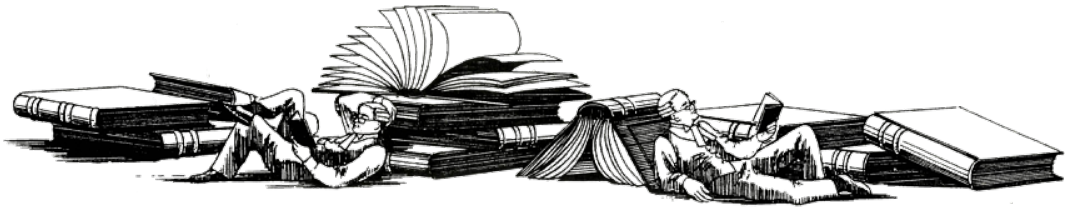


NOTES ON THE STYLE OF THE LAW

On re-typesetting the Referendum Reference

by

ELIJAH Z GRANET

typography ≈ *law reporting* ≈ *typesetting* ≈ *judgments* ≈ *beauty* ≈ *Scotland* ≈

A MOMENTOUS decision was handed down on Wednesday 23rd November by a unanimous Supreme Court, ruling on a reference from His Majesty's Advocate, that a proposed bill on a referendum on Scottish independence was on a reserved matter under the Scotland Act 1998, and thus without the competence of the Scottish Parliament. The *per curiam* judgment in the case,[1] is written in a clear and careful style, perfectly calibrated for the wide public audience which a case of this significance naturally attracts. In turn, the significance of *Reference re Referendum Bill*[2] calls for a resplendent judgment reading.[3] To aid in the art of this reading, I have re-typeset the judgment, and added a headnote. This version is appended *infra*, preceded by my notes on its preparation.

Notes on preparation

The style of my re-typesetting was strongly influenced by the ICLR's law reports. These, in many ways, are a gold standard of judgment reading, and I have consequently followed them in their use of Tschichold's Sabon for the body text, with a sans-serif face (Gill Sans) for the page numbering. I even used a bit of bold to follow the ICLR, despite my general preference against this. Similarly, I followed the ICLR layout of the heading and catchwords, as well as of the relative type size of the headnote. I tried to restrict the headnote to a clear, direct style; no one needs a florid headnote! As a slightly silly flourish, I did put the Lord Advocate's title in small-caps. This is to be taken as me having fun in a project, and not as general typographic advice. For the

1 [2022] UKSC 31

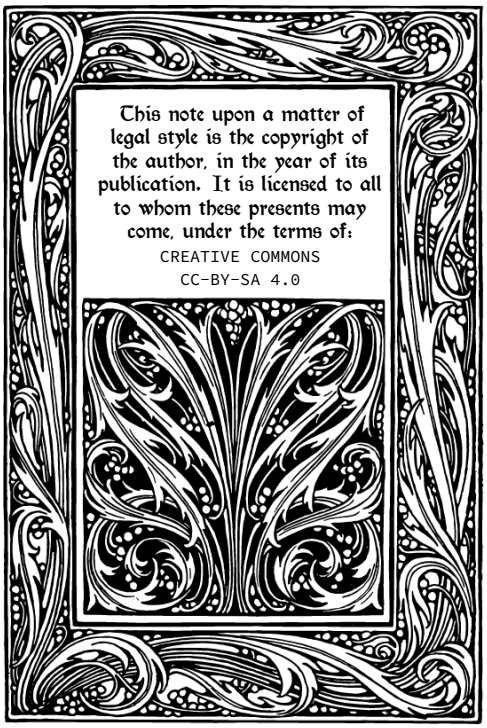
2 For more on how I name reference cases, see my previous note on the subject.

3 For more on the art of judgment reading, see my previous post on the topic.

names of counsel, I used an initials and honorifics format, checking via chambers directories or regulatory pages to confirm honorifics.

An early draft of the re-typeset used the English *Cur adv vult* to indicate that the Court took time for consideration. I am grateful to a user of a popular microblogging platform, 'Alasdair Chaluim', who rightly pointed out that, as this is a Scottish case, this should be *Avizandum*. I have revised it accordingly. The names of their Lordships in the panel judging this case are unwieldy in size and present a relatively unsightly block of text. This was designed to imitate the ICLR, but could use some revision in future.

Due to limits on my own time, and a desire to prepare this re-typeset quickly, I was limited in my options for quickly re-doing paragraphs. As a result, they are done list-style, with a line space between them and the number hanging within the left margin. This is sub-optimal and outside my normal template for a law report, but this was a quick project and some things had to be sacrificed for speed. Similarly, I have not corrected the judgment for style (so double-quotation marks are left in, instead of being changed to single-quotation marks). Section headings are a simple italic, and quotations are handled by a simple indent with some leading above and below. The closing note ('Reference disposed') is a guess at the proper style of the closing note for a reference case; this is a matter for further consideration.



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A

Supreme Court

Reference by His Majesty's Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998

[2022] UKSC 31

B

2022 Oct 11–12 ;
2022 Nov 23

The Lord Reed of Allermuir PSC
Lord Lloyd-Jones, Lord Sales,
Lord Stephens of Creevyloughgare
Lady Rose of Colmworth JJSC

C

Constitutional law — Devolution — Jurisdiction — Reserved matters — Referendums — Scotland — — Scotland Act 1998, sch 6 — Competence of Scottish Parliament — Self-determination in international law

D

The Scottish Government proposed a Scottish Independence Referendum Bill which would hold a referendum regarding SCottish independence. Under the Scotland Act 1998, reserved matters (s 2(1-2(*b*)) are without the Scottish Parliament's competence and include under schd 5, paras 1(*b–c*), the Union of the Kingdom of Scotland and the Kingdom of England as well as the Parliament of the United Kingdom. In order to determine if the Bill was within the competence of the SCottish Parliament, His Majesty's Advocate made a Reference under the 1998 Act, schd 6, para 34 regarding the Bill. This, in turn, raised the consequent questions of whether the matter at hand qualified as a 'devolution issue' for the purposes of para 34, if the Supreme Court ought to exercise its discretion to answer the Reference, and the susbtantive question as to the competence of the Parliament.

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Held, accepting the Reference, that the Bill related to the reserved matter of the Union between the Kingdom of Scotland and the Kingdom of England (post, para 92).

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Per curiam, international law does not provide a general right to secession and the applicable provisions of international law relate to colonies, which Scotland is not. *Reference re Secession of Quebec* [1998] 2 SCR 217 *approved*.

REFERENCE

By a reference under the Scotland Act 1998, schd 6, para 34, by His Majesty's Advocate to the Supreme Court to determine the question of: whether it was within the competence of the Scottish Parliament to pass a bill for holding a referendum on the question of 'Should Scotland be an independent country?'

G

The Lord Advocate, Prof T Hickman KC, Ms C O'Neill KC, & Mr P Reid (instructed by Scottish Government Legal Directorate) for the Scottish Government

Sir James Eadie KC, Mr D Johnston KC, Mr C Pirie, & Mr C Knight (Instructed by HM Advocate General for Scotland) for the His Majesty's Government in Right of the United Kingdom

H

Dr C M Mitchell KC & Mr D Welsh (instructed by Livingstone Brown Ltd) for the Intervenor, the Scottish National Party

Avizandum

23 Nov 2022. **THE LORD REED OF ALLERMUIR PSC, LORD LLOYD-JONES, LORD SALES, LORD STEPHENS OF CREEVYLOUGHGARE, & LADY ROSE OF COLMWORTH JJSC** handed down the following judgment.

[1] Does the Scottish Parliament have power to legislate for the holding of a referendum on Scottish independence? That is the subject-matter of a reference by the Lord Advocate, the senior Law Officer of the Scottish Government, to this court under paragraph 34 of Schedule 6 to the Scotland Act 1998 ("the Scotland Act"), as amended. But the Advocate General for Scotland, the Scottish Law Officer of the United Kingdom Government, has raised two preliminary issues. First, is the question referred by the Lord Advocate a "devolution issue"? If not, it cannot be the subject of a reference under paragraph 34 of Schedule 6. Secondly, even if the question is a devolution issue, should the court nevertheless decline to accept the reference in the exercise of its discretion?

[2] There are accordingly three questions which the court must consider: first, whether the question referred by the Lord Advocate is a devolution issue; secondly, if it is, whether the court should accept the reference; and thirdly, if so, how the question should be answered. It is logical to consider the questions in that order, since if either of the first two questions receives a negative answer, the third question does not arise.

[3] This is the judgment of the court. We begin by explaining the background to the reference (paras 4-11). We then set out the question referred (para 12). We then consider whether the question referred is a devolution issue (paras 13-47). We next consider whether the court should accept the reference (paras 48-54). We then consider how the question should be answered, addressing first the arguments presented by the Lord Advocate (paras 55-83), and then those presented by the Scottish National Party (paras 84-91). The Scottish National Party has exceptionally been permitted to intervene, notwithstanding that it is the party forming the Scottish Government in which the Lord Advocate is a minister, so that the court can consider a wide range of arguments. Finally, we give our answer to the question referred (para 92).

1. The background to the reference

[4] First, the background to the reference should be briefly explained. The Scottish National Party, which is committed to Scottish independence, has formed the Scottish Government since 2007.

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[5] In 2013 an Order in Council was made under section 30(2) of the Scotland Act so as to enable the Scottish Parliament to legislate for the holding of a referendum on independence. The Order in Council did so by modifying the definition of reserved matters in Schedule 5 to the Scotland Act. In particular, paragraph 1 of Schedule 5 provides:

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> "The following aspects of the constitution are reserved matters, that is—
>
> a) the Crown, including succession to the Crown and a regency,
> b) the Union of the Kingdoms of Scotland and England,
> c) the Parliament of the United Kingdom,
> d) the continued existence of the High Court of Justiciary as a criminal court of first instance and of appeal,
> e) the continued existence of the Court of Session as a civil court of first instance and of appeal."

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The Order in Council inserted a new paragraph 5A into Schedule 5, which provided that paragraph 1 did not reserve a referendum on the independence of Scotland from the rest of the United Kingdom if specified requirements were met. Paragraph 5A is no longer in force.

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[6] The referendum authorised by the Order in Council was held in 2014, and resulted in a majority vote against independence.

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[7] The Scottish Government wishes to hold another referendum on independence. The United Kingdom Government is unwilling to agree to the making of a further Order in Council under section 30(2) at the present time. In those circumstances, the Scottish Government wishes, if possible, to hold a referendum without an Order in Council, and therefore without any modification of the definition of reserved matters in Schedule 5.

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[8] Absent legislation by the United Kingdom Parliament, the holding of a referendum requires authorisation by an Act of the Scottish Parliament. The power of the Scottish Parliament to make legislation, described in the Scotland Act as its "legislative competence", is limited. Section 29(1) of the Scotland Act provides that an Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament. Section 29(2) lists five circumstances in which a provision is outside legislative competence:

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> "(a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland,
>
> a) it relates to reserved matters,
> b) it is in breach of the restrictions in Schedule 4,
> c) it is incompatible with any of the Convention rights or in breach of the restriction in section 30A(1),
> d) it would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland."

In relation to section 29(2)(b), as was explained earlier, reserved matters are defined in Schedule 5. Paragraph 1(b) and (c) of that Schedule reserve "the Union of the Kingdoms of Scotland and England" and "the Parliament of the United Kingdom" respectively: see para 5 above. If legislation authorising the holding of a referendum would relate to either or both of those matters, it would accordingly relate to a reserved matter, and be outside the legislative competence of the Scottish Parliament.

[9] Sections 31 to 33 of the Scotland Act provide for the scrutiny of Bills in order to check that they are within legislative competence. It will be necessary to consider these provisions in some detail. For present purposes, it is sufficient to note the terms of section 31(1):

> "A person in charge of a Bill shall, on or before introduction of the Bill in the Parliament, state that in his view the provisions of the Bill would be within the legislative competence of the Parliament."

In the case of a Bill introduced by the Scottish Government, paragraph 3.4 of the Scottish Ministerial Code requires that the statement under section 31(1) must have been cleared with the Law Officers.

[10] A Scottish Independence Referendum Bill has been drafted by the Scottish Government. The present reference arises because the Lord Advocate considers that she would be unlikely to have the necessary degree of confidence that the Bill does not relate to a reserved matter to clear a Ministerial statement under section 31(1) that the Bill is within the legislative competence of the Scottish Parliament. Given the importance of the issue to the Scottish Government, the Lord Advocate was requested by the First Minister to consider referring the question whether the Bill would be within the legislative

competence of the Scottish Parliament to this court for decision. The Lord Advocate agreed to make such a reference.

[11] The reference has been made under paragraph 34 of Schedule 6 to the Scotland Act, which provides:

> "The Lord Advocate, the Attorney General, the Advocate General or the Advocate General for Northern Ireland may refer to the Supreme Court any devolution issue which is not the subject of proceedings."

2. The question referred

[13] The question referred is:

> "Does the provision of the proposed Scottish Independence Referendum Bill that provides that the question to be asked in a referendum would be 'Should Scotland be an independent country?' relate to reserved matters? In particular, does it relate to: (i) the Union of the Kingdoms of Scotland and England (paragraph 1(b) of Schedule 5); and/or (ii) the Parliament of the United Kingdom (paragraph 1(c) of Schedule 5)?"

3. Is the question referred a devolution issue?

[13] Only a "devolution issue" can be referred to this court under paragraph 34 of Schedule 6. The expression "devolution issue" is defined by paragraph 1 of Schedule 6. So far as material, paragraph 1 provides:

> "In this Schedule 'devolution issue' means -
>
> a) a question whether an Act of the Scottish Parliament or any provision of an Act of the Scottish Parliament is within the legislative competence of the Parliament,
> b) a question whether any function (being a function which any person has purported, or is proposing, to exercise) is a function of the Scottish Ministers, the First Minister or the Lord Advocate,
> c) a question whether the purported or proposed exercise of a function by a member of the Scottish Government is, or would be, within devolved competence,

d) a question whether a purported or proposed exercise of a function by a member of the Scottish Government is, or would be, incompatible with any of the Convention rights or in breach of the restriction in section 57(4),

e) a question whether a failure to act by a member of the Scottish Government is incompatible with any of the Convention rights,

f) any other question about whether a function is exercisable within devolved competence or in or as regards Scotland and any other question arising by virtue of this Act about reserved matters."

[14] The Lord Advocate relies on the final words of paragraph 1(f):

> "any other question arising by virtue of this Act about reserved matters."

She maintains that the question which she has referred falls within that description. The Advocate General maintains that it does not. His arguments in support of that position can be considered under four headings.

(1) *The Advocate General's first argument: "arising by virtue of this Act", or by virtue of the Scottish Ministerial Code?*

[15] The first argument advanced by counsel for the Advocate General responds to the Lord Advocate's submission that the question she has referred is one "arising by virtue of this Act", as required by paragraph 1(f), because it arises in the course of her performance of her function under the Scottish Ministerial Code of advising the Scottish Government, and in particular the minister in charge of the Bill, on whether the statement required by section 31(1) of the Scotland Act can be made. In response, counsel for the Advocate General point out that the Scotland Act contains no provision requiring the Lord Advocate to advise ministers in relation to statements made under section 31(1). Since the Lord Advocate's function in relation to such statements is not prescribed by the Scotland Act, a question arising in the course of performing that function is not, they submit, one "arising by virtue of this Act". A requirement imposed by the Scottish Ministerial Code has no bearing on paragraph 1(f), since neither the existence nor the terms of the Code is prescribed by the Scotland Act.

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[16] These points are fairly made in response to the way in which the Lord Advocate initially put her case, but they are not fatal to her position as it developed, in response to questions from the bench, during the course of the hearing. As she came to accept, her role under the Scottish Ministerial Code does not bear on the present issue. Whether a question is one "arising by virtue of this Act" does not depend on whether the Lord Advocate is required by the Scotland Act to answer it. The question whether the provisions of a Bill would be within the legislative competence of the Scottish Parliament is one "arising by virtue of this Act" (subject to the other arguments advanced on behalf of the Advocate General), since it is a question which arises under section 31(1) for the person wishing to introduce the Bill, whether that be a minister or a private member. Provided the question is about reserved matters, as required by paragraph 1(f) of Schedule 6, the Lord Advocate is entitled to refer it to this court under paragraph 34 (subject, again, to the other arguments advanced on behalf of the Advocate General).

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(2) *The Advocate General's second argument: the scheme of legislative scrutiny established by sections 31 and 33 would be undermined*

[17] Sections 31 and 33 of the Scotland Act set out a number of provisions concerned with the scrutiny of Bills in order to assess whether they are within the legislative competence of the Scottish Parliament.

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[18] Section 31, headed "Scrutiny of Bills for legislative competence and protected subject-matter", imposes obligations upon the person who wishes to introduce a Bill and upon the Presiding Officer of the Scottish Parliament. As has been explained, section 31(1) requires that the person in charge of a Bill must make a statement, on or before the introduction of the Bill in the Scottish Parliament, that in his or her view the provisions of the Bill would be within the legislative competence of the Scottish Parliament. In addition, section 31(2) requires that the Presiding Officer must decide, on or before the introduction of a Bill in the Scottish Parliament, whether or not in his or her view the provisions of the Bill would be within the legislative competence of the Scottish Parliament, and state his or her decision.

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[19] Section 33, headed "Scrutiny of Bills by the Supreme Court (legislative competence)", confers upon certain Law Officers the power to refer certain questions of legislative competence to this court. In particular, section 33(1) provides:

H

> "The Advocate General, the Lord Advocate or the Attorney General may refer the question of whether a Bill or any provision of a

> Bill would be within the legislative competence of the Parliament to the Supreme Court for decision."
>
> The generality of that provision is, however, cut down by section 33(2), which provides:
>
> "Subject to subsection (3), he may make a reference in relation to a Bill at any time during —
>
> a) the period of four weeks beginning with the passing of the Bill, and
> b) any period of four weeks beginning with any approval of the Bill in accordance with standing orders made by virtue of section 36(5)."

Subsection (3) is immaterial to the present proceedings. Subsection 2(b) addresses the situation where a Bill has been approved by the Scottish Parliament following its reconsideration after this court's decision on a reference under section 33(1).

[20] Counsel for the Advocate General argue that it would be surprising if the United Kingdom Parliament had set up a scheme for the reference of Bills under section 33, but had simultaneously enabled the Law Officers to make references of Bills or proposed Bills outside that scheme. The view that section 33 provides the only method of scrutinising a measure for legislative competence prior to Royal Assent is, they submit, supported by a number of considerations, including the following:

(1) The definition of devolution issues in paragraph 1 of Schedule 6 refers to Acts of the Scottish Parliament but contains no reference to Bills or proposed Bills.

(2) The Notes on Clauses which accompanied the Scotland Bill when it was considered by the United Kingdom Parliament, and were published online and in hard copy, state, in relation to paragraph 34 of Schedule 6:

> "Paragraph 34 provides that all the principal Law Officers may refer to the Judicial Committee [whose devolution jurisdiction was inherited by the Supreme Court] any devolution issue which is not the subject of proceedings. This power enables the Law Officers to refer

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> any vires question to the Judicial Committee even although it is not the subject of a judicial dispute and *has not arisen in proceedings on a Bill*." (emphasis added)

Counsel submit that the words which we have italicised indicate a lack of intention on the part of the United Kingdom Parliament that questions about Bills should be referable under paragraph 34.

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(3) The United Kingdom Parliament, they submit, clearly did not intend that a Bill could be referred under paragraphs 1(f) and 34 of Schedule 6 after it has been introduced in the Scottish Parliament, yet the Lord Advocate's analysis lacks an explanation of why that is not possible on her interpretation of Schedule 6. Concurrent methods of raising the same or similar points would, they submit, be a recipe for chaos.

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(4) References under the closing words of paragraph 1(f) of Schedule 6 are limited to questions about reserved matters. But the limits upon the legislative competence of the Scottish Parliament are not confined to reserved matters: that is only one of five limitations imposed by section 29(2) (see para 8 above). The Lord Advocate's interpretation of paragraph 1(f) would therefore result in a bifurcation of issues arising in relation to the Scottish Parliament's legislative competence (we shall refer to this argument as "the bifurcation point"). Issues relating to reserved matters could, on her interpretation, be considered on a reference under paragraphs 1(f) and 34 of Schedule 6 at the stage when a Bill was in draft, but other issues relating to legislative competence could only be referred under section 33 after the Bill had been passed. It is hard, counsel submit, to identify any purpose which the United Kingdom Parliament might have intended by this bifurcation, and the Lord Advocate does not attempt to do so.

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(5) The terms of an Act passed by the Scottish Parliament may differ from those of a proposed Bill referred under paragraphs 1(f) and 34 of Schedule 6. For that reason also, there could be a further reference under section 33. The Lord Advocate does not explain why the United Kingdom Parliament would have imposed such a potential burden on the finite resources of the court.

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(6) The Lord Advocate's approach also gives rise to the surprising consequence that Law Officers of the United Kingdom Government, who are given the same power to make a reference under

paragraph 34 of Schedule 6 as the Lord Advocate, can make a pre-emptive reference of whether a legislative proposal by the Scottish Government is outside legislative competence because it relates to reserved matters, rather than waiting for the appropriate moment under section 33.

[21] These submissions raise a number of matters of importance, particularly as regards the relationship between references under paragraphs 1(f) and 34 of Schedule 6, on the one hand, and under section 33, on the other.

[22] We accept that a reference cannot be made under paragraphs 1(f) and 34 after a Bill has been introduced in the Scottish Parliament. As we have explained, section 33(1) confers a power on Law Officers to refer a question of legislative competence in relation to a Bill to this court, but section 33(2) then confines that power to a specified period after the passing of the Bill or its approval following an earlier reference. The clear implication is that it is only during those specified periods that a reference to this court can be made in respect of a Bill once it has been introduced. As was pointed out in *Keatings v Advocate General for Scotland* [2021] CSIH 25; 2021 SC 329, para 61, the time limits imposed on references by Law Officers under section 33(2) would be rendered nugatory if they could make a reference under another provision of the Scotland Act during the Bill's passage through the Scottish Parliament.

[23] However, it does not follow that a reference cannot be made under paragraphs 1(f) and 34 of Schedule 6 before a Bill is introduced. As counsel for the Advocate General accepted, section 33 is not inconsistent with the existence of a power to refer a question relating to proposed legislation under paragraphs 1(f) and 34 prior to the introduction of a Bill.

[24] We also accept that a bifurcation of issues relating to legislative competence is liable to arise if questions about reserved matters can be referred under paragraphs 1(f) and 34 of Schedule 6, since other issues affecting legislative competence cannot be so referred. The consequent possibility of consecutive references raising different issues in relation to the same Bill – first, a reference of questions about reserved matters under paragraphs 1(f) and 34 prior to the introduction of the Bill, and secondly a reference of other aspects of legislative competence under section 33 after the Bill has been passed - is a relevant consideration in construing Schedule 6. However, it is not necessarily a sufficient reason for cutting down the amplitude of the language used in paragraph 1(f) ("any other question arising by virtue of this Act about reserved matters"), particularly since the issue might be addressed through the exercise of the court's discretion to decline to accept a

A reference under paragraph 34. The same can be said of the argument that a reference under paragraphs 1(f) and 34 might conceivably be followed by a further reference under section 33 in the event that a Bill were to be amended during its passage through the Scottish Parliament so that it raised a further question as to whether it related to a reserved matter.

B [25] The other arguments advanced by counsel for the Advocate General are less cogent. First, the fact that paragraph 1 of Schedule 6 contains no reference to Bills is not necessarily significant, given that the terms of paragraph 1(f) are wide enough to include questions relating to proposed Bills.

C [26] Secondly, the statement in the Notes on Clauses does not advance the argument. The statement that paragraph 34 enables the Law Officers to refer "any vires question" could hardly be wider, and would cover the present reference. The following words, "even although it is not the subject of a judicial dispute and has not arisen in proceedings on a Bill", do not cut down the width of that statement. We do not, however, attach particular D weight to the Notes on Clauses. The document was drafted by Government officials and has no endorsement by the United Kingdom Parliament. It is much less significant than the language carefully chosen by the Parliamentary drafter and enacted by Parliament. Furthermore, paragraph 1(f) of Schedule 6 did not form part of the Bill at the time when the Notes on Clauses were produced, and the document does not therefore refer to it.

E [27] Thirdly, we see nothing anomalous about the possibility that United Kingdom Law Officers, as well as the Lord Advocate, might refer a question about reserved matters relating to a legislative proposal, if such a reference can be made under paragraphs 1(f) and 34. Similarly, we accept as the F Lord Advocate did, that if her construction of the scope of paragraph 1(f) is right, then it must apply equally to the power in paragraph 4 of Schedule 6 to institute proceedings for the determination of a devolution issue in the Scottish courts. Again, we see nothing anomalous in the Law Officers having a parallel power to choose the appropriate forum for the determination of a particular issue. Neither of these powers creates a risk of frivolous or G disruptive litigation given that the Law Officers can be expected to exercise the power only in appropriate circumstances.

(3) *The Advocate General's third argument: an alternative construction of paragraph 1(f)*

H [28] The Advocate General's third argument focuses on the fact that paragraph 1(f) includes any "other" questions about devolved competence, "other" questions in or as regards Scotland and "other" questions about reserved

matters and asks the question "other than what?" The argument relates each component within paragraph 1(f) to the preceding paragraphs 1(a) to (e). Paragraphs 1(a) to (e) bring within the term "devolution issue" questions arising about devolved competence, in or as regards Scotland and reserved matters in particular contexts within the Scotland Act. So, the Advocate General argues, one must identify what else in that Act might need to be included by paragraph 1(f) as a devolution issue "other" than questions already covered by the first five sub-paragraphs.

[29] In order to understand the Advocate General's third argument, it is helpful to break down paragraph 1(f) into its component parts, using notional sub-sub- paragraphs, as follows:

> "(f) (i) any other question about whether a function is exercisable (A) within devolved competence or (B) in or as regards Scotland and
>
> (ii) any other question arising by virtue of this Act about reserved matters."

Following that notional annotation, this reference is concerned with the interpretation of paragraph 1(f)(ii).

[30] Looking first at paragraph 1(f)(i)(A), Counsel for the Advocate General seek to identify the questions about whether a function is exercisable within devolved competence which might need to be covered by paragraph 1(f)(i)(A) because they are not already covered by paragraph 1(a)-(e), and in particular by paragraph 1(c), which already covers questions about whether the exercise of a function by a member of the Scottish Government would be within devolved competence.

[31] Counsel for the Advocate General submit that there are a number of provisions of the Scotland Act (sections 92(4)(c), 104(2)(c) and 106(2)(b)) which employ the phrase "within devolved competence" in defining the powers of bodies other than the Scottish Government. The exercise of powers under those provisions does not fall within the ambit of paragraph 1(c) of Schedule 6, because paragraph 1(c) brings within the definition of "devolution issue" only questions whether the purported or proposed exercise of functions by members of the Scottish Government is or would be within devolved competence.

[32] Against that background, counsel submit that paragraph 1(f)(i)(A) is concerned with questions arising under the provisions listed in para 31 above, ie

A questions about whether a function is exercisable within devolved competence by persons other than members of the Scottish Government. Although the language of paragraph 1(f)(i)(A), if considered in isolation, is also capable of covering questions concerning the exercise of functions within devolved competence by members of the Scottish Government, such questions are likely to fall within paragraph 1(c), and therefore to be excluded from the scope of paragraph 1(f)(i)(A) by the word "other", in the phrase "any other question". Given that the inclusion of the word "other" in paragraph 1(f)(i)(A) is intended to restrict that provision to functions which are not already included in paragraph 1(c), that provision must be given a more focused meaning, restricted to those provisions of the Scotland Act where it is needed.

[33] Counsel next follow the same process of reasoning in relation to paragraph 1(f)(i)(B). The phrase "in or as regards Scotland" is used, in the context of a definition of limited powers, in a number of provisions in the Scotland Act, besides its use in defining legislative competence in section 29(2)(a), and hence its use, through its incorporation by section 54, in defining devolved competence. In particular, they submit, it is used in relation to functions other than those of members of the Scottish Government in sections 56(4)(a), 63(1), 88(6), 90(1) and 106(2)(a), and in paragraph L2 of Schedule 5. Against that background, they submit that paragraph 1(f)(i)(B) is concerned with questions arising under those provisions, because it is only those questions which are "other" than questions already within the definition under paragraph 1(c). Although paragraph 1(f)(i)(B) is also capable of covering questions concerning the exercise of functions in or as regards Scotland by the Scottish Ministers, such questions are likely to fall within paragraph 1(c), and therefore to be excluded from the scope of paragraph 1(f)(i)(B) by the word "other".

[34] Counsel next follow the same process of reasoning in relation to paragraph 1(f)(ii). The phrase "reserved matters" is used, in the context of a definition of limited powers, in a number of provisions of the Scotland Act, besides its use in defining legislative competence in section 29(2)(b), and hence its use, through its incorporation by section 54, in defining devolved competence. In particular, they submit, it is used in relation to non-legislative powers of the Scottish Parliament in sections 23(5) and (6), and in relation to United Kingdom ministers and cross-border public authorities in sections 56(4)(a), 58(4)(b), 88(2)(b) and (6), and 91(3)(d). Against that background, they submit that paragraph 1(f)(ii) is concerned only with questions arising under those provisions, and not with questions relating to the legislative competence of the Scottish Parliament, which are intended to arise only under

section 33, after a Bill has been passed, or under paragraph 1(a) of Schedule 6, after legislation has been enacted.

[35] Counsel submit that that interpretation of paragraph 1(f) is supported by the Explanatory Notes on the Scotland Act, which state in relation to that sub-paragraph:

> "The questions swept up into this sub-paragraph can arise in various circumstances. For example, there could be a question whether Her Majesty is making an Order in Council within devolved competence (see note on section 118) or whether a function is exercisable 'in or as regards Scotland' so that it may transfer by an order under section 63 or whether a public body is a Scottish public authority whose functions are exercisable only 'in or as regards Scotland' (see definition in section 126(1)) or whether the functions of a body relate to a reserved matter (see section 126(3))."

Counsel point out that all of the examples given, apart from the last, fall under paragraph 1(f)(i), and concern the functions of bodies other than the Scottish Government.

[36] Since, on counsel's analysis, paragraph 1(f)(ii) is not concerned with the legislative competence of the Scottish Parliament, they submit that it follows that the question referred by the Lord Advocate falls outside the scope of that provision.

[37] We are not persuaded by this submission. The terms of paragraph 1(f) are very wide: "*any other question* about whether a function is exercisable within devolved competence or in or as regards Scotland and *any other question* arising by virtue of this Act about reserved matters" (emphasis added). When paragraph 1(f) is seen in its context, following paragraph 1(a) to (e), it has the appearance of a sweeping-up provision, designed to supplement the more precise provisions which precede it, so as to ensure that no gap is left. So understood, it ensures that it is possible for every conceivable question about whether a function is exercisable within devolved competence or in or as regards Scotland, and every conceivable question about reserved matters, to be decided by the courts. In particular, the words "any other question" would naturally be interpreted as meaning "any question, other than one falling within paragraph 1(a) to (e)", and therefore as covering any question about reserved matters which is not covered by those provisions. It is understandable that the United Kingdom Parliament should

A have provided a means of ensuring that every such question is justiciable, since there could otherwise be situations where a limit on the exercise of a function could not be authoritatively determined.

[38] That reading of paragraph 1(f), in accordance with the ordinary meaning of the words used, is consistent with the courts' general approach to the B interpretation of the Scotland Act, as explained, for example, by Lord Hope (with whom the other members of the court agreed) in *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61; 2013 SC (UKSC) 153 ("*Imperial Tobacco*"), para 14:

> C "The best way of ensuring that a coherent, stable and workable outcome is achieved is to adopt an approach to the meaning of a statute that is constant and predictable. This will be achieved if the legislation is construed according to the ordinary meaning of the words used."

D We also note that Lord Hope said at para 33 of the same case that it would be wrong to pay any regard to the Explanatory Notes on the Scotland Act, which were produced by officials several years after the legislation had been enacted, and therefore did not form any part of the contextual scene of the statute.

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[39] Construing paragraph 1(f) according to the ordinary meaning of the words used is also consistent with the important function which paragraph 1 plays in the overall scheme of the Scotland Act. It is by no means limited to defining the scope of references to this court. Devolution issues can arise in F any civil or criminal proceedings in any court or tribunal in Scotland (Part II of Schedule 6), England and Wales (Part III) or Northern Ireland (Part IV), as well as being the subject of a reference by a Law Officer to this court (Part V). The definition of a devolution issue in paragraph 1 is the key to the raising before any court or tribunal, anywhere in the United Kingdom, of any question arising under the Scotland Act, other than (since 2013) a G question in relation to a compatibility issue as defined by section 288ZA of the Criminal Procedure (Scotland) Act 1995, as amended (which concerns certain questions arising in criminal proceedings in relation to Convention rights, ie rights and freedoms guaranteed by the European Convention on Human Rights, and retained EU law).

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[40] All of these considerations point towards treating the provisions mentioned in para 34 above as examples of provisions under which questions can arise about reserved matters, but not as being the only possible examples. In

particular, reserved matters also feature in the definition of the legislative competence of the Scottish Parliament; and questions about that aspect of legislative competence may arise which do not concern enacted legislation or Bills which have been introduced in the Scottish Parliament, and do not therefore fall within the ambit of paragraph 1(a) or of section 33. The Lord Advocate maintains that the present case concerns a question of that kind.

[41] In response, counsel for the Advocate General again raise the bifurcation point, and ask why, if questions of that kind about reserved matters were intended to fall within paragraph 1(f), that provision does not also extend to all the other aspects of legislative competence. There is undeniable force in this objection, and possible explanations of why the draftsman might have singled out reserved matters would be speculative. Nevertheless, a lack of tidiness in legislation is not unknown, and the fact that a particular interpretation would have an untidy outcome is not a fatal objection if that construction is nevertheless the most persuasive.

[42] In short, (1) the breadth of the language used by the United Kingdom Parliament in paragraph 1(f), (2) the courts' general approach to the construction of the Scotland Act, (3) the apparent purpose that the provision should sweep up any questions arising under the Act about reserved matters which are not covered by paragraphs 1(a) to (e), and (4) the critical role of paragraph 1(f) in relation to justiciability, all incline us to construe paragraph 1(f) in accordance with the ordinary meaning of the words used, rather than as being concerned only with the non- legislative powers of the Scottish Parliament and with the functions of United Kingdom ministers and cross-border public authorities.

3. The Advocate General's fourth argument: why should there be a power to refer questions which the Lord Advocate is able to answer?

[43] Counsel for the Advocate General submit that if the Scottish Government requires ministers to be guided by legal advice from the Law Officers when deciding whether they can make the statement required by section 31(1), and if, as in the present case, the Lord Advocate is not satisfied that a Bill would be within legislative competence, then the result is that the Bill cannot be introduced. It is, they submit, hard to see why this should be a matter of legal concern. The United Kingdom Parliament, they submit, would not have intended the resources of the court to be taken up with references by the Lord Advocate of provisions which she herself cannot confirm to be within legislative competence.

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[44] We are not persuaded by this argument. Law Officers perform an important role in providing legal advice to government, but they are not infallible. Further, as pointed out at paras 9 and 15-16 above, the person who has to form and state the opinion referred to in section 31(1) is the person in charge of a Bill, who may be either a minister or a private member. They too are not infallible when considering an issue of law regarding legislative competence. Moreover, the Law Officers, a minister or a private member (as the case may be) may believe that there is a reasonably arguable case that a Bill is within legislative competence, while not being sufficiently confident to be able to state positively that it is, being mindful that this is ultimately a question of law which only a court can resolve. However, following the practice set out in the Scottish Ministerial Code, a Scottish Government Bill cannot be introduced, however important it may be politically, unless the Lord Advocate is satisfied that its provisions would be within the legislative competence of the Scottish Parliament. If the Lord Advocate is not so satisfied, the Bill will not be introduced, and no reference can be made under section 33. But the Lord Advocate may be mistaken, with the consequence that a legitimate and politically important proposal for legislation will never see the light of day. The same position may arise in relation to a Bill introduced by a private member. Accordingly, it would be impossible to establish that a Bill which might in fact be within legislative competence (and as to which a Law Officer or its introducer thought there was a reasonable argument that it was within competence) was a proper and legitimate Bill fit to be passed by the Scottish Parliament.

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[45] It would be more consistent with the rule of law and with the intention of the Scotland Act that the Scottish Parliament should be able to exercise its powers where it has legislative competence for the Lord Advocate (if necessary, in the case of a private member's Bill, by acting at the request of that member) to be able to obtain an authoritative judicial decision on the point. Admittedly, only a decision on the scope of reserved matters can be obtained under paragraphs 1(f) and 34 of Schedule 6. Other aspects of legislative competence cannot be referred under those provisions. However, if legislation were construed so as to exclude anything short of a perfect solution, the best would indeed be the enemy of the good.

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[46] In confining the power to make a reference to Law Officers, the United Kingdom Parliament could also be confident that such references would be made responsibly in the public interest. That confidence is borne out by the fact that this is the first occasion on which a reference has been made by the Lord Advocate since the Scotland Act came into force 23 years ago. It is also the first occasion on which any Law Officer has referred a question

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in respect of a proposed Bill under any of the devolution statutes. Any risk that the court's resources might be unduly absorbed by such references is also mitigated by its discretion to decline to accept them.

[47] For these reasons, we conclude that the question referred is a devolution issue, and that this court accordingly has jurisdiction to decide it.

4. Should the court decline to accept the reference?

[48] On two occasions in the past, this court has declined to decide questions referred to it by the Attorney General for Northern Ireland under paragraph 34 of Schedule 10 to the Northern Ireland Act 1998, which is the provision corresponding to paragraph 34 of Schedule 6 to the Scotland Act, on the basis that it possesses an inherent discretion to do so. Counsel for the Advocate General submit that the court should exercise its discretion to decline to decide the question which is the subject of the present reference.

[49] The two references from Northern Ireland were very different from the present case. In the first of those cases, *Reference by the Attorney General for Northern Ireland of devolution issues to the Supreme Court pursuant to Paragraph 34 of Schedule 10 to the Northern Ireland Act 1998* [2019] UKSC 1; [2020] NI 793, the court adjourned the reference in circumstances where *inter partes* proceedings were pending which would allow most if not all of the issues to be raised, and in which the Attorney General had the power to intervene and make a reference. Lord Kerr, giving the judgment of the court, explained that it was generally desirable that legal questions should be determined against the background of a clear factual matrix rather than as theoretical issues of law.

[50] In the second case, *Reference by the Attorney General for Northern Ireland of devolution issues to the Supreme Court pursuant to Paragraph 34 of Schedule 10 to the Northern Ireland Act 1998* [2020] UKSC 2; [2020] NI 820, the Attorney General sought to challenge the compatibility of United Kingdom legislation with Convention rights, by referring a question concerning the issuing by the devolved administration of lists of postcodes which were incorporated by reference into the commencement order made by the United Kingdom Government. The United Kingdom legislation was the subject of a direct challenge in other proceedings in England and Wales. The court refused to accept the reference on two grounds. First, it was said, the court must retain a discretion whether to deal with a reference on a devolution issue where that issue is to be raised in proceedings where the claimed incompatibility of the measure with Convention rights occupies centre stage, as opposed to its appearance via a side wind. Secondly, it was

said, although the production of the postcode lists was an act of a devolved institution, the relative isolation of that act from the introduction of the United Kingdom legislation threw into stark relief the inappropriateness of regarding the preparation of the lists as an act sufficient to give rise to a devolution issue.

[51] Neither of the Northern Ireland cases arose in the same circumstances as the present case, but counsel for the Advocate General submit that they demonstrate that the court can decline to accept a reference where it is not an appropriate vehicle for the determination of the issue in question. They argue that that is also the position in the present case, particularly for the following reasons:

1. Any Bill introduced into the Scottish Parliament may not be in the same terms as the proposed Bill presently before the court, with the consequence that the court's decision in respect of the proposed Bill may not be determinative. A further reference would then be necessary under section 33.
2. Any Bill introduced into the Scottish Parliament may be amended during its passage, with the same consequence.
3. The present reference cannot deal with issues of legislative competence which fall outside the scope of paragraph 1(f), such as whether a Bill providing for a referendum on Scottish independence would be incompatible with section 28(7) of the Scotland Act, which protects the power of the United Kingdom Parliament to make laws for Scotland.
4. A practical problem in assessing whether the provisions of a proposed Bill would relate to reserved matters arises from the absence of the policy memorandum and other documents which would accompany a Government Bill on its introduction into the Scottish Parliament. Such documents can be taken into account in identifying the purpose and effect of legislation, as required by section 29(3) of the Scotland Act (set out at para 57 below): *Martin v Most* [2010] UKSC 10; 2010 SC (UKSC) 40, para 25.
5. It is inappropriate, they submit, for the Lord Advocate to treat this court as a legal advice centre. It is a normal aspect of the responsibilities of a Law Officer to provide legal advice to government on her own responsibility. The substantive question in the present case is, they submit, not even one of particular difficulty.

[52] In support of that submission, counsel cite *Yalland v Secretary of State for Exiting the European Union* [2017] EWHC 630 (Admin). That case concerned challenges by a number of individuals to a decision by the United

Kingdom Government to leave the European Economic Area. The proceedings were brought before any such decision had been made. The Divisional Court refused permission to apply for judicial review. It observed at para 25:

> "It will rarely be appropriate to consider such issues when they may depend in part on factual matters or future events since until those factual matters are established or the events occur, the courts will not be in a position to know with sufficient certainty what issues do arise in a particular case. Similarly, when matters may depend upon or be affected by future legislation, it would generally not be appropriate to make rulings on questions of law until the precise terms of any legislation are known."

Observations to similar effect were made in the cases of *R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 950 (Admin); [2022] EWCA Civ 118 and *Keatings v Advocate General for Scotland*, where proceedings concerning the legislative competence of the Senedd and the Scottish Parliament respectively, raised in advance of the introduction of legislation, were held to be premature. The approach followed in these authorities is eminently sensible. As Lord Phillips of Worth Matravers MR observed in an earlier case, the court should not be used as a general advice centre. The danger is that it will enunciate propositions of principle without full appreciation of the implications that these will have in practice: *R (Burke) v General Medical Council* [2005] EWCA Civ 1003; [2006] QB 273, para 21.

[53] However, these authorities were all concerned with ordinary litigation. There may be greater scope for this court to entertain issues that might not otherwise be ripe for decision in the context of references under its devolution jurisdiction. Nevertheless, we accept that counsel for the Advocate General makes some powerful points, which may often be compelling. We do not, however, find them compelling in the circumstances of the present case. As the Lord Advocate submitted, those circumstances are exceptional, for the following reasons:

1. The reference has been made in order to obtain an authoritative ruling on a question of law which has already arisen as a matter of practical importance. It is a question on which the Lord Advocate has to advise ministers. The answer to the question will have practical consequences: it will determine whether the proposed Bill is introduced

into the Scottish Parliament or not. The question is therefore not hypothetical, academic or premature.

2. The question relates to a proposed Bill which, the court is informed by the Lord Advocate, the Scottish Government intends to introduce in the event that the court decides that it does not relate to reserved matters. All the provisions of the Bill which are material to the question referred will, the court is informed, be introduced in the same form as they are in before the court.

3. The purpose and effect of the material provisions of the Bill are apparent without the assistance of a policy memorandum or related papers.

4. Given the brevity and clarity of the provision in issue in this case, and the Scottish Government's commitment and practical ability to secure its enactment in its present form, the court does not have to be concerned in this case about the possibility that the Bill might be materially amended during its passage through the Scottish Parliament.

5. In the circumstances of this case, the court can discount the risk that a further reference under section 33 is likely to be needed in order to deal with materially different aspects of legislative competence.

6. As we have indicated at paras 44-45 above, we do not consider that the Lord Advocate, in making the reference, is acting other than with a proper sense of her responsibilities. The question referred is not of a routine character. It is understandable that the Lord Advocate should have decided that it should be referred to this court in the public interest.

[54] For these reasons, we conclude that the court should accept the reference.

5. *Consideration of the question referred*

[55] In order to decide the question referred, the court will begin by considering the arguments presented by the Lord Advocate, and the response to those arguments by counsel for the Advocate General. We will then consider the arguments presented by the Scottish National Party, and the Advocate General's response.

(1) *The arguments of the Lord Advocate and the Advocate General*

i. *Introduction*

[56] The question referred was set out at para 12 above. The central issue is whether legislation providing for a referendum on Scottish independence would relate to a reserved matter. If so, it would be beyond the power of the Scottish Parliament, since section 29(2)(b) of the Scotland Act provides that a provision is outside the legislative competence of the Scottish Parliament so far as "it relates to reserved matters": para 8 above. In terms of paragraph 1 of Schedule 5, reserved matters include "the Union of the Kingdoms of Scotland and England" and "the Parliament of the United Kingdom": para 5 above.

[57] The critical question is accordingly whether the proposed Bill would relate to the Union of the Kingdoms of Scotland and England or the Parliament of the United Kingdom. Section 29(3) provides, so far as material:

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

The court has repeatedly held that the phrase "relates to" indicates something more than a loose or consequential connection: *Martin v Most*, para 49; *Imperial Tobacco,* para 16; and *In re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64; [2019] AC 1022; 2019 SC (UKSC) 13 ("*Continuity Bill*"), para 27.

i. *The case that the proposed Bill relates to reserved matters*

[58] In her submissions, the Lord Advocate very fairly presented to the court the arguments on both sides of the question. Counsel for the Advocate General developed the arguments in favour of an affirmative answer, ie that the proposed Bill providing for a referendum on the question, "Should Scotland be an independent country*?*", does relate to reserved matters and so is outside the Scottish Parliament's legislative competence. The arguments advanced in favour of the conclusion that the Bill would relate to the reserved matter of the Union of the Kingdoms of Scotland and England can be summarised as follows.

[59] First, counsel noted that the court had previously held that the purpose of paragraph 1 of Schedule 5 was that matters in which the United Kingdom as a whole had an interest should continue to be the responsibility of the United Kingdom Parliament: see, for example, *Imperial Tobacco,* para 29.

That was consistent with the statement in relation to reserved matters, in the White Paper which preceded the Scotland Act, that "[t]he Government believe that reserving power in these areas will safeguard the integrity of the UK": *Scotland's Parliament* (Cmnd 3658, 1997), para 3.4. That pointed to measures which questioned the integrity of the United Kingdom being reserved.

[60] Secondly, counsel noted the court's previous statements to the effect that the phrase "relates to" requires more than a loose or consequential connection. A referendum on independence would, it was submitted, have more than a loose or consequential connection to the reserved matter of the Union of the Kingdoms of Scotland and England.

[61] Thirdly, as to the purpose of the Bill, the court was entitled to infer from a wide variety of background materials that the objective of the Scottish Government in introducing the Bill would be to achieve independence from the United Kingdom. For example, the Bill was intended to fulfil a manifesto commitment to hold a referendum "capable of bringing about independence": Scottish National Party Election Manifesto, *Scotland's Future, Scotland's Choice* (2021), p 12.

[62] Fourthly, as to the effect of the Bill, although the referendum would not be self- executing – that is to say, a majority vote in favour of independence would not automatically result in legal change to give effect to that outcome – its practical effect would be politically significant. A "yes" vote would, in the Lord Advocate's submission, support the Scottish Government's case for negotiating independence with the United Kingdom Government, and would place political pressure on the United Kingdom Government and Parliament to respect the result by agreeing to independence for Scotland. It would be difficult for the United Kingdom Parliament to ignore a decisive expression of public opinion. A "no" vote would also be politically significant in its impact. In the submission of counsel for the Advocate General, were the outcome of a referendum to favour independence, it would be used to seek to build momentum towards achieving the termination of the Union and the secession of Scotland. It was in precisely that hope that the Bill was being proposed.

[63] Counsel's submissions in support of the case that the Bill would relate to the reserved matter of the Parliament of the United Kingdom proceeded on a similar basis. The purpose of a referendum on Scottish independence would relate to the United Kingdom Parliament for essentially the same reasons as it would relate to the Union. The scope of the reservation encompassed the sovereignty of the United Kingdom Parliament. The secession of Scotland

from the Union would necessarily bring that sovereignty in relation to Scotland to an end: the United Kingdom Parliament would no longer be able to make laws for Scotland. A referendum on independence had the purpose, within the meaning of section 29(3), of bringing that end about.

i. *The case that the proposed Bill does not relate to reserved matters*

[64] In support of the argument that the proposed Bill does not relate to the reserved matter of the Union, the Lord Advocate submitted, first, that although the aim of Schedule 5 was to reserve to the United Kingdom Parliament matters of concern to the entire United Kingdom, the holding of an advisory referendum did not take the question of the Union out of that Parliament's hands.

[65] Secondly, it was submitted that a different approach to the meaning of the phrase "relates to", requiring a "close connection", had been adopted by Lord Mance, with whom a majority of the court agreed, in *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3; [2015] AC 1016 ("*Welsh Asbestos*"), para 27. Furthermore, it was submitted, the court's approach to the issue in the *Continuity Bill* case at paras 25-33 suggested that there had to be a legal or direct practical effect on the reserved matter before the provision could be said to "relate to" it. Following these approaches, the connection between an advisory referendum and a reserved matter would be insufficiently close and direct.

[66] Thirdly, in relation to the purpose of the Bill, the Lord Advocate submitted that the court's approach to the purposive interpretation of statutes was narrower in scope than the approach which had been adopted to identifying the purpose of devolved legislation in the context of section 29(2). The focus, in the former context, was primarily on the language used by the United Kingdom Parliament rather than on background material. Following that approach, the purpose of the Bill, as set out in clause 1, was "to make provision for ascertaining the views of the people of Scotland". No wider purpose was identified. If the purpose was merely to ascertain the views of the people of Scotland, then that related to the Union in only a loose or consequential way.

[67] Fourthly, in relation to the effect of the Bill, it was submitted that the practical effects of a referendum were speculative. The court was not equipped to engage in such speculation, and it would be constitutionally inappropriate for it to guess how the United Kingdom Parliament might respond if a referendum resulted in a decision in favour of independence. In any event,

in referring to the effect of a provision in section 29(3), the United Kingdom Parliament should be taken to have meant the direct effects prescribed by the legislation.

[68] Fifthly, the Scottish Parliament must, as a matter of principle, have the power to ascertain the views of the electorate on particular issues by means of a referendum. Since the Scottish Government can negotiate with the United Kingdom Government in relation to reserved matters, for example where a section 30 order is sought, and the Scottish Parliament can debate and pass motions in respect of reserved matters, it is appropriate that the power to hold a referendum should extend to reserved matters.

[69] Essentially the same argument was advanced by the Lord Advocate in support of the proposition that the Bill would not relate to the Parliament of the United Kingdom. Since the Bill would establish only an advisory referendum, it was submitted, it would not restrict the powers, authority or jurisdiction of the United Kingdom Parliament.

i. *The court's assessment*

[70] The court has repeatedly held that the purpose of the reservation of the Union and the United Kingdom Parliament, and the other matters listed in paragraph 1 of Schedule 5, is that "matters in which the United Kingdom as a whole has an interest should continue to be the responsibility of the United Kingdom Parliament at Westminster": *Imperial Tobacco,* para 29. The point was repeated in *Christian Institute v Lord Advocate* [2016] UKSC 51; 2017 SC (UKSC) 29; [2016] HRLR 19 ("*Christian Institute*"), para 65. In *Continuity Bill*, para 60, the court stated that the matters reserved by paragraph 1 of Schedule 5 are "all fundamental elements of the constitution of the UK, and of Scotland's place within it". We agree with the Lord Advocate's submission (para 59 above) that that points towards measures which question the integrity of the United Kingdom being reserved. That, however, is not determinative. It is necessary to decide whether the proposed Bill would relate to the reserved matters of the Union and the United Kingdom Parliament, in accordance with section 29 of the Scotland Act.

[71] In relation to the meaning of the phrase "relates to", we are not persuaded by the Lord Advocate's argument (para 65 above) that there is any difference between the approach which this court adopted in *Martin v Most*, para 49, *Imperial Tobacco,* para 16, and *Continuity Bill*, para 27, to the effect that the phrase indicates something more than a loose or consequential connection, and the approach adopted by Lord Mance in the *Welsh Asbestos* case. The issue there was whether the Welsh Assembly (as it then was) had the

power, under the conferred powers model then in place, to impose a charge on the insurers of persons liable to the victims of asbestos-related diseases, on the basis that the funds raised would be used to pay for health services. The argument was that the legislation imposing the charge related to "Organisation and funding of national health service". Lord Mance cited at para 25 of his judgment the relevant dicta from *Martin v Most* and *Imperial Tobacco*. At para 27, he expressed the view that any raising of charges permissible on that basis would have to be "more directly connected" with the health service provided and its funding, as would be the case, for example, in the case of prescription charges. However, the only connection between the imposition of the charge on the insurers and the health services provided and their funding was alleged wrongdoing on the part of a person whom the insurer had insured. That, said Lord Mance, was "at best an indirect, loose or consequential connection". The judgment does not indicate any departure from the approach adopted in the earlier cases, or any intention to adopt a test of "direct connection". Nor has it been interpreted in any subsequent decision of this court as having done so.

[72] Nor does the court consider that a different approach was adopted in the *Continuity Bill* case. In that case, the court expressly stated that, in order to relate to a reserved matter, a provision must have more than a loose or consequential connection with it, citing the relevant dicta in *Martin v Most* and *Imperial Tobacco*: para 27. It did not suggest that a legal or direct effect on the reserved matter was necessary.

[73] In relation to the "purpose" of a provision, ascertaining the purpose of legislation in the context of section 29(3) is a different exercise from the purposive interpretation of legislation. The Lord Advocate's argument (para 66 above) is accordingly based on a mistaken analogy. In the context of statutory interpretation, the court is concerned only with the objective meaning of the language used. That requires an intense focus on the words used by the legislature, although other background materials can sometimes be used as an aid to their construction. The exercise required by section 29(3) is of a different nature. The court is not attempting to construe the legislation in question. On the contrary, as was said in *In re Agricultural Sector (Wales) Bill* [2014] UKSC 43; [2014] 1 WLR 2622 ("*Agricultural Bill*"), para 50:

> "As the section requires the purpose of the provision to be examined it is necessary to look not merely at what can be discerned from an objective consideration of the effect of its terms. The clearest indication of its purpose may be found in a report

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> that gave rise to the legislation, or in the report of an Assembly committee; or its purpose may be clear from its context."

The court also observed in that case, at para 54, that the purpose and effect of legislation may, in this context, be "derived from a consideration of both the purpose of those introducing it and the objective effect of its terms". Similar observations have been made in other cases, including *Martin v Most,* para 75, and *Imperial Tobacco,* paras 16-17. The point is well illustrated by the latter case, where the legal effect of the provisions under challenge was to inhibit trading in tobacco and smoking-related products, but their real purpose – "what these provisions are really about", as it was put at para 43 – was to promote public health.

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[74] In relation to the "effect" of a provision, we do not accept the Lord Advocate's submission (para 67 above) that the effect of a provision, within the meaning of section 29(3), is confined to the direct effects prescribed by the legislation. In the first place, regard is to be had to the provision's "effect in all the circumstances": a phrase whose scope extends beyond purely legal effects. That is reflected in the court's attention to the practical consequences of the provisions in question, as for example in *Imperial Tobacco,* para 39, and in *Agricultural Bill,* para 53, where the court referred to the "legal and practical effects of the Bill". Furthermore, the court has previously made it clear that a provision does not have to modify the law applicable to a reserved matter in order to relate to that matter: *Christian Institute,* paras 33 and 63.

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[75] Having clarified the meaning of the terms employed in section 29(2) and (3), it is next necessary to apply the test to the proposed Bill. In doing so, we follow the structured analysis adopted in *Imperial Tobacco,* para 26, and the *Continuity Bill* case, para 27, and ask two questions:

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1. What is the scope of the subject-matter of the relevant matter reserved by Schedule 5?
2. By reference to the purpose of the provision under challenge, having regard (among other things) to its effect in all the circumstances, does that provision relate to the reserved matter?

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[76] In the present case, two reserved matters are relevant: the Union, and the United Kingdom Parliament. The scope of the reservation of the Union is sufficiently clear for the purposes of this case from its terms: the Union of the Kingdoms of Scotland and England. In relation to the reservation of the United Kingdom Parliament, this court held in the *Continuity Bill*

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case, para 61, that the reservation "encompasses, amongst other matters, the sovereignty of Parliament". A

[77] In this case, the purpose which is apparent on the face of the Bill is also what the Bill is really about. The purpose of the Bill is to hold a lawful referendum on the question whether Scotland should become an independent country. That question evidently encompasses the question whether the Union between Scotland and England should be terminated, and the question whether Scotland should cease to be subject to the sovereignty of the Parliament of the United Kingdom. B

[78] The effect of the Bill, however, will not be confined to the holding of a referendum. Even if it is not self-executing, and can in that sense be described as advisory, a lawfully held referendum is not merely an exercise in public consultation or a survey of public opinion. It is a democratic process held in accordance with the law which results in an expression of the view of the electorate on a specific issue of public policy on a particular occasion. Its importance is reflected, in the first place, in its official and formal character. Statutory authority is needed (and would be provided by the Bill) to set the date and the question, to define the franchise, to establish the campaign period and the spending rules, to lay down the voting rules, to direct the performance of the counting officers and registration officers whose function it is to conduct the referendum, and to authorise the expenditure of the public resources required. Statutory authority, and adherence to the statutory procedure, confer legitimacy upon the result. C D E

[79] That legislative framework is put in place because the result of a lawfully held referendum is a matter of importance in the political realm, even if it has no immediate legal consequences. That has been demonstrated in practice by the history of referendums in this country, and has also been recognised by this court. For example, in relation to the 2014 referendum on Scottish independence, Lord Hodge stated in *Moohan v Lord Advocate* [2014] UKSC 67; 2015 SC (UKSC) 1; [2015] AC 901, para 17, with the agreement of the majority of the court, that "the referendum is a very important political decision for both Scotland and the rest of the United Kingdom". In relation to the 2016 referendum on leaving the European Union, the majority of the court stated in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, para 124: F G

> "[T]he referendum of 2016 did not change the law in a way which would allow ministers to withdraw the United Kingdom from the European Union without legislation. But that in no way means H

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> that it is devoid of effect. It means that, unless and until acted on by Parliament, its force is political rather than legal. It has already shown itself to be of great political significance."

[80] The Lord Advocate herself, in her written submissions to the court, describes the issue raised by the reference as "one of exceptional public importance to the people of Scotland and the United Kingdom", as of "considerable practical importance", and as "a question of fundamental constitutional and public importance". Those submissions contrast with the argument advanced elsewhere in the same document that the proposed Bill would have "limited legal and practical effect", that it "relates to the Union in only an indirect or consequential way", and that "[a]ny practical effects beyond ascertaining the views of the people of Scotland are speculative, consequential and indirect and should not properly be taken into account". The former submissions reflect a more realistic assessment.

[81] A lawful referendum on the question envisaged by the Bill would undoubtedly be an important political event, even if its outcome had no immediate legal consequences, and even if the United Kingdom Government had not given any political commitment to act upon it. A clear outcome, whichever way the question was answered, would possess the authority, in a constitution and political culture founded upon democracy, of a democratic expression of the view of the Scottish electorate. The clear expression of its wish either to remain within the United Kingdom or to pursue secession would strengthen or weaken the democratic legitimacy of the Union, depending on which view prevailed, and support or undermine the democratic credentials of the independence movement. It would consequently have important political consequences relating to the Union and the United Kingdom Parliament.

[82] Turning, then, to the question whether the Bill relates to the Union, and determining that question by reference to the purpose of the Bill, having regard to its effect in all the circumstances, we are in no doubt as to the answer. It is plain that a Bill which makes provision for a referendum on independence – on ending the Union – has more than a loose or consequential connection with the Union of Scotland and England. That conclusion is fortified when regard is had to the effect of such a referendum. As we have explained at para 74 above, it is not only legal effects that are relevant in the context of section 29(3). A lawfully held referendum would be a political event with political consequences. It is equally plain that a Bill which makes provision for a referendum on independence – on ending the sovereignty of the Parliament of the United Kingdom over Scotland - has

more than a loose or consequential connection with the sovereignty of that Parliament.

[83] For these reasons, we reject the Lord Advocate's submissions that the proposed Bill does not relate to reserved matters.

(2) *The Scottish National Party's additional arguments: self-determination and the principle of legality*

[84] In addition to adopting the submissions made by Lord Advocate in support of the legislative competence of the Scottish Parliament in relation to the proposed Bill, the intervener, the Scottish National Party, makes further submissions founded on the right to self-determination in international law and the principle of legality in domestic law.

[85] The intervener submits that the right to self-determination is a fundamental and inalienable right in international law and that there is a strong presumption in favour of the interpretation of domestic legislation in a manner which is compatible with international law. While a narrow reading of the phrase "relates to" in section 29(2)(b) of the Scotland Act would render within competence a non-self-executing referendum in accordance with the right of the Scottish people to self-determination, a broad reading of that phrase would be incompatible with that right. It is submitted that where two possible readings of a statutory provision are available, one of which is compatible with international law and the other of which is not, the former should be preferred. In support of this submission the intervener relies upon article 1 of the United Nations Charter which provides that one of the fundamental purposes and principles of the United Nations is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". It further relies on General Assembly Resolution 1514 of December 1960 which states, at para 2:

> "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

This statement is repeated in the International Covenant on Economic, Social and Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966).

[86] The Advocate General does not dispute that the United Kingdom recognises and respects the right of self-determination in international law. However,

A he submits that the intervener fails to make good its implicit and necessary assertion that the right to self-determination in international law obliges the United Kingdom to make provision, either through the terms of the Scotland Act or otherwise, for a further advisory referendum on Scottish independence in the terms of the proposed Bill. In particular, the Advocate
B General submits that the principle of self-determination has no application here. Secondly, he submits that nothing in the Scotland Act, which is the only relevant statutory scheme on this reference, breaches the right to self-determination, regardless of the interpretation given to it on this reference.

[87] The strong presumption in favour of interpreting our domestic law in a way
C which does not place the United Kingdom in breach of its obligations in international law is well established. (See, for example, *R v Lyons* [2002] UKHL 44; [2003] 1 AC 976 per Lord Hoffmann at para 27; *Assange v Swedish Prosecution Authority* [2012] UKSC 22; [2012] 2 AC 471 per Lord Dyson at para 122.) If there is ambiguity in a statutory provision
D operating in a field where the United Kingdom is bound by a treaty obligation, the presumption of conformity with international law will apply to the interpretation of that statutory provision (*Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116 ("*Salomon*"), per Diplock LJ at p 143). This presumption of compatibility extends to international treaty obligations whether or not they have been implemented into domestic law
E within the United Kingdom (*R v Secretary of State for the Home Department, Ex parte Brind* [1991] 1 AC 696 per Lord Bridge at pp 747-748, per Lord Ackner at p 760 (concerning the European Convention on Human Rights, which at that date had not been implemented into domestic law); *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), section 26.9; Shaheed Fatima, "The Domestic Application of International
F Law in British Courts", in Curtis Bradley, ed, *The Oxford Handbook of Comparative Foreign Relations Law* (2019) at pp 494-495; James Crawford, *Brownlie's Principles of Public International Law*, 9th ed (2019), p 62, citing Diplock LJ in *Salomon* at p 143). However, the presumption will only be a permissible aid to interpretation if the statutory provision is not
G clear on its face (*Salomon* per Diplock LJ at p 143; *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, per Lord Templeman at p 481; *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449, per Lord Hughes at para 137, per Lord Kerr at para 239).

H [88] There are insuperable obstacles in the path of the intervener's argument based on self-determination. First, the principle of self-determination is simply not in play here. The scope of the principle was considered by

the Supreme Court of Canada in the *Reference re Secession of Quebec* [1998] 2 SCR 217. There, the Governor in Council referred a series of questions to the Supreme Court including whether there exists a right to self-determination under international law that would give Quebec the right to secede unilaterally. In its judgment the Supreme Court explained (at paras 136-137) that Canada was a sovereign and independent state conducting itself in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction. It considered that the then current constitutional arrangements within Canada did not place Quebecers in a disadvantaged position within the scope of the international law rule. It continued:

> "In summary, the international law right to self- determination only generates, at best, a right to external self- determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions." (at para 138)

It went on to say that in other circumstances peoples were expected to achieve self- determination within the framework of their existing state:

> "A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the National Assembly, the legislature or the government of Quebec do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally." (at para 154)

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[89] In our view these observations apply with equal force to the position of Scotland and the people of Scotland within the United Kingdom. They are also consistent with the United Kingdom's submission to the International Court of Justice in the case of Kosovo, adopted by the intervener as part of its submissions in the present case: "To summarise, international law favours the territorial integrity of "States. Outside the context of self-determination, normally limited to situations of colonial type or those involving foreign occupation, it does not confer any 'right to secede' ": Written Proceedings in relation to UN General Assembly Resolution 63/3 (A/RES/63/3) (8 October 2008), Written Statement of the United Kingdom in response to the Request for an Advisory Opinion of the International Court of Justice on the Question, 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?", (17 April 2009), para 5.33. The submission went on to state that international law does not, in general, prohibit secession; but the relevant point, in relation to the intervener's submission based on a *right* of self-determination under international law, is the absence of recognition of any such right outside the contexts described by the Supreme Court of Canada, none of which applies to Scotland.

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[90] Secondly, the intervener relies on the principle of self-determination in international law as an interpretative tool supporting a narrow reading of the words "relates to" in section 29(2)(b) so as to give a more limited scope to the limitation of legislative competence relating to reserved matters. However, no reading of that subsection, whether wide or narrow, could result in a breach of the principle of self- determination in international law. The Scotland Act allocates powers between the United Kingdom and Scotland as part of a constitutional settlement. It establishes a carefully calibrated scheme of devolution powers. Nothing in the allocation of powers, however widely or narrowly interpreted, infringes any principle of self-determination. On the contrary, the legislation establishes and promotes a system of devolution founded on principles of subsidiarity. It is now well established that devolution legislation such as the Scotland Act falls to be interpreted like any other statute, subject to the rules of interpretation set by the Act itself (see, for example, section 29(3) and (4)). It would be inappropriate to apply any interpretative presumption with the purpose of achieving a greater or lesser devolution of powers.

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[91] For the same reasons, the principle of legality does not avail the intervener. Nothing in the allocation of powers under the Scotland Act infringes the principle of legality.

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6. Conclusion

[92] We therefore answer the reference as follows:

1. The provision of the proposed Scottish Independence Referendum Bill that provides that the question to be asked in a referendum would be "Should Scotland be an independent country?" does relate to reserved matters.
2. In particular, it relates to (i) the Union of the Kingdoms of Scotland and England and (ii) the Parliament of the United Kingdom.

Reference disposed.

Elijah Granet, *Law Reporter*