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For full version of abbreviations click 'Abbreviations' on FB's website.

CITATIONS OF FB'S STATUTORY INTERPRETATION

Note The citations below consist of other writings which expand the treatment in the book while mentioning passages from the book. Citations included on this document are:

Citation 1

Extract from 'A Unified Theory of Statutory Interpretation'

by R.N. Graham, Assistant Professor, Faculty of Law, University of New Brunswick.

Citation 2

'Systems Dynamics in the Law: A Comparative Approach to Certainty in the Common Law and Reviewability of Past Decisions'

by Orlan Lee

Citation 3

PART XV THE FUNCTIONAL CONSTRUCTION RULE

Section 250 (Examples)

The Irish Law Reform Commission (LRC-CP14-1999),Consultation paper on statutory drafting and interpretation, plain language and the law.

Citation 4

PART XVII PRINCIPLE AGAINST DOUBTFUL PENALISATION

The Irish Law Reform Commission (LRC-CP14-1999),Consultation paper on statutory drafting and interpretation, plain language and the law.

Citation 5

Review by Paul Michell of

'*Dynamic Statutory Interpretation* by William N. Eskridge, Jr.', *McGill Law Journal* Vol 41 Page 714

Citation 6

PART XXVIII LINGUISTIC CANONS OF CONSTRUCTION - ELABORATION OF MEANING OF WORDS AND PHRASES

Citation 7

'The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession', Murray Hunt

26.1 *Journal of Law and* Society, March 1999, pp. 86-102 at 98.

Citation 1

Extract from 'A Unified Theory of Statutory Interpretation'

by R.N. Graham, Assistant Professor, Faculty of Law, University of New Brunswick.

The text of the article is drawn from "A Unitarian Theory of Statutory Interpretation", R.N. Graham, 1999, York University. That paper elaborates the ideas set out in this article by reference to the theories of deconstruction and critical legal studies.

36

Like William Eskridge, Coté contends that dynamic interpretation does a better job than originalism in "dealing with the dynamic relationship between drafter and interpreter". [71] According to Coté, the drafters of statutory language do not establish the legislation's meaning, as meaning "is born of interpretation".[72] Over time, as the law is applied to more and more unforeseen situations, the statute's meaning evolves into something beyond that which was envisioned by its drafters. Francis Bennion describes the forces behind this evolutionary process as follows:

> 'Each generation lives under the law it inherits. Constant formal updating is not practicable, so an Act takes on a life of its own. What the original framers intended sinks gradually into history. While their language may endure as law, its current subjects are likely to find that law more and more ill-fitting'.[73]

The dynamic interpreter of language, unlike the originalist, plays an active role in the development of meaning.

[71] Coté, 20
[72] Coté, 20.
[73] Francis Bennion, *STATUTORY INTERPRETATION*, 2nd ed. (London: Butterworths, 1992), 618.

Citation 2

There are two citations in the article:

‘Systems Dynamics in the Law: A Comparative Approach to Certainty in the Common Law and Reviewability of Past Decisions’

by Orlan Lee

http://ouclf.iuscomp.org/articles/lee2.shtml#fn15sym -

(1) in footnote 14 the author says that *STATUTORY INTERPRETATION* is ‘a key reference work’;
(2) footnote 45 includes the following: ‘As he [that is FB] says [p. 3 in 4th edn], “statutory interpretation keys into the whole system of law”’.

Citation 3

PART XV THE FUNCTIONAL CONSTRUCTION RULE

Section 250 (Examples)

Citation from:

The Irish Law Reform Commission (LRC-CP14-1999),Consultation paper on statutory drafting and interpretation, plain language and the law.

http://www.lawreform.ie/publications/data/lrc103/lrc_103.html

III. Aids To Understanding
1. Use of Examples
5.68
There is increasing evidence to show that the use of examples substantially improves understanding. Research at the Communications Design Centre in Pittsburgh unearthed the so-called “scenario principle”, that is the tendency of readers when confronted with difficult concepts to create scenarios to help them understand the meaning.[35]
5.69
The intelligibility of Acts could also be improved by the use of examples showing how provisions apply to particular cases. In its comprehensive examination of statute law, the Renton Committee recommended that more use be made of examples and that these should be set out in schedules.[36] This practice has also been recommended by the Law Reform Commission of Victoria and used in their rewrites of existing legislation.
5.70
Examples would help not only the general public and administrators who have the day to day administrating of legislation, but also the legal profession and the judiciary in that they would have a speedier and more complete understanding of the intention of the legislature and how the legislation applies to the matter in hand.[37]
5.71
There are many ways of using examples. Simple illustrations can be used. Illustrations can also be given of how a complicated section works. This technique was used in the *Consumer Credit Act, 1974* (U.K.). Numerous definitions and examples were put in a Schedule to the Act.
5.72
In the codes of India examples were used in a third way, to explain the meaning of a particular section.
Section 5 of the *Indian Evidence Act, 1872*, reads:

> “ 5. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of others.
>
> Illustrations
>
> (a) A is tried for the murder of B by beating him with a club with the intention of

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[35] Flower, Hayes and Swartz, *Revising Functional Documents: the Scenario Principle*, Communications Design Centre Carnegie-Mellon University, (Pittsburgh 1950), Technical Report No. 10.
[36] Renton Report, *op cit*. fn.32, at para.10.7.
[37] Appendix to Clarity's submission to the Hansard Society, June 1992, at pp.1–2.

causing his death.

> At A's trial the following facts are in issue:-
> A's beating B with a club;
> A's causing B's death by such beating;
> A's intention to cause B's death."

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5.73

How are examples to be interpreted? As part of the Act, as superior to the Act or as having no binding effect? Bennion is of the view that examples in an Act should be treated as detailed indications of how Parliament intend the legislation to operate, but that the example is not to be given precedence over the Act. If there is a conflict of meaning, the Act is given preference.[38] This is the same solution reached in Australia. Section 15AD of the *Interpretation Act (Australia)* provides:

> " Where an Act includes an example of the operation of a provision:
> the example shall not be taken to be exhaustive; and
> if the example is inconsistent with the provision, the provision prevails."

5.74

In the Irish context, we would suggest that, in general, the best place to give examples would be in the explanatory memorandum which is produced with every Bill. However, the Commission recognises that examples are extremely useful where there are, for example, complex mathematical formulae included in an Act. In such cases examples in the text of the act would be appropriate.

5.75

The Commission provisionally recommends that examples should be used in legislation where they would assist in the application of a formula. The Commission does not however favour the use of examples in legislation as a general rule, and, except in the case of formulae, would provisionally recommend the use of examples in explanatory memoranda rather than in the text of an Act.

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[38] BENNION, *STATUTORY INTERPRETATION* (2nd ed. 1992) at p.504.

Citation 4

PART XVII PRINCIPLE AGAINST DOUBTFUL PENALISATION

Citation from:

The Irish Law Reform Commission (LRC-CP14-1999),Consultation paper on statutory drafting and interpretation, plain language and the law.

http://www.lawreform.ie/publications/data/lrc103/lrc_103.html

Presumption that Penal and Revenue Statutes be Construed Strictly

1.089

Given the importance of preserving the rights of the accused, statutes which are "penal" (a broad term) in their nature will be construed by the courts as strictly limited. Penal liability will not be implied by the courts in the absence of clear and unambiguous words.

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1.090

Maxwell identifies four aspects of the rule that penal statutes must be strictly construed:

1) the requirement of express language for the creation of an offence;
2) strict interpretation of the words setting out an offence;
3) fulfilment to the letter of statutory conditions precedent to the infliction of punishment;
4) strict observance of technical provisions concerning criminal procedure and jurisdiction.[124]

1.091

In Re *Emergency Powers Bill, 1976* [125] O'Higgins J noted in relation to the Bill that:

" [a] statutory provision of this nature which makes such inroads on the liberty of the person must be strictly construed. Any arrest sought be justified by the section must be in strict conformity with it. No such arrest may be justified by importing into the section incidents or characteristics of an arrest which are not expressly or by necessary implication authorised by the section." [126]

1.092

The principle was followed in *The People (DPP) v Farrell*[127] which concerned the construction of section 30 of the *Offences Against the State Act, 1939*. O'Higgins J stated:

" The Act of 1939 must be strictly construed. It is legislation of a penal kind which was passed for a special purpose and which has the effect of interfering with the normal rights and liberties of citizens." [128]

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[124] SIR PETER MAXWELL, MAXWELL ON THE INTERPRETATION OF STATUTES, (12th ed. 1969) at pp.239–40

[125] [1977] IR 159

[126] *ibid.* at p. 173.

[127] [1978] IR 13

[128] At p.25.

1.093

In *Aamand v Smithwick* [129] it was held that the provisions of an extradition statute were also subject to the rule of strict construction, since they incorporated into Irish law a penal statutory code and resulted in penal sanctions against the individual.[130]

1.094

In *Mullins v Harnett*[131] the rules regarding the interpretation of penal statutes were carefully scrutinised by O'Higgins J. Relying on Maxwell and Bennion, he found that the principle of strict interpretation was to be applied only following the application to the statute of the normal principles of statutory interpretation. Only if the application of these principles left the meaning of the statute open to continuing doubt, was the principle of strict construction to be applied in order to give the benefit of the doubt to the individual as against the State.

Start of page 25

1.095

The application of the presumption beyond criminal statutes was emphasised by O'Higgins J in *Mullins v Hartnett* when he said: "Penal statutes are not only criminal statutes, but any statutes that impose a detriment."[132] The application of strict construction to taxation statutes was confirmed in *Inspector of Taxes v Kiernan* [133] Henchy J stated:

" when a word or expression is used in a statute creating a penal or taxation liability, then if there is looseness or ambiguity attaching to it, it should be construed strictly so as to prevent the fresh imposition of liability from being created unfairly by the use of oblique or slack language." [134]

1.096

In *Kinsale Yacht Club v Commissioner of Valuation*[135] the Supreme Court held that the principle of strict construction did apply to section 5 of the *Valuation Act, 1988*, although the Act was not a criminal or taxation statute. The Court held that the important factor was that the provision led to the "fresh imposition of liability" as referred to in *Inspector of Taxes v Kiernan*.[136]

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[129] [1995] 1 ILRM 61
[130] *Per* Finlay CJ at p.67 referring to the *Extradition Act, 1965*
[131] [1988] 2 ILRM 304
[132] At p.310
[133] [1982] ILRM 13
[134] At p.15
[135] [1994] 1 ILRM 457
[136] op cit. fn.133.

Citation 5

Extract from:

Review by Paul Michell of *'Dynamic Statutory Interpretation* by William N. Eskridge, Jr.',

***McGill Law Journal* Vol 41 Page 714**

'. . . Some traditional texts, it is true, are quite sophisticated and nuanced and reveal a great deal of learning.[11] For the most part, however, they are resolutely non theoretical and, thus, prone to accusations of being merely "black-letter law". They treat the subject as a mere set of rules.

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[11] See the wonderfully idiosyncratic F.A.R. Bennion, Statutory Interpretation, 2d ed. (London: Butterworths, 1992).

Citation 6

PART XXVIII LINGUISTIC CANONS OF CONSTRUCTION - ELABORATION OF MEANING OF WORDS AND PHRASES

Citation from:

The Irish Law Reform Commission (LRC-CP14-1999), Consultation paper on statutory drafting and interpretation, plain language and the law.

http://www.lawreform.ie/publications/data/lrc103/lrc_103.html

1.058

The principal maxims and presumptions, and their application in the Irish courts, are set out below.

The Importance of Context: The Noscitur a Sociis and Ejusdem Generis Rules

Noscitur a Sociis

1.059

The rule of noscitur a sociis states that words of a statute are to be construed in the light of their context. [68]It may be translated as 'a thing is known by its associates'. In the English case of *Bourne v Norwich Crematorium Ltd*, [69]Stamp J explained the rule as follows:

> ' English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back again into the sentence with the meaning which you have assigned to them as separate words, so as to give the sentence or phrase and meaning which as a sentence or phrase it cannot bear without distortion of the English language.' [70]

1.060

In *People (Attorney General) v Kennedy,* [71] the Supreme Court was required to interpret section 29 of the *Courts of Justice Act, 1924,* which granted a right of appeal without any express limitation as to who could bring the appeal. The Supreme Court rejected a literal interpretation of the section and held that the right of appeal was impliedly limited to the accused person. Black J viewed the approach of the Court in this case as part of a wider principle that statutory provisions should be interpreted in context, which encompassed both the noscitur a sociis and the ejusdem generis rules.[72]

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[68] See the dicta of Viscount Simonds in *AG v Prince Ernest Augustus of Hanover [1957]* AC 436 at p.461: 'Words, and particularly general words, cannot be read in isolation; their colour and their content are derived from the context.'

[69] [1967] 2 All ER 576

[70] At p.578. Cited with approval in *Dillon v Minister for Posts and Telegraphs*, Supreme Court Unreported, 3 June 1981.

[71] [1946] IR 517

[72] See also *Dillon v Minister for Posts and Telegraphs*, op cit. fn.70; *United States Tobacco International Inc v Minister for Health* [1990] 1 IR 394.

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1.061

He explained the importance of the rules as follows:

> ‘ A small section of a picture, if looked at close-up, may indicate something quite clearly; but when one stands back and examines the whole canvas, the close-up view of the small section is often found to have given a wholly wrong view of what it really represented. ’ [73]

He went on to say:

> ‘ If one could pick out a single word or phrase and, finding it perfectly clear in itself, refuse to check its apparent meaning in the light thrown upon it by the context or by other provisions, the result would be to render the principle of *ejusdem generis* and *noscitur a sociis* utterly meaningless; for this principle requires frequently that a word or phrase or even a whole provision which, standing alone, has a clear meaning must be given quite a different meaning when viewed in the light of its context. ’ [74]

1.062

In *HMIL Limited (Formerly Hibernia Meats International Ltd) v Minister For Agriculture and Food*, [75] the *noscitur a sociis* and *ejusdem generis* rules were applied. In construing EC regulations on the export of beef, Barr J held that, on an application of the *noscitur a sociis* rule, ‘the Court should recognise the common denominator between 'scraps' and 'large tendons, cartilages, pieces of fat', i.e. that all are unfit for human consumption.[76]

Ejusdem Generis

1.063

The *ejusdem generis*, or ‘of the same genus’ rule, is similar though narrower than the more general rule of *noscitur a sociis*. It operates where a broad or open-ended term appears following a series of more restrictive terms in the text of a statute. Where the terms listed are similar enough to constitute a class or genus, the courts will presume, in interpreting the general words that follow, that they are intended to apply only to things of the same genus as the particular items listed. Bennion defines the *ejusdem generis* rule as,

> ‘ a principle of construction whereby wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character.’ [77]

1.064

The *ejusdem generis* rule was applied by O'Higgins J in *The People (DPP) v Farrell*, [78]in the construction of section 30 of the *Offences Against the State Act, 1939*. It was argued that the detention of the applicant in a garda car for a period of hours during the course of his questioning was unlawful and that his subsequent detention in a garda station was therefore also unlawful. The legality of the

Start of page 17

detention turned on whether a garda car could be regarded as a ‘convenient place’ in accordance with the legislation. O'Higgins J considered that it could not, since the *ejusdem*

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[73] [1946] IR 517 at p.536.
[74] *ibid.*
[75] High Court Unreported, 8 February 1996.
[76] At p.32 of the transcript.
[77] FRANCIS BENNION, *STATUTORY INTERPRETATION*, (2nd ed. 1992) at p.858.
[78] [1978] IR 13

generis rule required that the term be construed in the light of the other places of detention listed: 'Garda Síochána Station, a prison, or some other convenient place'. The rule required, at a minimum, that 'other convenient place' should be a building of some kind.[79]

1.065

In *HMIL Limited (Formerly Hibernia Meats International Ltd) v Minister For Agriculture And Food*, [80]the *ejusdem generis* rule was applied along with the *noscitur a sociis* rule. Barr J considered that a provision listing 'other scraps left over from cutting or boning' at the end of a list of more specific items – bones, cartilages – was 'an apposite illustration of the *ejusdem generis* principle in operation.' He found that, according to the rule, 'other scraps' should be interpreted as including all unspecified items which were not fit for human consumption.' [81]

1.066

More recently, the presumption was applied in the High Court by Barr J in *Royal Dublin Society v Revenue Commissioners*.[82] Barr J held that section 7 of the Excise Act, 1835, which allowed the Revenue Commissioners to grant a liquor licence to ' . . . a theatre or other place of public entertainment' was a provision to which the *ejusdem generis* rule applied. He found that there was nothing in the Act to suggest that 'other place of public entertainment' was meant in a wider sense to that applicable to 'theatre' and that therefore it should be interpreted only as referring to places of public entertainment which were similar to, or within the same genus as, 'theatre', in other words to 'a performance for the benefit of the public with a defined time frame and where seating is provided for patrons.' [83]

1.067

The *ejusdem generis* rule will not apply where there is a list of items which do not constitute a genus, or where only one item is listed. In *Kielthy v Ascon Ltd* [84] it was emphasised by O Dalaigh CJ that the *ejusdem generis* rule could only apply where antecedent categories establish a genus. He held that this was not the case where, as in the provision to be interpreted by the court, the general words were preceded by the enumeration of only one category. In *Dublin Corporation v Dublin Cinemas Ltd* [85] it was held that a list of words in a statute which included playgrounds, recreation grounds and 'any building adapted for use as a shop' was too broad and included items which were too incongruous to constitute a genus, and that therefore the *ejusdem generis* rule did not apply.

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1.068

The courts will also refuse to apply *ejusdem generis* where a statute contains general words, which are then followed by a list of particular items: in such cases the list of items is not regarded as limiting. In *Application of Quinn*, [86]Griffin J pointed out the limitations of

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[79] However, O'Higgins J held that the detention continued to be in the Garda station, and that this encompassed the agreed journey in the car and return i.e. the detention did not end by reason of the car journey.

[80] *op cit.* fn.69

[81] At p.33 of the transcript. Barr J noted that the application of the *noscitur a sociis* and *ejusdem generis* rules had precisely the same effect as regards the interpretation of the statute as would an application of the principles of teleological interpretation.

[82] [1998] 2 ILRM 487

[83] In *Point Exhibition Company v Revenue Commissioners* [1993] 2 IR 551, Geoghegan J expressed doubt (obiter) that a dance hall could be described as a 'place of public entertainment' under the same section, having regard to the *ejusdem generis* rule. See also *Irish Commercial Society v Plunkett* [1986] IR 258; *CW Shipping Co Ltd v Limerick Harbour Commissioners* [1989] ILRM 416.

[84] [1970] IR 122

[85] [1963] IR 103

[86] [1974] IR 19

ejusdem generis, and emphasised that it was a presumption rather than a rule: '. . .the *ejusdem generis* rule is one to be applied with caution as it is a mere presumption which applies in the absence of any other indications of the legislature.' [87]He found that the *ejusdem generis* presumption did not apply to the construction of section 2 of the *Public Dance Halls Act, 1935*, since the general words preceded the particular words, rather than followed them.

[87] ibid. p.30.

Citation 7

‘The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession’, Murray Hunt

26.1 *Journal of Law and* Society, March 1999, pp. 86-102 at 98.

‘The assimilationist tendency of the prevailing [legal] culture ought not to be underestimated. A good example is the way in which practitioners’ texts explain the significance of recent legal developments for busy practitioners with too little time to reflect on them. In the 1992 edition of the practitioner’s bible on statutory interpretation, Bennion’s *Statutory Interpretation: A Code*, for example, the status of fundamental rights had become such as to merit inclusion in part XVII of the author’s Code of Interpretation, as part of a wider general principle ‘against doubtful penalisation’. In other words, the recent enthusiasm of some judges for construing statutes against a background presumption in favour of fundamental rights is explained as just one more manifestation of the well-established technique of construing the language of statutes strictly so as to minimize the extent to which they interfere with values such as property or personal liberty. Such is the power of the prevailing categories of thought that no development is sufficiently fundamental or significant that it cannot be fitted neatly within those categories, with the minimum of disturbance to the underlying premises about what law is and what legal actors do.’