IN THE COURT OF SESSION

NOTE OF ARGUMENT FOR THE PURSUER

in the cause

MARTIN JAMES KEATINGS residing at 22 Greycraigs, Cairneyhill, KY12 8XL

PURSUER

against

(FIRST) THE ADVOCATE GENERAL FOR SCOTLAND, Victoria Quay, Edinburgh, EH6 6QQ; and (SECOND) THE LORD ADVOCATE, Crown Office, Chambers Street, Edinburgh EH1 1LB (THIRD) THE SCOTTISH MINISTERS, Victoria Quay, Edinburgh, EH6 6QQ

DEFENDERS

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1. INTRODUCTION

1.1. In this action the pursuer seeks the following substantive orders from the court:

a. A declarator that the Scottish Parliament has power under the provisions of the Scotland Act 1998 ("SA 1998") to legislate for the holding of a referendum on whether Scotland should be an independent country, without requiring the consent of the United Kingdom Government or any further amendment, by the Union Parliament, of the SA 1998 as it stands.

b. A declarator that the Scottish Government's proposed Act of the Scottish Parliament concerning an independence referendum contains no provision which, if passed by the Parliament, would be outside its legislative competence.

1.2. This note of argument is prepared in preparation for the two day diet on the procedure roll, as ordered by this court by its interlocutor of 4th November 2020.

Defenders' preliminary Pleas

1.3. The Advocate General for Scotland (the first defender) and the Lord Advocate (the second defender) have both pled a large number of preliminary pleas in relation to the action. These amount to claims to the effect that:

a. The proceedings are academic;

b. The proceedings are hypothetical;

c. The proceedings are incompetent;

d. The proceedings should have been raised by way of an application to the supervisory jurisdiction;

e. The pursuer has no title, interest or standing to bring the proceedings;

f. The proceedings are premature;

g. The pursuer's averments are irrelevant *et separatim* lacking in specification;

h. The pursuer's declarators are too vague.

1.4. Given the number of preliminary pleas – the supporting propositions for which tend to blend into each other - one would be forgiven for thinking that the UK Government and the Lord Advocate simply did not want any decision on the merits of the action.

1.5. Indeed, both defenders who remain in this action have thus far actively sought to prevent this court carrying out its constitutional function in clarifying questions of law by relying instead on unfounded and inconsequential preliminary points.

1.6. This court was clear in permitting this hearing that *all* parties' pleas will be considered and determined. That includes those of the pursuer. It cannot be permitted to pass without note that both defenders have sought to expend public funds on the instruction of multiple senior counsel on each side in an attempt to prevent the pursuer from having his legal questions determined by this court.

Defenders' (lack of) position on the substance of the pursuer's case

1.7 The Advocate General in his note of argument also sets out the UK Government's response to the substantive arguments advanced by the pursuer in relation to the extent of the legislative competence of the Scottish Parliament under the SA 1998 to enact legislation making provision for the holding of an independence referendum. He states that "secession (*sic*) involves (at least) reduction in the UK Parliament's powers…. Therefore Scottish independence would affect the reserved matters in both §1(b) [the Union of the

Kingdoms of Scotland and England] and §1(c) [the Parliament of the United Kingdom]. He relies, in part support for his analysis, on the statements of 31 January 2020 and 1 September 2020 by Nicola Sturgeon MSP in her capacity as First Minister which are referred to in the pursuer's pleadings.

1.8 The Scottish Ministers have withdrawn their defences to this action. Interestingly the Advocate General for Scotland relies upon these now withdrawn defences to make the following claim in his note of argument:

> The current Scottish Government's policy on a referendum on Scottish independence is: (i) not to hold one before the elections to the Scottish Parliament due to be held on 6 May 2021; (ii) to "*publish a draft bill*" (rather than introduce a Bill in the Scottish Parliament) before those elections; and (iii) depending on the result of those elections, to seek to obtain an order under section 30 modifying the SA to give the Scottish Parliament the power to legislate for one.

1.9 Following the withdrawal of its defences, the Scottish Government has stated that it is going to publish a draft Referendum Bill before the end of the current Parliamentary session. Further, the current First Minister, Nicola Sturgeon MSP, has announced that her party, the Scottish National Party, will be campaigning in the May 2020 Scottish Parliamentary election on the basis that, if re-elected as the largest party in the Parliament with sufficient support to re-form a Government, this draft will be introduced as a Government Bill before the Parliament. No Government Bill can be introduced to the Parliament unless the Scottish Government Minister in charge of that Bill shall, on or before introduction of the Bill in the Parliament, state that in the Scottish Government's view the provisions of the Bill would be within the legislative competence of the Parliament: Section 31(1) SA 1998. But no statement has been made by the Scottish Government that there requires first to be a modification - whether by the Westminster Parliament or Crown in right of the UK Government - of the current terms of the terms of the SA 1998 and/or that it will not introduce such a Bill on the basis of the legislative competence of the Scottish Parliament under the terms of the SA 1998 as it now stands without modification.

1.10 Against that background it might therefore reasonably be expected that argument would be presented by or on behalf of the Scottish Government to this court to the effect that its draft Bill would be within the legislative competence of the Parliament. No such argument is made, however. Indeed the Lord Advocate refuses to take any position on whether or not the Scottish Government's proposed Act of the Scottish Parliament concerning an independence referendum contains any provision which, if passed by the Parliament, would be outside its legislative competence. All he tells the court is that:

"He does not intend to advance submissions on the merits of the pursuer's substantive case on the legislative competence of the Scottish Parliament."

1.11 Interestingly this same tactic of refusing to engage with the substance of the legal question before the court was employed by the Advocate General for Scotland in the hearing in *Wightman* before the CJEU, presumably in an unsuccessful attempt to convince the court that there was no "dispute" before the national court and so the legal question raised by it was purely academic and hypothetical. [1] But this kind of political motivated litigation gaming might be thought to be a surprising position for the Lord Advocate to take, given that he was expressly convened in this action is his constitutional *persona* and capacity as the independent constitutional defender of the rights and powers of the Scottish

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[1] See Case C-621/18 *Wightman v Secretary of State for Exiting the European Union* [2019] QB 199 decision of the CJEU Full Court at paras 20-24, 43 setting out the Advocate General for Scotland's submissions to it:

"*Consideration of the question referred*

Admissibility

20 The United Kingdom Government argues that the question referred is inadmissible because it is hypothetical. In particular, the United Kingdom Government submits that no draft act of revocation of the notification of the United Kingdom's intention to withdraw from the European Union has been adopted or even contemplated, that there is no dispute in the main proceedings and that the question referred is actually intended to obtain an advisory opinion on a constitutional issue, namely the correct interpretation of article 50 TEU and of acts adopted pursuant to that article.

21 According to the United Kingdom Government, there is no concrete dispute, since the question referred addresses events that have not occurred and may not occur. The United Kingdom Government submits that it has consistently reiterated its intention to honour the result of the referendum by giving notice under article 50 TEU and thereby withdrawing from the European Union, whether on the basis of an agreement or without any agreement.

22 The question, according to the United Kingdom Government, actually concerns the legal implications of a situation that does not currently exist. It is based on the assumption, first, that there will be an attempt by the United Kingdom, whether at the instigation of its Parliament or otherwise, to revoke the notification and, secondly, that the European Commission or the other 27 member states will oppose that revocation. Only in the event of such opposition would a dispute arise.

23 According to the United Kingdom Government, the lodging of the petition in the main proceedings accompanied by a request that a question be referred for a preliminary ruling in order to obtain an advisory opinion from the court circumvents the rules of the Treaty on the Functioning of the European Union (TFEU) on remedies, standing and time limits.

That government submits that the advisory opinion procedure is subject to the rules set out in article 218(11) TFEU and is available only where a question arises as to the compatibility of a proposed international agreement with the Treaties.

24 The only possible remedies would be direct actions, if the United Kingdom were to revoke its notification and trigger a dispute with the other member states and the EU institutions.

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Substance

...

43 The United Kingdom Government has <u>*not taken a position*</u> on the right, for a member state that has notified its intention to withdraw from the European Union under article 50 TEU, to revoke that notification."

Parliament. Yet again the Lord Advocate refuses to take any position on just in what capacity he is defending the present action. He states, somewhat defensively, that:

> "It is not for the pursuer to "dictate the role that a compearing defender may have in any litigation, or the matters on which such a defender may be heard".

The unconstitutional ambiguity of the Lord Advocate's position in this action

1.12 This action was duly and properly intimated by the pursuer from the outset to the Advocate General (as representing, in the terminology of the Crown Proceedings Act 1947, the Crown in right of the United Kingdom Government), to the Scottish Ministers (as representing the Crown in right of the Scottish Administration) and on the Lord Advocate in his capacity as an independent Scottish Law Officer acting in the public interest as the relevant constitutional defender of the powers of the Scottish Parliament. The Scottish Ministers originally entered appearance in this action but have since withdrawn from it.

1.13 It is therefore entirely appropriate and indeed necessary for the *court* - in order to be able to satisfy itself that all relevant parties have been duly called before it - to be clear as to precisely what "hat" the Lord Advocate is now wearing in his continued defence to this action. The Lord Advocate's defence substantively mirrors and repeats the now withdrawn defences of the Scottish Ministers. The Lord Advocate in these circumstances is constitutionally obliged to clarify to the court whether he is, in his maintained defence

(1) acting *qua* representative of the Scottish Government (of which he is a member per Section 44(1)(c) SA 1998 [2])

or

(2) distinct from the statutorily guaranteed independence of his decision-making function in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland under Section 45(5) SA 1998, he is acting in the broader public interest as defender of the Scottish Parliament independently of the Scottish Government. [3] He cannot be both.

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[2] Cf the position of the Attorney General in Ireland whose office is the subject of specific constitutional provision in the form of Article 30 of the *Bunreacht na hÉireann* which specifies in Article 30.1. that "there shall be an Attorney General who shall be the adviser of the Government in matters of law and legal opinion, and shall exercise and perform all such powers, functions and duties as are conferred or imposed on him by this constitution or by law" but in Article 30.4 provides that "the Attorney General shall *not* be a member of the Government"

[3] Under the Irish constitution the holder of the office of Attorney General also exercise more general public interest functions, independently of the Government, in for example taking case to seek clarification of the law and seeking to enforce the Constitution. See for example *Attorney General v. X* [1992] 1 IR 1 per Costello J noting that "Provision is made in the constitution for the office of Attorney General. He is legal adviser to the Government. But in addition the Constitution imposes on him duties

1.14 This is a fundamental issue of the separation of powers (which is the animating principle of our constitution) and of the principle that justice be seen to be done. The Scottish Government's political or party political interests cannot be equated with the public interest or with the interests of the Scottish Parliament. Because the Lord Advocate has, despite repeated invitations, failed to clarify his position on this fundamental constitutional point, the pursuer has also intimated this action separately on the Scottish Parliamentary Corporate Body to ensure that the Sottish Parliament is duly and fully aware of this action and of the terms of the defence of its powers and legislative competence which is, or is not being offered by the Lord Advocate.

2. THE PRELIMINARY PLEAS

2.1 The pursuer submits that the defenders' preliminary are all ill-founded and fall to be dismissed by this court on that basis.

The scheme established by the SA 1998

2.2 The Lord Advocate says that the court is being asked to reach a decision in the present case in a manner which is "inconsistent with the constitutional structures established by the SA 1998" and should be refused on the basis. The Advocate General makes much the same claims.

2.3 The pursuer's immediate response to that is that in *AXA General Insurance Limited v Lord Advocate* 2012 SC (UKSC) 122 the UK Supreme Court confirmed that the SA 1998 is *not* to be read as a standalone constitutional framework document which, within the four corners of its text, definitively and completely sets out the powers, duties and obligations of the Scottish Parliament or the bases upon which and by whom these might be determined by the court. As Lord Reed noted:

> "136. … The language of section 29 SA 1998 does *not* imply that the matters listed there are necessarily exhaustive of the grounds on which Acts of the Scottish Parliament may be challenged.
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> 137. In *Whaley v Lord Watson of Invergowrie*, 2000 SC 340 Lord President Rodger, in rejecting the approach adopted by the Lord Ordinary in that case to the relationship between the courts and the Scottish Parliament, made the following observations

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which he must fulfil independently of the Government." See to similar effect *Attorney General v. Hamilton (No. 1)* [1993] 2 IR 250 per McCarthy J who stated that the Attorney General had a duty – exercisable independently of the Government – to enforce and uphold the constitution.

(pp 348, 349):

> 'The Lord Ordinary gives insufficient weight to the fundamental character of the Parliament as a body which — however important its role — has been created by statute and derives its powers from statute. As such, it is a body which, like any other statutory body, must work within the scope of those powers. If it does not do so, then in an appropriate case the court may be asked to intervene and will require to do so, in a manner permitted by the legislation.
>
> In principle, therefore, the Parliament like any other body set up by law is subject to the law and to the courts which exist to uphold that law.
> ....
> Some of the arguments of counsel for the first respondent appeared to suggest that it was somehow inconsistent with the very idea of a parliament that it should be subject in this way to the law of the land and to the jurisdiction of the courts which uphold the law. I do not share that view. On the contrary, if anything, it is the Westminster Parliament which is unusual in being respected as sovereign by the courts. And, now, of course, certain inroads have been made into even that sovereignty by the European Communities Act 1972 [(cap 68)]. By contrast, in many democracies throughout the Commonwealth, for example, even where the parliaments have been modelled in some respects on Westminster, they owe their existence and powers to statute and are in various ways subject to the law and to the courts which act to uphold the law. The Scottish Parliament has simply joined that wider family of parliaments.'

138. As the Lord President's remarks make clear, the Scottish Parliament is not a sovereign parliament in the sense that Westminster can be described as sovereign: its powers were conferred by an Act of Parliament, and those powers, being defined, are limited. It is the function of the courts to interpret and apply those limits, and the Scottish Parliament is therefore subject to the jurisdiction of the courts.

139. Questions as to the limits of the powers of the Scottish Parliament, and as to the lawfulness of its Acts, may come before different courts in different ways.
...
142 ... The constitutional function of the courts in the field of public law is to ensure, so far as they can, that public authorities respect the rule of law. The courts therefore have the responsibility of ensuring that the public authority in question does not misuse its powers or exceed their limits.
...
150. Fundamental rights and the rule of law are protected by section 29(2) SA 1998, in so far as it preserves Convention rights. But, as Lord Steyn pointed out in *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36 [2004] 1 AC 604 (para 27):

> '[T]he Convention is not an exhaustive statement of fundamental rights under our system of law. Lord Hoffmann's dictum [in *R v Secretary of State for the Home Department* [2000] 2 AC 115 at page 131] applies to fundamental rights beyond the four corners of the Convention.'

...
153. [The UK] Parliament did not legislate in a vacuum: it legislated for a liberal democracy founded on particular constitutional principles and traditions. That being so, [the UK] Parliament cannot be taken to have intended to establish a body [in the Scottish Parliament] which was free to abrogate fundamental rights or to violate the rule of law."

2.4 There is simply no basis – and significantly no authority is cited – for the Lord Advocate's claim that "before Royal Assent ... questions of legislative competence are *exclusively* for

those persons identified by the SA 1998 as having a relevant interest in proposed legislation, exercising the powers conferred on them by that Act."

2.5 Nor is there any support for the Advocate General's (weaker) claim that

> "The correct interpretation of the provisions is that those procedures are (implicitly) exclusive, and therefore that this action is contrary to the SA. *Esto* the procedures are not exclusive, the common law basis for refusing a declarator on the ground of there being an alternative remedy".

But of course there is no alternative remedy available to the pursuer because the remedies referred to there are purely inter-Governmental, namely a pre-Royal Assent reference by any of the UK law officers to the UKSC on the competency of a Bill as passed by the Scottish Government. This is a process from which the pursuer is excluded (or at least not included) and in any event would come too late for him as it would and could only occur after he has cast his vote for the May 2021 Parliamentary elections.

2.6 The Lord Advocate's reference to the terms of Section 40 SA 1998 and to the judgment of the First Division in *Whaley v Lord Watson of Invergowrie*, 2000 SC 340 simply do not support his claim that "the powers of the courts in proceedings against the Parliament itself are strictly constrained". Rather the decision and constitutional analysis of the First Division in *Whaley v. Watson* (which was affirmed by the UKSC in *AXA*) is to the effect that the full panoply of the courts powers at common law may be prayed in aid in relation to even the internal processes and procedures of the Scottish Parliament.

2.7 Further Section 40 SA 1998 expressly envisages that the court can and will pronounce declarators in relation to matters such as the limitations on the powers of the Scottish Parliament, just as the court can and will examine and determine the limits on the powers of other statutorily established bodies, and can properly provide guidance even before those powers have been exercised, or their limits specifically tested or breached.

2.8 Express support for these propositions - which are wholly contrary to the approach which the Lord Advocate and Advocate Generally each argue for - is to be found in further passages from the judgments in *Whaley v Lord Watson of Invergowrie*, 2000 SC 340. Thus Lord President (Rodger) notes (at 349H to 350D):

> "Since subsecs (3) and (4) of sec 40 SA 1998 have been specifically enacted to exclude certain powers of the court in relation to proceedings against the Parliament, *the inference must be that in other respects the law applies in the usual way to both the Parliament and to members of the Parliament.*
>
> Under reference to the opinion of Lord Woolf M R in *R v Parliamentary Commissioner for Standards,* ex parte *Al Fayed* at p 670 G-H, counsel for the first respondent submitted, however, that this court should exercise 'a self-denying ordinance in relation

to interfering with the proceedings' of the Scottish Parliament. Lord Woolf used that expression to describe the attitude which the courts have long adopted towards the Parliament of the United Kingdom because the relationship between the courts and Parliament is, in the words of Sedley L J, 'a mutuality of respect between two constitutional sovereignties'. *The basis for that particular stance, including article 9 of the Bill of Rights 1689, is lacking in the case of the Scottish Parliament*.

While all United Kingdom courts which may have occasion to deal with proceedings involving the Scottish Parliament can, of course, be expected to accord all due respect to the Parliament as to any other litigant, they must equally be aware that *they are not dealing with a parliament which is sovereign: on the contrary, it is subject to the laws and hence to the courts.*

For that reason, I see no basis upon which this court can properly adopt a 'self-denying ordinance' which would consist in exercising some kind of discretion to refuse to enforce the law against the Parliament or its members. *To do so would be to fail to uphold the rights of other parties under the law. The correct attitude in such cases must be to apply the law in an even-handed way* and, subject to the residual discretion described by Lord Watson in *Grahame v Magistrates of Kirkcaldy* at pp 91-93, *to grant to parties the remedy which they seek and to which they are entitled*.

2.9 Lord Prosser, concurring with the Lord President, said this (at 357F-358E):

"The contention that the court did not have jurisdiction to deal with the issues raised in this case was one I found hard to grasp. As I understood the submissions, the argument seemed to rest upon some broad view that since the Scottish Parliament was a parliament, rather than for example a local authority, the jurisdiction of the courts must be seen as excluded, as an unacceptable intrusion upon the legislative function which belonged to Parliament alone.

A variant of this argument appeared to be that if the court's jurisdiction was not actually excluded as a matter of law, the court should nonetheless be slow or hesitant or reluctant or unwilling to use the jurisdiction which it had, in order to avoid an undesirable intrusion on Parliament's freedom in relation to legislation.

Both forms of argument appear to me to be entirely without foundation. If and in so far as a parliament may have powers which are not limited by any kind of legal definition, there is no doubt scope for concepts of 'sovereignty', with the courts unable to enforce boundaries which do not exist. But *if and in so far as a parliament and its powers have been defined, and thus limited, by law, it is in my opinion self-evident that the courts have jurisdiction in relation to these legal definitions and limits, just as they would have for any other body created by law*. If anything, the need for such a jurisdiction is in my opinion all the greater where a body has very wide powers, as the Scottish Parliament has: the greater the powers, the greater the need to ensure that they are not exceeded. But the jurisdiction of the courts and the legal definition of the body seem to me to be merely two sides of the same coin.

Faced with the suggestion that the courts might abstain from exercising a jurisdiction which they have, *allowing the Parliament perhaps to exercise power beyond its legal limits, from a fear that enforcement of those limits might be seen as stopping Parliament from doing what it wanted to do, I am baffled*: a defined parliament is there to do *not* whatever it wants, *but only what the law has empowered it to do*. ...

> [T]he normal remedy for a threatened wrong, interdict, is not available to the court, in consequence of the provisions of section 40 SA 1998. It is not suggested that there is any other curtailment of what would be the court's normal remedial powers in relation to the apprehended wrong. *An appropriate declarator might be granted, before or after commission of the wrong*. …"

The legal and constitutional significance of the decision of the Scottish Government to make the referendum an election issue

2.10 The legal question of whether or not the Scottish Parliament already has the power to legislate for an independence referendum (whether in accordance with the precise terms of the Scottish Government's proposed Act of the Scottish Parliament, or otherwise) has been made a central election issue by the current Scottish Government (of which the second defender is a member). This disputed legal question between the two governments needs to be resolved prior to the Scottish Parliamentary elections in May 2021 as a matter of democratic necessity, in order to allow the pursuer, and all other members of the electorate to the Scottish Parliament, to exercise their individual rights to vote in these elections in a properly informed way.

2.11 The previous suggestion from the Scottish Government when third defenders in this action (which is understood is being maintained by the second defender in his capacity as a member of the Scottish Government) that this legal issue should be clarified only after the Scottish electorate cast its votes in the forthcoming Scottish Parliamentary elections risks perpetrating a fraud on the electorate.

2.12 It is not properly open to the Scottish Government to campaign for re-election on the basis that, if re-elected to power, it will purport to act beyond the limits of the powers imposed on it by law. It is contrary to the principle of the rule of law for members of a devolved political institution (whether the Scottish Government and/or the Parliament) to assert that an election result confers on them a democratic mandate or authorisation to ignore or purport to override the limits otherwise imposed on it by law. That might hold good for an elective tyranny or despotism, but not for a representative democracy governed by the rule of law.

2.13 In a similar submission from both defenders (which is of highly questionable competence in terms of Scottish constitutional law) the defenders seek to suggest that the access to these courts should be restricted to the privileged few who are elected officials. Both

defenders on behalf of their respective governments seek to argue before this court that the public should accept that it is not their role to question politicians. Nothing could be further from the truth.

2.14 The rule of law *requires* politicians to be held accountable in law and accountable in politics: *Cherry and others v Advocate General* [2019] CSIH 49, 2020 SC 37. The ultimate arbiter of political accountability is the vote from individuals in Scotland at elections. The pursuer, as a campaigner and as a voter, is entitled to seek an answer to the specific legal question of whether the route that is being proposed by a significant proportion of those in favour of Scottish independence is a legally viable route. The answer to that question informs the campaigning and the pressure placed by that campaigning on the elected politicians. With that in mind, one can readily see why both defenders would seek to have this court keep their public "in their place" and allow the politicians to seek to argue from both sides of their mouths.

2.15 Without the answer sought by declarator in this action, the pursuer will be faced from both sides with suggestions that the proposed route is riven with legal pitfalls. The Scottish public are entitled to go into an election, knowing whether those pitfalls exist so that the election votes are cast in full knowledge of the law. It simply does not do in a modern democratic society to require voters to cast their votes where there is a known and wholly fundamental legal ambiguity within the issue that without doubt will be the central issue of the upcoming elections to the Scottish Parliament. The Law Officers are public servants; it is not their role, nor the role of this court, to require the people to vote blindly and in ignorance of the true position on a legal issue which political parties have chosen to be the centre-piece of their electoral campaign and on which they dispute and offer competing and irreconcilable interpretation..

The significance of *Wightman*

2.16 Both the Lord Advocate and the Advocate General vainly try to underplay the constitutional significance of the decision of the First Division in *Wightman v Secretary of State for Exiting the European Union*, 2019 SC 111.

2.17 The fact is that in *Wightman* the First Division - after making a reference to the Court of Justice of the European Union on a substantive issue of EU law (namely whether the notification made by the United Kingdom under Article 50 of the Treaty on European Union (TEU) might be unilaterally withdrawn by it) – pronounced a purely advisory declarator of law. It entertained the proceedings - and ultimately gave the remedy sought

by the pursuers - notwithstanding that the UK Government's repeated position before the court was that even if the notice could be unilaterally withdrawn it would not be, and in circumstances in which there no vote contemplated or ever initiated before the UK Parliament requiring the UK Government to withdraw its notice.

2.18 By contrast the situation in the present case is one in which the pursuer and the 7,000 or so ordinary citizens giving financial backing to this action are undoubtedly and imminently being faced with a vote in the May 2021 elections to the Scottish Parliament. The outcome of these election will determine the political make-up of the next Scottish Government. The current First Minister, Nicola Sturgeon MSP, has stated that her party's campaign for re-election will be based on manifesto commitment to introduce a Government Bill legislating for a further independence referendum. Such a promise can only properly be made if and insofar as the provisions of the Bill would be within the legislative competence of the Parliament.

Claims on prematurity

2.19 The Lord Advocate says that "until a Bill has been passed by the Parliament, its text is subject to amendment, and is not fixed". This is true, but trite. It ignore the fact that no Government Bill can be introduced unless the Scottish Government is able to claim that the Bill as to be introduced will be within the Parliament's legislative competence. It is the legal accuracy of that claim that the pursuer requires to have determined by the court as a condition for his being able in a properly informed way to cast his vote in the Scottish Parliamentary elections.

2.20 What this means is that there is indeed a real question of law for this court to consider and determine to allow the pursuer (and all others having the right to vote in these elections) properly to exercise their democratic right and responsibilities as voters. What it also means is that the pursuer undoubtedly has standing qua voter in the forthcoming Scottish Parliament elections to bring this action to have that legal question clarified by this court. [4]

[4] Cf the decision of the Irish Supreme Court in *Crotty v. An Taoiseach* [1987] IR 713 at para 4-5 affirming the standing of an individual citizen challenging the lawfulness of the planned actions of the Irish Government to enter into, ratify and incorporate into Irish law changes in the European Treaties without a prior referendum:

> 4. In the High Court the plaintiff's claim was rejected on the grounds that because the Single European Act had not yet been ratified by the State and because the Act of 1986 had not yet been brought into effect the plaintiff failed to establish that he had a *locus standi* to challenge the validity of the Act of 1986 having regard to the provisions of the Constitution.

Claims that the action raises a hypothetical issue

2.21 It is clear that there is a live dispute in relation to the legal questions raised in this action. It is clear that the Scottish Government intends to publish a draft Bill within the next six months and that there will be very little time available thereafter to organise campaigns and rallies in support of it (or indeed raise concerns in relation to its lawfulness). The Advocate General seeks to argue – somewhat surprisingly, given the public statements on the matter – that the Scottish Government is not proposing to publish a draft Bill. That is very clearly simply incorrect. The question is very much currently live and it is in no way premature to ask this court to determine the legal dispute between the parties. Scotland is told to expect draft legislation and it is clear that the referendum will be *the* central issue of the election. The questions posed by the pursuer to this court are not being asked in a vacuum.

2.22 The positions of the United Kingdom Government and the Scottish Government cannot be reconciled. The Scottish Parliament's resolution to hold a referendum in 2020, in light of the position of the Prime Minister as set out above, cannot be effected unless such a referendum takes place without any involvement from the United Kingdom Government. The First Minister's speech on 31 January 2020 indicates that, whilst the consent of the United Kingdom Government would be welcome, other options in the absence of its consent are available. The pleas anent prematurity should accordingly also be repelled.

2.23 For the avoidance of doubt, contrary to what has been suggested by the first defender (although it is not clear on what foundation), this action does not have as its purpose the binding of the hands of the Scottish Government nor the giving of advice to it. Nor is that the effect of the declarators sought by the pursuer. In no way is any government or legislature bound to act or refrain from acting in any particular way as a result of this action. The remedies in this action are sought by the pursuer as informing his campaigning and that of Forward as One and its supporters.

Claims that this action breaches the separation of powers

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5. The Court is satisfied. in accordance with the principles laid down by the Court in *Cahill v. Sutton* [1980] IR 269 that in the particular circumstances of this case where the impugned legislation namely the Act of 1986, will, if made operative, affect every citizen the plaintiff has a *locus standi* to challenge the Act notwithstanding his failure to prove the threat of any special injury or prejudice to him, as distinct from any other citizen, arising from the Act."

2.24 On such a fundamental question of constitutional law, the competence or otherwise of a proposed course of action must be clarified before that action is taken. To insist that judicial involvement may only be sought after an action is taken is to take a view of public law in Scotland which is not consonant with the current understanding of the constitution and the role of the courts therein (and is to ignore the precedent set by the First Division in *Wightman v Secretary of State for Exiting the EU* [2018] CSIH 62, 2019 SC 111). The pursuer seeks legal certainty prior to the holding of any such referendum so as to prevent the constitutional paralysis which would result from a retrospective determination that an already-held referendum was outwith the legislative competence of the Scottish Parliament. Members of the democratically elected Scottish Parliament – who are accountable to the Scottish electorate, among them, the pursuer – must know, in advance of making such a determination, whether such actions would be *intra vires*. If it was competent (as it was) in *Wightman* for elected politicians to have clarity on a matter on which they were going to have to cast their votes in Parliament, it is *a fortiori* competent for members of the public, campaigners and voters to come before this court seeking clarity on a matter on which they know they are going to have to cast their votes at the ballot box.

2.25 It is not contrary to the separation of powers for this court to perform its constitutional function of determining the law. The defenders seek to suggest that there is an interference with the proceedings of the legislature but that is wholly without foundation. This court has a clear and specific role within the constitution of this country. That has been reiterated by the highest possible judicial authorities in recent years in *Wightman* and in *Cherry v Advocate General* [2019] UKSC 41 [2019] 3 WLR 589. Contrary to the refrain from governments that the courts – as they suggest of the public in this action – should stand aside and let them get on with it, when dealing with such fundamental matters, the courts have an obligation to heed the words of Lord Atkin from *Liversidge v Anderson* [1942] AC 206 at 244 and not adopt an attitude that is "more executive-minded than the executive". On policy issues, the courts rightly should tread lightly; that is not the territory we are in here. This is a pure matter of law and squarely within the competence and the *duty* of this court. Neither executive should be permitted to come before this court, arguing that the people of Scotland must be kept in the dark as to the law until such time as a politician decides to tell them.

Criminal liability and referendums

2.26 The Scottish Parliament has chosen to enact, by way of schedule 6 to the Referendums (Scotland) Act 2020 and sections 35 and 36 thereof, a set of criminal offences. Those

offences apply specifically when a referendum is being held throughout Scotland in pursuance of any provision made by or under an Act of the Scottish Parliament. Criminal liability for such offences is accordingly predicated and conditional on the *intra vires* nature of the referendum to which they are being applied. It is accordingly essential in a democratic society that one should know in advance with certainty that any referendum legislated for by the Scottish Parliament is *intra vires*. To proceed otherwise is to leave in doubt whether conduct might be subject to criminal sanction.

2.27 This is particularly so where some of the offences in schedule 6 to the 2020 Act would prevent otherwise Convention-protected fundamental rights such as the right to freedom of expression. Prior to the invocation by the State of its ultimate power to deprive individuals of their liberty, every citizen, including the pursuer and other campaigners like him, has a right to know and be certain about the limits of the power of the Scottish Parliament to legislate for referendums.

Claims that this public law action should be a judicial review application

2.28 The Inner House has been clear in very recent decisions that the principle of access to justice requires that, as a generality, anyone who wishes to do so can apply to the court to receive a determination of what the law is in a given situation: *Wightman v Secretary of State for Exiting the European Union* 2019 SC 111 per Lord Carloway at §21.

2.29 The Lord President was also clear that "The traditional methods of securing an answer to a legal question posed is by action of declarator": *Wightman v Secretary of State for Exiting the European Union* 2019 SC 111 per Lord Carloway at §21. This confirmation that an action of declarator is the appropriate procedure is repeated at §26. It is perfectly clear, therefore, that the preliminary pleas anent this matter having to be brought as an application to the supervisory jurisdiction are simply incorrect. The court can confidently refuse those pleas in law.

2.30 The attempts by the Lord Advocate once more to run this argument – notwithstanding that it was moved and dropped already on his behalf – is a classic example of a government seeking to place procedural obstacles in the way of litigation with the hope and intention of delaying and avoiding a decision on the genuine substance because it fears that it is wrong on the merits. It is pure litigation tactics on the part of the defenders of the type which has been deprecated by the Inner House in *Taylor v Scottish Ministers* 2019 SLT 288. In that case, Lord Drummond Young observed that procedural niceties should not stand in the way of due observance of the rule of law.

2.31 Rules of procedure are servants and not masters: *Ruddy v Chief Constable for Scotland* 2013 SC (UKSC) 126. This court should not be drawn into allowing the merits of this case to be derailed by ancillary and inconsequential procedural squabbles.

2.32 The suggestion, therefore, from the Lord Advocate that, notwithstanding the words of the Lord President, the court should find that a summons is restricted only to the vindication of a right and an action for declarator is incompetent, should be rejected entirely as being unfounded in law. As this court is well aware, there is no rule that all public law litigation must be carried out by way of application to the supervisory jurisdiction in Scotland.

2.33 The restriction to the general rule of open access to the courts was said by Lord Carloway to be "principally resource driven" and his description of the restriction was as follows:

> "For practical reasons, which are principally resource driven, there are limits to the general right to a legal ruling. One is that a court should not be asked to determine hypothetical or academic questions; that is those that will have no practical effect. In a case where there are no petitory conclusions, the declarator must have a purpose. There has to be some dispute about the matter sought to be declared. The declarator must be designed to achieve some practical result. This procedural limitation often overlaps with questions of title or interest."

2.34 The fact is that the courts in Scotland have repeatedly made general advisory declarators on the law as it will apply prospectively, rather than limited to a statement of the law as it was to be applied to resolve a specific dispute before it.[5] Apart from *Wightman*, other examples include:

- *Napier v. Scottish Ministers* [2005] CSIH 16, 2005 SC 307 where the First Division pronounced a bare declarator (which had no application to the facts of the case nominally before it which had in fact been settled) that

[5] See too in England and Wales *R. (on the application of Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2016] EWHC 2010 (Admin) in which a Divisional Court of Lord Justice Lloyd-Jones (as he then was) and Mr. Justice Jay, after surveying the relevant English case law on the competency of the pronouncing of advisory declaration granted (at para 180) declarations in the
following terms:

(1) Customary international law requires a receiving State to secure, for the duration of a special mission, personal inviolability and immunity from criminal jurisdiction for the members of the mission accepted as such by the receiving State.

(2) This rule of customary international law is given effect by the common law."

> "in civil proceedings in Scotland in which a finding is sought from the court that there has been an act or a failure to act by a public authority which is incompatible with the requirements of Article 3 ECHR, the appropriate standard of proof is the ordinary standard of proof applicable to civil cases in Scotland, namely, proof on a balance of probabilities;

- and *Davidson v. Scottish* Ministers [2005] UKHL 74, 2006 SC (HL) 41 where the Appellate Committee declared – again in a matter in which there was no longer live dispute between the nominal parties – that

> "references to civil proceedings in section 21 of the Crown Proceedings Act 1947 were to be read as *not* including proceedings invoking the supervisory jurisdiction of the Court of Session in respect of acts or omissions of the Crown or its officers."

Claims on pursuer's lack of standing

2.35 The claim by the Lord Advocate and the Advocate General that a voter such as the pursuer in this action who seeks clarification of a point of law on the basis of which he is being asked to cast his vote is in fact "someone who interferes in something with which he has no legitimate concern" is startling in its anti-democratic nakedness. It is not a proposition to which this court can or should assent.

2.36 The fact is that the pursuer's democratic rights as a voter can only properly be exercised against the background of an authoritative ruling and judgment from this court on this legal question as to whether or not the Sottish Parliament does indeed have the legislative competence currently claimed for it by the First Minister on behalf of the Scottish Government, and the Scottish National Party.

2.37 The questions for the court in determining the pursuer's standing to bring these proceedings are therefore: (i) is the declarator designed to achieve a practical result and (ii) is the legal question posed in dispute. If the answer to both of those questions is in the affirmative, the action is neither hypothetical not academic and the pursuer has title and interest to seek to have them granted by this court. The pursuer respectfully submits that there can be no doubt that both of those questions should be answered in the affirmative for the following reasons:

(1) The pursuer is the Convenor of Forward as One. Forward as One is a grassroots campaigning group which campaigns in favour of Scottish

independence. The pursuer organises marches and rallies in support of Scottish independence. He was responsible for petitioning the European Parliament for its support in relation to Scotland re-joining the European Union as well as petitioning the Scottish Parliament and the Westminster Parliament on matters related to Scottish independence.

(2) The pursuer's campaign work is consistent, high profile and highly regarded. Forward as One represents the views of thousands of individual campaigners and their views are represented in this action by the pursuer. The pursuer has previously stood as an independent candidate for elected office. He is not affiliated with any political party.

(3) The pursuer and Forward As One will continue to campaign for an independent Scotland. However, there is a dispute in relation to the powers under the SA 1998 insofar as it relates to the power of the Scottish Parliament to legislate for a referendum on Scottish independence without seeking the permission of the UK Government. The pursuer has received legal advice on the matter which favours the view that such permission is unnecessary for the holding of a referendum but that advice is caveated, rightly, because the matter has never been the subject of judicial determination.

(4) The pursuer, those supporting him and all voters in Scotland have a right to know prior to casting their votes, whether or not a change in SA 1998 is or is not required to give the Scottish Parliament legislative competence to make provision for a further Scottish independence referendum. This knowledge can only come from an authoritative ruling of the court. This knowledge will necessarily inform both the pursuer political campaigning strategy and be directly relevant to the decision of every individual in how to cast their votes in the forthcoming May 2021 elections to the Scottish Parliament.

(5) For a court to uphold the preliminary pleas proffered by each of the defendants and refuse to consider and rule on the substance of the matter raised in this action would amount to a dereliction by the court of its constitutional duties within a democratic polity. This is because it would leave the pursuer and every other individual with a right to vote in the Scottish May 2021 Parliamentary election in a state of ignorance as to the impact and significance of their vote. In *Wightman* and again in *Cherry* the First Division reiterated the essential role which courts play in a democracy in

clarifying the law on issues of constitutional importance in order to allow the machinery of democracy properly to function. That is what is at issue and at stake in the present action.

(6) The declarators sought by the pursuer put beyond legal challenge the notion that the Scottish Government is required to have their holding of a referendum rubber stamped by the UK Government. The determination of this court removes one of the most significant ambiguities that remains in relation to the issue of a further referendum on Scottish independence. It informs the basis, the strategy and the target of the pursuer's campaigning as a recognised and popular campaign group. It settles definitively a legal matter which remains thus far vague and unclear.

(7) The pursuer has in all the circumstances an enforceable legal and constitutional right to obtain legal certainty on this issue to allow him, and all other individual members of civil society both in Scotland and across the United Kingdom, to be able, in a properly informed way, to exercise their democratic rights as citizens of publicly campaigning and political lobbying on the issue of possible future constitutional change in our democratic structures. It is clear that the declarators sought will have a practical effect and that they are not hypothetical or academic.

(8) Insofar as it is not already clear from the pleadings in this case, the legal questions posed are clearly disputed. The Scottish Government published its "Scotland's Right to Choose" paper on 19th December 2019. The First Minister sought from the Prime Minister confirmation that he would engage seriously with the Scottish Government's proposals to hold a referendum on Scottish independence with a section 30 order. The Prime Minister replied by letter of 14th January 2020 confirming "I cannot agree to any request for a transfer of power that would lead to further independence referendums".

(9) On 29 January 2020, the Scottish Parliament approved a motion recognising the sovereign right of the people of Scotland to determine the form of government best suited for their needs, recognising that the Brexit result was a material change in circumstances since 2014 and recognising that a referendum on Scottish independence should accordingly be held so as to permit the people of Scotland to decide whether Scotland should be an independent country.

(10) On 31 January 2020, the First Minister said "To achieve independence, a referendum, whenever it happens – whether it is this year as I want, or after the next Scottish election – must be legal and legitimate. … And the best way to achieve that, even though it may not be ideal, is to reach agreement on a transfer of power to the Scottish Parliament, just as we did for 2014".

(11) On 20 July 2020, the Prime Minister said, in a briefing in Westminster ahead of a visit to Scotland: "It was in 2014 that the Scottish people voted to keep our United Kingdom together. Both sides committed to respecting that decision, and the First Minister promised that it would be a once in a generation vote. The UK Government will continue to uphold the decisive verdict from the referendum."

(12) On 1 September 2020, the First Minister, speaking to the Scottish Parliament said: "Before the end of this Parliament, we will publish a draft Bill setting out the proposed terms and timing of an independence referendum as well as the proposed question that people will be asked in that referendum".

(13) In a pre-action letter, prior to the raising of these proceedings, the pursuer's solicitor sought from the Office of the Advocate General formal confirmation the UK Government's position on whether a section 30 order was required for any future referendum in an attempt to avoid the need for legal proceedings to be brought. The Advocate General's solicitor replied on 13th February 2020 noting that "The United Kingdom Government's position is that it is outside the legislative competence of the Scottish Parliament to legislate for and hold a referendum on Scottish independence".

(14) It is therefore abundantly clear that the legal question posed by these proceedings is disputed. An answer to the question has a genuine and practical effect for the pursuer in that it will inform his actions as a campaigner going forward. The pursuer is not "a mere busybody" as the defenders would abusively term him. [6] Whilst the UK and the Scottish

[6] Cf *Walton v Scottish Ministers* [2012] UKSC 44, 2013 SC (UKSC) 67 per Lord Reed at paras 88, 94:

> "88. In the present case, Mr Walton made representations to the Ministers in accordance with the procedures laid down in the 1984 Act. He took part in the local inquiry held under the Act. He is entitled as a participant in the procedure to be concerned that, as he contends, the Ministers have failed to consult the public as required by law and have failed to follow a fair procedure. He is not a mere busybody interfering in things which do not concern him. He resides in the vicinity of the western leg of the WPR. Although that is some distance from the

Government may find high-profile challenges seeking legal clarity from the court politically inconvenient - because for their own (doubtless different) political reasons and calculations they would each prefer ambiguity and uncertainty – that is no reason for the court to decline to exercise its proper constitutional responsibilities. Indeed it is all the more reason for the court to exercise those constitutional responsibilities. The fundamental basis of a democratic system means that the pursuer has a right to campaign – and each individual voter has a right to vote - on the basis of clear and authoritative understanding of the legal significance and impact of their votes. This court can therefore be satisfied that the pursuer has standing and that the issues raised by this action are neither academic nor hypothetical. The defenders' pleas in law on these matters can and should also be repelled by this court.

Democracy as the fundamental basis of the constitution

2.38 The Advocate General makes the following essentially anti-democratic claim in his note of argument

> "The only people who have a sufficient interest before Royal Assent in whether a proposed Act would be within the powers of the Scottish Parliament are the people who are exercising powers and duties that the Scotland Act has given them".

This, frankly, encapsulates the problem with both of the defenders' positions in this litigation. Their position appears to be that government (whether Scottish or United Kingdom) are not properly answerable or accountable at the instance of the people before the courts. Instead they should be permitted to operate as they consider politically expedient untrammelled by legal questions raised by those "busybody" voters who might challenge their narrative.

Fastlink, the traffic on that part of the WPR is estimated to be greater with the Fastlink than without it. He is an active member of local organisations concerned with the environment, and is the chairman of the local organisation formed specifically to oppose the WPR on environmental grounds. He has demonstrated a genuine concern about what he contends is an illegality in the grant of consent for a development which is bound to have a significant impact on the natural environment. In these circumstances, he is indubitably a person aggrieved within the meaning of the legislation.

...

94. In many contexts it will be necessary for a person to demonstrate some particular interest in order to demonstrate that he is not a mere busybody. Not every member of the public can complain of every potential breach of duty by a public body. But there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no one was able to bring proceedings to challenge it."

2.39 The fact is that procedural niceties of what might or might be done within the Scottish Parliament during and after a legislative process is of no particular relevance to these proceedings. The pursuer seeks a specific answer in law to a specific question before the legislative process for the sole purpose of his campaigning and all others voting in possession of the full facts. To that end, the entire argument from both defenders about the provisions of the SA 1998 excluding (presumably by necessary implication) legal issues of the extent of the Parliament's existing legislative competency being brought before the court by ordinary members of the public is wholly unfounded and betrays a misunderstanding of the sovereign role of the people in democracy and a misunderstanding of this court's constitutional role in determining what the law *is*.

2.40 There is undoubtedly legal uncertainty and dispute over the extent of the current powers of the Scottish Parliament on this issue of whether it can as the SA 1998 stands, legislate for a further independence referendum. It is wholly constitutionally improper in a democracy for the pursuer - together with all the other individuals who together make up the relevant electorate - to be deprived of their right to vote on this issue in a properly informed way in forthcoming Scottish Parliamentary election, where that very issue is being made a central aspect of the election campaign. A position of voter ignorance on the basis of their respective political calculations. But on substantial matters of live constitutional significance such as this, it is essential that the law is clear in advance. Continued uncertainty on this issue undermines democracy. It unconstitutionally trammels the pursuer's ability and democratic right – and the ability and democratic rights of others who, like him, seek constitutional change - to campaign effectively on this matter as it leaves unclear just which legislature and/or government to lobby for legislation on this issue. An authoritative answer to this legal question is required now as a matter and principle of democratic constitutionalism.

2.41 As a voter in the forthcoming election to the Parliament the pursuer is, with his fellow voters, the relevant "decision-maker" as the legitimacy of the Parliament rests on his participation, along with his fellow voters, and it is to these voters that the Sottish Parliament and through it the Scottish Government is accountable: *Cherry and others v Advocate General* [2019] UKSC 41, 2020 SC (UKSC) 1. That is what living in a democracy means. Sovereignty rests with the people. Further in *Ghaidan v. Godin Mendoza* [2004] UKHL 30 [2004] 2 AC 557 Baroness Hale noted at para. 132:

> "Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being. ...[I]t is a purpose of all human rights instruments to secure the protection of the essential rights of members

of minority groups, even when they are unpopular with the majority. *Democracy values everyone equally even if the majority does not*."

2.42 In sum, it would be wholly contrary to the democratic nature of the constitution under which the Scottish Parliament operates – and an abdication of this court's constitutional function – for this court to refuse to address and answer this substantive issue on the basis of the various spurious and unconstitutional points pressed on it by the Lord Advocate and separately by the Advocate General on behalf of the UK Government. Such a position directly contravenes the concept of the rule of law which is embodied in our constitution.

2.43 If its proposed Act of the Scottish Parliament contains provisions which are not within the Scottish Parliament's legislative competence, then the Scottish Government is promising to do that which it has no power to do, and which the Parliament has no power to pass. It would be contrary to fundamental democratic principles in a representative democracy for those, such as the pursuer, who are included in the franchise to the Scottish Parliament to be expected or required to cast their votes in the May 2021 election from a position of ignorance as to the true legal position on this issue.

2.44 In all the circumstances these voters, among them the pursuer, have a legal and enforceable constitutional right to be authoritatively and definitively advised – on application to the courts - of the true legal position before deciding whether and how to cast their votes in the May 2021 election. It is only when the legal position by a decision of this court is clarified on this issue in these proceedings that the pursuer, and his fellow electors, can exercise their democratic rights and responsibilities as voters in a properly informed way.

Claims that the wording of the declarators as sought are too vague

2.45 Other than the general plea as to relevancy, which is dealt with below in relation to the substance of the dispute between the parties, that leaves only the question of whether the declarators sought by the pursuer are too vague. This is wrong. Instead the declarators in the terms sought seek to make it plain that the Scottish Parliament has power under the SA 1998, as amended, to legislate for and hold a referendum on Scottish independence without requiring the consent of the UK Government.

2.46 It is perfectly clear what that declarator means. The defenders have received adequate fair notice of the arguments to be presented on behalf of the pursuer. This is yet another

attempt to stymie consideration of the merits of the action. In any event, seemingly in complete ignorance of the irony thereof, the second defender has no pleadings on record that indicate why, how and to what extent it is suggested that the declarators are too vague.

2.47 In any event it remains for the court to pronounce such declarators in such form and terms as it thinks appropriate. The pleas in law anent "uncertainty" and the declarators being "too vague" can and should be repelled.

The defenders' irrelevant defences on the substance of the question

2.48 Having heard and rejected at the By Order hearing the various attempts by the defenders to persuade this court *not* to consider and determine the substantive legal question raised in this action, this court rightly held that all preliminary pleas should be debated at this hearing.

2.49 The Scottish Government has announced its imminent publication of a proposed Act of the Scottish Parliament. The proposed Act concerns a referendum on Scottish independence. The Scottish Government has said it will introduce and promote this proposed Act of the Scottish Parliament as a Government Bill before the Scottish Parliament, when and if re-elected to power after the May 2021 elections to the Scottish Parliament. The First Minister has stated that her party will campaign for re-election on that basis. This is against the backdrop of the categorical and restated refusal by the current UK Prime Minister to grant a section 30 SA 1998 order to permit the holding of such a referendum.

2.50 The Scottish Government is therefore clearly of the view that its proposed Act of the Scottish Parliament is within the legislative competence of the Parliament. If it considered otherwise - or if it thought there was any doubt on the matter - it would not be able to make the statement required of it under Section 31(1) SA 1998 confirming its view that the provisions of the Bill as introduced before the Parliament would be within the legislative competence of the Parliament.

2.51 The defenders' main/only defence to this case rely on them persuading this court that sections 28 to 36 SA 1998 *prevent* this court from determining a question of law placed before it. As is plain on any view, the provisions of SA 1998 relate to draft legislation once it has placed before the Scottish Parliament. The pursuer has made clear that these proceedings are brought to clarify the law that is currently unclear in a manner that will

inform and direct the campaigning actions of the pursuer, Forward as One and allow all those with a vote in the forthcoming May 2021 Scottish Parliamentary elections to cast their vote in a properly informed way.

2.52 The defenders' focus on particular procedural provisions in SA 1998 betrays a total misunderstanding of the pursuer's role in civil society and the intent and extent of the SA 1998 notwithstanding the full and clear pleadings on the matter. The SA 1998 is not a constitution and neither does it define and delimit the constitutional rights of individual voters such as the pursuer in a constitutional polity such as Scotland which aspires to the realisation, protection and preservation of democratic values.

2.53 It matters not to the pursuer's case whether or not there are provisions in the SA 1998 in relation to *how* a Bill is presented to the Scottish Parliament nor in relation to the (necessarily legally uninformed) statements on its legislative competency of the person in charge of the Bill and of the presiding officer because these statements would be being made in the absence of a clear and binding legal decision from the judiciary.

2.54 Without doubt, it is this court and this court alone which can authoritatively pronounce on this legal issue. The role of the legislature is to enact legislation as directed by the policies of the executive. It not the role of either of those branches of government to determine the lawfulness or otherwise of any action, inaction, enactment or proposal. The pursuer, as a democratic campaigner and individual voter, has every right to bring questions of law before this court in the exercise of its constitutional role. And this court has a responsibility to answer that question.

2.55 This court should accordingly dismiss the argument from the defenders that focuses on there being already a mechanism for scrutiny in the SA 1998. One need only have regard to the fact that the logical consequence of the defenders' argument is that a prominent and widely-supported campaigner like the pursuer would be excluded entirely from seeking a determination from this court as to the lawfulness or otherwise of a proposal on which he seeks to campaign because (i) he is not a Member of the Scottish Parliament and (ii) he cannot point to already-existing legislation. The law is *not* the preserve of elected officials and the pursuer is perfectly entitled as an interested and campaigning individual citizen and voter to seek from this court a determination of the law in the performance of its constitutional function.

2.56 This action raises for judicial determination a live question of the *extent* of the legal authority (which is otherwise undoubtedly afforded to the Scottish Parliament) to

legislate for the holding of referendums: see the Referendums (Scotland) Act 2020. Every legal power has its limits, and it is the function of the court to determine, when necessary, where they lie, compatibly with common law principles and as determined by the fundamental principles of our constitutional law: *Cherry v. Advocate General* [2019] UKSC 41, 2020 SC (UKSC) 1 at § 39.

2.57 Absent their irrelevant attempt to have this case dismissed without consideration of the substantive legal question raised by it, the defenders raise no other substantive defence in their pleadings to the court's granting of the declarators sought by the pursuer. That is clear not least from the paucity of pleading in the answers from answer 9 onwards from both defenders.

2.58 As such, the pursuer moves the court to sustain his first and second pleas in law, find the defences, as lodged by the defenders, to be irrelevant and thereafter to sustain his third plea in law and grant decree *de plano* in terms of the first conclusion.

3 THE PURSUER'S POSITIVE CASE

Formation of the Union

3.1 The current United Kingdom and the Union Parliament are the creations of the predecessor Parliaments of the predecessor nations which united to form the present United Kingdom. The pre-Union English Parliament's Union with Scotland Act 1706 and the pre-Union Scottish Parliament's Union with England Act 1707 each ratified Articles of Union which had been negotiated and agreed between Commissioners. Those Commissioners were nominated and appointed by pre-Union England and pre-Union Scotland respectively. The Articles of Union provided in Article I, that the separate Kingdoms of Scotland and England would on 1 May 1707 "and for ever after be united into one Kingdom by the name of Great Britain" and in Article III "That the United Kingdom of Great Britain be Represented by one and the same Parliament to be styled the Parliament of Great Britain."

3.2 The 1707 Parliamentary union between England and Scotland undoubtedly created a new State, but it did not create one Nation. The Treaty and Acts of Union in 1707 allowed for, but did not themselves effect, any harmonisation of the systems of public law as between Scotland and England: Article XVIII of the Treaty of Union 1707. Aspects of Scotland's continuing and distinct nationhood were included in the Treaty of Union. These aspects included Scotland's distinct legal, ecclesiastical and educational systems.

3.3 In 1800 the Parliament of Great Britain agreed and resolved with the Irish Parliament in 1800 to unite the kingdoms of Great Britain and Ireland into one kingdom. This union was effected by way of the British Parliament's Union with Ireland Act 1800 and the Irish Parliament's Union with Great Britain Act 1800. Both Acts included a provision that Great Britain and Ireland would on 1 January 1801 "and for ever after, be united into one kingdom". Notwithstanding that provision, the union of Great Britain and Ireland came to an end.

3.4 The Proclamation of the Irish Republic, which was read out from the steps of the Dublin General Post Office on Easter Monday 1916, sought to repudiate this British-Irish Union in the name of (Irish) popular sovereignty, declaring:

> "the right of the people of Ireland to the ownership of Ireland and to the unfettered control of Irish destinies, to be sovereign and indefeasible".

3.5 On 6 December 1921, following over five years of civil unrest and military conflict in Ireland, there were signed in London by representatives of Great Britain on the one hand and of Ireland on the other. though quite when and how Great Britain and Ireland had again become distinct entities in international law with the capacity to enter into Treaties is not clear). The Articles of an Agreement for a Treaty between Great Britain and Ireland were treated if they were international Treaty provisions which, by virtue of the principle of dualism, were then given effect in (British) domestic law by the Westminster Parliament's enactment of the Irish Free State (Agreement) Act 1922 and the Irish Free State Constitution Act 1922. It was this constitutional process which had the intention and effect of reversing and ending the 1800 Union between Great Britain and Ireland

3.6 Clause 11 of British-Irish Treaty of 1921 gave the Parliament of Northern Ireland (which sat in Stormont Castle in Belfast and which had been brought into being by the Westminster Parliament as a devolved legislature within the UK by the Government of Ireland Act 1920) one month from the date of these Acts coming into force to decide whether the territory of Northern Ireland ("as determined in accordance with the wishes of the inhabitants, so far as may be compatible with economic and geographic conditions") should remain in, or opt out from, the Irish Free State. Stormont duly exercised its opt out, leaving the Irish Free State in control of just 26 of the 32 counties which made up the island of Ireland. So it was this decision, by a devolved Northern Ireland Parliament sitting in Belfast, which created the present United Kingdom of Great Britain and Northern Ireland in 1921. The State of Nations that is the United Kingdom of Great Britain and Northern Ireland will therefore reach its first centenary in 2022.

3.7 The UK Supreme Court's statement in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [2018] AC 61 *("Miller 1")* at para. 41 that:

> "Northern Ireland joined the United Kingdom pursuant to the Acts of Union 1800 in Britain and Ireland"

appears to be based on a misreading or misunderstanding of constitutional history. The statement should more accurately have read:

> "in December 1922 Northern Ireland opted *out* from the Irish Free State and *re*-joined Great Britain, to create the (new state) of the United Kingdom of Great Britain and Northern Ireland".

3.8 The relationship of this newly formed United Kingdom of Great Britain and Northern Ireland with the rest of Ireland was, at least from the point of view of UK constitutional law, subsequently set out in the Ireland Act 1949 which, in Section 1(1) "recognized and declared that the part of Ireland heretofore known as Eire ceased, as from 18 April 1949, to be part of His Majesty's dominions" but declared (and continues to declare) in Section 2(1) that "notwithstanding that the Republic of Ireland is not part of His Majesty's dominions, the Republic of Ireland is *not* a foreign country for the purposes of *any law* in force in any part of the United Kingdom".

3.9 It is therefore clear that, as a matter of UK constitutional law, a union of the United Kingdom's constituent nations from time to time may be brought to an end by a constitutional process duly mandated by and consistent with the UK's own constitutional law at the time and with general public international law, notwithstanding any declaration of permanency or irrevocability at the time of union. Such statements of permanency have the status of political aspiration rather than of binding legal obligation.

The current Scottish Parliament

3.10 The current Scottish Parliament was established by the Union Parliament under and in terms of the SA 1998 (SA), Section 37 of which provides that "The Union with Scotland Act 1706 and the Union with England Act 1707 have effect subject to this Act". The Scottish Parliament has a place under the UK's current constitutional arrangement as a self-standing democratically-elected legislature: *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46, 2012 SC (UKSC) 122 per Lord Hope at § 46. The powers of the Scottish Parliament to pass legislation are themselves limited by law. The Scottish Parliament does not enjoy the sovereignty of the Crown in Parliament: *Advocate*

General's References on the UK withdrawal from the EU (Legal Continuity) (Scotland) Bill [2018] UKSC 64, 2019 SC (UKSC) 13 at § 12. Its legislative competence is specifically limited by section 29 and schedules 4 and 5 to the SA 1998.

3.11 Section 63A(1) SA (as inserted by the Scotland Act 2016) provides that "(1) The Scottish Parliament and the Scottish Government are a *permanent* part of the United Kingdom's constitutional arrangements". Section 63A(3) states that that "it is declared that the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum".

3.12 Although, in enacting the SA 1998, the devolved Scottish Parliament was undoubtedly *established* by the Union Parliament as a body to which the power to enact the functional equivalent of primary legislation had been *delegated*, that does not entail that the Scottish Parliament therefore owes its *legitimacy* to the Union Parliament (or indeed the UK Government).

3.13 The SA 1998 is an essential element of the architecture of the modern United Kingdom: *Somerville v Scottish Ministers* [2007] UKHL 44, 2008 SC (HL) 45 per Lord Mance at § 169. The SA 1998 is a constitutional statute: *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 [2019] 2 WLR 1219 per Lord Carnwath at § 120. It provisions are not subject to implied repeal by later non-constitutional Acts of Parliament: *BH v Lord Advocate* [2012] UKSC 24, 2012 SC (UKSC) 308 per Lord Hope at § 30.

3.14 The Scottish Parliament was established as a democratically elected legislature with power to make general laws in Scotland. It is directly democratically accountable to the people of Scotland, over whom it exercises its legislative power. The dominant characteristic of the Scottish Parliament is its firm rooting in the traditions of a universal democracy: *AXA v. Lord Advocate* [2011] UKSC 46, 2012 SC (UKSC) 122 at per Lord Hope § 49. It therefore draws its legitimacy from its accountability to its electorate (which is now determined by the provisions of Scottish Elections (Franchise and Representation) (Scotland) Act 2020).

3.15 The Scottish Parliament's accountability to its electorate is primarily effected by regular periodic elections to determine the membership of the legislature. On specific issues of political or constitutional importance, however, a democratically accountable legislature such as the Scottish Parliament may consider that it is better dealt with by way of a single-issue question to avoid ambiguity. Regular elections and occasional referendums

are among the measures that are required in order to ensure the ongoing accountability and legitimacy of a legislature.

3.16 The SA 1998 includes a power to hold referendums. That power includes power to hold a referendum on whether Scotland should be an independent country. Schedule 5 to the SA 1998 contains general reservations to the UK Government of matters which are outwith the legislative competence of the Scottish Parliament. This includes – at paragraph 1(b) in part I, under the heading "the Constitution" – that "[t]he following aspects of the constitution are reserved matters, that is … (b) the Union of the Kingdoms of Scotland and England".

3.17 During Parliamentary debates in 1998 in relation to the Scotland Bill then passing through Parliament, this reservation was raised. The then Secretary of State for Scotland, Donald Dewar MP, expressed his view to the House of Commons to the effect that

> "If one assumed that [a referendum] is a way of changing the constitution, no, it is not in the power of the Scottish Parliament to change the constitutional arrangements. […] A referendum that purported to pave the way for something that was ultra vires is itself ultra vires. That is a view that I take and one to which I will hold. But, as I said, the sovereignty of the Scottish people, which is often prayed in aid, is still there in the sense that, if they vote for a point of view, for change, and mean that they want that change by their vote, any elected politician in this country must very carefully take that into account. […] It is my view that matters relating to reserved matters are also reserved. It would not be competent for the Scottish Parliament to spend money on such a matter in those circumstances."

Lord Mackay of Drumadoon, the then Conservative Shadow Lord Advocate advised the House of Lords of his contrary view on the same provisions, observing as follows:

> "I believe that it would be perfectly possible to construct a respectable legal argument that it was within the legislative competence of the Scottish parliament to pass an Act of Parliament authorising the executive to hold a referendum on the issue of whether those who voted in Scotland wished Scotland to be separate from the UK. It would be perfectly possible to construct an argument that it would assist members of the Scottish parliament in the discharge of their devolved legislative and executive duties to be aware of the thinking of Scottish people on that very important issue. […] But I remain convinced that the law on this matter should be clarified. If it is not then the festering issue as to whether the Scottish parliament is competent to hold such a referendum will rumble on."

3.18 Lest the court be burdened with the usual arguments from the defenders in relation to parliamentary privilege as a result of the pursuer having quoted from Hansard, the

reliance on statements as a record of what was said is not a breach of Parliamentary privilege. Parliamentary privilege does not protect statements from being referred to before the courts: *Toussaint v Attorney General of St Vincent and the Grenadines* [2007] 1 WLR 2825 at §§16-17 and 31. Parliamentary privilege cannot be invoked to prevent the courts from carrying out their constitutional function: *Whaley v Watson*, 2000 SC 340 and *Craig v Advocate General for Scotland* [2018] CSOH 117, 2019 SC 230.

3.19 An important distinction must be recognised. A referendum which leads to something which would be *ultra vires* is not in itself *ultra vires*. Acts *flowing from* an *ultra vires* decision *are* necessarily *ultra vires*: *fs* at § 69. But acts *leading to* an *ultra vires* decision are <u>not</u> necessarily *ultra vires*. The holding of a referendum does not, of itself, implement the result or outcome of that referendum. A referendum is *not* the triggering of a bullet which is inevitably going to hit the target of a dissolution of the Union: cf *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5 [2018] AC 61 per Lord Carnwath (dissenting) at § 262, ultimately vindicated by decision of the Full Court of the CJEU in Case C-621/18 *Wightman and others v Secretary of State for Exiting the European Union* EU:C:2018:999 [2019] QB 199.

3.20 There is no inevitability whatsoever with a referendum, other than that a question will be asked to and answered by the enfranchised electorate. The outcome of a referendum on Scottish independence cannot be known in advance. The holding of a referendum on this question may result in a majority decision against the idea of Scottish independence and a re-affirmation instead of the constitutional *status quo*. Even if there were a majority decision in favour of Scottish independence arising from such a referendum this decision would have no automaticity. As with the case of Brexit, any attempt to dissolve – or radically re-define the terms of – "the Union of the Kingdoms of Scotland and England" would necessarily involve complex and lengthy negotiations. A referendum – nor indeed the *outcome* of a referendum – is not the act of secession. It is a perfectly competent question posed to the people of Scotland, asking if it is the will of Scotland that independence be sought. What happens thereafter is of no relevance to these proceedings.

3.21 It appears to be suggested in the Advocate General's note of argument that it is the UK Government's position that the people of the United Kingdom as a whole have an interest in whether the United Kingdom should be divided. To the extent that this seeks to introduce an argument anent the enfranchisement in relation to any referendum, that is nothing to do with the pursuer and is entirely a matter of political judgment. It has nothing whatsoever to do with the very specific legal questions being asked in this action.

3.22 The goal of *all* statutory interpretation is to discover the intention of the legislation and that intention is to be gathered from the words used by Parliament, considered in the light of their context *and their purpose*: *R (Black) v Justice Secretary* [2017] UKSC 81 [2018] AC 215 *per* Baroness Hale at §§ 36(3), (4). Parliaments are presumed not to legislate idly, or in vain. Individual provisions in Acts of Parliament are intended to have specific effect. Therefore, it must be the case that the Union Parliament did not consider that its listing of "the Union of the Kingdoms of Scotland and England" as a reserved matter in Schedule 5 SA would, of itself, have been sufficient to prevent the Scottish Parliament from legislating to modify provisions of the Union with Scotland Act 1706 and the Union with England Act 1707. Otherwise, the specific reservation under schedule 4 of the SA 1998 of "Articles 4 and 6 of the Union with Scotland Act 1706 and of the Union with England Act 1707 so far as they relate to freedom of trade" would be entirely unnecessary and otiose. In ordinary language, Articles 4 and 6 of the 1706 Act would clearly be said to "relate to" the Union of the Kingdoms of Scotland and England".

3.23 In order to allow for distinct meanings and effect to be given to both paragraph 1(2)(a) in Schedule 4 and to paragraph 1(b) in Part 1 of Schedule 5 SA (rather than have the specificity of the former subsumed in the generality of the latter) a narrower approach than ordinary language might otherwise indicate has to be given to the phrase "legislation which 'relates to the Union of the Kingdoms of Scotland and England." Rather than adopt a "black letter" or "ordinary language" approach, the SA 1998 clearly uses the phrase "relates to reserved matters" in defining the limits on the legislative competence of the Scottish Parliament as a technical term of art: (section 29(3) SA).

3.24 When it comes to the interpretation of constitutional statutes – and the (machinery for the better) protection of constitutional fundamental rights – it is *always* appropriate for the court to adopt a purposive approach to the proper interpretation of, and interplay between, the relevant statutory provisions. No explanation for resorting to a purposive construction is necessary. One can confidently assume that Parliament intends its legislation to be interpreted not in the way of a black-letter lawyer, but in a meaningful and purposive way giving effect to the basic objectives of the legislation: *Attorney General's Reference (No.5 of 2002)* [2004] UKHL 40 [2005] 1 AC 167 *per* Lord Steyn at § 31.

3.25 In determining whether or not the Scottish Parliament has the power to legislate for a further independence referendum for Scotland, it is therefore first of all necessary to identify the actual purpose of any Scottish legislation making provision for an independence referendum: *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61, 2013

SC (UKSC) 153 per Lord Hope at §16. Legislating to hold a referendum does not bring about any change, in itself, to the Union. It is clear from the provisions of the SA 1998 that the Scottish Parliament may, if it so determines, consult the people of Scotland about the possibility of effecting – in a manner which is consistent with the UK constitution – future change to the UK constitution. The exercise of such a power in such a manner is a consultative exercise of a principle of democratic accountability consistent with "principles of democracy and the rule of law and international norms" which were referred to in *Moohan v. Lord Advocate* [2014] UKSC 67, 2015 SC (UKSC) 1 per Lord Hodge (in a majority judgment with which Lord Neuberger, Baroness Hale, Lord Clarke and Lord Reed agreed) at § 35. The exercise of such a power would be *intra vires*.

3.26 The pursuer's interpretation of the SA 1998 should be accepted by this court as being correct. This is particularly so where no defender has come before this court with a contrary interpretation save for a disingenuous attempt to ouster the jurisdiction of this court's constitutional function and the ability of private citizens to invoke that function in clarifying the law.

3.27 For all of the reasons set out above, the declarator first concluded for by the pursuer should be granted. There is no factual dispute that would have a bearing on the granting of the legal declarator and, accordingly, the court should grant decree *de plano*.

Aidan O'Neill QC **David Welsh, advocate**