

The Contribution of Scottish Cases to Developing United Kingdom

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Lady Hale, President of the Supreme Court

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It is a great pleasure to be back in Scotland. I was here only last week, for the launch of the common law LLB at the University of Glasgow and will be back in a fortnight's time for the Writers to the Signet Society. In the Supreme Court of the United Kingdom, we are very conscious that we serve all parts of the United Kingdom and not just England and Wales. So it was a particular pleasure last year, at long last, to take up the proposal made by the Law Society of Scotland to the Royal Commission on Scottish Affairs in 1954, that the apex court in the United Kingdom should sit in Scotland. Better late than never. Your proposal was not supported by the Faculty of Advocates, but you will know better than I why that might be so.

We are also very conscious, in the Supreme Court of the United Kingdom, of the contribution made by Scottish cases, and also by Scottish lawyers, to the development of United Kingdom law. But the first thing I was asked by Peter Nicholson, who interviewed me for your Journal, was 'is there such a thing as UK law? Doesn't it just mean applying English law to whole UK?' I hope this is not just a repetition of the great Professor TB Smith's complaint about the anglicisation of Scots law. Obviously, there is such a thing as UK law which is not same as English law. There are at least three aspects to this:

- (1) There are many common law rules and principles which are the same north and south of the border. The most obvious examples are the law of negligence, much of private international law, and the general principles of public law.
- (2) A great deal of legislation is applicable to the whole UK – the whole of EU law, the Human Rights Act, immigration and asylum law, social security law, employment and equality law, much of tax law. There is also some legislation, such as the Abortion Act 1967, which is applicable to Great Britain but not to Northern Ireland.

- (3) Devolution issues – though particular to Scotland, Wales or Northern Ireland – are issues in UK constitutional law and in which the UK Supreme Court can play the role of a continental style constitutional court.

Common law

In relation to the common law, the complaint has often been made about the anglicisation of Scots law. But if that is so, dare I say it, the Scots themselves bear some of the blame.

Consider the history of the right of appeal to the House of Lords, which gave the English the great opportunity of influencing Scots law, but has in later years given the Scots the great opportunity of influencing English law. Before the Treaty of Union, 50 Scottish advocates were disbarred for asserting that there existed a right of appeal from the Court of Session to the Convention of Estates. In the Claim of Right of 1689, the Convention of Estates enacted a right to protest to the King and Parliament for ‘remeid of law’ against ‘sentences’ of the Court of Session. Stair took the view that this was not a general right of appeal but only applied to exceeding jurisdiction. But appeals to the English House of Lords were already well-established south of the border. The Treaty of Union, as we all know, preserved the Scottish justice system and expressly provided that ‘no Causes in Scotland be cognizable by the Courts of Chancery, Queen’s Bench, Common Pleas, or any other Court in Westminster Hall’. But the House of Lords did not sit in Westminster Hall and was not a court like any of the courts named. It very soon accepted that it had jurisdiction (*Greenshields v Magistrates of Edinburgh* (1709) 1 Rob 12). And it became very popular with the Scots. Everyone likes the possibility of an appeal, especially if it works as a delaying tactic. There were many more Scottish appeals than English appeals. This became such a problem that they introduced a limit to interlocutory appeals which persists to this day – these are only as of right if the Court of Session is not unanimous; otherwise only that court can give permission to appeal (Court of Session Act 1808).

We have a current example of that very thing. There are Scottish proceedings claiming that the article 50 notification to leave the European Union can be withdrawn. This raises an issue of European Union law which was deliberately not raised by either side in the case of *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61, because it might well have led to a reference to the Court of Justice. The Lord Ordinary declined to make a reference

because there was no real prospect of the notice being withdrawn. The Inner House has taken a different view and made the reference. The Court of Justice has arranged to hear it in November. Meanwhile the government has applied for permission to appeal. This is to be heard the week after next. If permission refused, that is the end of the matter, because it is interlocutory and the Inner House was unanimous.¹

Back to the 18th and 19 centuries. Scottish enthusiasm for appealing to the House of Lords continued almost unabated. And this despite the fact that, although Scotsmen such as Lord Mansfield became eminent lawyers in England, there was no Scottish Law Lord until 1867. It was only after the creation of the first life peers, the Lords of Appeal in Ordinary, in 1876 that it became the practice to have at least one Scottish Law Lord. Since the expansion in our numbers it has become the universal practice to have two, although the Constitutional Reform Act 2005 only requires that we should have at least one Justice with knowledge and experience of the law and practice in each part of the United Kingdom.

Having no Scottish Law Lord to keep them order, despite the huge volume of Scottish appeals, it is perhaps unsurprising that the English lawyers assumed that the law was the same north and south of the border, although they did have the judgments of the Court of Session before them to teach them otherwise. T B Smith complains that ‘sometimes in 18th and 19th centuries a policy of anglicising Scots law was pursued in a deliberate and indeed offensive manner’ (T B Smith, The Hamlyn Lectures, *British Justice: The Scottish Contribution*, London, Stevens, 1961, p 85). More commonly, however, English judges blandly assumed that English law reflected ‘principles of universal justice’ which must also be applicable in Scotland. The most notorious example is *Bartonsbill Coal Co v Reid* (1858) 3 Macq 266, 285, where Lord Cranworth said of the doctrine of common employment, ‘if such be the law of England, on what ground can it be argued not to be the law of Scotland?’ In that case, a miner was killed by the negligent operation of the machinery for getting him up to the surface. The Inner House held the employer liable – the miner and the machine operator were not *collaborateurs* – hewing coal and lifting it to the surface were different operations. The House of Lords said that they were both engaged in getting coal from the pit. It is interesting to note that Lord Inglis, later a great Lord President, argued unsuccessfully for the Coal Company in the Court of Session but appeared for the pursuer, Mrs McGuire, in another

¹ After this lecture was delivered, the Inner House did refuse permission and the Supreme Court held that it did not have jurisdiction to entertain an appeal, and the Court of Justice of the European Union held that the Article 50 notice could be unilaterally withdrawn: *Wightman v Secretary of State for Exiting the European Union* [2018] 3 WLR 1965, EU Decision.

case against the Coal Company in which the House of Lords gave judgment on the same day – a fine example of the cab rank rule operating at the Scottish Bar.

The other concern was that, even if there were Scots lawyers among the Law Lords, they would be contaminated by the English. ‘Nothing leeches out of you like law’. In *Cameron v Young* 1908 SC (HL) 7, Lord Robertson introduced into Scots law the English rule in *Cavalier v Pope* [1906] AC 428, that a landlord was not liable to anyone other than the tenant for injurious defects in the property let. In *Dumbreck v Addie* 1929 SC HL 51, [1929] AC 358, Lord Dunedin (and Lord Shaw of Dunfermline) concurred in the introduction of the English notion of different duties of care owed by occupiers to invitees, licensees and trespassers, when denying a remedy to a child trespasser who had been injured when machinery was started without warning in an unfenced field which the defenders knew was frequented by children, whereas the Inner House had found that the occupier was clearly at fault.

These are all fair examples at which to protest. English law on all three points was widely thought to be defective and was eventually changed by statute: the infamous doctrine of common employment was abolished both north and south of border by the Law Reform (Personal Injuries) Act 1948; the English got rid of the distinction between invitees and licensees in the Occupiers Liability Act 1957, but had to wait until Occupiers Liability Act 1984 to remedy the law relating to trespassers and the Defective Premises Act 1974 to get rid of *Cavalier v Pope*, whereas Scotland did all three in the Occupiers Liability (Scotland) Act 1960 – perhaps recognising that it was returning to the law as it had always been before the assaults of the English.

I mention all this – no doubt well known to most if not all of you – not only to acknowledge the deep sense of grievance which was felt north of the border by such incursions into the purity of Scots law, but also to point out that you have got your own back – not only in eventually persuading Parliament to restore matters to where they were before the Anglicisation of Scots law but also in the Scottification of English law.

The best-known example is of course *Donoghue v Stevenson* 1932 SC (HL) 31, [1932] AC 562. The Scots law of delict is based on the Roman law concept of *culpa* or fault. If somebody was at fault and harmed someone by his carelessness, 17th century Scots law saw no reason why he should not be liable to the person he harmed, even though he had no contract with that person. But this

was obscured in the 19th century by English notions of privity of contract, whereby a third party was not allowed to benefit from a breach of a contract between others. The case of the allegedly decomposing snail in a bottle of ginger beer bought by A but consumed by B came up from Scotland. The Lord Ordinary held that there could be liability if the facts were proved. The Inner House held by a majority that there could not – Lord Hunter dissenting or, as Lord Macmillan put it, protesting.

The House of Lords held that there could, but by a majority of three – Lords Atkin, Thankerton and Macmillan – to two – Lords Buckmaster and Tomlin. Lord Atkin's memorable 'neighbour' principle is always cited. But Lord Macmillan pointed out that the majority in the Inner House based their opinions solely on consideration of English cases. He went on to explain how there was 'no unbroken line showing that English law had committed itself irrevocably to what is neither reasonable nor equitable'. He was an enormously learned and distinguished Scots lawyer who had been Lord Advocate in a Labour government (although a Conservative) before being made a Lord of Appeal in Ordinary. The third member of majority was Lord Thankerton, who was also a Scots lawyer though educated at Winchester and Cambridge in England (where he got a third), and had practised in Scotland, was Solicitor General and Lord Advocate before becoming a Law Lord, just as his father, Lord Watson, had been. Surely the earlier purity of Scots thinking must have influenced them although they concentrated in their judgments on English and American cases.

You may justly feel resentment that this victory of an Australian and two Scotsmen over two Englishmen should immediately be hailed as a great breakthrough for the common law – whereas others might regard it as the vindication of classical principles of Scots law.

Note that all accepted that English and Scots law was the same – and Lord Atkin was clear that they were laying down the law for both Scotland and England although it was a Scottish case.

Since then, of course, other important developments in the law of negligence have been derived from Scottish cases; examples on the duty of care are *Hughes v Lord Advocate* [1963] AC 837, about the foreseeability of some harm even though it came about in an unexpected way, and *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, [2015] AC 1430, about a doctor's duty to inform her patient about the options (though I am bound to say that English practice was already in line with what the Supreme Court decided that the law required).

I am not sure that all the leading cases would be regarded with classical approval. In *McFarlane v Tayside Health Board* [2000] 2 AC 59, reversing the Inner House (1998 SC 389), the House of Lords limited the damages payable by negligent medical practitioners for the birth of a healthy child, when principle suggested that they should not be limited, but pragmatism suggested otherwise. In *Mitchell v Glasgow City Council* [2009] UKHL 11, [2009] 1 AC 874, the House denied liability for the criminal acts of third parties. I well remember how strongly it was urged on us that the Scots law of negligence was based on a single principle – the foreseeability of harm unless one took care. Categories should be a thing of the past. Counsel must have been listening to Professor Smith. Neither of the Scots Law Lords agreed. There must be limits to liability for failing to prevent criminal acts of others.

Scots cases have also played vital part in advancing law of causation: see *Bonnington Castings v Wardlaw* [1956] AC 613, and *McGhee v National Coal Board* 1973 SC (HL) 37 – breach of statutory duty cases but the same principles apply in negligence. Note that there were two Scots Law Lords in each and they were Scottish appeals, although the law was assumed the same north and south of the border. (*McGhee* led to the more problematic mesothelioma cases, starting with *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32).

Outside tort and delict, I would point to two other important examples of the English eventually following the Scots. The first is Crown Privilege. The House of Lords had held in *Duncan v Cammell, Laird and Co* [1942] AC 624 – the well-known war-time case about the sinking of the submarine *Thetis* on a test dive at the cost of 99 lives - that a ministerial certificate claiming Crown Privilege for certain documents – in that case everything the claimants needed to know about the plans for the vessel, its condition when raised, and so on - was conclusive against their production in civil proceedings brought by the families of the deceased. More than a decade later, the Law Lords held, in *Glasgow Corporation v Central Land Board* 1956 SC (HL) 1, that this was not the law in Scotland. The court had a discretion to overrule ministerial objections, although it did not do so in that case, which was about whether certain determinations of Central Land Board relating to development charges were ultra vires.

This had a vital impact south of the border. In 1966, the Law Lords issued a Practice Statement that they would depart from their own previous decisions if it was just to do so. The first case invoking that Practice Statement was *Conway v Rimmer* [1968] AC 910, which overruled what were

said to be dicta in *Duncan v Cammell, Laird and Co* and held that court should inspect the documents and decide for itself whether the public interest required non-disclosure. If disclosure was not prejudicial to the public interest, or the possibility of damage to the public interest was not enough to outweigh the prejudice of not disclosing the documents, in that case reports about a police officer who was suing for malicious prosecution, it would be ordered. Having examined the documents, the House of Lords ordered disclosure. This was a unanimous decision led by the great Lord Reid, but Lord Denning had dissented in the Court of Appeal (it would be nice to think that the Practice Statement had been made with this case in mind, but the litigation started a little later).

The second example is private international law. Scotland had a 'long start' in the subject owing to its cosmopolitan background drawing on continental learning. England only began to catch up in 18th century under influence of Lord Mansfield, who had appeared as an advocate in Scottish cases, but was called to the English Bar. The best-known example of English reception of Scottish ideas in this area is *The Spiliada, Spiliada Maritime Corporation v Cansulex* [1987] AC 460, which firmly adopted the Scottish doctrine of *forum non conveniens* in UK law. Two Scotsmen sat on the panel – Lord Keith and Lord Mackay – but it was Lord Goff who gave the leading judgment. He explained:

“That principle has for long been recognised in Scots law; but it has only been recognised comparatively recently in this country. In *The Abidin Dover* [1984] AC 398, 411, Lord Diplock stated that, on this point, English law and Scots law may now be regarded as indistinguishable. It is proper therefore to regard the classic statement of Lord Kinnear in *Sim v Robinow* (1892) 19 R. 665 as expressing the principle now applicable in both jurisdictions. He said, at p 668:

“the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.”

Lord Goff, who was also born and raised in Scotland, went on to cite several other Scottish cases in support (*Longworth v. Hope* (1865) 3 Macph 1049, 1053, *per* Lord President McNeill, and *Clements v. Macaulay* (1866) 4 Macph 583, 592, *per* Lord Justice-Clerk Inglis; and *Société du Gaz de Paris v Société Anonyme de Navigation "Les Armateurs E Francois,"* 1926 SC (HL) 13, 22, *per* Lord Sumner.) But he did 'feel bound to say' (citing Lord Dunedin in the *Société du Gaz* case) that the

Latin tag ‘forum non conveniens’ was not apt – the question is not one of convenience but of suitability or appropriateness.

The Spiliada was about whether a Liberian shipowner of a vessel chartered under a contract governed by English law to carry a cargo of bulk sulphur from Vancouver to India could bring a claim against the shippers, alleging that the cargo was wet and caused severe corrosion to vessel, in England. It is an irony that such doctrines are said to be the product of Scottish receptiveness to continental ideas but the Court of Justice of the European Union does not recognise the doctrine in its application of the jurisdictional provisions of Brussels Regulations (*Owusu v Jackson* [2005] QB 801).

Undoubtedly Scots common law developed from different sources than the English. T B Smith attributes the development of English common law to the fact that the English monarchs established early on their control over the administration of justice. Judges built up the law precedent by precedent:

‘This was essentially a professional law, based on the Inns of Court, which were close corporations of lawyers. At quite an early stage these lawyers adopted a semi-insular and self-sufficient outlook; and in particular set their faces against the competition of ecclesiastical courts, against the Roman law, against the authority of academic treatises and against a system of professional legal education based on the Universities.’ (Hamlyn Lectures, p 7)

English private law, in particular, was the loser from this insularity and case by case approach, which led to multiple categorisations, rather than general principles.

Scots lawyers, on other hand, were the opposite of insular. They looked to France and continental European influences, studying Roman law and continental treatises in continental Universities. This led eventually to Stair’s *Institutions of the Law of Scotland*:

‘Gathering the various threads of Roman, canon, Feudal and other Customary law which had already been recognised by the courts, and drawing upon the learning of Europe’s leading civilian commentators, Stair “restated” the law of

Scotland in an original, selective, comprehensive and rational manner.’ (Hamlyn Lectures, p 12)

The common law for him was ‘the common law of the world’ – based on Roman law – not the common law established by His English Majesty’s Judges as they journeyed on circuit throughout England.

I think these differences can be exaggerated in today’s world. But it is still possible to discern from among my colleagues those who start from a basis of legal principle and those who start from a basis of pragmatism – starting from the beginning or starting from the end: what Stephen Sedley called, ‘reasoning from a given conclusion’. My quarrel with Professor Smith is that I don’t think that the Scots are alone in this. There are those of us in England who try and start from a basis in principle and reason towards a result rather than the other way around.

One thing is clear. The English Law Lords would no longer presume to differ from unanimous Scots on question of pure Scots law – the notorious example is *Burnett’s Trustee v Grainger*, 2004 SC (HL) 19, where Scots law obviously outraged the English members of the panel, but they declined to dissent. So the Anglicisation of Scots law is surely at an end. It is different, of course, if the two Scots lawyers on the panel disagree.

Another thing is also clear. The Scots can recognise when the issue is one of Scots law rather than English. How could the case referred to the Judicial Committee of the Privy Council by Lord Lyon King of Arms, about the succession to the baronety of Pringle of Stichill, have been thought to be governed by English rather than Scots law until the hearing before us? It was clearly a case governed by Scots law, but was not so argued until we forced the issue (*Re Baronety of Pringle of Stichill* [2016] UKPC 16, [2016] 1 WLR 2878). So, as Lord Hope has hoped, the Scottish Law Lords and Justices can still be ‘useful to the Scots’.

Statute

It has always seemed to me that one of best excuses for having a Supreme Court of the United Kingdom is to ensure the uniform interpretation throughout the UK of statutes which apply throughout the UK (or Great Britain as the case may be). In 1873, when it was proposed to abolish appeals to the House of Lords in English cases, this may not have been appreciated,

because there was not so much legislation then. But now much of our lives is ruled by legislation and much of it is of UK-wide application. One reason for giving permission to appeal is that different interpretations have been found north and south of border (see, for example, *Warner v Scapa Flow Charters* [2018] UKSC 52, 2018 SLT 1057).

Stare decisis?

It is an interesting question how stare decisis works in House of Lords and Supreme Court cases. Are we only laying down the law for the country from which the case comes up or are we laying down the law for the whole of the UK or GB as the case may be?

Originally the Scottish courts did not recognise a strict doctrine of stare decisis, as many civilian systems (including the European Court of Human Rights) still do not. T B Smith pointed out in 1961 (Hamlyn Lectures, p 84) that it had never been expressly decided that the House of Lords was bound by its own previous decisions in a Scottish appeal. But when the House departed from the English doctrine that it was so bound in 1966, the Practice Statement made no distinction made between English and Scottish cases, so I think that it would apply to both – normally we would follow a previous decision, wherever it came from, but not if justice required otherwise.

If a case comes up from Scotland on a point of pure Scots law, or where it is acknowledged that Scots law is different from English law, then the decision can't and won't be binding in England – as happened with the Crown Privilege cases – although each may influence the other to find the same way.

The same would apply to a case coming up from England and Wales on a point of pure English (and Welsh) law, or where it was acknowledged that English (and Welsh) law is different from Scots law.

But where it is acknowledged that English (and Welsh) law and Scots law are the same, it would be highly anomalous if the English courts were bound by a House of Lords or Supreme Court decision in a case coming up from Scotland but the Scottish courts were not bound by a decision in a case coming up from England. A good example might be a case under the Child Abduction and Custody Act 1985, implementing the 1980 Hague Convention on the Civil Aspects of

International Child Abduction. This applies throughout the UK because it is implementing a treaty to which the UK is party. It would make no sense if a House of Lords or Supreme Court decision, for example on the meaning of habitual residence, in an English case were not applied in Scotland and vice versa. T B Smith only went so far as to say that the Court of Session would follow a decision in an English case, rather than put litigants to the expense of mounting a further appeal which they would almost certainly lose (Hamlyn Lectures, p 84), but it might – some would say must - go further than that.

Devolution issues

Devolution issues can come before the UK Supreme Court in two ways. Much the most common is an ordinary case between real parties coming up from the courts below in the usual way. But the law officers also have power to refer Bills passed by the Scottish Parliament (and other devolved legislatures) direct to the Supreme Court after completion of all its Parliamentary stages but before receiving Royal Assent, for us to rule in the abstract on whether it is within their competence. So far there have been three references from Wales, one from Northern Ireland which was withdrawn, and until this year none from Scotland. Now we have the United Kingdom Withdrawal from European Union (Legal Continuity) (Scotland) Bill.²

Whichever way the question of legislative competence comes before us, it is the same question. And we do now have a body of devolution case law, which will apply to all devolution issues from each part of the United Kingdom, but most of it coming from Scotland, and from which hopefully some consistent principles may be deduced.

First, perhaps most important of all, the devolved legislatures are not like local authorities, to which the normal principles of judicial review of administrative action apply. As was held in the *AXA* case (*AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868, 2012 SC (UKSC) 122), their decisions cannot be challenged for so-called *Wednesbury* unreasonableness. *AXA* was about whether the Scottish Parliament could legislate to make pleural plaques actionable damage, thus retrospectively altering the risks undertaken by employers' liability insurance companies.

² Judgment was given on 13 December 2018: [2018] UKSC 64.

Secondly, however, there were some comments in the *AXA* case about whether there might be general limits upon the powers of the Scottish Parliament, other than those set out in the devolution statutes. Lord Hope returned to the point he had made in *Jackson* (the Hunting Act case) (*R (Jackson) v Attorney General* [2006] UKHL 56, [2006] 1 AC 262, para 51):

‘The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind [abolishing judicial review or diminishing the role of the courts in protecting the interests of the individual] is not law which the courts will recognise.’

This shows that the Scots approach to the sovereignty of Parliament may not be quite the same as the English. T B Smith argues that the Treaty of Union is a written Constitution for the whole United Kingdom. The UK Parliament is not the English Parliament with added Scottish members. It is a new institution. The sovereignty of Parliament was an English doctrine established in the Glorious Revolution of 1688, but not necessarily a Scottish one.

Lord Reed reached a similar conclusion to Lord Hope but by a different route. The ‘principle of legality’ means that the UK Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words. There is a rule of statutory interpretation to that effect. Parliament has to be specific and face up to the political consequences (*R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 539; *Ahmed v Her Majesty’s Treasury* [2010] UKSC 2 and 5, [2010] 2 AC 534). Nor, therefore, can it confer upon another body, by general or ambiguous words, the power to do so. The UK Parliament could not be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law (para 153).

Thirdly, there cannot always be hard and fast lines between devolved and reserved matters. Demarcation disputes are not always easy to resolve.

As you know, the issue is whether an Act of the Scottish Parliament ‘relates to’ a reserved matter, listed in schedule 5, or whether it ‘modifies’ one of the specified enactments or rules of law, listed in Schedule 4. Whether a provision ‘relates to a reserved matter’ is to be determined by reference to the purpose of the provision, having regard (amongst other things) to its effect in all the circumstances (Scotland Act, s 29(3)).

In *Martin v Most* [2010] UKSC 10, 2010 SC (UKSC) 40, para 14, Lord Hope explained that Lord Sewel had told Parliament that arguments about whether a provision ‘relates to’ a reserved matter should be decided by reference to its ‘pith or substance’. But he pointed out that the Scotland Act does not use that phrase and, as Lord Walker explained, cases about drawing exclusive boundaries between one legislature and another (as is the case in Canada) may not be so helpful when considering whether a legislature with limited powers has trespassed impermissibly into areas reserved to a legislature with unlimited powers. The most recent decided case in this area³ is *Christian Institute v Lord Advocate* [2016] UKSC 51, 2016 SC (UKSC) 29, paras 29 to 32. where the UK Supreme Court drew together the threads emerging from *Martin v Most*, *Imperial Tobacco v Lord Advocate* and *Attorney-General for England and Wales v Counsel General for Wales, re Agricultural Sector (Wales) Bill* [2014] UKSC 43, [2014] 1 WLR 262.

First, ‘relates to’ indicates more than a loose or consequential connection (Lord Walker in *Martin v Most* endorsed by Lord Hope in *Imperial Tobacco*).

Secondly, in determining the purpose of a provision having regard to its effect, among other things (as Lord Mance explained in *Re Agricultural Sector (Wales) Bill*), it is necessary to look at more than what can be discerned from an objective consideration of the effect of its terms.

Thirdly, where the provision has more than one purpose, one of which does relate to a reserved matter, Lord Hope in *Imperial Tobacco* expressed the view, obiter, that if one of its purposes does so, then unless that can be regarded as consequential and of no real significance in the overall scheme of things, it will be outside competence.

Finally, this is not the same as the ‘pith and substance’ test and these cases should be dealt with according to the terms of the devolution statutes in question and not otherwise.

Scottish character?

I have said a lot about the character of Scots law - but what about the character of Scots lawyers? I do think that there is something in the principle versus pragmatism distinction, but I don’t think that it is as clear cut as that. There are many English Justices who put principle before

³ Until the recent reference of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill [2018] UKSC 64, which was more concerned with whether provisions in the Bill modified an enactment protected by Schedule 4.

pragmatism. But I haven't seen any Scottish Justices who have put pragmatism before principle. Much of the law we administer is the same both sides of the border. And we all use the same methods of legal reasoning. So I think that we have much more in common than we have not.

If ever there were an illustration of that, it is the robes question. In the House of Lords, the members of the appellate committee, like any other committee of the House, did not wear robes during hearings. But counsel did. When we moved to the Supreme Court, we did not adopt robes for our hearings and most of us wanted counsel to follow suit. But we could not agree on who was in charge – was it the court or was it a matter of professional conduct? We adopted a clever compromise. We said to counsel, if you would like to dispense with any or all of the items of court dress, just ask (implication, we shall say yes), but you must all agree. We thought the Scots would be the last to do this. In fact, they were the first. Moral: beware your unconscious biases.