

Statute Law

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Introductory note

For the convenience of readers this article, 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'.

Mandatory and directory requirements (Code s 10)

Opening words of Comment (Code p 28)

In *Petch v Gurney (Inspector of Taxes)* [1994] 3 All ER 731 (discussed in Taxation, pp 461, 462 below) Millett LJ said of the difficulty in deciding whether a statutory requirement is mandatory or directory (at 736):

'The difficulty arises from the common practice of the legislature of stating that something 'shall' be done (which means that it 'must' be done) without stating what are to be the consequences if it is not done.'

Legislative intention (Code pp 29-30)

Re Petch v Gurney (Inspector of Taxes) [1994] 3 All ER 731 at 738 Millett LJ said:

'Where statute requires an act to be done in a particular manner, it may be possible to regard the requirement that the act be done as mandatory but the requirement that it be done in a particular manner as merely directory. In such a case the statutory requirement can be treated as substantially complied with if the act is done in a manner which is not less satisfactory having regard to the purpose of the legislature in imposing the requirement. But that is not the case with a stipulation as to time. If the only time limit which is prescribed is not obligatory, there is no time limit at all. Doing an act late is not the equivalent of doing it in time.'

Statutory procedures (Code pp 31-32)

Where a statutory procedure is laid down for a particular purpose, the court will be reluctant to allow that purpose to be achieved in another way not primarily intended for it. See, eg *Re K (a minor)* (adoption: nationality)

[1994] 3 All ER 553 at 564 (adoption order on nearly adult child infringed the public policy of not allowing an application for an adoption order to be a substitute for the criteria and procedures under the code governing immigration into the United Kingdom).

The court, in following or applying a statutory procedure, cannot assume an inherent jurisdiction to waive or vary a requirement of the procedure where the requirement is one upon which the very existence of its jurisdiction to take the action in question depends: *Fetch v Gurney (Inspector of Taxes)* [1994] 3 All ER 731 at 735.

Interference with liberty (Code p 32)

Where an enactment instructs that on a trial on indictment a certain question shall be left to the jury, this is taken to be mandatory. Failure to observe it will lead to the conviction being quashed. An example of such a requirement is the Homicide Act 1957, s 3, which states that where on a charge of murder there is evidence of provocation the question whether this was enough to lead to loss of control 'shall be left to be determined by the jury'. *InR vRossiter* [1994] 2 All ER 752 and *J? v Cambridge* [1994] 2 All ER 760 failure to observe this requirement led to the murder conviction being quashed.

Where contracting out and waiver allowed (Code s 11)

Duty to give notice (Code p 37)

Where there is a statutory requirement that notice shall be in writing, or shall be of a certain length, the question whether this can be waived by agreement between the parties should depend on whether the legislative intention is to prohibit the party intended to be protected by the notice requirement from yielding up that protection. This appears to have been overlooked by the Court of Appeal in *Elsdon v Pick* [1980] 3 All ER 235, referred to by that court in *Hounslow London BC v Pilling* [1994] 1 All ER 432.

In *Elsdon v Pick* it was held that waiver of such a notice requirement by the tenant was good because agreed to *after* service of the notice in a case where the tenancy agreement did not provide for contracting out. The requirement, now contained in the Agricultural Holdings Act 1986, s 25(1), said that a notice to quit an agricultural holding 'shall (notwithstanding any provision to the contrary in the contract of tenancy of the holding) be invalid if it purports to terminate the tenancy before the expiry of twelve months from the end of the then current year of tenancy'. The words in parenthesis of course preclude contracting out by the contract of tenancy. The question whether the invalidity of a notice already served can be waived by agreement should, it is submitted, have been determined only after consideration of the imputed policy of the enactment. The same applies to *Hounslow London BC v Pilling*, where it seems the court would have followed *Elsdon v Pick* but for the existence of a joint tenancy (see the note on the former case at p 405 below, related to Code s 200 and see also Land Law, p 243 and Landlord and Tenant, pp 269-271 above).

The tort of breach of statutory duty (Code s 14)*Negligence* (Code p 50)

It may constitute negligence at common law if a person who is under a statutory duty contravenes a duty of care arising otherwise than under the statute (that is at common law), where the statutory provisions are merely part of the setting giving rise to the common law duty. Thus, in *Stovin v Wise (Norfolk CC, third party)* [1994] 3 All ER 467 a highway authority under a duty to maintain a highway imposed by the Highways Act 1980, s 41(1) failed to exercise its power under s 79 of the Act to require a neighbouring occupier to remove part of a bank obstructing the view at a junction, even though the authority knew of the danger and had indeed taken steps to exercise that power (which it did not pursue when the occupier failed to respond). *Held* The authority was liable in negligence at common law for failing to pursue the exercise of the power, whereby the respondent suffered loss from a resulting accident. (See also Tort, pp 475-476 below.)

Prosecuting agencies (Code s 18)*Function of Attorney General* (Code p 59)

InBrooksv DPP of Jamaica [1994] 2 All ER 231 at 238 Lord Woolf described the two constitutional roles of the Attorney General as being respectively 'his governmental role' and 'his role as the guardian of the public interest'. It is in the latter role that he superintends prosecutions.

Abuse of process

In R v Secretary of State for the Home Dept, ex p Schmidt [1994] 2 All ER 785 at 801 Sedley J said that the case of *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138 (All ER Rev 1993, pp 155, 221-222, 397) established 'the *Bennett* principle' in extradition. This strikes at 'an act on the part of the executive government [which] offends against the principle of comity'. It 'enlarges the concept of abuse of process to embrace serious abuses of power where it is only by the abuse of power that legal process has become possible'. On appeal to the House of Lords (*Schmidt v Federal Government of Germany* [1994] 3 All ER 65) it was held that the act of trickery whereby the appellant Schmidt was induced to come to England did not fall within the *Bennett* principle. (See also Extradition, pp 213-215 above.)

Courts and other adjudicating authorities (Code s 19)*Ouster of jurisdiction* (Code pp 64-67)

The decision in *ini? v Cornwall CC, ex p Huntington* [1992] 3 All ER 566 (All ER Rev 1992, pp 7-9, 370) (referred to in Supp p A3) was confirmed by the Court of Appeal at [1994] 1 All ER 694. Simon Brown LJ said (at 700) that the case was one where Parliament intended that the entirety of the statutory process should be gone through before there could be any opportunity for the High Court to pronounce upon the legality of the action taken under the

statutory powers. The *Ostler* clause in question in the case, namely the Wildlife and Countryside Act 1981, Sch 15 para 12, provides a special procedure for an application to be made to the High Court on a question of law only *after* the full procedural process for the making of a rights of way modification order has been completed. Here the applicant sought to bring in the High Court (by way of judicial review) before that stage had been reached. Simon Brown J said of the need to wait (again at 700) -

'... this is what Parliament has ordained, and in any event, there are obvious countervailing benefits. First among these is that the very fact that an application for judicial review cannot be made at this preliminary stage means that the [public] inquiry will not be delayed thereby.'

(For the nature of an *Ostler* clause (*R v Secretary of State for the Environment, ex p Ostler* [1976] 3 All ER 90) see Supp pp A3-4.)

Inherent jurisdiction (Code p 67)

In *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] 1 All ER 755 at 761 Nicholls V-C said:

'Inherent in the court is power to do those acts which the court needs must have to maintain its character as a court of justice (see Lord Diplock in *Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corp* [1981] 1 All ER 289 at 295) . . . Thus, the process by which the court compels the attendance of witnesses, or compels the production of documents as evidence, is a process whose source is the court's own inherent powers.'

Nicholls V-C cited the following dictum of Lord Ellenborough CJ in *Amey v Long* (1808) 9 East 473 at 484, [1803-13] All ER Rep 321 at 323: 'The right to resort to means competent to compel the production of written, as well as oral, testimony seems essential to the very existence and constitution of a Court of Common Law ...' for the tracing of the inherent jurisdiction back through enactments conferring on newly-created courts the powers of earlier courts, of which the power referred to by Lord Ellenborough was an instance, see Code Example 260.1. (See also Practice and Procedure, p 334 above.)

The words 'Subject to any enactment' preceding the statement that a court has inherent jurisdiction preclude jurisdiction to regulate procedure in an area already closely regulated by statute. For example the Civil Legal Aid (General) Regulations 1989, SI 1989/339 lay down time limits and prescribe cases where these may be waived. It was held in *mMiddleton v Middleton* [1994] 3 All ER 236 (discussed in Family Law, p 231 and Practice and Procedure, p 346 above) that this leaves no room for the exercise by the court of its inherent jurisdiction to waive procedural time limits.

The court's use of its inherent jurisdiction has recently become bolder. Thus in *mReX (a minor) (adoption details: disclosure)* [1994] 3 All ER 372 the Court of Appeal relied on this to override the clear provisions of the Adoption Act 1976, s 50(3), which states that 'every person shall be entitled to search [the index to the Adopted Children Register] and to have a certified copy of any entry in [it]'. The court made an order, purporting to be under its inherent jurisdiction, that during the minority of the child concerned the Registrar General should not disclose to any person without the leave of the court the

details of its adoption. This was because it was proved that the natural mother, if she discovered the whereabouts of the child, was likely to make trouble for it and the adoptive parents (see Family Law, pp 231-232 above). It is submitted that in fact the inherent jurisdiction does not authorise such an order and that the making of the order, however well meaning, was without jurisdiction.

Effect of orders (Code p 68)

Where an order is quashed on appeal, or otherwise ceases to have effect, it may not be deprived of all effect and the position depends on the wording of the relevant enactments. See, eg *Re K (a minor)(adoption: nationality)* [1994] 3 All ER 553 (British Nationality Act 1981, s 1(6), which states that where an order in consequence of which any person became a British citizen ceases to have effect this shall not affect the status of that person, does not apply where an order is quashed on appeal).

Adjudicating authorities with appellate jurisdiction (Code s 23)

Academic points

If the point of law to which an appeal relates is academic the court will not entertain the appeal: *Re K(a minor)(adoption: nationality)* [1994] 3 All ER 553, per Balcombe LJ at 556, citing *Sun Life Assurance Co of Canada v Jervis* [1944] 1 All ER 469; *Ainsbury v Millington* [1987] 1 All ER 929.

Dynamic processing of legislation by enforcement agencies (Code s 26)

Duty to obey court order (Code s 19(3) - see Supp p A5)

Where a consent order is made by a court under an enactment, its force is derived from the court's exercise of jurisdiction rather than the agreement between the parties. The latter is subsumed in the consent order, so that purely contractual incidents, such as the application of the doctrine of frustration, do not apply: *Crozier v Crozier* [1994] 2 All ER 362 (discussed in Family Law, pp 224-225 above).

Judicial review (Code s 24)

Declaration (Code p 90)

The court may grant a declaration even though there was no 'decision' and no prerogative order would issue. See the notes on *Equal Opportunities Commission v Secretary of State for Employment* [1994] 1 All ER 910 at p 402 below, related to Code s 140 (letter from Secretary of State to applicant giving his view on the validity of an enactment not a 'decision').

Dynamic processing of legislation (Code s 26)

A judicial decision will not qualify as a binding or persuasive precedent where no reasons for it are given. In *Powdrill v Watson* [1994] 2 All ER 513 at 521

Dillon LJ said of an unreported judgment by Harman J: 'a decision he has given where there is no report, transcript or note of the reasons by which he reached his conclusion and no indication of what the facts were, cannot rank as a helpful authority.'

Nature of delegated legislation (Code s 50)

Must not conflict with general law (Code p 152)

In *Oxfordshire CC v M* [1994] 2 All ER 269 at 280 Steyn LJ said it is axiomatic that a strong privilege, such as legal professional privilege, cannot be taken away by a provision in subordinate legislation made under an implied rather than an express power, since no such implication can arise. He cited in support of this proposition *Com/orfi/ote/sZ^v Wembley Stadium Ltd (Silkin and ors, third parties)* [1988] 3 All ER 53 (All ER Rev 1988, p 229) and *R v Secretary of State for the Home Dept, exp Leech* [1993] 4 All ER 539 (All ER Rev 1993, pp 362, 399). However, the proposition cannot apply where the implication necessarily arises from the words used in the enabling provision.

Amendment of delegated legislation (Code s 69)

An amending instrument made under a statutory power may produce an alteration which is opposite to, or otherwise different from, the purpose for which the power is conferred. The test is not what alteration is made, but whether the result of the amendment would constitute a lawful exercise of the power if the instrument amended had not existed in its previous form. *R v Secretary of State for Transport, exp Richmond upon Thames London BC* [1994] 1 All ER 577 concerned the Civil Aviation Act 1982, s 78(3), which empowers the Secretary of State by notice to restrict aircraft flights if he considers it appropriate 'for the purpose of avoiding, limiting or mitigating the effect of noise and vibration'. It was argued that this did not empower the Secretary of State to issue a notice allowing *higher* noise levels than prevailed immediately before. *Held* The argument was invalid. Laws J said (at 591) that through change of circumstances the Secretary of State 'may conclude that tighter, or looser, restrictions are required; indeed, he may conclude ... that no restrictions are required at all'. (See also Administrative Law, pp 7-8 above.)

Textual amendment (Code s 78)

Commencement of amendment

The fact that the drafter fails to provide necessary transitional provisions does not mean that a new provision inserted in an Act is to be treated as having been present since the Act was originally passed. This question arose in the case of the new s 13A of the Arbitration Act 1950, inserted by the Courts and Legal Services Act 1990, s 102. In *Z, 'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd, The Boucraa* [1994] 1 All ER 20 the House of Lords held that the question of retrospectivity fell to be considered on usual principles (see the notes on this case at p 401 below, related to Code ss 97-99).

Extra-statutory concessions (Code s 84)*Dispensing power of the Crown*

In *Yip Chiu-cheung v R* [1994] 2 All ER 924 at 928 Lord Griffiths, delivering the judgment of the Judicial Committee of the Privy Council, said that the following dictum of Gibbs CJ in the Australian case of *A v Hayden (No 2)* (1984) 156 CLR 532 at 540 'applies with the same force in England': 'It is fundamental to our legal system that the executive has no power to authorise a breach of the law and that it is no excuse for an offender to say that he acted under the orders of a superior officer.' (See also Criminal Law, pp 129-130 above.)

Savings (Code s 89)

In relation to the Interpretation Act 1978, s 16(1), it was stated by Lord Woolf in *Aitken v South Hams DC* (1994) Times, 8 July:

'Although the application of section 16(1)(d) is confined to the criminal field, that does not mean that "obligation or liability" in (c) has to be regarded as restricted to a civil obligation or liability. Section 16(1)(e) clearly applies equally to civil and criminal enforcement.'

Following *fiarnes v Eddleston* (1876) 1 Ex D 102, the House of Lords held that s 16 preserved the effect of a noise nuisance notice served under the Control of Pollution Act 1974, s 58(1) before its repeal and replacement by the Environmental Protection Act 1990, ss 162 and 164(2) and Sch 16 Pt III. This saving effect had been overlooked by the Divisional Court in *R v Folkestone Magistrates' Court, exp Kibble* (1993) Times, 1 March, which was followed by the Divisional Court in *Aitken*.

Presumption against retrospective operation (Code s 97)

The presumption against retrospectivity which applies in English law operates also in relation to Community law. It may apply, for example, where the declaratory nature of the European Court's jurisdiction means that a long-held view of a particular law would by virtue of one of its decisions be overthrown *as from the coming into force of that law*. In such cases, but only where the difficulty is extreme, the court modifies the declaratory effect of its judgment by denying it retrospective effect. Thus in *Neath v Hugh Steeper Ltd* Case C-152/91 [1994] 1 All ER 929 (see also Employment Law, pp 157-158 and European Community Law, pp 163-165 above) the European Court held that, except where a claim had been made before that date, the direct effect of art 119 of the EC Treaty could be relied on in order to claim equal treatment in the matter of occupational pensions only in relation to benefits payable in respect of periods of service subsequent to 17 May 1990 (the effective date of the decision in *Barber v Guardian Royal Exchange Assurance Group* Case C-262/88 [1990] 2 All ER 660 (All ER Rev 1990, pp 93-94, 102, 110-112), which held that such pensions constituted 'pay' within the meaning of art 119).

Principle against doubtful penalisation (Code pp 215-216)

The principle of fairness was used to determine a question of retrospectivity in *L 'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 All ER 20, where Lord Mustill said of the principle against retrospectivity (at 29) 'the basis of the rule is no more than simple fairness, which ought to be the basis of every legal rule'. (See also Arbitration, p 18 above.)

In *Plewa v Chief Adjudication Officer* [1994] 3 All ER 323 the House of Lords held that the principle of fairness would be infringed if it were held that the Social Security Act 1986, s 53 was retrospective, since in some circumstances it would render third parties liable to make reimbursement in respect of part payments when they were not so liable under the previous law. It would also remove a defence previously available.

Retrospective operation: procedural provisions (Code s 98)

Procedural provisions expected to be beneficial (Code p 218)

In *L 'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1993] 3 All ER 686 at 693 Bingham MR had discussed approvingly the second sentence of the Comment. However, in the House of Lords ([1994] 1 All ER 20 at 32) Lord Mustill said the distinction between procedural and substantive provisions can be misleading, 'since it leaves out of account the fact that some procedural rights are more valuable than some substantive rights'. He also said that sometimes (as here) it may be doubtful whether it is possible to assign the right in question unequivocally to one category rather than the other.

Retrospective operation: events occurring over a period (Code s 99)

For a judicial discussion of this section of the Code see *X 'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 All ER 20 at 31, per Lord Mustill.

Application of Act to persons and matters (Code s 128)

In *Arab Bank pic v Merchantile Holdings Ltd* [1994] 2 All ER 74 at 82 Millett J said, in conformity with what is stated at Code p 255: 'There is a presumption that, in the absence of a contrary intention express or implied, United Kingdom legislation does not apply to foreign persons or corporations outside the United Kingdom whose acts are performed outside the United Kingdom.' (See also Company Law, p 76 above.)

Where, however, the purpose of the enactment cannot be fulfilled in relation to matters within its area of extent unless it applies to foreigners outside that area, there is an implication that it is intended to apply to such foreigners; *set Re Seagull Manufacturing Co Ltd (in liq) (No 2)* [1994] 2 All ER 767 (Company Directors Disqualification Act 1986, s 6(1) held to apply to non-resident foreigners who by use of modern technology conducted a company's business within the jurisdiction).

Selective comminution (Code s 139)

In *R v Berry (No 3)* [1994] 2 All ER 913 at 919 Lord Taylor CJ referred to selective comminution as 'filleting out for the jury the words relevant to this case'.

Challenging validity of an enactment (Code s 140)

A provision of the EC Treaty may have direct effect. Thus, as stated by the Advocate General (C 0 Lenz) in *Enderby v Frenchay Health Authority* Case C-127/92 [1994] 1 All ER 495 at 517:

'... the principle of equal pay under art 119 of the EC Treaty, as embodied in art 1 of Directive 75/117, is a superior principle of law which the parties to a collective agreement cannot choose to disregard. The principle of equal pay is not only binding on the legislature (see *Rinner-Kuhn [v FWW Spezial-Gebaudereinigung GmbH & Co KG]* Case 171/88 and [*Arbeiterwohlfahrt der Stadt Berlin eV*] *Botel* Case C-360/90) but has been held by the court to be directly applicable (see *Defrenne [v Sabena]* Case 43/75 [1981] 1 All ER 122 at 135 (para 39)). Consequently the principle has effects in the relations between employer and employee (see *Defrenne* Case 43/75 and *Kowalska [v Freie und Hansestadt Hamburg]* Case C-33/89 [1990] ECR I-2591 at 2611 (para 12)).'

The law as to direct effect of directives applies a fortiori to Treaty provisions. (See Employment Law, p 158 and European Community Law, pp 165-166 above, for discussion of *Enderby v Frenchay Health Authority*.)

In *Equal Opportunities Commission v Secretary of State for Employment* [1994] 1 All ER 910 at 919-920 Lord Keith gave the following authoritative summary of the position established by the *Factortame* cases:

'... in the *Factortame* series of cases (*Factortame Ltd v Secretary of State for Transport* [1989] 2 All ER 692, *Factortame Ltd v Secretary of State for Transport (No 2)* Case C-213/89 [1991] 1 All ER 70, *R v Secretary of State for Transport, ex p Factortame Ltd* Case C-221/89 [1991] 3 All ER 769) the applicants for judicial review sought a declaration that the provisions of Pt II of the Merchant Shipping Act 1988 should not apply to them on the ground that such application would be contrary to Community law, in particular arts 7 and 52 of the EEC Treaty (principle of non-discrimination on the ground of nationality and right of establishment). The applicants were companies incorporated in England which were controlled by Spanish nationals and owned fishing vessels which on account of such control were denied registration in the register of British vessels by virtue of the restrictive conditions contained in Pt II of the 1988 Act. The Divisional Court (*R v Secretary of State for Transport, ex p Factortame Ltd* [1989] 2 CMLR 353), under art 177 of the Treaty, referred to the Court of Justice of the European Communities a number of questions, including the question whether these restrictive conditions were compatible with arts 7 and 52 of the Treaty. The European Court (*R v Secretary of State for Transport, ex p Factortame Ltd* Case C-221/89 [1991] 3 All ER 769) answered that question in the negative, and although the final result is not reported, no doubt the Divisional Court in due course granted a declaration accordingly. The effect was that certain provisions of United Kingdom primary legislation were held to be invalid in their purported application to nationals of member states of the European Community, but without any prerogative order being available

to strike down the legislation in question, which of course remained valid as regards nationals of non-member states.'

In *Equal Opportunities Commission v Secretary of State for Employment* [1994] 1 All ER 910 at 923-924 the House of Lords granted declarations that certain provisions of the Employment Protection (Consolidation) Act 1978 are incompatible with Community provisions, as follows:

'(1) That the provisions... whereby employees who work for fewer than 16 hours per week are subject to different conditions in respect to qualification for redundancy pay from those which apply to employees who work for 16 hours a week or more are incompatible with art 119 of the EEC Treaty and Council Directive (EEC) 75/117 of 10 February 1975 (the equal pay directive).

(2) That the provisions ... whereby employees who work for fewer than 16 hours per week are subject to different conditions in respect of the right to compensation for unfair dismissal from those which apply to employees who work for 16 hours a week or more are incompatible with Council Directive (EEC) 75/207 of 9 February 1976 (the equal treatment directive).'

(This case is also examined in Administrative Law, pp 1-5 and Employment Law, pp 154-156 above.)

Precise and disorganised enactments (Code s 141)

Rules, byelaws and similar provisions may be drafted with less precision than is usual with Acts and statutory instruments, and must be construed accordingly. In *Rv Investors Compensation Scheme Ltd, exp Bowden* [1994] 1 All ER 525 the court had to construe the Financial Services (Compensation of Investors) Rules 1990. Mann LJ said (at 533):

'The rules are not drawn with the tightness to be found in primary or secondary legislation and we approach the arguments with a caution against adopting the approach which is appropriate to enactments (cf *R v Criminal Injuries Compensation Board, ex p Schofield* [1971] 2 All ER 1011).'

Relevant and irrelevant facts (Code s 145)

Rulings by European Court (Code p 308)

The European Court said in *Enderby v Frenchay Health Authority* Case C-127/92 [1994] 1 All ER 495 (a sex discrimination case) at 521, in reply to Germany's objection that since it had not been established that the comparable jobs were of equal value the European Court should not be asked, in a reference by the national court under art 177 of the EC Treaty, to assume that they were:

'The court has consistently held that art 177 of the Treaty provides the framework for close co-operation between national courts and the Court of Justice, based on a division of responsibilities between them. Within that framework, it is solely for the national court before which the dispute has been brought, and which must assume the responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of each case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the question which it submits to the court (see, in particular,

the judgment in *Direction General de Defensa de la Competencia v Asociacion Espanola de Banca Privada* Case C-67/91 [1992] ECR I-4785 (at para 25)). Accordingly, where the national court's request concerns the interpretation of a provision of Community law, the court is bound to reply to it, unless it is being asked to rule on a purely hypothetical general problem without having available the information as to fact or law necessary to enable it to give a useful reply to the questions referred to it (see the judgment in *Meilicke v ADV/ORG A FA Meyer AG* Case C-83/91 [1992] ECR I-4871).'

The fact that the national court has already arrived at a decision does not invalidate a reference under art 177, provided the decision is provisional on none of the parties applying for such a reference: *Empire Stores Ltd v Customs and Excise Comrs* Case C-33/93 [1994] 3 All ER 90. Where, however, the decision is final, the court making it is *functus officio* and cannot on a subsequent application make a reference under art 177: *Chiron Corp v Murex Diagnostics Ltd* [1995] All ER (EC) 88, citing *Magnavision (SA) v General Optical Council* [1987] 2 CMLR 262 at 265-266; *Pardini v Ministero del Commercio L'Estero* Case 338/85 [1988] ECR 20. In *Chiron* Balcombe U said that before refusing leave to appeal the Appellate Committee of the House of Lords should, in appropriate cases, consider whether an issue arose which required a reference under art 177, since once leave was refused such a reference would not be possible.

Opposing constructions of an enactment (Code s 149)

Adversarial system (Code pp 314-315)

In *Oxfordshire CC v M* [1994] 2 All ER 269 at 281 Steyn LJ said that since 1962 -

'Our system of civil justice has become more open. Judges have had to become more interventionist.'

Inquisitorial system (Code p 315)

One consequence of treating proceedings as inquisitorial rather than, as normally, adversarial is that the usual rules regarding legal professional privilege may not apply: *Oxfordshire CC v M* [1994] 2 All ER 269 (care proceedings under Children Act 1989). Another is that costs orders may not be made: *Gojkovic v Gojkovic (No 2)* [1992] 1 All ER 267, [1992] Fam 40 at 57 (All ER Rev 1992, pp 195-196); *Sutton London BC v Davis (No 2)* [1995] 1 All ER 65.

Are legislative implications legitimate? (Code s 173)

Meaning of 'expressly' (Code pp 365-366)

In *Re a company (No 007946 of 1993)* [1994] 1 All ER 1007 Morritt J considered the words 'expressly relating to companies incorporated elsewhere than in Great Britain' in the Insolvency Act 1986, s 441(2). He said (at 1012):

'No doubt the word "expressly" is to be contrasted with "impliedly". But the words "relating to" are not the same as "referring to". The former includes but is not confined to the latter... it is quite possible, as a matter of ordinary English usage, to have an express relation without an express reference. For example, a provision which referred expressly to citrus fruits would be a provision expressly relating to oranges and lemons, even though they were not expressly mentioned in the provision.'

Reference was not made in the case to the dictum of Willes J in *Chorlton v Lings* (1866) LR 4 CP 374 at 387, which is set out at Code p 366 and referred to (under 'expressly') in the list given at Code pp 893-896. What Willes J said is in line with (though it goes wider than) the dictum of Morritt J given above, and could have been used by him to support what, with respect, is undoubtedly a correct ruling.

Morritt J's first sentence indicates that Willes J's suggestion that what is implied by certain words is also 'expressed' by them would not be followed today, except perhaps where the circumstances were compelling. The appeal of Willes J's suggestion lies in its recognition of the fact that, though drafters very often do purport to confine the effect of a provision to what is 'expressly' stated, this is linguistically unsound. What should count is the overall meaning to be collected from the words, which comprises both what is directly stated and what, in Willes J's words, is 'necessarily or properly' to be taken as implied.

When legislative implications are legitimate (Code s 174)

Implication limiting statutory power

Where powers are conferred by statute there are likely to be implied limitations restricting the express words. So where a statutory corporation such as a local authority is given power to enter into agreements there is an implied restriction limiting the power to what is reasonable having regard to the purpose for which the power is conferred: *Good v Epping Forest DC* [1994] 2 All ER 156 (relating to the power to enter into agreements conferred on local planning authorities by the Town and Country Planning Act 1971, s 52(1) (see Town and Country Planning, pp 496-498 below)).

Dealing with semantic obscurity (Code s 189)

As to Example 189.1 (Code pp 394-395) see further *R v Mandair* [1994] 2 All ER 715 (discussed at pp 419-420 below and in Criminal Procedure, pp 141, 143 above).

The Interpretation Act 1978 (Code s 200)

Number (Code pp 423-424)

Joint ownership etc In relation to an enactment for the protection of tenants a reference to 'a tenant' will, in the case of joint tenancy, be construed as a reference to all the joint tenants. In *Hounslow London BC v Pilling* [1994] 1 All ER 432 the Court of Appeal considered the following. In pursuance of a term in the tenancy agreement purporting to permit this, a council tenant,

being one of two joint tenants, gave notice to terminate the tenancy on a date earlier than provided for by the Protection from Eviction Act 1977, s 5(1), which says that no notice to quit a dwelling given by a tenant shall be valid unless given not less than four weeks before the date on which it is to take effect. *Held* The tenant possessed no power to contract out of the requirements of s 5(1) without the concurrence of her fellow joint tenant. (As to whether that concurrence would have sufficed see the note on this case at p 395 above, related to Code s 11.) Cf *Sutherland v Gustar (Inspector of Taxes)* [1994] 4 All ER 1, which concerned the right of a member of a partnership which had been assessed to tax jointly to appeal against the assessment without the consent of the remaining partners (see further Taxation, pp 444-445 below).

Statement of the informed interpretation rule (Code s 201)

For a justification of the informed interpretation rule, particularly in relation to taxing Acts, see IJ Ghosh 'The Construction of Fiscal Legislation' [1994] BTR 126.

Legislative history as a guide to construction (Code s 208)

In Re Devon and Somerset Farmers Ltd [1994] 1 All ER 717 it was said by the court (at 726) that 'where the construction is in doubt... regard should be had to the legislative history'. It was held (also at 726) in relation to the ruling by Mummery J in *Re International Bulk Commodities Ltd* [1993] 1 All ER 361 that 'the legislative history of [the Insolvency Act 1986 s 29(2)] (to which he was not referred) casts doubt on the correctness of his decision'.

Consolidation Acts (Code s 211)

For a discussion of whether a 'gateway' is required to justify consideration of the previous enactments now comprised in a consolidation Act see IJ Ghosh 'The Construction of Fiscal Legislation' [1994] BTR 126.

Codifying Acts (Code s 212)

In R v Smurthwaite [1994] 1 All ER 898 at 902 Lord Taylor CJ said:

'The right approach to [the Police and Criminal Evidence Act 1984], a codifying Act, is that stated in *R v Fulling* [[1987] 2 All ER 65], [1987] QB 426 following the principles laid down in *Bank of England v Vagliano Bros* [1891] AC 107 at 144, [[1891-4] All ER Rep 93]. That is simply to examine the language of the relevant provision in its natural meaning and not to strain for an interpretation which either reasserts or alters the pre-existing law.'

(See also Evidence, pp 186-192 above.)

Use of Hansard (Code s 217 as substituted by Supp pp A35-49)

Nature of enactment (Supp pp A37-39)

Whether enactment ambiguous In *Restick v Crickmore* [1994] 2 All ER 112 at 117 Stuart-Smith LJ said that although he did not consider the enactment in

question ambiguous 'perhaps it may be said that the difference of judicial opinion between the judges in the courts below and this court shows that there is an ambiguity (see *Chief Adjudication Officer v Foster* [1993] 1 All ER 705 at 717 per Lord Bridge of Harwich). *Ink v Secretary of State for the Home Dept, ex Mehari* [1994] 2 All ER 494 at 503 Laws J said that the Asylum and Immigration Appeals Act 1993, Sch 2, para 5(3)(a) satisfied the *Pepper v Hart* test of ambiguity because it 'is unclear on its face' (*Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42 (All ER Rev 1992, pp 381-397)). *In Petch v Gurney (Inspector of Taxes)* [1994] 3 All ER 731 at 736 it was held that the enactment was 'too plain for argument'.

Confirming the meaning It is mentioned at Supp p A38 that a third head justifying recourse to parliamentary history, which the House of Lords rejected, was suggested by counsel in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42. This was 'to confirm the meaning of a provision as conveyed by the text, its object and purpose'. *Ini v Jefferson* [1994] 1 All ER 270 Auld J, giving the judgment of the Court of Appeal, said (at 281) that by virtue of that decision (citing [1993] 1 All ER 42 at 64-65) the court was entitled to have regard to preparatory material for the Act in question 'if there were an ambiguity'. Since they did not hold that there was an ambiguity it seems that the recourse to these materials must be placed under this third head. In *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg* [1994] 1 All ER 457. Lloyd LJ (at 465) cited passages from Hansard, even though he expressly found that the relevant enactment was not within the *Pepper v Hart* criteria. Lord Lowry acted similarly in *A-G v Associated Newspapers Ltd* [1994] 1 All ER 556 at 564, as did Stuart-Smith LJ in *Restick v Crickmore* [1994] 2 All ER 112 at 117.

In Littrell v USA (No 2) [1994] 4 All ER 203 at 209-210 Rose LJ noted that the Court of Appeal had permitted reference to Hansard to ascertain whether in enacting the Visiting Forces Act 1952 Parliament had in mind a NATO treaty. There was no consideration of whether or not the *Pepper v Hart* conditions were satisfied. Rose LJ merely said that Hansard had been 'referred to without objection'.

These cases can be added to previous uses of the third head described in Examples 217.2 and 217.3 at Supp p A39.

Clarity of Hansard statement (Supp p A40)

In *JR v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg* [1994] 1 All ER 457 at 466 Lloyd LJ rejected the argument that a minister's statement should be disregarded because it was known that it had been made on the advice of the Attorney General and that advice was demonstrably wrong. Lloyd LJ said:

'[The argument] would, if correct, undermine the utility of *Pepper v Hart* in every case in which it would otherwise apply. Ministers act on advice. It cannot make any difference whether the source of the advice is made explicit.'

In *R v Secretary of State for the Home Department, ex p Mehari* [1994] 2 All ER 494 at 503 Laws J held that a minister's statement was 'clear' for the

purposes of *Pepper v Hart*, even though it did not directly throw light on the meaning of the enactment in question.

See also the notes on *R v Jefferson* [1994] 1 All ER 270 at p 416 below, related to Code s 334.

Duty of advocates (Supp p A40-43)

In *Re Devon and Somerset Farmers Ltd* [1994] 1 All ER 717 at 726 the judge said T was... told that nothing of assistance can be derived from Hansard'. The decision in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42 had been cited to the court, and the judge's remark indicates that counsel regarded it as his duty to carry out research in Hansard and report to the court the negative result. The court could then reach its conclusion untroubled by the possibility that some contrary construction might have been indicated by Hansard.

Special restriction on Parliamentary materials (the exclusionary rule)

(Code s 220 as substituted by Supp pp A50-83)

Parliamentary privilege (Supp pp A71-75)

In *Prebble v Television New Zealand Ltd* [1994] 3 All ER 407 the Judicial Committee of the Privy Council held that art 9 of the Bill of Rights 1689 prevented a party or witness from alleging that words in Parliament were improperly spoken or that an Act was passed to achieve an improper purpose, but that it did not restrict a person who wished 'to allege the occurrence of events or the saying of certain words in Parliament without any accompanying allegation of impropriety or any other questioning' (per Lord Browne-Wilkinson at 418). To argue about the meaning of words spoken in Parliament without making any such imputation falls into a middle category not dealt with by the *Prebble* decision as just described. Note, however, that elsewhere in his speech (at 414) Lord Browne-Wilkinson approved, as a correct statement of the legal meaning of art 9, s 16(3) of the Parliamentary Privileges Act 1987, an Act of the Commonwealth of Australia. Subsection (3) of this section states that it is not lawful to make statements etc for the purpose of 'drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of... proceedings in Parliament'. Lord Browne-Wilkinson also (at 413) cited approvingly the following statement by Blackstone (1 Bl Com (17th edn) 163):

'The whole of the law and custom of Parliament has its original from this one maxim, "that whatever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere".'

(See Tort, pp 490-492 below for further discussion of *Prebble*.)

Use of official statements on meaning of Act (Code s 232)

Official guidance to taxpayers

A government department may give guidance to taxpayers on how it interprets an enactment for the administration of which it is responsible, including how

it intends to exercise any power of judgment or discretion conferred on it by the enactment. In construing the enactment the court will have regard to any such guidance, though the guidance cannot deprive the court of its ultimate interpretative function. Such guidance may be given in a particular case, after the facts of the case have been disclosed. If in that case the department departs from the indication it has given, judicial review will lie if the departure is unfair (see Code p 741).

An example of such specific guidance is furnished by the practice of the Inland Revenue described in their statement of 18 October 1990, 'where practical to inform practitioners of the Revenue's interpretation of tax law as it applies to any case which falls within the responsibility of their office': per Lord Jauncey of Tullichettle in *Matrix-Securities Ltd v IRC* [1994] 1 All ER 769 at 790. In that case Lord Browne-Wilkinson said (at 791):

'... taxpayers frequently need to know the tax consequences of a transaction before carrying it through. To meet this need, the Revenue are prepared in certain circumstances to give advance assurances as to the tax repercussions of a transaction so that the parties can proceed with confidence. This practice is of the greatest benefit to taxpayers and it would not be in the public interest to discontinue it.'

Lord Browne-Wilkinson added (also at 791):

Tf the Revenue have made it known that in particular categories of transaction advance clearance can only be given effectively at a particular level and clearance is not obtained from that level, there is in my judgment no abuse of power if the Revenue seek to extract tax on a basis different from that contained in the assurance. If the taxpayer either knows or (by reason of Revenue circulars) ought to have known that a binding clearance can only be obtained in a particular way and a purported clearance has been obtained in a different way, there is nothing unfair if the Revenue say that the purported clearance (being to the knowledge of the taxpayer given without authority) is of no effect and does not bind them.'

(See Taxation, pp 433-436 for further discussion of the *Matrix Securities* case.)

Use of delegated legislation made under Act (Code s 233)

In *Deposit Protection Board v Dalia* [1994] 2 All ER 577 at 584-585 Lord Browne-Wilkinson said, 'although there are occasions on which regulations can be used as an aid to construction of the Act under which they are made (*Hanlon v Law Society* [1980] 2 All ER 199) that is only where the regulations are roughly contemporaneous with the Act being construed'. (See also Commercial Law, pp 35-37 above.)

In *R v Secretary of State for the Home Department, ex p Mehari* [1994] 2 All ER 494 at 504 Laws J said that a statutory instrument 'may be prayed in aid to construe main legislation, where it is clear that the two are intended to form an overall code'. He went on to say that it is immaterial from this point of view that the statutory instrument may yet be struck down by a negative resolution in Parliament.

Add to the authorities cited in footnote 1 on p 479 of Code: '*Deposit Protection Board v Dalia* [1993] 1 All ER 599, [1993] Ch 243 (affd [1994] 1 All ER 539)'.

The long title (Code s 245)

Add to the authorities cited in footnote 3 on p 497 of Code: '*Crozier v Crozier* [1994] 2 All ER 362 at 370.'

The preamble (Code s 246)

The preamble to s 1 of the Life Assurance Act 1774 was used by the House of Lords as a guide to the interpretation of s 2 of that Act in *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 1 All ER 213 at 224 (see the note on that case below, related to Code s 249).

The short title (Code s 249)*Guidance from informal short title*

In *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 1 All ER 213 the House of Lords considered the case *oiMark Rowlands Ltd v Berni Inns Ltd* [1985] 3 All ER 473, [1986] QB 211, referred to in Example 249.3. They upheld the reasoning in that case whereby the informal short title of the Life Assurance Act 1774, namely 'the Gambling Act 1774', was used to infer that the Act was not concerned with indemnity insurance. (See also Contract, p 117 and Commercial Law, pp 55-57 above.)

Law should be predictable (Code s 266)

The principle of English legal policy that the law should be certain, and therefore predictable applies also in Community law: *Deutsche Milchkontor GmbH v Germany* Joined cases 205 to 215/82 [1983] ECR 2633 at 2669 (para 30); *Neath v Hugh Steeper Ltd* Case C-152/91 [1994] 1 All ER 929 at 954 (para 15). It has two particular aspects: the doctrine of legitimate expectation and the presumption against retrospectivity (on the latter see Code s 97). The doctrine of legitimate expectation as an aspect of legal certainty derives from German law. It was used by the European Court in its judgment in *Amministrazione delle Finanze dello Stato v Essevi SpA* Joined cases 142 and 143/80 [1981] ECR 1413 at 1437 (para 34). In *Neath v Hugh Steeper Ltd* Case C-152/91 [1994] 1 All ER 929 at 954 (para 15) Mr Advocate General Van Gerven said:

'In essence, the [European Court] is prepared, on account of special circumstances, to avoid calling in question legal relationships established in the past, notwithstanding the fact that there are grounds for this under a clarifying ruling which the court has given in the meantime. It appears from its case law that the court recognises the good faith, or the legitimate expectation, of the parties concerned or of the member states as such a special circumstance if the retroactive application of the judicial decision involves serious problems for the parties or the member states.'

Law should be coherent and self-consistent (Code s 268)*Duplication of remedies* (Code p 560)

Where jurisdictions overlap the courts will endeavour to delimit each one in an appropriate way so as to avoid conflict. For example, the power under the

wardship jurisdiction (supplementing the Administration of Justice Act 1960, s 12(1)) to issue an injunction restraining reporting of proceedings was held *in Re R (a minor) (wardship: restrictions on publication)* [1994] 3 All ER 658 not to allow the wardship judge to encroach upon the jurisdiction of the trial judge to restrain reporting of criminal proceedings under the Children and Young Persons Act 1933, s 39(1) (see Contempt of Court, pp 104-105 above).

Law should not be subject to casual change (Code s 269)

Where the legal meaning of an enactment is doubtful, it will be presumed that the least alteration of the existing law was intended: *George Wimpey & Co Ltd v British Overseas Airways Corp* [1954] 3 All ER 661 at 672-673; *A-G v Associated Newspapers Ltd* [1994] 1 All ER 556 at 566.

Municipal law should conform to public international law (Code s 270)

Legal policy (Code pp 565-566)

A treaty is not law unless an Act of Parliament has made it so; otherwise the government could legislate by making a treaty. *ItiLittrell v United States of America (No 2)* [1994] 4 All ER 203, where this principle was upheld, Rose LJ (at 210) said:

'In *The Parlement Beige* [(1879) 5 PD 197, [1874-80] All ER Rep 104 - see Code p 261] Sir Robert Phillimore held that the terms of a treaty conferring immunity are ineffective in English law unless confirmed by the enactment of Parliament. Any other conclusion would permit the Crown by entering into a treaty to legislate without Parliament's consent. In the ensuing hundred years there has been no authority cited to this court which questions that principle. On the contrary, in *Walker v Baird* [1892] AC 491 the Privy Council held that reliance on a treaty as justifying interference with private rights affords no defence in municipal law ...'

Principle against penalisation under a doubtful law (Code s 271)

Nature of the principle (Code p 572)

It is because of this principle that the Judicial Committee of the Privy Council has advised that human rights provisions in constitutions should be construed in favour of the subject. In *Vasquez v R* [1994] 3 All ER 674 (see also Evidence, p 210 above) Lord Jauncey cited (at 682) the following dictum of Lord Diplock in *A-G of the Gambia v Momodou Jobe* [1984] AC 689 at 700: 'A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction.'

Statutory interference with human life or health (Code s 272)

In construing both statutory and common law powers of medical practitioners the court will have regard to the autonomy of the patient, that is his right to control what is done to his body. This was expressed by Lord Donaldson MR

mRe T (adult: refusal of medical consent) [1992] 4 All ER 649 at 664 (All ER Rev 1992, pp 298-305) in the following propositions:

'(1) Prima facie every adult has the right and capacity to decide whether or not he will accept medical treatment, even if a refusal may risk permanent injury to his health or even lead to premature death... This is so, notwithstanding the very strong public interest in preserving the life and health of all citizens... (2) An adult patient may be deprived of his capacity to decide by long-term mental incapacity ... (3) If an adult patient did not have the capacity to decide at the time of the purported refusal and still does not have that capacity, it is the duty of the doctors to treat him in whatever way they consider, in the exercise of clinical judgment, to be his best interests. (4) Doctors faced with a refusal of consent have to give very careful and detailed consideration to what was the patient's capacity to decide at the time when the decision was made ... It may be a case of reduced capacity.'

These propositions were cited in *Re C (adult: refusal of medical treatment)* [1994] 1 All ER 819, where Thorpe J held that the High Court has an inherent jurisdiction in such cases (1) to rule by way of injunction or declaration that an individual is capable of refusing or consenting to medical treatment, and (2) to determine the effect of a purported advance directive by the patient as to his future medical treatment (see Medical Law, pp 275-278 above). This conclusion was reached by Thorpe J (at 825) by reference to *Re T* and other recent decisions emphasising that the medical professions 'have ready access to judicial responsibility when difficult ethical questions confront them'.

Statutory restraint of the person (Code s 273)

Technicalities

In *Brooks v DPP of Jamaica* [1994] 2 All ER 231 at 241 Lord Woolf said 'where the liberty of the subject is at stake, technicalities are important'.

Presumption that literal meaning to be followed (Code s 285)

Weight to be attached to literal meaning (Code pp 600-601)

Where a form of words is laid down by statute it is best to adhere to this. The Police and Criminal Evidence Act 1984, s 77 requires the trial judge to instruct the jury to bear in mind the special need for caution in relation to a confession made by a mentally handicapped person. In *R v Campbell* (1994) Times, 13 July Stuart-Smith LJ said that although the judge did not have to follow any specific wording, he would be wise to use the statutory phrase 'special need for caution'.

Statutory powers (Code p 601)

A statutory power may be conditional on belief by the holder in the existence of certain facts (the qualifying facts). Is a purported exercise of the power effective where, although the holder's belief in the existence of the qualifying facts was genuine, they did not in truth exist? On a literal interpretation of the enactment conferring the power this should make no difference.

In *R v Secretary of State for the Home Dept, ex p Ejaz* [1994] 2 All ER 436 the crucial words, contained in the British Nationality Act 1981, s 6(2), were 'If ... the Secretary of State is satisfied that the applicant fulfils the requirements of Schedule 1 ... he may ... grant to him a certificate of naturalisation'. Without negligence, the Secretary of State was so satisfied, and granted the certificate. However, in fact the applicant did not fulfil the requirements of Sch 1. *Held* The literal meaning should be followed, so that the certificate was valid unless and until set aside under machinery for that purpose contained in the Act. This conclusion was reached by the Court of Appeal, reversing the court below, on the basis of various considerations presented by the wording of the Act. Surprisingly, the argument that weight should be given to the literal meaning of s 6(2) because of the presumption set out in this section of the Code does not appear to have been raised.

Presumption that consequential construction to be given (Code s 286)

It was stated by Mr Advocate General Lenz in *Enderby v Frenchay Health Authority* Case C-127/92 [1994] 1 All ER 495 at 513 (para 15) that:

'... a formalistic approach should not be adopted when categorising actual instances where women are placed at a disadvantage at work. In accordance with the result-orientated line taken by the Court of Justice in the past, a pragmatic approach ought to be pursued.'

This places emphasis on what English doctrines of statutory interpretation refer to as consequential construction. The Maastricht Treaty (the Treaty on European Union) expressly confirms the body of case law built up by the European Court. The fifth indent of art B of that Treaty states that one of the Union's objectives is to maintain in full the 'acquis communautaire' (that is the entire body of the existing Community rules as interpreted and applied by the European Court) and build on it (see *Neath v Hugh Steeper Ltd* Case C-152/91 [1994] 1 All ER 929 at 960 (para 23)).

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

Developments in technology (Code pp 627-628)

Improvements in medical science may require an updated construction of a phrase like 'actual bodily harm' as found in the Offences against the Person Act 1861, s 47. In *R v Chan-Fook* [1994] 2 All ER 552 (discussed in Criminal Law, pp 138-139 above) Hobhouse LJ cited (at 558) the dictum of *Lynskey v Jini? v Miller* [1954] 2 All ER 529 at 534 that 'There was a time when shock was not regarded as bodily hurt, but the day has gone by when that could be said'. A further change with the passage of time is indicated by Hobhouse LJ's remark (at 559) that 'the conventional phrase "nervous shock" is now inaccurate and inappropriate'. The Court of Appeal held that the phrase 'actual bodily harm' is now capable of including psychiatric injury, but that this should not be left to the jury unless they are assisted by expert evidence.

Discovering the mischief (Code s 300)

Unknown mischief (Code pp 653-654)

In *Re K (a minor) (adoption: nationality)* [1994] 3 All ER 553 the Court of Appeal were unable to ascertain the mischief of an enactment. Balcombe LJ said (at 557) that he was therefore 'forced back to first principles'.

Avoiding an artificial result (Code s 317)

Fictions (Code pp 706-707)

In *Marshall (Inspector of Taxes) v Kerr* [1994] 3 All ER 106 the House of Lords restricted the application of the deeming provisions of the Finance Act 1965, s 24 (now the Taxation of Chargeable Gains Act 1992, s 62) to avoid a result which (per Lord Browne-Wilkinson at 124) would lead to injustice and absurdity. To apply the deeming provisions would (per Lord Templeman at 112) give success to 'a narrow and technical argument in order to produce a result which Parliament could not have intended and to favour a minority of United Kingdom residents to the detriment of the majority'. Furthermore, it would be inconsistent with the law governing the administration of the estates of deceased persons. (See also Taxation, pp 446, 451-452 below.)

Presumption that ancillary rules of law intended to apply (Code s 327)

Independent abolition of ancillary rule

In a rare case the court may hold that a rule of law in contemplation of which Parliament enacted the provision in question has independently ceased to exist. It then, of course, will not affect the legal meaning of the enactment. It has been assumed, for example, that all criminal enactments are intended to be subject to the common law rule that a child between the age of 10 and 14 is presumed to be *doli incapax* (incapable of committing an offence) unless the prosecution prove that he knew the act was seriously wrong. In *C v DPP* [1994] 3 All ER 190 the Divisional Court held that because of the changed conditions of society the rule no longer existed. Accordingly, an appeal relying on it was dismissed. (See also Criminal Law, pp 127-129 above.)

Law regulating decision making (Code s 329)

Proportionality (Code p 739)

In *Enderby v Frenchay Health Authority* Case C-127/92 [1994] 1 All ER 495 the question arose whether, if part of a difference in pay between men and women is shown to be caused by market factors, this disproves discrimination pro rata. The European Court said (at 524):

'When national authorities have to apply Community law, they must apply the principle of proportionality . . . it is for the national court to determine, if necessary by applying the principle of proportionality, whether and to what extent the shortage of candidates for a job and the need to attract them by higher pay constitutes an objectively justified economic ground for the difference in pay between the jobs in question.'

Procedural propriety (Code pp 139-141)

See the notes on *Matrix-Securities Ltd v IRC* [1994] 1 All ER 769 at p 409 above, related to Code s 232.

Duty to give reasons (pp 743-744)

A caveat to the suggestion that the courts are moving to a position where reasons will be required for all administrative decisions (see All ER Rev 1993, pp 406-407) was entered by Sedley J in *R v Higher Education Funding Council, ex p Institute of Dental Surgery* [1994] 1 All ER 651 at 665-666, where he set out factors which tend both for *and against* imputing a requirement to give reasons:

'The giving of reasons may among other things concentrate the decision-maker's mind on the right questions; demonstrate to the recipient that this is so; show that the issues have been conscientiously addressed and how the result has been reached; or alternatively alert the recipient to a justiciable flaw in the process. On the other side of the argument, it may place an undue burden on decision-makers; demand an appearance of unanimity where there is diversity; call for the articulation of sometimes inexpressible value judgments; and offer an invitation to the captious to comb the reasons for unsuspected grounds of challenge... In the light of such factors each case will come to rest between two poles, or possibly at one of them: the decision which cries out for reasons, and the decision for which reasons are entirely inapposite.'

Sedley J went on to hold that there are two classes of case now emerging where reasons are required: (1) where the nature of the process itself (such as a decision on personal liberty) calls in fairness for reasons to be given, and (2) where it is something peculiar to the particular decision which calls in fairness for reasons to be given. Where, as in the instant case, the court lacked the expertise (knowledge of dental surgery) to judge whether the decision was *prima facie* aberrant it would not order reasons. (See also Administration Law, pp 9-10 above.)

Presumed application of rules of property law (Code s 332)

In *Marshall (Inspector of Taxes) v Kerr* [1994] 3 All ER 106 the House of Lords restricted the application of the deeming provisions of the Finance Act 1965, s 24 (now the Taxation of Chargeable Gains Act 1992, s 62) to avoid a result which would be inconsistent with the rules governing the administration of the estates of deceased persons. Under these a beneficiary, pending completion of administration, has neither a legal nor an equitable interest in the estate but merely a chose in action consisting of a right to have the estate properly administered. Parliament must be taken to have intended that these rules would be applied in appropriate cases when s 24 was enforced.

Presumed application of rules of criminal law (Code s 334)

Constructive notice Deemed knowledge does not satisfy the requirement of proof of mens rea: *R v Collett* [1994] 2 All ER 372 (registration of enforcement

notice issued under Town and Country Planning Act 1990, s 172(1) in land charges registry (see Town and Country Planning, pp 498-501 below)).

Right to silence (Code pp 755-756)

Can a statement made under statutory compulsion be regarded for the purposes of the criminal law as voluntary? In *Re Rex Williams Leisure pic* [1994] 4 All ER 27 at 40 Hoffmann LJ said:

'Section 447(8) [of the Companies Act 1985] is one of a number of sections scattered over various statutes which are intended to deal with . . . an early nineteenth century opinion that statements made under statutory compulsion were not "voluntary" for the purposes of the confession rule in criminal proceedings. In fact this view was decisively rejected in *Rv Scott* (1856) Dears & B 47, 169 ER 909, but starting with s 17(8) of the Bankruptcy Act 1883 (46 & 47 Vict c 52), Parliament has been constantly vigilant in case it should again raise its head. The result is that powers to obtain information in the Companies Act 1985, Insolvency Act 1986 and associated legislation are almost invariably accompanied by a provision that the answers are to be admissible against the informant.'

(See also Practice and Procedure, p 333 above.)

Accessories

Where an Act creates a criminal offence it is presumed that the common law rules regarding accessories, and the Accessories and Abettors Act 1861, s 8 (which says that whoever shall aid, abet, counsel or procure the commission of any indictable offence, whether a common law or statutory offence, is liable to be tried, indicted and punished as a principal offender), are intended to apply to the offence. This was confirmed by the Court of Appeal in *R v Jefferson* [1994] 1 All ER 270. Auld J, giving the judgment of the court, said (at 280):

'An aider and abettor of an offence is a common law notion, not a creation of statute. It is of general application to all offences, whether at common law or of statutory creation, unless expressly excluded by statute. Section 8 of the 1861 Act is merely a deeming provision as to how aiders and abettors are to be dealt with at trial. The proper approach is to consider whether there is anything in the 1986 Act which excludes, in relation to the public order offences created by it, the general common law principles of aiding and abetting.'

It is submitted that the final sentence of this dictum is a correct statement of the law, and overrides the inconsistency arising by the inclusion of 'expressly' in the second sentence. As stated elsewhere in the Code (see pp 361-369), the question is always one of ascertaining the intention of Parliament by assessing the overall meaning, whether or not express words are used. For other cases where this process has proved necessary as regards aiding and abetting see Code p 729.

See also the notes on this case at pp 407-408 above, related to Code s 217, and for further discussion, see Criminal Law, pp 124-125, Criminal Procedure, p 146 and Evidence, pp 208-209 above.

Presumed application of rules of evidence (Code s 335)

Public interest immunity (Code pp 765-766; Supp p A28)

The Attorney General's evidence to the Scott inquiry on the Matrix Churchill case (The Times, 25 and 26 March 1994) shows some confusion about public interest immunity (PII). The Attorney General said, citing *Conway v Rimmer* [1968] 1 All ER 874, that where documents fall into a class that has been recognised by the courts as attracting PII, the relevant minister is under a duty to refuse disclosure of the document: he *must* claim the privilege of PII. In fact this was *not* decided in that case, and such an idea was never hinted at in the five judgments of a highly distinguished court. It was rejected by Lord Templeman in *Chief Constable of the West Midlands Police, ex p Wiley* [1994] 3 All ER 420 at 424 (see also Practice and Procedure, pp 326-329).

The Attorney General's reported remarks turn the principle of PII inside out. Until *Conway v Rimmer* the courts played little part in it. If the minister certified that disclosing the document would damage the public interest, the courts accepted his certificate without question. Then in that case the Appellate Committee reversed the position and held that if the minister's certificate was challenged the court should decide where the balance of public interest lay. Lord Reid said, in words tailored to fit the Matrix Churchill case ([1968] 1 All ER 874 at 888):

'I do not doubt that there are certain classes of documents which ought not to be disclosed whatever their content may be. Virtually everyone agrees that cabinet minutes and the like ought not to be disclosed... To my mind the most important reason is that such disclosure would create or fan ill-informed or captious public or political criticism... no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind. That must... also apply to all documents concerned with policy making within departments including it may be minutes and the like by quite junior officials and correspondence with outside bodies. Further it may be that deliberations about a particular case require protection as much as deliberations about policy.'

However, this and similar statements do not mean that a minister is under a legal duty to claim Crown privilege in every such case: they are directed to the function of the *court* in passing judgment on such claims. As one would expect, it is entirely for the minister to judge initially whether the public interest requires a claim to be made by him. The question of making a claim (as opposed to adjudicating on such a claim) is a matter of policy, not law, but the minister may wish to take legal advice before deciding. He is not obliged to accept that advice; and in a case of internal government dispute the decision is ultimately one for the Cabinet.

The Attorney General is reported as saying 'PII cannot be waived' (ibid). This may point to another source of the confusion. In *Hehir v Comr of Police of the Metropolis* [1982] 2 All ER 335 (All ER Rev 1982, pp 140-141) the Court of Appeal ruled that PII *already successfully claimed* by the Commissioner could not when it suited him later be waived as respects one document only. This was because the court had accepted for *all* the documents that on balance the public interest was against disclosure.

laRvHorseferryRoadMagistrates' Court, expBennett (No2) [1994] 1A11ER 289 the court cited (at 295) the dictum of Bingham LJ in *Makanjuola v Comr of Police of the Metropolis* [1992] 3 All ER 617 at 623 that 'public interest immunity cannot in any ordinary sense be waived, since, although one can waive rights, one cannot waive duties' (see All ER Rev 1992, pp 330-332). However, this was in the context of a party to litigation not being able to waive what was not his right, but a duty imposed on him. In so far as PII is a right enjoyed by the executive there seems no reason in general why the executive cannot waive it. However, in *Bennett* it was held that, although in a sense part of the executive, the Crown Prosecution Service cannot by itself waive PII, since its desire to obtain a conviction might distort its judgment. In such a case the court held that the CPS should seek the consent of the Treasury Solicitor, as an impartial arm of the executive. This illustrates the fact that it is the executive and not the court that decides whether to claim PII. (See further Evidence, pp 193-194 and Practice and Procedure, p 329 above.)

In *Balfour v Foreign and Commonwealth Office* [1994] 2 All ER 588 the Court of Appeal confirmed that, once it is clear that disclosure of documents would involve an actual or potential risk to national security demonstrated by an appropriate certificate issued by a minister claiming PII, the court should not exercise its right to inspect the documents. (See also Practice and Procedure, p 331 above.)

The law regarding public interest immunity in relation to police complaints procedure was reviewed and adjusted by the House of Lords in *R v Chief Constable of the West Midlands Police, ex p Wiley* [1994] 3 All ER 420.

Application of principles of private international law (Code s 336)

It is presumed that an Act is intended to apply in accordance with the principles laid down by private international law (conflict of laws). Thus, in *Arab Bank pic v Merchantile Holdings Ltd* [1994] 2 All ER 74 at 80-81 Millett J said of the Companies Act 1985, s 151 that, although when read literally it purported to make it unlawful for the foreign subsidiary of an English parent company to give financial assistance for the purpose of the acquisition of shares of its parent company, this would give the section an extra-territorial effect contrary to the general principles of private international law. Accordingly, a narrower meaning must be given. He added that the consideration that the more limited meaning is necessary in order to avoid the creation of a jurisdiction wider than that generally recognised by international law has often been recognised as a ground for giving statutory words a more limited meaning than they are capable of bearing.

Like British courts, the European Court will where appropriate take guidance from the decisions of courts of countries outside the Community. Thus, in *Neath v Hugh Steeper Ltd* Case C-152/91 [1994] 1 All ER 929 at 969 (para 37) reference was made to a judgment of the United States Supreme Court on a question of sex discrimination.

Hearing both sides: *audi alteram partem* (Code s 341)

Inform the party of the case to be met (Code p 777)

In *Willowgreen Ltd v Smithers* [1994] 2 All ER 533 (see the discussion of this case at p 421 below, related to Code s 363 and also Practice and Procedure,

pp 312-313 above) the Court of Appeal held that the right to receive notice of process was fundamental. Nourse LJ (at 537) cited the following dictum of Denning LJ in *R v Appeal Committee of County of London Quarter Sessions, ex p Rossi* [1956] 1 All ER 670 at 674: 'it is a fundamental principle of our law that no one is to be found guilty or made liable by an order of any tribunal unless he has been given fair notice of the proceedings so as to enable him to appear and defend them.'

De minimis principle (Code s 343)

Fractions of a day (pp 781-782)

In *Re Palmer (deed) (a debtor)* [1994] 3 All ER 835 the Court of Appeal reversed the decision in *Re Palmer (deed) (a debtor)* [1993] 4 All ER 812 (All ER Rev 1993, pp 408-409, 418-420). The Court of Appeal decision gives valuable guidance on when (if at all) the rule that a judicial act takes effect from the beginning of the day on which it is performed should be taken to require a known fact such as the time during a day when a death actually occurred to be treated as later than a judicial act on the same day when it actually occurred before it. (See also Family Law, pp 239-240 above.)

Agency: *quifacitper alium facit per se* (Code s 351)

The House of Lords (at [1994] 1 All ER 99) affirmed the decision and reasoning of the Divisional Court in *Seaboard Offshore Ltd v Secretary of State for Transport, The Safe Carrier* [1993] 3 All ER 25 (All ER Rev 1993, pp 409-410).

Construction of Act or other instrument as a whole (Code s 355)

Different words to be given different meanings (Code pp 808-809)

Where a statutory procedure depends on the wording of an enactment, it may be important to reproduce the relevant wording accurately, without differences. This particularly applies in relation to criminal procedure. The Indictments Act 1915 requires an indictment to contain, in relation to each count, a statement of the offence charged, followed by particulars of the offence (see Code p 757 and Examples 45.2 and 81.2). Since a count is void if the offence is not correctly stated it is important in the case of a statutory offence to adhere to the language of the enactment creating the offence. The jury's verdict will reflect this wording, and as Lord Mackay of Clashfern LC said: 'it is highly desirable... that the precise words of the statute, so far as relevant, should be used in the jury's verdict' (*R v Mandair* [1994] 2 All ER 715 at 720). Where the words are departed from this will not invalidate the verdict provided it is clear from the surrounding circumstances that the jury's words must bear the same meaning as the relevant enactment.

In *R v Mandair* [1994] 2 All ER 715 the verdict referred to *causing* grievous bodily harm, whereas the words of the enactment, the Offences against the Person Act 1861, s 20, refer to *inflicting* such harm. The meaning of 'causing' is wider than that of 'inflicting', so it might be thought that the verdict could

have intended a form of 'causing' that fell outside the meaning of 'inflicting'. However, it was held that the surrounding circumstances excluded this intention. Lord Mackay said (at 721):

'I cannot see why it is not correct to give every word in the verdict its full meaning and select the meaning of the word "cause" which makes sense rather than selecting a meaning which does not make sense of the verdict as a whole. I cannot see why juries' verdicts should not be subject to the ordinary rules of construction [so] that they be read in such a way as to give every word a meaning which it can reasonably bear and where more than one meaning is possible that meaning should be selected which makes sense of the verdict rather than one which makes a nonsense of it.'

(See also Criminal Procedure, p 141 above.)

Interpretation of broad terms (Code s 356)

Pairs of broad terms

It was formerly common practice, and is still occasionally done by modern drafters, to use a pair of broad terms in conjunction. Thus, the Firearms Act 1968, s 19 makes it an offence to have a firearm in a public place 'without lawful authority or reasonable excuse'. The former phrase is unnecessary, being comprehended in the latter, and the whole has the air of an incantation. Nevertheless, each component must be carefully construed. Thus, *mR v Jones (Terence Michael)* (1994) Times, 19 August the Court of Appeal held that, though possession of a firearm certificate did not amount to a lawful authority for possession in a public place, an honest but mistaken belief in facts which, if they had existed, would have constituted lawful authority was capable of amounting to a reasonable excuse.

Ordinary meaning of words and phrases (Code s 363)

Tense (Code pp 829-830)

Selection of the wrong tense may invalidate a prescribed form. In */? v Canons Park Mental Health Review Tribunal, ex pA* [1994] 1 All ER 481 a medical form contained the question 'Is it likely that the medical treatment is alleviating or preventing a deterioration in the patient's condition?' Sedley J said (at 484):

'... the use of the present tense is unfortunate. The question... may divert the tribunal's attention from a more important question, namely whether it is likely that medical treatment *will* alleviate or prevent' (emphasis by Sedley J)

(See also Medical Law, pp 288-295 above.)

Legislative present Use of the present tense in a statute in relation to events generally was referred to as 'the legislative present' by Staughton LJ in *Re Barretto* [1994] 1 All ER 447 at 455. Refuting a suggestion of implied retrospectivity, he said: 'When the present tense is used it looks to the future'. He was referring to the fact that an enactment often says something like 'where

a person is convicted . . . ', meaning where they are convicted in the future, ie after the commencement of the enactment in question. (See also Criminal Procedure, pp 149-150 above.)

Substance versus form

Where an enactment uses a term it is presumed to refer to its substance rather than merely its form, where the two conflict. Here are two cases illustrating this principle.

In *Powdrill v Watson* [1994] 2 All ER 513 the Court of Appeal held that where the Insolvency Act 1986, s 19(5) referred to contracts of employment 'adopted' by an administrator it was looking to the substance rather than the form of the administrator's actions. So, where by his conduct he showed that he had in fact adopted certain contracts of employment, it did not avail him that by an 'incantation' he had purported not to adopt them. Dillon LJ said (at 521): 'the mere assertion by an administrator... that he is not adopting the contract is mere wind with no legal effect, because adoption is a matter not merely of words but of fact'. This was followed in *Re Leyland DAFLtd* [1994] 4 All ER 300 (discussed in Company Law, p 70 above), where Lightman J said (at 304) that an appeal from the decision in *Powdrill v Watson* was shortly to be heard by the House of Lords.

In *Willowgreen Ltd v Smithers* [1994] 2 All ER 533 the Court of Appeal considered CCR Ord 7, r 10(1), which provides that service of a summons may be effected 'by an officer of the court sending it by first-class post to the defendant at the address stated in the request for the summons'. This had been literally complied with, but the address was not one at which the defendant had ever lived or been present. *Held* The term 'address' must be construed as meaning an address of the defendant properly so called, and literal compliance with the rule was not sufficient. Nourse LJ said (at 537):

'In ordinary parlance a person's address is a place at which written communications can be delivered to him. In order that they can be delivered to him, he must, to a greater or lesser extent, be present to receive them. The extent to which his presence is necessary to make it his address may vary, and vary significantly, with the circumstances. But if he is never there at all, it cannot properly be called his address. It can, if communications will be sent on to him from there, be called a forwarding address. But that is not the same thing as an address.'

This dictum is relevant in construing the phrase 'properly addressing' in the Interpretation Act 1978, s 7 (Code p 898).

Conjunctive and disjunctive use

An example of disjunctive rather than conjunctive meaning in relation to the word 'and' arose in *Re H (a minor) (foreign custody order: enforcement)* [1994] 1 All ER 812 (see Family Law, p 229 above). The Court of Appeal held that in art 10 of the European Convention on the Recognition and Enforcement of Decisions Concerning Custody of Children, given the force of law by the Child Abduction and Custody Act 1985, the statement that 'recognition and enforcement' of a foreign judgment may be refused was to be construed

disjunctively. This meant that a judgment might be recognised but not enforced. The court had regard to the statement in *Dicey and Morris on the Conflict of Laws* (12th edn, 1993) 1453-454 that 'while a court must recognise every foreign judgment which it enforces, it need not enforce every foreign judgment which it recognises'.

Cessation of existence (Supp p A32)

For the passage beginning with this title in Supp p A32 substitute:

'Where a person or thing of a category referred to in an enactment has died or otherwise ceased to exist at the time the enactment falls to be applied, the enactment will normally not apply. What has ceased to exist cannot properly be said to fall within the category.^{3A} However the wording of the enactment may indicate a contrary intention. *Example 363.15* The Court of Appeal held that the words 'Where a person has been convicted' in the Criminal Appeal Act 1968 s 17(1) 'are wide enough to embrace a person who is dead'.^{3B}

3A *R v Jeffries* [1969] 1 QB 120 at 124 ('whenever a party to proceedings dies, the proceedings must abate'). This was upheld by the House of Lords in *R v Kearley (No 2)* [1994] 3 All ER 246.

3B *vMaguire* [1992] QB 936 at 944. See also *Example 395.2*.'

R v Kearley (No 2) is examined in Criminal Procedure, pp 142-143 above.

Implication by oblique reference (Code s 396)

An example of implication by oblique reference arose in *Re R (a minor) (contact: consent order)* (1994) Times, 18 July. In the absence of other indication, there is an obvious doubt whether an appeal lies from a consent order. If the parties have consented to the making of the order, how can either of them be entitled to appeal from it? However, Stuart-Smith LJ held that the point was settled by the fact that the Supreme Court Act 1981, s 18(1) provides that no appeal shall lie to the Court of Appeal *without leave* from an order made with the consent of the parties. Clearly, the Act contemplates that an appeal may lie from a consent order provided leave to appeal is granted.

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

Multi-purpose cases

Where an enactment turns on whether a person 'causes' an outcome, and is silent on the question whether he is required to be the *sole* cause, the court is likely to hold that the condition is satisfied if he is the substantial, even though not the only, cause: *R v CPC (UK) Ltd* (1994) Times, 4 August (causing polluting matter to enter a river contrary to the Salmon and Freshwater Fisheries Act 1975, s 4(1) and the Water Resources Act 1991, s 85(1)).