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 first edition of the author's textbook *Statutory Interpretation*. A reference to the relevant section of the Code is given after each heading in the notes below, where the book itself is referred to as 'Code' and the Supplement as 'Supp'. (Readers are asked to note that the second edition of this book was published in May **1992.)**

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 **87, 125, 146, 267, 289** and **377).**

The subject: *ignorantia juris neminem excusat* (Code s **9)**

Where Act disapplies rule (Code pp **20-21)**

For another example see the Limitation Act **1980** s **14**(i)(c) and *Halford v Brookes* **[1991] 3** All ER **559** (discussed in Practice and Procedure, pp **275-277** above and Tort, pp **399-400, 401-402** below).

Where contracting out and waiver allowed (Code s **11)**

Where a procedural rule is laid down for the benefit of a party to litigation, that party can usually waive compliance with it. So the requirement that a writ be served personally (RSC Ord **10,** r **1 (1))** does not prevent a defendant agreeing to accept service in some other manner: see *Kenneth Allison Ltd v A E Limehouse & Co* **[1991] 4** All ER **500** (discussed in Practice and Procedure, PP **398-399** above).

Civil sanction for disobedience to statute (Code s **14)**

Tort of breach of statutory duty (Code pp **38-42)**

(i) The tort of breach of statutory duty does not arise unless the breach gives rise to 'loss or injury of a kind for which the law awards damages',

as Lord Bridge put it in *Pickering v Liverpool Daily Post and Echo Newspapers pic* [1991] 1 All ER 622 at 632. This was an action for an injunction brought by a mental patient to restrain publication of details of his case in alleged breach of the Mental Health Tribunal Rules 1983^21(5) (see also Contempt of Court, pp 67-70 and Medical Law, pp 237-239 above). Lord Bridge said (at 632):

> 'I know of no authority where a statute has been held . . . to give a cause of action for breach of statutory duty when the nature of the statutory obligation or prohibition was not such that a breach of it would be likely to cause to a member of the class for whose benefit or protection it was imposed either personal injury, injury to property or economic loss. But publication of unauthorised information about proceedings on a patient's application for discharge to a mental health review tribunal, though it may in one sense be adverse to the patient's interest, is incapable of causing him loss or injury of a kind for which the law awards damages.'

(ii) In *Scally v Southern Health and Social Services Board* [1991] 4 All ER 563 the House of Lords held that, where recourse to a tribunal was the only remedy provided in an Act based on the Employment Protection (Consolidation) Act 1978, s 1 requiring an employer to provide information to an employee as to the terms of employment, there was no implied remedy in damages. This was because, by applying to the tribunal, an employee could discover the terms, or what they should be, and the purpose of the section was thereby achieved. See also Contract, p 86 and Employment Law, pp 130-131 above.

Enforcement agencies: investigating agencies (Code s 17)

A person, such as a police officer, who is in a public place for the purpose of investigating or preventing an offence will not fall within a statutory description intended to designate ordinary members of the public resorting to that place. *Cheeseman v Director of Public Prosecutions* [1991] 3 All ER 54 concerned the question whether two police officers in plain clothes who were waiting in a public convenience for the purpose of vice detection were 'passengers' within the meaning of the Town Police Clauses Act 1849, s 28. *Held* The term 'passenger' indicated a person who went to such a place of public resort for one of the normal purposes for which it was provided or existed, and therefore did not include a police officer who was present solely for the purpose of detecting or preventing crime. See also Criminal Law, p 113 above.

Enforcement agencies: courts and other adjudicating authorities (Code s 19)

Inherent power to regulate own procedures

Subject to any enactment, a court 'has inherent jurisdiction to regulate its own procedures', even to the extent of issuing local practice directions:

Langley v North West Water Authority [1991] 3 All ER 610, per Lord Donaldson MR at 614 (also discussed in Practice and Procedure, p 248 and Solicitors, p 308 above).

'Thus in *Arbuthnot Leasing International Ltd v Havelet Leasing Ltd* [1991] 1 All ER 591 Scott J held that although a director of an impecunious limited company seeking to represent the company has no right of audience, the court may in its discretion hear him when to do so serves the interests of justice. To the argument that the director could have put the company in funds to enable it to instruct counsel Scott J said (at 598): 'The costs burden is one that the courts should endeavour, so far as is consistent with principle and practice, to mitigate'.

Interpretation by adjudicating authorities (Code s 20)

In *R v Spens* [1991] 4 All ER 421 the Court of Appeal extended the rule that it is for the court rather than the jury to determine the legal meaning of a legislative text to other texts in the nature of legislation. Watkins LJ said (at 428):

> 'We agree that the construction of documents in the general sense is a matter of fact for determination by the jury. From that generality there must of course be excluded binding agreements between one party and another and all forms of parliamentary and local government legislation, in respect of which the process of construction by the judge is indispensable... As to the present case, our view is that [the City Code on Take-overs and Mergers] sufficiendy resembles legislation as to be likewise regarded as demanding construction of its provisions by a judge. Moreover, the code is a form of consensual agreement between affected parties with penal consequences. A further and almost overriding consideration is that if the judge's construction were not the governing influence the inevitable danger of inconsistency injuries finding on the meaning of the code would arise, with possibly disastrous consequences.'

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

It was held *in R v Berry (No 2)* [1991] 2 All ER 789 that where an appellate court (court A) fails to rule on a ground of appeal (ground X) because it allows the appeal on a different ground (ground Y) but then a higher appellate court (court B) reverses the decision of court A on ground Y, the appellant cannot go back to court A and ask it now to rule on ground X. This is because the appellate concept requires that, subject to any right of further appeal to a higher court, an appeal court shall make a final pronouncement on all matters before it. It follows that an appellate court whose decision is subject to a right of further appeal ought to give a substantive ruling on all grounds of appeal raised before it. *(Note* Although *Berry* was a case where court B was the House of Lords, it is submitted that the principle laid down is applicable generally.) See Criminal Procedure, p 118 above for further discussion of this case.

Enforcement agencies: judicial review (Code s **24**)

Proportionality

(i) The principle of proportionality, under which a decision may be invalidated if its effect is wholly disproportionate to the object to be achieved and the scope of the power under which it is made, is, as Lord Diplock said in *Council of Civil Service Unions v Minister for the Civil Service* **[1984] 3** All ER **935** at **950, [1984]** AC **374** at **410,** 'recognised in the administrative law of several of our fellow members of the European Economic Community'. He there contemplated that the principle might be adopted as a future ground of judicial review, but this development has not yet occurred. In *Brind v Secretary of State for the Home Department* **[1991] 1** All ER **720** at **739** Lord Lowry said: 'there can be very little room for judges to operate an independent judicial review proportionality doctrine in the space which is left between the conventional judicial review doctrine [under the three heads of illegality, irrationality and procedural impropriety] and the admittedly forbidden appellate approach.'

Rule in O'Reilly v Mackman (Code p **72**)

(ii) In *Doyle v Northumbria Probation Committee* **[1991] 4** All ER **294** Henry J reviewed the rule in *O'Reilly v Mackman* **[1982] 3** All ER **1124, [1983] 2 AC 237** as refined by subsequent decisions, and said **([1983] 2 AC 237** at **300):**

> 'Three plain principles emerge from those decisions.
>
> (i) In cases within the *O'Reilly v Mackman* doctrine, the courts will be astute to see that there is no evasion of the Ord 53 protections designed to eliminate groundless, unmeritorious or tardy harassment of local authorities by the use of an action by writ which in reality is seeking redress for the infringement of public law rights.
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> (ii) However, in cases not within the rule there is no necessary or overriding objection to public law issues being litigated in writ actions, whether in the Queen's Bench Division or in the Chancery Division: see *[Davy v Spelthome BC* [1983] 3 All ER 278, [1984] AC 262 (All ER Rev 1983, pp 1-4, 345-347), *Wandsworth London BC v Winder* [1984] 3 All ER 976, [1985] AC 261 (All ER Rev 1984, p 10) and *Gillick v West Norfolk Health Authority* [1985] 3 All ER 402, [1986] AC 112 (All ER Rev 1985, pp 171-175)].
>
> (iii) Order 53 should not be used for the litigation of private law claims.'

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

Overruling by court of own decision

As a matter of comity between courts, one lower court will not, in the absence of good cause, decline to follow a decision of another lower court

of equivalent jurisdiction: *Secretary of State for Trade and Industry v Langridge* **[1991] 3** All ER **591** at **599.** Normally, the Court of Appeal is bound to follow its own previous decisions: *Young v Bristol Aeroplane Co Ltd* **[1944] 2** All ER **293, [1944]** KB **718; *Morelle Ltd v Wakeling*** **[1955] 1** All ER **708, [1955] 2** QB **379; *Boys v Chaplin*** **[1968] 1** All ER **283, [1968] 2** QB **1; *Williams v Fawcett*** **[1985] 1** All ER **787** (All ER Rev **1985,** p **82).** In this regard a decision of a two-judge court is not inferior to that of a three-judge court unless the former had adopted a more summary procedure: *Langley v North West Water Authority* **[1991] 3** All ER **610.**

Act of Parliament: types of (Code s **28)**

Declaratory Acts (Code pp 87-88)

An enactment may *by implication* make a declaration as to the state of the previous law. Thus, in *Sinclair v Director of Public Prosecutions* **[1991] 2** All ER **366,** the House of Lords, in deciding that a magistrate hearing extradition proceedings under the Extradition Act **1970** had no jurisdiction to determine whether the proceedings were an abuse of process, held that the fact that in the Extradition Act **1989,** s **11** Parliament had conferred such a jurisdiction on the High Court was 'the clearest possible recognition by the legislature that hitherto no such discretion existed in the courts' (per Lord Ackner at **377).** See Extradition, pp **173-175** above for further discussion of this case.

Prerogative instrument: nature of (Code s **48)**

Royal charters

The term charter derives from the Latin *carta,* a document. Royal charters are written expressions of the will of the sovereign. They have been frequently used to grant corporate status by exercise of the royal prerogative on the advice of the Privy Council. A corporation created solely under the royal prerogative has all the powers of a natural person *{Bonanza Creek Gold Mining Co Ltd v R* **[1916] 1** AC **566** at **577-578, [1916-17]** All ER Rep **999** at **1003-1004).** In *Hazell v Hammersmith and Fulham London Borough Council* **[1991] 1** All ER **545** the House of Lords held that where the prerogative is exercised in conjunction with an enactment such as the London Government Act **1963,** s **1 (2)** (which specifies the provisions which may be made by a royal charter of incorporation relating to a London borough), the resultant corporation has only the powers intended by the enactment in question (see also Administrative Law, pp **1-5** above). Lord Templeman said (at **564):**

> 'where a statute authorises the grant of a royal charter, then, the extent of the powers exercisable by a corporation created by a charter granted pursuant to the statute [which at 563 he termed "a hybrid"] will depend on the true construction and intent of the statute.'

See, however, the dictum of Watson B in *Metropolitan Saloon Omnibus Co Ltd v Hawkins* **(1859) 4** H & N **87** at **93-94, [1843-60]** All ER Rep **430 at 432** that:

'It would make strange work in the law if we were to hold that the ordinary incidents of a corporation did not attach to companies incorporated by Act of Parliament' (cited *Derbyshire County Council v Times Newspapers Ltd* **[1991]** 4 All ER **795** at **800** (see Tort, pp **392-394** below)).

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

Presumption of validity

(i) It was stated by Lord Bridge in *Factortame Ltd v Secretary of State for Transport (No 1)* **[1989]** 2 All ER **692** at **701, [1989]** 2 **WLR 997** at **1012,** following *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* **[1974]** 2 All ER **1128, [1975]** AC **295** that it is a principle of English law 'that delegated legislation must be presumed to be valid unless and until declared invalid'. To be effective, such a declaration must be by a court possessing the necessary jurisdiction, as emphasised in *Chief Adjudication Officer v Foster* **[1991]** 3 All ER **846.** Here, the Court of Appeal considered a finding by a social security commissioner on an appeal to him from a social security appeal tribunal under the Social Security Act **1975,** s **101** that the Income Support (General) Regulations **1987** (SI **1987/1967)** paras **13(2)**(d)(ii) and (iii) were ultra vires. *Held* The commissioner had no jurisdiction to make the finding because he was confined to the ground that the tribunal's decision 'was erroneous in point of law' (Social Security Act **1975,** s **101(1)).** As used in the **1975** Act this phrase, despite the width of its literal meaning taken in isolation, did not extend to a finding that the regulation under which the tribunal had acted was itself ultra vires.

Severance

(ii) In *Dunkley v Evans* **[1981]** 3 All ER **285, [1981]** 1 WLR **1522** Ormrod LJ said **([1981]** 3 All ER **285** at **287-288, [1981]** 1 WLR **1522** at **1525):**

> 'We can see no reason why the powers of the court to sever the invalid portion of a piece of subordinate legislation from the valid should be restricted to cases where the text of the legislation lends itself to judicial surgery or textual emendation by excision.'

This was upheld by the House in *Director of Public Prosecutions v Hutchinson* **[1990]** 2 All ER **836, [1990]** 3 WLR **196** (All ER Rev **1990,** pp **6-7, 256)** so the dictum by Lord Donaldson MR in *Chief Adjudication Officer v Foster* **[1991]** 3 All ER **846** at **853** that 'it must be possible to sever the good from the bad without doing violence to the text' is clearly erroneous.

The enactment: precise or disorganised? (Code s **76**)

An example of where a drafter fell short of the precision nowadays expected is the Landlord and Tenant Act **1987,** which Sir Nicolas Browne-

Wilkinson V-C called 'an ill-drafted, complicated and confused Act' *(Denetower Ltd v Toop* **[1991] 3** All ER **661** at **668** discussed in Landlord and Tenant, pp **225-226** above).

Grammatical meaning: ambiguity (Code s **87)**

Unrecognised ambiguity

A grammatical ambiguity sometimes passes unrecognised as such by advocates and the court. This apparently happened in *Royscot Trust Ltd v Rogerson* **[1991] 3** All ER **294,** where the Court of Appeal considered the Misrepresentation Act **1967,** s **2(1).** This says that where a person has entered into a contract after an innocent misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then:

> 'if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be *so liable* notwithstanding that the misrepresentation was not made fraudulently.' (Emphasis added.)

The court, not recognising the ambiguity in the italicised words, held that it was constrained by the literal meaning to uphold an award of damages on the basis of fraud rather than (as would have been reasonable in the absence of actual fraud) on the less onerous basis of negligence.

The construction 'so liable' is a common piece of drafter's shorthand. The first thing the interpreter needs to do in such cases is write it out in full. This produces the wording '. . . that person shall be liable to damages in respect thereof notwithstanding . . .'. Here, it is immediately obvious that 'liable to damages' in this context is ambiguous, since its legal meaning may either be 'liable to the same measure of damages as for the tort of deceit' or 'liable to the same measure of damages as for the tort of negligence'. In the absence of actual fraud the court would then have had no difficulty in applying the relevant interpretative criteria to arrive at the latter more just meaning. See Contract, pp **87-88** and Tort, pp **403-405** below for further discussion of *Royscot Trust v Rogerson.*

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

Interpretation Act 1978: number (Code pp **284)**

It was submitted in last year's Review, at pp **258-259,** that the Court of Appeal erred in *R v Brentwood Justices, exp Nicholls* **[1990] 3** All ER **516** (All ER Rev **1990** pp **86, 257-259, 263)** where it held that if two or more defendants jointly charged with an offence triable either way disagree as to their election all must be tried on indictment. The correctness of this submission was confirmed by the House of Lords in *Nicholls v Brentwood Justices* **[1991] 3** All ER **359,** which reversed the Court of Appeal's decision (see also Criminal Procedure, p **124** above). It held that the Interpretation Act **1978**, s **6**(c) did not apply, since a contrary intention was indicated by the

wording of the relevant enactments, the Magistrates' Courts Act 1980, ss 18-25. Accordingly, the enactments had to be applied separately to each individual defendant.

Principles: nature of legal policy (Code s 126)

Conflicting elements of legal policy

In a particular case different elements of legal policy, for example the safeguarding of personal liberty and the need for state security, may conflict. The court then needs to weigh the conflicting elements and decide which should have predominance. However, the conflict may be more apparent than real. In *R v Secretary of State for the Home Department, ex p Cheblak* [1991] 2 All ER 319 at 334 Lord Donaldson MR, commenting on the dictum of Mann LJ in *R v Secretary of State for the Home Department, ex p B* (1991) Independent, 29 January that 'this court is aware of the tension which arises between considerations of liberty and the freedom to live where one wishes and considerations of national security upon the other hand', said that although they give rise to tensions at the interface 'national security' and 'civil liberties' are on the same side. He added (at 334):

> 'In accepting, as we must, that to some extent the needs of national security must displace civil liberties, albeit to the least possible extent, it is not irrelevant to remember that the maintenance of national security underpins and is the foundation of all our civil liberties.'

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

Construction in bonam partem (Code pp 298-300)

Where an enactment requires or provides for the doing of a specified act then, unless the enactment clearly otherwise provides, an act purported to be done in pursuance of the enactment will be held ineffective if it is fraudulent,

(i) In *Rous v Mitchell* [1991] 1 All ER 676 the Court of Appeal considered a notice to quit purported to be given under the Agricultural Holdings Act 1986, s 26(2) (see also Landlord and Tenant, pp 228-230 above). The court upheld a ruling that (a) the notice was ineffective because it contained false misrepresentations, and (b) it was immaterial that the tenant had not been deceived. Nourse LJ (at 700-701) applied the following dictum of Denning LJ in *Lazarus Estates Ltd v Beasley* [1956] 1 All ER 341 at 345, [1956] 1 QB 702 at 712 which he said stated 'a fundamental principle of our jurisprudence':

> 'No court in this land will allow a person to keep an advantage which he has obtained by fraud . . . Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever . . .'

Nourse LJ went on (at 702) to uphold the following statement by Aldous J in the court below:

'A notice to quit which is fraudulent in the sense that it was made without an honest belief in its truth *is no notice to which the court will give effect* and the recipient need take no action to serve any counternotice.' (Emphasis added.)

(ii) In *Killick v Roberts* [1991] 4 All ER 289 the Court of Appeal held that where a tenancy was rescinded because of fraudulent misrepresentation by the lessee a statutory tenancy did not arise under the Rent Act 1977, s 2(1)(d), even though the conditions of that enactment were literally fulfilled. As Nourse LJ put it (at 293) 'fraud unravels everything' and 'it cannot on any footing be the policy of the 1977 Act that a statutory tenancy obtained by fraud should survive the rescission of the protected tenancy'. See Landlord and Tenant, pp 219-220 above for further discussion of this case.

Principle that persons should not be penalised under a doubtful law (Code s 129)

Deprivation without compensation (Code p 304)

It was held in *Sheffield City Council v Yorkshire Water Services Ltd* [1991] 2 All ER 280 that the principle that Parliament is not to be taken to expropriate private property without compensation does not apply to a scheme of rearrangement of public functions whereby property used for those functions is transferred 'from one defunct public authority to another public authority to be used for the same function' (per Browne-Wilkinson V-C at 289).

Principle that law should not be subject to casual change (Code s 133)

Special protection for the common law (Code p 319)

See the note at p 334 below related to Code s 336.

Note In Supp p 31, note 1(a) referring to *Abbey National Building Society v Maybeech Ltd* [1984] 3 All ER 262 should be deleted since the *Abbey National* decision was overruled by *Billson v Residential Apartments Ltd* [1991] 3 All ER 265 (see Landlord and Tenant, p 218 above).

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

European Convention on Human Rights (Code pp 322-323)

In relation to the exercise of a statutory discretion, the convention will not be taken to cut down the width of the language in which the discretion is expressed. Lord Bridge said in *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720 at 722-723:

'But it is already well settled that, in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the convention, the courts will presume that Parliament intended to legislate in conformity with the convention, not in conflict with it. Hence, it is submitted, when a statute confers upon an administrative authority a discretion capable of being exercised in a way which infringes any basic human right protected by the convention, it may similarly be presumed that the legislative intention was that the discretion should be exercised within the limitations which the convention imposes. I confess that I found considerable persuasive force in this submission. But in the end I have been convinced that the logic of it is flawed. When confronted with a simple choice between two possible interpretations of some specific statutory provision, the presumption whereby the courts prefer that which avoids conflict between our domestic legislation and our international treaty obligations is a mere canon of construction which involves no importation of international law into the domestic field. But where Parliament has conferred on the executive an administrative discretion without indicating the precise limits within which it must be exercised, to presume that it must be exercised within convention limits would be to go far beyond the resolution of an ambiguity . . . and I cannot escape the conclusion that this would be a judicial usurpation of the legislative function.'

Presumption that enactment is to be given a literal meaning (Code s **137**)

Statutory powers

The coercive, often penal, nature of a statutory power means that the court will prefer to give it a literal, rather than expansive, construction. The Children and Young Persons Act **1933,** s **39** empowers a court hearing proceedings concerning a child or young person to direct that no report of the proceedings shall include 'any particulars calculated to lead to the identification' of the child. In *R v Crown Court at Southwark, ex p Godwin* **(7991] 3 AIIER818** the question arose whether this power enabled the court to *spell out* in its direction the kind of particulars, for example the name of an adult defendant, which it considered would in fact lead to the child's identification. Glidewell LJ held (at **822)** that the direction 'must be restricted to the terms of s **39(1),** either specifically using those terms or using words to the like effect and no more'. This case is also discussed in Contempt of Court, p **71** above.

Presumption that errors to be rectified (Code s **142**)

Errors of meaning (Code pp **342-344**)

In *BBC Enterprises Ltd v Hi- Tech Xtravision Ltd* [**1991**] **3** All ER **257** the House of Lords upheld the decision of the Court of Appeal in *BBC Enterprises Ltd v Hi-Tech Xtravision Ltd* [**1990**] **2** All ER **118** (All ER Rev **1990,** p **262**): see Commercial Law pp **28-29** above for discussion.

Presumption that ancillary rules of law apply (Code s **144**)

Independent change in ancillary rule

If an ancillary legal rule has changed independently of the operation of the enactment in question it follows that the application of the enactment will change accordingly. A common law rule may change if the social conditions to which it applies change, and this will have corresponding effects on the legal meaning of any relevant enactment. Where a common law rule applies to a social institution such as marriage, and that institution fundamentally changes its nature over the years, then the common law must be adapted by the courts accordingly. Otherwise, the common law rule would go on operating unchanged in relation to an institution that had in fact ceased to exist. Such adjustments are an aspect of the courts' function of maintaining the common law in efficient working order.

An example arose in *R v R— (rape: marital exemption)* **[1991] 4** All ER **481** (examined in Criminal Law, pp **108-110** above). The common law of rape is partially codified by the Sexual Offences Act **1956,** s **1** as amended by the Sexual Offences (Amendment) Act **1976,** s **1**. The latter section says that for the purposes of the former section 'a man commits rape if . . . he has *unlawful* intercourse with a woman who at the time of the intercourse does not consent to it' (emphasis added). It was generally understood that the italicised word referred to sexual intercourse outside marriage, which under ecclesiastical law was branded as fornication and therefore 'unlawful'. At common law sexual intercourse within marriage was regarded as invariably 'lawful' because 'the wife hath given herself up in this kind unto her husband which she cannot retract' (Hale, *History of the Pleas of the Crown* **(1756)** i **58,** p **629).** The House of Lords held that because of social developments the nature of the social institution of marriage had changed. Since 'marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband' (per Lord Keith at **484)** therefore the common law's treatment of it must be taken to have changed correspondingly. Accordingly, the italicised word in s **1** must now be treated as 'mere surplusage' (per Lord Keith at **489).**

Presumption that updating construction to be applied (Code s **146)**

Strict liability (Code p **362)**

(i) The modern tendency of courts not to infer that liability is intended to be limited to cases of fault when the liability is *civil* is illustrated by *Customs and Excise Commissioners v Air Canada* **[1991] 1** AUER **570.** The Court of Appeal held that the Customs and Excise Management Act **1979,** s **141(1)** (which states that an aircraft used for the carriage of a thing liable to forfeiture 'shall also be liable to forfeiture') was intended to impose strict liability. In arriving at this conclusion the court was influenced by the fact that the enactment operated in rem. Purchas LJ said (at **586-587):**

'The object to be seized under the provisions is incapable of motive or state of mind which can only exist in the proprietor, user or other person involved in the smuggling. Thus the confiscatory provisions. . . operated against the thing and were wholly independent of the knowledge, motive or attitude of owners or other persons associated with the thing.'

Changes in social conditions (Code p **362**)

(ii) Example **10** (Code p **363**) says that by **1957** (when the Housing Act **1957** was passed) the phrase 'working classes', which was used in it, had already been judicially declared obsolete, citing *H E Green & Sons v Minister of Health (No2)* **[1947] 2** All ER **469, [1948] 1** KB **34 and** *Chorley Borough Council v Barratt Developments (North West) Ltd* **[1979] 3** All ER **634.** In *Westminster City Council v Duke of Westminster* **[1991] 4** All ER **136** Harman J held that the phrase 'working classes', though it no longer appeared in the Housing Acts, was *not* obsolete (see also Landlord and Tenant, pp **216-218** above). *Chorley Borough Council v Barratt Developments (North West) Ltd* was not cited.

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

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

(i) In *Attorney General v Hislop* **[1991] 1** All ER **911** the Court of Appeal held that the Administration of Justice Act **1960** s **13 (2)** (appeal in cases of contempt of court) should be read as if the words 'for committal or attachment' were, as Parker LJ put it (at **917**) 'not there at all and are mere surplusage'. This was because otherwise a company could not appeal under the Act, which, as Parker LJ put it (at **918**) would be 'defeating the plain legislative purpose' (see also Contempt of Court, p **67** above).

(ii) In *R v R— (rape: marital exemption)* **[1991] 4** All ER **481,** described above in relation to Code s **144,** the House of Lords held that the word 'unlawfully' in the Sexual Offences (Amendment) Act **1976,** s **1 (1)** 'should be treated as being mere surplusage' (per Lord Keith at **489).**

Canons: interpretation of broad terms (Code s **150**)

In *Willson v Ministry of Defence* **[1991] 1** All ER **638** at **642** Scott Baker J said of the Supreme Court Act **1981** s **32A**(i), which refers to an action for damages for personal injuries in which there is 'a chance' that the injured person will develop some serious disease or suffer some serious deterioration in his condition, that 'the legislature has used a wide word here and used it deliberately'. He added:

'[I]t can cover a wide range between, on the one hand, something that is de minimis and, on the other hand, something that is a probability. In my view, to qualify as a chance it must be measurable rather than fanciful.'

See Tort, pp **408-409** below for further discussion of this case.

Amendment: consequential amendment (Code s **175**)

It is common drafting practice for a later enactment to widen or otherwise alter the application of an earlier enactment. In such cases consequential amendments are often required. Where, as sometimes happens, one of these is overlooked by the drafter the court will infer that it was intended. In *Cheeseman v Director of Public Prosecutions* **[1991] 3** All ER **54** the Divisional Court considered the widening by the Public Health Acts Amendment Act **1907,** s **81** of the application of the Town Police Clauses Act **1849,** s **28** (which penalises certain acts done in a street 'to the annoyance of passengers'). Section **81** said that any place of public resort under the control of a local authority should be deemed to be a street for the purposes of s **28** but failed to make any corresponding widening of the meaning of the term 'passenger'. Waterhouse J said (at **57):** 'I would suggest that the meaning of the word "passenger" must be deemed to have been extended to cover persons who go to a place of public resort for one of the normal purposes . . .'

Transitional provisions (Code s **189**)

In *Britnell v Secretary of State for Social Security* **[1991] 2** All ER **726** at **729-730** Lord Bridge said that the purpose of a transitional provision is 'to facilitate the change from one statutory regime to another'. He cited Thornton's statement that: 'The function of a transitional provision is to make special provision for the application of legislation to the circumstances which exist at the time when that legislation comes into force' *(Thornton on Legislative Drafting* **(3rd** edn, **1987)** p **319).** He added that one feature of a transitional provision is that 'its operation is expected to be temporary, in that it becomes spent when all the past circumstances with which it is designed to deal have been dealt with'.

Retrospective operation: general presumption against (Code s **190**)

Principle against doubtful penalisation (Code p **445**)

The growing propensity of the courts to relate legal principle to the concept *of fairness* was shown in *Secretary of State for Social Security v Tunnicliffe* **[1991] 2** All ER **712,** where Staughton LJ said (at **724):** 'In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears.'

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

In *BBC Enterprises Ltd v Hi- Tech Xtravision Ltd* **[1991] 3** All ER **257** the House of Lords upheld the decision of the Court of Appeal in *BBC Enterprises Ltd*

v Hi-Tech Xtravision Ltd [1990] 2 All ER 118 (All ER Rev 1990 p 264) (see p 325 above, and Commercial Law, pp 28-29 above).

Application: deemed location of a composite act or omission (Code s 227)

Even though an act may be made up of numerous elements, this does not necessarily make it a composite act for the purposes of a particular enactment. Thus in *Hiscox v Outhwaite (No 1)* [1991] 3 All ER 641 (discussed in detail in Arbitration, pp 14-17 above)the House of Lords held that for the purposes of the definition of 'Convention award' in the Arbitration Act 1975, s 7(1) an award was 'made' in the place where it was signed. Lord Oliver said (at 646):

> '. . . I can see no context for departing from what I apprehend to be the ordinary, common and natural construction of the word "made". A document is made when and where it is perfected. An award is perfected when it is signed . . .'

Pre-enacting history: the earlier law (Code s 231)

Use of term with previous history

(i) Where an enactment uses a processed term, that is one upon whose meaning the courts have previously pronounced, it may be presumed that it was intended to have that meaning in the enactment. Thus, in referring to breach of duty in the Limitation Act 1980, s 11(1), Parliament 'must be taken to have indorsed' the meaning attributed to that phrase in *Letang v Cooper* [1964] 2 All ER 929, [1965] 1 QB 232 (so decided in *Stubbings v Webb* [1991] 3 All ER 949, per Bingham LJ at 953 (see Tort, pp 399-402 below)).

(ii) Where the wording of an enactment seems incongruous, this may be explained by the fact that the drafter borrowed it inappropriately from an earlier enactment. The point is illustrated by the decision in *City Index Ltd v Leslie* [1991] 3 All ER 180 on the Financial Services Act 1986, Sch 1, para 9, which refers to a contract the purpose 'or pretended purpose' of which is of a certain kind. Finding the words 'or pretended purpose' inappropriate in the context McCowan LJ said (at 188): 'It may be that the draftsman simply lifted the phrase without thought from s 26(1) of the Prevention of Fraud (Investments) Act 1939'. See also the notes on this case at pp 331 and 336 below, respectively related to Code ss 267 and 377.

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

Where an Act is based on a report by the Law Commission the court is usually very ready to refer to the report in order to construe a doubtful passage in the Act.

In *R v Horseferry Road Metropolitan Stipendiary Magistrate, ex p Siadatan* **[1991] 1** All ER **324** the Divisional Court had to construe the somewhat garbled wording of the Public Order Act **1986,** s **4(1).** The question was whether the words 'such violence' near the end of the subsection refer to 'immediate' unlawful violence or, as a literal interpretation would indicate, to any unlawful violence. After consulting para **5.43** of the Law Commission report on which the provision was based (Law Com No **123 (1983)),** described by Watkins LJ (at **328)** as 'very clearly expressed', the court found for the former meaning. Watkins LJ said (at **328):** 'That the parliamentary draftsman, when drafting the last part of s **4(1),** did not achieve the same clarity and precision found in that paragraph is, we think, most regrettable'. See also Criminal Law, pp **113-114** above.

Enacting history: international treaties (Code s **242)**

Travaux preparatoires (Code p 538)

The Arbitration Act **1975** was passed to satisfy the United Kingdom's obligations under the New York Arbitration Convention of **19 5 8**. In *Hiscox v Outhwaite (No 1)* **[1991] 3** All ER **641** at **646** Lord Oliver said:

> '... both counsel have made reference, as an aid to construction of the 1975 Act, to the travaux preparatoires leading up to the convention. In so far as it can properly be said that there is any ambiguity in the Act, this is, of course, perfecdy permissible as indicating the difficulty with which the convention, and thus the Act, was seeking to contend.'

See also Arbitration, pp **14-17** above.

Enacting history: to ascertain Parliament's view of the pre-Act law (Code s **247)**

Mistake by legislator

In Billsonv Residential Apartments Ltd [1991] **3** All ER **265** the Court of Appeal considered the fact that in *Shiloh Spinners Ltd v Harding* **[1973] 1** All ER **90** the House of Lords declared the existence of an inherent equitable jurisdiction that, over a long course of legislation, Parliament had assumed not to exist. Browne-Wilkinson V-C said (at **281):**

> '. . . the question is whether Parliament has impliedly shown an intention to exclude the inherent jurisdiction. In one sense it is impossible logically to find any such intention: since, at the time all the legislation was passed, no one (including Parliament) thought that the courts had any such jurisdiction, Parliament could not have intended to exclude such jurisdiction. However, in my judgment that is to take too narrow a view . . . The subsequent disclosure of the true position by the House of Lords in *Shiloh Spinners* cannot alter the effect of legislation passed in ignorance of the true state of the law.'

See also the notes on this case at p **334** below, related to Code s **336,** and Landlord and Tenant, pp **218-219** above.

Operative components of Act: Schedules (Code s 267)

Statutory notes

Of the notes set out in certain paragraphs of the Financial Services Act 1986, Sch 1 (see, eg, para 9) Lord Donaldson MR said in *City Index Ltd v Leslie* [1991] 3 All ER 180 at 184:

> 'Several of these paragraphs include notes which substantially modify what would otherwise be the effect of the text of the paragraph, which, to me at least, is a novel form of legislation and potentially somewhat confusing, at least to a lawyer.'

This observation may be thought surprising in view of the fact that, as stated at Code p 570, such use of notes is a recognised drafting device.

See also the notes on this case at p 329 above, related to Code s 231, and p 336 below, related to Code s 377.

Unamendable descriptive components of Act: sidenotes (Code s 282)

The dictum of Upjohn LJ in *Stephens v Cuckfield RDC* [1960] 2 All ER 716, [1960] 2 QB 373 that: 'Although the marginal note to a section cannot control the language used in the section, it is permissible to have regard to it in considering what is the general purpose of the section and the mischief at which it is aimed.' (cited Code p 592) was applied in *Tudor Grange Holdings Ltd v Citibank NA* [1991] 4 All ER 1 at 13.

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

(i) The principle that a construction which may endanger human life or health will be rejected unless clearly intended by the legislature is analogous to the principle, applied in *Johnstone v Bloomsbury Health Authority* [1991] 2 All ER 293 (following *Ottoman Bank v Chakarian* [1930] AC 277) that it is unlawful for an employer to order his employee to do an act which, even though apparendy within the contract of employment, endangers his life or health. See Contract, pp 84-85, Employment Law, pp 129-130 and Medical Law, p 185 above for fuller discussion of *Johnstone*.

(ii) The decision *in Rv Registrar General, ex p Smith* [1990] 2 All ER 170 (All ER Rev 1990, p 265) was affirmed by the Court of Appeal at [1991] 2 All ER 88, though the court, it is submitted incorrectly, limited the application of the principle to cases where a literal construction would facilitate *crime* resulting in danger to life (see also Family Law, p 185 above).

Impairment of rights in relation to law and legal proceedings (Code s **298**)

Compromise of suits

The courts are reluctant to construe an enactment as interfering with the right of parties to compromise litigation. To an argument that the Unfair Contracts Act **1977,** s **10** applied to such a compromise Browne-Wilkinson V-C, rejecting it, said that if it were correct the Act would apply to all compromises or waivers of claims arising from past actions, which would be capable of being put in question on the ground that they were not reasonable. He added: 'it is improbable that Parliament intended that result: it would be an end to finality in seeking to resolve disputes'. *(Tudor Grange Holdings Ltd v Citibank NA* **[1991] 4** All ER **1** at **13).**

Purposive-and-strained construction (Code s **315**)

For an example of purposive-and-strained construction see the description, related to Code s **149,** of *Attorney General v Hislop* **[1991] 1** All ER **911** at p **327** above.

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

For an example see the note on *R v Registrar General, exp Smith* **[1991] 2** All ER **88** at p **331** above, related to Code s **289.**

Anti-evasion provisions in the Act or other instrument (Code s **328**)

The sidenote to the Unfair Contract Terms Act **1977,** s **10** reads 'Evasion by means of secondary contract'. Browne-Wilkinson V-C said: 'This sidenote clearly indicates that [the section] is aimed at devices intended to *evade* the provisions of Pt I of the **1977** Act by the use of another contract' *(Tudor Grange Holdings Limited v Citibank NA* **[1991] 4** All ER **1** at **113**: emphasis in original).

Decision-making rules of natural justice etc (Code s **335**)

When is a functionary acting 'judicially'? (Code pp **728-731**)

(i) In *R v Army Board of the Defence Council, ex p Anderson* **[1991] 3** All ER **375** the Divisional Court approved (at **385**) the summary given in Wade, *Administrative Law* **(6th** edn, **1988)** pp **518-519:**

> 'The mere fact that the power affects rights or interests is what makes it "judicial", and so subject to the procedures required by natural justice. In other words, a power which affects rights must be exercised "judicially", ie

fairly, and the fact that the power is administrative does not make it any the less "judicial" for this purpose.'

They went on to cite the following dictum of Lord Bridge in *Lloyd v McMahon* [1987] 1 All ER 1118 at 1161, [1987] AC 625 at 702:

'. . . the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of *fairness* demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of *fairness.*' (Emphasis added.)

The case is referred to in *R v Department of Health, ex p Gandhi* [1991] 4 All ER 547 at 556. As to this case see also the note at p 335 below, related to Code s 346, Employment Law, p 137 and Medical Law, pp 244-247 above.

Duty to give reasons

(ii) Where Parliament has required a particular type of tribunal to give reasons for its decisions the court will treat a similar type of tribunal not set up by statute as also required to give reasons. This was laid down by the Court of Appeal in *R v Civil Service Appeal Board, exp Cunningham* [1991] 4 All ER 310, where it was also held that the giving of leave to apply for judicial review imported a duty on the respondent to give reasons for the decision where these had not been furnished to the applicant (see also Adiriinistrative Law, pp 7-8 above). Lord Donaldson MR said (at 316): 'The applicant may still not be entitled to reasons, but the court is'. Lord Donaldson MR also cited (at 316) the dictum of Lord Denning MR that where a person has been given a legitimate expectation it would not be fair to deprive him of this without reasons given *(Breen v Amalgamated Engineering Union* [1971] 1 All ER 1148 at 1155, [1971] 2 QB 175 at 191).

Taxation only by Parliament (Code pp 724-725)

(iii) In *McCarthy & Stone (Developments) Ltd v Richmond upon Thames London Borough Council[ig9i]* 4 All ER 897 the House of Lords allowed an appeal against the decision in *R v Richmond upon Thames London Borough Council, ex p McCarthy & Stone (Developments) Ltd* [1990] 2 All ER 852 (All ER Rev 1990, p 267) where 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 was entided to make

a reasonable charge, and that this did not contravene the provision of the Bill of Rights **(1688)** restricting the levying of taxation to Parliament. The House of Lords held that making a charge for the service, as opposed to providing the service, was *not* incidental to its functions because it was 'incidental to the incidental' (see per Lord Lowry at **906).** To uphold the Court of Appeal's decision would allow a local authority 'to charge for the performance of every function, both obligatory and discretionary, which provided a service' (ibid). This could not possibly be justified. See Administrative Law, pp **5-7** above and Town and Country Planning, pp **422-423** below for further discussion of this case.

Rules of equity (Code s **336)**

Displacement by statute

Where, in legislating in an area formerly dealt with by equity, Parliament has demonstrated an intention that the area shall in future be dealt with entirely by the statutory provision, the equitable rule is treated as by implication extinguished. In *Billson v Residential Apartments Ltd* **[1991] 3** All ER **265** the Court of Appeal held that the inherent equitable jurisdiction to relieve from forfeiture of a lease in the case of wilful breach of covenant had been 'extinguished by reason of Parliament having legislated comprehensively in that field' (per Browne-Wilkinson V-C at **281).** This is without prejudice to the following dictum by Lord Wilberforce in *Shiloh Spinners Ltd v Harding* **[1973] 1** All ER **90** at **101, [1973]** AC **691** at **724-725:**

> 'In my opinion where the courts have established a general principle of law or equity, and the legislature steps in with particular legislation in a particular area, it must, unless showing a contrary intention, be taken to have left cases outside that area where they were under the influence of the general law.'

See also Landlord and Tenant, pp **218-219** above.

Rules of jurisdiction, evidence and procedure (Code s **341)**

Jurisdiction ousted by rule of law

The jurisdiction of the court may be ousted by a rule of law to that effect. Thus, under the common law all disputes between a member of the academic staff of a university and the governing body of the university fall within the exclusive jurisdiction of the visitor: *Thomas v University of Bradford* **[1987] 1 AUER 834, [1987]** AC **795** (All ER Rev **1987,** p *108); Pearce v University of Aston in Birmingham (No 1)* **[1991] 2** All ER **461.** If such a rule of the common law is abrogated by statute, the jurisdiction of the court is implicitly revived without the need for it to be expressly restored: *Pearce v University of Aston in Birmingham (No 1)* **[1991] 2** All ER **461.** See Employment Law, p **139** above.

Hearing both sides: ***audi altarem partem*** (Code s **346**)

Ensure there is a 'hearing'

A party cannot be 'heard' unless there is a 'hearing', though this need not be an oral hearing unless fairness or the enactment in question so requires: *R v Department of Health, ex p Gandhi* **[1991] 4** All ER **547** at **557.** See also Employment Law, p **137** and Medical Law, pp **244-247** above.

InRv Army Board of the Defence Council, ex p Anderson **[1991] 3** All ER **375,** which concerned a complaint of racial discrimination, the Divisional Court considered an allegation that the Army Act **1955,** s **181** (which provides for the investigation of complaints by soldiers) had been contravened. Although the complaint had been referred, as required, to two members of the Army Board for adjudication, the two had dealt with the matter by documents alone and had never consulted together. *Held* While such a tribunal was master of its own procedure, and was not required to hold an oral hearing, fairness required that its members should act together. Taylor LJ said (at **388):** 'there must be what amounts to a hearing'. Earlier he said (at **387):** 'There must be a proper hearing of the complaint in the sense that the board must consider *as a single adjudicating body,* all the relevant evidence and contentions before reaching its conclusions.' (Emphasis added.)

As to this case see also the note at pp **332-333** above, related to Code s **335,** and Employment Law, p **137** above.

Benefit from own wrong: ***nullus cotntnodum capere potest de injuria sua propria*** (Code s **354**)

See the note *onRv Registrar General, exp Smith* **[1991] 2** All ER **88** at p **331** above, related to Code s **289.**

Presumption of correctness: ***omnia praesumuntur rite et solemniter esse acta*** (Code s **355**)

The maxim establishes the presumption that official acts purported to be done under an enactment were indeed done in accordance with the enactment: *T C Coombs & Co (afirm) v Inland Revenue Commissioners* **[1991] 3** All ER **623** at **635-636** (functions of General Commissioner under Taxes Management Act **1970,** s **20(7)).**

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

The decision *iriRv Nanayakkara* **[1987] 1** All ER **650** (All ER Rev **1987,** p **257),** Supp p **88,** was affirmed by the House of Lords in R v *Kassim* **[1991] 3** All ER **713** at **720** (discussed in Criminal Law, p **111** above).

***Noscitur a sociis* principle** (Code s **377**)

Resolving an ambiguity

Where a term is ambiguous, reference to a nearby passage may resolve the ambiguity. This is illustrated by the decision in *City Index Ltd v Leslie* **[1991] 3** All ER **180** on the Financial Services Act **1986,** Sch **1,** para **9.** This refers to a contract the purpose of which 'is to secure a profit or avoid a loss'. The question arose whether 'secure a profit' meant obtain a profit or arrange security for a profit. The court decided the point be reference to a note included in para **9** which disapplied the paragraph 'where the profit is to be obtained' in a specified manner.

See also the notes on this case at pp **329** and **331** above, respectively related to Code ss **231** and **267** and Contract, pp **92-93** above.

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

In *Director of Public Prosecutions v Vivier* **[1991] 4** All ER **18** at **19-20** Simon Brown J said that by the Road Traffic Act **1988,** s **192(1)** 'road' is defined to mean any highway or any other road to which the public has access. He added:

> 'It is well established on the authorities that for the purposes of s 5 "other public place" falls to be construed ejusdem generis with "road" and accordingly has to be read as meaning a place to which the public has access.'

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

Implied insertion of 'if any'

Where a statutory condition specifies the doing of a certain act or the presence of a certain state of affairs, it may be appropriate to treat the phrase 'if any' as implied. For example RSC Ord **32,** r **3** requires a summons to be served 'not less than two clear days before the day so specified', meaning 'the day specified in the summons for the hearing thereof. In *Coates Bros plc v General Accident Life Assurance Ltd* **[1991] 3** All ER **929** Millett J rejected the argument that this meant that a summons must specify the date of hearing. He said (at **933**):

> '. . . those words do not require the summons to specify a day. All they do is require the summons to be served not less than two clear days before the day so specified, *if any.* If none is specified then there is no time for service laid down by the rule.' (Millett J's emphasis.)

See Landlord and Tenant, pp **227-228** and Practice and Procedure, pp **266-267** above for further discussion of this case.