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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 third edition (1997) of the author's textbook *Statutory Interpretation*. A reference to the relevant section of the Code is given after each heading in the notes below, where the book is referred to as 'Code'.

Duty to obey legislation (Code s 8)

Reasonableness (p 25)

In the absence of a contrary indication, a statutory duty, even if absolute, is not taken to extend so far as to require the performance of an act that it would be unreasonable to require. The Highways Act 1980 s 41(1) imposes on the highway authority for a highway maintainable at the public expense a duty 'to maintain the highway'. It was held in *Cross v Kirklees Metropolitan Borough Council* (1997) *The Times* 10 July that although this duty is absolute, and not merely a duty to take reasonable care, it must be measured by reasonable standards and applied practically. This means, for example, that the authority must be allowed a reasonable time to repair defects in a highway. Conversely, a statutory duty is not adequately performed if the mode of purported compliance is unreasonable, as shown in *Johnson v Blackpool General Commissioners* (1997) *The Times* 11 July (duty of taxpayer to allow inspection of documents not complied with by making them available at his home at one minute to midnight).

Mandatory and directory requirements (Code s 10)

The distinction between mandatory and directory requirements is illustrated by Bowen LJ's dictum concerning an enactment requiring consent to the initiation of legal proceedings: 'It directs what ought to be done . . . But it does not oblige the Court to close the gates of mercy upon the applicant, but enables it to stay proceedings until [consent is obtained]': see *Rendall v Blair* (1890) Ch D139 at 158. This dictum was cited in *Re Saunders (a bankrupt)* [1997] 3 All ER 992 at 1000, where it was held that the apparent prohibition in the Insolvency Act 1986 s 285(3) stating that no creditor shall before the discharge of a bankrupt commence any legal proceedings against the bankrupt except with the leave of the court was to be construed as directory only. Lindsay J examined a century of bankruptcy practice to that effect in England and the Commonwealth. He said (at 1001) 'a court can expect very emphatic language in a statute, perhaps even extending to the provision that for want of leave an action is without more to be dismissed, if the proceedings are . . . to be a nullity'. He cited (at 1003) an Australian dictum that the courts 'are not disposed to give an annihilating effect to a provision of this kind if the purpose of the provision can be achieved by treating it as directory'. Where proceedings have been started without the requisite leave the practice, in suitable cases, is to grant leave *nunc pro*

tunc (now for then).

Where contracting out and waiver allowed (Code s 11)

A person entitled to the performance of a statutory duty can effectively waive performance of the duty by the person bound. Thus the requirement in the Pension Schemes Act 1993 s 95 that an application be made in writing 'was clearly imposed for the benefit of the trustees; it might be unwise of them to waive the requirement, but it would be absurd to hold that they could not do so if they chose': *Hamar v Pensions Ombudsman* (1997) *The Times* 24 March.

Civil sanction for disobedience (the tort of breach of statutory duty) (Code s 14)

Subsection (1) (pp 48-50)

The recent rise in public law remedies has led to a tendency for the courts to rule in certain cases that Parliament intended these to provide the sole remedy. Thus in *O'Rourke v Camden London Borough Council* [1997] 3 All ER 23 the House of Lords overruled *Thornton v Kirklees Metropolitan Borough Council* [1979] QB 626 (which had held that a private law action for damages lay in respect of breach of the duty imposed by the Housing (Homeless Persons) Act 1977 (repealed) s 3(4)) on the ground that even back in 1977 public law remedies had advanced sufficiently for them to be relied on exclusively by Parliament in such cases.

If the enactment was made by delegated legislation it is necessary to determine whether the delegate was given power to create new actionable rights in private law: see eg *Olutu v Home Office* [1997] 1 All ER 385 (power to make custody time limit regulations did not include power to create rights under private law for breach of the regulations).

Subsection (14) (p 59)

Where the statutory duty is one of a general administrative or regulatory nature imposed on a public authority the breach tort is unlikely to arise. Thus in *Church of Jesus Christ of Latter-Day Saints (GB) v West Yorkshire Fire and Civil Defence Authority* [1997] 2 All ER 865 it was held that the duty imposed by the Fire Services Act 1947 s 13 to ensure a water supply was a general administrative one, so there was no private law liability for breach.

Subsection (17) (pp 61-62)

Liability under the tort of negligence (as opposed to the breach tort) may arise where a statutory power is conferred on a person and that person carelessly fails to exercise the power, or exercises it in a careless manner, and damage results. In *Capital and Counties plc v Hampshire County Council* [1997] 2 All ER 865 the fire brigade, a statutory body, were called to an office fire where the sprinkler system was already operating. The fire brigade officer ordered the sprinklers to be turned off, which led to the building being burnt down. A finding that this constituted the tort of negligence was upheld by the Court of Appeal.

Administrative or executive agencies (Code s 15)

Court supervision) (pp 65-66)

Recently judges have developed (one might more accurately say invented) a doctrine that those entrusted with administrative powers have a duty of good administration. In *R v Chief Constable of the North Wales Police, ex p AB* [1997] 4 All ER 691 at 699 Lord Bingham CJ said that the duty of a

public body not to disclose prejudicial information without sufficient reason 'rests on a fundamental rule of good public administration, which the law must recognise and if necessary enforce'. Buxton J said (at 703) that the public law obligations of the police 'include observance of the fundamental rules of good public administration, which this court will if necessary enforce'. Neither judge attempted to formulate these so-called 'rules', or state upon what authority they were called into being in their judgments.

Courts and other adjudicating authorities (Code s 19)

Jurisdiction (pp 72-74)

Statute may confer on courts the function of acting as a 'statutory attorney' on behalf of infants, incompetents or the unborn: see *Goulding v James* [1997] 2 All ER 239, *per* Mummery LJ at 249.

Ouster of jurisdiction (pp 74-76)

An error of law in the *Anisminic* sense (see *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147) may not be fatal if it can be corrected under the so-called 'slip rule' (for this see RSC Ord 20 r 11). The Company Directors Disqualification Act 1986 s 1(1) empowers the making of a disqualification order, defined as precluding four specified activities. A court made an 'order' limited to two only of the activities. It was argued that the order was a nullity. *Held* The error could be corrected under the 'slip' rule: *Official Receiver v Hannan* (1997) *The Times* 20 March.

Inherent jurisdiction (pp 76-78)

'The High Court is a court of unlimited jurisdiction. This does not mean that its jurisdiction is universal and unrestricted. It means that, unlike inferior courts and tribunals, it has [an inherent] jurisdiction to decide the existence and limits of its own jurisdiction': *Canada Trust Co v Stolzenberg* [1997] 4 All ER 983, *per* Millett LJ at 989. Although this dictum limits its effect to the High Court it must also apply to any other superior court. It is submitted also that, despite the words ' unlike inferior courts and tribunals' it also applies to these. It is self-evident that any court or tribunal must possess power to decide whether or not it has jurisdiction in a particular case since otherwise it could not proceed, though of course an appellate court or tribunal may later rule that its decision on this point was wrong in law.

Interpretation by adjudicating authorities (Code s 20)

Nature of discretion (p 83)

Discretion is to be applied where it is left to the authority to make a determination at any point within a given range. The Chronically Sick and Disabled Persons Act 1970 s 2(1) requires a local authority to ascertain the 'needs' of certain persons as a preliminary to deciding what benefit they should receive. Swinton Thomas LJ said of the argument that the requisite assessment of 'needs' involved a *discretion* that it was fundamentally flawed, adding: 'A need is a question of assessment and *judgment*, not discretion': *R v Gloucestershire County Council, ex p Barry* [1996] 4 All ER 421 at 438 (emphasis added). In its decision the Court of Appeal, by a majority of two to one, neatly showed the nature of the distinction between judgment and discretion by holding that while a local authority could not take its own financial means into account when deciding, as a matter of judgment, whether a person had 'needs' it could do so when deciding, as a matter of discretion, how it was to meet those 'needs'. This was reversed when the House of Lords, by a majority of three to two, held that financial resources *could* properly be taken into account when assessing 'needs': *R v Gloucestershire County Council, ex p Barry* [1997] 2 All ER 1. The reasoning of the majority in the Court of Appeal is to be preferred.

In *R v Sefton Metropolitan BC, ex p Help the Aged* [1997] 4 All ER 532 the House of Lords considered the duty imposed on local authorities by the National Assistance Act 1948 s 21(1). This requires an authority to provide residential accommodation for persons who are 'in need of care and attention'. *Held* Having regard to the decision in *R v Gloucestershire County Council, ex p Barry* [1997] 2 All ER 1 requiring the taking into account of a local authority's shortage of funds, it was necessary to conclude that there is a limited subjective element in judging the need for care and attention. However when, even so, that need is established in the case of a particular person, shortage of resources does not excuse a failure by the authority to perform its duty in their case.

Doctrine of judicial notice (Code s 21)

Obviously facts of which judicial notice is taken include facts relating to the court itself, such as the propensity of the local authority of the area to dishonour undertakings made by it to the court: see *Mullen v Hackney London Borough Council* [1997] 2 All ER 906. In this case it was held that the court is not *bound* to take judicial notice of a matter, but has a discretion (which must of course be exercised judicially) as to whether it does so or not.

Adjudicating authorities with appellate jurisdiction (Code s 23)

Academic points (p 94)

Lord Mustill said in *Attorney General's Reference (No 3 of 1994)* [1997] 3 All ER 936 at 952 'The courts have always firmly resisted attempts to obtain the answer to academic questions, however useful this might appear to be'. He added that to some extent this applies even to a reference by the Attorney General under the Criminal Justice Act 1972 s 36(1), which has the pecularity that 'it is not a step in a dispute, so that in one sense the questions referred are invariably academic'.
Appeal by successful party

A successful party cannot appeal against a judgment or order if he has thereby obtained all he is entitled to: *Lake v Lake* [1955] P 336 (petitioner granted divorce on ground of condonation of her adultery could not appeal against finding that she had committed the adultery). Cf *Curtis v London Rent Assessment Committee* [1997] 4 All ER 842 (party asking for quashing of finding of rent assessment committee could appeal against judge's order quashing that finding and remitting the matter to a different committee because the order required that committee to deal with the matter on what the

party contended was an erroneous basis).

Court of Appeal (pp 97-99)

As to appeal from refusal of leave to appeal see *Smith v Cosworth Casting Processes Ltd* [1997] 4 All ER 840 (practice note). As to appeal from refusal to extend time for appeal see *Marshall v Gradon Construction Services Ltd* [1997] 4 All ER 880. For difficulties as to extension of time for appeal where a court decision after expiry of the time limit indicates that the view of the law taken in the case was erroneous see *Greig Middleton & Co Ltd v Denderowicz* [1997] 4 All ER 181.

Judicial review (Code s 24)

Public law (pp 102-103)

Lord Woolf MR said in *Trustees of the Dennis Rye Pension Fund v Sheffield City Council* [1997] 4 All ER 747 at 754-755: '[The guidance given by Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237] involves recognising: (a) that remedies for protecting both private and public rights can be given both in private law proceedings and on an application for judicial review; (b) that judicial review provides, in the interest of the public, protection for public bodies which are (*sic)* not available in private law proceedings (namely the requirement of leave and the protection against delay) . . . (c) that for these reasons it is a *general rule* that it is contrary to public policy "and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Ord 53 for the protection of such authorities" (see [1983] 2 AC 237 at 285) . . . If judicial review is used when it should not [be], the court can protect its resources either by directing that the application should continue as if begun by writ or by directing it should be heard by a judge who is not nominated to hear cases in the Crown Office List . . . in cases where it is unclear whether proceedings have been correctly brought by an ordinary action it should be remembered that after consulting the Crown Office a case can always be transferred to the Crown Office List as an alternative to being struck out' (emphasis by Lord Woolf MR).

Where other remedy available (p 104)

Even though a claim is against a public body in respect of its public law functions, it will not be an abuse of process to bring a private law action where this would be more appropriate than judicial review, that is where the considerations of leave, expedition, and Crown Office expertise are not applicable and the issue is essentially one of fact between two parties: *Trustees of the Dennis Rye Pension Fund v Sheffield City Council* [1997] 4 All ER 747.

Declaration or injunction (p 107)

It was said in *Trustees of the Dennis Rye Pension Fund v Sheffield City Council* [1997] 4 All ER 747, *per* Lord Woolf MR at 752, that judicial review is not intended to be used for debt collecting. It seems from that case that a statutory debt is not therefore recoverable in judicial review. This would seem anomalous where on judicial review it is held that such a debt is due.

The doctrine of Crown immunity (Code s 34)

The principle laid down in *M v Home Office* [1994] 1 AC 377 at 395 [1993] 3 All ER 537 at 566 (Home Secretary held to have properly been found to be in contempt of court in respect of disregard of a judge's order made against him in his official capacity) was applied to the Director of the Serious Fraud Office, a government department established by the Criminal Justice Act 1987 s 1(1), in *R v City*

of London Magistrates' Court, ex p Green [1997] 3 All ER 551.

Meaning of 'commencement' (Code s 71)

Confusion about commencement dates is not uncommon. The Sexual Offences Act 1985, which came into force on 16 September 1985, amended certain maximum sentences under the Sexual Offences Act 1956. In imposing sentence in a particular case the judge failed to realise that, as the offences had been committed before the amendments took effect, the sentences he was imposing were excessive in law. This caused Lord Bingham of Cornhill CJ to say that it was the clear duty of counsel for the prosecution and the defence to familiarise himself or herself with the relevant sentencing powers of the court, and to direct the judge's attention to those powers where it was appropriate to do so: *R v Street* (1997) *The Times* 31 March 1997. Nothing was said about the duty of the judge, which marks the peculiarity of English law under which counsel are required to keep the judge from committing errors. In other jurisdictions blame for such errors falls upon the judge.

Repeal and re-enactment (adaptation of references) (Code s 91)

The Interpretation Act 1978 s 17(2)(a) was applied in *Michaels v Harley House (Marylebone) Ltd* [1997] 3 All ER 446. This concerned the Companies Act 1985 ss 736 and 736A. These sections were substituted for the original s 736 by the Companies Act 1989 s 144, the purpose being to make changes required by Council Directive (EEC) 83/349. Section 17(2)(a) was applied despite the statement in the comment to Code s 91 that it is intended for consolidation Acts, and if applied to anything else should be construed with great caution. Lloyd J (at 458) found the result 'curious' but regarded the effect of s 17(2)(a) as plain.

Application of Act to foreign persons etc: general principles (Code s 128)

The principle of comity (pp 275-276)

It was held in *Gaudiya Mission v Brahmachary* [1997] 4 All ER 957, which concerned a religious charity established in India, that, having regard to the principle of implied territoriality of legislation and practical considerations of enforceability, terms such as 'trust' or 'charity' in an Act, such as the Charities Act 1993, extending (for most purposes) to England and Wales only do not apply to bodies established abroad.

Drafting presumed competent (Code s 142)

Where the proof is overwhelming that the drafting has been bungled, and the public interest is at stake, the courts will not hesitate to apply a blunt instrument, regardless of the niceties of the language. Difficulties as respects consecutive or concurrent sentences of imprisonment in relation to the deduction of time spent in custody on remand led to much public disquiet in the 1990s. Finally the courts cut through the tangles of the defective drafting to resolve the questions at issue in a fashion that might be described as cavalier, even if necessarily so: see *R v Secretary of State for the Home Department, ex p Naughton* [1997] 1 All ER 426 (consecutive sentences); *R v Governor of Brockhill Prison, ex p Evans* [1997] 1 All ER 439 (concurrent sentences). In the former case Simon Brown LJ began his judgment (at 427) with the words: 'No one could have failed to notice the recent political storm created by the various changes of approach adopted by the prison authorities to the calculation of certain prisoners' release dates'.

Judicial notice of relevant facts (Code s 147)

The decision in *R v Simpson* [1983] 1 WLR 1494, cited in Example 147.1, was followed in *Director of Public Prosecutions v Hynde* [1998] 1 All ER 649 July (butterfly knife 'made for use for causing injury' within Aviation Security Act 1982 s 4(2)(c)).

Nature of strained construction (Code s 157)

For obvious reasons, judges are reluctant to admit they are applying a strained construction. The Legal Aid Act 1988 s 31(1) says that receipt of legal aid by a party 'shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised'. This was considered by the House of Lords in *Connelly v RTZ Corp plc* [1997] 4 All ER 335. The court in Namibibia, rather than the English High Court, was the convenient court on every ground except that the impecunious plaintiff could obtain legal aid in England but not in Namibibia. *Held* The Legal Aid Act 1988 s 31(1) did not prevent the legal aid factor being used to deny a stay of proceedings instituted by the plaintiff in England. In justification Lord Goff said that it would be surprising and strange if the factor could not be so used, and that he was satisfied that on its true construction s 31(1) did not have this effect. This amounted to saying (though it was not said) that in the circumstances of the case a strained construction was desirable.

When implications are legitimate (Code s 174)

Implied limitations (p 389)

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: see *Avon County Council v Hooper* [1997] 1 All ER 532, *per* Hobhouse LJ at 537 ('It is implicit . . . in the general law governing the activities of local authorities that [a statutory power] must be exercised reasonably . . . ').

Interstitial articulation by the court (Code s 179)

'It is true that the House [of Lords] has a power to develop the law. But it is a limited power. And it can be exercised only in the gaps left by Parliament. It is impermissible for the House to develop the law in a direction which is contrary to the expressed will of Parliament: *R v Chief Constable of the Royal Ulster Constabulary, ex p Begley* [1997] 4 All ER 833, *per* Lord Browne-Wilkinson at 838. Although this dictum is in terms limited to the House of Lords it must apply to all courts or the House of Lords would in some cases be applying a different system of law to that applied by the courts from which it was hearing appeals, which would be absurd.

Weighing the interpretative factors: nature of the operation (Code s 186)

A particular factor may be found on both sides of the equation, but with more weight on one side than the other. Thus in *Re H & K (Medway) Ltd* [1997] 2 All ER 321 Neuberger J said at 327 that one of two possible interpretations of the Insolvency Act 1986 s 40 'can be said to involve the section interfering with property rights to a lesser extent than [the other]'.

Nature of rules of construction (Code s 192)

Rules of construction laid down by statute may be in oblique form, as with the Children and Young Persons Act 1933 s 44(1): 'Every court in dealing with a child or young person . . . shall have regard to the welfare of the child or young person'. This modifies the construction of any enactment to which it is applicable: see *R v Secretary of State for the Home Department, ex p Venables* [1997] 3 All ER 97, *per* Lord Browne-Wilkinson at 120.

Statutory definitions (Code s 199)

Enlarging definitions (pp 441-442)

The type of enlarging definition which states that the defined term includes a part of the subject-matter, though common, is dangerous. The danger is that the drafter will forget the definition at some point and draft as if the term did not include a part. For an example of the acute difficulties in interpretation that this error can cause see *Shimizu (UK) Ltd v Westminster City Council* [1997] 1 All ER 481.

Interpretation Act 1978 (Code s 200)

The term 'person' (pp 444-445)

(1) Under the Interpretation Act 1978 s 5 and Sch 1, the term 'person' includes a body of persons, whether corporate or unincorporate. As invariably, this statutory definition does not apply if, whether expressly or by implication, the context otherwise requires. Thus in the Criminal Justice Act 1988 s 133(1), which requires compensation to be paid where 'a person has been convicted of a criminal offence and subsequently his conviction has been reversed', the word 'person' does not include a company: *R v Secretary of State for the Home Department, ex p Atlantic Commercial (UK) Ltd* (1997) *The Times* 10 March.

(2) It was formerly said that the reason why a human foetus *in utero* is not a person or individual is that it is part of the person of its mother, so that up to the moment of birth it does not have any separate interests capable of being taken into account by the court: see *In re MB (Caesarian section)* (1997) *The Times* 18 April. However advances in knowledge of genetics have now led to acceptance of the fact that mother and foetus are two different entities, even though the foetus is not in law a person: see *Attorney General's Reference (No 3 of 1994)* [1997] 3 All ER 936.

Skeleton arguments (Code s 206)

Skeleton arguments are further dealt with in *Practice Note* [1997] 4 All ER 830.

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

Subs (3): form of words with previous legislative history (the Barras principle) (pp 460-461)

In *R v Emmett* [1997] 4 All ER 737 the House of Lords overruled the decision in *R v Tredwyn* (1994) 99 Cr App R 154 on the legal meaning of the Drug Trafficking Offences Act 1986 s 3(1) (repealed). After the decision in *Tredwyn*, s 3(1) was re-enacted in similar terms in the Drug Trafficking Act 1994 s 11(7). Lord Steyn (at 743) peremptorily dismissed as 'implausible' the argument that Parliament thereby intended to indorse *Tredwyn*, but it seems that the *Barras* principle and the cases underlying it were not cited.

The *Barras* principle applies where what has gone before is not a court decision but some other event which bore on the legal meaning of the enactment in question: see eg *R v Chief Constable of the Royal Ulster Constabulary, ex p Begley* [1997] 4 All ER 833, *per* Lord Browne-Wilkinson at 839 (official report on meaning of enactment).

Special restriction on Parliamentary materials (the exclusionary rule) (Code s 220)

Residuary right to admit Parliamentary materials (pp 521-522)

In *Michaels v Harley House (Marylebone) Ltd* [1997] 3 All ER 446 at 465 Lloyd J referred to Hansard although there was no suggestion that the *Pepper v Hart* conditions (see Code s 217) were satisfied. The same thing happened in *Fitzpatrick v Sterling Housing Association Ltd* [1997] 4 All ER 991 at 1114-1115. These references must have been made under the residuary right of the court to allow such references where it thinks fit.

International treaties (Code s 221)

In *Re H and others (minors) (abduction: acquiescence)* [1997] 2 All ER 225 at 234 Lord Browne-Wilkinson said: 'An international convention, expressed in different languages and intended to apply to a wide range of differing legal systems, cannot be construed differently in different jurisdictions. The convention must have the same meaning and effect under the laws of all contracting states.' For this reason it was held in that case that the term 'acquiescence' as used in the treaty set out in the Child Abduction and Custody Act 1985 Sch 1 was not to be construed in accordance with the special rules of English law.

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

Admissibility of statements (p 539)

A Hansard report of a Minister's statement on the legal meaning of an existing Act (as opposed to a Bill) is not admissible under the rule in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593: see *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862 at 898.

Nature of legal policy (Code s 263)

While often regarded primarily as judge-made, legal policy also draws from expressions of intention embodied in legislation. Thus it was said by Phillips J that 'the whole policy of the law as enshrined in [the Trade Union and Labour Relations Act 1974] and the later enactments is to withdraw the law from the field of industrial disputes. There is a kind of legal laissez-faire or neutrality as soon as an industrial dispute breaks out': *Gallagher v Wragg* [1977] ICR 174 at 178. In *Tracey v Crosville Wales Ltd* [1997] 4 All ER 449 at 465 Lord Nolan said that the preponderance of judicial opinion over the past 20 years had been to the effect stated by Phillips J in this passage. Lord Nolan added: 'If that is *not* the policy of the law it might be argued that Parliament should have taken, or should now take, an opportunity to correct it'.

Morality (pp 602-603)

The courts may consider a moral issue so difficult that they decline to rule whether the practice in question is contrary to legal (or public) policy, preferring to leave the matter to Parliament to decide. Thus in *Re W (a minor) (adoption: homosexual adopter)* [1997] 3 All ER 620 Singer J declined to rule

that it is contrary to legal (or public) policy for a lesbian to adopt a child. He said (at 625) that a review of recent developments 'warns me clearly how unruly is the horse of public policy which I am asked to mount, and upon what shifting sands I would be riding if I did so . . . public policy considerations should not fall within the province of judges to define within this sphere'.

Statutory interference with rights of legal process (Code s 281)

Access to courts (p 659)

No citizen should without clear authority be shut out from the seat of justice. The Supreme Court Fees (Amendment) Order 1996 was made under the Supreme Court Act 1981 s 130. Article 3 of the order purported to revoke certain provisions relieving impecunious persons from the need to pay court fees. *Held* Article 3 was ultra vires and void since its effect was to exclude such persons from the seat of justice and s 130 contained no express power allowing this: *R v Lord Chancellor, ex p Witham* [1997] 2 All ER 779.

Rights of appeal (p 661)

Where there is a lacuna in an Act under which legal proceedings may be brought, whereby no right of appeal is given against the outcome of those proceedings, the court will strive to find an alternative method in suitable cases. See eg *T v Child Support Agency* [1997] 4 All ER 27 (declaration granted where no appeal lay against mistaken finding of paternity).

Statutory interference with economic interests (Code s 278)

Is taxation 'penal'? (pp 655-657)

Taxation is clearly 'penal' within the meaning of this section of the Code (see Code pp 637-638), and must not be applied by the courts unless clearly imposed. As Evans LJ said in *Ingram and another (executors of the estate of Lady Ingram (deceased)) v Inland Revenue Commissioners* [1997] 4 All ER 395 at 414 'in the context of tax legislation it is necessary to consider the legal analysis with the utmost precision, so that the taxpayer shall not become liable to tax unless this is clearly and unequivocally the effect of the statutory provisions'.

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

Errors of meaning (pp 679-682)

Examples 287.14 and 287.15 give two cases under the Magistrates' Courts Act 1980 where the court 'corrected' the drafter's erroneous assumption that in summary prosecutions there would always be a trial, overlooking the possibility of a guilty plea. In each case the court held that the enactment must be read as modified so as to limit its apparently universal application to cases where the plea was 'not guilty'. By contrast in *R v Horsman* [1997] 3 All ER 385 the Court of Appeal declined to rectify the mistake in the Criminal Appeal Act 1968 s 3 of assuming that a conviction on indictment will always follow a jury verdict, again overlooking the possibility of a guilty plea.

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

Ongoing Acts (pp 686-689)

Code s 288(2) was approved by the Court of Appeal in *R v Hammersmith and Fulham London BC, ex p M* (1997) CA Transcript 267: see *Fitzpatrick v Sterling Housing Association Ltd* [1997] 4 All ER 991 at 1009-1010.

An ongoing Act is taken to be always speaking. It speaks from day to day, though always (unless textually amended) in the words of its original drafter. As Lord Woolf MR said of the National Assistance Act 1948: 'That Act had replaced 350 years of the Poor Law and was a prime example of an Act which was "always speaking". Accordingly it should be construed by continuously updating its wording to allow for changes since the Act was written': *R v Hammersmith and Fulham London Borough Council, ex p M* (1997) *The Times* 19 February. As Bingham MR said in *R v Ministry of Defence, ex p Smith* [1996] QB 517 at 554: 'A belief which represented unquestioned orthodoxy in year X may have become questionable by year Y and unsustainable by year Z' (on this dictum see *Fitzpatrick v Sterling Housing Association Ltd* [1997] 4 All ER 991 at 1024).

In a case where the accused had telephoned women repeatedly without speaking, Swinton Thomas LJ held that this was an 'assault' within the meaning of the Offences against the Person Act 1861 s 47: *R v Ireland* [1997] 1 All ER 112. Of decisions on the meaning of 'assault' he said (at 115): 'The early cases pre-date the invention of the telephone. We must apply the law to conditions as they are in the twentieth century.'

The fact that, since the events in question in a case, the relevant enactment has been expressly amended to update its terminology does not mean that the original language is not to be given, as respects that case, an updating construction producing a like effect: *R v Fellows* [1997] 2 All ER 548 (updating amendment by Criminal Justice and Public Order Act 1994 s 84 and Sch 9 of references to photographs, films etc in Obscene Publications Act 1959 s 1(3) and Protection of Children Act 1978 s 1(1)).

If an Act operates by reference to specified monetary limits, the effect of inflation will render these out of date unless they are amended by express amendment. The powers of the courts by use of updating construction do not enable them to treat such specified limits as impliedly modified to take account of inflation. In divining the intention of Parliament when specifying such limits it may however be important to bear in mind their original value in real terms: see *Issa v Hackney London Borough Council* [1997] 1 All ER 999.

Precedents on the meaning of 'family' are likely to go on being departed from as public perceptions of sexual and familial morality, especially regarding homosexuality, continue to change: see *Fitzpatrick v Sterling Housing Association Ltd* [1997] 4 All ER 991.

For the treatment of the new device of cloning see 147 NLJ (1997) p 716 (whether cloned sheep an 'animal' within Animals Act 1971).

Purposive-and-strained construction (Code s 306)

Purposive-and-strained construction is what judges usually mean when they refer to a purposive construction. Here are two examples.

The Insolvency Rules (SI 1986 No 1925) r 5.17(1) says 'every creditor who was given notice of the creditors' meeting is entitled to vote at the meeting . . .' *Held* This allows a creditor to vote who has *not* been given notice of the meeting but has found out about it otherwise. A literal interpretation 'made little sense of the legislation': *In re Debtors (Nos 400 and 401 of 1996)* (1997) *The Times* 27 February, *per* Rimer J.

The Police and Criminal Evidence Act 1984 s 69(1)(b) says that a statement in a document produced

by a computer which is not operating properly is admissible in evidence only where it is shown that the defect 'was not such as to affect the production of the document or the accuracy of its contents'. The statement printed out by a breathtesting device showed an error in the time of the test because the computer's clock was set wrongly. *Held* The enactment should not be given its literal meaning: *Director of Public Prosecutions v McKeown* [1997] 1 All ER 737. Lord Hoffmann said (at 743) that the question was whether the defect was such as to affect the accuracy of the document. 'If the words are read literally, it did . . . In my view, however, the paragraph was not intended to be read in such a literal fashion . . . To discover the legislative intent, it is necessary to consider the purpose of the rule'.

Avoiding an unworkable or impracticable result (Code s 313)

Impossibility (p 754)

Where an enactment refers to a thing it is assumed that it means a thing which is capable of existing. So the reference to 'another legal estate not in existence' in the Law of Property Act 1925 s 65(2) 'can only have been intended to refer to a legal estate which was capable of existence': *Ingram and another (executors of the estate of Lady Ingram (deceased)) v Inland Revenue Commissioners* [1997] 4 All ER 395, *per* Nourse LJ at 402.

Fictions (pp 779-780)

Chief Adjudcation Officer v Webber [1997] 4 All ER 274 concerned the Income Support (General) Regulations 1987 (SI 1987/1967), reg 61. Students attending full-time courses were excluded from receiving income support payments, and reg 61 said that a person who had started such a course was to be deemed a full-time student until it ended. *Held* The drafter had failed to take account of a course, like this one, which was at the start full-time but at other periods of it part-time, so the deeming provision would not be treated as depriving the appellant of benefit. Evans LJ said (at 285): 'It is not necessary to say that there is a general principle that a deeming provision could never have such an effect [but] I should require express words of the utmost clarity to persuade me that Parliament intended to produce that disgraceful result'.

Tax avoidance (Code s 321)

Ramsay principle (pp 793-795)

The modern application of the *Ramsay* principle was explained in the important House of Lords case of *Inland Revenue Commissioners v McGuckian* [1997] 3 All ER 817. The principle may require the court, as with any other countering of attempted evasion of legislation, to adopt a strained construction of the relevant enactment. Or it may fall to be applied in other ways, as in *R v Inland Revenue Commissioners, ex p Roux Waterside Inn Ltd* (1997) *The Times* 23 April, which concerned the Income and Corporation Taxes Act 1988 s 591B. This authorises the Inland Revenue to withdraw approval of a tax-exempt pension scheme if the facts concerning the scheme cease to warrant approval. *Held* This power could be used to counter evasion which contravened the *Ramsay* principle.

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

This section of the Code was cited and followed by Lord Steyn in *Pierson v Secretary of State for the Home Department* [1997] 3 All ER 577 at 604. Its operation is further illustrated by the dictum of Byles J in *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180 at 194 that 'although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission': see *Pierson v Secretary of State for the Home Department* [1997] 3 All ER

577, per Lord Steyn at 603-604.

Phillips LJ said that the common law requirement of fairness in decision making falls to be applied in statutory interpretation 'because of the common law principle': *R v Secretary of State for the Home Department, ex p Fayed* [1997] 1 All ER 228 at 252. Hutchison LJ referred, in relation to the relevance of the Police Act 1964 as background to the Race Relations Act 1976, to 'the normal adjectival or parasitic operation of associated legislation': *Farah v Commissioner of Police of the Metropolis* [1997] 1 All ER 289 at 302.

Rules of law (p 809)

An example of an enactment working in conjunction with an existing rule of law is the Partnership Act 1890 s 14(1), which lays down the liability of a non-partner who is held out as being a partner. It has been held that although s 14(1) does not mention estoppel it in fact states the principle of the common law doctrine of estoppel by conduct, whose features must be taken to be applied by implication: see *Hudgell Yeates & Co v Watson* [1978] QB 451 at 467, 470-471; *Nationwide Building Society v Lewis* [1997] 3 All ER 498.

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

Contrary intention (p 836)

The enactment may indicate expressly or by implication that the relevant rules of tort law are *not* intended to apply. This came up in *Jones v Tower Boot Co Ltd* [1997] 2 All ER 406. As regards the field of employment, the provisions of the Sex Discrimination Act 1975 and the Race Relations Act 1976 are similar. Section 32(1) of the latter Act states that anything done by a person 'in the course of his employment' is to be treated as done by the employer. (The corresponding provision of the Sex Discrimination Act 1975 is s 41(1).) Prima facie, the use of this familiar phrase is intended to attract the rules of vicarious liability laid down by the law of tort. *Held* The purposes of the two Acts, as appearing generally from their terms, require the phrase to be given its natural everyday meaning rather than its narrower technical meaning in the law of tort.

Presumed application of rules of evidence (Code s 335)

Standard of proof (pp 848-849)

In *Dunbar (administrator of Dunbar (decd)) v Plant* [1997] 4 All ER 289 the Court of Appeal approved the application of the civil standard of proof where in civil proceedings the question was whether a party had committed an offence under the Suicide Act 1961 s 2(1) of aiding and abetting suicide.

De minimis principle (Code s 343)

Fractions of a day (pp 870-871)

The exclusive rule was applied without argument in *Okolo v Secretary of State for the Environment* [1997] 4 All ER 242, which concerned the Acquisition of Land Act 1981 s 23(4). This requires an application to be made within six weeks from the date on which a notice is published. It was accepted that the six weeks started running at the beginning of the day, a Tuesday, after that on which the notice was published. The Court of Appeal, reversing Sedley J, held that the six weeks ended at midnight on the Monday, rather than on the Tuesday. Schiemann LJ said (at 247): 'The point in relation to the six

weeks is very simple and, to my mind, one of first impression . . . if the notice is published on a Monday and you are given six weeks to challenge it, six weeks will have ended by midnight of the Monday in six weeks' time'. He held that for an unvarying period such as a week the corresponding date rule (see Code p 809) does not apply.

Impossibility: *lex non cogit ad impossibilia* (Code s 346)

Limited resources (p 879)

It may not be possible for a public authority to carry out a duty imposed on it by statute if its financial or other resources are inadequate, and this may provide a defence. Local police resources were inadequate to provide full policing against persistent and prolonged acts of obstruction by animal rights activists. *Held* The police were not required to do more than their resources allowed, taking into account other calls on them: *R v Chief Constable of Sussex, ex p International Traders' Ferry Ltd* [1997] 2 All ER 65. The point was not raised that the police may not have been doing enough to apprehend the organizers of the criminal obstruction, and reduce the pressure on police resources in that way.

Benefit from own wrong (Code s 349)

Unlawful homicide (p 887)

In *Dunbar (administrator of Dunbar (decd)) v Plant* [1997] 4 All ER 289 the Court of Appeal subjected the 'forfeiture rule' described in the Forfeiture Act 1982 s 1(1) to elaborate analysis, with much citation of authority. The case concerned a suicide pact where only one of the parties died. Mummery LJ said (at 300): 'The rule was applied [to the survivor] because no one can benefit from his own wrong'.

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

This principle continues to be relevant. In *Phonographic Performance Ltd v AEI Rediffusion Music Ltd* [1997] 3 All ER 560 at 566 Lightman J said '. . . s 135C(1) [of the Copyright, Designs and Patents Act 1988] must be read in the light of the 1988 Act as a whole . . .'.

Different words to be given different meanings (pp 900-902)

Different words in a consolidation Act may be given the same meaning because derived from different Acts. As regards the meaning of terms in the Employment Protection (Consolidation) Act 1978, Phillips LJ said: 'No significance is to be attached to the difference between dismissal which is "regarded" as unfair (ss 58 and 59) and dismissal which is "treated" as unfair (s 60). The difference in language is attributable to the fact that the 1978 Act consolidates provisions from different statutes': *MRS Environmental Services Ltd v Marsh* [1997] 1 All ER 92 at 102.

Interpretation of broad terms (Code s 356)

Broad terms mobile in time (p 907)

A broad term is said to be mobile in time where the circumstances that fall within it are liable to differ according to the historic date of the facts in question. This identifies the type of broad term which changes its meaning according to time. With such terms it is necessary to be on guard when applying

previous judicial decisions as to the meaning of the term. A meaning that was applicable in the circumstances prevailing at some past time may no longer be relevant if the circumstances have materially altered. Here is an example. The Road Traffic Act 1988 s 145(3)(a) requires insurance cover in relation to 'the use of [a] vehicle on a road'. Section 192(1) of the Act defines 'road' as 'any highway and any other road to which the public has access'. The origins of the definition are in the Motor Car Act 1903, passed when conditions were very different to those of today. Because of the varying circumstances in relation to which the term 'road' is used in road traffic legislation, and the changes that take place, it is to be regarded as a broad term mobile in time: see *Cutter v Eagle Star Insurance Co Ltd* [1997] 2 All ER 311 ('road' in s 145(3)(a) now includes a parking space in a multi-storey car park). See also the discussion above of *Fitzpatrick v Sterling Housing Association Ltd* [1997] 4 All ER 991 and the term 'family' in relation to Code s 288.

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

Where facts substantially correspond (pp 980-982)

Where the facts of the instant case substantially though not entirely correspond to a description in the relevant enactment, it is presumed that the enactment is intended to apply in the same way as it would if they entirely corresponded. The Lion Intoximeter is an approved device for breathtesting under the Road Traffic Act 1988 s 7(1). In *Director of Public Prosecutions v Jones* [1997] 1 All ER 737 Lord Hoffmann said (at 745) '... it seems to me impossible to argue that, by reason of the inaccuracy in its clock, the device . . . could no longer be described as a Lion Intoximeter'.

A statutory description of an agreement is likely to apply rather to the substance than the form of the agreement, unless it is in terms related to form. Here is an example. The Restrictive Trade Practices Act 1976 s 9(3) says that in determining whether an agreement is one to which the Act applies no account shall be taken of any 'term' of a certain description. *Held* The test turned on the essential nature of a provision, not whether in the drafting it was expressed as a distinct term of the agreement: *MD Foods plc (formerly Associated Dairies Ltd) v Baines* [1997] 1 All ER 833. Lord Nicholls of Birkenhead said (at 840) 'there is no warrant for interpreting the Act as elevating form over substance . . .'

Direct effect of Community law (Code s 411)

'The basis of the enforceability of directives against the state and its emanations is a species of estoppel . . . But the individual has no right to a mandamus against the state in his national court requiring that the directive be implemented ...': *R v Secretary of State for Employment, ex p Seymour-Smith* [1997] 2 All ER 273, *per* Lord Hoffmann at 278.

Transposing of Community law (Code s 412)

Where an Act is passed to give effect to Community law, terms used in the Act must be construed in accordance with that law. The provisions regarding value added tax (VAT) in the Value Added Tax Act 1983 are to construed so far as possible in accordance with Council Directive (EEC) 77/388. This means that the term 'consideration' in s 10 of the Act is to be construed not in accordance with common law principles relating to contract 'but in the wider sense used by civil lawyers": *Rosgill Group Ltd v Customs and Excise Commissioners* [1997] 3 All ER 1012, *per* Scott V-C at 1020.

Effect of Community law on UK enactments (Code s 413)

As Phillips LJ said in an appeal relating to provisions affected by Council Directive (EEC) 77/187 (the

acquired rights directive), which does not have direct effect: 'The respondents contend, and contend rightly, that those provisions must be interpreted in a purposive manner so as to make them accord with the acquired rights directive, in so far as this can be achieved': *MRS Environmental Services Ltd v Marsh* [1997] 1 All ER 92 at 94.

References to CJEC under article 177 of EC Treaty (Code s 416)

Where the principles of relevant Community law are settled, but difficulties in a case before the national court derive from the application of these settled principles to the particular facts of the case, it is not appropriate to refer them under Art 177. 'It is . . . for the national court to resolve these difficulties': *Rosgill Group Ltd v Customs and Excise Commissioners* [1997] 3 All ER 1012, *per* Scott V-C at 1019.