with the one offence of affray. Nicholls and Carr wished to be tried summarily, while Willbourne wished to be tried by jury. Relying on s 6(f), the court held that the effect of Willbourne's wish was that all three must be tried by jury.

The decision is difficult to justify. The drafter of s 20(3) had erred by failing to envisage and provide for the fact that defendants are frequently tried jointly for the same offence. Section *6(c)* requires references to 'the accused' to be construed as including two or more accused persons, but the obvious possibility that they might decide in differing ways was not dealt with by the wording of s 20(3). The court was therefore required to arrive at the 'corrected version' of the enactment in accordance with the true intention of Parliament (see Code s 90). It is submitted that this would be more likely to have been to the effect that there should be two separate trials, a summary trial for those defendants who wished it and a jury trial for any who elected for that alternative.

Powers and duties: Interpretation Act 1978, s 12(1) (Code p 284)

The Interpretation Act 1978, s 12(1), says that where an Act confers a power it is implied, unless the contrary intention appears, that the power may be exercised from time to time as occasion requires. To the previous examples of the overlooking of this provision (see Supp p 26) there can be added *R v Immigration Appeal Tribunal, ex p Secretary of State for the Home Department* [1990] 3 All ER 652, which concerned the power to make an application for leave to enter the United Kingdom under the Immigration Act 1971, s 3(1).

Principles: nature of legal policy (Code s 126)

Legal policy, which is an aspect of public policy, is explained at Code pp 285-295. For an example of the emergence of a new head of policy see the note on *R v Registrar General, exp Smith* [1990] 2 All ER 170 at p 265 below, related to Code s 289 (also discussed in Family Law, pp 151-152 above).

Principles: that law should serve the public interest (Code s 127)

Estoppel per rem judicatem

The House of Lords held in *Thrasyvoulou v Secretary of State for the Environment* [1990] 1 All ER 65 that where an enactment creates a specific jurisdiction for the determination of any issue which establishes the existence of a legal right then, unless the contrary intention appears from the enactment, there is an implication that the principle of res judicata is intended to apply to give finality to that determination even though it is not made by a court.

The House accordingly held that a determination in favour of the appellant in an appeal against an enforcement notice under the Town and Country Planning Act 1971, s 88(2)(fe) to *(e),* that an existing use of a building or land was either permitted or beyond the reach of enforcement proceedings gave rise to an estoppel per rem judicatem. Lord Bridge said (at 70-71):

> 'The doctrine of res judicata rests on the twin principles which cannot be better expressed than in terms of the two Latin maxims "interest reipublicae ut sit finis litium" and "nemo debet bis vexari pro una et eadem causa". These principles are of such fundamental importance that they cannot be confined in their application to litigation in the private law field. They certainly have their place in the criminal law. In principle they must apply equally to adjudications in the field of public law.'

(For further discussion of *Thrasyvoulou,* see Town and Country Planning at PP 350-351 below.)

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

European Convention on Human Rights

In R v Secretary of State for the Home Department, exp Brind [1990] 1 All ER 469 the Court of Appeal considered the argument that a directive issued by the Home Secretary to the Independent Broadcasting Authority under the Broadcasting Act 1981, s 29(3), prohibiting the broadcasting of direct statements by representatives of proscribed terrorist organisations in Northern Ireland contravened the provisions of art 10 of the European Convention on Human Rights regarding freedom of speech. *Held* Since there was no ambiguity in the wording of s 29(3), which gave the Home Secretary unfettered power to prohibit the broadcasting of 'any matter or classes of matter', its width was not to be treated as cut down by art 10. Lord Donaldson MR said (at 477):

> '. . . you have to look long and hard before you can detect any difference between the English common law and the principles set out in the convention, at least if the convention is viewed through English judicial eyes . . . when the terms of primary legislation are fairly capable of bearing two or more meanings [there is] a presumption that Parliament has legislated in a manner consistent, rather than inconsistent, with the United Kingdom's treaty obligations.'

As to this case, which was followed by the Court of Appeal in *R v General Medical Council, ex p Colman* [1990] 1 All ER 489, see also the note on pp 252-253 above related to Code s 24.

Presumptions: that regard be had to the consequences of a construction (Code s 140)

For an example of consequential construction see the description, related to Code s 142, of the important decision of the House of Lords in *McMonagle v Westminster City Council* [1990] 1 All ER 993 at pp 261-262 below.

Presumptions: that 'absurd' result not intended (Code s 141)

For an example see the description, related to Code s 142, of the important decision of the House of Lords in *McMonagle v Westminster City Council* [1990] 1 All ER 993 at pp 261-262 below.

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

Garbled or corrupt text (Code pp 339-342)

In *McMonagle v Westminster City Council* [1990] 1 All ER 993 the House of Lords considered the definition of 'sex encounter establishment' in the Local Government (Miscellaneous Provisions) Act 1982, Sch 3 para 3A. The definition contains four sub-paragraphs, numbered *(a)* to *(d),* which respectively specify four classes of premises in which sexual services of various kinds are provided. Sub-paras *(a)* to *(c)* each expressly limit the services covered by them to those which are 'not unlawful'. Thus sub-para *(c)* says 'premises at which entertainments which are not unlawful are provided by one or more persons who are without clothes or who expose their breasts or genital, urinary or excretory organs during the entertainment'. In *McMonagle* the appellant had been convicted of contravening the Act by operating premises falling within sub-para *(c)* without a licence. He argued that the conviction was bad because the prosecution had failed to prove that the entertainments in question were 'not unlawful'. Applying *Stone v Corp of Yeovil* (1876) 1 CPD 691 (see Code p 375) and *Salmon v Duncombe* (1886) 11 App Cas 627 (see Code p 755), the House held that the words 'which are not unlawful' must be treated as surplusage attributable to the ineptitude of the draftsman. Accordingly it was not necessary for the prosecution to prove that the entertainments were not unlawful.

The only speech delivered was that of Lord Bridge (at 994—998). Since this important decision is relevant to no less than eight sections of the Code (all noted in the appropriate places in this article) in addition to s 142, an extended quotation from Lord Bridge's speech is now given.

> 'Your Lordships, I believe, find it both startling and unedifying that an appellant. . . should be able to dispute his guilt on the ground that the activity on which his conviction is founded is taken outside the ambit of the enactment under which he is charged by reason only that it proves him guilty of another much graver indictable offence . . .
>
> The social background against which the legislation providing for the licensing of sex establishments must be considered is the product of a revolution in public attitudes to every aspect of sexual morality . . . It is . . . inevitable that in the current climate of opinion prosecutions for public indecency offences have become rare and since any such prosecution will, if the defendant so elects, be tried by jury the standard likely to be applied . . . is in a high degree unpredictable . . . what is immediately striking is the extent to which the language of the new para 3A of Sch 3 in sub-paras *(a)* to (c) must necessarily be read as giving express parliamentary sanction to some of the more striking manifestations of the sexual revolution to which I have referred.
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> . . . reading the words ["which are not unlawful"] in their literal sense as defining an essential feature of an establishment requiring to be licensed, the meaning for which counsel for the appellant has energetically argued, would have the consequence, it seems to me, of substantially frustrating what must have been the primary purpose . . . It seems to me manifestly absurd that the intention of the legislation was to subject to licensing control only those establishments conducted in the least offensive way and to leave those which pander more outrageously to the taste of the voyeur immune from any control or legal restraint save such as might be imposed by the possibility of conviction by a jury of a public indecency offence.

> For these reasons I entertain no doubt in my own mind that we should be giving effect to the true intention of the legislature if we could avoid this absurdity by treating the phrase "which is not unlawful" . . . as mere surplusage. I recognise that this is a strong course to take in construing a statute and one which imputes an unusual degree of ineptitude to the draftsman.'

The decision is open to the criticism that it is perfectly possible that, as its chosen wording indicates, Parliament really did wish to do no more than plug the loophole that existed because lawful sex entertainments etc were not subject to prosecution, and desired to place these, and these alone, under some form of regulation. This is indeed the most likely construction. The fact that, as Lord Bridge says, jury decisions are unpredictable does not justify the House of Lords in using its judicial power to install an alternative form of legal control over unlawful sex shows.

Errors of meaning (Code pp 342-344)

(i) In *BBC Enterprises Ltd v Hi-Tech Xtravision Ltd* [1990] 2 All ER 118 the Court of Appeal considered an enactment which contained, in relation to persons using a device for unscrambling coded television transmissions, the words 'when they are not entitled to do so'. The enactment was the Copyright, Designs and Patents Act 1988, s 298(2)(a). The problem of construction arose because everyone has the right, subject to compliance with licensing requirements, to receive television transmissions. This is under the principle thus described by Staughton LJ (at 122): 'in this country, at any rate, everything which is not prohibited by law is permitted'. How then could anyone (except infringers of the licensing law) fit the words in question?

The intention of s 298 was clear, namely to give certain rights akin to copyright to persons transmitting coded programmes. The court held that, although the drafter had not stated the precondition in a form corresponding to the underlying legal position, this should not be allowed to stultify the enactment. Applying a dictum of Lord Diplock in *Fothergill v Monarch Airlines Ltd* [1980] 2 All ER 696 at 705, Staughton LJ said (at 123):

> 'Save perhaps in revenue and penal enactments, I consider that the courts should now be very reluctant to hold that Parliament has achieved nothing by the language it has used.'

(Note - The dictum of Lord Diplock is given at Code p 423, where the case reference is unfortunately omitted.) (See pp 26-27 above for further discussion of this case.)

(ii) In *Re Spence (deed)* [1990] 2 All ER 827 the Court of Appeal considered the legal meaning of the phrase in s 1(1) of the Legitimacy Act 1976 (a consolidation Act) '[the] child of a void marriage, whenever born'. Nourse LJ said (at 832):

> 'I have been much troubled by [this expression]. A void marriage, both as a matter of language and by definition . . . is a nullity. It is only an idle ceremony. It achieves no change in the status of the participants. It achieves nothing of substance. How then can you sensibly refer to a child of a void marriage?'

The court held that since the words presented 'a real and substantial difficulty or ambiguity' within the meaning of that phrase as used by Lord Wilberforce in *Farrell v Alexander* [1976] 2 All ER 721 at 726 it was entitled to refer to the different wording in the original enactment, the Legitimacy Act 1959, s 2 (see Family Law at p 137 above and Succession at p 277 below for further discussion of *Re Spence).*

(iii) For an example of the drafter misconceiving the legislative project by failing to envisage that more than one person might be involved, see the note on *R v Brentwood Justices, ex p Nicholls* [1990] 3 All ER 516 at pp 258-259 above, related to Code s 125.

(iv) To the reference in Supp p 32 to comments made by the court in *Harrison v Tew* [1987] 3 All ER 865 at 872-873, [1988] 2 WLR 1 at ion, there should be added a reference to comments made by Lord Lowry on an appeal in that case *(Harrison v Tew* [1990] 1 All ER 321 at 326-330).

(v) The decision in *Box Parish Council v Lacey* [1979] 1 All ER 113, [1980] Ch 109, (see Code p 344, Example 12) was overruled by the House of Lords in *Hampshire County Council v Milburn* [1990] 2 All ER 257. As to the latter case see the note on pp 267-268 below related to Code s 363.

Canons: construction of Act or instrument as a whole (Code s 149)

Every word to be given meaning (Code pp 375-376)

For an exception see the description, related to Code s 142, of the important decision of the House of Lords in *McMonagle v Westminster City Council* [1990] 1 All ER 993 at pp 261-262 above.

Conflicting statements within one instrument (Code pp 377-378)

In *Institute of Patent Agents v Lockwood* [1894] AC 347 at 360 Lord Herschell LC said that where there is a conflict between two sections in the same Act: 'You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other'. This dictum was relied on by the Court of Appeal in *Re Man and another (bankrupts)* [1990] 2 All ER 880 when deciding between two conflicting provisions of the Insolvency Act 1986.

Nicholls LJ said (at 886) that the so-called rule referred to in *Wood v Riley* (1867) LR 3 CP 26 at 27 that 'the last [provision] must prevail', if it had ever existed, was long since obsolete. He added: 'Such a mechanical approach . . . is altogether out of step with the modern, purposive, approach to the interpretation of statutes and documents'. This overlooks the possibility that there may in rare cases be no means of deciding between conflicting provisions on purposive grounds, when a rule of thumb is needed. It should also be remembered that it used to be the practice, and in the case of private and personal Acts still is, to place saving clauses at the end, with the intent that they should override anything inconsistent in the earlier part of the Act.

Weighing the factors: changes in legal policy (Code s 163)

For a case where the House of Lords acknowledged that Parliament had in legislation recognised profound changes in public perceptions of sexual morality see the note, related to Code s 142, on *McMonagle v Westminster City Council* [1990] 1 All ER 993 at pp 261-262 above.

Application: foreigners and foreign matters outside the territory (Code s 223)

In *BBC Enterprises Ltd v Hi-Tech Xtravision Ltd* [1990] 2 All ER 118 at 121 Staughton LJ said 'Parliament is not assumed, in a criminal enactment, to have intended to regulate conduct outside this country'. As to this case see the note, related to Code 142, on p 262 above.

Pre-enacting history: consolidation Acts (Code s 232)

In *Re Spence (deed)* [1990] 2 All ER 827 the Court of Appeal considered the legal meaning of the phrase in s 1(1) of the Legitimacy Act 1976 (a consolidation Act) '[the] child of a void marriage, whenever born'. The court held that since the words presented 'a real and substantial difficulty or ambiguity' within the meaning of that phrase as used by Lord Wilberforce in *Farrell v Alexander* [1976] 2 All ER 721 at 726 it was entitled to refer to the different wording in the original enactment, the Legitimacy Act 1959, s 2.

Enacting history: committee reports leading up to Bill (Code s 237)

For reliance by the House of Lords on the report of a Royal Commission see the note on *Hampshire County Council v Milburn* [1990] 2 All ER 257 at pp 267-268 below, related to Code s 363.

Enacting history: special restriction on parliamentary materials (Code s 241)

Bill of Rights (Code p 530)

In *Rost v Edwards* [1990] 2 All ER 641 Popplewell J ruled that in the light of authority he was compelled to find that the effect of art 9 of the Bill of Rights (1688) is that whatever was said or done in either House of Parliament could not be enquired into in a court of law, even though the enquiry did not in any sense challenge what had been said or done (see pp 332-333 above).

Unamendable descriptive component of Act: headings (Code s 281)

As Code s 281 says, its headings form part of an Act and may be used as a guide to interpretation. It is therefore surprising to find Harman J, in *Esso Petroleum Co Ltd v Ministry of Defence* [1990] 1 All ER 163 at 166, disdaining the assistance of a crossheading on the ground that 'the construction of an Act cannot be controlled by crossheadings'. While construction may not be *controlled* by a crossheading it can often be assisted by one, and it is the

court's duty to take advantage of this aid when arriving at the legal meaning of an enactment. As to this case see also the note on p 258 above related to Code s 125, and the note below related to Code s 284.

Unamendable descriptive component of Act: punctuation (Code s 284)

As stated at Code p 86, both public Bills and private Bills are fully punctuated when introduced into Parliament. As Code s 284 says, its punctuation forms part of an Act, and may be used as a guide to interpretation. It is therefore surprising to find Harman J erroneously stating in *Esso Petroleum Co Ltd v Ministry of Defence* [1990] 1 All ER 163 at 165 that 'commas are not part of the draft of Bills laid before Parliament but are inserted at the Queen's Printer's stage of publication'. As to this case see also the note on p 258 above related to Code s 125, and that above related to Code s 281.

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

The principle that, however plain the wording, the court will reject a construction of an enactment that may endanger life or health is illustrated by *R v Registrar General, exp Smith* [1990] 2 All ER 170. The Adoption Act 1976, s 51, places what is in terms an absolute duty on the Registrar General to supply an adopted person with information needed to enable him to obtain a copy of his birth certificate. In *Smith* the applicant was a psychotic who it was proved might, if he discovered the identity of his natural mother, do her an injury. *Held* The application would be refused. Watkins LJ said (at 175):

> 'In our very firm view, having regard to the potential menace to the safety in the future of the natural mother of the applicant and possibly others related to him by blood or otherwise, a public policy consideration positively demands that we refuse to grant the relief sought by the applicant. It is, we think, beyond belief that Parliament contemplated that an adopted child's right to obtain a birth certificate should be absolute come what may. . . If what we term to be an appropriate head of public policy is apparently novel and wanting until now of expression being given to it, that is no reason at all to deny it a place in the relevant law.'

Purposive-and-strained construction (Code s 315)

(i) In *X Ltd v Morgan-Grampian (Publishers) Ltd* [1990] 2 All ER 1 (see also Contempt, pp 50-51 above and Practice and Procedure, pp 208-211 above) the House of Lords approved a purposive-and-strained construction of the phrase 'information contained in a publication' in the Contempt of Court Act 1981, s 10 (which cuts down the common law powers of the courts to deal with contempts in relation to sources of information). They widened it to include information communicated and received for the purposes of a publication which has not yet taken place and may never take place. Lord Lowry said (at 17):

> 'This seems to be a necessary interpretation; otherwise a defendant such as Mr Goodwin [a journalist whose information had not been published] would be worse off than if he had already published . . . '

This example of judicial legislation can perhaps be explained, if not justified, by the fact that here the court is choosing to narrow its own powers even further than Parliament had clearly narrowed them.

(ii) For another example of purposive-and-strained construction see the description, related to Code s 142, of the important decision of the House of Lords in *McMonagle v Westminster City Council* [1990] 1 All ER 993 at pp 261-262 above.

(iii) For a further example of purposive-and-strained construction see the note on p 262 above related to Code s 142 and concerning *BBC Enterprises Ltd v Hi-Tech Xtravision Ltd* [1990] 2 All ER 118.

Construction against 'absurdity': avoiding a futile or pointless result (Code s 324)

Pointless legal proceedings (Code pp 702-703)

The law discourages the bringing of legal proceedings without preliminary attempts to settle the matter informally. In *Sandwell Metropolitan Borough Council v Bujok* [1990] 3 All ER 385 the House of Lords considered the provisions relating to statutory nuisances contained in the Public Health Act 1936, ss 91-99. While constrained by the language to hold that s 99 enabled a private person to prosecute for a statutory nuisance without first giving the offender notice of the nuisance and an opportunity to remedy it, the House resolved a doubt whether such a prosecutor was required by s 99 to be granted his costs by reference to the need to discourage prosecutions of this kind. Lord Griffiths (at 389-390) cited with approval the following dictum of Watkins LJ in the court below:

> 'In law there is no doubt that [the respondent] was entitled to commence proceedings without giving notice of the state of the dwelling to the local authority. But in every other conceivable way I regard that action as entirely wrong. Endless trouble to many people in courts and local authority offices and much money could be saved by the giving of notice of disrepair which it is to be supposed a local authority would appropriately react to.'

Construction against 'absurdity': avoiding a disproportionate counter-mischief (Code s 326)

For an example see the note on *R v Registrar General, ex p Smith* [1990] 2 All ER 710 at p 265 above, related to Code s 289.

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

Position of the Crown (Code p 722)

In *Re JS (a minor) (wardship: boy soldier)* [1990] 2 All ER 861 (discussed in Family Law at pp 114-145 above) Hollis J struck out an originating summons making JS, a boy soldier, a ward of court on the ground that the Crown was

improperly impleaded and that by the Army Act 1955 control of the body of JS was vested in the military authorities. He applied the following dictum of Russell LJ in *Re A (an infant), Hanif v Secretary of State for Home Affairs* [1968] 2 All ER 145 at 152:

> '. . . the judge would have no right to complain of or countermand a lawful posting overseas of a ward who was in the armed forces. The law refers the military control of the ward to the military authorities.'

He also applied a dictum of Denning LJ in the same case (at 662) to the effect that the court will not exercise its wardship jurisdiction 'so as to interfere with the statutory machinery set up by Parliament'.

Taxation only by Parliament (Code pp 724-725)

In *R v Richmond upon Thames London Borough Council, ex p McCarthy & Stone (Developments) Ltd* [1990] 2 All ER 852 the Court of Appeal held that a local authority providing a service in exercise of the power conferred by the Local Government Act 1972, s **111(1),** to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any of its functions is entitled to make a reasonable charge, and that this does not contravene the provision of the Bill of Rights (1688) restricting the levying of taxation to Parliament. As to this case see further the note at p 257 above related to Code s 109.

Implied application of rules of evidence etc (Code s 341)

Estoppel

As to the implied application of the principle of res judicata see the note on pp 259-260 above related to Code s 127.

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

Ex turpi causa non oritur actio (Code p 759)

In *Kirkham v Chief Constable of the Greater Manchester Police* [1990] 3 All ER 246 the Court of Appeal held that in view of the abolition of the crime of suicide by the Suicide Act 1961, s 1, the principle *ex turpi causa non oritur actio* did not apply to negate an action for damages in tort where the police negligently allowed a prisoner to commit suicide. For the history of the maxim's application see *Pitts v Hunt* [1990] 3 All ER 344 (discussed at pp 317—319 below).

Canons: ordinary meaning (Code s 363)

Several ordinary meanings (Code pp 799-800)

A phrase may have more than one ordinary meaning because it is capable of being construed in different grammatical senses. In *Hampshire County Council*

v Milburn [1990] 2 All ER 257 the House of Lords considered the meaning of the phrase 'waste land of a manor' in the Commons Registration Act 1965, s 22(i)(fe). They held it could mean either land which is currently waste land of a manor or waste land which was formerly, but is not now, waste land of a manor. As Lord Templeman put it (at 262) 'the word "of" may be either a possessive genitive or a genitive of origin'. In view of the fact that no new manors could be created after the promulgation of the statute of Quia Emptores in 1290, and having in mind the purpose of the 1965 Act as indicated in the Report of the Royal Commission on Common Land 1955-58 (Cmnd 462), the House held it must be given the latter meaning. As to this case see also note (v) on p 263 above related to Code s 142.

Canons: *expressum facit cessare taciturn* (Code s 388)

See the note on *Oladehinde v Secretary of State for the Home Department* [1990] 3 All ER 393 at pp 251-252 above, related to Code s 15.