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Statute Law

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Introductory note

For the convenience of readers this section of the Review conforms to the Code set out in the second edition of the author's textbook *Statutory Interpretation* as modified by the Second Supplement (Cumulative) 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 Second Supplement as '2nd Supp.'.

Ignorantia juris neminem excusat (Code s 9)

A mistake of law ought not to be treated by the court as a mistake of fact. It apparently was so treated by Carnwath J in *R v Westminster City Council, ex p Obeid* (1996) *The Times* 16 July (mistaken belief as to the law governing housing benefit held mistake as to a 'relevant fact' within Housing Act 1985 s 60(3)).

Ignorance of adviser (p 26)

Neill LJ said in *Biggs v Somerset County Council* [1996] 2 All ER 734 at 741, 743: "... in 1976 the impact and importance of s 2 of the European Communities Act 1972 was not widely known. Nor was the decision in *Defrenne v Sabena* Case 43/75 [1976] ECR 455 fully understood or taken into account even by the legal profession ... The fact that after 1 January 1973 [the commencement of the European Communities Act 1972] Acts of Parliament and other UK legislation might have to yield to provisions determined by a different and superior system of law was, I suspect, fully appreciated only by a comparatively small number of people. But ... it would be contrary to the principle of legal certainty to allow past transactions to be reopened and limitation periods to be circumvented because *the existing law* at the relevant time had not yet been explained or had not been fully understood.' (Neill LJ's emphasis.)

Mandatory and directory requirements (Code s 10)

The analysis in this section was applied by the Court of Appeal in *DPP v Cottier* [1996] 3 All ER 126 at 131.

Jurisdiction (p 31)

Where a duty is imposed on a court not to begin a hearing unless a certain notice has been given this may be treated as directory only: *DPP v Cottier* [1996] 3 All ER 126 (notice required by the Children and Young Persons Act 1969 s 34(2)).

Breach of statutory duty (Code s 14)

It may constitute the tort of negligence for a legal adviser to fail to advise a client of a relevant statutory requirement. For example the Companies Act 1985 s 320 requires approval by the members where a company acquires assets of one of its directors. In *British Racing Drivers Club Ltd v Hextall Erskine & Co* [1996] 3 All ER 667 a company's solicitors failed to advise the board of directors of this requirement in relation to such an acquisition. It was held that the solicitors were liable to the company in negligence for the resulting loss.

Adjudicating authorities with appellate jurisdiction (Code s 23)

A statutory restriction on a right of appeal does not apply to the raising by the *respondent* to an appeal of argument amounting to an appeal from any ruling of the court below which was adverse to the respondent:*Vitol SA v Norelf Ltd, The Santa Clara* [1996] 3 All ER 193.

Judicial review (Code s 24)

Public law and private law (pp 86-87)

The distinctions between public law and private law, and the precise limits between them, are by no means worked out and continued flexibility is desirable. Proceeding by writ under private law, rather than by an application for judicial review, may be held an abuse of the process of the court if the matter concerns public law and judicial review is the appropriate remedy because, for example, speed is required in the public interest. (Authority for both these propositions will be found in *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 All ER 575, *per* Lord Slynn at 581.)

It will be seen that the question whether a matter is justiciable as one of public law or is within the realm of private law is not easy to determine. From different aspects, it may fall into both these categories: see *R v Legal Aid Board, ex p Donn & Co (a firm)* [1996] 3 All ER 1, *per* Ognall J at 11. That it concerns public matters is not conclusive. 'The fact that [court] shorthand writers perform an important public function makes their engagement no more a matter of public law than the engagement of a civil servant, as in [*R v Lord Chancellor's Department, ex p Nangle* [1992] 1 All ER 897]; a police surgeon, as in [*R v Derbyshire CC, ex p Noble* [1990] ICR 808]; a senior

nursing officer, as in *R v East Berkshire Health Authority, ex p Walsh* [1985] QB 152; a consultant surgeon, as in *R v Trent Regional Health Authority, ex p Jones* (1986) *The Times* 19 June or a prison officer, as in *McLaren v Home Office* [1990] ICR 824. The public importance of the work does not make the matter one of public law...'. (From the transcript of *R v Lord Chancellor, ex p Hibbitt & Saunders (a firm)* (1993) *The Times*, 12 March: see *R v Legal Aid Board, ex p Donn & Co (a firm)* [1996] 3 All ER 1 at 9.) As was said by Ognall J in *R v Legal Aid Board, ex p Donn & Co (a firm)* [1996] 3 All ER 1 at 11: 'The answer must, it seems to me, fall to be decided as one of overall impression, and one of degree. There can be no universal test.'

Where other remedy available (pp 87-88)

In *R v Special Educational Needs Tribunal, ex p South Glamorgan County Council* (1995) The Times, 12 December (no remedy by judicial review as to decision by Special Educational Needs Tribunal since appeal lies under RSC Ord 55) Rose LJ relied on Lord Templeman's dictum in *R v IRC, ex p Preston* [1985] AC 835 at 862: 'Judicial review process should not be allowed to supplant the normal statutory appeal procedure'.

Doctrine of Crown immunity (Code s 34)

In determining whether an Act binds the Crown it may be necessary to examine the legislative history, as in *Soden v Burns* [1996] 3 All ER 967 at 974-975. Here the court considered the extraordinary provision in the Insolvency Act 1986 s 434 which states that the Crown is bound by 'the provisions of this Act which derive from the Insolvency Act 1985' and relate to certain matters, a particularly obnoxious piece of legislation by reference.

Precise and disorganised drafting (Code s 141)

Legislative drafting in Britain has now reached a high degree of precision, and the product should be construed accordingly. However it needs to be borne in mind that drafters occasionally fall short of this demanding standard. This applied with the drafting of the Landlord and Tenant Act 1987 which Browne-Wilkinson V-C called 'an ill-drafted, complicated and confused Act': *Denetower Ltd v Toop* [1991] 1 WLR 945 at 952. In *Belvedere Court Management Ltd v Frogmore Developments Ltd* [1996] 1 All ER 312 at 330 Bingham MR described this criticism as 'understated', while in *Mainwaring v Trustees of Henry Smith's Charity* [1996] 2 All ER 220 at 233 he acknowledged that the Act had become a byword by sarcastically saying that with 'any other Act' the court would think it extraordinary that doubt should exist on such a fundamental point as whether 'disposal' related to exchange of contracts or completion. In *Belvedere* Hobhouse LJ said (at 331) that it was not the role of the courts to construct solutions to such inadequate drafting; they had to be found within the scope of the tools available for discovering the legislative intention.

Nature of the grammatical meaning (Code s 151)

An enactment is not ambiguous because it confers a power of judgment or discretion which, in a

particular case, might legitimately be exercised in more than one way. The Broadcasting Act 1990 s 92(2)(a) restricts radio advertising which is of a nature judged by the Radio Authority to be 'political'. It was held in *R v Radio Authority, ex p Bull* [1995] 4 All ER 481, following *R v Broadcasting Complaints Commission, ex p Granada Television Ltd* [1995] EMLR 163 at 167 (meaning of 'privacy') that the term 'political' is not here ambiguous merely because it is of indeterminate meaning. Because of the wide variety of possible advertisements, it was not possible for Parliament to provide a clear definition of the term 'political'. So it left the decision to the judgment of the regulatory authority, which had expertise in the field and was able to respond to changing circumstances.

Nature of a legislative implication (Code s 172)

Where an enactment makes a statement that necesarily involves the existence of a certain legal rule, that rule (even if not established *aliunde*) is inferred to be intended to exist by virtue of the enactment. For example the grand jury never had to pay attention to such matters as rules of evidence. When Parliament replaced it by examining justices it was assumed that this would apply to them too. However the Magistrates' Courts Act 1980 s 102(1) stipulates that in committal proceedings written statements satisfying certain conditions are admissible to the like effect as oral evidence. In *Williams v Bedwellty JJ* [1996] 3 All ER 737 at 741 Lord Cooke of Thorndon said: 'The implication is plain that, if necessary, examining justices must consider admissibility'.

Are legislative implications legitimate? (Code s 173)

In *R v Dover Magistrates' Court, ex p Commrs of Customs and Excise* (1995) The Times 12 December it was held that it was 'implicit' in the Courts Act 1971 s 52 that the power to award costs conferred by it did not extend to costs in proceedings other than those before the court.

When implications are legitimate (Code s 174)

Implication limiting court's discretion

It has been held to be not legitimate to find a restrictive implication limiting a statutory discretion conferred on the court, since the necessary restriction can be effected by treating the discretion as *incorrectly exercised* if applied too widely: *Aiden Shipping Co Ltd v Interbulk* [1986] AC 965, where the House of Lords held as respects the Supreme Court Act 1981 s 51(1), which after stating that costs shall be in the discretion of the court adds that the court 'shall have full power to determine by whom and to what extent the costs are to be paid', that no implication should be found restricting the width of the discretion. However, as shown by *Zanussi v Anglo-Venezuelan Real Estate and Agricultural Development Ltd* (1996) *The Times* 18 April, this ruling should be treated with care, so as not to interfere with the general principle that an enactment conferring a power will often need to be treated as subject to implied restrictions. In that case the Court of Appeal held that the Supreme Court Act 1981 s 51(1) was impliedly restricted to the making of costs orders in the proceedings which are before the court, and did not extend to other proceedings.

Commonsense construction rule (Code s 197)

Of the fact that a literal construction of the Limitation Act 1980 s 35 as substituted produces the result that where the same cause of action is continued by a successor in title this is a 'new claim', Evans LJ said in *Yorkshire Regional Health Authority v Fairclough Building Ltd* [1996] 1 All ER 519 at 529: 'Only if the court was obsessed by the strictly literal interpretation and oblivious to the common sense of the matter could the conclusion be entertained'.
It is common sense to assume that if a particular proposition is laid down, the converse also applies. Thus if A is to be treated for the purposes of an enactment as residing with B, it follows as a matter of common sense that B is to be treated for those purposes as residing with A. For a case where regulations were expressly (and unnecessarily) amended to spell this out, for fear it might be held not to apply see *Bate v Chief Adjudication Officer* [1996] 2 All ER 790 at 800.

Statutory definitions (Code s 199)

Contrary intention

Whether it is so stated or not, a statutory definition does not apply if the contrary intention appears from the Act in which the defined term is used. The Interpretation Act 1978, which lays down many statutory definitions of general application, states that they apply 'unless the contrary intention appears': see Interpretation Act 1978 s 5, which relates to definitions set out in Schedule 1 to the Act. Similar statements usually appear in Acts providing ad hoc definitions, but whether they do or not, a definition is disapplied if the context in which the defined term is used indicates that that is the intention. For a general discussion see H M Thornton, 'Contrary Intention', 15 *Stat LR* (1994) 182.

A contrary intention may apply to a part only of a definition: see *Starke and another (executors of Brown (decd)) v Inland Revenue Commissioners* [1996] 1 All ER 622 (definition of 'land' in Interpretation Act 1978 s 5 and Sch 1 held to be disapplied only so far as concerned the words 'buildings and other structures'). This involves treating the words 'unless the contrary intention appears', where the context so requires, as if they read 'unless, and to the extent that, the contrary intention appears'.

Failure to define term correctly (p 418)

A commmon error in framing a definition is that of circularity, for example by including the term defined as part of the definition. Thus in *Re Campbell (a bankrupt)* [1996] 2 All ER 537 the court considered the definition of 'property' in the Insolvency Act 1986 s 436. This says: '"property" includes ... every description of interest ... arising out of, or incidental to, property...'. Knox J (at 540) described this as 'somewhat circular, because it will be recalled that what is actually being defined is just that word "property"'.

Interpretation Act 1978 (Code s 200)

The term 'person' (pp 422-423)

A body corporate or corporation (often called a company) is a *persona ficta*, an artificial person created by the law. 'Although a company can act only by an agent, because there is no such thing as "the company" as such, there are often situations where it is possible, and sometimes necessary, to say that "the company" has done something or has acted in a certain way': *Jonathan Alexander Ltd v Proctor* [1996] 2 All ER 334, *per* Buxton J at 342.

Pre-enacting history: the pre-Act law (Code s 210)

Subsection (3): form of words with previous legislative history

In using earlier legislative treatment of a particular mischief as a guide to interpretation, the court must keep in mind changes of approach. In *Firstpost Homes Ltd v Johnson* [1995] 4 All ER 355, Balcombe LJ said (at 363-364): 'I am not prepared to construe the word 'signed' in s 2(3) of the Law of Property (Miscellaneous Provisions) Act 1989 by reference to the old learning on what amounted to a signature of a note or memorandum sufficient for the purposes of the Statute of Frauds (1677) or s 40 of the Law of Property Act 1925. To do so would ... defeat the obvious intention ... I can see no justification for retaining the old law ... and every reason for consigning it to the limbo where it clearly belongs and where, as Peter Gibson LJ has said, many of the earlier judges would have consigned it if they had felt free to do so.'

Use of Hansard (Code s 217 as substituted by 2nd Supp. pp B43-B56)

Comment Part One: General (pp B43-B45)

In *Pepper (Inspector of Taxes) v Hart*, [1993] AC 593 at 637 Lord Browne-Wilkinson said that attempts to introduce material which did not satisfy the tests laid down in that case should be met by orders for costs made against those who improperly introduced the material. He repeated this in *Melluish (Inspector of Taxes v BMI (No 3) Ltd* [1995] 4 All ER 453 at 468.

Comment Part Four: Content of Hansard Statement (p B48)

In *Pepper (Inspector of Taxes) v Hart*, [1993] AC 593 at 634 Lord Browne-Wilkinson said that the new rule laid down by the decision should apply only where the sponsor's statement in Parliament 'discloses the mischief aimed at [by the enactment] or the legislative intention lying behind the ambiguous or obscure words'. He reiterated this requirement in *Melluish (Inspector of Taxes v BMI (No 3) Ltd* [1995] 4 All ER 453 at 468, where he said that the statement should be 'directed to the very point in question in the litigation'. He added that for a party to cite a statement not so directed is improper because it 'involves the interpretation of the ministerial statement and the question whether anything said in relation to the other provision can have any bearing on the provision before the court'.

The difficulty of avoiding such 'interpretation' of a minister's statement is illustrated by *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573. Here Jacob J considered the

Misrepresentation Act 1967 s 2(2) ambiguous on the question whether the reference to rescission of a contract meant that rescission must still be open. He therefore (at 590) allowed a reference to Hansard under *Pepper v Hart*. The reference was to a statement by the Solicitor General of the time as to the intended meaning of what became s 2(2) on this point. Jacob J said: 'So the Solicitor General told the House of Commons that it was his view that damages could be awarded under s 2(2) when there was an impossibility of rescission. Accordingly, I hold that the power to award damages under s 2(2) does not depend upon an extant right to rescission - it only depends upon a right having existed in the past.'

Comment Part Five: Clarity of Hansard Statement (p B48)
That the sponsor's statement must be 'clear' was stressed by several of the Law Lords in *Pepper (Inspector of Taxes) v Hart*, [1993] AC 593. Lord Browne-Wilkinson (at 640) limited it to the case where the statements relied upon are clear (at 638, 640). He reiterated this requirement in *Melluish (Inspector of Taxes v BMI (No 3) Ltd* [1995] 4 All ER 453 at 468.

Special restriction on Parliamentary materials (the exclusionary rule) (Code s 220 as substituted by 2nd Supp. pp B58-B89)

Residuary right to admit Parliamentary materials (p B89)

In *Three Rivers District Council v Governor and Company of the Bank of England* (1996) *Times* 8 January, Clarke J held that the *Pepper v Hart* restrictions (see also *Melluish (HMIT) v BMI (No 3) Ltd* [1995] STC 964*)* did not apply to the citation of parliamentary materials for a purpose other than the construction of a particular statutory provision. Here the court's task was to ascertain the purpose and object of the Banking Acts 1979 and 1987 so as to construe them consistently with Council Directive 77/80/EEC of 12 December 1977 (OJ 1977 L322/30) and those restrictions did not apply.

In *Miller v Stapleton* [1996] 2 All ER 449 at 462 Carnwath J referred to what the relevant minister, Mr Richard Crossman, had said in the House of Commons on the Bill for the Parliamentary Commissioner Act 1967 even though there was no suggestion that the *Pepper v Hart* conditions were satisfied. Indeed that case was not mentioned. Mr Crossman had given a list of examples of the type of maladministration intended to be covered by the Bill. Carnwath J indicated that this is commonly used in the administration of the 1967 Act, and is indeed known as 'the Crossman catalogue'.

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

Official guidance ceases to be authoritative if overruled by a court decision: see *R v Wandsworth London Borough Council, ex p Mansoor* [1996] 3 All ER 913(statement that the duty under the Housing (Homeless Persons) Act 1977 (repealed) required provision of *permanent* accommodation).}

In *R v Wandsworth London Borough Council* (1995) *The Times* 15 December the House of Lords held that Local Authority Circular LAC(93)10, issued by the Department of Health, was mistaken

in its statement of the legal meaning of the National Health Service Act 1948 ss 21 and 26 as amended by the Community Care (Residential Accommodation) Act 1992. Lord Hoffmann said that the opinion of the department was entitled to respect, particularly since he assumed that the amendments made by the 1992 Act had been drafted on its instructions, but that opinion was 'simply wrong'.

Heading (Code s 255)

The wording of this section of the Code, namely that a heading within an Act, whether contained in the body of the Act or a Schedule, is part of the Act and may be considered in construing any provision of the Act, provided due account is taken of the fact that its function is merely to serve as a brief, and therefore necessarily inaccurate, guide to the material to which it is attached, was applied by Henry LJ in *Oyston v Blaker* [1996] 2 All ER 106 at 114.

Nature of legal policy (Code s 263)

Changes in legal policy (p 536)

The courts should not declare that legal policy on a point has changed where this would run contrary to clear existing enactments. For example it seems that legal opinion, both at home and internationally, has moved away from the belief that an accused person should be granted an opportunity of cross-examining prosecution witnesses before being commmitted for trial. Lord Cooke of Thorndon said in ***R v Bedwellty Justices, ex p Williams*** (1996) *The Times* 6 August, a case where the accused had been denied this opportunity-

> 'The right to cross-examine at a preliminary hearing finds no place in most human rights instruments, perhaps in none. It might not long survive anywhere in the United Kingdom. Nevertheless the case has to be determined on the footing that the right still exists here and might be of significant value, at least of a tactical kind, to the defence. Your Lordships are not entitled to prefer a changed conception of the public interest to the clear statutory law'.

Law should serve the public interest (Code s 264)

Interest reipublicae ut sit finis litium (pp 543-544)

Under this principle the court will treat as an abuse of process an attempt to make a collateral attack, through fresh proceedings, on a decision which should be treated as final: see ***Smith v Linskills (a firm)*** [1996] 2 All ER 353 (convicted person attempted to reopen conviction by suing his solicitor in negligence).

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

Deprivation without compensation (pp 572-573)

An aspect of the principle against penalisation under a doubtful law is that where compensation is provided the courts will more readily infer an intention to deprive persons of their property. So where land which could have been acquired compulsorily is acquired from a person by agreement, ancillary rights of other persons, such as those under restrictive covenants, may be overridden in the same way as if the acquisition had been compulsory, provided compensation is available. An example of this is furnished by *Brown v Heathlands Mental Health National Health Service Trust* [1996] 1 All ER 133, following *Kirby v School Board for Harrogate* [1896] 1 Ch 437 and *Re Elm Avenue (6, 8, 10 and 12), ex p New Forest DC* [1984] 1 WLR 1398 (restrictive covenants overridden on acquisition by agreement since compensation available under Compulsory Purchase Act 1965 s 10 in succession to Lands Clauses Consolidation Act 1845 s 68).

Statutory restraint of the person (Code s 273)

Habeas corpus (p 579)

The writ of habeas corpus does not issue where the decision to detain is open to judicial review: *R v Oldham Justices, ex p Cawley* [1996] 1 All ER 464. Simon Brown LJ said (at 478): 'in judicial review the court has wider powers of disposal: whereas in habeas corpus the detention is either held unlawful or not, and the applicant accordingly freed or not, on judicial review [of the order or warrant for detention] the matter can be remitted [to the person issuing it] with whatever directions may be appropriate'. Where it is indisputable that the detention is unlawful, and no question regarding the nature of any administrative decision falls to be decided, habeas corpus is the appropriate remedy: *Re S-C (mental patient: habeas corpus)* [1996] 1 All ER 532 (patient detained in undoubted contravention of the Mental Health Act 1983 s 3, even though the receiving hospital could not be held to have commited any offence or tort by reason of the protective provision in section 6(3) of the Act).

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

Errors of meaning (pp 611-614)

The Children Act 1989 s 31(8) governs designation of a local authority in a care order 'where the child does not reside in the area of a local authority'. In *Gateshead Metropolitan Borough Council v L* [1996] 3 All ER 264 it was held that the omission of the word 'ordinarily' before 'reside' was a parliamentary slip. If it were not corrected by the court, certain children would fall outside what purported to be a comprehensive provision. The court would accordingly treat that word as inserted.

Meaning narrower than the object (casus omissus) (Code pp 614-615)

Sometimes a *casus omissus* is too considerable to be remedied by a rectifying construction. The drafters of successive Acts dealing with the trial of insane persons mistakenly assumed that such a person would never be tried summarily. It was held in *R v Horseferry Road Magistrates' Court, ex p K* [1996] 3 All ER 719 that this created an obvious legislative lacuna which could not be remedied by rectifying construction. It did not create an inference that Parliament intended, in the

case of summary trials, to disapply the common law defence of insanity applicable where mens rea is in issue.

Purposive-and-literal construction (Code s 305)

Non-purposive-and-literal construction (p 667)

In the sense used in English law, purposive construction is an almost invariable requirement. But a non-purposive construction, giving effect to the literal meaning, may be necessary, because unavoidable, where there is insufficient indication of (a) what the legislative purpose is or (b) just how it is to be carried out. Occasionally such a construction is given where there is no such necessity, as in ***R v Preddy*** [1996] 3 All ER 481. Here the House of Lords strikingly held that the Theft Act 1968 s 15 (dishonestly obtaining property belonging to another) does not apply to bank transfers because, although they end with one party being better off and the other correspondingly worse off, the former do not thereby possess 'property belonging to another'. Cf Lord Diplock's comment on the similar decision in ***IRC v Ayrshire Employers Mutual Insurance Association Ltd*** [1946] 1 All ER 637 that if the court can identify the target of legislation 'their proper function is to see that it is hit; not merely to record that it has been missed' (*Courts and Legislators*, p 10).

Differential readings

The subjective nature of judicial assessments of meaning may produce differential readings even though the enactment is not strictly speaking ambiguous. This may lead to different views as to what the literal meaning is, and it is here that the presumption favouring a purposive construction becomes important. In ***Kent County Council v Holland*** (1996) ***The Times*** 26 July the defendant was accused before magistrates of the offence of wilfully obstructing the free passage along a footpath, contrary to the Highways Act 1980 s 137. The obstruction consisted in the fact that he kept two fierce dogs so close to the footpath that they frightened users of it. Some were so deterred that they would not use it at all. The magistrates dismissed the charge on the ground that to hold that this amounted to an 'obstruction' within the meaning of the section would be to stretch the meaning of the word too far. ***Held*** The magistrates were right. The Divisional Court apparently did not consider, as many people might, that a purposive construction required the verb 'obstruct' to be treated as including psychic factors in the Miltonic sense ('Both Sin, and Death, and yawning Grave at last,/ Through Chaos hurld, obstruct the mouth of Hell ...' - ***Paradise Lost*** x 637). They held, it is submitted wrongly, that 'The uncertainty of the test and the inconsistent results it would produce ... mitigated [*sic*] against such an interpretation'.

Avoiding an anomalous or illogical result (Code s 315)

Decision turning on an immaterial distinction (pp 697-698)

Even though two cases are not exactly alike, it may still be anomalous to distinguish between them if the difference is immaterial or trivial. Thus on the fact that a literal construction of the Limitation Act 1980 s 35 as substituted would produce the anomalous result that where the same cause of action was continued by a successor in title this would be a 'new claim' for the purpose of limitation, Evans LJ said it would be 'an absurd conclusion' and one not to be followed: ***Yorkshire Regional Health Authority v Fairclough Building Ltd*** [1996] 1 All ER 519 at 529.

Evasion distinguished from avoidance (Code s 320)

Ramsay principle (pp 715-718)

The *Ramsay* principle does not entitle the court 'simply to ignore or override apparently effective transactions which on their face confer an interest in land on the transferee': *Belvedere Court Management Ltd v Frogmore Developments Ltd* [1996] 1 All ER 312, *per* Bingham MR at 326 (arrangements by landlord designed to avoid leasehold enfranchisement under Landlord and Tenant Act 1987 s 12).

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

'Signing' of documents (p 731)

When there is a provision in a statute requiring a document to be 'signed' by a particular person (A), with nothing in the subject-matter or context to indicate that personal signature is necessary, then the common law rule prevails and a signature duly authorised by A which was affixed to the document by another person (B) is to be treated in law as the signature of A: *Tennant v London County Council* (1957) 121 JP 428 at 438, cited *Morrow v Nadeem* [1986] 1 WLR 1381 at 1388. As to the different methods by which a document may be 'signed', and the transmission of a signed document by fax, see *Re a debtor (No 2021 of 1995), ex p Inland Revenue Commissioners v The debtor* [1996] 2 All ER 345.

Law regulating decision making (Code s 329)

Duty to give reasons (pp 743-744)

The 1996 cases of *S (a minor) v Special Educational Needs Tribunal* [1996] 1 All ER 171 and *R v Criminal Injuries Compensation Board, ex p Cook* [1996] 2 All ER 144 provide an opportunity for the following revised summary of the law governing the question of giving reasons for decisions made under statutory powers.

Decisions by courts Save in exceptional cases, Parliament when conferring a statutory discretion on a court is presumed to intend that reasons shall be given for the decision: *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119 at 122; *R v Harrow Crown Court , ex p Dave* [1994] 1 WLR 98. One exceptional case concerns the awarding of costs, where reasons need not be given unless the award is unusual: *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119 at 122. Another is where a judge refuses leave to appeal to the Court of Appeal from a refusal of leave to appeal from an arbitrator: *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1985] AC 191 at 206.

Decisions by tribunals etc In the case of a quasi-judicial decision such as that of an administrative tribunal it is less easy to determine, in the absence of specific provision, whether there is a duty to give reasons. The basic position is that the party appearing before the tribunal 'is entitled to know, either expressly stated by it or inferentially stated, what it is to which the tribunal is addressing its mind': *R v Immigration Appeal Tribunal , ex p Kahn (Mahmud)* [1983] QB 790, *per* Lord Lane

CJ at 794. In other words, the parties must be made aware, in broad terms, why they lose or why they win:*Union of Construction, Allied Trades and Technicians v Brain*, [1981] ICR 542, *per* Donaldson MR at 551. There is no basic requirement of natural justice that reasons should always be given when a discretion is exercised by a tribunal such as a social security commissioner: *R v Secretary of State for Social Services, ex p Connolly* [1986] 1 WLR 421. Cf *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1985] AC 191; *R v Civil Service Appeal Board, ex p Bruce* [1988] 3 All ER 686.

Administrative decisions In the case of a purely administrative decision, the law does not at present recognise a general duty to give reasons, though such a duty may in appropriate circumstances be taken as implied: *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531, *per* Lord Mustill at 564. He added (at 566) that there is however a 'continuing momentum in administrative law towards openness of decision-making'. The person against whom such a decision is made must not be left with the sense of grievance that would naturally arise if the reasons for it remained unknown or obscure: *Re Poyser and Mills' Arbitration* [1964] 2 QB 467, *per* Megaw LJ at 477-478; *R v Criminal Injuries Compensation Board, ex p Cook* [1996] 2 All ER 144, *per* Hobhouse LJ at 159. Where a decision is puzzling if not explained, failure to explain it may lead its to being held void as irrational: *R v Secretary of State for the Home Department, ex p Doody* [1993] QB 157 at 188.

General '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': *R v Higher Education Funding Council, ex p Institute of Dental Surgery* [1994] 1 WLR 242, *per* Sedley J at 256-257. Where Parliament has conferred an express exemption from giving reasons, courts should not exert pressure on the decision makers in question in an attempt to induce them to give reasons anyway: *R v Secretary of State for Social Services, ex p Connolly* [1986] 1 WLR 421.

Nature of the reasons Where a decision maker is required to give reasons, these must be 'proper, adequate and intelligible': *Westminster City Council v Great Portland Street Estates plc* [1985] AC 661, *per* Lord Scarman at 673. 'The overriding test must always be: is the tribunal providing the parties with materials which will enable them to know that the tribunal has made no error of law in reaching its finding of fact?': *Alexander Machinery (Dudley) Ltd v Crabtree* [1974] ICR 120, *per* Donaldson J at 122; see also *R v Mental Health Review Tribunal, ex p Clatworthy* [1985] 3 All ER 699 at 703. Where a tribunal gives reasons 'one must somehow be able to read from the reasons the issue to which the reasons are directed': *R v Mental Health Review Tribunal, ex p Pickering* [1986] 1 All ER 99 at p 104. The degree of particularity required in the reasons will vary according to what in the circumstances is practicable: see eg *S (a minor) v Special Educational Needs Tribunal* [1996] 1 All ER 171 (difference between summary reasons and full reasons). Where reasons for a decision are required to be given (whether by express command, as in the Housing Act 1985 s 64, or by implication) failure to give adequate reasons may render the

decision unlawful: see *R v Westminster City Council, ex p Ermakov* [1996] 2 All ER 302 and cases there cited.

Presumed application of rules of equity (Code s 330)

Equitable remedies (p 746)

Where, in legislating in an area formerly dealt with by equity, Parliament has demonstrated an intention that the area shall in future be dealt with entirely by the statutory provision, the equitable rule is treated as by implication extinguished or disapplied. Thus it was held in *Department of Social Security v Butler* [1995] 4 All ER 193 that a Mareva injunction could not be granted under the Supreme Court Act 1981 s 37 in support of the Secretary of State for Social Security's statutory rights under the Child Support Act 1991 because the statutory procedures were comprehensive and moreover the High Court had no jurisdiction in relation to those rights, which were enforceable by a magistrate's court only.

Displacement by statute (p 746)

The rule in *Russel v Russel* (1783) 1 Bro CC 269, 28 ER 1121 whereby a deposit of title deeds creates an equitable mortgage was impliedly abolished by the provisions of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 stating that a contract for the disposition of an interest in land can only be made in writing:*United Bank of Kuwait plc v Sahib* [1996] 3 All ER 215.

Presumed application of rules of tort law (Code s 333)

Nuisance (p 752)

The grant of planning permission under statutory powers is not a licence to commit nuisance: *Wheeler v J J Saunders Ltd* [1995] 3 WLR 466. However a planning authority, through its development plans and decisions, may over time alter the character of a neighbourhood (for example from residential to industrial). By reason of this, activities done with planning permission which might formerly have constituted an actionable nuisance may not now do so: *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd* [1992] 1 PLR 123. Further relevant dicta on the latter point are to be found in *Hunter v Canary Wharf Ltd* [1996] 1 All ER 482.

Presumed application of rules of evidence (Code s 335)

Standard of proof (pp 762-763)

Acts frequently determine the incidence of proof of a relevant fact without saying anything about the standard of proof required to be satisfied by the side on whom the burden is thus cast. In such cases the inference is that common law rules as to the standard of proof are to apply. These lay down broadly two standards, the criminal standard and the civil standard. The latter turns on a balance of probabilities, but it was held by Lord Nicholls of Birkenhead in *Re H and others*

(minors) (sexual abuse: standard of proof) [1996] 1 All ER 1 at 16-17 that '... the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on a balance of probability ... this does not mean that where a serious allegation is in issue the standard of proof required is higher'.

Interpretation of broad terms (Code s 356)

Pairs of broad terms (2nd Supp p B124-B125)

For the text of footnote 2 in Code p 815 substitute '*R v Jones* [1995] 3 All ER 139'.

Ordinary meaning of words and phrases (Code s 363)

Tense (pp 829-830)

In some cases the context may indicate that a reference to the present tense is not to be taken literally: see eg *McCann v Wright* [1996] 1 All ER 204, *per* Evans LJ at 211 ('These words [sc "are living together as husband and wife" in the Domestic Violence and Matrimonial Proceedings Act 1976 s 2(2)] are not to be given the strictly literal meaning which the present tense implies').

***Ejusdem generis* principle** (Code ss 379-386)

It is possible, if unlikely, for the principle to apply where there is a string of terms but there are no general words. For example the Sexual Offences Act 1956 s 31 makes it an offence for a woman to exercise 'control, direction or influence' over a prostitute. It was held in *Attorney General's Reference (No 2 of 1995)* [1996] 3 All ER 860 at 863 that this phrase was to be construed disjunctively, the three critical words showing a descending order of seriousness. It was difficult to see how the ejusdem generis rule could apply, having regard to the fact that there were no general words.

In addition to the generic string, other parts of the context may give assistance in finding the genus. The Insolvency Act 1986 s 74(2)(f) says that in a winding up the following is not deemed to be a debt of the company in competition with non-member creditors: 'a sum due to any member of the company (in his character of a member) by way of dividends, profits or otherwise...' It was held in *Soden v British and Commonwelath Holdings plc (in administartion)* [1996] 3 All ER 951 that a sum due as damages was not within the class indicated by the string 'dividends, profits', the court being helped to reach this conclusion by the words in parenthesis.

***Expressio unius* principle: words of designation** (Code s 391)

RSC Ord 55 r 8 makes express provision for the right of specified persons to appear and be heard on an appeal. These do not include the tribunal from whose decision an appeal is brought. In *S (a*

minor) v Special Educational Needs Tribunal [1996] 1 All ER 171 at 175-176 Latham J said 'It is argued that on the application of the principle expressio unius exclusio alterius a tribunal is not entitled to appear and be heard. I think that is strictly correct, in the sense that a tribunal has no right to appear ... But the court has ample powers to permit the tribunal to appear and be heard in appropriate matters'. This is presumably a reference to the court's inherent jurisdiction.

***Expressio unius* principle: words providing remedies etc** (Code s 392)

In *R v Secretary of State for Education and Employment, ex p Morris* (1995) *The Times* 15 December Popplewell J, considering whether the Education Act 1993 required consultation before a school was shut under Part V of the Act, said that elsewhere in the Act, eg ss 104 and 184-185, there was an express obligation to consult before taking action. The absence of any reference in the present circumstances to an obligation to consult therefore led to 'the obvious conclusion' that no such obligation existed.

***Expressio unius* principle: words of extension** (Code s 393)

Re a debtor (No 13A/10/95) [1996] 1 All ER 691 concerned two provisions of the Insolvency Act 1986. The first, s 11(3), states that while an administration order is in force no proceedings, and no execution or other legal process, may be commenced or continued, *and no distress may be levied*. The second, s 252(2), states that while an interim order is in force no proceedings, and no execution or other legal process, may be commenced or continued but does not repeat the italicised words. *Held* (at 703): the italicised words in the first provision were words of extension indicating that the Act did not intend the levying of distress to be treated as included in 'proceedings' or 'legal process'; and the levying of distress was therefore not covered by the second provision.

The Court of Justice of the European Community (Code s 400 as added by 2nd Supp. pp B140-B141)

Jurisdiction of CJEC as respects law other than Community law

The Court of Justice of the European Community (CJEC) has a jurisdiction additional to that relating to Community law. It is conferred by treaties other than the European Community Treaties, for example the Protocol on the interpretation of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters made at Brussels on 27 September 1968. The text of the 1971 Protocol on the interpretation by the CJEC of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters made at Brussels on 27 September 1968 is set out in the Civil Jurisdiction and Judgments Act 1982 Sch 1. Section 2 of the Act provides that the Convention has the force of law in the United Kingdom, while s 3 relates to the interpretation of the Convention by reference to rulings by the CJEC. Although questions of interpretation are thus made to relate to what is juridically a provision of an Act of Parliament, this does not mean that terms used in the Convention are to be interpreted as if they

were solely terms of domestic law. On this see *Kleinwort Benson Ltd v Glasgow City Council* [1996] 2 All ER 257 ('contract' in art 5(1) of the Convention to be construed not as a term of domestic law but in a broader sense consonant with the laws of the states bound by the Convention and relevant rulings of the CJEC).