**Hilary Term**
**[2010] UKSC 10**

# JUDGMENT

# Martin (Appellant) *v* Her Majesty's Advocate (Respondent) (Scotland)

# Miller (Appellant) *v* Her Majesty's Advocate (Respondent) (Scotland)

**before**

**Lord Hope, Deputy President**
**Lord Rodger**
**Lord Walker**
**Lord Brown**
**Lord Kerr**

## JUDGMENT GIVEN ON

## 3 March 2010

**Heard on 8, 9 and 10 December 2009**

*Appellant (Martin)*
Christopher Shead
Almira Delibegovic-Broome
Claire Mitchell
(Instructed by Beaumont & Co)

*Respondent*
W James Wolffe QC
James Mure QC

(Instructed by Crown Office and Procurator Fiscal Service)

*2nd Respondent & Intervener*
The Baron Davidson of Glen Clova QC
Mark Lindsay
(Instructed by Office of the Solicitor to the Advocate General for Scotland)

*Appellant (Miller)*
Andrew Brown
Andrew Devlin
(Instructed by Patterson Bell Solicitors)

*Respondent*
W James Wolffe QC
James Mure QC
(Instructed by Crown Office and Procurator Fiscal Service)

*2nd Respondent & Intervener*
The Baron Davidson of Glen Clova QC
Mark Lindsay
(Instructed by Office of the Solicitor to the Advocate General for Scotland)

**LORD HOPE**

1. The Scottish Parliament was established by section 1 of the Scotland Act 1998. It was opened on 1 July 1999. Section 29(1) of the Act provides:

> "An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament."

2. This provision lies at the heart of the scheme of devolution to which the Act gives effect. Section 29 has to be read together with Schedule 4 which protects certain enactments from modification, and then with section 30 and Schedule 5 which defines reserved matters. These are matters reserved to the UK Parliament, and which are therefore excluded from the legislative competence of the Scottish Parliament. The area of competence that is identified by this group of provisions forms the basis for a series of sections that are designed to ensure that the Scottish Parliament confines itself to the defined areas of competence: section 31 (scrutiny of Bills before introduction), section 32 (the responsibility of the Presiding Officer), section 33 (reference of Bills to the Judicial Committee – now the UK Supreme Court – for scrutiny), section 35 (the power of the Secretary of State to intervene in certain cases) and sections 98 to 103 and Schedule 6 (post-enactment adjudication of issues about legislative competence by the courts).

3. The White Paper, *Scotland's Parliament*, Cm 3658 (1997), para 4.3, contrasted this scheme of devolution with that which had been laid down by the Scotland Act 1978, which was repealed because less than 40 per cent of the persons entitled to vote in the referendum which was required by section 85 of that Act voted in favour of it. Under that Act legislative competence was to be transferred to the Scottish Assembly in specifically defined particular groups, further defined by reference to a long list of existing statutes. That scheme, which would have required frequent updating by the UK Parliament, was seen to be incompatible with the aim that the White Paper expressed of ensuring maximum clarity and stability. While the scheme in the 1998 Act may not strike one as a model of clarity, it does appear so far to have achieved the aim of stability.

4. Of course, harmony between the governments at Westminster and Holyrood until the May 2007 elections to the Scottish Parliament contributed to this process, as did frequent use of legislative consent motions (also known as Sewel motions, named after Lord Sewel, Parliamentary Under-Secretary of State for Scotland during the passage of the Scotland Act 1998) passed by the Scottish Parliament agreeing that the UK Parliament might pass legislation on a devolved issue

extending to Scotland. But it is a remarkable fact that the myriad of devolution issues that have come before the courts for determination since May 1999 have been devoted almost exclusively to the exercise of functions in criminal cases by the Lord Advocate. *Logan v Harrower* [2008] HCJAC 61, 2008 SLT 1049 was the first case that brought the extent of the legislative competence of the Scottish Parliament under judicial scrutiny on grounds other than compliance with Convention rights. As in the case of the appeals that are now before this court, it arose of out of a prosecution for contraventions of section 103(1)(b) of the Road Traffic Act 1988. There was no appeal against the appeal court's determination to the Judicial Committee.

5. The question whether an Act of the Scottish Parliament is within the legislative competence of the Parliament is a devolution issue: Schedule 6, para 1(a). So it is for the courts to decide whether an Act which is challenged is within or outside competence. But the judicial function in this regard has been carefully structured. It is not for the judges to say whether legislation on any particular issue is better made by the Scottish Parliament at Holyrood or by the UK Parliament at Westminster. How that issue is to be determined has already been addressed by the legislators. It must be decided according to particular rules that the Scotland Act 1998 has laid down. But those rules, just like any other rules, have to be interpreted. That is the court's function. It is for the court to say what the rules mean and how, in a case such as this, they must be applied in order to resolve the issue whether the measure in question was within competence.

*These proceedings*

6. Section 33 of and Part I of Schedule 2 to the Road Traffic Offenders Act 1988 provide that the offence of driving while disqualified under section 103(1)(b) of the Road Traffic Act 1988 may be prosecuted in Scotland either summarily or on indictment. As originally enacted, the maximum punishment for that offence if prosecuted summarily in Scotland was six months or the statutory maximum fine or both. If it was prosecuted on indictment in Scotland the maximum sentence was twelve months or a fine or both. By section 45 of the Criminal Proceedings etc (Reform) (Scotland) Act 2007, the provisions of which I shall examine in more detail later, the Scottish Parliament increased to twelve months the maximum sentence that might be imposed for this offence under the 1998 Act by the sheriff sitting summarily. That section came into force on 10 December 2007: the Criminal Proceedings etc (Reform) (Scotland) Act 2007 (Commencement No 2 and Transitional Provisions and Savings) Order 2007 (SSI 2007/479).

7. Sean Martin was charged on summary complaint at Oban with a co-accused named Rodney Cuthill. The complaint contained fourteen charges, of which charges 1, 2, 8 and 9 were directed against Martin. In charges 1 and 8 it was

alleged that he drove a motor vehicle on a road while disqualified, contrary to section 103(1)(b) of the Road Traffic Act 1988, and that he committed those offences while on bail. On 14 December 2007 he pled guilty to charges 1 and 8 and to the other two charges. On 17 December 2007 he was sentenced to 12 months imprisonment on charges 1 and 8, of which four months was attributed to the fact that he committed the offences while on bail. On 12 March 2008 he presented a Bill of Suspension to the High Court of Justiciary in which he sought suspension of the sentence of imprisonment on the ground that the relevant provisions of the Criminal Proceedings etc (Reform) (Scotland) Act 2007 were beyond the legislative competence of the Scottish Parliament. On 28 March 2008 he was granted interim liberation pending the determination of his Bill of Suspension.

8. Ross Miller was charged on summary complaint at Stirling. The complaint contained three charges. In charge 1 it was alleged that he drove a motor vehicle on a road while disqualified, contrary to section 103(1)(b) of the Road Traffic Act 1988. On 24 April 2008 he pled guilty to charge 1 and to one of the other charges and was remanded in custody. On 14 May 2008 he was sentenced to seven months imprisonment on charge 1, back-dated to 24 April 2008. On 20 June 2008 he presented a Bill of Suspension to the High Court of Justiciary in which he sought suspension of the sentence of imprisonment on the same grounds as Martin. He applied for interim liberation, but on 3 July 2008 he withdrew that application. Unlike Martin, he has now served his sentence.

9. The two Bills of Suspension came before the appeal court for a hearing on 6 January 2009. Devolution minutes identifying the devolution issue in these proceedings had also been lodged. The court saw no reason for distinguishing these cases from its previous decision in *Logan v Harrower*, in which it held that the increase in the sentencing power of the sheriff sitting summarily by section 45 of the Criminal Proceedings etc (Reform) (Scotland) Act 2007 was within the legislative competence of the Scottish Parliament. As nothing had been said to suggest that that decision was wrong, it refused to pass the Bills. It also refused the devolution minutes. On 30 January and 24 February 2009 respectively it granted the appellants leave to appeal to this court.

10. As this narrative shows, the only reasoned decision on this issue by the appeal court is to be found in *Logan v Harrower*. In para 24 of that case, Lord Nimmo Smith, delivering the opinion of the court, said:

> "We agree with the advocate depute that, in the present case, the purpose of the provision is to make Scots criminal law with regard to penalties, procedure and jurisdiction in the sheriff court apply consistently to both common law offences and statutory offences.

> As provided by para 3 in part I of Schedule 4 to the Scotland Act, the modifications made by section 45 of the 2007 Act to the reading of Part I of Schedule 2 to the Road Traffic Offenders Act 1988 are merely incidental to, or consequential on, the more general aspect of the provision, which relates generally to the powers of the sheriff in relation to statutory offences, whatever their origin; and the modifications do not have a greater effect upon reserved matters than is necessary to give effect to the purpose of the provision in section 45."

*The legislative competence rules*

11. The scheme of devolution of legislative power which the Scotland Act 1998 sets out recognises that it was not possible, if a workable system was to be created, for reserved and devolved areas to be divided into precisely defined, watertight compartments. Some degree of overlap was inevitable, for the reasons explained by Lord Rodger in his discussion of the division of responsibility on matters of policy; see paras [73] and [74]. This is a familiar phenomenon in the case of federal systems such as those in Canada and Australia, where legislative competence is divided between the Dominion and the Provinces or the Commonwealth and the States. In *Prafulla Kumar Mukherjee v Bank of Commerce Ltd, Khulna* (1947) LR 74 Indian Appeals 23 the Judicial Committee rejected the argument that the principles which obtain in Canada and Australia had no application in India. Lord Porter gave this explanation at p 42:

> "It is not possible to make so clean a cut between the powers of various legislatures: they are bound to overlap from time to time."

The rule that was evolved by the Judicial Committee was to examine the statute that was impugned to ascertain its "pith and substance", or its "true nature and character", to determine whether it was legislation "with respect to" matters that were in the prohibited or permitted sphere. The phrase "pith and substance" was first used by Lord Watson in *Union Colliery Co of British Columbia Ltd v Bryden* [1899] AC 580, 587. The phrase "true nature and character" was first used in *Russell v The Queen* (1882) 7 App Cas 829, 839-840. The principles that these phrases embody are sometimes referred to, by a word that went out of fashion in mediaeval times, as the "respection" doctrine.

12. In *Prafulla Kumar Mukherjee v Bank of Commerce Ltd*, *Khulna* having referred to the rule and found that it applied to Indian as well as Dominion legislation, Lord Porter went on to say this at p 43:

> "No doubt experience of past difficulties has made the provisions of the Indian Act more exact in some particulars …. But the overlapping of subject-matter is not avoided by substituting three lists for two, or even by arranging for a hierarchy of jurisdictions. Subjects must still overlap, and where they do the question must be asked what in pith and substance is the effect of the enactment of which complaint is made, and in what list is its true nature and character to be found. If these questions could not be asked, much beneficent legislation would be stifled at birth, and many of the subjects entrusted to provincial legislation could never effectively be dealt with."

13. The same point had already been made by Lord Atkin in *Gallagher v Lynn* [1937] AC 863, which was an appeal from Northern Ireland. Section 4 of the Government of Ireland Act 1920 provided that the Parliament of Northern Ireland had power to make laws for the peace, order and good government of Northern Ireland, but not to make laws in respect of, among other things, trade with any place out of Northern Ireland. He held that an Act regulating the supply of milk in Northern Ireland which imposed controls on every person who within Northern Ireland sold or exposed for sale milk, whether produced within or without the territory of Northern Ireland, was a law for the peace, order and good government of Northern Ireland in respect of precautions taken to secured the health of its inhabitants, not a law in respect of trade. At p 870, explaining what was meant by the "pith and substance" doctrine, he said:

> "If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field. Nor are you to look only at the object of the legislator. An Act may have a perfectly lawful object, eg to promote the health of the inhabitants, but may seek to achieve that object by invalid methods, eg a direct prohibition of any trade with a foreign country."

14. The rule that was evolved and applied in these cases, among others, provides the background to the scheme that is now to be found in the Scotland Act. It was referred to at the committee stage in the House of Lords by Lord Sewel: *Hansard* HL Debates (21 July 1998), vol 592, col 818 et seq. The scheme seeks to give effect to the rule. Lord Sewel, recognising that a degree of trespass into reserved areas was inevitable, said that it was intended that any argument as to whether a provision in an Act of the Scottish Parliament "relates" to a reserved matter must be decided by reference to its "pith and substance" or its purpose and

if its purpose is a devolved one it is not to be outside legislative competence merely because it affects a reserved matter: col 819.

15. The question whether that aim has been achieved must be determined by examining the provisions of the Scotland Act in which the scheme is laid out. While the phrase "pith and substance" was used while these provisions were being debated, it does not appear in any of them. The idea has informed the statutory language, and the rules to which the court must give effect are those laid down by the statute. As to what they mean, the Scotland Act provides its own dictionary.

16. Section 29, which must now be quoted in full, provides as follows:

> "(1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.
>
> (2) A provision is outside that competence so far as any of the following paragraphs apply –
>
> (a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland,
>
> (b) it relates to reserved matters,
>
> (c) it is in breach of the restrictions in Schedule 4,
>
> (d) it is incompatible with any of the Convention rights or with Community law,
>
> (e) it would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland.
>
> (3) For the purposes of this section, the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined, subject to subsection (4), by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.
>
> (4) A provision which –
>
> (a) would otherwise not relate to reserved matters, but

(b) makes modifications of Scots private law, or Scots criminal law, as it applies to reserved matters,

is to be treated as relating to reserved matters unless the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise."

17. The paragraphs of section 29(2) that require to be examined in this case are paras (b) and (c). The first question is whether section 45 of the Criminal Proceedings etc (Reform) (Scotland) Act 2007 "relates to" a reserved matter. Reserved matters are the matters reserved to Westminster by section 30(1) of the Scotland Act, which gives effect to the list of matters in Schedule 5. Para 1 of Part II of Schedule 5 provides that the matters to which any of the sections in the Part apply are reserved matters for the purposes of the Act. Head E – Transport lists among the subject matter of section E1, which applies to Road Transport, the following:

"(d) the Road Traffic Act 1988 and the Road Traffic Offenders Act 1988."

Section 45 of the 2007 Act does not refer expressly to any of the provisions of the Road Traffic Act 1988 or the Road Traffic Offenders Act 1988. But, as it applies to offences under enactments passed before the 2007 Act generally, it must be taken to refer to them by implication. Their subject matter is a reserved matter.

18. The question whether a provision "relates to" a reserved matter in terms of section 29(2)(b) is to be determined by reference to the purpose of the provision, applying the rule set out in section 29(3). This rule lays down the primary test of what is meant by "purpose". But it is necessary to have regard also to section 29(4) which deals with a special category of overlap between reserved matters and matters which are not reserved that is in point in this case. This is because section 126(5) of the Scotland Act provides that references in the Act to Scots criminal law include criminal offences, jurisdiction, evidence, procedure and penalties and the treatment of offenders, and because section 45 of the 2007 Act deals with what the head-note to Part 3 of that Act refers to as "penalties".

19. The list of reserved matters has been drawn up by reference to different aspects of executive or governmental responsibility. But the spheres of activity embraced by Scots private law and Scots criminal law, which are not reserved, do not respect those boundaries. They extend across all of them. The regulation of both devolved matters and reserved matters within Scotland is likely to involve questions of Scots private law and Scots criminal law. Section 29(4) does not

apply if, applying the test laid down by section 29(2), the provision in question has already been found otherwise to "relate to" a reserved matter. That is the effect of para (a) of this subsection. It does apply, however, if it makes modifications of Scots private law or Scots criminal law as it applies to reserved matters: para (b). Here too the boundary between what is reserved and what is not reserved is to be determined by applying a "purpose" test. The key word here is "consistently". If the purpose is to make the relevant rule of Scots criminal law apply consistently to reserved matters and otherwise, it will pass the test. The provision will not then fall to be treated as relating to a reserved matter, and thus outside the legislative competence, because it is caught by section 29(2)(b).

20. The question whether the provision is in breach of any of the restrictions in Schedule 4 must also be addressed in this case. The paragraphs in that Schedule that need to be considered are paras 2 and 3, which so far as relevant provide as follows:

> "2 (1) An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, the law on reserved matters.
>
> (2) In this paragraph, 'the law on reserved matters' means –
>
> (a) any enactment the subject matter of which is a reserved matter and which is comprised in an Act of Parliament or subordinate legislation under an Act of Parliament, and
>
> (b) any rule of law which is not contained in an enactment and the subject matter of which is a reserved matter,
>
> and in this sub-paragraph 'Act of Parliament' does not include this Act.
>
> (3) Sub-paragraph (1) applies in relation to a rule of Scots private law or Scots criminal law (whether or not contained in an enactment) only to the extent to that the rule in question is special to a reserved matter …
>
> 3 (1) Paragraph 2 does not apply to modifications which –
>
> (a) are incidental to, or consequential on, provision made (whether by virtue of the Act in question or another enactment) which does not relate to reserved matters, and
>
> (b) do not have a greater effect on reserved matters than is necessary to give effect to the purpose of the provision.
>
> (2) In determining for the purposes of sub-paragraph (1)(b) what is necessary to give effect to the purpose of a provision, any power to

> make laws other than the power of the Parliament is to be disregarded."

21. There is obviously some duplication between section 29 and the provisions of this Schedule. At first sight, paragraph 2(1) declares what the reader already knows, having studied section 29(4). But, in contrast to section 29(4) which deals with the question whether a provision "relates to" a reserved matter, para 2(1) refers to "the law on" reserved matters. The meaning of this expression is set out in para 2(2)(a). The starting point is that the law on reserved matters as a whole is protected from modification by the Scottish Parliament. This appears to withdraw the protection that is given by section 29(4) to modifications of a rule of Scots private law or Scots criminal law as it applies to reserved matters whose purpose was to make the law apply consistently to reserved matters and otherwise. But paragraph 2(1) is itself qualified by the opening words of paragraph 2(3). The words "is special to a reserved matter" are the key words in this subparagraph. The contrast which they suggest is between a rule of Scots criminal law which is special to a reserved matter on the one hand and one which is general in its application on the other because it extends to both reserved matters and matters which have not been reserved. There is a strong family likeness between the two tests, as Lord Walker says: see para [54]. But a modification which survives the test in section 29(4) will have to pass the tests in Schedule 4: section 29(2)(c). If it passes the test in paragraph 2(3), paragraph 2(1) will not apply. It will have no need of the protection that is given by paragraph 3 to modifications that fall within the scope of that paragraph.

22. This analysis shows that the questions which lie at the heart of this case are: (1) whether the purpose of section 45 was to make a modification to Scots criminal law as defined in section 126(5); (2) if so, whether its purpose was to make the law apply consistently to reserved matters and otherwise; and (3) if it passes those tests, whether the rule that it sought to modify was special to a reserved matter within the meaning of paragraph 2(3) of Schedule 4.

*Section 45 of the 2007 Act*

23. Section 45 of the Criminal Proceedings etc (Reform) (Scotland) Act 2007 is one of a group of sections dealing with sentencing powers which appear in Part 3 of the Act under the heading "Penalties". Two sections require to be noticed in addition to section 45. First there is section 43, which deals with common law offences. It amends section 5 of the Criminal Procedure (Scotland) Act 1995, which deals with the sheriff's summary jurisdiction and powers, in two respects: in section 5(2)(d), the power to impose imprisonment is raised from any period not exceeding three months to twelve; and section 5(3) is repealed. Secondly, there is

section 44, which increases the maximum sentence of imprisonment for a list of particular summary-only statutory offences which had attracted a maximum sentence in excess of the previous common law maximum but were below the new maximum of twelve months for offences dealt with summarily.

24. Section 45 is headed "Other statutory offences". It is not necessary for the purposes of this case to quote it in full. The provisions that are relevant provide as follows:

> "(1) The maximum term of imprisonment to which a person is liable on summary conviction of a relevant offence is, by virtue of this subsection, 12 months.
>
> (2) Accordingly, the specification of a maximum period of imprisonment in every relevant penalty provision is, in relation to any relevant offence to which it applies, to be read subject to subsection (1).
>
> (3) Without prejudice to subsections (1) and (2), the Scottish Ministers may by order amend the specification of a maximum term of imprisonment in a relevant penalty provision so as to specify, in relation to the relevant offence to which it applies, that the maximum term of imprisonment to which a person is liable on summary conviction is 12 months.
>
> …
>
> (6) In this section, a 'relevant offence' is an offence under a relevant enactment or instrument which is –
>
> (a) triable either on indictment or summary complaint, and
>
> (b) punishable on summary conviction with a maximum term of imprisonment of less than 12 months.
>
> (7) In this section –
>
> a "relevant enactment" is an Act passed before this Act…"

It is common ground that the Road Traffic Offenders Act 1988 is a relevant enactment and that a contravention of section 103(1)(b) of the Road Traffic Act 1988 is a relevant offence for the purposes of this section.

*What was the "purpose" of section 45?*

25. Section 29(3) of the Scotland Act provides that, when consideration is being given to the "purpose" of the provision, regard is to be had to its effect "in all the circumstances". One of the circumstances to which it is proper to have regard is

the situation before the provision was enacted, which it was designed to address. Reports to and papers issued by the Scottish Ministers prior to the introduction of the Bill, explanatory notes to the Bill, the policy memorandum that accompanied it and statements by Ministers during the proceedings in the Scottish Parliament may all be taken into account in this assessment.

26. The sentencing powers of the sheriff, sitting as a court of summary jurisdiction, are regulated by statute. Section 7(5) of the Criminal Procedure (Scotland) Act 1995 provides that a stipendiary magistrate shall have the summary criminal jurisdiction and powers of a sheriff. Prior to the commencement of the Criminal Proceedings etc (Reform) (Scotland) Act 2007, section 5(2) of the 1995 Act provided inter alia as follows:

> "The sheriff shall, without prejudice to any other or wider powers conferred by statute, have power on convicting any person of a common law offence –
>
> ….
>
> (d) to impose imprisonment, for any period not exceeding three months."

Section 5(3) of the 1995 Act provided that the maximum sentence for a second or subsequent offence involving violence or dishonesty was six months. The effect of these provisions was that the power of the sheriff or stipendiary magistrate to impose a sentence of imprisonment was limited to a maximum of three months in the case of common law crimes (except in the case of certain types of repeat offences) and, in the case of statutory offences, to the maximum laid down by the relevant statute. In the case of a contravention of section 103(1)(b) of the Road Traffic Act 1988, section 33 of and Part I of Schedule 2 to the Road Traffic Offenders Act 1988 provided that the maximum if the offence was prosecuted summarily in Scotland was six months.

27. In November 2001 the Minister of Justice appointed a committee under Sheriff Principal John McInnes QC to review the provision of summary justice in Scotland, including the structures and procedures of the sheriff courts and the district courts as they related to summary business and the inter-relation between the two levels of court, and to make recommendations for the more efficient and effective delivery of summary justice in Scotland. In the report which it presented to Ministers in January 2004 the Summary Justice Review Committee identified a need to relieve pressure on the higher courts. This implied a need to move cases from the High Court of Justiciary to the sheriff and jury court, and in turn a need to move cases from the sheriff and jury court to summary procedure. In para 7.87 of

its report it recommended that, to equip summary judges with the disposals that would be necessary to deal with cases that would be heard summarily in the future, the criminal jurisdiction of judges sitting summarily should be increased to a maximum of twelve months detention or imprisonment or a £20,000 fine.

28. Having consulted on this recommendation among other proposals, the Scottish Ministers decided to accept it. In March 2005 the Minister for Justice published *Smarter Justice, Safer Communities – Summary Justice Reform Next Steps* (Scottish Executive, March 2005). In para 4.10 reference was made to the recommendations that the Committee had made which were designed to promote case handling at a more appropriate level:

> "Recognising the pressures on the solemn system, the Committee recommended that the sentencing powers of a sheriff sitting without a jury should be raised to one year in custody or a fine of £20,000, enabling the transfer of the least serious solemn business to the summary courts…"

In para 4.50 it was stated that it was proposed to implement the report's recommendations in relation to the custodial sentencing powers of sheriffs sitting summarily.

29. The Criminal Proceedings etc (Reform) (Scotland) Bill was introduced into the Scottish Parliament in February 2006. In para 186 of the explanatory notes to the Bill it was said of section 35 (which became section 45 when the Bill was passed) that it brought the maximum summary prison sentences for certain statutory offences into line with the new maximum sentence for common law offences set out in what is now section 43 of the Act. In the Policy Memorandum which accompanied the Bill it was stated in para 6 that the Bill made provision in eight main policy areas, including:

> "increases in the criminal sentencing powers of the summary courts, ensuring that those courts can deal with an appropriate range of cases in terms of both severity and caseload, and do so more quickly than is currently the case."

In para 206 it was stated that the Executive believed that professional sheriffs should be able to deal with a wider range of cases under summary procedure than they were currently entitled to, including some that would attract a higher penalty.

30. The theme that is apparent from these earlier documents was picked up by the Justice 1 Committee in its report on the general principles of the Bill: Justice 1, 10th Report 2006, *Stage 1 Report on Criminal Proceedings etc (Reform) (Scotland) Bill*, 5th July 2006. In para 293 of its report the Committee said that one of the principal drivers for the reforms proposed by the Bill was that justice should be dispensed at the appropriate level and that this meant, among other things, the granting of significantly increased sentencing powers to sheriffs sitting without a jury. In para 294 it said that it broadly accepted that there was merit in some cases being dealt with at lower levels of the judicial system than was the case at present. Introducing the stage 1 debate in the Parliament on 14 September 2006, the Minister for Justice said that the Bill made a number of changes to the detailed law of criminal procedure, that each of these changes played its part in speeding up the system as a whole, that the Bill would ensure that increased sentencing powers for sheriffs would ease the pressure on the higher courts and that the bill was to be regarded as part of the executive's wider work to reform the summary justice system: Scottish Parliament Official Report, cols 27664-6.

31. In my opinion this material shows conclusively that the purpose of section 45 of the 2007 Act was to contribute to the reform of the summary justice system by reducing pressure on the higher courts. An increase in the sentencing powers of sheriffs when they were dealing with statutory offences was seen as a necessary of this process. The jurisdiction of the sheriff sitting summarily is defined by reference to the penalties that the sheriff can impose. These are pre-eminently matters of Scots criminal law: see section 126(5). As it was to a rule of Scots criminal law that the provision was directed, I would hold that it does not relate to a reserved matter within the meaning of section 29(2)(b).

*Was it to make the law apply "consistently"?*

32. Section 45 of the 2007 Act forms part of a group of sections, all directed to a reform – or modification – of the sentencing powers of the sheriff sitting summarily. The leading provision is section 43, which increased the maximum sentence for common law offences from three (or, in the case of some repeat offences, six) months to twelve months. It is obvious however that to have left the matter there would have led to an imbalance in the system between how common law offences were to be dealt with on the one hand and how statutory offences were to be dealt with on the other. The reform that this would have achieved would have been incomplete and confusing. To achieve its object it had to be extended across the board to statutory offences as well.

33. To draw a line between statutory offences relating to reserved matters and those relating to matters that were not reserved would have been even more confusing. When they were dealing with an offence created by a United Kingdom

statute, prosecutors and sheriffs would have had to check in each case whether they were on the right side of the line. Statutory offences of all kind form a large part of the diet of the summary courts. To achieve a complete and worthwhile reform of the summary justice system a modification of the sentencing power across the whole range of statutory offences was required. In my opinion the purpose of the modification in section 45 must be taken to have been to make the law relating to the increased sentencing power of the sheriff sitting summarily apply consistently to reserved matters and otherwise. I would hold that section 45 is not to be treated as relating to a reserved matter under section 29(4).

*Is the rule "special" to a reserved matter?*

34. The question that must now be addressed is that set out in para 2(3) of Schedule 4: is the rule of Scots criminal law that the Act seeks to modify special to a reserved matter? To answer it, one must first identify the rule of Scots criminal law that is being modified. Then one must ask whether that rule is special to a reserved matter. Identifying the rule is a crucial step towards reaching the right answer to the question whether the modification that is proposed is within the competence of the Scottish Parliament or must be dealt with at Westminster. I agree with Lord Rodger that, unlike section 29(3) and (4), para 2 of the Schedule concentrates on the rule of law that is being modified by the enactment and makes no mention of the purpose of the modification: see para [122]. But the purpose of the enactment may nevertheless be referred to in order to identify the rule of law that is being modified.

35. I think that it is clear that any modification of the maximum punishment that can be imposed for the offences that the road traffic legislation has created must be held to be a matter for the United Kingdom Parliament at Westminster. The rule of Scots law as to the maximum term of imprisonment that can be imposed would fall to be treated as a rule that was special to a reserved matter. So would any other limits on the extent of the penalties or as to the scope of offences that the Road Traffic legislation lays down. The Calman Report, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century*, June 2009, considered in paras 5.167-181 certain aspects of road traffic regulation including drink-driving limits and speed limits. As the authors of the report were right to recognise, under the current legislation any alteration to those limits that might be thought to be acceptable in Scotland would not be within the legislative competence of the Scottish Parliament.

36. Some concern was expressed during the progress of the Bill as to whether this reform might lead to what was referred to as sentence drift – a tendency on the part of sheriffs to impose higher sentences for these offences than they would previously have regarded as appropriate. But it is plain that this was not what the

reform was intended to do, and there is no evidence that this has in fact happened. So I do not think that it would right to say that the purpose of section 45 was to achieve an overall increase in the sentences that sheriffs were imposing. Had that been the purpose, it would have gone some way to identifying the rule of law that was being modified. As it is, the rule cannot be identified by that route.

37. Section 33 of and Part I of Schedule 2 to the Road Traffic Offenders Act 1988 provide that the maximum sentence of imprisonment for the offence under section 103(1)(b) of the Road Traffic Act 1988 if prosecuted summarily in Scotland is six months and that it is twelve months if prosecuted in Scotland on indictment. They contain, in effect, two rules of Scots criminal law. One is a rule as to the overall maximum sentence, which is twelve months imprisonment. That, plainly, is a rule which is special to the Road Traffic Acts and it is a reserved matter. The other is a rule about Scots criminal jurisdiction and procedure, which is not reserved. It is that rule which determines the procedure under which the maximum sentence can be imposed. The purpose of the modification that section 45 makes is to enable more statutory offences to be prosecuted summarily. The maximum sentence of imprisonment for the offence if prosecuted in Scotland remains twelve months. The modification relates to the procedure which determines whether the sheriff has jurisdiction to impose the maximum sentence. It extends the power that is given to him when he is sitting summarily. It seems to me therefore that the rule of Scots law that is being modified is the rule of procedure, not the rule of Scots law as to the maximum sentence for the offence. The rule of procedure is a rule that applies generally to the way cases are dealt with in the sheriff court. It is not special to the Road Traffic Offenders Act 1988.

38. The purpose of para 2(3) of Schedule 4 to the 1998 Act, as I understand it, is to avoid the fragmentation of rules of Scots criminal law which are of general application into some parts which are within the Scottish Parliament's competence and some parts which are not. It is, of course, the case that the difference between the maximum sentence that could be imposed by a sheriff sitting summarily and that which could be imposed by him in solemn proceedings was prescribed in Schedule 2 to the Road Traffic Offenders Act 1988. But in doing so the Schedule was basing itself on a distinction between two forms of Scots criminal procedure which apply generally. I think that it was within the competence of the Scottish Parliament to extend its general reform of that procedure to the forms of procedure referred in this and other statutes that deal with reserved matters, otherwise fragmentation would occur. I am not confident that it helps to reason by way of examples. Each case must be taken on its own merits. In case of doubt, the words "to the extent only" suggest that a generous application of para 2(3) which favours competence is to be preferred, as opposed to one which applies it narrowly. And the key to the decision in this case lies in identifying the rule in question, which is achieved by examining the purpose of the provision which is under scrutiny.

39. One could, of course, say that Schedule 2 contains two maximum sentences, one for summary proceedings and the other for proceedings on indictment, and that as both are reserved matters it was not open to the Scottish Parliament to alter either of them. But that, in my opinion, would be to carry the process of analysis too far. The word "special" indicates that, in cases such as this where the decision depends on the exercise of judgment, the purpose of the provision may be the best guide. So, in agreement with Lord Walker and Lord Brown and respectful disagreement with Lord Rodger and Lord Kerr, I would hold that section 45 was not directed to a rule which was special to a reserved matter within the meaning of para 2(3) of Schedule 4, that para 2(1) of the Schedule does not apply, that it survives scrutiny under section 29(2)(c) and there is no need to refer to para 3.

40. Had it been necessary to refer to para 3, I would have held that section 45 of the 2007 Act was not saved by it. On this point I disagree with the appeal court in *Logan v Harrower*. A decision as to the procedure under which a sentence of more than six months could be imposed was not a modification of an incidental or consequential nature. It was an important change in the procedure which one would expect to see set out in the body of the enactment, not in a schedule of the kind that generally deals with matters that are merely incidental or consequential on provisions found elsewhere in the enactment.

41. Section 104 of the Scotland Act enables Her Majesty in Council or a Minister of the Crown, with the consent of both Houses of the United Kingdom Parliament, to make such provision as is considered necessary or expedient in consequence of any provision made by or under any Act of the Scottish Parliament. As the explanatory notes to that section point out, the power to make provision consequential on legislation under paragraph 3 of Schedule 4 is very limited. Among other things, it does not enable the Scottish Parliament to legislate otherwise than as a matter of Scots law. It does not have power under that provision to make any consequential provisions that require to take effect elsewhere in the United Kingdom. Examples of the use that is made of the power under section 104 are to be found in the Adults with Incapacity (Scotland) Act 2000 (Consequential Modifications) (England, Wales and Northern Ireland) Order 2005 (SI 2005/1790) and the Police, Public Order and Criminal Justice (Scotland) Act 2006 (Consequential Provisions and Modifications) Order 2007 (SI 2007/1098). There are many others. Lord Rodger in para [81] has mentioned some of them.

42. The use of section 104 is not confined to cross-border matters. The power was used in connection with the reforms introduced by the 2007 Act to make the powers to impose sanctions under the Road Traffic Offenders Act 1988 available in the justice of the peace courts that were to be established under the 2007 Act, and to make the same powers available in the district courts during the phased introduction of the justice of the peace courts: see the Criminal Proceedings etc

(Reform) (Scotland) Act 2007 (Powers of District and JP Courts) Order 2007 (SI 2007/3480). I agree with Lord Rodger that the scheme for adjusting the sheriff's summary criminal jurisdiction in relation to statutory offences could have been dealt with in this way, had this been thought to be necessary. But the modification that was required in their case was to a procedural route that was already available for dealing with these offences in the sheriff court. For the reasons that I have given I consider that the judgment that was made that the modification was within the legislative competence of the Scottish Parliament was correct, and that the use of the section 104 power was not necessary.

*Conclusion*

43. The result of this analysis is that section 45 of the 2007 Act survives scrutiny. Endorsing what the appeal court decided in *Logan v Harrower* but differing from it as to the reason why the section is not in breach of the restrictions in Schedule 4, I would hold that the provision is within the legislative competence of the Scottish Parliament. I would therefore dismiss these appeals. Bearing in mind that the appellant Martin who is on interim liberation has not yet served the sentence that the sheriff imposed on him, I would remit both cases to the appeal court for any further orders that may be required. Had I been in favour of allowing the appeals I would have made an order under section 102(2)(a) of the 1998 Act removing the retrospective effect of the decision that, so far as it purports to modify the penalty provision for a contravention of section 103(1)(b) of the Road Traffic Act 1988 in Part I of Schedule 2 to the Road Traffic Offenders Act 1988, section 45(2) of the Criminal Proceedings etc (Reform) (Scotland) Act 2007 is outside the competence of the Scottish Parliament. I would also have made an order under section 103(2)(b) suspending its effect for two months to allow the defect to be corrected as it seems to me that, in a case of this kind, these two orders go hand in hand.

**LORD WALKER**

44. The Scotland Act 1998 is on any view a monumental piece of constitutional legislation. Parliament established the Scottish Parliament and the Scottish Executive and undertook the challenging task of defining the legislative competence of the Scottish Parliament, while itself continuing as the sovereign legislature of the United Kingdom. That task is different from defining the division of legislative power between one federal legislature and several provincial or state legislatures (as in Canada or Australia, whose constitutional difficulties the

Judicial Committee of the Privy Council used to wrestle with, often to the dissatisfaction of those dominions). The doctrine of "pith and substance" mentioned by Lord Hope in his judgment is probably more apt to apply to the construction of constitutions of that type. But both have to face the difficulty of defining (necessarily in fairly general and abstract terms) permitted or prohibited areas of legislative activity.

45. The difficulties (viewed from the perspective of Northern Ireland) are discussed in Harry Calvert's *Constitutional Law in Northern Ireland*, which, though written as long ago as 1968, still provides a very helpful commentary. It shows how different forms of words have come to be recognised as indicating a more or less proximate (or direct, or crucial) connection between a proposed enactment and an area of legislative activity. Calvert quotes (from an unidentified source), at pp 180-181, the argument of the Attorney-General for Northern Ireland when *Lynn v Gallagher* [1937] AC 863 was before the House of Lords:

> "The crux of this whole legislation lies in three words, the words 'in respect of' used in section 4(1) of the Government of Ireland Act, 1920. These three words are the apt words to indicate the true subject matter of an enactment but they are not, we submit, the apt words to indicate merely the results of an enactment. They are possibly rather stronger than a word such as 'concerning', and than the phrase 'in relation to', but they certainly must have a different meaning, unless they may be construed contrary to the general use of language, from the word 'affecting'. In the British North America Act the words used are 'in relation to' and these words 'in respect of' do not occur in it. We submit that these words 'in respect of' are no weaker than the words there used.

Calvert also quotes, at p 179, Higgins J in *McArthur Ltd v Queensland* (1920) 28 CLR 530, 565:

> "We have to determine in each case what is the *subject* of the legislation – what subject is the Act 'with respect to' - what it effects – not what things or operations it may indirectly *affect*."

46. These background matters must have been in the mind of those who undertook the drafting of the Scotland Act (and in particular the provisions directly relevant to these appeals). But in the Scotland Act Parliament has gone further, and has used more finely modulated language, in trying to explain its legislative purpose as regards "reserved matters." The Court has to consider two groups of

provisions, each of which has a particular nexus with reserved matters as defined in Schedule 5 of the Act.

47. The first group of provisions consists of section 29(2)(b) as explained and qualified by subsections (3) and (4). The second group consists of section 29(2)(c) and Schedule 4, paras 2 and 3. All these provisions are set out in Lord Hope's judgment (paras 16 and 20) and I need not repeat them. But it is worth considering the manner in which reserved matters are defined in Schedule 5 (to which both groups of provisions are linked).

48. Schedule 5, Part I, contains general reservations: the constitution, political parties, foreign affairs, public service, defence and treason. Part II then contains specific reservations under eleven heads (themselves elaborately subdivided and made subject to exceptions). Although termed specific, some of these are expressed in general terms. For instance, Head A1, Fiscal, economic and monetary policy, is as follows:

> "Fiscal, economic and monetary policy, including the issue and circulation of money, taxes and excise duties, government borrowing and lending, control over United Kingdom public expenditure, the exchange rate and the Bank of England.
>
> *Exception*
>
> Local taxes to fund local authority expenditure (for example, council tax and non-domestic rates)."

Many of the specific reservations in Part II are expressed as the "subject-matter" of a particular statute (or part of a statute). For example Head E.1, Road Transport, includes "The subject-matter of . . .(d) the Road Traffic Act 1988 and the Road Traffic Offenders Act 1988" (subject to an exception for a few sections of the Road Traffic Act 1988). The use of the expression "subject-matter" has been described (in an unsigned editorial in (1998) 19 Statute Law Review v) as an "elegant drafting device" but as having potential difficulties.

49. So I come back to the first group of provisions, consisting of subsection (2)(b) of section 29 as explained and qualified by subsections (3) and (4). Its structure appears reasonably straightforward. Section 29(2)(b) prohibits legislation by the Scottish Parliament which "relates to" reserved matters. That is an expression which is familiar in this sort of context, indicating more than a loose or consequential connection, and the language of section 29(3), referring to a provision's purpose and effect, reinforces that. Section 29(4) adds to the reach of

section 29(2) (as is clear from section 29(4)(a)) as regards modifications of Scots private law, or Scots criminal law, "as it applies to reserved matters." Scots private law and Scots criminal law are widely defined in section 126 (4) and (5). Paragraph 29(4)'s default position is restrictive: the modification is to be treated as relating to reserved matters "unless the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise." Here "the law in question" must mean the relevant rule of Scots private law or Scots criminal law.

50. The second group of provisions consists of section 29(2)(c) and Schedule 4, paras 2 and 3. Para 2(1) contains a general prohibition on modification (including amendment or repeal) of the law on reserved matters, that composite expression being defined in sub-paragraph (2) by reference to the subject-matter of an enactment or non-statutory rule. So reading Schedule 4, para 2(1) and (2) together with Schedule 5, Part II, Head E1(d), we see that (if those provisions stood alone) an Act of the Scottish Parliament could not modify the Road Traffic Offenders Act 1988, because the subject-matter of that Act is a reserved matter.

51. As I understand it the Court is agreed (although not for identical reasons) that the legislation now in point, section 45 of the Criminal Proceedings etc (Reform)(Scotland) Act 2007, does not infringe section 29(2)(b) of the Scotland Act. The Court is however divided as to the effect of section 29(2)(c). Lord Rodger and Lord Kerr take the view that section 45 of the 2007 Act infringes section 29(2)(c) and Schedule 4, para 2 (being "special to a reserved matter" for the purposes of para 2(3) and not being saved by para 3, relating to incidental or consequential modifications).

52. I agree that para 3 is not in point. The crucial provision is para 2(3). But it is important, in my view, to try and see it as part of a rational and coherent scheme defining the legislative competence of the Scottish Parliament.

53. That is easier said than done, as the division within the Court indicates. When I first studied this second group of provisions I got the impression that they replicated, but in different language, the effect of what I have called the first group of provisions, and that it was hard to discern the legislative scheme or purpose underlying this. I still have difficulty with this. But I think the answer may be that section 29(2) is dealing comprehensively with the scope of any new legislation enacted by the Scottish Parliament, whereas Schedule 4 is (as its heading indicates) concerned with the protection of some existing legislation (or some non-statutory rule of law) which has a reserved matter as its subject-matter.

54. However the statute-book is already so heavily burdened that almost any new legislation is likely to modify existing legislation, and in Scotland a lot of new

legislation will have the effect of modifying Scots private law or Scots criminal law. So in most cases both groups of provisions will be in point. Section 29(4) is concerned with a provision which makes a modification to Scots private law or Scots criminal law as it applies to reserved matters; in that case it is necessary to enquire whether its purpose is to make the law in question apply consistently to reserved matters and otherwise (that is, to non-reserved matters). Schedule 4, para 2(3) is concerned with the modification of a rule of Scots private law or Scots criminal law to the extent that the rule in question is "special" to a reserved matter. There is to my mind an obvious degree of affinity between these two enactments, in that a provision intended to produce consistency in a rule's application across the board (that is, to reserved matters and non-reserved matters alike) is unlikely to apply to a rule which is special to a reserved matter. "Special" is to be contrasted with "general" and a measure intended to produce consistency across the board is general by its very nature. The two statutory tests are not identical (if Parliament had intended them to be identical it would no doubt have used the same words in each). Nevertheless they have a strong family likeness, and it would be rather surprising if a provision came within the legislative competence of the Scottish Parliament under section 29(4) but failed on the test in Schedule 4, paragraph 2(3).

55. In applying each test it is necessary to identify the rule of Scots criminal law which is to be modified. It is to be found in sections 9 and 33 of, and Schedule 2 to, the Road Traffic Offenders Act 1988, so far as they apply to an either-way offence under section 103(1)(b) of the Road Traffic Act 1988 committed in Scotland. These provisions are part of Scots criminal law, and they relate (almost by definition, having regard to the wording of Head E1(d)) to a reserved matter.

56. It is also necessary to identify the purpose of the provision which makes the modification, that is section 45 of the 2007 Act. Its purpose was (as Lord Hope says in his judgment, para [31])

> "to contribute to the reform of the summary justice system by reducing pressure on the higher courts. An increase in the sentencing powers of sheriffs when they were dealing with statutory offences was seen as a necessary of this process."

Similarly in Lord Rodger's view (para [105]) it was

> "to introduce a novel, general, provision for determining the maximum term which a sheriff, sitting as a court of summary jurisdiction, could impose by way of imprisonment in respect of either-way statutory offences which had previously attracted a maximum sentence of less than 12 months' imprisonment."

Lord Rodger gives a very similar explanation of the purpose of section 45 in para [113] of his judgment.

57. In my opinion this statutory purpose includes achieving consistency in the sheriff's sentencing powers, on summary conviction, as between reserved and non-reserved matters. Lord Rodger accepts this in para [116] of his judgment, but reaches a different conclusion on the similar point (not, I accept, exactly the same point) arising under Schedule 4, paragraph 2(3).

58. I would accept that on my interpretation both section 29(4) and Schedule 4, para 2(3) may produce some difficult borderline cases, and some results which might appear anomalous. Perhaps they would do so on any interpretation, since in the Scotland Act Parliament was attempting to define legislative competence across the whole broad expanse of what are now regarded as the concerns of government.

59. But (with great respect to the contrary views of Lord Rodger and Lord Kerr) I do not see this as a difficult borderline case. The relevant rule of Scots criminal law to be modified is not that driving while disqualified is a criminal offence, nor that it is a criminal offence punishable by imprisonment, nor that the maximum term of imprisonment is 12 months. All that has been enacted by the Westminster Parliament, and is left untouched. The rule to be modified is whether (and if so to what degree) the option of summary trial before the sheriff should reduce the maximum sentence that can be passed. That is to my mind a general matter relating to the Scottish system of criminal justice, and is not something special to the reserved matter of road transport.

60. For these reasons, and for the fuller reasons in the judgment of Lord Hope, while respecting the closely-argued contrary views of the minority, I agree with Lord Hope and Lord Brown that the appeals should be dismissed and the cases remitted to the Appeal Court for any further orders that may be required.

**LORD BROWN**

61. Section 33 of and Part 1 of Schedule 2 to the Road Traffic Offenders Act 1988 (the RTOA), as originally enacted, provided that the offence of driving while

disqualified (the offence) under section 103(1)(b) of the Road Traffic Act 1988 (the RTA) could be prosecuted in Scotland either summarily or on indictment; if summarily, the maximum punishment was six months imprisonment (and/or a fine); if on indictment, twelve months (and/or a fine). The RTOA and the RTA are reserved matters. By section 45 of the Criminal Proceedings etc (Reform) (Scotland) Act 2007 (the 2007 Act) the Scottish Parliament purported to increase from six months to twelve months the maximum sentence that could be imposed for the offence by the sheriff sitting summarily. (Although immaterial to this appeal, it may be noted that in England and Wales the offence was, and remains, triable summarily only and subject to a maximum sentence of six months imprisonment.)

62. The sole issue for determination on this devolution appeal is whether section 45 of the 2007 Act was within the Scottish Parliament's legislative competence within the meaning of section 29 of the Scotland Act 1998 (the 1998 Act). Section 29 has already been set out in full by other members of the Court and I need not repeat it. So too the relevant paragraphs of Schedule 4 to the 1998 Act (referred to in section 29(2)(c)).

63. Before coming to the single point on which the Court is divided it is worth noting the following basic matters. First, that section 45 of the 2007 Act, the enactment impugned, did not increase the maximum penalty available for the offence in Scotland: that remained at twelve months imprisonment; what changed was that the sheriff could impose this maximum sentence no less when sitting as a court of summary jurisdiction than as a court of solemn jurisdiction. Secondly, that the essential purpose of section 45 (indeed, of sections 43 to 49 of the 2007 Act as a whole) was not to increase the penalties imposed by the Scottish courts but rather, by enlarging the sheriff's summary sentencing powers, to reallocate business within the court system – to have more cases tried summarily instead of by a jury, summary trials generally being simpler, faster and cheaper than jury trials. Thirdly, that had the 2007 Act, directed as it was to reallocating court business in this way and to standardising the sheriff's summary sentencing powers for the future, not included within its provisions modification of the RTOA and the RTA in the way described, it would have created a striking contrast between the sheriff's summary powers when dealing with reserved matters and those available to him in other cases. Of course, as Lord Rodger points out, any such anomaly or inconsistency could if necessary be cured by resort to section 104 of the 1998 Act. But was that the only lawful means of achieving the desired consistency in this case? That is the question.

64. I understand all of us to agree that section 45 does not fall foul of section 29(2)(b) of the 1998 Act. It does not relate to a reserved matter having regard to section 29(3) and is not to be deemed to relate to reserved matters by virtue of

section 29(4). On this latter point, in common with Lord Hope, I regard section 45 as making modifications of Scots criminal law as it applies to reserved matters but as doing so for the purpose of making Scots criminal law (as to the allocation of court business) apply consistently.

65. What critically divides the Court is the question raised under section 29(2)(c): as to whether section 45 is in breach of the restrictions in Schedule 4. I do not pretend to find paragraphs 2 and 3 of Schedule 4 entirely easy to follow and naturally I recognise the force of Lord Rodger's reasoning. For my part, however, I remain unpersuaded that section 45 modifies the law on reserved matters within the meaning of paragraph 2(1), given that (by virtue of paragraph 2(3)) paragraph 2(1) applies in relation to a rule of Scots criminal law only to the extent that the rule is special to a reserved matter (which I do not regard the unamended 6 months limits of the sheriff's summary jurisdiction to be). Even, however, were I persuaded that section 45 is to be regarded as modifying the law on reserved matters within the meaning of paragraph 2, I would conclude here that paragraph 2 is then disapplied by paragraph 3 since such modification is to be seen merely as incidental to a provision being made (for reallocation of court business and the standardisation of the sheriff's summary sentencing powers) in relation to unreserved matters and has no greater effect on reserved matters than is necessary to give effect to such purpose.

66. Given that the Scottish Parliament is plainly intended to regulate the Scottish legal system I am disinclined to find a construction of Schedule 4 which would require the Scottish Parliament, when modifying that system, to invoke Westminster's help to do no more than dot the i's and cross the t's of the necessary consequences. I too, therefore, would dismiss these appeals.

**LORD RODGER**

67. Does an enactment of the Scottish Parliament "relate to reserved matters"? Does it modify a rule of Scots criminal law that is "special to a reserved matter"? These are the key questions in the present appeals. The answers depend on the interpretation of section 29(2)(b) and (c) of the Scotland Act 1998 ("the 1998 Act"), along with paras 2 and 3 of Part I of Schedule 4 to the Act. Viewed in isolation, para 2, in particular, can appear to use impenetrable language to erect an arbitrary restriction on the Parliament's powers. Matters become clearer, however, when the provisions are seen in their setting in life. A useful starting-point is the situation before 1999.

*Policy responsibility before devolution*

68. Until devolution took effect, leaving aside the fluctuating position of Northern Ireland, the central government of the United Kingdom was carried on by a single executive and a single Parliament. The executive was responsible for, and could determine, all areas of policy for the entire United Kingdom. Similarly, Parliament could legislate to give effect to the chosen policy in all parts of the United Kingdom.

69. In practice, Parliament did not always insist on the law being uniform throughout the United Kingdom. To take only the most obvious example, Parliament did not intervene to impose uniformity on the private or criminal laws of England and Scotland. Instead, when legislation was to apply in both jurisdictions, where necessary, it included provisions that were tailored to fit the underlying law of both systems. So, for instance, the Rehabilitation of Offenders Act 1974 had to take account of differences in the two systems of criminal procedure.

70. Sometimes, even if Parliament was legislating for England and Wales only, for example, the legislation could not be effective unless some provisions were made to extend to Scotland – and vice versa. To take another obvious example, aspects of the legislation on detained patients in the Mental Health Act 1983 and the Mental Health (Scotland) Act 1984 had a cross-border dimension and would have been unworkable if various provisions of the English Act had not extended to Scotland and various provisions of the Scottish Act had not extended to England. When the legislation was being prepared, officials and, if necessary, ministers in the various departments, including the Scottish Office, would discuss the proposals and try to iron out any difficulties.

71. Even where there was no particular cross-border dimension, legislation proposed by one department might have an impact on matters for which another department was responsible. Proposed legislation on, say, education might have an impact on employment; legislation on care in the community might raise law and order questions; legislation on transport might affect the environment; legislation on planning might affect trade and industry. And so on. More particularly, to be effective, legislation on a matter for which one department had responsibility might require that a piece of legislation falling within another department's sphere of responsibility should be amended. So, when a policy was being worked up and incorporated into a Bill, while one department would take the lead, very frequently officials and ministers from a number of departments would be involved. Suppose, for instance, the Home Office and the Scottish Office had proposed legislation to adjust the jurisdiction of the courts by increasing the sentencing powers of summary courts in both England and Wales and in Scotland. Suppose also that, in

order to be effective, the reforming legislation would have had to modify the penalty provisions for offences in various Acts, such as the Road Traffic Offenders Act 1988 ("the RTOA"). In that event, officials of the lead departments would have consulted officials and ministers from all the departments, including the Department of Transport, having responsibility for the Acts which it was proposed should be modified.

72. Sometimes the impact of the proposed legislation on a different area would be relatively insignificant – perhaps involving little more than updating statutory references or bringing the language of existing legislation into conformity with the language of the proposed legislation. In such cases the main task of the other departments might well be to help the lead department and the Bill team by identifying provisions that would require to be modified in this way. But sometimes the impact would be more significant and would trench on issues of policy. Then there could well be differences of opinion among the departments concerned as to the best way forward. If officials could not resolve them, the disputed issues could be taken for decision to the appropriate cabinet committee and ultimately, if necessary, to the full cabinet or to the Prime Minister. The result would be a Bill which made all the necessary amendments, whatever the subject-matter of the legislation being amended and irrespective of the department which had responsibility for that subject.

*Policy responsibility after devolution*

73. In the 1998 Act and the corresponding Acts for Wales and Northern Ireland, Parliament devolved legislative and executive authority in varying degrees. The powers of the Scottish Parliament are to be found in sections 28 and 29 of the 1998 Act. Section 28(1) of the 1998 Act provides that, subject to section 29, the Scottish Parliament may make laws. In terms of section 29(1), an Act of the Scottish Parliament is not law so far as any of its provisions is outside the legislative competence of the Parliament. Under section 29(2) a provision is outside that competence in various circumstances – in particular, if, (b), "it relates to reserved matters" or, (c), it is in breach of the restrictions in Schedule 4.

74. Leaving aside certain matters where powers are shared (section 56), it is immediately obvious that the overall scheme was to devolve power to the Scottish Executive and Scottish Parliament, but to except certain "reserved matters", which are identified in Schedule 5 to the 1998 Act. All other matters are devolved matters – although that term is not used since the Act concentrates on identifying the matters lying outside the competence of the Scottish Parliament and Scottish Executive. So far as these reserved matters are concerned, policy responsibility in respect of Scotland remains with the United Kingdom government and the United Kingdom Parliament retains the sole responsibility for legislating on them.

*The purpose of a provision and its validity*

75. It is convenient at this stage to notice that, under section 29(3) of the 1998 Act, the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter – and so is outside the competence of the Parliament under section 29(2)(b) – is to be determined by reference to the purpose of the provision. Sometimes the clearest indication of the purpose of a provision will be found in a report which gave rise to the legislation or in a report of one of the committees of the Parliament. But very often the purpose of a provision will be clear from its context in the Act in question. For example, the subject-matter of the Carriage of Goods by Sea Act 1992 is a reserved matter: para 1 and Section E3 of Part II of Schedule 5 to the 1998 Act. Obviously, therefore, if the Scottish Parliament purported to pass a Carriage of Goods by Sea (Scotland) Act with the sole purpose of repealing the 1992 Act in Scots law, its purpose would relate to a reserved matter and so its provisions would be outside the competence of the Parliament by virtue of section 29(2)(b). In practice, such a clear example would be unlikely to get past the legal advisers to the Scottish Parliament. In real life the problem is likely to arise in more complex situations.

76. But assume, for example, that the purpose of an Act is to increase the sentencing powers of the lower courts in Scotland so as to allow them to deal with more serious cases. The purpose of the Act plainly relates to a devolved, rather than a reserved, matter. So its provisions will not be outside the competence of the Scottish Parliament by reason of section 29(2)(b). Does it follow that all of its provisions are automatically within the competence of the Scottish Parliament? By no means. For example, any provision which was incompatible with rights under the European Convention on Human Rights or with Community law would be outside competence by reason of section 29(2)(d) – even if that provision was designed to help achieve the purpose of increasing the sentencing powers of the lower courts in Scotland. Similarly, any provision which was in breach of the restrictions in Schedule 4 to the 1998 Act would be outside competence – again, even though the provision was designed to help achieve the purpose of increasing the sentencing powers of the lower courts in Scotland.

77. Quite simply, therefore, even if the purpose of an Act is within the competence of the Scottish Parliament in terms of section 29(2)(b) of the 1998 Act, the Parliament cannot achieve that purpose by enacting provisions which are beyond its competence for one of the reasons listed in the other paragraphs of that subsection. As Lord Atkin put it in *Gallagher v Lynn* [1937] AC 863, 870, an Act may have a perfectly lawful object but may seek to achieve that object by invalid methods. In other words, the fact that a provision may have a lawful (devolved) purpose does not validate the provision if, for some other reason, it is outside the competence of the Parliament. So, in particular, the mere fact that the purpose of a

provision is to increase the sentencing powers of the sheriff, sitting as a court of summary jurisdiction, will not validate it if the provision is outside the competence of the Parliament because it purports to modify a rule of Scots criminal law that is special to a reserved matter: section 29(2)(c) of, and para 2 of Part I of Schedule 4 to, the 1998 Act.

*Section 104 orders*

78. The fact that the powers of the Scottish Parliament are subject to these limitations means that there is now a stark contrast between the position in England and Scotland. For England, one executive and one Parliament continue to have the necessary powers to determine policy in all subject areas and to put it into effect by legislation. For Scotland, however, the necessary powers are divided between two executives and two legislatures. Even though the legislative arrangements for Scotland have changed in this way, the nature of the problems to be tackled by legislation has not changed. So, for example, some measures, like mental health legislation, which are devolved matters, still have a cross-border dimension. Similarly, proposed legislation in one field, which happens now to be devolved, may require substantial amendment to legislation in another field, which happens now to be reserved.

79. In these situations the Scottish Parliament will not have all the powers that are needed to make a fully effective reform. So its legislation can take the matter only so far. If it is to be fully effective, the legislation passed by the Scottish Parliament will require to be "topped up" by legislation of the United Kingdom Parliament dealing with any aspects which are beyond its competence.

80. The need to provide for such situations was foreseen by those who drafted the 1998 Act. Section 104, which is designed to be used when they arise, is therefore a key element of the scheme for devolution. It contains a tailor-made mechanism for using the powers of the United Kingdom Parliament to supplement legislation of the Scottish Parliament, without the need for full-scale legislation by Parliament:

> "(1) Subordinate legislation may make such provision as the person making the legislation considers necessary or expedient in consequence of any provision made by or under any Act of the Scottish Parliament or made by legislation mentioned in subsection (2).
>
> (2) The legislation is subordinate legislation under an Act of Parliament made by—

a member of the Scottish Executive,

a Scottish public authority with mixed functions or no reserved functions, or

any other person (not being a Minister of the Crown) if the function of making the legislation is exercisable within devolved competence."

Of course, the Scottish Parliament and Scottish Executive cannot compel a Minister of the Crown to exercise the power under section 104. The intention underlying section 104 – and indeed the whole scheme of devolution – is, however, that the redistribution of powers should not impair but improve the government of the United Kingdom as a whole. It proceeds on the basis that both administrations can be expected to co-operate appropriately. In particular, it presupposes that the United Kingdom ministers and Parliament will not be indifferent to the effectiveness of legislation passed by the Scottish Parliament. Not surprisingly, therefore, since devolution, ministers have made more than 40 orders under section 104.

81. Some of the section 104 orders have concerned matters with a cross-border aspect. When legislating for England and Wales, Parliament can, of course, still include any provisions which require to extend to Scotland in order to make the legislation effective – though, doubtless, only after discussion with the Scottish Executive and their officials. But, as already noted, it is outside the competence of the Scottish Parliament to make any provision that would form part of the law of England and Wales: section 29(1) and (2)(a) of the 1998 Act. So the Scottish Parliament cannot make any changes to English law which may be needed in order to make its legislation on the devolved matter effective. Section 104 comes to the rescue. For instance, following the enactment of the Mental Health (Care and Treatment) (Scotland) Act 2003 by the Scottish Parliament, a Scotland Office minister used his power under section 104 of the 1998 Act to make the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005 (No 2078; S 9), amending the law of, inter alia, England and Wales in order to facilitate the removal of detained patients from Scotland to England or Wales.

82. But section 104 may also be needed in cases where proposed changes in the law on one subject require changes in the law on another subject.

83. Given the large measure of devolution in matters such as justice, education and health, many of the subjects that are likely to be affected by legislation of the

Scottish Parliament will fall within the sphere of responsibility of the Scottish Executive. If the proposed amendments to existing legislation are uncontroversial, then officials can deal with them. If there are disputes on significant matters of policy between, say, the education and criminal justice directorates, it will be for the Scottish Ministers and their officials to thrash them out and incorporate the agreed policy into legislation for the consideration of the Parliament. Again, whatever the principal subject-matter of an Act may be, it can be expected to include the necessary amendments to all the relevant legislation on other devolved matters.

84. After, as before, devolution, however, legislation on a subject which is now a reserved matter is liable to have an impact on a subject which is now devolved. For example, legislation on asylum seekers (a reserved matter) might have an impact on the legislation relating to accommodation for homeless persons (a devolved matter). Given the continuing power of Parliament to legislate for Scotland (section 28(7)), there would be no difficulty in incorporating all the necessary changes into the legislation on asylum seekers – presumably, after the Home Office had discussed the proposals with the Scottish Executive, just as, formerly, the Home Office would have discussed them with the Scottish Office.

85. The converse situation is where the Scottish Executive and Parliament wish to legislate on a matter which has implications for what is now a reserved matter. If, in the days before devolution, effective legislation could often only be prepared and introduced once policy issues in a number of discrete areas had been hammered out, the position must be the same after devolution. Likewise, if different departments were the guardians of policy on different matters before devolution, the same must apply after devolution – the difference being that the Scottish Ministers and their directorates are now responsible for policy on devolved matters, the United Kingdom government and its departments for policy on the other (reserved) matters. Under section 54 of the 1998 Act, the competence of Scottish ministers is, of course, modelled on the competence of the Scottish Parliament.

86. Suppose, for instance, that the Scottish Executive wanted to introduce legislation changing the system of accommodation for homeless persons in Scotland, but the reform would involve modifying provisions in a (reserved) Act on asylum seekers. If similar legislation had been proposed by the Scottish Office before devolution, the Scottish Office and the Home Office would have discussed the relevant policy issues. Eventually, the government as a whole would have reached a view on them and this view would have been reflected in the resulting legislation – if any.

87. Obviously, after devolution, exactly the same policy issues would present themselves. By devolving power over Scottish housing policy to the Scottish Executive and the Scottish Parliament, Parliament cannot have intended to remove from the United Kingdom government the power to take all the necessary decisions on asylum matters. So, in principle, the position after devolution must remain the same as before.

88. If the Home Office and the United Kingdom Parliament were content with the proposed changes to the legislation on asylum seekers, there would be no difficulty: they could be made by order under section 104 of the 1998 Act. One example of such an order dealing with a reserved matter is the Housing (Scotland) Act 2006 (Consequential Provisions) Order 2008 (No 1889), article 6 of which amends the list of disqualifying offices in Part 3 of Schedule 1 to the House of Commons Disqualification Act 1975. Another example is more immediately relevant to the Criminal Proceedings etc (Reform) (Scotland) Act 2007 ("the 2007 Act") which gives rise to these appeals. The Criminal Proceedings etc (Reform) (Scotland) Act 2007 (Powers of District and JP Courts) Order 2007 (No 3480; S 7) repeals or amends provisions of the RTOA. I return to this order briefly at para 151 below.

89. On the other hand, if agreement could not be reached and proposed Scottish housing legislation would involve changes to legislation on asylum seekers which the United Kingdom government regarded as unacceptable, it would have to be either dropped or modified. This would not be to single out Scottish housing legislation – exactly the same would apply to any similar proposal from the ministry with responsibility for housing in England. The only difference is that, for England, the dispute would have to be settled by ministers and departments within the United Kingdom government, whereas, for Scotland, it would have to be settled between a minister and department in Westminster and a minister and directorate in Edinburgh – or, ultimately, between the United Kingdom government and the Scottish Executive. If, therefore, the Scottish Parliament persisted in legislating on the matter, despite the United Kingdom government's opposition, one would expect to find that the relevant provisions affecting asylum seekers would be outside its competence and so not law.

90. By no means all encroachments by the Scottish Parliament into the territory of reserved matters are going to be dramatic or unacceptable. As already explained, legislation on a devolved matter is quite likely to entail some change in a reserved matter. Section 29(2)(c) recognises this reality. It proceeds on the basis that, even when the legislation of the Scottish Parliament does not relate to a reserved matter – and so must relate to a devolved matter – the legislative package, as a whole, may require to have some impact on the law on reserved matters, if it is to be effective. Section 29(2)(c) and Schedule 4 are designed to show how far, in this respect, the Scottish Parliament can go by itself. Consistently with the general

structure of the Act, these provisions prescribe what modifications of the law on reserved matters lie outside the competence of the Scottish Parliament – since they would truly be a matter for the consideration of the United Kingdom government and Parliament. If a proposed reform includes aspects which fall outside the competence of the Scottish Parliament in this way, that does not mean that the reform cannot go ahead: if the United Kingdom government and Parliament are content, these aspects can be addressed by an appropriate order under section 104.

*Incidental or consequential modifications*

91. I shall have to look at paras 2 and 3 of Part I of Schedule 4 to the 1998 Act in more detail in due course, but it is convenient to notice one aspect at this stage. As in pre-devolution days, a piece of legislation on what is now a devolved matter may require essentially minor and technical modifications to the law on what are now reserved matters. Obviously, the Scottish Parliament should be able to make these modifications for itself. And para 3(1) of Part I of Schedule 4 makes it clear that it can – provided that the modifications do not go further than is necessary. Referring back to the restriction imposed by para 2, para 3(1) provides:

> "Paragraph 2 does not apply to modifications which—
>
> (a) are incidental to, or consequential on, provision made (whether by virtue of the Act in question or another enactment) which does not relate to reserved matters, and
>
> (b) do not have a greater effect on reserved matters than is necessary to give effect to the purpose of the provision."

92. The paragraph refers to modifications which are "incidental to, or consequential on, provision made ... which does not relate to reserved matters." The adjectives suggest the kinds of relatively minor modifications which are often to be found in schedules, rather than cluttering up the body of a traditional United Kingdom statute. The wording of a form to be used in making an application or carrying out a transaction is an example of the kind of "incidental" matter which is usually consigned to a schedule. As mentioned already at para 72 above, typical "consequential" amendments are concerned to modernise the language of an existing provision or to update legislative references. Amendments of this kind are also usually found in a schedule to an Act.

93. Precisely because they raise no separate issue of principle, amendments of these kinds can be safely stowed away in a schedule, which is unlikely to be debated in any detail, if at all. If the legislature approves the main provisions, then

it must equally approve these technical and mechanical changes which are needed to give effect to the main provisions. Similarly, it is easy to see that a modification of that kind to the law on a reserved matter, following on from legislation on a devolved matter, would be unlikely to raise any issue of principle to which the relevant United Kingdom minister or Parliament would object. So the Scottish Parliament can deal with it. That is what para 3(1) provides. In the unlikely event that a problem arose, the Secretary of State could make an order under section 35(1)(b) of the 1998 Act prohibiting the Presiding Officer from submitting the Bill for Royal Assent.

94. With that rather lengthy introduction, I can now turn to examine the particular problem which gives rise to these appeals.

*The problem in these appeals*

95. Put briefly, section 45 of the 2007 Act purports to provide inter alia that a person convicted on summary complaint of a contravention of section 103(1)(b) of the Road Traffic Act 1988 ("the RTA") is liable to a maximum term of imprisonment of 12 months rather than of 6 months, as originally provided in section 33 of, and Part I of Schedule 2 to, the RTOA. The effect of para 1 and Section E1 of Part II of Schedule 5 to the 1998 Act is that the RTOA is a reserved matter. So the enactment that comprises section 33 of, and Part I of Schedule 2 to, that Act is the law on a reserved matter. The appellants maintain that, to the extent that it purported to modify the maximum term of imprisonment on summary conviction laid down by the RTOA, section 45 was special to this reserved matter and so outside the competence of the Scottish Parliament by reason of section 29(2)(c) of, and para 2 of Part I of Schedule 4 to, the 1998 Act. It is therefore not law. It follows, they say, that the maximum term of imprisonment on summary conviction of a contravention of section 103(1)(b) of the RTA remains 6 months. If so, the terms of imprisonment, of over 6 months, imposed on the appellants for their respective contraventions of section 103(1)(b) of the RTA, were incompetent and the bills of suspension must be passed and the sentences quashed.

96. The same point came before the criminal appeal court (Lord Nimmo Smith, Lord Eassie and Lord Wheatley) in *Logan v Harrower* 2008 SLT 1049. The court held that section 45 of the 2007 Act was within the competence of the Parliament. In the present cases the appeal court simply followed that decision and, without issuing any written judgment, refused to pass the bills of suspension.

*Summary jurisdiction before the 2007 Act*

97. Before looking in detail at the provisions of the 1998 Act, it is necessary to examine the position on summary jurisdiction before section 45 of the 2007 Act was brought into force on 10 December 2007. Following the enactment of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"), the only provision dealing with the summary jurisdiction and powers of the sheriff to impose a sentence of imprisonment was section 5 of that Act. By section 5(1) the sheriff, sitting as a court of summary jurisdiction, was to continue to have all the jurisdiction and powers exercisable by him at the commencement of the Act. Section 5(2) then provided that, without prejudice to any other or wider powers conferred by statute, on convicting any person of a common law offence, the sheriff was to have power, (d), to impose imprisonment, for any term not exceeding 3 months. By subsection (3), in the case of a second or subsequent conviction of an offence inferring dishonest appropriation of property (or attempt) or of an offence inferring personal violence, the sheriff was to have power to impose a term of imprisonment not exceeding 6 months.

98. Since this was the only general provision dealing with the extent of the sheriff's summary powers of imprisonment, under the 1995 Act there was no general provision of any kind in Scottish criminal procedure which prescribed the maximum term of imprisonment which a sheriff, sitting as a court of summary jurisdiction, could impose where someone was convicted of a statutory offence. The limit depended on what the legislature had provided for the particular offence. So, if you wanted, for example, to know the maximum sentence of imprisonment available on a conviction, on summary complaint, under the Knives Act 1997 you would look at sections 1(5)(a) and 2(2)(a) of that Act. Similarly, for a summary conviction of a contravention of section 103(1)(b) of the RTA, you would look in Part I of Schedule 2 to the RTOA. Often you would find that the maximum penalty on summary conviction was 3 or 6 months. But, even as long ago as 1871, section 7 of the Prevention of Crime Act permitted the sheriff to impose 12 months imprisonment on summary conviction of an offence against the Act. And, if you looked at section 25 of, and Schedule 4 to, the Misuse of Drugs Act 1971 today, you would see that the maximum sentence on summary conviction of various offences is 12 months imprisonment.

99. In 2004 the Summary Justice Review Committee chaired by Sheriff Principal McInnes QC recommended that, in order to relieve pressure on the courts of solemn jurisdiction, the criminal jurisdiction of judges sitting summarily should be increased: they should be able to impose a maximum sentence of 12 months imprisonment or detention and a maximum fine of £20,000. The first group of sections in Part 3 of the 2007 Act (sections 43 to 49) was designed to give effect to a slightly modified version of the Committee's recommendation. Sections 43 to 45

dealt with the recommendation on imprisonment for the sheriff court. Section 46 dealt with the justice of the peace court, while sections 47 and 48 were designed to increase the maximum available fine to £10,000, rather than £20,000, as contemplated by the Committee. Section 49 dealt with compensation orders.

100. The intention behind the relevant provisions of the 2007 Act therefore was that sheriffs sitting as a court of summary jurisdiction should be able to deal with more serious contraventions of the common law and statute law – not that they should impose higher sentences for the same conduct. The anticipated benefits of the reform were thought to outweigh the admitted risk that the effect of increasing the sentences which the summary courts could impose would be an undesirable upward drift in the level of sentences. The appeal court has the necessary powers to check any such tendency in an appropriate case.

*The reform as carried out by the 2007 Act*

101. So far as imprisonment is concerned, the reform was effected by three separate provisions.

102. The first, section 43, dealt with the power of imprisonment for common law offences. Most common law offences, such as assault, are triable either on summary complaint or on indictment. For these cases the reform was effected simply by substituting 12 months for 3 months in section 5(2)(d) of the 1995 Act. So now the maximum penalty for all common law offences is 12 months. Section 5(3), being no longer needed, was repealed. No common law offence falls within the area of reserved matters and so no issue as to legislative competence arises.

103. The second provision was in section 44, which deals with certain specified offences that can be tried only on summary complaint. Again, the maximum term of imprisonment is increased to 12 months. The reform was effected by amending the penalty provisions in the individual statutes creating the offences. Since none of the offences falls within the area of reserved matters, again no issue as to legislative competence arises.

104. Section 45 completed the scheme by dealing with statutory offences which are triable either on indictment or on summary complaint ("either-way offences") and which are punishable on summary conviction with a maximum term of imprisonment of less than 12 months (subsection (6)). Section 45(1) and (2) provide:

> "(1) The maximum term of imprisonment to which a person is liable on summary conviction of a relevant offence is, by virtue of this subsection, 12 months.
>
> (2) Accordingly, the specification of a maximum period of imprisonment in every relevant penalty provision is, in relation to any relevant offence to which it applies, to be read subject to subsection (1)."

By section 45(2) the specification of a maximum period of imprisonment in any relevant penalty provision in any Act passed before the 2007 Act is to be read subject to section 45(1).

105. In short, section 45 was intended to introduce a novel, general, provision for determining the maximum term which a sheriff, sitting as a court of summary jurisdiction, could impose by way of imprisonment in respect of either-way statutory offences which had previously attracted a maximum sentence of less than 12 months imprisonment. In all such cases the sheriff is now to be able to impose a maximum sentence of 12 months imprisonment.

106. In order to achieve its purpose, section 45 had to do two things. First, it had to make provision for the maximum term of imprisonment to which a person is liable on summary conviction of a relevant offence to be 12 months. That is what subsection (1) does. But, by itself, that provision would not have worked – or, at the very least, would have left the position unclear. By the very terms of subsection (6)(b), section 45 applies only to offences where the statutory maximum term of imprisonment on summary complaint has already been fixed at less than 12 months. In other words, if it is to work, section 45 must also, secondly, increase the previous maximum term of imprisonment for the offences in question when tried on summary complaint. So the new rule in section 45(1) has to be made to prevail over, and to supersede, any penalty provision providing for a lower maximum term of imprisonment on summary conviction of any either-way offence in any relevant enactment. That is what subsection (2) is designed to do.

107. The present case shows subsection (2) in action. Section 33 of the RTOA provides:

> "(1) Where a person is convicted of an offence against a provision of the Traffic Acts specified in column 1 of Part I of Schedule 2 to this Act or regulations made under any such provision, the maximum punishment by way of fine or imprisonment which may be imposed

on him is that shown in column 4 against the offence and (where appropriate) the circumstances or the mode of trial there specified.

(2) Any reference in column 4 of that Part to a period of years or months is to be construed as a reference to a term of imprisonment of that duration."

The table below sets out the entry relating to contraventions of section 103(1)(b) of the RTA in Part I of Schedule 2 to the RTOA:

| (1) Provision creating offence | (2) General nature of offence | (3) Mode of prosecution | (4) Punishment | (5) Disqualification | (6) Endorsement | (7) Penalty points |
|---|---|---|---|---|---|---|
| *Offences under the Road Traffic Act 1988* | | | | | | |
| RTA section 103(1)(b) | Driving while disqualified. | (a) Summarily, in England and Wales.<br><br>(b) Summarily, in Scotland.<br><br>(c) On indictment, in Scotland. | (a) 6 months or level 5 on the standard scale or both.<br><br>(b) 6 months or the statutory maximum or both.<br><br>(c) 12 months or a fine or both. | Discretionary. | Obligatory. | 6 |

108. Taking section 33 and the table together – leaving the 2007 Act on one side – on a summary conviction of a contravention of section 103(1)(b) of the RTA in Scotland, the maximum punishment by way of imprisonment which may be imposed on the offender is 6 months.

109. A contravention of section 103(1)(b) of the RTA is a "relevant offence" in terms of section 45(6) of the 2007 Act. Similarly, section 33 of, and Part I of Schedule 2 to, the RTOA constitute a "relevant penalty provision" in terms of section 45(7) of the 2007 Act. So, by virtue of section 45(2), the specification of a maximum period of imprisonment of 6 months on summary conviction in column 4 of Part I of Schedule 2 is "to be read subject to" section 45(1) of the 2007 Act. In other words, the relevant entry in column 4 of the Schedule is to be read subject to the requirement that the maximum term of imprisonment on summary conviction of *any* relevant offence (including a contravention of section 103(1)(b) of the RTA) is to be 12 months.

110. Section 45(3) of the 2007 Act gives the Scottish Ministers power by order actually to amend the specification of a maximum term of imprisonment in a relevant penalty provision. But the Court was told that the Ministers had not exercised that power in respect of Part I of Schedule 2 to the RTOA. An order amending the figure in column 4 of the Schedule from 6 to 12 would make the position clearer for anyone consulting it. But it would not change the substance. If section 45 was within the competence of the Scottish Parliament in this regard, section 45(1) prevails over the Schedule and provides that the maximum term of imprisonment for someone convicted on summary complaint of a contravention of section 103(1)(b) of the RTA is 12 months. Therefore, even if section 45 does not technically amend the figure in column 4 of the Schedule, it certainly purports to supersede, and thereby modify, the law comprising section 33 of the RTOA and the relevant entry in the Schedule. Similarly, it purports to supersede and modify all the other comparable penalty provisions which prescribe the maximum term of imprisonment that can be imposed, on summary conviction, for either-way offences in statutes dealing with reserved matters.

111. In short, section 45 purports to modify, inter alia, the maximum term of imprisonment to which someone is liable on summary conviction of a contravention of section 103(1)(b) of the RTA by increasing it from 6 months to 12 months. The issue in the appeals is whether, in so far as it purports to make this modification of the provisions of the RTOA, section 45 of the 2007 Act is outside the competence of the Scottish Parliament in any of the ways specified in section 29(2) of the 1998 Act. In fact, the parties are agreed that the only relevant limits are those in section 29(2)(b) and (c). Therefore, the Court has to decide whether section 45 of the 2007 Act falls foul of the limits in section 29(2)(b) and (c) and para 2 of Part I of Schedule 4.

112. It is convenient to start with section 29(2)(b).

*Is section 45 beyond the competence of the Scottish Parliament because it relates to a reserved matter?*

113. In para 75 above, I have given a hypothetical example of an Act of the Scottish Parliament whose purpose would obviously relate to a reserved matter. The Act would therefore be outside its competence. Sometimes, of course, the purpose of a provision may be obscure. And, even when it is not obscure, people may describe the purpose in slightly different ways. But, having regard to its background and its context, I would identify the purpose of section 45 of the 2007 Act as being to adjust the jurisdiction of the Scottish courts by making 12 months the maximum term of imprisonment to which a person is liable on summary conviction of any either-way statutory offence. For the sake of brevity, I shall refer to this purpose as being "to increase the sheriff's summary sentencing powers".

The jurisdiction and sentencing powers of the Scottish courts are not reserved matters. So the purpose of the section can on no view be said to "relate to reserved matters". This is so, even though, in order to achieve its purpose, as part of the scheme for adjusting the jurisdiction of the Scottish courts, the section does undoubtedly purport to affect reserved matters, viz, by modifying the relevant penalty provision in the RTOA – and, as the advocate depute accepted, by modifying penalty provisions for either-way offences in any other statutes falling within the scope of the reserved matters in Schedule 5 to the 1998 Act. An example would be the maximum term of imprisonment on summary conviction of a corrupt practice under section 168(1)(b) of the Representation of the People Act 1983.

114. Section 29(4) of the 1998 Act has also to be considered, however, since it contemplates the possibility that a provision whose purpose does not otherwise relate to a reserved matter may nevertheless be treated as relating to a reserved matter and so fall outside the competence of the Scottish Parliament. Subsection (4) applies to a provision which "makes modifications of Scots private law, or Scots criminal law, as it applies to reserved matters". So the subsection would apply only if section 45 could be said to make a modification to Scots criminal law "as it applies to reserved matters".

115. The advocate depute argued that subsection (4) did not apply to a case like the present because it was restricted to cases where the provision in question applied only to reserved matters. Although no such qualification appears in the wording, he submitted that it was implicit since, if a provision applied to both reserved and devolved matters, its purpose would, inevitably, be to make the law apply consistently to reserved matters and otherwise. I accept that, where a provision applies to both reserved and devolved matters, its *effect* may be to make the law apply consistently to both. But its *purpose* may be different. It is possible, for example, to conceive of a situation where the *purpose* of a provision was actually to make a modification in relation to the criminal law applying to a particular reserved matter, but the provision was made to apply, incidentally, to devolved matters. Section 29(4) must be apt to catch a case of that kind.

116. That said, I am very doubtful whether subsection (4) applies in this case. The words of the subsection obviously cover a case where some general provision of Scots private or criminal law applies to reserved matters. For example, it would cover modifications to the general law on limitation as it applied to actions relating to some reserved matter; or modifications to, say, the general law of criminal procedure as it applied to an accused's trial, on summary complaint or on indictment, for some offence constituting a reserved matter. In such cases the provision modifies the law applying to the reserved matter; it does not modify the reserved matter itself. But Parliament provides that, subject to the "unless" clause, it is none the less to be treated as relating to the reserved matter. In the present

case, by contrast, section 45 actually modifies the reserved matter – or, rather, the law on the reserved matter – viz, the penal provision in Part I of Schedule 2 to the RTOA. In my view section 29(4) is not designed to cover a provision of this kind. Therefore, as far as section 29(2)(b) is concerned, the position is regulated by section 29(3).

117. Even if this were considered to be too narrow a construction of section 29(4) of the 1998 Act, section 45 of the 2007 Act would still not fall to be treated as relating to the reserved matter of the RTOA. A provision which makes modifications of Scots criminal law, as it applies to reserved matters, is to be treated as relating to reserved matters "unless the purpose of the provision" is to make the law apply consistently to reserved matters and otherwise. The phrase, "the purpose of the provision", must refer to the same purpose in both subsection (3) and subsection (4). Part of the purpose of section 45 – as described in para 112 above – is indeed to make the law on the sheriff's power to imprison apply consistently to all either-way statutory offences, whether constituting reserved matters in terms of Schedule 5 or not. So section 45 is not to be treated as relating to a reserved matter under section 29(4).

118. In effect, the "unless" clause in section 29(4) allows the Scottish Parliament to make a general reform of Scottish private or criminal law, even though it modifies the law which applies to reserved matters. Again, this is not surprising since the United Kingdom Parliament's legislation on particular topics has always been framed and operated against the background of the general private and criminal law as it applies in the various jurisdictions from time to time. Equally, any reform of the general law has to take account of all the matters to which it actually applies.

119. In agreement with all of your Lordships, I am therefore satisfied that section 45 of the 2007 Act is not outside the competence of the Scottish Parliament by reason of relating to a reserved matter. The question then arises: even though the purpose of section 45 is one that the Scottish Parliament can legitimately pursue, is the section nevertheless to some extent outside its competence because it is in breach of a restriction in para 2 of Part I of Schedule 4 to the 1998 Act? This question has to be addressed in stages.

*Does section 45 modify the law on a reserved matter?*

120. As already explained, under section 29(2)(c) of the 1998 Act, section 45 will be outside the competence of the Scottish Parliament so far as it breaches any of the restrictions in Schedule 4 to the 1998 Act. The relevant paragraphs for present purposes are paras 2 and 3. Paragraph 2 provides:

"(1) An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, the law on reserved matters.

(2) In this paragraph, "the law on reserved matters" means—

(a) any enactment the subject-matter of which is a reserved matter and which is comprised in an Act of Parliament or subordinate legislation under an Act of Parliament, and
(b) any rule of law which is not contained in an enactment and the subject-matter of which is a reserved matter, and in this sub-paragraph "Act of Parliament" does not include this Act.

(3) Sub-paragraph (1) applies in relation to a rule of Scots private law or Scots criminal law (whether or not contained in an enactment) only to the extent that the rule in question is special to a reserved matter or the subject-matter of the rule is—

(a) interest on sums due in respect of taxes or excise duties and refunds of such taxes or duties, or
(b) the obligations, in relation to occupational or personal pension schemes, of the trustees or managers…."

121. At first sight, para 2(1) appears to impose a very drastic limit on the competence of the Scottish Parliament: an Act of the Parliament cannot modify (which includes amending or repealing – section 126(1)) the law on reserved matters. If that were all that para 2 said, then it would prevent the Scottish Parliament from ever touching legislation on reserved matters – even if the purpose of the provision related to a devolved matter. In effect, it would make section 29(2)(b) superfluous. But para 2(1) is actually qualified by para 2(3) and does not apply to modifications falling within the scope of para 3.

122. Section 29(3) and (4) focus on the provision which is being enacted and on its purpose. By contrast, para 2 of Part I of Schedule 4 focuses on the rule of law that is being modified by the enactment and makes no mention whatever of the purpose of the modification.

123. Paragraph 2(2)(a) defines "the law on reserved matters" as "any enactment the subject-matter of which is a reserved matter and which is comprised in an Act of Parliament or subordinate legislation under an Act of Parliament." As explained in para 95 above, the effect of para 1 and Section E1 of Part II of Schedule 5 to the 1998 Act is that the subject-matter of the RTOA is a reserved matter. So the enactment comprising section 33 of, and the relevant entry in Part I of Schedule 2

to, that Act is part of the law on this reserved matter. This conclusion supports my earlier conclusion that these provisions are not provisions of Scots criminal law, "as it applies to reserved matters" in terms of section 29(4)(b). A provision cannot be both "the law on a reserved matter" and the law "as it applies to" the self-same reserved matter.

124. As I have already explained at para 110 above, section 45 of the 2007 Act undoubtedly purports to supersede and modify the enactment in section 33 of, and the relevant entry in Part I of Schedule 2 to, the RTOA. Therefore the power of the Scottish Parliament to enact section 45 for reserved statutes depends on whether the restriction in para 2(1) of Part I of Schedule 4 to the 1998 Act applies to the modification made by section 45.

*Does section 45 fall within para 3(1) of Part I of Schedule 4?*

125. In *Logan v Harrower* 2008 SLT 1049, 1054, at para 24, giving the opinion of the appeal court, Lord Nimmo Smith said this:

> "While we were not fully addressed on the extent to which recourse may legitimately be had to extra-statutory materials as an aid to the construction of a statutory provision such as section 45, in order to discover whether its purpose is such as to bring it within the proviso to section 29(4), it appears to us to be legitimate to have regard to the passages in the Policy Memorandum and Explanatory Notes, quoted above, which contain express statements about its purpose. From these it may be taken, as the advocate depute submitted, that the purpose and of the provision in section 45 of the 2007 Act is to increase generally the criminal sentencing powers of the sheriff, sitting as a court of summary jurisdiction, and that the provision, construed in this light, fulfils this purpose. We agree with the advocate depute that, in the present case, the purpose of the provision is to make Scots criminal law with regard to penalties, procedure and jurisdiction in the sheriff court apply consistently to both common law offences and statutory offences. As provided by paragraph 3 in Part I of Schedule 4 to the Scotland Act, the modifications made by section 45 of the 2007 Act to the reading of Part I of Schedule 2 to RTOA 1988 are merely incidental to, or consequential on, the more general aspect of the provision, which relates generally to the powers of the sheriff in relation to statutory offences, whatever their origin; and the modifications do not have a greater effect upon reserved matters than is necessary to give effect to the purpose of the provision in section 45."

126. Lord Nimmo Smith had already explained, at para 22 of the court's opinion, that the argument before the court had centred on section 29(4) of the 1998 Act. And para 23 and the first three sentences of para 24 contain the reasoning by which the court concluded that section 45 of the 2007 Act was not to be treated as relating to reserved matters by reason of section 29(4).

127. In the final sentence of para 24 the appeal court moved on to consider whether, nevertheless, section 45 was in breach of the restriction in para 2(1) of Part I of Schedule 4 to the 1998 Act. The court held that it was not – on the view that the modifications made by section 45 of the 2007 Act to the reading of Part I of Schedule 2 to the RTOA "are merely incidental to, or consequential on, the more general aspect of the provision, which relates generally to the powers of the sheriff in relation to statutory offences, whatever their origin." The appeal court had in mind para 3(1) of Part I of Schedule 4 which is set out in para 91 above. In other words, the court held that the modifications made by section 45 were incidental to, or consequential on, provision made which did not relate to reserved matters. So the prohibition in para 2(1) did not apply to those modifications. In my view the reasoning is unsound.

128. I have already indicated, at paras 91-93 above, that para 3(1) appears to be intended to cover the kinds of minor modifications which are obviously necessary to give effect to a piece of devolved legislation, but which raise no separate issue of principle. Indeed the amendments to the RTOA – replacing references to the "district court" with references to "the justice of the peace court" – in para 7 of the Schedule to the 2007 Act are as good an example as any of minor consequential amendments to the law on reserved matters which para 3(1) of Part I of Schedule 4 to the 1998 Act permits the Scottish Parliament to make. In fact, para 444 of the Explanatory Notes says that "Paragraph 7 is consequential upon the establishment of JP courts and inserts references to that court in place of the district court." But the modifications made by section 45 of the 2007 Act are of a completely different character – and the draftsman clearly thought so, since they are effected not in the Schedule but by a separate section in the body of the Act. Section 45 is one of three sections (the others being 43 and 44) which combine to alter the jurisdiction of the sheriff sitting as a court of summary jurisdiction. None of the sections can be regarded as incidental to, or consequential on, another: they are all independent and deal with distinct aspects of the situation. Needless to say, the relevant paragraphs of the Explanatory Notes do not suggest that section 45 is to be regarded as merely consequential or incidental.

129. Moreover, section 45 applies to any penalty provision in "a relevant enactment" – which, by subsection (7), covers any Act passed before the 2007 Act. These are the words which bring in, for example, the RTOA. So the modifications of the law on reserved matters made by section 45 are effected by exactly the same

words as the modifications of the law on devolved matters. Both sets of modifications play an equivalent part in the overall scheme – the modifications to "reserved" penalty provisions are of no less importance than the modifications to "devolved" penalty provisions. Neither can be regarded as incidental to, or consequential on, the other.

130. Despite this, in *Logan v Harrower* the appeal court considered that the modifications to the law in Part I of Schedule 2 to the RTOA were "merely incidental to, or consequential on, the more general aspect of the provision, which relates generally to the powers of the sheriff in relation to statutory offences, whatever their origin." The reasoning is not easy to follow. It is enough, however, to observe that neither section 45 nor any other provision in the 2007 Act actually has any separate "more general aspect" relating "generally" to the powers of the sheriff in relation to statutory offences. So there is no separate devolved provision of that kind – and, more particularly, no separate "provision made … which does not relate to reserved matters" – in relation to which the modifications to the RTOA made by section 45 could ever be regarded as incidental or consequential.

131. For these reasons, like Lord Hope, I am satisfied that para 3(1) of Part I of Schedule 4 to the 1998 Act does not have the effect of preventing para 2 from applying to section 45 of the 2007 Act. It is therefore necessary to look at the qualification to para 2(1) which is to be found in para 2(3), and which the appeal court did not consider in *Logan v Harrower* because of their conclusion on para 3(1).

*Is the rule of law in the RTOA "special to a reserved matter" under para 2(3)?*

132. Unquestionably, section 33 of the RTOA and the relevant entry in Part I of Schedule 2 comprise a rule of Scots criminal law to the effect that, on a summary conviction of a contravention of section 103(1)(b) of the RTA, the maximum punishment by way of imprisonment which may be imposed on the offender is 6 months. That is the rule which section 45 purports to modify. Paragraph 2(1) of Part I of Schedule 4 prevents the Scottish Parliament from modifying a rule of Scots criminal law only to the extent that the rule is "special to a reserved matter". So the Court has to decide whether this rule is "special" to a reserved matter.

133. The advocate depute argued that the rule is not special to this reserved matter or indeed to any other reserved matter: the rule simply prescribes a maximum penalty of 6 months imprisonment for a conviction on summary complaint and that is a penalty that is found in many statutes, on both reserved and devolved matters. To be "special", the penalty would have to be one that was not prescribed for an infringement of any statute dealing with a devolved matter. In

theory, for instance, it would have applied if the unique penalty for an infringement of section 103(1)(b) of the RTA had been – per impossibile – say, whipping. Then, because that was a penalty which was found only within the sphere of reserved matters, the Scottish Parliament would be prevented from modifying it. It is fair, however, to say that the advocate depute was unable to point to any actual rule of Scottish criminal law or procedure to which, on his preferred construction, para 2(1) would apply.

134. Although I was initially attracted by the advocate depute's argument, it cannot be right, since, on his construction, the limit makes no sense whatever. Why should the Scottish Parliament's power to modify an enactment whose subject-matter is a reserved matter depend on whether there happens to be some comparable enactment dealing with a completely different devolved matter? More particularly, why should the Scottish Parliament be entitled to modify the maximum term of 6 months imprisonment on summary conviction of a contravention of section 103(1)(b) of the RTA in Part I of Schedule 2 to the RTOA simply because there happen to be a number of either-way offences in the devolved area where the maximum term of imprisonment on summary conviction is also 6 months? Of course, the Parliament can alter the penalty provision for those offences because it is its business to make such amendments where appropriate. But that is, of itself, no reason why it should become the Scottish Parliament's business – for whatever purpose – to modify the penalty provision which Parliament has deliberately chosen to enact for a specific offence for which Parliament retains responsibility.

135. The general point can be illustrated by reference to limitation periods. As Mr Johnston QC points out, in *Prescription and Limitation* (1999), Appendix II, p 371, the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act") does not say that its provisions are not to apply where other enactments establish a prescriptive or limitation period for specific rights or remedies. Nevertheless, as he goes on to say, on general principles of statutory construction, "it can be assumed that an enactment of a special nature takes precedence over an enactment of a general nature: the 1973 Act is therefore displaced by more specific provision in other enactments." Mr Johnston then gives a useful table listing a range of enactments which contain their own specific limitation periods.

136. By contrast, there are many statutes which provide for civil liability but do not contain any separate, specific, provision on limitation of proceedings brought for their breach. For example, a breach of a duty under the Provision and Use of Work Equipment Regulations 1998 (No 2306) is actionable: section 42 of the Health and Safety Act 1974. But there is no special rule of law on the limitation of proceedings for such a breach: the general rule of law in the 1973 Act applies. Therefore, if the Scottish Parliament chose to alter that general rule in the 1973 Act, it could do so and the new period would apply to actions for breach of the

Regulations. This is so, even though Part I of the Health and Safety Act is a reserved matter: para 1 and Section H2 of Part II of Schedule 5 to the 1998 Act.

137. Many statutes do make special provision on limitation, however. For example, under section 568(5) of the Companies Act 2006, an action for loss suffered because of a contravention of the pre-emption provision in a company's articles must be brought within 2 years. That is unquestionably the law on a reserved matter as defined in para 2(2) of Part I of Schedule 4 to the 1998 Act. It is surely unthinkable that, even as part of an exercise to tidy up the Scots law of limitation of actions, the Scottish Parliament would be able to alter that period, which is "special" in the sense that, instead of relying on the general law of limitation, Parliament has deliberately selected 2 years as being appropriate for proceedings of that particular kind. Leaving aside any other possible difficulties, if the Scottish Parliament could change the period, the result would be to introduce a difference between English and Scots law in an area where Parliament, legislating after devolution, must have considered that the same special rule should continue to apply in both jurisdictions.

138. Equally surely, the power of the Scottish Parliament to alter the period in section 568(5) of the Companies Act could not be affected because, if you rooted around in the statute book, you could find that, under section 5 of the Limitations of Actions and Costs Act 1842, the limitation period for actions brought under local and personal Acts (which would, usually at least, concern devolved matters) happened also to be 2 years. Likewise, it would be irrational to conclude that, if the Scottish Parliament were to repeal or amend section 5 of the 1842 Act so that it no longer provided for a period of 2 years, this would somehow simultaneously remove a power which the Parliament had hitherto enjoyed to amend the limitation period under section 568(5) of the Companies Act 2006. Quite simply, the two enactments have nothing to do with one another. Conversely – and reverting to penalties – it would be absurd to hold that the Scottish Parliament could not modify a penalty provision so long as it was "special to", in the sense of "unique to", a reserved matter, but could give itself the power to do so by enacting the same penalty for a devolved matter. Besides being absurd, this would offend against the principle that the limits on the competence of the Scottish Parliament are fixed by the 1998 Act and cannot be altered except by new legislation by Parliament or by Order in Council under section 30(2).

139. What, then, do the critical words mean? In my view, a statutory rule of law is "special to a reserved matter" if it has been specially, specifically, enacted to apply to the reserved matter in question – as opposed to being a general rule of Scots private or criminal law which applies to, inter alia, a reserved matter. Only general rules whose subject-matter is listed in sub-paras (a) to (e) of para 2(3), as amended, are protected from modification. If interpreted in this way, para 2(3) means that para 2(1) prevents the Scottish Parliament from modifying any

enactment which must be taken to reflect the conscious choice of Parliament to make special provision for the particular circumstances, rather than to rely on some general provision of Scottish private or criminal law. Whether or not to modify such an enactment involves questions of policy which must be left for the consideration of the United Kingdom government and Parliament which are responsible for the matter. On this interpretation, paras 2(1) and (3) place a comprehensible limit on what the Scottish Parliament can do.

140. I return to the particular problem in these appeals. Suppose that, instead of increasing the maximum term of imprisonment available on summary conviction of a contravention of section 103(1)(b) of the RTA from 6 to 12 months, the Scottish Parliament had chosen to reduce it to 3 months – perhaps as part of a general package of reductions in sentences designed to save money by cutting expenditure on criminal justice. The purpose of the legislation would plainly relate to a devolved matter. Nevertheless, the Scottish Parliament could not achieve that purpose by modifying the RTOA in that way because the maximum term of imprisonment on summary conviction of the offence had been specially chosen by Parliament. The modification would therefore be outside the competence of the Scottish Parliament by virtue of para 2 of Part I of Schedule 4. And it would rightly be outside competence because it would inevitably involve significant road traffic policy issues which, under the 1998 Act, it would be for the United Kingdom government (more particularly, the Secretary of State for Transport) and Parliament to evaluate. For instance, would it be acceptable if the average sentence for driving while disqualified fell because prosecutors were reluctant to mount the more complicated and time-consuming sheriff and jury trials necessary to attract a prison sentence of more than 3 months? Would the potential cost-cutting advantages of the policy outweigh this possible disadvantage? Mutatis mutandis, the Secretary of State for Transport and the United Kingdom government as a whole would have to consider these issues if the Ministry of Justice made an equivalent proposal for England and Wales. If they ultimately agreed, Parliament would be asked to legislate to amend the RTOA. In the case of Scotland, if the United Kingdom government and Parliament were content, the necessary changes could be made by a section 104 order. If a reduction in the maximum term of imprisonment on summary conviction would be outside the competence of the Scottish Parliament in this way, the same must apply to an increase.

141. For these reasons I conclude that the rule of Scots criminal law prescribing the maximum term of imprisonment for a summary conviction of a contravention of section 103(1)(b) of the RTA, in Part I of Schedule 2 to the RTOA, is "special" to that reserved matter, in the sense that Parliament has chosen it specifically for that offence. So, by virtue of para 2(1) of Part I of Schedule 4 to the 1998 Act, the Scottish Parliament has no power to modify it.

142. A majority of your Lordships have reached the opposite view.

143. At para 34 of his judgment, Lord Hope accepts that, when considering para 2 of Part I of Schedule 4, the starting-point is identifying the rule of Scots criminal law that is being modified. Then one must ask whether that rule is special to a reserved matter. Naturally, I agree. Lord Hope takes the view that the purpose of the enactment may be referred to in order to identify the rule of law that is being modified. I see no room for that approach in this case. Here, the purpose of the enactment is clear and undisputed: to increase the sheriff's summary sentencing powers. If, however, you want to know *which* rules of Scottish criminal law the enactment is modifying in order to achieve that purpose, you simply have to look at the perfectly clear terms of section 45 and apply them to the penal provisions in question.

144. I agree with Lord Hope when he says, at paras 35 and 37, that the rule of Scots law as to the maximum term of imprisonment that can be imposed – i e the maximum period of 12 months on indictment, set out in the relevant part of column 4 of the Schedule – falls to be treated as a rule that is special to a reserved matter. I have explained my reasons for taking that view. These cannot, of course, be Lord Hope's reasons. But he gives no explanation for his view beyond the assertion that it "plainly, is a rule which is special to the Road Traffic Acts and it is a reserved matter."

145. In para 39 Lord Hope considers that it "would be to carry the process of analysis too far" to say that the Schedule contains two maximum sentences, one for summary proceedings and the other for proceedings on indictment. But that is precisely what Parliament *does* say in section 33(1) of the RTOA read together with the relevant entry in the Schedule (referring to "the maximum punishment by way of … imprisonment" and giving different figures depending on "the mode of trial"). Lord Hope also thinks that it would be carrying the process of analysis too far to say that both of these maximum sentences are "special". Apparently this is because such a decision depends on an exercise of judgment in which the purpose of "the provision" (here, section 45) may be the best guide. But, as the cross headings show, para 2 of Part I of Schedule 4 is designed to protect the law on reserved matters from modification. It is therefore necessary to identify which rules of Scots criminal law are to be regarded as "special to a reserved matter" in terms of para 2(3) and so protected from modification. Since, ex hypothesi, these rules cannot be modified, they cannot be identified by reference to the purpose of a provision which purports to modify them.

146. In the end, therefore, all we know is that, for some unstated reason, the maximum sentence which can be imposed on conviction of a contravention of section 103(1)(b) of the RTA in a prosecution on indictment is a rule which is "special to the Road Traffic Acts", but the maximum sentence which can be imposed for the same offence in a summary prosecution is not.

147. In para 59 of his judgment Lord Walker identifies what the relevant rule of Scots criminal law to be modified is not: it is not that driving while disqualified is a criminal offence (agreed), nor that it is a criminal offence punishable by imprisonment (agreed), nor that the maximum term of imprisonment is 12 months (also agreed, since, again, this must be a reference to the maximum term of imprisonment in a prosecution on indictment). The inference seems to be that these rules might indeed be "special to a reserved matter" and beyond the reach of the Scottish Parliament. As Lord Walker says, however, all these rules have been left untouched. You then eagerly wait to hear about the rule that has not been left untouched: that the maximum term of imprisonment is 6 months in a summary prosecution. But you wait in vain. Instead, the rule to be modified turns out to be "whether (and if so to what degree) the option of summary trial before the sheriff should reduce the maximum sentence that can be passed." With great respect, that does not really look much like a rule of Scots criminal law. But, whatever the description, it is actually the product of the two specific rules of Scots criminal law as to the maximum term of imprisonment for a contravention of section 103(1)(b) of the RTA in summary and indictment proceedings respectively. That product can itself be modified only by modifying either or both of these specific rules. By enacting section 45, the Scottish Parliament purported to modify the rule that the maximum term of imprisonment for this offence in summary proceedings is 6 months. The unavoidable question is whether that rule is "special to a reserved matter" in terms of para 2(3) of Part I of Schedule 4 to the 1998 Act. But that question is neither posed nor answered.

148. Having bowed politely in the general direction of the argument, Lord Brown rests his conclusion on simple assertion.

149. Until now, judges, lawyers and law students have had to try to work out what Parliament meant by a rule of Scots criminal law that is "special to a reserved matter." That is, on any view, a difficult enough problem. Now, however, they must also try to work out what the Supreme Court means by these words. It is a new and intriguing mystery.

*Conclusion*

150. In my view, so far as it relates to the penalty provision in the RTOA relating to contraventions of section 103(1)(b) of the RTA, section 45 was outside the competence of the Scottish Parliament. There was, of course, nothing to prevent the Scottish Parliament from increasing the maximum term of imprisonment which a sheriff, sitting as a court of summary jurisdiction, could impose. That is what section 45(1) does – and, by itself, the provision is unobjectionable since it merely deals with the jurisdiction of the sheriff. But any increase in jurisdiction brought about by section 45(1) would remain subject to all the penalty provisions in

statutes which stipulate a lower maximum term of imprisonment on summary conviction. So subsection (2) was introduced in order to modify all those provisions. Modification of penal provisions in statutes falling within the devolved sphere causes no difficulty. But, for the reasons I have explained, modifying a specific penal provision in a statute within the reserved area is outside competence – essentially, because it involves making a significant change to law which Parliament has decided is to be its own responsibility.

151. Of course, it is true that the purpose of section 45 is to increase the sheriff's summary sentencing powers. That is why section 45 does not "relate to reserved matters" and so is not beyond the competence of the Scottish Parliament by virtue of section 29(2)(b). But a purpose of increasing the summary sentencing powers of sheriffs or other lower court judges is not a passport that entitles the Scottish Parliament to disregard the prohibitions in the other paragraphs of section 29(2) and to sweep aside any provision of the RTOA which stands in its way. The competent end does not justify the use of means which are beyond competence. If evidence to support that simple proposition were needed, it is to be found in the Criminal Proceedings etc (Reform) (Scotland) Act 2007 (Powers of District and JP Courts) Order 2007, which was made under section 104 of the 1998 Act shortly before the 2007 Act came into force. The order was not mentioned by counsel on either side. Its purpose was, first, to repeal the provisions of the RTOA which prevented the district court (and its successor, the justice of the peace court) from imposing the penalty of disqualification for traffic offences, and then to amend section 34 so as to include the district court (and, hence, the justice of the peace court) among the courts with the power to impose that penalty for such offences. Even though these changes were clearly part of the overall scheme in the 2007 Act, to allow the lower courts to hear more serious cases by increasing their sentencing powers, it was recognised that the section 104 order was needed to carry out this particular aspect of the scheme. By contrast, the minor consequential amendment to section 248C(1) of the 1995 Act, relating to the disqualification power for other offences, was made by section 80 of, and para 26 of the Schedule to, the 2007 Act.

152. In order to achieve another part of the scheme to adjust the jurisdiction of the Scottish courts by increasing the sentencing powers of the lower courts, section 45 of the 2007 Act purports to modify, inter alia, the enactment relating to contraventions of section 103(1)(b) of the RTA in Part I of Schedule 2 to the (reserved) RTOA. As a result, the maximum term of imprisonment that can be imposed for that offence by a court of summary jurisdiction in Scotland is intended to be twice what can be imposed by the equivalent court in England. Of course, it is not essential that the two jurisdictions should march exactly in step on this matter – as is plain from the availability of indictment proceedings with a maximum sentence of 12 months imprisonment in Scotland, but not in England. But that is a disparity which Parliament chose to introduce. Whether a further

disparity between the jurisdictions should indeed be introduced is precisely the kind of issue – like the issue as to whether the district court or justice of the peace court, rather than just the sheriff court, should have power to disqualify for road traffic offences – which the 1998 Act intends that Parliament should decide. This need cause no difficulty for the Scottish Executive's scheme to adjust the jurisdiction of the Scottish courts by increasing the sentencing powers of sheriffs in summary cases if the United Kingdom government and Parliament are content that the maximum available term of imprisonment for this offence on summary conviction should be increased in this way. Provided the draft is approved by both Houses of Parliament, the appropriate order can be made under section 104 of the 1998 Act: sections 114 and 115 and paras 2 and 3 of Schedule 7. This is indeed precisely the kind of situation for which section 104 was designed.

153. Applying section 101 of the 1998 Act, I would therefore hold that the definition of "relevant penalty provision" in section 45(7) of the Criminal Proceedings etc (Reform) (Scotland) Act 2007 does not include a provision of a relevant enactment or instrument which is special to a reserved matter within the meaning of para 2(3) of Part I of Schedule 4 to the Scotland Act 1998.

154. It follows that section 45 does not modify the maximum term of imprisonment of 6 months on summary conviction of a contravention of section 103(1)(b) of the Road Traffic Act 1988 in column 4 of Part I of Schedule 2 to the Road Traffic Offenders Act 1988.

155. I would accordingly allow the appeals, pass the bills of suspension, quash the sentence imposed by the sheriff court in each case for the contravention of section 103(1)(b) of the Road Traffic Act 1988 and remit to the appeal court to proceed as accords.

**LORD KERR**

156. The legislative competence of the Scottish Parliament is self evidently a subject of fundamental importance. As the appeals in these cases amply demonstrate, however, it is impossible to devise a comprehensive charter which, for every conceivable situation, infallibly prescribes the limits of that legislature's enacting power. This, it seems to me, is the inevitable consequence of the transfer by the United Kingdom government of some – or even many – powers to a devolved administration while retaining or, as it is more usually put, reserving,

certain other matters to Parliament in Westminster. Whether a particular Act of the Scottish Parliament falls within its legislative competence will, for the most part therefore, depend on a consideration of the particular provisions of the enactment in question.

157. The quest will usually begin with section 29 of the Scotland Act 1998. It stipulates (in subsection (1)) that any provision of an Act of the Scottish Parliament is not law so far as it is outside the legislative competence of the Parliament. Subsection (2) (b) states that a provision is outside the competence of the Scottish Parliament if it relates to reserved matters. The issue as to whether a provision does so relate is to be determined in accordance with subsection (3) which, so far as is material, provides:

> "… the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined, subject to subsection (4), by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances."

158. Subsection (3) has a number of component parts, each of which deserves careful consideration. The first is that which specifies that it is subject to subsection (4). This latter subsection (to which I shall turn presently) is a deeming provision designed to expand the category of cases in which a change in the law is to be considered to relate to reserved matters because it modifies Scots private or criminal law "as it applies to reserved matters".

159. The need to enlarge the group in this way appears to me to clearly indicate that the construction to be placed on the expression 'relates to reserved matters' must be suitably restrained. If, in every instance where a provision of the Scottish Parliament touched on a reserved matter, it was to be considered to *relate* to a reserved matter, subsection (4) would not be needed. The phrase needs a more careful and restricted application, therefore.

160. Guidance as to the extent of the restriction is provided by the next component part of section 29 (3). The resolution of the question whether a particular provision relates to a reserved matter is to be determined by reference to the *purpose* of the provision. One is immediately thereby drawn to an examination of the objective of the legislation and of the particular provision within it.

161. Before dealing with the result of that examination, it is useful to note the next component part of subsection (3). It is to the effect that the determination (by reference to its purpose) whether an Act of the Scottish Parliament relates to a

reserved matter is to be conducted *having regard to* "(among other things) … its effect in all the circumstances". It seems to me obvious that the way in which the subsection is structured signifies that the *effect* of the provision is subordinate to its *purpose* in the inquiry as to whether it relates to a reserved matter. Indeed, the assessment of the effect of the provision is directly linked to the search for its purpose. This is unsurprising. As Lord Brown pointed out in the course of argument, one will customarily expect that the purpose of a particular provision is to bring about a desired effect.

162. The 'other things', apart from the effect of the provision, which are to be taken into account in ascertaining its purpose are not specified in subsection (3). Mr Brown on behalf of the appellant, Mr Miller, accepted (sensibly and correctly, in my view) that these would include statements by those responsible for the legislation which purported to identify the reasons for its enactment.

163. The genesis of the legislation under challenge here is the report of the Committee appointed in November 2001 to review summary justice in Scotland under the chairmanship of Sheriff Principal John McInnes QC. The formal remit of the Committee was stated to be:

> "To review the provision of summary justice in Scotland, including the structures and procedures of the sheriff courts and district courts as they relate to summary business and the inter-relation between the two levels of court, and to make recommendations for the more efficient and effective delivery of summary justice in Scotland."

164. In paragraph 9 of its summary of recommendations the Committee recorded its proposal that the criminal jurisdiction for judges in summary cases should be a maximum 12 months' detention or imprisonment and a £20,000 fine. The reasons for this particular recommendation are discussed throughout the report. In paragraph 7.72 on page 78 at paragraph (iv) it is explained that the view of the majority of the Committee was that there was a need to relieve pressure on the higher courts. This required the lower courts to take on more serious cases. Consequently, some increase in sentencing powers for the judges in those courts was required. The Committee recognised that recommending an increase in the sentencing powers of the courts of summary jurisdiction could give rise to what is described in the report as "sentence drift", that is a tendency to increase the normal sentencing range because of the availability of the increase in the statutory maxima. It made clear its express disavowal of any intention to bring about sentence drift in paragraph 7.89 of the report where the following appears:

> "In proposing an increase in sentencing powers, we are clear that we do not intend any … uplift of the going rate for all offences, but rather we wish to extend the range of offences that can appropriately be dealt with in the summary courts."

165. The Ministerial response to the McInnes recommendations was contained in a report entitled, 'Smarter Justice, Safer Communities – Summary Justice Reform' published in March 2005. In paragraph 4.10 the Scottish Executive signalled its acceptance of the proposal that there be an increase in the sentencing powers of a sheriff sitting without a jury in summary proceedings, stating that this form of proceeding was "generally simpler and faster than trials in a solemn court". The report also acknowledged the concern that there might be upward sentence drift but recorded the Committee's finding that there was no evidence that this was linked to an increase of sentencing powers in summary proceedings – (para 4.51).

166. The Bill which was to give effect to the recommendations of the McInnes Committee (among other matters), the Criminal Proceedings etc. (Reform) (Scotland) Bill, was introduced to the Scottish Parliament on 27 February 2006. Clause 35, which became section 45 of the enacted legislation, dealt with certain statutory offences (including driving whilst disqualified) and provided for a new maximum term of imprisonment of twelve months to which a person summarily convicted of such an offence would be liable.

167. The Bill was considered by the Justice 1 Committee of the Scottish Parliament on 19 April 2006. In answer to a question from a member of the Justice Committee concerning the possibility of an increase in the prison population because of the enlarged sentencing powers of the sheriff courts in summary proceedings, Noel Rehfisch of the Scottish Executive Justice Department said this, at Scottish Parliament Official Report, cols 2838-2839:

> "… it is clear that the intention of the changes is not to be more punitive in respect of any particular offence. For example, for any statutory offence that can be tried only summarily at present, the sentencing limit will not change. The increase to 12 months is about providing headroom in the summary system to deal with slightly more serious cases that, in the view of the McInnes Committee – which ministers accepted – could relevantly, competently and capably be dealt with in the sheriff summary court.
>
> On two occasions in recent years there have been increases in the maximum sentencing level in the sheriff solemn courts. The same sheriffs, albeit with a jury, are responsible for determining sentences in those cases. To date, there is no evidence that those increases have

> led to what might popularly be described as sentence drift. We are confident that the judiciary will continue to consider individual cases on their merits. The measures are about having the appropriate level of business in certain sectors of the system."

168. These comments were reflected in the 10th report of the Justice 1 Committee published on 5 July 2006. At paragraph 135 of the report the following appears:

> "In oral evidence Executive officials stated that these provisions are about seeking some form of business redistribution to ensure that every level of the system deals with the business that it ought to deal with and managing that as effectively as possible. Indeed, in the Policy Memorandum [containing the Executive's comments on the provisions of the Bill], the Executive refers to its policy of creating a flexible court capacity to ensure that cases can be dealt with quickly and at the appropriate level."

and at paragraph 136:

> "The Executive's expectation is that this redistribution of cases would represent a downward shift of around 500 to 550 cases per year from sheriff and jury to sheriff summary procedure. The Executive has also stated that the provisions in the Bill are not designed to be more punitive in relation to any particular offences. The Scottish Prison Service referred in oral evidence to its view that it does not expect the Bill to have a significant impact on the prison population."

169. It appears to me from all this material that the purpose of section 45 of the 2007 Act is unmistakably clear. As the advocate depute submitted, it is to effect a reallocation of business within the court structure. The means by which this is achieved is an increase in the sentencing powers available to sheriffs sitting in their summary jurisdiction. The greater maximum penalty is not an end in itself nor is it intended that that the 'going rate' for relevant offences should be increased. This is merely the mechanism by which the quite different purpose of providing for a more expeditious dispatch of business can be achieved. This conclusion is reinforced by the consideration that defendants charged with relevant offences are not exposed to a greater penalty in the summary proceedings than they formerly faced if prosecuted for the same offences on indictment.

170. In this context, I should say that I consider that the analogy which the appellants sought to draw with the decision of the Divisional Court in Northern Ireland in the case of *Reg (Hume) v Londonderry Justices* [1972] N. I. 91 is misconceived. In that case the Parliament of Northern Ireland, in exercise of its powers under section 4 of the Government of Ireland Act 1920 to make laws for the peace, order and good government of Northern Ireland, had purported (by a regulation made in a statutory rule and order by the Minister of Home Affairs) to authorise certain members of Her Majesty's forces to require an assembly of persons to disperse if a breach of the peace was apprehended. The Divisional Court held that the regulation was made in breach of section 4 (3) of the 1920 Act which forbade the making of laws by the Northern Ireland Parliament in respect of Her Majesty's forces. It had been argued on behalf of the respondent that the 'pith and substance' of the regulation was the peace, order and good government of Northern Ireland and that the conferring of powers on members of the armed forces was merely incidental. This argument was rejected, Lowry LCJ observing (at page 111) that both the object and the method of achieving it must be valid. Since the method in that case had been expressly forbidden, the regulation could not be rescued from its invalidity because it was for a permitted object. By contrast, in the present case the method (enlargement of the sentencing powers in sheriff summary proceedings) of achieving the object (the more efficient and expeditious prosecution of offences) is not expressly forbidden.

171. For these reasons, and for the reasons more fully given by Lord Hope and Lord Rodger, I am therefore satisfied that section 45 of the Criminal Proceedings etc (Reform) (Scotland) Act 2007 does not relate to reserved matters within the meaning to be ascribed to that condition in section 29 (2) (b) of the Scotland Act 1998.

172. I turn to briefly consider section 29 (4). It provides:

> "(4) A provision which—
>
> (a) would otherwise not relate to reserved matters, but
>
> (b) makes modifications of Scots private law, or Scots criminal law, as it applies to reserved matters,
>
> is to be treated as relating to reserved matters unless the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise."

173. As I have already observed, this is a deeming provision which expands the category of cases in which a change in the law is to be considered to relate to

reserved matters, although not so relating for the purposes of section 29 (3). Modifications of Scots private or criminal law are to be treated as relating to reserved matters subject to two important qualifications. The first of these is that such modifications are confined to the law *as it applies to reserved matters*. The advocate depute argued that section 45 of the 2007 Act modified Scots criminal law generally and on that account could not be said to apply solely to reserved matters. It appears to me, however, that this first qualification is not designed to exclude from the ambit of section 29 (4) modifications that relate to both reserved and devolved matters. It was suggested in argument that the purpose of the provision was to prevent the Scottish legislature from targeting reserved matters. This may well be correct but that objective is likely to be severely curtailed if a measure of the Scottish Parliament applying to reserved and devolved measures which were unrelated to each other was exempt from the reach of section 29 (4) and it appears to me that this must be the logical conclusion of the advocate depute's argument.

174. A final determination of this issue is not, in my opinion, strictly necessary, however, because it is quite clear that the impugned legislation comes squarely within the second qualification in section 29 (4). A provision, the purpose of which is to make the law apply consistently to reserved matters and otherwise, is not caught by the subsection. It is unquestionably clear that section 45 of the 2007 Act has that precise purpose and for that reason it does not come within section 29 (4).

175. The final and, to my mind, most troubling issue arises from section 29 (2) (c) of the 1998 Act. It states that a provision is outside the competence of the Scottish Parliament if it is in breach of the restrictions in Schedule 4 to the Act. Paragraph 2 of that Schedule contains the following material provisions:

> "(1) An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, the law on reserved matters.
>
> (2) In this paragraph, "the law on reserved matters" means—
>
> (a) any enactment the subject-matter of which is a reserved matter and which is comprised in an Act of Parliament or subordinate legislation under an Act of Parliament, and
>
> (b) any rule of law which is not contained in an enactment and the subject-matter of which is a reserved matter,
>
> and in this sub-paragraph "Act of Parliament" does not include this Act.

> (3) Sub-paragraph (1) applies in relation to a rule of Scots private law or Scots criminal law (whether or not contained in an enactment) only to the extent that the rule in question is special to a reserved matter ..."

176. Section 45 of the 2007 Act self evidently relates to a rule of Scottish criminal law. Is the rule 'special' to a reserved matter? Lord Hope has concluded that the rule is not special to a reserved matter because it does not increase the penalty that can be imposed in respect of the offence but has merely changed the procedural route by which the enlarged penalty can be imposed. It is concerned with a rule of procedure that applies generally to prosecutions for offences in the sheriff court. On this analysis, section 45 is not to be regarded as directed to a rule which is special to a reserved matter. By contrast, Lord Rodger considers that a statutory rule is special to a reserved matter if it has been enacted in order to apply specifically to the rule in question.

177. I have not found it easy to reach a view as to which of these competing and persuasively argued positions is to be preferred. It is clear that paragraph 2 (3) contemplates an ambit or scope of application for a particular rule beyond its possible impact on reserved matters. It is only on the extent to which the application of the rule is special to reserved matters that the denial of legislative competence is engaged. In this context, 'special to' may be regarded as connoting 'having a specific effect on' reserved matters. Where an act of the Scottish Parliament seeks to modify a rule of Scots law which has an effect on reserved matters that act will be outside the legislative competence of the Scottish Parliament. But where the rule of Scots law being modified is not special to reserved matters, Parliament's legislative power remains intact. Viewing the effect of the provision in this way, I have concluded that where an act of the Scottish Parliament modifies a statutory rule which has a specific effect on a reserved matter it comes within the prohibition contained in paragraph 2 (1) of Schedule 4 to the 1998 Act. I therefore agree with Lord Rodger that section 45 is caught by that paragraph.

178. The question then arises whether the section can be saved by recourse to paragraph 3 of Schedule 4 to the 1998 Act which provides:

> "(1) Paragraph 2 does not apply to modifications which—
>
> are incidental to, or consequential on, provision made (whether by virtue of the Act in question or another enactment) which does not relate to reserved matters, and

do not have greater effect on reserved matters than is necessary to give effect to the purpose of the provision."

179. Both Lord Hope and Lord Rodger have concluded that a statutory provision that alters the sentencing power of the sheriff court sitting in its summary jurisdiction cannot be regarded as coming within this provision. Although I was initially attracted by the notion that the increase in sentencing powers was incidental to a provision being made for the reallocation of court business, I have come to the view that this cannot be right. The increase in sentencing powers *is the provision concerned.* It is not incidental to another permissible statutory rule. It cannot be saved by paragraph 3, therefore.

180. In the result, I agree with Lord Rodger that this appeal should be allowed.