WEST v. SECRETARY OF STATE FOR SCOTLAND

No. 33.
Apr. 23, 1992.

FIRST DIVISION.
Lord Weir.

WILLIAM LAURISTON WEST, Petitioner (Reclaimer). — *Mackinnon.*
THE SECRETARY OF STATE FOR SCOTLAND (on behalf of the Scottish Prison Service), Respondent. — *Clarke, Q.C., Reed.*

Administrative law — Practice — Judicial review — Competency — Prison officer refused discretionary reimbursement of removal expenses — Scope of supervisory jurisdiction of Court of Session — Whether exercise of discretion by Scottish Prison Service open to judicial review — Whether criteria for exercise of supervisory jurisdiction included requirement that "public law" element be present — Rules of Court 1965, rule 260B.[1]

The petitioner, a serving prison officer, was transferred from a young offenders institution to a prison. Under his conditions of service with his employers, the Scottish Prison Service, he was regarded as "mobile staff" and liable to be transferred compulsorily to any prison service establishment in Scotland. Provision was made in the conditions of service for the reimbursement to staff of *inter alia* removal expenses. As a result of his transfer, the petitioner required to move house but was thereafter informed by his employers that his removal expenses would not be reimbursed. He then presented a petition to the Court of Session for judicial review of the prison service's decision, on the ground that the refusal was an unreasonable exercise of its discretion, for reduction of its decision, and declarator that he was entitled to reimbursement of his removal expenses and damages. The respondent, the Secretary of State for Scotland, lodged answers on behalf of the prison service, arguing that the petition was incompetent and irrelevant. Before the Lord Ordinary (Weir), the respondent challenged the petition on competency only. The Lord Ordinary sustained the respondent's plea and dismissed the petition, holding that the dispute arose from rights and duties of a contractual nature, enforceable at ordinary law, which were indistinguishable from those of a person holding a contract of employment with a private employer and therefore not amenable to judicial review. The petitioner thereafter reclaimed to the Inner House of the Court of Session.

Held (*aff.* judgment of Lord Weir) (1) that the respondent's plea to the competency raised an important question about the extent of the jurisdiction of the court in proceedings for judicial review and that it was now necessary for guidance to be given as to the scope of this procedure; (2) that the competency of applications to the supervisory jurisdiction was to be determined by reference to the following propositions: (a) that the Court of Session had power, in the exercise of its supervisory jurisdiction, to regulate the process by which decisions were taken by any person or body to whom a jurisdiction, power or authority had been delegated or entrusted by statute, agreement or other instrument; (b) that the sole purpose for which the supervisory jurisdiction might be exercised was to ensure that the person or body did not exceed or abuse its jurisdiction, power or authority or fail to do what that required; (c) that the competency of the application did not depend upon any distinction between private law and public law, nor was it confined to those cases which English law had accepted as being amenable to judicial review, nor was it correct in

[1]The Rules of Court 1965 enact *inter alia* that;— "260B.—(1) *Application.* An application to the supervisory jurisdiction of the court which immediately before the coming into operation of this rule would have been made by way of summons or petition, shall be made by way of an application for judicial review in accordance with the provisions of this rule."

regard to issues about competency to describe judicial review as a public remedy; (3) further, by way of explanation, (a) that judicial review was available, not to review the merits of a decision, nor for the court to substitute its own opinion, but to ensure that a decision-maker did not exceed or abuse his powers or fail to perform his duty; (b) that "jurisdiction", meaning "power to decide", best described the nature of the power, duty or authority which was amenable to the supervisory jurisdiction; (c) that there was no substantial difference between English law and Scots law as to the grounds on which the process of decision-making would be open to review; (d) that cases in which the exercise of the supervisory jurisdiction was appropriate involved not contractual rights and obligations but a tri-partite relationship, between the person or body to whom the jurisdiction had been delegated, the person or body by whom it was delegated, and the persons in respect of whom the jurisdiction was to be exercised; and (4) that, accordingly, on the facts of the present case, as there was no suggestion that the petitioner's concern was with the exercise of a jurisdiction, power or authority conferred on some third party who could be identified separately from his employer, there was an absence of any feature to place the case in any category other than that of a private, employee-employer dispute about his conditions of employment; and reclaiming motion *refused.*

Authorities *considered*: *Connor* v. *Strathclyde R.C.* 1986 S.L.T. 530 and *Safeway Food Stores Ltd. v. Scottish Provident Institution* 1989 S.L.T. 131 *overruled.*

WILLIAM LAURISTON WEST presented a petition for judicial review of the decision of his employers, the Scottish Prison Service, not to reimburse his removal expenses following his compulsory permanent transfer from H.M. Young Offenders Institution, Polmont, to H.M. Prison, Edinburgh. The Secretary of State for Scotland was called as respondent in the petition.

The petition and answers thereto called before the Lord Ordinary (Weir) for a first hearing thereon.

At advising, on 22nd March 1991, the Lord Ordinary *dismissed* the petition as being incompetent.

LORD WEIR'S OPINION.—The petitioner has been a prison officer for a number of years. On 17th March 1989 he was given a compulsory permanent transfer from H.M. Young Offenders Institution, Polmont, to H.M. Prison, Edinburgh. At that time he was living at a house near his place of work and on 7th April 1989 he applied for permission to live outwith official quarters at his new posting. The petitioner avers that permission was granted but that shortly before he was due to take up his post, he was informed by the respondents that he would not be reimbursed the expenses of removal from his old to his new house. There is a dispute as to what was the nature of the understanding between the petitioner and the respondents regarding permission to move. What is not in dispute is that the petitioner did move house and he claims that the cost of moving amounted to £10,000. The respondents maintain that they had a discretion in all cases to decide whether the distance between the old and the new stations justified the payment of expenses.

The decision to refuse reimbursement of expenses is challenged in these proceedings for judicial review on grounds which are familiar in modern administrative law. The petitioner avers that in reaching their decision the respondents exercised their discretion unreasonably and that he had been denied a legitimate expectation that he would obtain reimbursement of the cost of removal at public expense. He further contends that the discretion was

unreasonably exercised on account of a failure by the respondents to apply their policy fairly and consistently.

The respondents seek dismissal of the petition on the ground of both competency and relevancy. By agreement, the argument before me was confined to the matter of competency upon the understanding that should the plea to competency be repelled, it would then be open to the respondents to argue their plea to relevancy. Counsel for both parties were agreed that the plea of competency raised sharply an important question concerning the extent of the court's jurisdiction in judicial review.

Before giving consideration to the arguments, it is necessary to explain more fully the nature of the relationship between the petitioner and the respondents.

The petitioner was appointed as an established prison officer in the Scottish Home and Health Department (which is the government department responsible for the Scottish Prison Service) by letter dated 13th December 1982. Paragraph 3 of that letter states: "The following paragraphs and the schedule attached to this letter summarise your main conditions of service as these apply at present. Any significant changes will be notified by means of departmental instructions. Details of conditions of service applicable to your appointment are to be found in the Staff Guide and Reference Book, a copy of which will be handed to you when you take up duty at your joining establishment." Paragraph 1 of the schedule states *inter alia* as follows: "The following terms and conditions also apply to a prison officer's appointment in the Civil Service. In accordance with your letter of appointment you have been appointed as a Prison Officer in the Scottish Prison Service. You will understand that, in consequence of the constitutional position of the Crown, the Crown has the right to change its employees' conditions of service at any time, and the Crown's employees hold their appointments at the pleasure of the Crown."

In terms of their conditions of service all prison officers were designed as mobile staff and were liable to be transferred to any prison service establishment in Scotland. Prison officers who were transferred were entitled to be reimbursed certain expenses incurred as a result of the transfer. Paragraph 80 of what is called "The Red Book" states: "Not all types of transfer qualify for reimbursement of home removal expenses and it is a matter for Personnel Services Division's discretion in all cases whether the distance between the old and new stations justifies the payment of expenses. Account will also be taken of the extent to which the distance from the officer's home to the new office exceeds that to the old office, whether the officer's home can be regarded as within the dormitory area for the new office, whether reasonable transport facilities are available and whether the transfer involves a change in the officer's pay. An officer who is in doubt about the application of the transfer rules should seek written advice before committing himself in any way. Claims for hypothetical expenses (*e.g.*, compensation to an officer who sells his furniture instead of moving it) and any unreasonable or unnecessary expenses will not be considered."

The petitioner was required to sign a declaration accepting the situation of officer in the Scottish Prison Service on the conditions set forth in the notification attached to his appointment and he undertook to engage to conform to any rules, standing orders and instructions which were then or might thereafter be established.

It is necessary to understand the nature of the relationship between the petitioner

and the respondents in order to give context to the argument on competency which was advanced by counsel for the respondents. The petitioner is a civil servant and for constitutional reasons he is described as holding his office at the pleasure of the Crown. There is no formal contract of employment. The question of a civil servant's relationship with the Crown has been discussed in a number of cases which were cited to me (*Owners of S.S. Raphael* v. *Brandy* [1911] A.C. 413; *Sutton* v. *Attorney-General* (1923) 39 T.L.R. 294; *Reilly* v. *R.* [1934] A.C. 176; *Riordan* v. *War Office* [1959] 1 W.L.R. 1046; *Kodeeswaran* v. *Attorney-General of Ceylon* [1970] A.C. 1111. From a study of these cases it can be concluded that the absence of a formal contract of employment does not rule out the existence of mutual rights and obligations enforceable as between a civil servant and the State. An examination of the provisions of the petitioner's terms of appointment clearly revealed the existence of such rights and obligations. The appointment was offered on certain conditions in writing and was accepted by the petitioner in writing. The terms of conditions of service refer indeed to the Crown's "employees". As Lord Atkin said in *Reilly* v. *R.*: "A power to determine a contract at will is not inconsistent with the existence of a contract until so determined."

A prison officer in Scotland (unlike his counterpart in England) may take a case for unfair dismissal to the industrial tribunal under sec. 138 of the Employment Protection (Consolidation) Act 1978. I am satisfied from a study of the petitioner's terms of service that they give rise to rights and duties of a contractual nature which may be enforceable at law. The petitioner's position in respect of these matters is indistinguishable from that of a person holding a contract of employment with a private employer.

Counsel for the respondents submitted that the remedy which the petitioner seeks is not obtainable by the process of judicial review. He submitted that the dispute between the parties was one concerning matters essentially of private contract and that no element of what is called "public law" was present. On this point he submitted that the law in Scotland was now settled, and that the supervisory jurisdiction of the Court of Session does not extend into this field.

I agree with counsel that an issue concerning the reimbursement of travelling and removal expenses would appear to be of the nature of a private dispute between the petitioner and the respondents arising from his terms of service and I also accept that the fact that one party to the arrangement is the Crown does not necessarily put the case into a category different from any other dispute between an employer and an employee. It was submitted that in such circumstances I was bound to hold that the action was incompetent in view of the decision of the Inner House in *Tehrani* v. *Argyll and Clyde Health Board* 1989 S.C. 342. By that case it was affirmed that in a dispute involving an employer-employee relationship (in that case between a health board and a consultant surgeon) it was necessary to demonstrate an element of public law in the application for judicial review in order that it could be held to be competent (see Lord Justice-Clerk (Ross) at pp. 361–362 and 365–367; and Lord Wylie at pp. 371–372).

Counsel for the petitioner submitted that *Tehrani* had been wrongly decided, but contented himself with asking me to note that proposition. Alternatively he invited me to regard the opinions of the court on this particular point as *obiter*, proceeding as they did upon a concession made by counsel for Mr Tehrani that

in a contractual dispute between an employer and an employee it was necessary to focus on a matter of public law. If I was to regard the case of *Tehrani* as not binding on me for that reason, it would be open to me to disregard the distinction imported from English law between public and private law in the field of judicial review.

I have given considerable thought to the question whether the decision in *Tehrani* is binding on me. There is no doubt that a concession was made (which was not made in the Outer House) that for an application for judicial review to be competent a public law factor had to be demonstrated. Nevertheless, having studied the opinions of the Lord Justice-Clerk and Lord Wylie in particular, it seems to me that the Inner House did address themselves clearly and quite generally on the question of competency in the circumstances of a contractual dispute between two parties and their reasoning does not appear to me to proceed solely upon the basis of the concession. I consider that in view of the manner in which these opinions were expressed, I would be doing violence to the doctrine of *stare decisis* if I was to disregard *Tehrani* and to proceed on independent lines.

Counsel for the petitioner submitted that the right of action arose not through a breach of private contract but by a wrongful exercise of a discretion applied to a particular term of contract by a public authority. He argued that it was this abuse of power which gave rise to the various administrative law remedies which the petitioner sought. I asked what the position would be if, for example, the Scottish Prison Service was "privatised". Could the petitioner then obtain these remedies by means of judicial review? There seems no reason in logic or justice to grant such a remedy to an employee in the public sector and to deny it to an employee in the private sector. If the door were opened in this way, judicial review would be open to all employees to apply for such relief where an employer allegedly abused his discretionary power. Some may argue that, as a matter of equity, this is the direction in which the law should proceed but it seems to me that in the present state of the law it is not open to me to hold that judicial review is available to redress a grievance arising from an employer-employee relationship, whether or not the "employer" is the Crown or a private body or person.

For these reasons I must uphold the respondents' plea to the competency and dismiss the petition.

As it was indicated to me that my decision would be the subject of a reclaiming motion whichever way I decided the case, I think it is right to make some reference to certain of the submissions which were made by counsel for the petitioner.

In the first place it was stressed that although the Inner House decided in *Tehrani* that when dealing with contract of employment cases the question of public and private law had to be addressed, opinions were reserved as to the extent generally of the supervisory jurisdiction of the Court of Session. In this connection it has to be remembered that the classic statement on this question arose out of a disputed arbitration which is the matter of private law. In the case of *Forbes* v. *Underwood* (1886) 13 R. 465 at p. 467 Lord President Inglis said: "The position of an arbiter is very much like that of a Judge in many respects, and there is no doubt whatever that whenever an inferior Judge, no matter of what kind, fails to perform his duty, or transgresses his duty, either by going beyond his jurisdiction, or by failing to exercise his jurisdiction when called

upon to do so by a party entitled to come before him, there is a remedy in this Court, and the inferior Judge, if it turns out that he is wrong, may be ordered by this Court to go on and perform his duty, and if he fails to do so he will be liable to imprisonment as upon a decree *ad factum praestandum*. The same rule applies to a variety of other public officers, such as statutory trustees or commissioners, who are under an obligation to exercise their functions for the benefit of the parties for whose benefit these functions are entrusted to them... . Now all this belongs to the Court of Session as the Supreme Civil Court of this country in the exercise of what is called, very properly, its supereminent jurisdiction."

Moreover, this jurisdiction has been extended beyond public officers or public bodies to other bodies such as a church and a voluntary association (*McDonald* v. *Burns* 1940 S.C. 376; *St Johnstone Football Club* v. *Scottish Football Association* 1965 S.L.T. 171). These cases indicate that the court is inclined to give itself a more extensive sphere of jurisdiction than that which would be permitted under English law and arguably one which ignores any distinction between public and private law.

In the second place the dichotomy between public and private law was introduced into English law as an import from other countries which themselves have distinct systems relating to public and private law (*Davy* v. *Spelthorne Borough Council* [1984] A.C. 262, *per* Lord Wilberforce at p. 276). Moreover, judicial review was an innovation which was applied to English forms of remedy which are very different both in origin and in content to the remedies available under the law of Scotland. It was submitted that the Inner House in *Tehrani*, in basing its decision on the English case of *R.* v. *East Berkshire Health Authority, ex parte Walsh* [1985] Q.B. 152, did not take this factor into account. Moreover, Rule of Court 260B does not attempt to set the bounds within which judicial review must operate.

In the third place there are indications that the English courts are now seeking to loosen to some extent the bonds imposed on their jurisdiction by the public-private law tests. For example, in *McLaren* v. *Home Office* Court of Appeal, 7th March 1990, unreported, Woolf L.J. said: "There can, however, be situations where an employee of a public body can seek judicial review and obtain a remedy which would not be available to an employee in the private sector. This will arise where there exists some disciplinary or other body established under the prerogative or by statute to which the employer or the employee is entitled or required to refer disputes affecting their relationship. The procedure of judicial review can then be appropriate because it has always been part of the role of the court in public law proceedings to supervise inferior tribunals and the court in reviewing disciplinary proceedings is performing a similar role. As long as the 'tribunal' or other body has a sufficient public law element, which it almost invariably will have if the employer is the Crown and it is not domestic or wholly informal, its proceedings and determination can be an appropriate subject for judicial review."

It was said that this test of sufficiency of public law represented a dilution of a previously rigorous distinction between public and private law. If the case of *McLaren* had been before the Inner House in *Tehrani*, it might have affected their examination of the issue there, but it is not for me to say how it would have affected their approach.

With these considerations in mind, I was urged by counsel for the petitioner to

reach a decision on the court's supervisory jurisdiction which would favour both width and flexibility and so enable future development of this branch of the law to proceed untroubled by fetters imported from the English system of law. In the end it seemed to me that counsel's submission was a very wide one indeed. He recognised that the petitioner had no claim for recovery of his expenses based on any breach of his terms of employment and the only way in which he could obtain a remedy was by founding upon an alleged abuse of a discretionary power. It was the existence of a term in the conditions of service giving the respondents a discretionary power which by itself made the matter open to judicial review if it could be shown that the power had been exercised in a manner giving rise to one or other of the administrative law remedies.

In view of the way I have reached my decision it is neither necessary nor appropriate for me to express my view on these submissions. However, it is to be recognised that they raise important issues which have far-reaching implications for the future development of a branch of the law which is itself in a process of evolution. There is a school of thought which would take as its motif: "Wider still and wider shall thy bounds be set." The problem for the court is to determine where and how the bounds should be set. For my part I would welcome the opportunity which a reclaiming motion might give for a comprehensive consideration and statement of the scope of the court's supervisory jurisdiction.

The petitioner thereafter reclaimed.

The reclaiming motion came before the First Division of the Court of Session, comprising the Lord President (Hope), Lord Cowie and Lord Mayfield, for a hearing thereon, on 17th March 1992.

At advising, on 23rd April 1992, the following opinion of the court was delivered by the Lord President (Hope).

OPINION OF THE COURT.—This is a petition for judicial review of a decision taken by the Scottish Prison Service. The petitioner is a serving prison officer, who holds his appointment as a civil servant in the Scottish Home and Health Department. This is the government department for the Scottish Prison Service by which his letter of appointment was issued on 13th December 1982. In terms of their conditions of service all prison officers are designed as mobile staff and they are liable to be transferred to any prison service establishment in Scotland. Provision was made for the reimbursement of certain expenses incurred as a result of the transfer, but it was provided that not all types of transfer qualified for reimbursement of home removal expenses. The decision which the petitioner seeks to challenge was a refusal by the Scottish Prison Service to reimburse him for the expenses of moving house when he was transferred from H.M. Young Offenders Institution, Polmont, to H.M. Prison, Edinburgh, following a compulsory permanent transfer in March 1989. He was granted permission to live outwith official quarters at his new posting and he purchased a house in Edinburgh to which he moved from his previous residence near Falkirk. He avers that shortly before he was due to take up his new post he was informed by the Scottish Prison Service that he would not be reimbursed the expenses of his removal. His contention is that that decision was an unreasonable exercise of the discretion available to them in respect of the terms for his compulsory transfer.

He seeks reduction of the decision together with a declaration that he is entitled to be reimbursed for the expenses of his removal and damages.

The petition was served on the Scottish Prison Service and answers were then lodged on their behalf in the name of the Secretary of State for Scotland, who is responsible for the administration of the Scottish Prison Service and for decisions such as that complained of. He sought dismissal of the petition on the grounds of both competency and relevancy. When the matter came before the Lord Ordinary the argument was confined to the matter of competency. It was understood that if the plea to the competency were to be repelled, it would then be open to the respondent to argue his plea to relevancy. In the event the Lord Ordinary sustained the plea to competency and it is his decision on this matter which is now before us in this reclaiming motion.

Counsel for both parties were agreed before the Lord Ordinary that the plea to the competency of the petition raised an important question about the extent of the jurisdiction of the court in proceedings for judicial review. The Lord Ordinary has endorsed this view. He regarded the submission to which he listened as raising important issues which have far-reaching implications for the future development of this branch of the law. It was indicated to him that his decision would be the subject of a reclaiming motion whichever way he decided the case. He made it clear at the end of his opinion that he would welcome the opportunity which a reclaiming motion might give for a comprehensive consideration and statement of the scope of the court's supervisory jurisdiction under Rule of Court 260B.

We accept that it is now necessary for guidance to be given as to the scope of this procedure. Having listened to a full and careful argument on the matter, we propose in this opinion to examine the history of the supervisory jurisdiction of the Court of Session prior to the introduction of the new procedure by Rule of Court 260B. We shall then comment on some of the cases which have been decided since that rule was introduced. One issue of particular importance is the extent to which it is relevant, in determining the limits of the new procedure, to have regard to the development of judicial review in England and to employ the terminology of English law. We shall examine the origins of this usage and the extent to which it can be reconciled with the Scottish cases. In conclusion we shall set out what we consider to be the principles which may be used to define the limits of the supervisory jurisdiction of this court. But in order to set the context for this discussion, it is first necessary to explain in a little more detail the circumstances of the present case.

The nature of the relationship between the petitioner and the Scottish Prison Service has been described by the Lord Ordinary. The petitioner is a civil servant and for constitutional reasons he is said to hold his appointment at the pleasure of the Crown. Accordingly he has no formal contract of employment, but this does not mean that the relationship between him and the Scottish Prison Service is without any mutual rights or obligations. On the contrary, his letter of appointment made reference to conditions of service applicable to his appointment in terms which indicated clearly that there were to be rights and obligations on both sides. The Lord Ordinary was satisfied from a study of the petitioner's terms of service that they gave rise to rights and duties of a contractual nature which might be enforceable at law. Counsel for the petitioner did not challenge that conclusion, nor did he challenge the Lord Ordinary's statement that the

petitioner's position in respect of these matters was indistinguishable from that of a person holding a contract of employment with a private employer.

The decision which is challenged in this case was taken under para. 80 of the petitioner's conditions of service, the first sentence of which is in these terms: "Not all types of transfer qualify for reimbursement of home removal expenses and it is a matter for Personnel Services Division's discretion in all cases whether the distance between the old and new stations justifies the payment of expenses."

It should be noted that, although there is a reference here to the personnel services division, no attempt has been made by the petitioner to present the decision as being that of any particular officer or body which can be seen to have a separate identity from the Scottish Prison Service themselves. This is important, because from the pleadings in this case it appears that it was for the Scottish Prison Service, and not some third party to whose jurisdiction the matter was committed, to decide whether or not the petitioner was to be reimbursed for his expenses. Had this been a case where the decision was one to be taken by a third party, the point to be decided in this case would have been different, for reasons to which we shall return. As it is, the issue appeared to the Lord Ordinary to be of the nature of a private dispute between the petitioner and the Scottish Prison Service arising from his terms of service. We agree with that analysis, and we regard this case as indistinguishable in that respect from any other dispute of a similar nature between an employer and an employee. It is for that reason that the respondent maintains that the petition is incompetent, on the ground that the only issue is a pure matter of contract between the parties and as such is not amenable to judicial review.

The supervisory jurisdiction prior to Rule of Court 260B

We turn now to our examination of the history of the supervisory jurisdiction of the Court of Session prior to the introduction of the new procedure by Rule of Court 260B. In his submissions for the petitioner, counsel invited us to consider the early history of the Court of Session from its institution in 1532, and he drew our attention to the significance for its development of the abolition of the Scots Privy Council in 1708.

There is no doubt that this act of the new Parliament at Westminster left a significant gap in the administration of justice in Scotland. Prior to the union the Privy Council had exercised a wide equitable jurisdiction of a kind which was not enjoyed by the Court of Session at that time. As Sheriff McNeill has explained in "The Passing of the Scottish Privy Council" 1965 J.R. 263, the contrast was between the Court of Session, whose functions were essentially that of a court of law, and the Privy Council as the chief executive organ of the state which dispensed the extraordinary power of the Crown. In the words of Hill Burton, in his introduction to vol. I of the Privy Council Register, it was "as if the Court of Session were bound by the strict doctrines of the law, while the Privy Council could administer abstract justice by its innate prerogative, and was bound in duty to interfere if the strict rule of law should inflict a wrong". As McNeill has pointed out, however, no statute, Act of Sederunt or Act of Adjournal was passed in 1708 to distribute the jurisdiction formerly enjoyed by the Scots Privy Council, so it was left to the Court of Session itself to develop its own jurisdiction in order to provide an extraordinary equitable remedy where none was available within the strict limits of the law. This development was described by Lord

Kames in his *Principles of Equity* (3rd edn, 1776): "In Scotland, as well as in other civilized countries, the King's council was originally the only court that had power to remedy defects or redress injustice in common law. To this extraordinary power the court of session naturally succeeded, as being the supreme court in civil matters; for in every well-regulated society, some one court must be trusted with this power, and no court more properly than that which is supreme."

But a more cautious approach to the limits of this initiative is evident from this passage in Lord Kames's *Historical Law Tracts* (4th edn, 1778) at pp. 228–229: "Under the cognisance of the privy council in Scotland came many injuries, which, by the abolition of that court, are left without any peculiar remedy; and the court of session have with reluctance been obliged to listen to complaints of various kinds that belonged properly to the privy council while it had a being. A new branch of jurisdiction has thus sprung up in the court of session, which daily increasing by new matter will probably in time produce a new maxim. That it is the province of this court, to redress all wrongs for which no other remedy is provided. We are, however, as yet far from being ripe for adopting this maxim. The utility of it is indeed perceived, but perceived too obscurely to have any steady influence on the practice of the court; and for that reason their proceedings in such matters are far from being uniform."

These comments were referred to with approval by Erskine, *An Institute of the Laws of Scotland* (8th edn), I.iii.23 where he said: "The author of the historical law tracts reasonably conjectures that it will soon be considered as part of the province of the court of session to redress all wrongs for which a peculiar remedy is not otherwise provided." But these predictions are an imperfect guide to what in fact took place, and in order to identify the limits of this supereminent jurisdiction in the exercise of the court's supervisory role it is necessary to examine the cases which, as the court entered the nineteenth century, were beginning to establish a consistent pattern for the next 200 years.

As Lord Fraser of Tullybelton pointed out in *Brown* v. *Hamilton District Council* 1983 S.C. (H.L.) 1 at p. 42, the principle upon which the supervisory jurisdiction has been exercised was stated in terms which, so far as they go, would be perfectly appropriate at the present day in *Magistrates of Perth* v. *Trustees on the Road from Queensferry to Perth* (1756) Kilkerran's Notes, Brown Sup., Vol. 5, 318 at p. 319. A statute had provided that the justices should "finally determine" questions between the road trustees and other persons. Lord Kilkerran held that the provision did not exclude the supreme jurisdiction of the Court of Session "to determine what it is that falls within their powers; but whatever matter is found to be within their power, this court cannot review their proceedings". The same point arose in *Countess of Loudon* v. *Trustees on the High Roads in Ayrshire* (1793) M. 7398. The trustees had been authorised by statute to suppress, or close up, any by-road which did not appear to them to be of importance to the public. There was an appeal from their judgment to the next meeting of the quarter sessions whose order and sentence was to be final and conclusive. The trustees had resolved to suppress a road which some members of the public wished to keep open. A bill of advocation was presented to the Court of Session as well as an appeal to the quarter sessions, and the question then arose as to the competency of the bill. The relevant part of the decision is recorded in these terms: "The Court were of opinion, that the judgments of the

quarter sessions were not liable to review on such points, as fixing the line of road, or the position of the toll bars, which were discretionary in their nature, and in the exercise of the powers exclusively committed to the Trustees. But it was on the other hand agreed, that a right to review, in the case of the smallest excess of power, was essential, and was not excluded by the words of the act. It could not be supposed, (it was observed) that the trustees or Justices were meant to be themselves the sole and exclusive judges of the extent of their own powers, or that such a jurisdiction, which might even be held to be in some measure unconstitutional, was intended to be given."

Two points of significance are to be found in this passage. The first is the clear distinction which Lord Kilkerran observed between review on the merits and control of the process of decision-making by the body to whom the merits of the decision have been entrusted. The second is the use of the words "excess of power", and the insistence by the court that the trustees or justices were not the sole and exclusive judges of their own "jurisdiction". These expressions recur throughout the cases on this chapter of the law, and one can see here, even at the very earliest stage of its development, the emergence of a clearly defined principle that, where an excess or abuse of the power or jurisdiction conferred on a decision-maker is alleged, the Court of Session, in the exercise of its function as the supreme court, has the power to correct it.

In *Heritors of Corstorphine* v. *Ramsay* 10th March 1812, F.C. it was held competent for the Court of Session to review a judgment of a presbytery in regard to schoolmasters, although their jurisdiction was declared to be final by the statute, if they refused to act, or if they exceeded their powers. Lord President Hope's opinion contains these passages at pp. 549 and 550: "It is very true that the 43rd of the King [43 Geo. III, cap. 54] gave the exclusive jurisdiction as to schoolmasters to presbyteries alone. But that jurisdiction is exclusive only where they act in matters committed to them. But if they refuse to act at all, or go beyond their powers, they may be controlled by this court... . In other cases of privative jurisdiction, the Court of Session as the Supreme Court of this country, has been in use to interfere, and to control. Thus, in the case of Commissioners of Supply refusing to split superiorities; in the case of road trustees refusing to act; and in the case of Courts of Lieutenancy exceeding their powers, the Court has interfered. In the case of road trustees from Aberdeenshire, this was most completely exemplified. The trustees refused to act, and to assess the damages due to a person through whose property the road went. The court compelled them to do so. They then proceeded; and the heritor, not satisfied, brought the case before the court by advocation, complaining of the proceedings, insofar as they proceeded on no proper evidence. The court refused to sustain the advocation. The court could compel the trustees to act; but having once done so, they had no power to interfere with what was done."

Here again one can see a recognition of the distinction between the privative jurisdiction entrusted to the decision-maker on the merits, with which the Court of Session cannot interfere, and control by the court where the decision-maker refuses to act at all or goes beyond the powers which have been entrusted to him. The jurisdiction is seen here clearly to be a supervisory jurisdiction only. There is no conflict between the supervisory function and the exclusive or privative jurisdiction of the body whose decisions are open to supervision in this way.

These points were mentioned again in two further cases decided in the following decade. In *Ross* v. *Findlater* (1826) 4 S. 514 it was held that the Court of Session had jurisdiction to set aside the decree of a presbytery removing a schoolmaster, when they had failed to comply with the requisites of the statute. Lord Justice-Clerk Boyle at p. 520 explained the position of the court in these words: "There has been manifest excess of power, and this, as the supreme court, is bound to redress all the wrongs of the lieges and to keep all inferior jurisdictions within the law. We are entitled to quash the proceedings of the Presbytery, but without interfering on the merits of the question."

In *Guthrie* v. *Miller* (1827) 5 S. 711 it was held that the court could not interfere with the exercise of the discretionary powers vested in commissioners of police under a local Police Act, except in cases in excess power or deviation from the statute. Lord Justice-Clerk Boyle said at p. 713: "It did not appear to me that there was any clause in this act to exclude the review of this court in a case of flagrant excess of power, or deviation from the statute... . If the court saw a case of wildful denial of rights under the statute, or a clear excess of power, we would interfere; but we cannot be called on to fix whether there is to be a lamp at this point, and a watchman at that." Lord Alloway at p. 713 is also instructive on this point: "The doctrine laid down from the Chair as to jurisdiction cannot be disputed. The great distinction is that, when this court has no previous jurisdiction, it requires express terms to exclude. But when there is no previous and radical jurisdiction, and the jurisdiction is created by the statute, the question comes to be determined on this ground, Have the parties intrusted with powers exceeded them? For while they keep within the bounds of the statute, which commits to them a discretionary power, unless excess of that power is pointed out, this court cannot well interfere."

This consistent line of authority in the Court of Session provided the background to a consideration of the matter in the House of Lords in *Campbell* v. *Brown* (1829) 3 W. & S. 441. This was a case about the dismissal of a schoolmaster. He was dissatisfied with the proceedings for his dismissal, and the question arose whether the Court of Session could review the judgment of the presbytery which, by the statute, was declared to be final without appeal to or review by any court civil or ecclesiastical. The argument for the schoolmaster was that the Court of Session had a *jus supereminens* which entitled the court to review the decision of the presbytery where there had been an informality in its proceedings. This argument was successful in the Court of Session, and on appeal to the House of Lords its judgment was affirmed on the ground that the Court of Session had a jurisdiction to review and set aside the proceedings of the presbytery where those proceedings had been irregular and informal. The following passage from the speech of the Lord Chancellor, Lord Lyndhurst, at p. 448 is of particular interest and importance: "But I apprehend, that ... a jurisdiction is given in this case to the Court of Session, not to review the judgment on the merits, but to take care that the Court of Presbytery shall keep within the line of its duty, and conform to the provisions of the Act of Parliament. There is in the Court of Session in Scotland that superintending authority over inferior jurisdictions, which is requisite in all countries, for the purpose of confining those inferior jurisdictions within the bounds of their duty; and the only question here, is whether this case is of such a nature and description as to justify the calling into action that authority of the Superior Court? Cases were cited at the Bar, and

mentioned in the printed papers now on your Lordships' table, in which the Court of Session has exercised a superintending authority over inferior jurisdictions, when they have been guilty of an excess of their jurisdiction, or have acted inconsistently with the authority with which they were invested. Now, in this particular case, the power of final judgment is given to the Presbytery, under certain limitations and certain restrictions. The party is to be served with the libel — the necessary proof is to be taken — and unless the inferior tribunal pursue the course pointed out by the Act of Parliament, they have no authority to proceed to judgment; and if, without pursuing the course pointed out, they do proceed to a judgment, in that case all their proceedings will be so inconsistent with the authority with which they are invested, that the superintending authority of the Court of Session may be interposed, for the purpose of setting aside those proceedings."

There is here an affirmation of the principle which defines the limits of the supervisory jurisdiction of the court. On the one hand there is no jurisdiction to review the judgment of the inferior tribunal or jurisdiction on the merits of the question, which has been entrusted to them alone. On the other hand the court has authority to see that the decision-taking body — the inferior tribunal or jurisdiction — keep within the limits of their duty and do not exceed the authority which has been given to them by the enabling power.

That was a case taken on the ground that the proceedings of the presbytery were irregular on the ground of an informality which was inconsistent with the enactment of the statute which gave them their authority. But the grounds upon which the decision of an inferior tribunal could be corrected were not limited to irregularities of any particular kind. As James Darling, *Practice of the Court of Session* (1833), observed at p. 15: "In cases even where the power of review is plainly excluded, the Session, as the supreme civil court of the kingdom, must necessarily still have jurisdiction to examine whether the inferior tribunals proceed according to the regulations of the statutes conferring on them the jurisdiction, and according to the ordinary principles of the common law." Examples are then given of various cases in which the court had exercised its authority to interfere on the ground of excess of power, assuming a jurisdiction beyond that conferred, omitting something enjoined by the statute or the irregular conduct of the proceedings. The author went on to say this: "Wrongs of the above kinds must be redressed; and, besides, any thing done not in exact conformity with the provisions of a statute, is not a thing done in pursuance and execution of the statute, which is necessary to confine the matter to a particular jurisdiction... . This jurisdiction of the Court of Session is evidently of a quite different nature from that of reviewing the merits of the cases which are intrusted to the inferior courts."

These observations are important to an understanding of the distinction which must be made between the question of competency as to whether a decision is open to review by the Court of Session in the exercise of its supervisory jurisdiction, and the substantive grounds on which it may do so. The extent of the supervisory jurisdiction is capable of a relatively precise definition, in which the essential principles can be expressed. But the substantive grounds on which that jurisdiction may be exercised will of course vary from case to case. And they may be adapted to conform to the standards of decision-taking as they are evolved from time to time by the common law.

Four cases in the latter half of the nineteenth century may now be mentioned to illustrate the extent of the supervisory jurisdiction as it had by now developed, and to show the range of decisions which may be subject to review. *Ashley* v. *Magistrates of Rothesay* (1873) 11 Macph. 708 was a case about the hours of opening and closing of inns and public houses in the Burgh of Rothesay. The magistrates made a resolution that all inns and public houses in the burgh were to close at ten instead of eleven as required by the statutes, and they granted certificates to that effect at a meeting held for the granting and renewal of licensing certificates. The matter came before the Court of Session in an action of reduction and declarator. The defenders pleaded that the action was incompetent because review by the court had been excluded by the statute. It was held that when an inferior court exceeds its power, the Court of Session may reduce its decree although bearing to be under an Act which excludes reduction. Lord President Inglis explained the point at p. 716: "Now, the plain answer to the objection founded upon in this section is that the present is not a process of review, nor is it in a proper sense a stay of execution. It is a proceeding brought in the court for the purpose of setting aside as incompetent and illegal the proceedings of an inferior court, and the jurisdiction of this court to entertain such an action cannot be doubted, notwithstanding the entire prohibition of review of any kind. This is not review, as I said before, but it is the interference of the Supreme Court for the purpose of keeping inferior courts within the bounds of their jurisdiction. The magistrates having exceeded their powers under the statute, their order, whatever it may be — or decision — is liable to be set aside."

This decision was later affirmed in the House of Lords in *Macbeth* v. *Ashley* (1874) 1 R (H.L.) 14. In *Macfarlane* v. *Mochrum School Board* (1875) 3 R. 88 a schoolmaster raised an action of reduction of a decision by a school board to remove him and that of the board of education by whom their judgment had been confirmed. He sought to do this on the grounds of deviation from the statutory procedure and of malice and oppression. The latter ground was held not to be relevant, but it was held that the court had jurisdiction in the action so far as based on relevant averments of deviations from the statutory procedure, although it had no power to review the judgment of a school board on its merits. Lord President Inglis said this at p. 98 of the argument presented to the court on competency: "But the pleas which are stated both by the school board and by the board of education proceed upon a failure to distinguish between the review of a judgment of this kind by a court of law and the reduction of such a resolution or sentence as we have before us on the ground of incompetency. The school board of a parish and the board of education are both of them the creatures of statute. They can do nothing except under statutory authority. They can exercise no power whatever, except which is given to them by the statute; and if they do not conform to the conditions by which the statute authorises them to exercise that power they are no longer acting under the statute, and their proceedings would be liable not to be reviewed but to be set aside as incompetent."

In *Lord Advocate* v. *Stow School Board* (1876) 3 R. 469 the school board had resolved that it was necessary for additional school accommodation to be provided, and this resolution was confirmed by the board. But the school board then resolved that the carrying out of the former resolution should be delayed and they refused to comply with a requisition by the board of education to carry out their original

resolution. The court, on the petition of the Lord Advocate, ordered the school board to comply with the requisition of the board of education. In his comment on the point of competency Lord Deas said this at p. 473: "The first question is, what power have we to interfere? Looking to the terms of the Education Act 1872 and in particular to those of the 28th and 36th sections, it appears to me that we have no power to interfere with the action of the board of education in a matter of the kind now in dispute, except in two cases — first, if it were plain that the board had refused or failed to apply their minds to the question of school accommodation in the particular parish, so as to come to an intelligent resolution on the subject, we might interfere to correct that abuse; or second, if the board had gone contrary to or outwith the statute we might, in that case, also interfere to set them right."

Finally, in this group of cases there is *Forbes* v. *Underwood* (1886) 13 R. 465 in which it was held in an appeal from the sheriff court that the Court of Session alone has jurisdiction to compel an arbiter to proceed. It was argued that the position of an arbiter was analogous to that of a public body such as road trustees refusing to act, in which case the Court of Session would interfere to make them proceed although it had no jurisdiction to direct them what to do. Lord President Inglis at p. 467 said this about the jurisdiction of the Court of Session: "The position of an arbiter is very much like that of a Judge in many respects, and there is no doubt whatever that whenever an inferior Judge, no matter of what kind, fails to perform his duty, or transgresses his duty, either by going beyond his jurisdiction, or by failing to exercise his jurisdiction when called upon to do so by a party entitled to come before him, there is a remedy in this Court, and the inferior Judge, if it turns out that he is wrong, may be ordered by this Court to go on and perform his duty, and if he fails to do so he will be liable to imprisonment as upon a decree *ad factum praestandum*. The same rule applies to a variety of other public officers, such as statutory trustees and commissioners, who are under an obligation to exercise their functions for the benefit of the parties for whose benefit these functions are entrusted to them, and if they capriciously and without just cause refuse to perform their duty they will be ordained to do so by decree of this court, and failing their performance will, in like manner, be committed to prison. Now, all this belongs to the Court of Session as the Supreme Civil Court of this country in the exercise of what is called, very properly, its supereminent jurisdiction."

After considering the position of inferior judges and then of arbiters, he went on to say this at p. 469: "Now, all these are considerations which require the most delicate handling by a court that is called upon to enforce under the penalty of imprisonment the duty of the arbiter to go on and close the submission. I can hardly conceive anything more suitable for the interposition of the Supreme Court, or less suitable to the jurisdiction of an inferior judge. It appears to me that the parallel between the position of an arbiter and the position of inferior Judges — Judges in the proper sense of the term — is complete, and that the two are quite indistinguishable in this question of jurisdiction."

The importance of this case for present purposes is that it shows that the principle upon which the supervisory jurisdiction is exercised is not affected by distinctions which may exist for other purposes between public bodies and those who exercise a jurisdiction under a private contract. The public or private nature of the inferior body or tribunal is not decisive, nor is it necessary to inquire whether the decision of the inferior body or tribunal is administrative in character.

The essential point is that a decision-making function has been entrusted to that body or tribunal which it can be compelled by the court to perform. As counsel for the respondent pointed out, the tri-partite relationship in these arrangements is significant. The essential feature of all these cases is the conferring, whether by statute or private contract, of a decision-making power or duty on a third party to whom the taking of the decision is entrusted but whose manner of decision-making may be controlled by the court.

This consistency of approach was maintained throughout the cases in this century which preceded the introduction of Rule of Court 260B. In *Moss' Empires* v. *Assessor for Glasgow* 1917 S.C. (H.L.) 1 an action for reduction of an entry in the valuation roll was held to be competent on grounds explained by Lord Kinnear at p. 6: "Now I apprehend that there can be no question at all of the jurisdiction of the Court of Session to entertain an action of that kind wherever any inferior tribunal or any administrative body has exceeded the powers conferred upon it by statute to the prejudice of the subject. The jurisdiction of the court to set aside such excess of power as incompetent and illegal is not open to dispute."

The scope of the expression "any inferior tribunal or any administrative body" will be evident from the cases to which we have already referred. The common characteristic is not the nature of the tribunal or body as such but the entrusting to it of a decision-making power or duty which must be exercised within the jurisdiction conferred upon it and is accordingly subject to supervision by the court.

In *McDonald* v. *Burns* 1940 S.C. 376 the Court of Session was willing to entertain an action as to whether the proceedings by which sisters were expelled from a convent in Edinburgh were regular and in conformity with the law and constitution of the Roman Catholic Church. It was recognised by Lord Justice-Clerk Aitchison that the judicatories of religious bodies in Scotland have their own exceptional circumstances. Nevertheless, as he explained at p. 383, the court will entertain actions arising out of the judgments of ecclesiastical bodies where the religious association has acted beyond its own constitution in a manner calculated to affect the civil rights and patrimonial interests of any of its members and where, although acting within its own constitution, its procedure has been marked by gross irregularity such as would, in the case of an ordinary civil tribunal, be sufficient to vitiate the proceedings. The significance of this case is that it provides a further example of the supervisory jurisdiction being exercised by the court in a case where the jurisdiction was conferred on the inferior tribunal otherwise than by statute, and where the matter at issue could not be described as being in the area of public law.

The unimportance for this purpose of the distinction between public and private law can be seen also from the decision in *St Johnstone Football Club Ltd.* v. *Scottish Football Association Ltd.* 1965 S.L.T. 171. The point at issue arose out of the articles of association of the S.F.A., to which the football club were subject as members of it, which empowered the council of the S.F.A. to fine or expel its members on grounds of which they were to be the sole judges. The case provides a clear example of the tri-partite relationship to which we referred earlier, by which a decision-making body — in this case the council — has been entrusted by an enabling body with a limited jurisdiction for decision-taking in regard to others to which it must adhere. Lord Kilbrandon held, following *McDonald* v. *Burns*, that the Court of Session will entertain actions arising out

of the judgments of the governing bodies of private associations, whether or not the civil rights and patrimonial interests of its members have been interfered with by the proceedings complained of, where a gross irregularity such as a departure from the rules of natural justice has been demonstrated. *Barrs* v. *British Wool Marketing Board* 1957 S.C. 72; *McDonald* v. *Lanarkshire Fire Brigade Joint Committee* 1959 S.C. 141; *Palmer* v. *Inverness Hospitals Board of Management* 1963 S.C. 311 and *Watt* v. *Lord Advocate* 1979 S.C. 120 are all examples of quasi-judicial bodies and tribunals of various kinds being held to be subject to the supervisory jurisdiction of the court.

Mention should be made here of a case which lies outside the mainstream of this line of authority but to which counsel for the petitioner attached some importance in support of his argument that wherever a discretion is to be exercised, the court may interfere to control the manner of its exercise. This proposition, which ignores the tri-partite element inherent in the conferring of a jurisdiction or duty on a third party, is too broadly stated to be acceptable as an accurate definition of the supervisory jurisdiction. But counsel sought support for it in the observations of Lord President Clyde in *Governors of Donaldson's Hospital* v. *Educational Endowments Commissioners* 1932 S.C. 585, where, at p. 599, after saying that all discretionary powers, without exception, must be used both reasonably and according to law, he said: "Were it otherwise, there would be no difference between a discretionary power and an arbitrary one; and, if those upon whom a discretion is conferred exercise it, not reasonably or according to law, but arbitrarily, they are not using, but abusing, their discretion. Whenever this can be established as matter of fact, their acts become liable to be interfered with by a court of law. The right and duty of the court so to interfere — whenever, that is to say, discretionary powers are exercised either unreasonably or in a manner contrary to law — is illustrated by many cases, alike in the law of Scotland and in that of England, dealing with discretionary powers given to trustees under settlement and to magistrates under statute."

That case, however, was one which had been presented to the court under the Educational Endowments (Scotland) Act 1928 for an opinion as to whether a proposed scheme was outwith the powers conferred on the commissioners. The argument was about the width of the discretionary powers of the commissioners, and the statutory background was a special one which makes it unwise to attach significance for present purposes to the passage which we have quoted. In any event these observations were directed to the substantive grounds on which the exercise of a discretion may be controlled rather than the question of crucial importance in the present case, which is to define the circumstances in which it is competent for the court in the exercise of its supervisory jurisdiction to exercise this control. These comments are best seen therefore in the same light as the observations of Lord President Emslie in *Wordie Property Co. Ltd.* v. *Secretary of State for Scotland* 1984 S.L.T. 345 at pp. 347–348 about the grounds upon which a decision taken by the Secretary of State in the exercise of statutory powers may be challenged as *ultra vires*. A discussion about the substantive grounds on which control is to be exercised should be kept separate from one about the competency of exercising that control.

Brown v. *Hamilton District Council*

We come now to *Brown* v. *Hamilton District Council* 1983 S.C. (H.L.) 1 and to

the observations of Lord Fraser of Tullybelton which were of such importance to the further development of the supervisory jurisdiction. But before examining what Lord Fraser said in that case it is worth pausing to notice the essential characteristics of this jurisdiction as revealed by the cases which we have described so far. The most striking feature is the consistency of approach over a period in excess of two centuries. This approach was both simple and understandable, untroubled by disputes about the scope of remedies or distinctions between public and private law which in England have given rise to much difficulty. Moreover, the development of the law of Scotland in this field has not been on a case-by-case basis, as counsel for the petitioner invited us to find, but on the basis of principle. The principle is that where a particular matter has been entrusted to an inferior body or tribunal the Court of Session cannot substitute its own view for what that body or tribunal may decide; but it can nevertheless interfere in order to control any excess or abuse of power or failure to act within the limits of the jurisdiction which has been conferred. That supervisory jurisdiction may be appealed to in order to insist upon standards of rationality and fairness of procedure in addition to what may have been expressly required by the statute or by the contract by which the limits of the inferior jurisdiction have been defined. The only point of criticism was that to which Lord Fraser drew attention in *Brown* at p. 49, and again in *Stevenson* v. *Midlothian District Council* 1983 S.C. (H.L.) 50 at p. 59, that the procedure for obtaining judicial review from the Court of Session was too slow and cumbersome and was in need of reform.

Before we examine these passages, it is appropriate to observe the comments at the outset of Lord Fraser's speech at p. 42. Three points of importance are made on this page. First, that it has long been recognised in Scotland that the Court of Session has jurisdiction to exercise a supervisory control over inferior courts and tribunals in cases where there is no right of appeal from those courts or tribunals, and even in cases where appeal is expressly excluded by statute; second, that no difference of substance exists between the laws of England and Scotland in regard to the grounds on which judicial review may be open; and third, that the supervisory jurisdiction over inferior courts and tribunals is vested exclusively in the Court of Session as the supreme court. There was nothing new in these remarks. All of them were amply vouched by previous authority, and there is no hint in anything said by Lord Fraser that the law of Scotland on these matters was in need of change. The respondent's argument in that case was that the supervisory jurisdiction of the Court of Session over bodies other than courts and tribunals was exclusive to this court only in respect of decisions which were judicial or quasi-judicial, and that administrative decisions were subject to a supervisory jurisdiction in the sheriff court. But Lord Fraser found few traces in the Scottish cases of a distinction being drawn between administrative and judicial decisions, and he held that the supervisory jurisdiction over decisions of administrative bodies, whether they were administrative, judicial or quasi-judicial, was privative to the Court of Session. Here again, what he said was entirely consistent with the authorities to which we have referred, and there is nothing here to disturb the pattern of consistency which is such a prominent feature of this long line of authority.

When he came to make his recommendation for procedural reform, however, Lord Fraser used expressions which have been relied upon in later cases as

suggesting the limits for judicial review under the new rule. In *Brown* at p. 49 he said: "Secondly, it is for consideration whether there might not be advantages in developing special procedure in Scotland for dealing with questions in the public law area, comparable to the English prerogative orders." The phrase "the public law area" and a reference later on the same page to "the public law field" have attracted attention, as also have comments in *Stevenson* to the same effect at p. 59 where Lord Fraser said: "In the recent case of *Brown* v. *Hamilton District Council* I suggested that there might be advantages in developing or reviving special procedure in Scotland, comparable to the procedure under Order 53 of the Rules of the Supreme Court of England, for obtaining judicial review of decisions by public bodies. This appeal is a good example of a case where such procedure might have been useful."

Now it is clear that it was not Lord Fraser's intention in these passages to define the extent of the supervisory jurisdiction of this court. He had said all that was necessary on this point in *Brown* at p. 42. The context for these remarks was the entirely different one of concern about the time taken in the cases which were before him for the jurisdiction to be exercised. In *Brown's* case it had taken almost four years for a decision made in December 1978 to reach the House of Lords, yet the nature of the jurisdiction made it wholly unnecessary for the merits of the case to be gone into because all the court could do was to exercise its supervisory control. In *Stevenson's* case, where the notice was served in February 1978, it was five years before the case was resolved in the House of Lords.

His use of the phrases "the public law area" and "the public law field" should also be seen in the light of the fact that when the speeches in *Brown* were delivered on 25th November 1982 the judgments in two other cases about judicial review in England were also being delivered: see *O'Reilly* v. *Mackman* [1983] 2 A.C. 237 and *Cocks* v. *Thanet District Council* [1983] 2 A.C. 286. Those two cases were also concerned with decisions by public bodies, the question being whether judicial review was the appropriate remedy. It was held in both of them that, since all the remedies under English law for the infringement of rights protected under public law could be obtained on an application for judicial review, subject to safeguards designed to protect public authorities from harassment, it would as a general rule be an abuse of process for a person to seek to establish by ordinary action that his public law rights had been infringed. No doubt the phrases used by Lord Fraser came readily to his mind as appropriate in that general context. One can accept that it was his particular concern that the remedies available to litigants in Scotland who took issue with decisions taken by public bodies in this country should not be at a disadvantage as compared with those in England because the procedure in Scotland denied ready access to the courts for the obtaining of the appropriate remedies. But it would be a mistake to assume from these few remarks that Lord Fraser intended to narrow the supervisory jurisdiction of the Court of Session from what it had previously been to a jurisdiction which was to be available only for exercise in the field which was recognised as being the field of public law.

Rule of Court 260B and subsequent cases

On 27th April 1983 a working party was set up under the chairmanship of Lord Dunpark with the following terms of reference: "Having regard to the observations

of Lord Fraser of Tullybelton in his speeches in *Brown* v. *Hamilton District Council* and *Stevenson* v. *Midlothian District Council*, to devise and recommend for consideration a simple form of procedure, capable of being operated with reasonable expedition, for bringing before the court, for such relief as is appropriate, complaints by aggrieved persons (1) against acts or decisions of inferior courts, tribunals, public bodies, authorities or officers in respect of which no right of appeal is available, alleging that they have been done or taken without compliance with particular statutory procedural requirements; and (2) of failure of any body or person to perform a statutory duty, which it or he could be compelled to perform in terms of section 91 of the Court of Session Act 1868."

This working party assumed the title of the Working Party on Procedure for Judicial Review of Administrative Action. In para. 4 of its report it said: "It is obvious from our terms of reference that the procedure which we recommend will be confined to disputes about the validity of acts done or decisions taken by tribunals and public bodies and their officers in the field of administrative law and to applications for the specific performance of a statutory duty by any body or person."

Similar references elsewhere in the report indicate a concern only for decisions taken in this particular field of administrative law. And when it came to the terms of the new proposed rule, the working party proposed as the first of the new rules a provision whose effect would have been to limit the exercise of the supervisory jurisdiction under this procedure to "acts or decisions of inferior courts, tribunals, public authorities, public bodies or officers acting in a public capacity". The intention was that the new procedure should be used instead of any other form of process whenever an act or decision of one of the specified bodies or officers was to be challenged as unlawful for any reason. It is of particular interest, therefore, against this background that when the new rule 260B was made in due course by S.I. 1985 No. 500, in relation to proceedings commenced on or after 30th April 1985, no limit whatever was imposed by Rule of Court 260B(1) as to the bodies, officers or others to whose acts or decisions it was to apply.

The following characteristics of Rule of Court 260B may therefore be noted at this stage. First, since it was introduced by Act of Sederunt without any further enabling power having been conferred on the court by general legislation, it was a procedural amendment only which did not and could not alter in any respect the substantive law. Thus neither the nature or scope of the supervisory jurisdiction nor the grounds on which it may be exercised were affected by the introduction of this new rule. Second, it requires that all applications to the supervisory jurisdiction must be made only by means of the new procedure. The former procedure by way of summons or petition is no longer to be available in such cases. This makes it all the more important to observe that no change in the substantive law was being effected. To treat the procedure as available only in some cases appropriate for the supervisory jurisdiction and not others would risk leaving those other cases without a remedy, because no other procedure is available. Crucial to a proper understanding of the new procedure, therefore, is the generality of its application, since it applies to all cases where an application is being made to the supervisory jurisdiction of the court.

The simplicity of the rule and the success of the new procedure have nevertheless created difficulties. Perhaps because of a misconception about Lord

Fraser's references to the public law field in *Brown*, and a tendency to think in terms of administrative law generally as illustrated by the report of the working party, there has been some confusion about the proper use in this field of English terminology and case-law. It should be said at once in this chapter that, as Lord Fraser pointed out in *Brown* at p. 42, there is no difference between the law of Scotland and the law of England as to the substantive grounds on which a decision may be challenged as *ultra vires* in proceedings of this kind. As Lord Fraser put it in *Brown*: "The decisions in the English cases of *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223, and *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147, so far as they relate to matters of substance and not of procedure, are accepted as being applicable in Scotland: see *Watt* v. *Lord Advocate*." Lord President Emslie's remarks in *Wordie Property Co. Ltd.* v. *Secretary of State for Scotland* at pp. 347–348 are to the same effect.

The problem which has arisen in cases following the introduction of rule 260B is about the influence of English law on decisions about the competency of the procedure. Indications of a misunderstanding in this respect are to be found in *Connor* v. *Strathclyde Regional Council* 1986 S.L.T. 530. That case was concerned with a decision taken at a selection board of the education authority for the appointment of assistant head teachers in two schools. The application for judicial review was challenged on the ground of competency, and this argument was successful on a number of grounds. Counsel were agreed that it was appropriate to consider English law in regard to the question of competency, and the Lord Ordinary applied *dicta* in the English cases in order to arrive at this result. This led him to hold that the petition was incompetent because the actings of the board did not indicate a sufficient element of public law for them to be subject to judicial review. He went on to say, under reference to Lord Diplock's statement in *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] A.C. 374 at p. 408 of the test which must be satisfied in England to qualify as a subject for judicial review, that the question of judicial review was still in the process of development, and that in the present state of the law the Court of Session had no power in the exercise of its supervisory jurisdiction to intervene "in a situation where there is no element of public law arising which is sufficient to attract public law remedies". But to describe the supervisory jurisdiction of the Court of Session as a public law remedy, and then to look for an element of public law as the test of whether it is available, is to introduce concepts which have had no part in the development of that jurisdiction in Scotland over the last two centuries. And there are indications of the confusion between the relevance of English law to the substantive grounds for review and its irrelevance to questions of competency, which was the only issue which the court in that case had to decide. The description of judicial review under Rule of Court 260B as a public law remedy led to the decision in *Safeway Food Stores Ltd* v. *Scottish Provident Institution* 1989 S.L.T. 131 that, as the dispute in that case arose out of private arbitration, an action of reduction under the ordinary procedure was competent. But that decision was at variance with *Forbes* v. *Underwood*, to which no reference was made in that case. The confusion introduced by the argument that the procedure under Rule of Court 260B is concerned only with a public law remedy led to a decision which cannot now be supported as being correct.

Tehrani v. *Argyll and Clyde Health Board*

The most important of the cases since the introduction of the new rule, however, is *Tehrani* v. *Argyll and Clyde Health Board* 1989 S.C. 342. It was his concern about the implications of some of the things said in that case that was in the forefront of the Lord Ordinary's mind when he observed that he would welcome the opportunity which a reclaiming motion would give for a comprehensive consideration and statement of the scope of the court's supervisory jurisdiction.

The petitioner in that case was a consultant surgeon employed by the National Health Service for Scotland who had been suspended from duty following a complaint arising from his treatment of a patient. The health board investigated the allegations which were made against him, and in due course a committee of inquiry was set up by them to investigate these allegations and to report to the board. It was the board's decision to dismiss the petitioner summarily from his employment with them which the petitioner sought to challenge by way of judicial review. The board contended that the application was incompetent, but the Lord Ordinary repelled that plea and, having considered the arguments about the manner of the dismissal, held that it was unreasonable in the *Wednesbury* sense and granted decree of reduction. The board reclaimed and their plea to competency was sustained in the Inner House. But before examining the opinions which were delivered in the Inner House, we should say something about the reasons which the Lord Ordinary gave for holding that the petition was competent. This is because these reasons illustrate that some of the difficulties which the court has experienced in arriving at a clear understanding of the supervisory jurisdiction in the context of Rule of Court 260B are to be found also in his opinion and are not confined to things said in the course of argument in the Inner House.

It was submitted for the board in the Outer House that the dispute was essentially a matter of private law, being concerned with a breach of contract, and that it was not open to judicial review: p. 350. It was recognised that the supervisory jurisdiction could extend to contracts of employment where an individual's employment was protected by statute, but since the petitioner's relationship with the board was one which was regulated by contract, it was contended that the supervisory jurisdiction did not apply. Attention was drawn to the tendency to confine judicial review to what were called "public law" matters. The Lord Ordinary was referred to the cases of *Connor* v. *Strathclyde Regional Council* and *Safeway Food Stores Ltd.* v. *Scottish Provident Institution* which we have mentioned above. But he was not persuaded that the approach taken in these cases was correct, nor was he convinced that the distinction in English law between public law and private law in the context of judicial review applied in Scotland. He then turned to examine some of the previously reported cases in Scots law, especially *Forbes* v. *Underwood*, in order to determine the issue of competency. He observed that the dispute in *Forbes* concerned a matter which was purely one of private law and that this did not prevent the court from exercising its supervisory jurisdiction. He then said this at p. 352: "In my view, this case is authority for the proposition that where quasi-judicial machinery is stipulated in a private contract for use in certain circumstances, the court may exercise its supervisory jurisdiction."

Senior counsel for the respondent in the present case said that he had no quarrel with that proposition so long as it was clearly understood that the

quasi-judicial machinery was some body independent of the employer to whom the responsibility for decision-taking had been delegated. But the expression used carried with it the risk of misunderstanding, because the quasi-judicial machinery which the Lord Ordinary proceeded to identify was that of the board themselves as the petitioner's employers. He rejected as illogical the board's argument that, while the committee which conducted the inquiry were open to judicial review, the board themselves were not. It will be clear, however, from our analysis of the supervisory jurisdiction that there was a distinction which could logically be made. The committee was a body which had been set up by the board to which a jurisdiction had been committed. In its case the tri-partite relationship between an inferior tribunal, the appointing body and the petitioner was established. But the board themselves were not in that position. As the petitioner's employer they owed certain duties to him and in particular they owed him the duty to act fairly. But the performance of that duty was a matter to be regulated under the ordinary jurisdiction of the court according to the contract between employer and the employee and was not amenable to judicial review. In *Sutcliffe* v. *Thackrah* [1974] A.C. 727 at p. 737H, Lord Reid described the argument that, as all persons carrying out judicial functions must act fairly, therefore all persons who must act fairly are carrying out judicial functions as completely illogical: see also Lord Salmon at p. 759H. Yet that same fallacy is, with respect, apparent in the Lord Ordinary's reasoning at p. 353, where he said that the concepts of natural justice and unreasonableness are both aspects of judicial review and cannot be kept artificially apart. It was this association of ideas which led him to hold that the application was competent. He saw the functions of the board as being quasi-judicial, and thus subject to the requirements of natural justice, and thus amenable to judicial review. The fact was, however, that the board were not performing any function independent of their position as the employers of the respondent to whom they owed a duty to act fairly under their contract with him, and for that reason their duty to act fairly was not open to judicial review.

Two other points about the Lord Ordinary's approach should be noted here before we turn to the opinions in the Inner House. The first is that he made no mention of para. 197 of the petitioner's terms and conditions of service, which made provision enabling either party to terminate the contract without notice by reason of such conduct by the other party as enabled him so to treat it at law. This provision played an important part in the argument in the Inner House that the board were entitled to terminate the petitioner's employment without notice, provided his conduct had been such as to enable them to dismiss him summarily at common law. The second point relates to the Lord Ordinary's comment at p. 357 that cogent reasons had to exist for the step of summary dismissal to be taken and that the reasons for summary dismissal when compared with the alternative of dismissal with notice had to be particularly compelling. At p. 358 he said that the question for examination was whether any board acting reasonably in the circumstances would have concluded that the only course was to dismiss him forthwith. But this was in effect the *Wednesbury* test of unreasonableness, and in the Inner House it was held that it was the wrong test to apply to the contract. The proper question was whether a reasonable health board could reasonably have concluded that the petitioner was in material breach of contract so that they would be justified in dismissing him summarily. As Lord Murray

pointed out at p. 378, this was a pure matter of law of contract without any public law element at all.

It will be apparent from what we have said so far that there were sound reasons for the decision reached by the Inner House that the petition was incompetent and that, in any event, even if it was competent it fell to be dismissed as irrelevant. According to the [*Scots Law Times*] rubric, 1990 S.L.T. at p. 119D, however, it was held that in deciding whether or not a petition for judicial review was competent the question was whether a matter of public law was raised in the application. If that was indeed the *ratio* of the decision it would be in conflict with the long line of authority in Scotland which preceded the introduction of rule 260B, and with the terms of the rule itself, which did not restrict the supervisory jurisdiction to what may loosely be described as the field of public law. It would also have the disadvantage of introducing into the law of Scotland a novel and uncertain test which even in England has given rise to such substantial difficulty. As Lord Wilberforce pointed out in *Davy* v. *Spelthorne Borough Council* [1984] A.C. 262 at p. 276: "The expressions 'private law' and 'public law' have recently been imported into the law of England from countries which, unlike our own, have separate systems concerning public law and private law. No doubt they are convenient expressions for descriptive purposes. In this country they must be used with caution, for, typically, English law fastens, not upon principles but upon remedies."

In our opinion, however, on a proper analysis of the opinions in the Inner House, this part of the [*Scots Law Times*] rubric is inaccurate. The case is not to be read as having decided that the competency of an application to the supervisory jurisdiction of the Court of Session depends upon whether a matter of public law is raised in the application.

The argument for the board in the Inner House was that Rule of Court 260B fell to be read in a restricted sense, having regard to the mischief which it was intended to redress, and that, since Lord Fraser's remarks in *Brown* were clearly related to public law matters, the supervisory jurisdiction was exercisable only in the field of public administrative law. For the petitioner on the other hand it was accepted that the essential problem in the case was whether there were elements of public law in his contract of employment which would entitle him to a public law remedy: the Lord Justice-Clerk at 1989 S.C. p. 361, Lord Wylie at p. 369, Lord Murray at pp. 374 and 377. The point was made that as a matter of principle the supervisory jurisdiction of the Court of Session could embrace not only public law matters but also private law to control voluntary associations or clubs, and that Rule of Court 260B did not expressly restrict its ambit to public law matters. But counsel were content to present their argument for the petitioner on the basis that for the purposes of that case the court did not have to choose between a restricted and a wider interpretation of that rule. They accepted that for the petitioner to succeed in his application he had to show that he was entitled to the public law remedy for which he contended. That being the nature of the argument it is not surprising that the Lord Justice-Clerk was satisfied that in that case it was not necessary to determine in any comprehensive way the scope of the Scottish procedure of judicial review under Rule of Court 260B, and that Lord Murray was able to reserve judgment on this point: at pp. 361 and 377. For the reasons which we have explained earlier in this opinion these arguments were inconsistent with the Scottish authority on the scope and nature

of the supervisory jurisdiction, and the terminology in which they were presented was liable to create difficulty. Any acceptance by the court of that terminology must, however, be regarded as strictly *obiter* in the circumstances, and the case is not to be taken as authority for the proposition that Rule of Court 260B is restricted in its scope to public law matters or is to be regarded only as a remedy of public administrative law. There is no indication in the Lord Justice-Clerk's opinion at p. 361 that he questioned the authority of cases such as *Forbes* v. *Underwood, McDonald* v. *Burns* and *St Johnstone Football Club Ltd.* v. *Scottish Football Association Ltd.*, where remedies were provided by the Court of Session in the exercise of its supervisory jurisdiction in the field of private law.

It is true that the Lord Justice-Clerk said at p. 366 that he was satisfied that in that case there were no public law elements in the petitioner's case which could give rise to any entitlement "to a public law remedy such as judicial review". We do not, with respect, agree that judicial review under Rule of Court 260B is properly to be described as a public law remedy. But that passage must be read in the context of the arguments which were presented to the court, and in any event for reasons which we shall come to it is plain that the description of judicial review as a public law remedy is not the *ratio* of the decision.

Lord Wylie's comments at pp. 371–372 went further on this point. He said that the Lord Ordinary was wrong to decline to follow English authority in this field of law, having regard to what he had described as the distinctive origins and development of the remedies covered by judicial review in the two countries. He went on to say that the two procedures and the distinctive remedies provided were different but their purposes and the mischief for which they sought to provide remedies were the same in both jurisdictions. He agreed with counsel for the respondents that there was no good reason for differences between the two jurisdictions to develop in this field and added that it would be regrettable if they did. In our opinion, however, the origins and development of judicial review in the two countries are indeed different, as the Lord Ordinary was right to point out. One has only to look at what Lord Wilberforce said in *Davy* v. *Spelthorne Borough Council*, which we have quoted above, to see that these differences are fundamental. The English approach appears to be to fasten not upon principle but upon remedies, whereas the Scottish approach is based essentially upon principle. Moreover the choice of remedy has not in itself caused any difficulty in this country. The ordinary remedies of reduction, declarator and interdict are all available as a means of exercising the necessary control: see Lord Fraser in *Brown* at p. 42 and Rule of Court 260B(4) in which the powers of the court are set out.

The argument in England has been whether cases which were in the public law field should be dealt with by ordinary action or by judicial review: see *O'Reilly* v. *Mackman*, in which at p. 285E Lord Diplock said that it would in his view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action. What he saw as objectionable was the evasion by this means of the provisions of order 53 of the Rules of the Supreme Court, which, for the protection of such authorities, prescribes a time-limit for making the application for relief under that procedure. The nature of this debate is entirely different from that which has been taking place in Scotland

since Rule of Court 260B was introduced. Furthermore, it is unnecessary for us to be troubled in Scotland by the distinction between public law and private law which has continued to create difficulty in England: see *R.* v. *Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] Q.B. 815, which illustrates the way in which what Lloyd L.J. described at p. 845 as "the new-found distinction between public and private law" continues to influence the developing law of judicial review in that country. There are obvious disadvantages in attempting to follow English authority in this field as it develops case by case, not the least of which is the uncertainty which this would create. We respectfully disagree therefore with Lord Wylie's comment in the passage to which we have referred. But, for the reasons already explained, we regard these remarks as *obiter* in the light of the argument presented in that case.

The petitioner's principal argument in the Inner House in *Tehrani* was that his case was similar to that of *Malloch* v. *Aberdeen Corporation* 1971 S.C. (H.L.) 85. And, as the Lord Justice-Clerk pointed out at p. 335, he founded strongly upon the decision in that case. But there was an important distinction between the two cases, in that, while in *Malloch* there was a special statutory provision which bore directly on the power to dismiss, namely sec. 85 (1) of the Education (Scotland) Act 1962, the powers of dismissal in *Tehrani* were those set out in his terms and conditions of employment. There was an indirect link with the Secretary of State in that he had approved these terms and conditions. But, while he was no doubt exercising a jurisdiction in deciding whether or not to approve them, once they had been approved they were no longer amenable to judicial review, and decisions taken under them were challengeable only by means of the ordinary remedies available in respect of a contract of employment. This distinction was noted by the Lord Justice-Clerk at p. 366, where he observed that merely to hold that a particular case was one where the principles of natural justice must be observed did not mean that the case was thereby elevated into the domain of public administrative law. We can find nothing in his discussion of this point with which we would disagree in principle, nor is there anything in the relevant passages in Lord Wylie's opinion at p. 371 or Lord Murray's opinion at p. 377 which is inconsistent with what we consider to be the correct approach. Lord Wylie drew attention at p. 371 to a passage in the opinion of Purchas L.J. in *R.* v. *East Berkshire Health Authority, ex parte Walsh* [1985] Q.B. 152 at p. 176, where he drew attention to the danger of confusing the rights and remedies enjoyed by an employee arising out of a private contract of employment with the performance by a public body of the duties imposed upon it as part of the statutory terms under which it exercises its powers. Similar observations are to be found in the opinion of Sir John Donaldson M.R. in that case which were quoted by the Lord Justice-Clerk at p. 366. We agree that these two issues are entirely distinct, and that if, in a case such as *Tehrani*, a public authority enters into a contract with their employees to give them rights under the terms of a contract of employment, a breach of that contract is a matter which must be dealt with under the ordinary jurisdiction by seeking contractual remedies and that it does not give rise to an entitlement to judicial review.

For these reasons we are in full agreement with the *ratio* of the decision in this case, which we consider to have been correctly decided. As already said, head (1) of the rubric [in the *Scots Law Times* report] goes further than is justified by the opinions, especially as the concession was made only in regard to the

circumstances of that particular case and only the observations of Lord Wylie could properly be taken as having general application to all cases under Rule of Court 260B. The case should not be regarded as authority for the proposition that, in deciding whether or not a petition is competent under that rule, the question is whether a matter of public law has been raised in the application. The use of the expressions "public law remedy", "public law areas" and "public administrative law" is inappropriate in the context of a discussion as to whether an application is competent under the rule.

Cases subsequent to Tehrani

We must now deal briefly with two cases which were heard in the Inner House between the date when *Tehrani* was advised on 30th June 1989 and the hearing in the present case. These are *Watt* v. *Strathclyde Regional Council* 1992 S.L.T. 324, and *Jackson* v. *Secretary of State for Scotland* 1992 S.C. 175.

The first of these cases was concerned with the pay and conditions of teaching staff employed by education authorities in Scotland. These had to be determined by a statutory body, whereupon each local authority were required to give effect to them in so far as they related to teachers in their employment. A statutory body had formulated a settlement relating to absence cover for teachers who were absent from their duties for more than three days, which the respondent education authority was unwilling to implement. Yet the statute expressly required the education authority to give effect to the settlement. As Lord Clyde said in the course of his opinion, the decision of the education authority was one which cut across the statutory obligation, and it was in regard to this aspect of the case that an application was made for judicial review. The matter was complicated by the fact that on one view of the dispute between the teachers and their employers the issue was properly to be seen as one of contract, and it was for this reason that the Lord Ordinary held that the application for judicial review was not competent. But in the Inner House it was held that, while the ordinary contractual remedies were no doubt available in regard to such breaches of contract as might result, the decision itself not to give effect to the settlement was amenable to the remedy of judicial review. No one has suggested in the argument in the present case that *Watt* was wrongly decided in the Inner House. Indeed the respondent's counsel submitted that the application was clearly competent because the issue raised was one as to an excess of jurisdiction by the education authority. Our attention was, however, drawn to some of the *dicta* in the opinions of the Lord President and Lord Clyde which might cause difficulty if they were to be regarded as definitive of the supervisory jurisdiction under Rule of Court 260B. As the Lord President explained in the opening paragraph of his opinion, that case was dealt with as one of urgency, and the time available did not enable counsel to explore in argument the nature of the supervisory jurisdiction to any significant extent. Accordingly, where there is conflict between what was said in that case and the analysis of the supervisory jurisdiction in this opinion, the analysis in this opinion is to be preferred. In these circumstances it is not necessary to deal in detail with the opinions in *Watt*, and we require to mention two matters only. The first is that the point made by the Lord President and Lord Clyde that the fact that the decision was of general application made it especially suitable for judicial review ought not in itself to be regarded as decisive of the question whether judicial review was appropriate. As junior counsel for the

respondent pointed out, a decision which is of the appropriate character is amenable to judicial review whether it affects only one person or one hundred. The true significance of the point is that it revealed the nature or character of the decision as being one taken in the exercise of a statutory power or the implement of a statutory duty which, by its nature, was bound to affect all those in respect of whom the jurisdiction conferred by the statute was to be exercised. The second point is that Lord Clyde's comment that the petitioner's attack in that case was directed essentially at "an alleged excess of power" was entirely consistent with the expressions used in the many Scottish cases prior to Rule of Court 260B, and it expresses very well the critical point in that case which showed that the decision was open to judicial review.

Jackson was an application for judicial review by an officer in the Scottish Prison Service of a decision by the Scottish Home and Health Department to defer his application to be permitted to retire on grounds of ill health from his post as governor-in-charge of a young offenders' institution until discplinary proceedings against him had been disposed of. The dispute was one about the proper construction of provisions in the Civil Service Code which were treated as being, in effect, part of a contract of employment between the officer and the Secretary of State. No point of general importance is to be attached to this case on the point of competency, however, since no plea of competency was taken by the Secretary of State. The arguments were confined to the questions about the proper construction of the relevant provisions in the code. We were informed that it was not thought that any practical purpose would be served by taking the point on competency in that case, and it should be noted that the Lord Ordinary recorded at the end of his opinion that counsel had expressly refrained from presenting this argument, which was not raised in the Inner House.

Summary and conclusion

We are now in a position, in the light of our examination of all these cases, to describe the principles by reference to which the competency of applications to the supervisory jurisdiction under Rule of Court 260B are to be determined. Counsel for the petitioner urged us not to attempt to do this, on the ground that it was better to allow the matter to develop on a case-by-case basis. Senior counsel for the respondent on the other hand said that there was no reason why we should not do so and that counsel for the petitioner's submission was based on a fundamental misconception about the nature of the supervisory jurisdiction. The question of competency was to be resolved by reference to principle. A case-by-case approach, he said, might be appropriate in England, but it was not the Scottish approach and it could only lead to continued uncertainty about the basis upon which the jurisdiction was to be exercised. In our opinion the principles are well settled, and no good reason has been advanced as to why we should not now describe them in order to remove the uncertainty and to correct misunderstandings which have affected discussions on this matter since the rule was introduced.

The following propositions are intended therefore to define the principles by reference to which the competency of all applications to the supervisory jurisdiction under Rule of Court 260B is to be determined:

1. The Court of Session has power, in the exercise of its supervisory jurisdiction, to regulate the process by which decisions are taken by any person or body to

whom a jurisdiction, power or authority has been delegated or entrusted by statute, agreement or any other instrument.

2. The sole purpose for which the supervisory jurisdiction may be exercised is to ensure that the person or body does not exceed or abuse that jurisdiction, power or authority or fail to do what the jurisdiction, power or authority requires.

3. The competency of the application does not depend upon any distinction between public law and private law, nor is it confined to those cases which English law has accepted as amenable to judicial review, nor is it correct in regard to issues about competency to describe judicial review under Rule of Court 260B as a public law remedy.

By way of explanation we would emphasise these important points:

(*a*) Judicial review is available, not to provide machinery for an appeal, but to ensure that the decision-maker does not exceed or abuse his powers or fail to perform the duty which has been delegated or entrusted to him. It is not competent for the court to review the act or decision on its merits, nor may it substitute its own opinion for that of the person or body to whom the matter has been delegated or entrusted.

(*b*) The word "jurisdiction" best describes the nature of the power, duty or authority committed to the person or body which is amenable to the supervisory jurisdiction of the court. It is used here as meaning simply "power to decide", and it can be applied to the acts or decisions of any administrative bodies and persons with similar functions as well as to those of inferior tribunals. An excess or abuse of jurisdiction may involve stepping outside it, or failing to observe its limits, or departing from the rules of natural justice, or a failure to understand the law, or the taking into account of matters which ought not to have been taken into account. The categories of what may amount to an excess or abuse of jurisdiction are not closed, and they are capable of being adapted in accordance with the development of administrative law.

(*c*) There is no substantial difference between English law and Scots law as to the grounds on which the process of decision-making may be open to review. So reference may be made to English cases in order to determine whether there has been an excess or abuse of the jurisdiction, power or authority or a failure to do what it requires.

(*d*) Contractual rights and obligations, such as those between employer and employee, are not as such amenable to judicial review. The cases in which the exercise of the supervisory jurisdiction is appropriate involve a tri-partite relationship, between the person or body to whom the jurisdiction, power or authority has been delegated or entrusted, the person or body by whom it has been delegated or entrusted and the person or persons in respect of or for whose benefit that jurisdiction, power or authority is to be exercised.

We must now return to the facts of the present case, and to the question whether the petitioner's application to the supervisory jurisdiction can be regarded as competent. On this issue there is very little more to be said. There is no suggestion in the pleadings, nor was there at any stage in the argument, that the petitioner's concern is with the exercise of a jurisdiction, power or authority conferred on some third party who could be separately identified from his employer. No question has been raised as to any statutory or other restraint, whether by Parliament or any other body or person, on the exercise by the Scottish Prison Service of their discretion, through their personnel services division, on the matter at issue in this case. We can find nothing here, therefore,

which could be said to raise a question about an excess or abuse of power or jurisdiction. There is an absence of any feature to place this case into any category other than that of a dispute between an employee and his employer about his conditions of employment. As the Lord Ordinary put it, the issue appears to be of the nature of a private dispute between the petitioner and the respondent arising from his terms of service. In the circumstances we consider that the Lord Ordinary was right to sustain the respondent's plea to the competency and to dismiss the petition.

On the whole matter, therefore, we shall refuse this reclaiming motion and adhere to the Lord Ordinary's interlocutor.

THE COURT refused the reclaiming motion.

Ketchen & Stevens, W.S. — *R. Brodie.*

E.F.T. COMMERCIAL LTD. v. SECURITY CHANGE LTD.

No. 34.
May 8, 1992.

FIRST DIVISION.
Lord Coulsfield.

E.F.T. COMMERCIAL LIMITED, Pursuers (Respondents). — *Clarke, Q.C., Peoples.*
SECURITY CHANGE LIMITED AND GRESHAM HOUSE plc, Defenders (Reclaimers). — *Haddow, Q.C., Boyd.*

Contract — Lease — Lease of machinery — Construction — Termination of lease — Condition that if company lessee should have receiver appointed to it lessor might, without prejudice to any other rights under lease or claims for breach of it, immediately terminate lease — Condition that if lease terminated in that way certain sums in payment of all rentals for remaining period of lease payable — Whether penalty clause — Whether enforceable.

Lessors leased an item of printing equipment to company lessees. The leasing agreement provided in cl. 8 that in the event of the lessee company having *inter alia* a receiving order made against it or a receiver appointed, the lessors might terminate the agreement by notice in writing to the lessee. An administrative receiver was appointed to the lessee and the lessors duly terminated the agreement in accordance with that provision. By virtue of termination of the agreement in this way, in terms of cl. 9 (b) (iv) of the agreement the lessee became due to make payment to the lessors, "as agreed compensation for the lessors' loss of profit, the total of all rentals (including V.A.T.) which would have been payable during the unexpired primary period of the agreement together with the first secondary rental". The lessors demanded payment of this sum from the lessee's administrative receiver. When payment was not forthcoming, the lessors then sued the lessee's guarantors for the amount. The guarantors failed to pay, arguing that cl. 9 (b) (iv) amounted to a penalty clause and was unenforceable. The Lord Ordinary (Coulsfield) held that, as the case was not concerned with a breach of contract, the law relative to penalty clauses did not apply and that, as there was binding authority that the principle which rendered penal clauses unenforceable did not extend to cases where a payment followed upon the exercise of an option, not involving a breach of contract, there was no convincing reason to distinguish that latter case from the present, and granted decree *de plano*. The guarantors reclaimed.

Held (*aff.* judgment of Lord Coulsfield) that it was well settled that the rule