Statute Law

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Introductory note

For the convenience of readers this section, like its predecessors in the All England Law Reports Annual Review series, conforms to the Code set out in the second edition of the author's textbook *Statutory Interpretation* as modified by the Supplement to that edition. 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'. This section does not include cases reported in issues of the 1993 All England Law Reports earlier than Part 3 of Volume 2 because they are dealt with in the Supplement. The case of *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42 was also covered in the author's contribution to All ER Rev 1992 (see PP 381-397)-

Mandatory and directory requirements (Code s 10)

Jurisdiction (Code p 31)

InRv Merseyside Coroner, exp Can [1993] 4 All ER 65, where a coroner had summoned a jury informally, it was held that requirements of the Coroners Act 1988, s 8 and the Coroners Rules 1984, r 4 laying down the method whereby a tribunal of coroner and jury is set up were mandatory. Neill LJ added (at 73):

> 'Furthermore, the fact that r 48 of the 1984 rules makes special provision to cater for exceptional circumstances makes it impossible to construe the legislation as including a further implied power given to the coroner to summon a jury merely by some informal oral communication.'

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

Foreseeability of damage

In the absence of any indication that a foreseeability test is being imposed by the enactment in question, such a test is not to be taken as applied. This distinguishes the tort of breach of statutory duty from the parallel tort of negligence. It was so held by the Court of Appeal in *Lamer v British Steel pic* ['993] 4 All ER 102, which concerned a claim under the Factories Act 1961, s 29 (duty to provide a safe place of work) (see also Employment Law, pp 174-175 above). Peter Gibson J said (at 112):

> 'It would . . . seem wrong to me to imply a requirement of foreseeability, as the result will frequently be to limit success in a claim for breach of statutory

duty to circumstances where the workman will also succeed in a parallel claim for negligence; thus it reduces the utility of the section.'

Class intended to be relieved (Code pp 48-49)

In *West Wiltshire District Council v Garland* [1993] 4 All ER 246 the question arose whether an action lay against district auditors at the suit of (a) the local authority or (b) officers of that authority in respect of breach of the duty imposed by the Local Government Finance Act 1982, s 15. MorrittJ (at 251) relied on a suitable modification of the two questions posed by Lord Bridge in *Hague v Deputy Governor of Parkhurst Prison* [1991] 3 All ER 733 at 739-741. [1991] All ER Rev, pp 287-291, 396-398:

> 'They are (1) whether the provision in question is intended to protect the interests of a class of which the council or the officer is a member, and (2) did Parliament intend to confer on the council or the officer a cause of action for breach of such duty?'

Held The answer to both questions was in the affirmative as respects the council but in the negative as respects the officers. MorrittJ said (at 255) that he was assisted in coming to his favourable conclusion as respects the council by the fact that:

> 'The ability of the council to seek judicial review and such powers as it enjoys enabling it to determine whether to re-engage that auditor do not provide an adequate remedy in the case of an audit negligendy conducted.'

Prosecuting agencies (Code s 18)

Where a person has been promised immunity from prosecution but is thereafter prosecuted in the same matter, this may be a ground for judicial review as constituting an abuse of process *(R v Croydon Justices, ex p Dean* [1993] 3 All ER 129, discussed in Criminal Procedure, p 163 above). The position is similar where the prosecuting agency secured the defendant's presence within the jurisdiction by forcibly abducting him, or having him abducted from within the jurisdiction of another state, in violation of law *(Bennett v Horseferry Road Magistrates' Court* [1993] 3 **All ER 138**: see Criminal Procedure, p 155 and Extradition, pp 221-222 above).

Courts and other adjudicating authorities (Code s 19)

Ouster of jurisdiction (Code pp 64-67)

In R v Central Criminal Court, exp Director of Serious Fraud Office [1993] 2 All ER 399 the Divisional Court held that the *Anisminic* clause *(Anisminic Ltd v Foreign Compensation Commission* [1967] 2 All ER 986) set out in the Criminal Justice Act 1987, s 6(5) (which states that where a charge is dismissed under s 6(1) no further proceedings may be brought on the charge except by means of the preferment of a voluntary bill of indictment) did not preclude judicial review of the dismissal (see Criminal Procedure, p 156 above for further discussion). (For the meaning of the term *'Anisminic* clause' see Supp P **A3**-4.)

Judicial review (Code s 24)

Where other remedy available (Code pp 87-88)

In R v *Metropolitan Stipendiary Magistrate, ex p London Waste Regulation Authority* [1993] 3 All ER 113 judicial review was sought of a refusal by an examining magistrate to commit for trial. It was argued by the respondent that the prosecutor should first have pursued the alternative remedy of seeking a voluntary bill of indictment. Rejecting the argument, Watkins LJ said (at 120) —

> '. . . it is a matter of discretion; and it follows that the court is entitled to take into account the convenience of the other remedy and the common sense of the situation. Here, the voluntary bill procedure does not allow for reasoned argument to be put before the judge on an inter partes basis, save perhaps very exceptionally. If a voluntary bill had been granted in this case and a trial ensued, it would have been open to the defendants to take the same point before the trial judge which was canvassed before us and upon which we heard full argument and, if convicted, before the Court of Appeal, Criminal Division. That would be undesirable from every standpoint and would most certainly not, in our view, lead as would be desirable to a convenient and relatively economical resolution of the point in question.'

The doctrine of Crown immunity (Code s 34)

Ambit of 'the Crown' (Code p 119)

In *M v Home Office* [1993] 3 All ER 537 at 540 Lord Templeman gave the following useful summary of the unwritten British constitution:

> 'The expression "the Crown" has two meanings, namely the monarch and the executive. In the seventeenth century Parliament established its supremacy over the Crown as monarch, over the executive and over the judiciary. Parliamentary supremacy over the Crown as monarch stems from the fact that the monarch must accept the advice of a Prime Minister who is supported by a majority in Parliament. Parliamentary supremacy over the Crown as executive stems from the fact that Parliament maintains in office the Prime Minister, who appoints the ministers in charge of the executive. Parliamentary supremacy over the judiciary is only exercisable by statute. The judiciary enforce the law against individuals, against institutions and against the executive. The judges cannot enforce the law against the Crown as monarch because the Crown as monarch can do no wrong but judges enforce the law against the Crown as executive and against the individuals who from time to time represent the Crown . . . To enforce the law the courts have power to grant remedies including injunctions against a minister in his official [or in his personal] capacity.'

In that case the Home Secretary, Mr Kenneth Baker, was held to have properly been found to be in contempt of court in respect of disregard of a judge's order made against him in his official capacity (see also Contempt of Court, pp 105-106 above).

Doctrine of ultra vires (Code s 58)

Implied limitation on power (Code pp 160-161)

R v Secretary of State for the Home Department, exp Leech [1993] 4 All ER 539 concerned a restriction, implied by reference to constitutional rights, on the power conferred by the Prison Act 1952, s 47(1) to make rules for the regulation and management of prisons. The Prison Rules 1964, r 33(3), made under this power, purports to authorise, inter aha, the reading and stopping of a prisoner's correspondence with his solicitor. *Held* Rule 33(3) was ultra vires as creating a substantial impediment to the exercise of the constitutional right of a prisoner to unimpeded access to the courts and to a solicitor for advice as to instituting proceedings. (See also Prisons, p 362 above.)

Byelaws compared to other instruments (Code p 163)

As respects challenges to a byelaw, a distinction is drawn between substantive and procedural invalidity. As Woolf LJ said in *Bugg v Director of Public Prosecutions* [1993] 2 All ER 815 at 822:

> 'The first is where the byelaw is on its face invalid because either it is outwith the power pursuant to which it was made because, for example, it seeks to deal with matters outside the scope of the enabling legislation, or is patendy unreasonable . . . The second [arises where] there has been non-compliance with a procedural requirement with regard to the making of that byelaw . . . for example if there was a failure to consult.'

Woolf LJ cited as instances of the first ground the matters mentioned in a dictum of Lord Russell CJ in *Kruse v Johnson* [1898] 2 QB 91 at 99-100, [1895-9] All ER Rep 105 at no where he said that substantive invalidity would exist if byelaws —

> 'were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men.'

An example given by Woolf LJ is *R v Rose* (1855) 9 JP 676 where the applicant, who had been convicted of an offence under a byelaw, successfully applied for an order of certiorari because the offence related to neglecting properly to clean and remove all snow, rather than just *filthy* snow, which the Divisional Court regarded as being all that was within the scope of the enabling Act, the Public Health Act 1848. The Act contained a non-certiorari clause but this did not protect the byelaw since, as Lord Campbell CJ explained (at 677): 'we think that if the bye-law was, in fact, in excess of the authority given by the statute, he had not jurisdiction to convict, and therefore the *certiorari* was not taken away.'

Nowadays, according to Woolf LJ, a challenge to a byelaw on the ground of procedural invalidity 'would have to be the subject of judicial review'. This is because evidence would be required and the matter is likely to be too complex for a court lower than the High Court to be able to handle satisfactorily. Woolf LJ cited as applicable to byelaws the following dictum of Webster J in *Plymouth City Council v Ouietlynn Ltd* [1987] 2 All ER 1040 at 1046:

> 'except in the case of a decision which is invalid on its face [ie subject to substantive invalidity], every decision of the licensing authority under [the legislation dealing with the licensing of sex establishments] is to be presumed to have been validly made and to continue in force unless and until it has been struck down by the High Court; and neither the justices nor the Crown Court have power to investigate or decide on its validity.'

Woolf LJ said (at 827):

> 'So far as procedural invalidity is concerned, the proper approach is to regard byelaws and other subordinate legislation as valid until they are set aside by the appropriate court with the jurisdiction to do so. A member of the public is required to comply with byelaws even if he believes they have a procedural defect unless and until the law is held to be invalid by a court of competent jurisdiction. If before this happens he contravenes the byelaw, he commits an offence and can be punished. Where the [byelaw] is substantively invalid, the position is different. No citizen is required to comply with a law which is bad on its face. If the citizen is satisfied that that is the situation, he is entitled to ignore the law.'

The words 'he commits an offence and can be punished' are open to question. If a person charged with an offence against a byelaw which he believed to be subject to procedural invahdity wished to take that point it would be open to him to ask for an adjournment of criminal proceedings pending the hearing of an application by him for judicial review (for an example see *R v Liverpool City Magistrates' Court, ex p Shacklady* [1993] 2 All ER 929, discussed in Criminal Procedure, p 158 above). If the Divisional Court quashed the byelaw for procedural invalidity it would be unthinkable for the criminal court thereafter to proceed to a conviction.

Regarding the burden of proof in the 'grey area' where bad faith is alleged, Woolf LJ held (at 828) that subject to any statutory provision to the contrary -

> '. . . it is probably the position that, once the byelaw has been produced in evidence, it is prima facie valid and there is then an evidential burden upon a defendant to show that on the balance of probability there has been mala fides on the part of the byelaw maker. It cannot be for a defendant to prove the matter beyond reasonable doubt, nor can it be sufficient for him merely to challenge the validity of the byelaw.'

(Bugg v DPP is further discussed in Criminal Procedure, p 154 above.)

Types of instrument: byelaws (Code s 65)

See the notes on *Bugg v Director of Public Prosecutions* [1993] 2 **All ER** 815 above, related to Code s 58.

Components of byelaws (Code p 173)

As to the annexing of a plan to byelaws see *Anderson v Alnwick District Council* [1993] 3 All ER 613.

Application of Act to foreigners and foreign matters outside the territory (Code s 130)

Extension to foreigners where objects of Act so require (Code p 268)

New information technology means that many activities performed in a

territory may be controlled by persons who are outside the territory. So regulatory enactments may increasingly need to be construed as applying to such persons. In *Re Seagull Manufacturing Co Ltd (in lief)* [1993] 2 All ER 980 Peter Gibson J said (at 985) of the Insolvency Act 1986, s 133:

> 'Where a company has come to a calamitous end and has been wound up by the court, the obvious intention of this section was that those responsible ... should be liable to be subjected to a process of investigation ... Parliament could not have intended that a person who had that responsibility could escape liability to investigation simply by not being within the jurisdiction. Indeed, if the section were to be construed as leaving out of its grasp anyone not within the jurisdiction, deliberate evasion by removing oneself out of the jurisdiction would suffice ... s 133 must be construed in the light of circumstances existing in the mid-1980s when the legislation was enacted. By use of telephone, telex and fax machines English companies can be managed perfectly well by persons who need not set foot within the jurisdiction.'

Application of Act to Britons and British matters outside the territory (Code s 131)

Continuing or repeated matters

A matter relevant for the purposes of an enactment may take place partly within and partly outside the jurisdiction (see Code s 134). Where however the crucial act has taken place outside the jurisdiction, a legally irrelevant repetition of the act within the jurisdiction cannot form the basis of proceedings. In *R v Atakpu* [1993] 4 All ER 215 the defendants had engaged outside the jurisdiction in a conspiracy to steal certain cars. They then entered the jurisdiction with the stolen cars (see Criminal Law, p 150 above). *Held* If goods have once been stolen, they cannot be stolen again by the same thief by reason of his engaging in a further exercise of rights of ownership over them. Accordingly, no act had been committed within the jurisdiction which would found a prosecution. The court rejected the ingenious argument that because an indictment would not lie in respect of the theft which took place outside the jurisdiction therefore the defendants had originally 'come by the property (innocently or not) without stealing it' within the words of the Theft Act 1968, s 3(1) (meaning of 'appropriation') so that the stealing was constituted by. the first appropriation which was committed within the jurisdiction. (This was partly because the court held that 'stealing' must have the same meaning in s 3(1) as in s 24 of the 1968 Act, where it clearly includes an act committed outside the jurisdiction.)

Opposing constructions of an enactment (Code s 149)

Inquisitorial system (Code p 315)

In *R v Redbourne* [1993] 2 All ER 753 at 758, when it was suggested that the Drug Trafficking Offences Act 1968, s 1(2) (which requires the court to determine whether a convict has benefited from drug trafficking) must be construed as laying down an inquisitorial process Stoughton LJ said: 'such a process, although favoured by some other nations, would be so foreign to

our law that we would expect Parliament to say so expressly if it were intended.'

Use of Hansard (Code s 217 as substituted by Supp p A35)

Nature of enactment (Supp p A37)

As an example of the ignoring by the House of Lords of the restrictions on reference to Hansard it itself laid down in *Pepper v Hart* [1993] 1 All ER 42, see *Steele Ford & Newton (a firm) v Crown Prosecution Service* [1993] 2 All ER 769 at 777, where Lord Bridge referred to Hansard to ascertain the reason why sub-s (3) had been inserted in the Solicitors Act 1974, s 50, as amended by the Supreme Court Act 1981, s 147, although there was no suggestion that any ambiguity or absurdity arose. (See also Practice and Procedure, pp 350-351 above and the notes on this case at p 403 below, related to Code s 288, and p 405 below, related to Code s 328.)

Special restriction on Parliamentary materials (the exclusionary rule) (Code s 220 as substituted by Supp p A50)

Residuary right to admit Parliamentary materials (Supp p A83)

An example of the use of this residuary right occurred in *Doody v Secretary of State for the Home Department* [1993] 3 All ER 92 at 101, where Lord MustiU set out a lengthy extract from a speech by the Minister of State, the Hon Angela Rumbold, on a proposed amendment to what became the Criminal Justice Act 1991. His purpose was to show, for the purpose of construing the Act, the government's reasons for not accepting that provision corresponding to s 34 (discretionary life sentences) of the Act should be made in relation to mandatory life sentences. Lord Mustill made no attempt to bring his action within *Pepper v Hart* principles, or otherwise to justify it, so it must be treated as having been effected under this residuary right. (See also Prisons, pp 359-361 above.)

The short title (Code s 249)

Short title as guide to meaning (Code p 504)

Caution is needed when using a short tide conferred by a Statute Law Revision Act as this may be inaccurate. In relation to the short tide of the Criminal Procedure Act 1865, conferred by the Short Tides Act 1896, Mann LJ said in *Lockheed-Arabia Corp v Owen* [1993] 3 All ER 641 at 643 that the Act was 'inepdy tided' since most of its sections apply to civil proceedings also. (This case is considered in Evidence, p 219 and Practice and Procedure, p 346 above.)

Presumption that rectifying construction to be given (Code s 287)

In Example 287.20 on page 616, for the last two sentences substitute 'However the courts have held that it must be treated as limited to immoral purposes which are of a sexual nature.' Delete footnote 3 and in footnote 4 for *'Crook v Edmondson* [1966] 2 QB 81' [[1966] 1 All ER 833] substitute 'R *v Kirkup* [1993] 2 All ER 802'.

Presumption that updating construction to be given(Code s 288)

Ongoing Acts (Code pp 618-619)

An updating construction will not be given to an ongoing Act where to do this would go against a presumption that the result in question is intended only where express provision for it is made. In *Steele Ford & Newton (afirm) v Crown Prosecution Service* [1993] 2 All ER 769 the House of Lords traced the origin of the wording of the Supreme Court Act 1981, s 51(1) (which, until substituted by the Courts and Legal Services Act 1990, s 4(1), said that in civil proceedings the court 'shall have full power to determine by whom and to what extent the costs are to be paid') to the Supreme Court of Judicature Act 1890, s 5. They held that s 51 (1) did not empower the court to order costs to be paid out of central funds where this power was not expressly provided, since to do so would infringe the constitutional principle that no money can be taken out of the Consolidated Fund except under a distinct authorisation from Parliament itself. (See also the notes on this case in Practice and Procedure, pp 3 50-3 51 above and at p 402 above, related to Code s 217, and p 405 below, related to Code s 328.)

Similarly, it was held in *Re C (a minor) (adopted child: contact)* [1993] 3 All ER 259 that although changes might be taking place in society's long-held view that an adopted child should not retain contact with its natural parents, in the legal field such changes could only be expressed through statutory reform and pending this, the governing principles must be drawn from current law and practice. However, in this latter case no guiding presumption was cited. It is submitted that here the need for an updating construction should in the absence of any contrary presumption have been recognised, provided it was found that social views had indeed shifted enough to justify a change in construction of the relevant enactments. A key factor against this may have been the Adoption Act 1976, s 39(2), which remains in force and provides that an adopted child shall be treated in law as if he were not the child of any person other than the adopter(s). (See Family Law, p 236 above for further discussion.)

Developments in technology (Code pp 627-628)

In *Lockheed-Arabia Corp v Owen* [1993] 3 All ER 641 at 646 Mann LJ relied upon statements at Code p 627 in holding that the reference to 'any writing proved ... to be genuine' in the Criminal Procedure Act 1865, s 8 (which permits comparison of a disputed writing with any such genuine writing) must now be taken to allow comparison with a photocopy of the genuine writing since the legislators of 1865 could not have foreseen 'the facsimile reproductions which now we both suffer and enjoy'.

Principle of the open court (Code p 632)

An aspect of the principle of the open court concerns the right to report judicial proceedings. *\nRv Clerkenwell Magistrates' Court, exp Telegraph pic* [1993] 2 All ER 183 at 187 Mann LJ said 'The public has a legitimate and important interest in legal proceedings held in public and is accordingly entitled to reports of all such proceedings' (see further Code s 277 and

Example 187.1). It follows that where a judge or magistrate is minded to make an order under statutory powers restricting reporting he has power to allow representations to be made against this by newspapers and other interested persons. This was laid down in *R v Clerkenwell Magistrates' Court, exp Telegraphplc* [1993] 2 All ER 183. Mann LJ said (at 189) that the power is a discretionary one, though it is arguable that under the principle audi alteram partem (see Code s 341) such persons should be regarded as having, on behalf of the public, a *right* to make representations. (See also Contempt of Court, pp 99-100 above.)

Remedy provided for the mischief (Code s 302)

Advancing the remedy (Code p 658)

It is presumed that, in providing a remedy for a mischief, Parliament intended the remedy to apply to the whole of the mischief rather than a part only. *Knowles v Liverpool City Council* [1993] 4 All ER 321 concerned the Employers' Liability (Defective Equipment) Act 1969, s 1, which was passed as a result of *Davie v New Merton Board Mills Ltd* [1959] 1 All ER 346. That decision held that a workman could not recover for injury caused by a defective tool provided by the employer where no reasonable inspection by the employer would have disclosed the defect. Section 1 of the 1969 Act protected the employee against injury caused by 'a defect in equipment'. In *Knowles* the respondent was injured when a defective flagstone he was laying broke. It was argued that the flagstone was not 'equipment'. *Held* The argument would be rejected. Lord Jauncey said (at 327): 'there can be no logical reason why Parliament having recognised the difficulties facing workmen, as demonstrated by *Davie v New Merton Board Mills Ltd,* should have removed those difficulties in part rather than in whole.' (See also Employment Law, p 174 above.)

Purposive-and-strained construction (Code s 306)

In *R v Poplar Coroner, exp Thomas* [1993] 2 All ER 381 at 387 a construction where the purposive factor was allowed too much weight in departing from the literal meaning was referred to by Dillon LJ as an 'over-purposive' construction.

Evasion distinguished from avoidance (Code s 320)

Ramsay principle (Code pp 715-718)

In *Fitzwilliam v IRC* [1993] 3 All ER 184 at 220 Lord Browne-Wilkinson summarised the *Ramsay* principle *(WTRamsay Ltd v IRC, Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 865) as developed in later cases in the following words:

> 'The commissioners or the court must identify the real transaction carried out by the taxpayers and, if this real transaction is carried through by a series of artificial steps, apply the words of the taxing provisions to the real transaction, disregarding for fiscal purposes the steps artificially inserted. The provision of the taxing statute is to be construed as applying to the actual

transaction the parties were effecting in the real world, not to the artificial forms in which the parties chose to clothe it in the surrealist world of tax advisers.'

Lord Browne-Wilkinson said (at 221-222) that it could be argued that the *Ramsay* principle did not apply in construing an enactment, such as the Finance Act 1975, s 51(1), which expressly provides for the circumstances and occasions on which transfers carried through by 'associated operations' are to be taxed. He left this point open. (See Taxation, pp 423-425 below for fuller discussion of *Fitzwilliam.)*

Presumed application of constitutional law rules (Code s 328)

Authority for public expenditure

In *Auckland Harbour Board v R* [1924] AC 318 at 326 Viscount Haldane said:

> 'It has been a principle of the British Constitution now for more than two centuries . . . that no money can be taken out of the Consolidated Fund into which the revenues of the state have been paid, excepting under a distinct authorization from Parliament itself.'

This principle was followed by the House of Lords in *Steele Ford & Newton (afirm) v Crown Prosecution Service* [1993] 2 All ER 769, where the House ruled that the wide words of the Supreme Court Act 1981, s 51(1) (which, until substituted by the Courts and Legal Services Act 1990, s 4(1), said that in civil proceedings the court 'shall have full power to determine by whom and to what extent the costs are to be paid') did not empower the court to order costs to be paid out of central funds where this power was not expressly provided. (By the Interpretation Act 1978, Sch 1 'central funds' is defined as 'money provided by Parliament'.) They therefore reversed the decision of the Court of Appeal below (reported as *Holden & Co v Crown Prosecution Service (No 2)* [1992] 1 WLR 407 - see Code p 368 as modified in Supp p A14). Lord Bridge said (at 780) 'in a sensitive constitutional area, such as that with which we are here concerned . . . we should be scrupulous to avoid trespassing on parliamentary ground'. (See also Practice and Procedure, PP 3 50-3 51 above and the notes on this case at p 402 above, related to Code s 217, and p 403 above, related to Code s 288.)

Law regulating decision making (Code s 329)

The decision-making rules (Code pp 737-738)

It is stated at Code p 737 that where a decision is made otherwise than by a court, and the decision-making rules are infringed, 'the decision may be void or voidable'. However, in *Bugg v Director of Public Prosecutions* [1993] 2 All ER 815 at 824 Woolf LJ said of remarks by Lord Denning in *DPP v Head* [1958] 1 All ER 679 at 692:

> 'Lord Denning drew a distinction which would no longer be apposite between orders which were void and orders which are voidable . . . The distinction between orders which are void and voidable is now clearly no longer part of our law.'

This presumably is intended to apply to all decisions made under statutory powers. It seems that the distinction is thought by Woolf LJ to have

disappeared from the law because of the recent rise and development of the remedy of judicial review, under which a more sophisticated view is taken of defective decision making and the simple dichotomy between 'void' and 'voidable' may be thought no longer to suffice. However, this may be doubted. As stated in the notes on *Buggv Director ofPublic Prosecutions* [1993] 2 **A11ER** 815 at p 399 above, related to Code s 58, W o o l f LJ distinguished in the case between substantive invalidity, where an order or other instrument is bad on its face, and procedural invalidity, where the instrument stands unless and until quashed on judicial review. This seems to correspond very well with the long-standing distinction between void and voidable instruments.

Procedural propriety (Code pp 739-741)

In *Doody v Secretary of Statefor the Home Department* [1993] 3 All ER 92 at 106 Lord Mustill said that fairness is' essentially an intuitive judgment'. From the authorities on it he derived the following rules:

> '(1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.'

On the sixth of these heads, Lord Mustill commented (at 107):

> ' I find in the more recent cases on judicial review a perceptible trend towards an insistence on greater openness, or if one prefers the contemporary jargon "transparency", in the making of administrative decisions.'

Duty to give reasons (Code pp 743-744)

In *Doody v Secretary of Statefor the Home Department* [1993] 3 All ER 92 at 110 Lord Mustill said:

> 'I accept without hesitation, and mention it only to avoid misunderstanding, that the law does not at present recognise a general duty to give reasons for an administrative decision. Nevertheless, it is equally beyond question that such a duty may in appropriate circumstances be implied, and I agree with the analyses by the Court of Appeal in *R v Civil Service Appeal Board, exp Cunningham* [1991] 4 All ER 310 of the factors which will often be material to such an implication.'

The words 'at present' in this dictum indicate that it is the desire of the judges to move towards a state where reasons *are* required to be given for all aoWnistrative

decisions, though parliamentary intervention will probably be required to achieve it completely. This accords with what Lord Mustill (at 1 n) described as 'the continuing momentum in administrative law towards openness of decision-making'.

Presumed application of rules of equity (Code s 330)

Rules of equity (Code p 744)

Although equity acts in personam, a person holding an equitable interest in property has a right in rem. In *Tinsley v Milligan* [1993] 3 All ER 65 at 86 Lord Browne-Wilkinson said:

> 'More than 100 years has elapsed since the fusion of the administration of law and equity. The reality of the matter is that, in 1993, English law has one single law of property made up of legal and equitable interests. Although for historical reasons legal estates and equitable estates have differing incidents, the person owning either type of estate has a right of property, a right in rem not merely a right in personam.'

Lord Browne-Wilkinson went on to say (at 91) that 'the time has come to decide clearly that the rule is the same whether a plaintiff founds himself on a legal or equitable tide: he is entided to recover if he is not forced to rely on his own illegality'. This illustrates that when it is said that rules of equity apply by implication to enactments it must be understood that this refers to those rules *as they currently exist*. Thus the old rule that he who comes to equity must come with clean hands has been relaxed so that it hardly amounts to more than the rule just referred to against relying on illegality (see *Tinsley v Milligan* [1993] 3 All ER 65, per Lord Lowry at 83).

See also the notes on *Tinsley vMilligan* [1993] 3 **All ER** 65 at p 408 below, related to Code s 340. (This case is also considered in Commercial Law, p 58, Contract, pp 122-123, Family Law, p 230, Land Law and Trusts, pp 251-253 and Restitution, pp 371-373 above.)

Equitable remedies (Code p 746)

Where an enactment imports an equitable remedy, whether expressly or by implication, an attribute of that remedy will not apply where its application would be contrary to the legislative intention. In *Taylor v Newham London Borough Council* [1993] 2 All ER 649 the Court of Appeal held that although the Housing Act 1985,5138(3) states that the duty imposed on a housing authority by the right to buy provisions of the Act 'is enforceable by injunction' this does not import (except possibly in very rare cases) the usual discretion of the court to refuse an injunction. (See also Landlord and Tenant, pp 279-281 above.)

Implied application of rules of evidence (Code s 335)

Standard of proof (Code pp 762-763)

If, although not criminal proceedings in the strict sense, the proceedings relate to criminal offences, the standard of proof is likely to be the criminal one. Thus in *R v Dickens* [1990] 2 All ER 626 at 629, [1990] 2 QB 102 at 106 (All ER Rev 1990, pp 129-130) Lord Lane CJ said that the context of the Drug Trafficking

Offences Act 1986 and the nature of the penalties under it make clear that the standard of proof whether a confiscation order should be made in respect of the proceeds of drug trafficking is the criminal one (see All ER Rev 1990, pp 129-130).

Burden of proof (Code pp 763-764)

In *R v Redboume* [1993] 2 All ER 753 at 758 Stoughton LJ said: 'We regard an appropriate test as to where the burden of proof lies as provided by the question: who will lose if no evidence is called?'

Reliance on illegality: *allegans suam turpitudinem non est audiendus* (Code s 340)

Judicial initiative (Code p 775)

In *Tinsley v Milligan* [1993] 3 All ER 65 at 92 Lord Brovvoie-Wilkinson pointed out that the requirement that the court shall notice any illegality which appears in the case does not necessarily mean that the plaintiff then cannot recover. He went on:

> 'There are many cases where a plaintiff has succeeded, notwithstanding that the illegality of the transaction under which Pie] acquired the property has emerged: see, for example, *Bowmakers Ltd vBamet Instruments Ltd* [1944] 2 A11ER. 579, [1945] KB 65 ... the court is only entitled and bound to dismiss a claim on the basis that it is founded on an illegality in those cases where the illegality is of a kind which would have provided a good defence if raised by the defendant.'

Locus poenitentiae

In *Tinsley v Milligan* [1993] 3 All ER 65 at 89 Lord Browne-Wilkinson said that towards the end of the nineteenth century it had come to be recognised both at law and in equity that in the case of a transaction carried out for an illegal purpose —

> '... if the plaintiff had repented before the illegal purpose was carried through, he could recover his property: see *Taylor v Bowers* (1876) 1 QBD 291, [1874-80] All ER Rep 405, *Symes v Hughes* (1870) LR 9 Eq 475 ... The doctrine of locus poenitentiae therefore demonstrates that the effect of illegality is not to prevent a proprietary interest in equity from arising or to produce a forfeiture of such a right: the effect is to render the equitable interest unenforceable in certain circumstances. The effect of illegality is not substantive but procedural.'

See also the notes on *Tinsley v Milligan* [1993] 3 All ER 65 at p 407 above, related to Codes 330, and in Commercial Law, p 58, Contract, pp 122-123, Family Law, p 230, Land Law and Trusts, pp 251-253 and Restitution, pp 371-373 above.

De minimis principle (Code s 343)

Fractions of a day (Code pp 781-782)

In Re *Palmer(deed) (adebtor)* [1993] 4 All E R 8i2 at 8i8 Vinelott J said that a judicial act is presumed to have been made on the first moment of the day when it was done and takes precedence over other acts on the same day. The rule is not an

inflexible one and if there is competition between two acts the actual time when each was done can be considered. In that case it was held that the making of an insolvency administration order is a judicial act and that where such an order was made on the day of the insolvent's death it must therefore be taken to have been made *before* the moment during the day when the death occurred (see also Succession, pp 418-420 below).

Judge in own cause (Code s 348)

The principles applicable to cases of bias were reviewed by the House of Lords in *R v Gough* [1993] 2 All ER 724. They distinguished the case where a person acting in a judicial capacity has a direct pecuniary interest, where he is thereby automatically disqualified from sitting, from other cases, where the test is whether, having regard to the relevant circumstances, there is a real danger of bias. The term 'danger' was considered preferable to 'likelihood' as indicating that the test is one of possibility of bias rather than probability. Lord Woolf said (at 740) of the celebrated dictum by Lord Hewart that justice must be seen to be done:

> 'It was because Lord Hewart CJ's judgment in the *SussexJustices* case *[R v Sussex Justices, expMcCarthy]* [1924] 1 KB 256 at258-259, [1923] All ER Rep 233 at234 has created difficulties that in the *Camborne Justices* case *[R v Camborne Justices, ex p Pearce* [1954] 2 All ER 850, [1955] 1 QB 41], where exactly the same issue was involved, the court warned against a misuse of Lord Hewart CJ's judgment since it was being "urged as a warrant for quashing convictions or invalidating orders on quite unsubstantial grounds and, indeed, in some cases, upon the flimsiest pretexts of bias" (see [1954] 2 All ER 850 at 855, [1955] 1 QB 41 at 51-52). As the court pointed out, the continued citation of Lord Hewart CJ's maxim may lead to the erroneous impression that "it is more important that justice should appear to be done than that it should in fact be done". I therefore suggest that the *SussexJustices* case neither creates nor should it be placed in a separate category.'

(See also Contempt of Court, pp 104-105 and Criminal Procedure, pp 157-158 above.)

Agency: *quifacitperaliumfacitperse* (Code s 351)

In *Seaboard Offshore Ltd v Secretary of State for Transport* [1993] 3 All ER 25 at 30-31 Staughton LJ reviewed what is said in *Halsbury's Laws* regarding vicarious liability in relation to statutory offences. He went on to cite (at 32) the following dictum of Atkin J in *Mousell Bros Ltd v London and North-Westem Rly Co* [1917] 2 KB 836 at 845 -

> '... while prima facie a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute, in which case the principal is liable if the act is in fact done by his servants.'

Nevertheless, Staughton LJ held (at 33) that 'there are cases... where, despite the existence of strict hability, one has to look at the statute to see whether vicarious liability was intended'. In the instant case, concerned with the Hability imposed on the owner of a ship by the Merchant Shipping Act 1988, s 31, it was held that vicarious liability was not imposed for the defaults of every employee of the owner, however lowly his status. It was probable that vicarious liability was not

intended by s 31, so that where the owner was a company the rule applied that was laid down in *Tesco Supermarkets Ltd v Nattrass* [1971] 2 All E R 127. The company alone being liable, it was criminally responsible only for the acts and omissions of those natural persons who, as Staughton LJ (at 34) put it, constitute 'the brain, the nerve centre, the directing mind and will, the alter ego, the very ego and centre of the personality of the corporation'. He went on to cite the dictum of Lord Diplock in *Tesco* (at 155), where he said -

> '[the answer] to the question: what natural persons are to be treated in law as being the company for the purposes of acts done in the course of its business, including the taking of precautions and the exercise of due diligence to avoid the commission of a criminal offence, is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company.'

(See also Shipping Law, pp 375-376 above.)

Interpretation of broad terms (Code s 356)

General

It is not for the court to lay down a definition of a broad term which Parliament has chosen not to define. In relation to the term 'matters relating to trial on indictment' as used in the Supreme Court Act 1981, s 29(3) Lord Bridge said in *Smalley v Crown Court at Warwick* [1985] 1 All ER 769 at 779-780, [1985] AC 622 at 644:

> 'It must not be thought that in using the phrase "any decision affecting the conduct of a trial on indictment" I am offering a definition of a phrase which Parliament has chosen not to define. If the statutory language is, as here, imprecise, it may well be impossible to prescribe in the abstract a precise test to determine on which side of the line any case should fall and, therefore, necessary to proceed . . . on a case by case basis.'

InRv Crown Court at Wood Green, exp DPP [1993] 2 All ER 656 at 661 Mann LJ said that since 1987, in relation to the phrase in question, 'this court has proceeded on a case by case basis in the light of the guidance given by Lord Bridge'. (See also Criminal Procedure, pp 155-157 above.)

Statutory guidelines (Code p 814)

Where, under powers conferred by an enactment, a minister or other authority issues guidelines as to the construction of that or any other enactment, the court will on judicial review make a declaration to that effect if it finds that the guidelines are incorrect in law. This arose in *R v Secretary of State for the Environment, exp Tower Hamlets London Borough Council* [1993] 3 All ER 43 9 (provision of the Code of Guidance to Local Authorities on Homelessness, issued under the Housing Act 1985, s 71, to be wrong in law). (This case is discussed in Landlord and Tenant, pp 284-285 above.)

Judicial guidelines (see Supp p A30)

Judicial guidelines should not fetter a statutory discretion by confining its exercise

to rare or exceptional cases if no such restriction is indicated in the enactment conferring the discretion: *R v Lee* [1993] 2 All ER 170 (discretion conferred by Children and Young Persons Act 1933, s 39(1) to prohibit publication of identity of juvenile defendants) (see Contempt, pp 100-101 above). This may not apply if the case is within inclusive words mainly directed to cases of a different kind: *R v King's Lynn Magistrates, exp Holland* [1993] 2 All ER 377 (application to examining justices of discretion to exclude prejudicial evidence conferred on courts generally by the Police and Criminal Evidence Act 1984, s 78) (see Criminal Procedure, p 155 and Evidence, p 201 above).

Ordinary meaning of words and phrases (Code s 363)

Several ordinary meanings (Code pp 827-828)

Where a word used in legislation is alleged to have the same meaning as another word, which the legislator might have used in its place, the allegation is likely to be rejected if the legislator has also used that other word in the same legislation. This arose in *JR. v Crown Court at Knightsbridge, exp Dunne* [1993] 4 All ER 491, where it was alleged that 'type' as used in the Dangerous Dogs Act 1991, s 1(1) (which refers to 'any dog of the type known as the pit bull terrier') had a meaning equivalent to 'breed' rather than any wider meaning. Glidewell LJ, holding that a wider meaning was intended, pointed out that s 2(4) of the Act said that in determining whether to make an order 'in relation to dogs of any type' the Secretary of State should consult 'a body concerned with breeds of dogs', adding that here 'the two words are being used in contradistinction to each other'.

Implication where statutory description only partly met (Code s 397)

Actual description not substantive

Difficulty may arise where the actual description of a matter or thing is not a substantive one, but is merely provisional, temporary or acting. Here the decision depends on whether the actual description is intended by those concerned to be substantially equivalent to the substantive description. In *Vince v Chief Constable of the Dorset Police* [1993] 2 All ER 321 the question was whether the requirement in the Police and Criminal Evidence Act 1984, s 36(3) that no police officer may be appointed a custody officer unless he is of at least the rank of sergeant was satisfied by the appointment of an acting sergeant. The Court of Appeal held by a majority that on the facts of the instant case the point was academic and refused a declaration. They considered *R v Alladice* (1988) 87 Cr App R 380 where, construing different provisions, Lord Lane CJ said (at 383):

> 'the holder of an acting rank, at least so far as authority and powers are concerned, is to be treated as if he were the holder of the substantive rank, unless his appointment to the acting rank was a colourable pretence.'

However, the Court of Appeal held in *Vince* that an officer who had not attained the rank of sergeant had not attained eligibility for appointment as a custody officer since he did not hold 'the rank of sergeant' within the meaning of s 36(3).