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Statute Law

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Introductory note

For the convenience of users this section of the Review conforms to the Code set out in the third edition (1997) of the author's textbook *Statutory Interpretation* as updated by the 1999 Supplement. 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'.

Mandatory and directory requirements (Code s 10)

General (pp 30-31)

The text of section 10 of the Code was set out in the judgment of Swinton Thomas LJ in *Attorney General's Reference (No 3 of 1999)* [2000] 4 All ER 360 at 368-369, where the Court of Appeal held that the requirement in the Police and Criminal Evidence Act 1984 s 64(3)(b) that samples required to be destroyed must not be used in the later investigation of an offence is mandatory. The decision was reversed by the House of Lords in *Regina v B Attorney General's Reference No 3 of 1999* (2000) The Times 15 December, where the House held that the requirement is merely directory. SEE [2001] 1 All ER 577

Jurisdiction (pp 33-34)

In *Storer v British Gas plc* [2000] 2 All ER 440 the Court of Appeal held that the duty to hold judicial proceedings in public is mandatory rather than merely directory. See the note on this case at p 000 below, related to Code s 288.

Interference with liberty (p 35)

In *Attorney General's Reference (No 3 of 1999)* [2000] 4 All ER 360 at 369 Swinton Thomas LJ relied on this passage. The decision was reversed by the House of Lords in *Regina v B Attorney General's Reference No 3 of 1999* (2000) The Times 15 December (see above).

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

Subsection (4) (pp 51-52)

In *Harris (suing as personal representative of Andrews (deceased)) v Lewisham and Guys Mental Health NHS Trust* [2000] 3 All ER 769 Stuart-Smith LJ, citing two authorities, said at

774 that a claim for racial discrimination has been described as a claim in respect of a statutory tort.

Subsection (5) (p 52)

(a) To the authorities cited in footnote 2 as amended by 1999 Supplement p S6, add: *Three Rivers District Council and others v Bank of England* [2000] 3 All ER 1.

(b) For the insertion at the end of footnote 6 made in 1999 Supplement p S6 substitute 'Even where the duty is owed to the employer, the latter may be vicariously liable for negligence by the professional person: *Phelps v London Borough of Hillingdon* [2000] 4 All ER 504 HL (local education authority held vicariously liable for negligence by educational psychologist)'.

Subsection (17) (pp 61-62)

In *Kent v Griffiths and others* [2000] 2 All ER 474 the Court of Appeal found that a duty of care arose when the ambulance service, a part of the National Health Service, accepted a 999 emergency call. There was a breach of that duty when, without any good reason, the ambulance was considerably late in arriving and the patient suffered.

Administrative or executive agencies (Code s 15)

Government departments (pp 62-63)

The courts may criticise lack of proper enforcement by Government departments. In *Re R (a minor) (inter-country adoption) Practice Note* [1999] 4 All ER 1015 at 1019 Bracewell J criticised the Home Office's non-enforcement of immigration law as 'a serious failure of responsibility'. He went on: 'This evident lack of either effective procedure or enforcement of immigration law can only operate as an encouragement to break the law in the knowledge that action is unlikely to be taken. This failure enables individuals to disappear from official view if they choose to do so. This is a matter of very serious concern which has implications far beyond the circumstances of this case'. See further Code pp 65-66.

Court supervision) (pp 65-66)

On court supervision see the reference above to *Re R (a minor) (inter-country adoption) Practice Note* [1999] 4 All ER 1015.

Courts and other adjudicating authorities (Code s 19)

Jurisdiction (pp 72-74)

(a) Insert at the end of footnote 7 on page 73: 'See also *Aparau v Iceland Frozen Foods plc* [2000] 1 All ER 228 at 239 ('it is elementary that jurisdiction cannot be conferred on [a statutory tribunal] by consent or acquiescence').

(b) At end of Example 19.4A (inserted by 1999 Supplement at p S9) insert 'See also *Wakelin and Others* (2000) *Times* 10 April (Pensions Ombudsman)'.

(c) After Example 19.4A (inserted by 1999 Supplement at p S9) insert-

A court or tribunal (including an arbitrator) is required if called upon to determine, subject to appeal or review, the extent of its own jurisdiction: see *Ex p Zerek* [1951] 2 KB 1 at 13-14

(cited in *Grammer v Lane and others, Grammer v Stone and others* [2000] 2 All ER 245 at 260).

Remedies (p 79)

If a public body is given a statutory responsibility which it is required to perform in the public interest, then in the absence of an implication to the contrary in the statute, it has standing to apply to the court for an injunction to prevent interference with the performance of its public responsibilities. The court should grant such an application when it appears just and convenient to do so. (*Broadmoor Hospital Authority and another v R* [2000] 2 All ER 727 at 740.)

Appellate and reviewing courts (p 80)

For the important changes effected in appellate powers and procedures by the Civil Procedure Rules introduced on 26 April 1999 see *Tanfern Ltd v Cameron-MacDonald and another* [2000] 2 All ER 801.

Interpretation by adjudicating authorities (Code s 20)

Judicial confusion over distinction between judgment and discretion (pp 83-84)

In *Storer v British Gas plc* [2000] 2 All ER 440 (see the note on that case at p 000 below, related to Code s 288) Henry LJ said (at 445) 'Whether a court is sitting in public may be, in any individual case a question of fact and degree for the judge, a matter of discretion'. With respect, this is a matter of judgment rather than discretion since the judge is intended to assess the factual situation not exercise a power of choice. For a detailed analysis of the difference between judgment and discretion see Bennion, 'Jaguars and Donkeys: Distinguishing Judgment and Discretion' 164 JP 22 and 29 April, 6 May 2000. See also Bennion, 'Distinguishing judgment and discretion' PL, Autumn, 368.

Judicial guidelines (pp 84-85)

Guidelines are now sometimes laid down by the Judicial Studies Board. As to damages for personal injuries see their *Guidelines for the Assessment of General Damages in Personal Injury Cases* (Blackstone, 4th edn 1998). In a combined judgment covering eight cases, of which the first was *Heil v Rankin and Another* (2000) *Times* 23 March, the Court of Appeal handed down revised guidelines in the light of the Law Commission Report *Damages for Personal Injury: Non-Pecuniary Loss* (1999, Law Com No 257). Lord Bingham of Cornhill CJ said that the issue of the JSB guidelines had been a welcome development and that it was highly desirable that a new edition reflecting the revised guidelines should be issued as soon as possible. As to JSB guidelines see also Code p 92.

Adjudicating authorities with original jurisdiction (Code s 22)

Tribunals (pp 92-93)

In the absence of any statutory power to that effect in the enactments relating to a particular tribunal, the tribunal possesses no authority to rescind a decision of that or any other tribunal: *Akewushola v Secretary of State for the Home Department* [2000] 2 All ER 148.

Judicial review (Code s 24)

Public law (pp 102-103)

After the insertion made at 1999 Supplement pp S13-S14 insert-

In *Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752 at 759 Lord Woolf MR said that nowadays if proceedings involving public law issues are commenced by an ordinary action they are subject to Pt 24 of the Civil Procedure Rules, which enables the court, if it considers that the claimant has no real prospect of success, to give summary judgment. 'This is a markedly different position from that which existed when *O'Reilly v Mackman* was decided. [It] restricts the inconvenience to third parties and the administration of public bodies caused by a hopeless claim to which Lord Diplock referred'. Sedley LJ said at 757 that the single important difference between judicial review and civil suit is the differing time limits. He also said that the ground had shifted considerably since 1982 when *O'Reilly v Mackman* was decided, and that the critical decision now was not that case but *Cocks v Thanet DC* [1983] 2 AC 286, 'which decided that where private law rights depended on prior public law decisions they too must ordinarily be litigated by judicial review'.

Remedies (pp 105-107)

Practice Note [2000] 4 All ER 1071 records that with effect from 2 October 2000 the following changes are made. An order for mandamus is renamed a mandatory order, an order of certiorari is renamed a quashing order, an order for prohibition is renamed a prohibiting order, the Crown Office List is to be known as the Administrative Court, and the Crown Office is to be known as the Administrative Court Office.

Declaration or injunction (p 107)

In footnote 7, after the insertion made at 1999 Supplement p S15, insert 'See also *Steed v Secretary of State for the Home Department* [2000] 3 All ER 226 (HL) (claim on surrendering weapons under scheme made under Firearms (Amendment) Act 1997 s 15).

Dynamic processing of legislation (Code s 26)

In consequence of the decision of the House of Lords in *R v Governor of HM Prison Brockhill, ex p Evans (No 2)* (2000) 4 All ER 15, the new passage inserted in Code p 116 by 1999 Supplement pp S15-S17 needs to be altered by substituting the following for the words from 'Where there is an existing judicial decision' on p S16 to the end of the passage on p S17-

Where there is an existing judicial decision on a point, and that decision has not been overruled by a later court decision, it is usually assumed that the law must thereafter be taken to be as indicated by that decision. However this is not always so. The profession may have expressed doubts about its correctness. It may have been decided *per incuriam*, or at least without full argument. The profession may expect it to be overruled if the point should in future come before a higher court. This is why, putting the matter at its most succinct, and allowing for the possibility of judicial disagreements, it can be said that the legal meaning of an enactment is what it is most likely the House of Lords, as the final court of appeal, would say it is. Even here it has to be remembered that the House of Lords now claims power to depart from its previous decisions (see Code p 111).

In *R v Governor of HM Prison Brockhill, ex p Evans (No 2)* (2000) 4 All ER 15, the House of Lords considered a claim for damages for false imprisonment brought by a convicted prisoner against the governor of Brockhill Prison. Under a line of judicial of authority as to the legal

meaning of the Criminal Justice Act 1967 s 67(1) known as the *Gaffney* approach, the release date of the prisoner had been calculated by the governor as 18 November 1996. However the *Gaffney* approach was in effect overruled by ***R v Secretary of State for the Home Department, ex p Naughton*** [1997] 1 All ER 426. On the normal declaratory principle of judicial precedent *Naughton* operated retrospectively (see below), so the respondent should with hindsight have been released on 17 September 1996. Was she entitled to damages from the governor, even though at the relevant time he had correctly applied the law as laid down by the *Gaffney* approach? ***Held*** False imprisonment is a tort of strict liability, and the governor as representing the state was not absolved by the fact that he acted correctly.

Lord Slynn said (at 18) that the governor could not be criticised even though the court in *Naughton* doubted the soundness of the earlier decisions on which the *Gaffney* approach was based. Lord Steyn, applying (at 20) the basic rule of statutory interpretation (see Code s 193), said the relevant principles of law pulled in opposite directions and he would therefore carry out a balancing exercise. He said it was 'a matter of judgment how the weight of the competing principles in the present case should be assessed'.

Evans shows that no general answer can be given to the question what is the effect on previous transactions when a ruling on the law changes: it depends on the nature of the law in question. It should also be borne in mind, whenever it becomes necessary for anyone, whether a practitioner advising a client, a court disposing of a case, or a person such as the prison governor in *Evans*, to decide what the legal meaning of an enactment is, that it is requisite, where there is real doubt on the point (for real doubt see Code pp 15-16) to apply all relevant interpretative criteria. The existing court decision will only be one of these, and the overall weight of argument may fall the other way. The interpreter does not discharge his or her duty if this investigative process is not undertaken when necessary, especially where a serious issue, perhaps affecting the liberty of the subject, depends on it.

Even where there is no real doubt as to the correctness of the earlier decision, it may still be overturned in a later case. In other words the legal meaning of an enactment may, as stated above, be X at one moment in time and Y at a later date. The later decision will on normal principles operate retrospectively (see eg ***Miliangos v George Frank (Textiles) Ltd*** [1976] AC 443; ***R v Preddy*** [1996] AC 815), so that Y is taken to have been the legal meaning all along. The case of the governor of Brockhill Prison needs to be distinguished from the byelaw case of ***Percy v Hall*** [1996] 4 All ER 523 (see Code pp 195-196), where it was held that the acts of police enforcing a byelaw would not be rendered unlawful by a later court ruling that the byelaw was void. See also ***Boddington v British Transport Police*** [1998] 2 All ER 203.

The difficult case where, without fault, a person relied on meaning X before a later court substituted meaning Y should be decided according to principles of legal policy (for this see Code pp 595-606). As Schiemann LJ said in ***Percy v Hall*** [1997] 4 All ER 523 at 545: 'The policy questions which the law must address in this type of case are whether any and if so what remedy should be given to whom against whom in cases where persons have acted in reliance on what appears to be valid legislation'. (For the *Evans* type of case one would substitute 'have acted in reliance on what appears to be a valid court ruling'.) One obvious principle of legal policy that should be applied is that law should be just and court decisions should further the ends of justice (see Code pp 614-616).

Another aspect of legal policy is the principle that legal changes should not operate retrospectively: see Code p 623. However, because procedural changes are assumed to be beneficial and not punitive, the principle against retrospectivity does not apply to them: see Code p 623 and also pp 237-240. Put more broadly, the principle against retrospectivity applies only where retrospectivity would inflict hardship. Treating the decision abrogating the *Gaffney* approach as retrospective in the case of the plaintiff in *Evans* on balance conferred a benefit.

In *Evans* the House of Lords discussed the question whether the declaratory-retrospective principle applied by the common law to decisions overruling earlier cases should be relaxed. Lord Slynn said (at 19): 'I consider that there may be situations in which it would be desirable, and in no way unjust, that the effect of judicial rulings should be prospective or limited to certain claimants. The European Court of Justice, though cautiously and infrequently, has restricted the effect of its ruling to the particular claimants in the case before it and to those who had begun proceedings before the date of its judgment. Those who had not sought to challenge the legality of acts done years before could only rely on the ruling prospectively. Such a course avoided unscrambling transactions perhaps long since over and doing injustice to defendants' (see further Code p 1013). Lord Slynn's colleagues in *Evans* did not share this view. Lord Hobhouse said (at 39): 'It is a denial of the constitutional role of the courts for courts to say that the party challenging the *status quo* is right, that the previous decision is overruled, but that the decision will not affect the parties and only apply subsequently'.

Overriding effect of an Act (Code s 32)

Effect on existing law (p 133)

The rug analogy given on p 133 was acted on by Wall J in *Re O (a child) (blood tests: constraint) Re J (a child) (blood tests: constraint)* [2000] 2 All ER 29 at 39-40.

Challenge to validity of an Act (Code s 47)

For an expanded authoritative account of the matters discussed in this section of the Code see Colin R Munro, *Studies in Constitutional Law* (2nd edn 1999), pp 127-171.

Summary as to defects in enactment procedure (p 167)

A possible ground for a claim that an Act is invalid would be that alterations had been made to it after royal assent. Here the courts might apply by analogy the rule in *Pigot's Case* (1614) 11 Co. Rep. 26b (unilateral alteration to a deed after signature may nullify the deed). On this rule see *Master v Miller* (1791) 4 TR 320; *Raiffeisen Zentralbank Osterreich AG v Cross-seas Shipping Ltd and Others* (2000) *Times* 1 February.

Ultra vires delegated legislation (Code s 58)

The case cited in Example 58.1 was followed in *R v Secretary of State for the Home Department and others, ex p Saleem* [2000] 4 All ER 814, where the Court of Appeal held that the Asylum Appeals (Procedure) Rules 1996 r 42(1)(a) was ultra vires and invalid in so far as it purported to determine conclusively the moment at which an asylum seeker received notice of an adjudicator's determination.

Severance (p 186)

The principles of severance outlined here apply whether or not ultra vires is in question. In *Imperial Chemical Industries plc v Colmer (Inspector of Taxes)* [2000] 1 All ER 129 severance of a statutory definition was held impossible: see the note on this case at p 000 below, related to Code s 413.

Delegated legislation: general interpretative principle (Code s 60)

Explanatory notes

In *Coventry and Solihull Waste Disposal Co Ltd v Russell (Valuation Officer)* [2000] 1 All ER 97 at 107 Lord Hope of Craighead said 'In my opinion an explanatory note may be referred to as an aid to construction where the statutory instrument to which it is attached is ambiguous'. This dictum needs to be construed widely. It may be necessary to refer to the explanatory note in order to determine *whether* the instrument is ambiguous or otherwise uncertain. As always, the primary need is to give the instrument an informed construction (for the informed interpretation rule see Code s 201). An explanatory note was referred to in *Westminster City Council v Haywood and another (No 2)* [2000] 2 All ER 634 at 645.

Commencement on date specified by government order (Code s 74)

Decision not to make commencement order (pp 207-208)

At the end of footnote 7 on page 208 insert 'See further "The prerogative, legislative power, and the democratic deficit: the Fire Brigades Union Case" by Ian Leigh [1995] 3 Web JCLI.'

Consequential amendment (Code s 82)

Interpretation of consequential provisions (p 218)

In the addition to footnote 3 inserted by the 1999 Supplement (page S20), add at end: 'This decision was affirmed by the House of Lords in *Inco Europe Ltd and others v First Choice Distribution (a Firm) and others* [2000] 2 All ER 109.

Uniform meaning throughout area of extent (Code s 104)

Introductory (p 248)

In third line of Comment, as amended by the 1999 Supplement (see p S22), after 'Otton LJ at 339' insert '; *Wisely v John Fulton (Plumbers) Ltd Wadey v Surrey County Council* [2000] 2 All ER 545, *per* Lord Hope of Craighead at 547'.

Meaning of 'Great Britain' (Code s 116)

In *R v Manchester Stipendiary Magistrate and another, ex p Granada Television Ltd* [2000] 1 All ER 135 at 138-139 Lord Hope of Craighead said: 'In *Stuart v Marquis of Bute, Stuart Moore* (1861) 9 HL Cas 440 at 454 Lord Campbell LC said: ". . . as to judicial jurisdiction, Scotland and England, though politically under the same Crown and under the supreme sway of one united Legislature, are to be considered as independent foreign countries, unconnected with each other". Shortly after the union it was established that a right of appeal lay in civil matters from the Court of Session to the House of Lords. But the High Court of Justiciary, which is the supreme criminal court in Scotland, is unique among the superior courts of the United Kingdom in that its decisions are not subject to appeal to this house: *Mackintosh v Lord Advocate* (1876) 2 App Cas 41. In the result the system of criminal law which operates in Scotland has remained entirely separate from that of England. Prior to the coming into operation of the Scotland Act 1998 on 1 July 1999, legislation relating to Scottish criminal law and procedure was dealt with by the United Kingdom Parliament. But even that matter

has now been devolved to the Scottish Parliament. Thus, although there is now much common ground between England and Scotland in the field of civil law, their systems of criminal law are as distinct from each other as if they were two foreign countries'.

Ireland (Code s 123)

The decision in *Re Gilligan* [1998] 2 All ER 1 (see 1999 Supplement p S22) was upheld by the House of Lords in *Re Gilligan* [2000] 1 All ER. Lord Steyn referred (at 124) to 'longstanding and close ties between the Republic of Ireland and the United Kingdom', adding that 'Ireland has a special position in English law'. See also the note on this case at p 000 below, related to Code s 392.

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

Extension to foreigners where objects of Act so require (pp 287-289)

It was held by the Court of Appeal in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd The Ikarian Reefer* [2000] 1 All ER 37 that a British court has jurisdiction under the Supreme Court Act 1981 s 51(1) to order a non-party to pay the costs of proceedings, even though the party is resident or domiciled outside the court's territorial jurisdiction, where the costs are those of an action brought within the jurisdiction.

Deemed location of an artificial person (Code s 135)

Piercing the corporate veil (p 299)

In *R v Dimsey R v Allen* [2000] 2 All ER 142 Laws LJ said (at 147) '. . . the corporate veil may fall to be lifted where companies are used as a vehicle for fraud. Here the companies in question were the appellant's alter ego . . .'

Drafting presumed competent (Code s 142)

In *Metropolitan Police District Receiver v Palacegate Properties Ltd* [2000] 3 All ER 663 at 669 Pill LJ said: 'Parliamentary draftsmen do sometimes make mistakes (see *R v Lynsey* [1995] 3 All ER 654)'. The former case concerned the meaning of 'term of years certain' in the Landlord and Tenant Act 1954 s 38(4)(a).

The factual outline (Code s 143)

Actus reus (p 322)

At the end of the passage relating to *Attorney General's Reference (No 3 of 1998)* [1999] 3 All ER 40 inserted by the 1999 Supplement (page S23) insert-

This was upheld by the House of Lords in *R v Antoine* [2000] 2 All ER 208, where Lord Hutton (at 222) endorsed citations indicating that the terms *actus reus* and *mens rea* are useful for purposes of legal analysis, though there may in a particular instance be an overlap between them.

The legal thrust (Code s 144)

Cause of action (pp 326-327)

(a) At end of footnote 5 on page 326 insert 'See also *Harris (suing as personal representative of Andrews (deceased)) v Lewisham and Guys Mental Health NHS Trust* [2000] 3 All ER 769'.

(b) At end of footnote 2 on page 327 insert 'See also the reference to *Stock v London Underground Ltd* (1999) *Times* 13 August in *Ord v Upton (as trustee to the property of Ord)* [2000] 1 All ER 193, *per* Aldous LJ at 205 ('the existence of different heads of damage does not, in modern litigation, give rise to two different causes of action').

Opposing constructions of an enactment (Code s 149)

Inquisitorial system (pp 336-337)

'Children's cases are to be regarded as being in a special category . . . Relevant information should be made available to the court in order that it can arrive at a conclusion which is in the overriding interests of the welfare of the child': *per* Sir Stephen Brown P in *Oxfordshire County Council v M* [1994] Fam 151 at 162. This was cited by Bracewell J in *Re R (a minor) (inter-country adoption) Practice Note* [1999] 4 All ER 1015 at 1018. He added (at 1019): 'The duty is to make full, frank and timely disclosure of relevant information'.

Grammatical ambiguity (application of interpretative factors) (Code s 152)

In *Imperial Chemical Industries plc v Colmer (Inspector of Taxes)* [2000] 1 All ER 129 at 133 Lord Nolan said 'An ambiguity is a word or phrase fairly open to diverse meanings, the classic example being "twelve o'clock" which, save for users of the 24-hour clock, could equally mean midday or midnight'.

Semantic obscurity and the 'corrected version' (Code s 155)

Compression of language (pp 351-352)

Insert the following after Example 155.2-

Example 155.2A The Employment Rights Act 1996 s 98(4) refers to the reason for a dismissal which is 'shown' by the employer. In *Midland Bank plc v Madden* [2000] 2 All ER 741 at 748 Lindsay J, having explained in detail the complex requirement imposed by this, added: 'All that might rightly be regarded as a heavy freight to be borne by the simple word "shown" but such a requirement is not in our view in any pejorative sense a gloss upon or departure from the statute but rather is a reasonable judicial working out of what meaning the undefined word must have been intended by the legislature to have in its context'.

When implications are legitimate (Code s 174)

Implied ancillary powers (pp 388-389)

For a detailed example of the application by a court of the rule in *A-G v Great Eastern Rly Co* see *British Waterways Board v Severn Trent Water Ltd* [2000] 1 All ER 347 (powers ancillary to those conferred by Water Industry Act 1991).

Nature of the interpretative criteria (Code s 180)

Interpretative criteria as part of the common law (p 399)

It is said in the text that the reports are full of dicta which seek to capture a rule or principle of statutory interpretation in a few words when for its full and exact statement many are needed. This echoes the Introduction (page 3) where it is said that judges lean to the delivery of impromptu and pithy (and therefore doubly inaccurate) descriptions of the nature of statutes and the principles governing their interpretation. A recent example is the dictum by Kay J in *Buckland and others v Secretary of Sate for the Environment, Transport and the Regions* [2000] 3 All ER 205 at 209 that 'the interpretation of a statute by means other than the language of the section only becomes permissible when the language is not clear and unambiguous'. This is so fundamentally mistaken that one scarcely knows where to start in correcting it. Perhaps the best beginning is to consider the two-stage approach to statutory interpretation (Code s 204). From that one might pass to the rule that an Act is to be read as a whole (Code s 355).

Commonsense construction rule (Code s 197)

Opening passage (pp 427-428)

For a case where the requirements of common sense were overborne by weightier factors see the note on ***R v Sharkey*** [2000] 1 All ER 15 at p 000 below, related to Code s 273.

Greater includes less (pp 429-431)

In *Buckland and others v Secretary of Sate for the Environment, Transport and the Regions* [2000] 3 All ER 205 at 209 the definition of 'byway open to all traffic' in the Wildlife and Countryside Act 1981 s 66 was considered. It was held that the reference to use 'mainly' for the purpose for which footpaths and bridleways are used did not mean that there had to be a third type of user as well, since 'mainly' included 'exclusively'.

Statutory definitions (Code s 199)

Enlarging definitions (p 441-442)

Where an enlarging definition widens the defined term to include matters not normally within it, this may lead to confusion unless the drafter is careful. This happened with a definition in the Police and Criminal Evidence Act 1984 s 23, which says that in the Act 'premises' includes 'any place and in particular . . . any vehicle'. Section 19(3) empowers a constable to seize 'anything which is on the premises'. With a vehicle, does it empower him to seize not only anything on the vehicle but the vehicle itself? Under the ordinary meaning of 'premises' this question cannot arise for, as Roch LJ said in *Cowan v Commissioner of Police of the Metropolis* [2000] 1 All ER 504 at 513, the constable 'will not be able to seize and retain premises where they are immovable property because of the physical impossibility of doing so'. 'In my judgment', continued Roch LJ at 513, 'there is no reason why the word "anything" . . . should not include "everything" where the nature of the premises makes it physically possible for the totality of the premises to be seized and retained by the police, and where practical considerations make that desirable'. The Court of Appeal so held, though it

has to be pointed out that reading 'anything' as 'everything' does not do the trick because s 19(3) then empowers the constable to seize 'everything which is on the premises' but still not the premises itself. This must go down as a bold example of rectifying construction.

Judicial glosses

Care is needed in applying a judicial paraphrase of, or other gloss on, a statutory definition because this may be misleading. In *Secretary of State for Trade and Industry v Deverell and another* [2000] 2 All ER 365 the Court of Appeal considered the definition of 'shadow director' in the Company Directors Disqualification Act 1986 s 22(5). Morritt LJ said (at 376) that previous judicial descriptions or epithets concerning this definition might be very effective in graphically conveying its effect on the facts of the cases where they were used. 'But, it seems to me, they may be misleading when transposed to the facts of other cases. Thus to describe the board as the cat's paw, puppet or dancer to the tune of the shadow director implies a degree of control . . . in excess of what the statutory definition requires.'

The Interpretation Act 1978 (Code s 200)

Number (pp 445-446)

As so often happens with the Interpretation Act 1978, its provisions were apparently overlooked in *Goodland v Director of Public Prosecutions* [2000] 2 All ER 425. The provision in question here was s 6(c) (words in the singular include the plural) of that Act. The question was whether an exhibit was an indecent photograph of a child by virtue of being 'an image . . . which appears to be a photograph' within the meaning of the definition of the term 'pseudo-photograph' in the Protection of Children Act 1978 s 7(7). The exhibit consisted of a photograph (not indecent) of a girl of ten dressed in a gymnastic outfit attached by one corner to a photograph (not of a child) showing a naked female's abdominal and genital area. When the latter was placed over the former the combined appearance was of a naked child and thus 'indecent'. The Court of Appeal held that the definition was not satisfied. Simon Brown LJ said (at 439): 'In my judgment an image made by an exhibit which obviously consists . . . of parts of two different photographs sellotaped together cannot be said to be "a photograph".' However, by virtue of the Interpretation Act 1978 s 6(c), the definition in s 7(7) included a version which read 'an image . . . which appears to be two or more photographs'. This was an exact description of the exhibit in question here when, as intended, it was viewed with the indecent photograph placed over the lower body of the girl of ten.

The informed interpretation rule (Code s 201)

Subsection (2) (p 451)

In *R v Secretary of State for the Environment, Transport and the Regions and another, ex p Spath Holme Ltd* [2000] 1 All ER 884 at 894 Stuart-Smith LJ said that before starting to construe the words used it is necessary 'to make an informed determination whether these words are ambiguous'. Although the decision was reversed in *R v Secretary of State for the Environment, Transport and the Regions and another, ex p Spath Holme Ltd* [2001] 1 All ER 195 that does not affect the importance of this dictum.

Skeleton arguments (Code s 206)

The passage by Lord Woolf MR set out in the 1999 Supplement (page S31) refers to delivering skeleton arguments sequentially. In *Brown and Another v Bennett and Others* (2000) *Times* 13 June Neuberger J said in a case management conference that it is for the

court to determine whether skeleton arguments should be delivered sequentially or simultaneously, since there is nothing in the rules about it. He said that sequential delivery should not operate unfairly, so that defendants were entitled to time 'not to formulate their skeleton argument, but to re-fashion a draft in order to reflect the claimant's argument'.

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)

(a) A like principle operates where a new Act builds upon a principle previously applied.

Example 210.1A The Highways Act 1959 s 44(1) (re-enacted as the Highways Act 1980 s 41(1)) imposed on highway authorities the duty to maintain a highway that formerly lay upon the inhabitants at large. *Held* This meant that 'maintain' in the new legislation had to be given the same meaning it had been held to have in the former law and could not be widened to require removal of snow and ice (*Goodes v East Sussex County Council* [2000] 3 All ER 603 (HL)).

(b) A rare case where Parliament expressly attracted the interpretation given to a previous enactment is found in the Compulsory Purchase Act 1965 s 10(2). Of this Lord Hoffmann said in *Wildtree Hotels Ltd and others v Harrow London Borough Council* [2000] 3 All ER 289 at 293 that this is 'an unusual provision which suggests some anxiety on the part of the legislature to discourage the courts from taking a fresh look at the statutory language'.

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

Parliamentary privilege (pp 510-515)

The references inserted by the All ER Annual Review 1999 at Code pages 511 and 514 to *Hamilton v Al Fayed* [1999] 3 All ER 317 should be changed to *Hamilton v Al Fayed* [2000] 2 All ER 224.

The long title (Code s 245)

In footnote 1 on page 541, as amended by the 1999 Supplement, after '[1999] 2 All ER 425 at 429' insert '; *Glasgow City Council and others v Marshall and others* [2000] 1 All ER 641 at 646'.

Sidenote (Code s 256)

In *R v Buckland* [2000] 1 All ER 907 at 911 sidenotes were erroneously referred to as 'section headings' by Lord Bingham of Cornhill CJ. The Crime (Sentences) Act 1997 s 2(5)(g) refers to provisions of the Firearms Act 1968 by reference to section numbers followed in parenthesis by the sidenote to the section in question. The court rejected an argument that because a sidenote did not refer to imitation firearms (though the section did) the reference should be taken to exclude these.

Nature of legal policy (Code s 263)

Principles and policy (pp 597-598)

In *McFarlane v Tayside Health Board* [1999] 4 All ER 961 at 1000 Lord Millett said that limitations on the scope of legal liability arise from legal policy, 'our more or less inadequately expressed ideas of what justice demands', and that legal policy in this sense is not the same as public policy, 'even though moral considerations play a part in both'. Lord Steyn (at 977-978) preferred to decide the case, a claim in tort for damages where a vasectomy proved ineffective to prevent a birth, on what he called 'distributive justice' (as opposed to 'corrective justice').

Nature of legal policy (pp 598-600)

In *Krasner v Dennison and others; Lawrence v Lesser* [2000] 3 All ER 234 at 247 Chadwick LJ cited the following dictum of Joyce J in *Re Fitzgerald, Surman v Fitzgerald* [1903] 1 Ch 933 at 940: 'It is contrary to the policy of the law in this country that property should be so settled as to continue in the enjoyment of a bankrupt notwithstanding his bankruptcy'.

Law should serve the public interest (Code s 264)

Interest reipublicae ut sit finis litium (pp 607-609)

Lord Bridge's dictum cited at Code p 609 was applied to adjudications by the Pensions Ombudsman in *Westminster City Council v Haywood and another (No 2)* [2000] 2 All ER 634.

Construction in bonam partem (pp 611-614)

After Example 264.10 on page 612 insert-

Example 264.10A The Employment Rights Act 1996 s 182 confers on an employee under a contract of employment (defined in s 230 of the Act) a right to payments from the Secretary of State. *Held* This would not apply if the employment was not genuine: *Secretary of State for Trade and Industry v Bottrill* [2000] 1 All ER 915.

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

European Convention on Human Rights (pp 632-634)

In *Krasner v Dennison and others; Lawrence v Lesser* [2000] 3 All ER 234 at 254 Chadwick LJ said that, in relation to the European Convention on Human Rights as respects the period before the Human Rights Act 1998 was brought fully into force, when construing the relevant provisions of the Insolvency Act 1986 'the court should follow the approach indicated by Lord Diplock in *Garland v British Rail Engineering Ltd* [1983] 2 AC 751 at 755 and construe the words of the statute, if they are reasonably capable of bearing such a meaning, as intended to carry out an international obligation which the United Kingdom has assumed under a treaty or convention and not so as to be inconsistent with that obligation'.

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

Nature of the principle (p 638)

In accordance with the basic rule of statutory interpretation (see Code s 193), a penal enactment will not be given a strict construction if other interpretative factors weigh more

heavily in the scales. Thus in *Re Lo-Line Electric Motors Ltd* [1988] Ch 477 Browne-Wilkinson V-C rejected the submission that because the Company Directors Disqualification Act 1986 s 22(5) had penal consequences the word 'director' should be strictly construed. As Morritt LJ put it when following that decision in *Secretary of State for Trade and Industry v Deverell and another* [2000] 2 All ER 365 at 373, he approached the question of construction on the normal basis because the paramount purpose of disqualification is the protection of the public.

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

(a) For the effect of illegality where an illegal immigrant claims a statutory health etc benefit see *R v Wandsworth London Borough Council, ex p O* [2000] 4 All ER 590 (benefit under National Assistance Act 1948 s 21).

(b) In footnote 5 on page 642, after '[1996] 4 All ER 28' insert '; *Re O (a child) (blood tests: constraint) Re J (a child) (blood tests: constraint)* [2000] 2 All ER 29'.

Statutory restraint of the person (Code s 273)

Opening passage (pp 645-646)

It is important to bear in mind that, as Lord Bingham of Cornhill CJ said in *Dlodlov Mental Health Review Tribunal for the South Thames Region* (1996) 36 BMLR 145 at 149, what an enactment authorising the detention of a person does 'cannot have the effect of producing a physical result. It is a form of authority'. So, citing that dictum, it was held in *R v Sharkey* [2000] 1 All ER 15 that a person could be ordered 'to be returned to prison' under the Criminal Justice Act 1991 s 40 even though he was already in prison having been the subject of an order under s 39 of that Act (which, in the case of a prisoner who has been released on licence, authorises the Secretary of State to revoke his licence and recall him to prison). This was despite the fact that, as Lord Bingham said in the latter case (at 20), 'it would appear to be common sense that a person cannot be returned to a place where he already is'.

Statutory interference with economic interests (Code s 278)

Property rights on death (p 654)

In footnote 5, the 1999 Supplement (page S44) inserted a reference to *Lewisham and Guys Mental Health NHS Trust v Andrews* [1998] ICR 774. Since this decision was reversed on appeal the reference should be deleted, and the following substituted: 'In footnote 5, at end insert-

In *Harris (suing as personal representative of Andrews (deceased)) v Lewisham and Guys Mental Health NHS Trust* [2000] 3 All ER 769 the Court of Appeal held that the Law Reform (Miscellaneous Provisions) Act 1934 s 1(1) (which provides that on the death of a person all causes of action subsisting against or vested in him, other than for defamation, shall survive in relation to his estate) applied to a claim under the Race Relations Act 1976 s 54(1). However Mummery LJ said (at 776-777): 'This does not mean that all benefits conferred by or recoverable under all statutes survive on death. See, for example, *D(J) v D(S)* [1973] Fam 55 at 59 (application for financial provision under the matrimonial causes legislation not a "cause of action")'.

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

Right of litigious control (pp 659-660)

(a) The new Civil Procedure Rules made under the Civil Procedure Act 1997 and introduced in 1999 have curtailed the citizen's right of litigious control. 'Under the CPR, the court has power . . . to control the evidence which is placed before the court': ***Stevens v Gullis (Pile, third party)*** [2000] 1 All ER 527, ***per*** Lord Woolf MR at 535.

(b) In ***Clark v University of Lincolnshire and Humberside*** [2000] 3 All ER 752 at 762 Lord Woolf MR reinforced what is said in the text regarding the right to cite unreported cases when he observed that the fact that a decision is reported 'does not alter the consideration which a judge can give to the terms in which his judgment is couched'.

(c) In ***Copeland v Smith*** [2000] 1 All ER 457 the Court of Appeal laid down important principles regarding law reports. Buxton LJ said (at 459-460): '[I express] my very great concern that the judge was permitted by these professional advocates to approach the matter as if it were free from authority when there was a recently reported case in this court directly on the point, which was reported not in some obscure quarter but in the official law reports. It is not only extremely discourteous to the judge not to inform him about the law, but it has also been extremely wasteful of time and money in this case . . . [Also] we were referred to the case only in a Court of Appeal transcript . . . It is not satisfactory to refer to a reported case by means of a . . . transcript. The purpose of cases being reported is, amongst other things, to assist the court and the advocates by means of listing the cases that have been referred to . . . and also by means of the very helpful headnotes that are provided.'

Brooke LJ said (at 462-463): '[It] is quite essential for advocates who hold themselves out as competent to practise in a particular field to bring themselves up to date with recent authority in their field. . . . If [they] only take one set of the general reports, for instance the Weekly Law Reports as opposed to the All England Law reports, or the All England Law reports as opposed to the Weekly Law Reports, they should at any rate have systems in place which enable them to keep themselves up to date with cases which have been considered worthy of reporting in the other series. If this is not done, judges may be getting the answer wrong through the default of the advocates . . . The English system of justice has always been dependent on the quality of the assistance that advocates give to the bench. This is one of the reasons why, in contrast to systems of justice in other countries, English judges are almost invariably in a position to give judgment at the end of a straightforward hearing without having to do their own research and without the state having to incur the cost of legal assistance for judges because they cannot rely on the advocates to show them the law they need to apply. . . .It is, of course, the duty of an advocate under the English system of justice to draw the judge's attention to authorities which are in point, even if they are adverse to that advocate's case.'

The unspoken (surely unintended) premiss here is that English judges are so ignorant of law that either they need to be told by advocates what law they are to apply or else have it served up to them by paid staff. That would contradict the usual appellation of 'learned judge' and surely is not an acceptable posture for the judiciary of any modern state. The fact is that all judges have a duty to stay abreast of legal developments and keep an alert eye (regardless of what the advocates in a case may or may not tell them) on the applicable law in the instant case. Members of the public involved in litigation would expect no less. Also questionable is the suggestion that it is somehow a good thing that the state does not have to pay for legal assistance for senior judges. Judges of the very high level of skill and experience pertaining in the Court of Appeal are wasting their valuable time and effort if they do not receive every assistance by way of staff that they reasonably need.

Presumption favouring rectifying construction (Code s 287)

Opening (pp 675-676)

In *Inco Europe Ltd and others v First Choice Distribution (a Firm) and others* [2000] 2 All ER 109 Lord Nicholls of Birkenhead said of the Supreme Court Act 1981 s 18(1)(g) (at 114) 'I am left in no doubt that, for once, the draftsman slipped up'. *Held* A rectifying construction was required whereby 'from any decision of the High Court under that Part' was read as 'from any decision of the High Court under a section in that Part which provides an appeal from such decision' (see 115). See also the note on this case at p 000 below, related to Code s 304.

Casus omissus (pp 682-684)

See the note on *Cowan v Commissioner of Police of the Metropolis* [2000] 1 All ER 504 at p 000 above, related to Code s 199.

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

Ongoing Acts (pp 686-689)

(a) In the addition to footnote 2 on page 686 made in the 1999 Supplement, p S46, at end add 'The principle was also applied by the House of Lords in *McCartan Turkington Breen (a firm) v Times Newspapers Ltd* [2000] 4 All ER 913 (1888 Act reference to public meeting updated to include press conference).

(b) In *Victor Chandler International v Customs and Excise Commissioners and another* [2000] 2 All ER 315 at 322 Sir Richard Scott V-C endorsed the principles set out in Code s 288(2) and (3). He went on (at 323)-

'Before applying an "always speaking" construction to a penal statutory provision in order to take account of developments which have taken place since the provision was enacted, the court must, in my judgment, be very clear that the new situation to which the provision is to be applied is within the mischief at which the provision was aimed. It must be very clear that the new situation falls within the parliamentary intention.'

In that case the Court of Appeal considered the Betting and Gaming Duties Act 1981 s 9(1)(b), which restricts publication of 'an advertisement or other document'. *Held* This must be treated as updated so as to include a teletext advertisement.

(c) In the 1999 Supplement, p S47-

(i) in the amendment to footnote 3 on page 686 of the main work, for '(1999) *Times* 17 August' substitute '[2000] 1 All ER 160';

(ii) in view of the Court of Appeal decision in *Victor Chandler International v Customs and Excise Commissioners and another* [2000] 2 All ER 315, delete the entry relating to page 689 of the main work.

Social changes (pp 693-696)

In *Goodes v East Sussex County Council* [2000] 3 All ER 603, where the House of Lords held that the duty to maintain a highway imposed by the Highways Act 1980 s 41 (cf Example 8.5) does not include a duty to clear snow and ice, Lord Hoffmann said (at 615) that the updating

principle did not allow a judicial extension of the duty to maintain so as 'to create a duty not only more onerous but different in kind'.

Developments in technology (pp 696-698)

In *Victor Chandler International v Customs and Excise Commissioners and another* [2000] 2 All ER 315 at 323 Sir Richard Scott V-C expressed agreement with the reasoning set out in Example 288.19.

Open court principle (pp 702-703)

In *l v British Gas plc* [2000] 2 All ER 440 the Court of Appeal considered the Industrial Tribunals (Constitution and Rules of Procedure) Regulations 1993 (SI 1993/2687), Sch 1 rr 8(2)(3), which require any hearing of or in connection with an originating application to an employment tribunal to take place in public except in certain specified cases. *Held* The requirement was mandatory not directory. A hearing in the regional chairman's office behind a locked door clearly did not comply with it, so the decision reached would be quashed. Henry LJ (at 446) cited Bentham's aphorism that 'Publicity is the very soul of justice' and Lord Halsbury's dictum in *Scott v Scott* [1936] AC 177 at 200 that 'Every Court of justice is open to every subject of the King', though as stated above and at Code pp 702-703 there are exceptions. See also the note on this case at p 000 above, related to Code s 20.

Nature of purposive construction (Code s 304)

Contrast with literal construction (pp 732-733)

The argument set out on page 733 that in *Jones v Wrotham Park Settled Estates* [1980] AC 74 at 105 Lord Diplock was mistaken in saying that for a rectifying construction to be effected it must be possible to state with certainty what the missing words are was endorsed by the House of Lords in *Inco Europe Ltd and others v First Choice Distribution (a Firm) and others* [2000] 2 All ER 109. Lord Nicholls of Birkenhead said (at 115) that the court must be sure of 'the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used'. See also the note on this case at p 000 above, related to Code s 287.

Avoiding an unworkable or impracticable result (Code s 313)

Logical impossibility (p 754)

Where an enactment refers to a thing it is assumed to mean, unless the context otherwise requires, a thing which *exists* as denoted or described by the enactment. Where jurisdiction depends on the existence of a thing, and it is doubtful if that thing does exist, it is expedient to resolve the doubt before proceeding. In *Grammer v Lane and others, Grammer v Stone and others* [2000] 2 All ER 245 a landlord purported to refer to arbitration, by a notice given under the Agricultural Holdings Act 1986 s 12(1), the amount of rent under a tenancy. Since the existence of the tenancy was disputed, and the dispute was before the county court in other proceedings, the notice was given 'without prejudice'. *Held* In the circumstances it was lawful to give the notice 'without prejudice'.

Construction which otherwise defeats legislative purpose (Code s 326)

For further strictures on the drafting of the 1920 Act referred to in Example 326.3 see *Cadogan Estates Ltd v McMahon* [2000] 4 All ER 897 [HL].

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

Introductory (pp 805-806)

In *Wisely v John Fulton (Plumbers) Ltd Wadey v Surrey County Council* [2000] 2 All ER 545 at 547 Lord Hope of Craighead said-

> 'As a general rule Parliament must be taken to have legislated against the background of the general principles of the common law. It may be found on an examination of the statute [in question] that Parliament has decided not to follow the common law. In that situation the common law must give way to the provisions of the statute. But an accurate appreciation of the relevant common law principles is nevertheless a necessary part of the exercise of construing the statute.'

Legal policy (pp 808-809)

Example 327.7 cites a case where the legal meaning of the broad term 'property' was held to be impliedly cut down by reference to legal policy. In *Haig v Aitken* [2000] 3 All ER 80 Rattee J held that on grounds of privacy the legal meaning of the same term as defined in the Insolvency Act 1986 s 436 was impliedly cut down so as not to include personal correspondence of the bankrupt Mr Jonathan Aitken, even though the media would have paid substantial sums for the right to publish it.

Legal concepts (p 809)

In footnote 7, at end insert 'See also *Re Horne (a bankrupt)* [2000] 4 All ER 550 (effect of a statutory rule on the common law meaning of "signed").'

Law regulating decision making (Code s 329)

Decisions in public law (pp 817-818)

The decision-making rules do not apply where the decision is informal, not fully determinative, and open to constant review: *R v Secretary of State for the Home Department, ex p Shaw* (2000) *Times* 16 March (refusal to provide a place on prison sex offender treatment programme); or where the decision is preliminary to a further decision against which there is a right of appeal: *R v Secretary of State for the Home Department, ex p Allen* (2000) *Times* 21 March (refusal to hear prisoner on question of release under Criminal Justice Act 1991 ss 34A and 37A).

Procedural propriety (pp 820-823)

(a) In footnote 2 on page 822, at end add: 'See also *R v Falmouth and Truro Health Authority, ex p South West Water Ltd* [2000] 3 All ER 306.'

(b) In footnote 3 on page 822, at end add: 'See also *R v North and East Devon Health Authority, ex p Coughlan (Secretary of State for Health and another intervening)* [2000] 3 All ER 850 (legitimate expectation of substantive benefit where patient promised home for life)'.

Duty to give reasons (pp 825-827)

For the present reference at p 825 to *Flannery v Halifax Estate Agencies Ltd T/A Colleys Professional Services* [1999] LS Gaz 32 (see 1999 Supplement p S53) substitute '*Flannery and another v Halifax Estate Agencies Ltd* [2000] 1 All ER 373'. In that case the Court of Appeal held that where a county court judge decided a subsidence case without saying why he preferred one set of expert evidence to the other this amounted to a failure to give reasons where these were required. A new trial was ordered.

Presumed application of rules of equity (Code s 330)

Displacement by statute (pp 829-830)

As mentioned in 1999 Supplement, p S54, in *Dimond v Lovell* [1999] 3 All ER 1 at 18 Sir Richard Scott V-C refused to apply equitable doctrines by treating damages awarded where statutory requirements had not been complied with as subject to a trust in favour of the infringer. He said: '[The Consumer Credit Act 1974] has enacted that an agreement not "properly executed" is unenforceable. It is not, in my judgment, the function of the courts to remedy that unenforceability by creating a trust in favour of 1st Automotive over damages payable to Mrs Dimond'. On appeal this was upheld by the House of Lords in *Dimond v Lovell* [2000] 2 All ER 897, where it was also held that the same principle prevented the doctrine of unjust enrichment being brought into play with a like object.

Presumption that rules of contract law apply (Code s 331)

Contract law (pp 830-831)

After Example 331.1 insert-

In *The Chancellor, Masters and Scholars of the University of Oxford v Humphreys and another* [2000] 1 All ER 996 it was held that the common law rule to which Example 331.1 relates was not to be taken as impliedly overridden by UK legislation supplementary to an EEC directive. See also the note on this case at p 000 below, related to Code s 413.

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

Mens rea (pp 838-839)

In the citation from the speech of Lord Diplock in *Sweet v Parsley* (see footnote 6 on page 838) the words 'and upon reasonable grounds' should now be treated as omitted if the citation is to be seen as an accurate statement of the current law: see *B (a minor) v Director of Public Prosecutions* [2000] 1 All ER 833, where Lord Steyn said (at 851) '[t]here has been a general shift from objectivism to subjectivism in this branch of the law'. By reason of that decision, the addition to footnote 7 on page 838 inserted by the 1999 Supplement should be deleted.

Right to silence (pp 840-841)

The House of Lords held in *R v Hertfordshire County Council, ex p Green Environmental Industries Ltd and another* [2000] 1 All ER 773 that the privilege against self-incrimination does not apply to answering a request for information under the Environmental Protection Act 1990 s 71(2). The request is not part of any prosecutive procedure, and does not form even a preliminary to such a procedure. Lord Hoffmann said (at 779): 'Those powers have been conferred not merely for the purpose of enabling the authorities to obtain evidence against

offenders but for the broad purpose of protecting the public health and the environment . . . Parliament is more likely to have intended that the question of whether the obligation to provide potentially incriminating answers has caused prejudice to the defence in a subsequent criminal trial should be left to the judge at the trial, exercising his discretion under [the Police and Criminal Evidence Act 1984 s 78]. See also the note on this case at p 000 below, related to Code s 412.

Presumed application of rules of evidence (Code s 335)

Expert evidence (p 848)

'It is now clear from [the new Civil Procedure Rules] that, in addition to the duty which an expert [witness] owes to a party, he is also under a duty to the court': *Stevens v Gullis (Pile, third party)* [2000] 1 All ER 527, *per* Lord Woolf MR at 533

Estoppel in pais (p 851)

The doctrine of estoppel may not be invoked to render valid a transaction which the legislature has, on grounds of public policy, enacted is to be invalid: *Yaxley v Gotts and another* [2000] 1 All ER 711 at 718.

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

Reliance on wrongdoing (pp 860-861)

The principle does not apply where the illegality is merely incidental. In *Hall v Woolston Hall Leisure Ltd* [2000] 4 All ER 787 it did not prevent the claimant recovering under the Sex Discrimination Act 1975 s 6(2)(b) merely because she had acquiesced in her employer's defrauding the Revenue by not deducting tax from her wages.

Defences (pp 861-862)

In footnote 1 on page 862, at end insert 'at 343; cited *Hall v Woolston Hall Leisure Ltd* [2000] 4 All ER 787 at 806'.

Judicial initiative (pp 863-864)

In *Webb v Chief Constable of Merseyside Police, Porter and another v Chief Constable of Merseyside Police* [2000] 1 All ER 209 the Court of Appeal held that, in the absence of statutory authority covering the case, the court should not countenance the expropriation of property by a public authority even where the property appeared to derive from the proceeds of unlawful drug smuggling.

De minimis principle (Code s 343)

General principle

The de minimis exception also applies where common law principles are treated as imported: see the views of the Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd and another* [2000] 1 All ER 65 at 71 (while the older cases speak of disqualification if the judge has an interest in the outcome of the proceedings 'however small', there has in more recent

authorities been acceptance of a de minimis exception). See also the note on this case at p 000 below, related to Code s 348.

Fractions of a day (pp 870-871)

The inclusive rule applies where the period is expressed to be one 'beginning with' a specified date: ***Zoan v Rouamba*** [2000] 2 All ER 620 ('beginning with the date of the agreement' in Consumer Credit (Exempt Agreements) Order 1989, art 3(1)(a)(i)).

Judge in own cause (Code s 348)

General principle (pp 884-886)

Following the decision of the House of Lords in ***R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)*** [1999] 1 All ER 577, which extended the principle of automatic disqualification for financial interest 'to a limited class of non-financial interests', *per* the Court of Appeal in ***Locabail (UK) Ltd v Bayfield Properties Ltd and another*** [2000] 1 All ER 65 at 71, the detailed governing elements of the 'judge in own cause' principle were authoritatively reviewed and restated in the latter case. See also the note on that case at p 000 above, related to Code s 343.

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

Surplusage (p 900)

For the presumption against surplusage, which may also be called redundancy, see also Code p 955. In ***Walker (Inspector of Taxes) v Centaur Clothes Group Ltd*** [2000] 2 All ER 589 at 595 Lord Hoffmann said: 'I seldom think that an argument from redundancy carries great weight, even in a Finance Act. It is not unusual for Parliament to say expressly what the courts would have inferred anyway.'

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

(a) At the end of the passage inserted at Code p 901 by para (a) in the 1999 Supplement p S60 insert: 'See also ***Newspaper Licensing Agency Ltd v Marks and Spencer plc*** [2000] 4 All ER 239 at 260 (paras 90, 91)'.

(b) At end of footnote 3 on page 901 insert: 'In ***Re B (deceased)*** [2000] 1 All ER 665 at 673 Robert Walker LJ described the conclusion in ***Re Beaumont, Martin v Midland Bank Trust Co Ltd*** [1980] Ch 444 as "questionable"'.

Interpretation of broad terms (Code s 356)

Opening (pp 905-906)

In footnote 11 on page 906 (which concerns the interpretation of the Supreme Court Act 1981 s 29(3)), add at end references to ***R v Crown Court at Winchester, ex p B (a minor)*** [1999] 4 All ER 53 and ***R v Crown Court at Manchester, ex p H and another*** [2000] 2 All ER 166.

Composite expressions (Code s 364)

Overlap in meaning (p 926)

The Justices of the Peace Act 1997 s 16(4)(b) allows for the removal of a magistrate for 'inability or misbehaviour'. The Sheriff Courts (Scotland) Act 1971 s 12 provides for the removal of a sheriff for 'inability, neglect of duty or misbehaviour'. This raises the question whether a magistrate can be removed under the 1997 Act for neglect of duty. Is there an overlap in meaning in the 1971 Act phrase 'neglect of duty or misbehaviour'? In other words is neglect of duty a form of misbehaviour? On the likely supposition that it is, the phrase 'inability or misbehaviour' in the 1997 Act has the same legal meaning as the phrase 'inability, neglect of duty or misbehaviour' in the 1971 Act.

Terms with both ordinary and technical meaning (Code s 368)

On page 935 insert the following after Example 368.3A-

Example 368.3B The Housing Act 1985 s 91(1) says a secure periodic tenancy 'is not capable of being assigned' except in circumstances not relevant in the instant case. Two women were joint tenants. One moved out, executing a deed of release of her interest. It was held by the House of Lords in *Burton v Camden London Borough Council* [2000] 1 All ER 943 (Lord Millett dissenting) that, although 'assigned' has a narrow technical meaning excluding a release, as a matter of ordinary usage it is wide enough to include a release. To avoid an artificial result, the wide meaning must be given here.

Expressum facit cessare tacitum (Code s 389)

Example 389.0 was inserted by the 1999 Supplement. The decision to which it refers was reversed by the House of Lords in *B (a minor) v Director of Public Prosecutions* [2000] 1 All ER 833 on the ground (among others) that the Sexual Offences Act 1956 is a 'ragbag' of various provisions drawn from different statutes, and is therefore incapable of supporting the implication referred to in the example.

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

In *Re O (a child) (blood tests: constraint) Re J (a child) (blood tests: constraint)* [2000] 2 All ER 29 the words of designation were words in the Family Law Reform Act 1969 s 21(3) which provide an exception in the case of a person under sixteen from the prohibition in s 21(1) from taking a blood sample from a person without their consent. *Held* The *expressio unius* principle applied, so that no other type of exception could be taken as intended.

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

Where an Act specifically lays down protective provisions against abuse of process under it this may remove the court's inherent power to treat improper action under the Act as such an abuse, even though the specific protective provisions may be considered inadequate: *Re Gilligan* [2000] 1 All ER 113 (proceedings under Backing of Warrants (Republic of Ireland) Act 1965). See also the note on this case at p 000 above, related to Code s 123.

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

In *R v A* [2000] 2 All ER 177 at 182 Clarke LJ said 'If an event or state of affairs A is caused by B, C and D, it can, in our judgment, fairly be said that each of B, C and D causes A'. The case concerned the legal meaning of the Child Abduction Act 1984 s 3(a) ('a person shall be regarded as taking a child if he causes or induces the child to accompany him . . .').

Proportionality (Code s 406)

Margin of appreciation (1999 Supplement p S66)

In *Krasner v Dennison and others; Lawrence v Lesser* [2000] 3 All ER 234 at 255 Chadwick LJ said 'national authority is, in principle, better placed than the international judge to appreciate what is in the "public interest"; and so must be allowed a certain margin of appreciation: see the observations of the European Court of Human Rights in *James v UK* (1986) 8 EHHR 123 at 142 (para 46)'.

Interpretation of Community law (Code s 410)

Subsections (4) and (5) (pp 999-1000)

In footnote 6 on page 1000, at end insert 'The de minimis maxim was applied to a directive in *Berkeley v Secretary of State for the Environment and others* [2000] 3 All ER 897 [HL].'

Direct effect of Community law (Code s 411)

In *Hall v Woolston Hall Leisure Ltd* [2000] 4 All ER 787 at 802-803 Mance LJ said-

'57. The [Council Directive (EEC) 76/207 (sex discrimination)] cannot be relied on as creating any rights directly enforceable in the present case, since the respondent is a private sector employer (see *Coote v Granada Hospitality Ltd* Case C-185/97, [1998] All ER (EC) 865 at 876, [1998] ECR I-5199 at 5219 (para 17)). But it has been stated repeatedly by the Court of Justice that-

> "the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty [of Rome] to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced to implement Directive No 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189."

58. The quotation is from para 26 of the Court of Justice's decision in *Von Colson v Land Nordrhein-Westfalen* Case 14/83 [1984] ECR 1891 at 1909. The reference to the third paragraph of art 189 (now art 249 EC) is to the provision in the EC Treaty making directives binding as to the result to be achieved on all member states, but leaving to national authorities the choice of forum and methods.'

Transposing of Community law (Code s 412)

(a) In *R v Hertfordshire County Council, ex p Green Environmental Industries Ltd and another* [2000] 1 All ER 773 Lord Hoffmann said (at 780) 'There is no dispute that since [the Environmental Protection Act 1990] gives effect to a directive, it must be interpreted according to the principles of Community law, including its doctrines of fundamental human rights'. See also the note on this case at p 000 above, related to Code s 334.

(b) Where a period is allowed for transposition of a directive, the directive nevertheless has legal effect with respect to the member states from the moment of its notification. The transposition period is simply to give member states the necessary time to adopt transposition measures. See *R v Secretary of State for Health and others, ex p Imperial Tobacco Ltd and others* [2000] 1 All ER 572, *per* Lord Woolf MR at 586.

(c) Where a required transposition has not been effected by the state the position regarding remedies is subject to the rule in European jurisprudence that a breach has vertical but not horizontal effect.

Example 412.3 Council Directive 85/337/EEC (OJ1985 L175/40) requires member states to ensure that, before development consent is given for quarrying, an assessment of significant environmental effects is carried out. The Planning and Compensation Act 1991 Sch. 2 para. 2(6)(b) purports to give a deemed planning consent without the need for such an assessment. *Held* This deemed consent must be treated as ineffective. In *R v Durham County Council and Others, ex p Huddleston* (2000) *Times* 15 March Sedley LJ said-

> 'The question is whether the possibility of giving that Directive direct effect by disapplying the deeming provision is precluded by the consequence that to do so would impermissibly alter the legal relations between two persons, the applicant and the developers, neither of whom is part of the state. In other words, is this the forbidden territory of horizontal direct effect?'

The Court of Appeal answered in the negative, holding that in treating the deemed consent as ineffective it was giving the Directive a vertical effect which clothed the planning authority with power of control over the development which it should have been given by the state.

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

(a) See *Perceval-Price and Others v Department of Economic Development and Others* Times 28 April 2000 (Equal Pay Act (Northern Ireland) 1920 s 1(9) and relevant order to be read with the omission of certain words).

(b) At the end of subsection (2) on page 1004 insert 'However there is a presumption that an enactment is compatible with a Community law provision unless and until it has been declared incompatible by a competent court'.

(c) After subsection(5) on page 1005 insert: '(5A) If the Community law provision does not deal comprehensively with the matter in question, but leaves space for certain details to be laid down by a UK enactment, the latter is to be given a purposive construction which so far as possible gives effect to the Community law provision.'

Section 413(2) (pp 1006-1008)

(a) At the end of footnote 3 on page 1007 insert: 'This was followed by the House of Lords in *Imperial Chemical Industries plc v Colmer (Inspector of Taxes)* [2000] 1 All ER 129 (holding company as defined in Income and Corporation Taxes Act 1988 s 413(3)(b) holding shares in companies some of which resident within EU and some not).

(b) Before the introductory words *Subsections (3)-(5)* on page 1008 insert-

> 'The presumption that an enactment is compatible with a Community law provision unless and until it has been declared incompatible by a competent court was laid down in *Factortame Ltd v Secretary of State for Transport* [1990] 2 AC 85, *per* Lord Bridge at 142: see *R v Secretary of State for Health and others, ex p Imperial Tobacco Ltd and others* [2000] 1 All ER 572, *per* Lord Woolf MR at 584.'

Section 413(3)-(5) (p 1008)

In *Director General of Fair Trading v First National Bank plc* [2000] 1 All ER 240 at 250 Evans-Lombe J said: 'The origin of [the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159] is Council Directive (EEC) 93/13. It is clear, therefore, that the words "good faith" are not to be construed in the English law sense of absence of dishonesty but rather in the continental civil law sense'. The validity of this dictum was not affected by the reversal of his decision by the Court of Appeal at [2000] 2 All ER 759. [HL 2002 1 All ER 97]

New section 413(5A)

On page 1010, before the note headed '*Subsection (6)*, insert-

Subsection (5A) A Community law provision may not deal comprehensively with a matter, leaving space for certain details to be laid down by a UK enactment. Here the latter is to be given a purposive construction which so far as possible gives effect to the Community law provision. For example in *The Chancellor, Masters and Scholars of the University of Oxford v Humphreys and another* [2000] 1 All ER 996 Roch LJ said (at 1023)-

> 'The [CJEC] has decided that where the transfer of an undertaking takes place an employee is entitled to decide not to continue the contract of employment or employment relationship with the transferee. The [Council Directive (EEC) 77/187 (the acquired rights directive)] cannot be interpreted as obliging the employee to continue his employment relationship with the transferee. Where the employee decides not to continue with the transferee, the court has left it to member states to provide whether in such cases the contract of employment or employment relationship must be regarded as terminated either by the employee or the employer.'

See also the note on this case at p 000 above, related to Code s 331.

Human Rights Act 1998

In *R v Broadcasting Standards Commission, ex p British Broadcasting Corporation (Liberty intervening)* [2000] 3 All ER 989 at 996 Lord Woolf MR commented on the requirement in the Human Rights Act 1998 s 3 that, so far as it is possible to do so, legislation must be read and given effect in a way which is compatible with the Convention rights. He said that legislation may well be compatible with the Convention rights if it provides *greater* protection than is required by those rights. This is in accordance with the principle that the greater includes the less (see Code pp 429-431). If a requirement is that *x* amount of protection be given, it must be satisfied by giving an amount greater than *x*.

For a detailed discussion of s 3 see Bennion, 'What interpretation is "possible" under section 3(1) of the Human Rights Act 1998?' PL [2000] 77.