

Scottish Young Lawyers Association – 1 April 2011

Scots Law seen from South of the Border

I could not help noticing that I was described in the billing for this lecture as someone who was, at one time, a young Scottish lawyer. The reminder that one was young once is, I suppose, something that one has to face with increasing age. The fact that I still feel quite young – I am certainly not the oldest of the current team of Supreme Court Justices – is beside the point. After all, it is a fact that I joined the profession in 1965, more than 45 years ago, and that I started to study law nearly 50 years ago in 1962 – long before any of you were first thought of. But my comparative longevity does have one advantage. I can look back to how things were when I started, to see whether I can offer you anything by way of warning or encouragement as you set out on your careers. So let me offer you these thoughts before I turn to my advertised subject matter.

It was, of course, a different world in 1962. It was not quite the world of silent motion pictures, although many of the films were still in black and white. Sex had not yet been discovered. That did not happen until 1963, according to the poet Philip Larkin¹. Nor indeed had drugs. For the most part we did what we were told. As students we all wore jackets and ties and, unlike those who followed soon afterwards, we all had short hair cuts. Women were seldom seen in the law faculties – there were only 6 out of 110 of us in my year at Edinburgh University. National service had just ended, but there were still some people like me who had had to do it. For us national service had not just been a

¹ *Annus Mirabilis* in Philip Larkin *High Windows* (1974), reprinted in *Collected Poems* (2003).

year out after leaving school. In my case service in the army lasted for two and a half years. We wanted to get qualified so that we could earn some money as soon as possible.

The way the qualification system was organised in those days certainly assisted this process. My father was a solicitor and I could, if I had wished, have joined his firm as soon as I had my law degree as there were no rules against this practice in those days. In search of a greater freedom to develop my own career, I decided to go to the Bar instead. The only rules I had to satisfy there were that I had to have the right passes in my law degree, that I spent a year devilling and that I could answer in Latin three questions that were put to me in Latin at the Faculty's oral examination. There was no requirement to sit for the diploma, as it had not yet been invented. The law degree which I studied for was an ordinary degree, for which the course was three years. An honours degree was not available, and when I left the university it was still in its infancy. So I had no option but to take the ordinary degree like everyone else. It was, it has to be said, a very ordinary degree. One of the professors who taught us Scots law spent almost his entire time reading out, word for word, chapters from that well-known textbook, Gloag and Henderson. When, one day, he departed from that text we discovered that he was reading instead from an article that had been published in the Scots Law Times. It was, for the most part, learning by rote, and one was tested by class exams every fortnight.

Most of the passes I needed were in things that everyone had to do to get their degree at the ordinary level – Scots law, constitutional law and criminal law, of example. To satisfy the Faculty I had to do evidence and procedure, which was taught to us by part-

time lecturers from the Faculty of Advocates. I also had to do forensic medicine. This presented more of an obstacle for me than you might have thought, as I fainted in the first lecture. In the event, thanks to some credits which I had from a previous arts degree, I was able to complete all but two of the courses in which I needed passes in my first two years. So it was possible for me to combine my third and final year with devilling, which is what I did. There was no requirement to qualify as a solicitor before you started devilling, although we were advised that it might be helpful to work for a while in a solicitor's office. This was done as a so-called Bar apprentice, unpaid. Many of the Edinburgh firms were happy to oblige, and they took some pride as they watched their previous law apprentices make progress at the Bar. What I did was to work for two different firms – one of them was Simpson & Marwick – in the holidays, and I shall always be grateful to them for their help and encouragement.

You will no doubt be shocked to learn that I received my law degree on a Wednesday in July 1965 and that I was admitted to the Faculty of Advocates on the Friday of the same week. Only six people were called to the Bar in my year – this was not abnormal – and I was the only one to be called on the day when my turn came. I have to confess, as I look back, that I was almost wholly unfit to practise. I had a reasonable grasp of written pleadings due to my year's devilling. But I had only the most sketchy knowledge of the rules of court, to which our attention had not been drawn at all at the university. Nor had I really been tested in the art of conducting a case in court. My training was confined to observing the work done by my devil masters. So I had to set about learning my trade on the job.

It was very slow going, as there was not much work available. I had the occasional appearance on the motion roll and one or two undefended divorces, which was the staple diet for beginners at the Bar in those days. I remember my first venture into Glasgow High Court, as an unpaid advocate on the Poores' Roll. This was before criminal legal aid had become fully available. I had only the vaguest idea of what I was supposed to do. I was instructed for the second accused, which I hoped would give me some kind of protection as counsel for the first accused would put his questions first. My hopes were dashed when the first accused pled guilty and I was on my own. I could think of almost nothing to put to the witnesses for the Crown or to say on my client's behalf. The case was over all too quickly, and a verdict of guilty was returned within minutes. I hoped that it was the right verdict. It was obvious that I was not going to get very far as a criminal lawyer.

After about two years of almost no work Simpson & Marwick began to instruct me as one of their team of junior counsel for the National Union of Mineworkers. The coal mining industry was still very active in Scotland, and their cases made up quite a large proportion of the reparation business in the Court of Session. I found myself addressing juries at the outset of civil jury trials and appearing in frequent procedure roll debates in which counsel for the National Coal Board subjected our pleadings to meticulous criticism to persuade the Lord Ordinary that the case was unsuitable for jury trial. Here at last I found myself getting into my stride as an advocate. As I was now over 30 I was on the verge of ceasing to be a Young Lawyer. So I can draw veil over the strange

progression of events that has resulted in someone as under-qualified as I was, even by the most modest of modern standards, to enter practice at all sitting now as a Justice in the UK's highest court.

I can only applaud the time and trouble that you have undertaken to get to where you are now. The great breakthrough towards the raising standards began in the university law faculties. First there was the introduction of the honours degree, which transformed the way that law is taught. It attracted a new generation of academic lawyers to the teaching of law in the law faculties. To them we owe a huge amount, as they have done so much to re-invigorate the study of, and writing about, Scots law. Then there was the introduction of a much more organised system of training for those who wanted to enter the profession. This was in response to the demands of increasing public scrutiny of what lawyers do and of their ability to do it. Diversity within the professions has been transformed – more still to be done, but a great deal has been achieved. All of these things are good. People like me had to learn the hard way, by trial and error. The public today expect, and are entitled to expect, a high standard of performance from everyone as soon as they are qualified. Preparation for practice takes time, but it is time well spent. In today's world it cannot be otherwise. It would be unthinkable now to turn the clock back to how things were done 50 years ago. Of course, aspiring lawyers must now study for longer and, often, accumulate more debts. The changes to university funding may well make this situation worse, depending on what happens here in Scotland. I do sometimes wonder whether more could be done to provide financial support for those who wish to make their career at the Scottish Bar, as is done both by Inns of Court and

individual Chambers in England. But if there is a lesson to be learned from what has happened to me in my career, it is that in our profession you must keep on learning. And make the most of your opportunities. You never know where they may take you.

Let me now turn to my advertised subject – Scots law as seen from south of the Border. My perspective is, of course, moulded in part by my own background as a Scots lawyer and in part by the job that I now do in London. To put what I have to say about it into context, I should say a little bit about both of them. My background of legal education may have been rudimentary by modern standards, but it did instil in me a strong sense of the separate identity of Scots law. I was never taught by Professor TB Smith, who was one of the greatest advocates for our system in the third quarter of the last century. But his influence was everywhere. We were taught to be proud of our system and to be suspicious of influences from south of the Border – “Strange Gods” as TB Smith referred to them in one of his many publications². It was in that spirit that I committed myself to the practice of law in Scotland for 24 years – four years of which I spent as an advocate depute – and to my work as Lord President and Lord Justice General for seven years after that.

Of course, my perspective changed when I became a Law Lord 14 years ago. I was now in direct contact with the legal systems of the other jurisdictions of the UK, and with the jurisdictions of the countries across the world for whom the Judicial Committee of the Privy Council was the final court of appeal, which in those days included Hong Kong and

² TB Smith 'Strange Gods: The Crisis of Scots Law as a Civilian System', in *Studies Critical and Comparative* (1962) 72. This was Smith's inaugural lecture as Professor of Civil Law at Edinburgh University.

New Zealand. In football terms, it was like moving to the Champions League from the SPL. One is better placed, in such company, to assess one's own team's performance. But these feelings of pride and suspicion have never really left me. So anyone who thinks that, because I now sit on the Supreme Court, I have given up on Scotland would be making a big mistake. I come home to Scotland every weekend and do most of my written work here. It is here at home in Edinburgh that I write my judgments, just as I did when I was the Lord President. I read the Law Society's Journal and the SCOLAG magazine. My room in London has the Scots Law Times, the Stair Memorial Encyclopaedia and a selection of Scottish textbooks on its bookshelves. And I have made a point over the years of having a series of outstanding young Scots lawyers as my judicial assistants, to keep me in touch with current thinking here in Scotland. So when I look north from south of the Border I do so against the background of many years in practice in Scotland and of the strong links with Scotland that I have kept up while working in London.

As many of you will be aware, the UK Government has proposed making amendments to the Scotland Bill which will affect the jurisdiction of the Supreme Court to hear devolution issues coming before it from Scotland. At the moment, the Lord Advocate's acts, in her capacity as head of criminal prosecutions in Scotland, are subject to the general *vires* control of section 57(2) of the Scotland Act 1998. This has meant that it is possible to raise by way of a devolution issue Convention Rights issues that may arise at all levels within the Scottish criminal justice system. There is no doubt that the widespread use that has been made of this opportunity was not anticipated when the

Scotland Bill was going through Parliament. And, as we all know, the fact that decisions of the High Court of Justiciary on devolution issues can be appealed to a court in London has given rise to some degree of controversy. It has been seen by some as undermining the work of that court and imperiling the separate identity of Scots criminal law. This has led to proposals³, following a report by an expert group chaired by Sir David Edward⁴, to reform the devolution issue jurisdiction. The details are still under discussion as the Scotland Bill works its way through Parliament at Westminster. But, in broad outline, it is proposed that acts or failures to act by the Lord Advocate in the course of criminal proceedings should be removed from the ambit of section 57(2) the Scotland Act. Instead there should instead be a statutory right of appeal, with leave, from the High Court of Justiciary to the Supreme Court in matters where it is alleged that the Lord Advocate has acted incompatibly with a Convention right or community law.

I do not think that it is right for me to enter into this debate. It must be for others to determine, through the democratic process, what my court's jurisdiction should be and on what terms. Elementary principles require judges to be impartial, and free from apparent bias. So those who will have to exercise that jurisdiction must remain detached from that debate. But I should like to say this. The extent of the proposed change should not be misunderstood, as recent press reports suggest it may have been. There is no question whatever of there being a general right of appeal to the Supreme Court on issues of

³ Details of the consultation may be found here: <http://www.oag.gov.uk/oag/262.102.html> (accessed 10 March 2011)

⁴ 'Section 57(2) and Schedule 6 of the Scotland Act 1998 and the role of the Lord Advocate: Report of the Expert Group appointed by the Advocate General for Scotland': [http://www.oag.gov.uk/oag/files/Expert%20Group%20report\(1\).doc](http://www.oag.gov.uk/oag/files/Expert%20Group%20report(1).doc) (accessed 10 March 2011)

domestic criminal law. Our court is not equipped to handle work of that kind, and it has absolutely no desire to do so. The reason why it is proposed that the Supreme Court should continue to exercise a jurisdiction in relation to devolved matters is the same as it was from the beginning when the system was first set up. It is to ensure that this country's international obligations under the EU treaties and the European Convention on Human Rights, which were entered into by the United Kingdom and on its behalf and have been made part of our domestic law by the Parliament at Westminster, are secured in a consistent manner throughout the United Kingdom⁵. It goes no further than that. However, as some of the comments which have been made about them are based on a view about how the Supreme Court approaches the cases that come to it from Scotland I would like, in keeping with the title of this talk, to say a little about how it actually does so.

The fear is sometimes expressed that an appeal to a court based in London dilutes that distinctiveness of Scots law. This fear is certainly not new, and it is not confined to the criminal law. In times long gone by, the concern was – with some justification – that the House of Lords was an anglicising body. TB Smith certainly thought so, and in his polemic *Law from over the Border*⁶ Andrew Dewar Gibb too deplored the anglicising tendencies, as he saw them, of the then House of Lords. They had been epitomised a

⁵ For a discussion of some of these issues, see M Scott, *Allison and McInnes: the "real possibility" test*, 2010 SLT (News) 47; M Scott, *Allison and McInnes: future application*, 2010 SLT (News) 53.

⁶ A Dewar Gibb *Law from over the border: a short story of a strange jurisdiction* (1950).

century earlier by the infamous words of Lord Cranworth in *Bartonshill Coal Company v Reid*⁷:

“But if such be the law of England, on what ground can it be argued not to be the law of Scotland?”

Of course, as we all know, there is a simple answer to that question. Scots law is different, and it has every right to be so. If the fear that the Supreme Court is an anglicising court is still present, it is best answered by studying what the Court actually does and the influence on its work of the two Scots Justices. Now that so much of our work is dominated by the European Convention on Human Rights, which is the basis for most of the devolution issues which we consider, the principal focus of charge today is that it pays insufficient attention to the distinctive nature of Scots law when it is ruling on Convention rights. I hope that by discussing how we approach Scottish cases in the Supreme Court today I may allay that fear.

The first point to make is that the majority of appeals we hear from Scotland that allow us to pass judgment on issues of Scots law are civil appeals from decisions of the Inner House of the Court of Session. They went to the House of Lords as of right because before the Union litigants in civil appeals could appeal as of right from the Court of Session to the Scottish Parliament. As result of the reforms in 2009 the Supreme Court has simply inherited that jurisdiction. Many of these appeals do not raise any Scottish issues of pure Scots law at all. This is because much of the law which applies in Scotland

⁷ (1858) 3 Macq 266, 285. Dewar Gibb collects a selection of other similarly unacceptable quotations at pp 49 – 69 and 118 – 125 of his book. The first section, including *Bartonshill Coal Co*, predates the involvement of a Scottish law lord in the hearing of Scottish appeals under the Appellate Jurisdiction Act 1876.

is common to the whole of the United Kingdom. Or, as it was put by Professor Neil Walker in his review of the Supreme Court’s jurisdiction in Scottish appeals, although Scots law enjoys a high level of *formal* autonomy, there is a rather lower level of *substantive* autonomy⁸. The point is most obvious in areas of statute law – of company law, intellectual property, taxation and employment law, for example. They may contain some nuggets of Scottishness – the distinctive provisions relating to the registration of company charges⁹, for example. But on the whole they are uniform provisions, and that is so for important reasons that demand that there is harmony across the Border in matters that affect our commercial relations with each other. As citizens of all parts of the United Kingdom we live within a single economic area.

The UK also has, as I have said, significant European and international obligations which have been made part of domestic law. Directly effective European Union law has, of course, to be the same north and south of the Tweed as it binds the whole of the United Kingdom. But that is not the only example that can be given. Not very long ago the House of Lords was concerned in two joined Scottish and English appeals with the meaning of “bodily injury” in article 17 of the Warsaw Convention, which was incorporated into the law of the UK by the Carriage by Air Act 1961. They raised the same issues, and it is plain that the way the Convention is interpreted has to be the same throughout the United Kingdom. So it made sense for these appeals to be heard together

⁸ N Walker *Final Appellate Jurisdiction in the Scottish Legal System* (2010) p 24.

⁹ Companies Act 2006, Part 25.

when they reached the House of Lords¹⁰. Nobody, I think, has suggested that it was wrong for us to join hands across the Border in that way and reach a result which was equally applicable in both jurisdictions. On the contrary, the two cases that came from Scotland made a significant contribution to the debate.

It is not just in the field of statute law that there is commonality. It exists at common law too. Guided by Professor TB Smith we like to contrast our system with the English by describing Scots as a mixed system: one which has elements of both common law and the *ius commune* of the civil law¹¹. Of course, there are elements of feudal and canon law too, and some areas which are purely home-grown. Different influences have been in the ascendancy at different periods in our legal development. The result is that the level of mixture differs depending on the area of law that is in issue. Some areas of our law are virtually identical to the English common law: one thinks of the law of negligence as an example. So much of the English law of negligence was developed in Scottish appeals to the House of Lords, starting of course with *Donoghue v Stevenson*¹², *Muir v Glasgow Corporation*¹³ and *Hughes v Lord Advocate*¹⁴, that the law of negligence can properly be said to be common to both jurisdictions. In the recent case of *Mitchell v Glasgow Corporation*¹⁵ Baroness Hale of Richmond paid tribute to this tradition when she said

¹⁰ *Abnett v British Airways and Sidhu v British Airways* 1997 SC (HL) 26; *King v Bristow Helicopters and M v KLM Royal Dutch Airlines* 2002 SC (HL) 59.

¹¹ For an overview, see KGC Reid 'The Idea of Mixed Legal Systems' (2003) 78 *Tulane L Rev* 5 and, for a detailed consideration of particular areas of Scots and South African law, see R Zimmermann, D Visser and K Reid *Mixed legal systems in comparative perspective : property and obligations in Scotland and South Africa* (2004).

¹² 1932 SC (HL) 31.

¹³ 1943 SC (HL) 3.

¹⁴ 1963 SC (HL) 31.

¹⁵ 2009 SC (HL) 21.

that that was but the latest in a long line of cases from Scotland which had played such an important part in shaping the law of negligence for the whole of the United Kingdom¹⁶. In those areas where Scots and English law are the same, be it because of a common statutory basis or shared common law rules, I should have thought there was nothing for the Scots to fear in looking to the UK Supreme Court, one of the leading courts in the common law world, to interpret and develop its law.

Another example is the case of *Helow v Advocate General for Scotland*¹⁷. It was argued that a Court of Session judge, Lady Cosgrove, should have recused herself from hearing a petition for judicial review of a refusal to grant asylum to a Palestinian asylum seeker. The asylum seeker, whose petition Lady Cosgrove had refused, claimed that she was apparently biased because of her membership of the International Association of Jewish Lawyers and Jurists. This raised a question of apparent bias, as to which the test is now the same in England as it is Scotland. As far as I know, no-one in England objects to the fact that it was laid down by me, a Scottish judge, in *Porter v Magill*¹⁸, which was an English appeal, to replace the test previously used in England which was seen to be out of step with current thinking. It is the same test as that which I had persuaded the High Court of Justiciary to adopt in *Bradford v Macleod*¹⁹ about 25 years previously. So *Helow* is another example of a situation where the Supreme Court is required to consider and apply a common law principle which is the same in Scotland as it is England. Many more examples could be given.

¹⁶ Ibid, para 78. See, too, E Reid ‘Smith v Littlewoods Organisation Ltd (1985)’ in C Mitchell & P Mitchell (eds) *Landmark Cases in the Law of Tort* (2010) 251 at p271.

¹⁷ 2009 SC (HL) 1.

¹⁸ [2002] 2 AC 357, at para 103.

¹⁹ 1986 SLT 244, 247.

For all of the areas of commonality, however, there are certainly some areas of civil law where there are marked differences. One thinks of property law and the law of heritable security as particular examples, but they are by no means the only ones. What, then, of these areas, where Scots law is quite distinct from that of England? Does the manner in which the Supreme Court functions mean that it takes insufficient account of the distinctively Scottish point when it arises?

Let me, then, say a little bit more about how a case is actually dealt with by us as we go about our business. By convention, two of the twelve Justices are Scots lawyers. The convention is that they both will sit in Scottish appeals if they are available, and arrangements are made for them to be heard on days when that can be achieved. Leave to appeal is not required in most civil cases, but it is a requirement in devolution issues and in some cases which have their origins in lower tribunals. Where leave to appeal is required, the case is referred to a panel of three Justices which considers the application. In Scots cases this always includes the two Scottish Justices. The third member is usually the President of the Court, but if he is not available it is the Justice from Northern Ireland. These decisions are reached by a consensus, but in practice where leave is needed everything depends on the view that is taken by the two Scottish Justices. Where the case progresses to an appeal the position is, of course, different. The case will be heard by five or perhaps seven Justices, so the two Scots will always be in the minority. Are two Scottish judges enough, you might well ask?

One response to this question is that it will always be the case in a generalist court such as the Supreme Court that not all of members of the bench are experts in the area of law of the case under appeal. Other countries – such as Germany²⁰ and France – have different appellate courts for different areas of law. In France, for example, the Cour de Cassation is divided into chambers: civil, criminal, commercial and social. There is also the Conseil d’Etat, which has an administrative jurisdiction, and the Conseil Constitutionnel to which constitutional matters are referred. The common law model – to which the United Kingdom subscribes – is a generalist one. In the UK Supreme Court however we consider all types of cases. In the course of a few weeks, for example, we have had to consider a claim by investors arising of the Lehman Brothers insolvency; the “principle of equivalence” in EU law regarding claims to asylum; a capital gains tax case; the statutory scheme of compensation for those wrongfully convicted; a copyright case in relation to the helmet worn by the storm troopers in Star Wars; and the holding of inquests into deaths at the hands of the security forces in Northern Ireland. The variety of our work knows no bounds, and is inevitable that Justices will be asked to sit from time to time in areas of law with which they are not familiar.

In those circumstances, the panel selection is obviously important. We are careful, when deciding upon their composition, to ensure that the panel will comprise those Justices with real expertise in the area of law that is in issue. In family and employment law cases, for example, there is Lady Hale; in chancery law cases, Lord Walker; in commercial cases, Lord Mance and Lord Collins. It is the same when we are faced with

²⁰ N Foster & S Sule *German Legal System and Laws* (2010) Chp 3.

an appeal from Scotland that raises an issue of Scots law, or a case from Northern Ireland. Unlike those from Scotland and Northern Ireland who are generalists, the English Justices are, typically, specialists. Indeed that is why they are on the Court. The Scottish Justices, by virtue of the nature of legal practice in Scotland, are likely to have some experience in most areas of law, but they are not to same degree specialists – except, of course, in Scots law. So, just as our practice is to respect the judgment of the English Justices who are specialists in their own field, we expect that of them when issues of Scots law are involved. And the other Justices do defer to our expertise but, of course, will reason their way to their own conclusions. In *Montgomery v HM Advocate*²¹ which was the first devolution case to reach the Judicial Committee of the Privy Council under the jurisdiction that has now been transferred to the Supreme Court, I said that members of the Judicial Committee whose background was in English law had now to exercise the intellectual discipline of thinking themselves into the Scottish system of criminal law when sitting on references or appeals from the High Court of Justiciary. That was perhaps, to be frank, asking a bit much of them. But we do expect them to respect our judgment, and in my experience they almost always do so.

So the fact that an appeal on a distinctive question of Scottish law will be considered by a panel consisting of only two Scottish Justices can be said to be simply one instance of the generalist appellate court structure which the UK adopts. Is that a sufficient answer to the concern that the court consists of a minority of Scottish judges? In most cases, as I have said, it will be. But not always. For there will be occasional cases which, by virtue of their different legal backgrounds, judges will instinctively approach differently. So, it

²¹ 2001 SC (PC) 1, 13.

is important for us to know how the other judges are likely to approach cases where there is a particular Scottish sensitivity.

To see how this works in practice, let us consider the following. First, there is the area of private law where the laws of Scotland and England are probably most different from each other: property law. Depending on when you graduated, many of you will be familiar with the story, as, for some time, the decisions were something of a *cause célèbre*. Indeed one of them – *Sharp v Thomson*²² – was seen by many to be a *bête noire*. The issue in each case was at what point did the buyer become protected against the seller's insolvency? Hardly the stuff of particular controversy, one might think. However, that case is said to have provoked more debate and discussion than possibly any case in modern times.²³ Why? Because it was felt that a core distinction between Scottish and English law was in danger. A contracts to sell his house to B; B pays over the price and A hands over the disposition. But, before B registers the disposition, A becomes bankrupt. Can the trustee in sequestration claim both the house and the purchase price? What if the seller is a company, it has granted a floating charge over its assets and it is the floating charge which crystallises?

The floating charge example was the first to be the subject of litigation. The Outer²⁴ and Inner House²⁵ both held that Scots law recognised no intermediate right between a personal right and a real right; that no real right was transferred to the buyer until

²² 1997 SC (HL) 66.

²³ Scottish Law Commission *Discussion Paper on Sharp v Thomson* (DP 114, 2001) para [1.5].

²⁴ 1994 SC 503.

²⁵ 1995 SC 455.

registration of the disposition; and that the house therefore formed part of the “property” of the seller company until the buyer registered the disposition. The floating charge holder took both the property and the price. That was the law according to Professor Kenneth Reid, who is the pre-eminent expert in this field²⁶. The same would not have been true in England – a contract for the sale of land is specifically performable and an equitable interest in the land would have passed to the buyer before he had obtained legal title to the property²⁷. Scots law, however, does not recognise “equitable interests” in land. There is no separation here of law and equity. This was therefore a case which did raise a distinctive – indeed, fundamental – feature of Scots law.

The House of Lords allowed the appeal in *Sharp v Thomson* and held that, in Scots law too, the floating charge did not attach to the house. The seller no longer had any “beneficial interest” in the house and so it was not part of his “property” when the floating charge attached. That case spawned, if not one hundred case notes, then certainly very many, a great deal of which were critical of the decision. I was not involved in that decision, so I cannot comment at first hand upon how the decision was reached. In fact, I was Lord President when the case was heard in the First Division, and I was one of the judges whose decision was being reversed. So I was careful not to discuss the case at all with my colleagues. It may be worth noting, however, that three Scottish Law Lords sat on that case – Lord Keith, Lord Jauncey and Lord Clyde. Two of them produced detailed opinions. They suggest to me they were greatly influenced in the

²⁶ See, in particular, KGC Reid ‘*Sharp v Thomson: a civilian perspective*’ 1995 SLT (News) 75.

²⁷ See, now, C Harpum, S Bridge & M Dixon *Megarry & Wade The Law of Real Property* (7th edn, 2008) [15-052].

conclusions that they drew by the views of the two English Law Lords as to the way the legislation was intended to operate. It is perhaps worth noting that, although their views were not regarded sympathetically by the leading experts on Scots property law²⁸, there were some Scottish commentators who had argued that the Inner House's decision was wrong and led to unfair results, as one creditor took both both the house and the money,²⁹

Sharp v Thomson was followed a few years later by *Burnett's Tr v Grainger*³⁰. It was a case about personal insolvency. There the question was whether the house was part of the "whole estate" of the debtor so as to be part of the estate which vested in his trustee in bankruptcy. The House of Lords distinguished *Sharp* and held that it did: the trustee does indeed take both the house and the money. Centuries of case law made clear which meaning was to be given to phrase "the whole estate of the debtor" used in the Bankruptcy Act. It was made clear that there was no intermediate right between a personal and a real right, and that delivery of the disposition did not give rise to a trust, either actual or constructive, in favour of the buyer. By now the personnel in the House of Lords had changed. I was one of the two Scottish judges on that case, along with Lord Rodger. Lords Hoffmann, Bingham and Hobhouse made up the rest of the panel. Anyone who reads the opinions of Lords Hoffmann and Hobhouse will see that they felt strongly that the case should have been decided the other way. But they did not dissent.

²⁸ See, e.g., KGC Reid "Jam today: *Sharp* in the House of Lords" 1997 SLT (News) 79; KGC Reid 'Equity Triumphant: *Sharp v Thomson*' (1997) 1 Edin LR 464; GL Gretton "Equitable Ownership in Scots Law?" (2001) 5 Edin LR 73.

²⁹ R Rennie 'Dead on delivery' 1994 SLT (News) 183; I Doran 1995 SLT (News) 101.

³⁰ 2004 SC (HL) 19.

Lord Hoffmann began his opinion³¹ as follows:

“I have studied carefully the opinions of my noble and learned friends Lord Hope of Craighead and Rodger of Earlsferry and they have satisfied me that the interlocutor pronounced by the Extra Division was in accordance with the law of Scotland. The appeal must therefore be refused. I am however by no means satisfied that this state of the law is either desirable or a necessary consequence of fundamental principles of Scots law.”

Lord Hobhouse entered into the debate in some greater detail, setting out his reservations about the decision³². Lord Bingham, however, felt strongly that on an issue such as this – where there was genuinely a distinctive point of principle of Scots law – that if the Scottish judges reached a particular decision, it was not for him – unfamiliar with the system – to interfere. And Lord Hoffmann and Lord Hobhouse, both large personalities as judges, heeded his guidance. So, like much of our constitution, much turns on convention and unwritten rules of behaviour. *Burnett’s Tr* suggests that the presence of two Scottish judges who have the respect of their colleagues is a sufficient safeguard against things going wrong. It might even be said that the contributions of Lords Hoffmann and Hobhouse, providing a reasoned, critical analysis pointing out what they saw as the illogicality of the decision, has given us as Scots lawyers something to think about, which should not summarily be dismissed.

One sees that tendency in other cases, too, where significant points are often made by those who are approaching the matter with fresh eyes. In the recent case of *Royal Bank of Scotland v Wilson*³³ it was Lord Walker who first questioned the approach which had until then been taken to the statutory provisions dealing with the enforcement of standard

³¹ Ibid, paras 2-3.

³² Ibid paras [51] – [65]

³³ [2010] UKSC 50; 2010 SLT 1227.

securities. He asked a simple question: why, when the statute says “shall”, do you always apply it as if it said “may”³⁴. Of course, the cross-fertilization of ideas can operate in the other direction. In a series of House of Lords cases in the 1970s and 1980s, the English law about when an action would be sisted – they say stayed – because of pending foreign litigation was changed, with real enthusiasm on the part of the English judges, to bring them in line with the Scottish doctrine of *forum non conveniens*.³⁵

What, you might well ask, would have happened if Lord Rodger and I had disagreed in *Grainger* – which, as it happened, seemed both during the hearing (to the obvious alarm of Professor Reid, who was listening to the argument) and in our discussion afterwards to be a very real possibility? The judgment would then have lain in the hands of the other judges. Lord Rodger and I are careful to be seen as independent of each other, to maintain our credibility with our colleagues. So the possibility of our disagreeing with each other because we see things differently is not at all remote. You do not need to be an avid reader of the law reports – reading the *Scotsman* or the *Herald* will do – to realise that this did happen recently. In *Martin v HM Advocate*³⁶, a devolution issue concerning the validity of an Act of the Scottish Parliament increasing shrieval sentencing powers for road traffic offences, Lord Rodger and I came to different conclusions. The outcome of the case therefore depended upon the decisions of the three other, non-Scottish, judges – one of whom agreed with Lord Rodger, while the other two agreed with me. Some might see that as a flaw in the system. I suggest that it should prompt a different reaction.

³⁴ Conveyancing and Feudal Reform (Scotland) 1970, s 19(1).

³⁵ *The Abidin Daver* [1984] AC 398, 411 *per* Lord Diplock. The earlier cases included *The Atlantic Star* [1974] AC 436 and *MacShannon* [1978] AC 795.

³⁶ 2010 SLT 412.

Sometimes there is an idea, as Lord Rodger has said, that there is one ideal Scots law and, if results do not measure up to that law, then in some way decisions that disagree with it – and, by extension, the judges who decided them – are wanting.³⁷ The reality is that frequently, as one would expect in a vibrant legal community such as ours, there are indeed *differing* views about what Scots law on a particular topic should be. And if there is this variety of views – as existed in *Martin* – can it really be said that in choosing one over the other, judges are somehow being insensitive to the distinctive nature of Scots law? Instead, they are reasoning their way to what each believes to be the most coherent position, in light of the arguments presented to them and, in that case two detailed, but different, judgments of the two Scottish judges.

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From private law I move finally to Convention rights, which are what our devolution jurisdiction is all about. This brings me to *Cadder v HM Advocate*³⁸ - a case that will, I am sure, be very familiar to all of you. Of course you would not allow me to get away from here without saying something about it. Whatever you may think of the decision itself, the way it was arrived at is a very good example of how the Supreme Court goes about its business.

Scotland has, of course, its own distinctive tradition of criminal law and criminal procedure. There are many aspects of it that we can quite rightly feel proud. However, as part of the United Kingdom, Scotland is part of a state which has undertaken to comply with the European Convention on Human Rights, as surely Scotland would also

³⁷ A Rodger 'The Costs and Benefits of Mixed Legal Systems' (2003 – 2004) 78 *Tulane Law Review* 419, 423.

³⁸ 2010 SLT 1125.

wish to do were it independent. Occasionally, there will be a conflict between those international obligations and domestic law. That is true whatever part of the UK is involved. Until 1998, the conflict would give rise only to a remedy in international law, by a UK citizen exercising his or her right of individual petition to the Strasbourg court. It was that which led to the abolition in our schools of corporal punishment, when the Strasbourg court held that the suspension of a child who refused to submit to the tawse violated his right to education³⁹. In 1998, however, it was decided that those Convention obligations should be enforceable in domestic law: in the jargon, that rights should be brought home. That was the approach which was enacted via the Human Rights Act and also the Scotland Act of that year. A theme that was common to the schemes of devolution for all three jurisdictions – Scotland, Wales and Northern Ireland – was that effect should be given to the United Kingdom’s international obligations in framing the devolved institutions’ legislative competence and the executive powers vested in their ministers. It is hard to see that it could have been otherwise.

In *Cadder*, the Supreme Court had to consider whether Scottish legislation which permitted police to detain an individual for six hours and question him without allowing him access to a solicitor, and then to rely upon that evidence at trial, was contrary to Article 6(2) of the Convention. It held that it was not, so it was not within the prosecutor’s power to lead evidence of admissions made by an accused in those circumstances. That was a different conclusion to that reached by a court of seven judges in the High Court of Justiciary in the earlier case of *HM Advocate v McLean*⁴⁰. As the

³⁹ *Campbell and Cosans v United Kingdom* [1982] 4 EHRR 293.

⁴⁰ 2010 SLT 73.

Cadder case is so recent, and as there are pending references to the Supreme Court concerning follow up cases, I am limited in what I can say about the decision itself. I will, however, pose, and answer, one question: was the court, in reaching its decision that the provisions of Scots law were incompatible with the Convention somehow insensitive to the specialities of Scots law? I suggest not. There was certainly no pressure of any kind by the judges from England and Wales and Northern Ireland to treat the case in that way. The reason for the difference in result between the High Court of Justiciary's decision in *McLean* and the Supreme Court in *Cadder* was not a difference in view as to the merits or demerits of Scots law. What distinguishes the two decisions is a difference of approach between the two courts to the Convention.

The outcome, ultimately, turned on an understanding of the jurisprudence of the European Court of Human rights in Strasbourg and its effect on the domestic system. A large part of our time in the Supreme Court is spent in analysing Strasbourg cases, as much of our work requires us to assess the compliance of our domestic legal regime with the Convention rights. Assisted by a very helpful intervention from JUSTICE, we were able to explore the Convention jurisprudence in depth, to consider the position in other European countries and to judge how our system would stand up to scrutiny from outside – as it would have had to, if the case had gone to Strasbourg. We would have been failing in our duty under the statute if we did not examine the case in that way. As always, it is for others to judge whether the decisions we have reached on Convention rights which differ from those reached in Edinburgh are more in keeping with the aims and purposes of the Convention, which is our particular responsibility.

It became clear, as Lord Rodger put it in his judgment, that there was not the remotest chance that the Strasbourg court would hold that the protections which Scots law otherwise afforded to the accused – in particular, by the requirement of corroboration – meant that the ruling of the Grand Chamber in *Salduz v Turkey*⁴¹ did not apply to a Scottish case. Strasbourg's concern, after all, was to protect the privilege not to incriminate oneself. The truth was that the Scottish rules were based on a view of where the balance was to be struck between the public interest and the rights of the accused which was irreconcilable with Convention rights, and no amount of dialogue with Strasbourg would result in a change of view on its part. The principle against self-incrimination is strongly embedded in the European jurisprudence. Once that had been appreciated, there was no room for a decision based on expediency. As Lord Bingham has said, our task is to apply the law, not to decide cases according to our personal preferences. Of course, the decision was not popular, especially among those who must answer to the electorate. But, as Justice Stephen Breyer of the US Supreme Court has said, do not imagine that our decisions are popular. It is not our job to be popular.

The point that I wish to emphasize is that this was not a decision based on a lack of sensitivity to the distinctive nature of Scots law, but rather a decision based on a proper application of a rule of Scots law – part of which, as Parliament has directed, is that the Lord Advocate must, in prosecuting criminal cases, act in compliance with Convention rights, unless compelled by primary legislation to do otherwise. In an appropriate case, the court would be willing to say that a particular aspect of Scots law which had not been

⁴¹ (2008) 49 EHHR 421.

sufficiently considered by the Strasbourg jurisprudence, such that the Strasbourg court should be asked to “think again” on a particular point. This type of dialogue has taken place in various English decisions, in a line of cases about the procedure for the recovery of possession by local authorities, particularly in social housing cases,⁴² and most recently in *Horncastle*, concerning the use of hearsay evidence⁴³. The court would, of course, be willing to take this approach even if the point were distinctive to Scots law. The Convention does not require the adoption of uniform solutions throughout the United Kingdom if there is room within the UK’s margin of appreciation for various positions. But *Cadder* was not a case of that kind.

There is no doubt that the devolution jurisdiction which the Supreme Court exercises has provoked a feeling among our politicians, and some others, that Scots criminal law and procedure is now being run from London – not unlike the feeling in London that much of our public law is now being run from Strasbourg. Descriptions by the Prime Minister and the Home Secretary of a decision of the Supreme Court that the system for placing sex offenders’ names on the sex offenders’ register was incompatible with Convention rights because it did not provide for their cases to be reviewed⁴⁴ as “appalling” is an example of the same phenomenon south of the Border. Why, it is said, should decisions of that kind be left to unelected judges? But if you want to be elected, you must appeal to the majority – the majority of those who are eligible to vote for you. If the views you express are not their views, you will not get elected. It is precisely because they can be

⁴² *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465 and *Doherty v Birmingham City Council*[2008] UKHL 57, [2009] 1 AC 367,

⁴³ [2009] UKSC 14, [2010] 2 AC 373 para [11].

⁴⁴ *R (on the application of F and Thomson) v Secretary of State for the Home Department* [2010] UKSC 17.

relied upon to be independent and impartial that these matters have been left to the judges. The Convention rights are there, as the European Convention itself is at pains to stress, for everyone, including the despised and the unpopular. Then there is the question, why should there be a right of final appeal to London? Well, the reality is that the Supreme Court is doing no more than applying the law that every court in the land is required to apply, by the international obligations that the United Kingdom has entered into and the legislation that has given them effect in our domestic law. Perhaps it was easier for us to do this than it was for a court which was only too well aware of the consequences for the business that it has to conduct, as the aftermath of *Cadder* has shown.

What then of the future? I am as strong a believer in the virtues of the Scottish legal system as I ever was. In some respects my belief in it has been strengthened by what I have learned south of the Border. But I also believe very strongly that, if it is to be kept up to date and able to compete with the English system, our system must look outwards and not inwards as it adapts to the realities of modern life. One of the great virtues of Scots law, as a mixed system, was its willingness to adapt itself so as to keep pace with the way things were done elsewhere. Pride in our own system is one thing; isolationism is quite another. We have much to gain by maintaining contact with the way that law is practised in England and Wales and beyond. We have much to lose if we were to raise the drawbridge and cut ourselves off from the outside world. The Supreme Court, where Justices from all three jurisdictions of the UK engage with each other on so many important and difficult issues, is there as a vital point of contact. That applies to

Convention rights issues as much as it does to issues of private law. I hope that I have been able to reassure you that, from the Scots point of view, our precious legal system is indeed respected in that court and that it is secure in its hands⁴⁵.

1 April 2011

Lord Hope of Craighead

⁴⁵ I am grateful to my judicial assistant Peter Webster for his help in preparing this lecture.