Jurisdiction To Hear Appeals — CPAG
Scottish/English Decisions

100/94

JBM/MB/SH/3

BIZARRE!

Commissioner's File: CIS/260/1993

SOCIAL SECURITY ACT 1986

SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that I have no jurisdiction to consider the decision of the Manchester Social Security Appeal Tribunal dated 10 February 1993 as it is not a final decision.

2. This is an appeal by the adjudication officer to the Commissioner with the leave of the tribunal chairman against the decision of the appeal tribunal in respect of the decision of the adjudication officer first involved in these appeals and issued on 16 October 1991. On 7 December 1993 I made the following direction:-

> "I direct an oral hearing. I require legal argument as to the issues raised and in particular as to the jurisdiction of the Commissioner in respect of the appeal tribunal not making a final decision (see paragraph 5 of the adjudication officer's submission dated 4 November 1993)".

An oral hearing was accordingly arranged for 22 March 1994. The claimant's representative requested a postponement and I made the ruling:-

> "I agree to one postponement only".

Accordingly the postponed hearing was re-arranged for 21 June 1994. By a letter dated 20 June 1994 the claimant's representative requested a further postponement writing in the following terms:-

> "I am applying for a postponement of the above hearing.

I realise this request is at short notice but Mr. Blundell is unable to attend and M.S. McClellan who was to act as the representative will not be able to attend due to ill-health.

Under the circumstances, application could not have been made any sooner."

This was received by fax at the Office of the Commissioner late in the afternoon of 20 June 1994.

I held an oral hearing on 21 June 1994. The claimant was not present neither was his representative. Mr. S. Cooper of the Solicitors Office of the Departments of Social Security represented the adjudication officer. To him I am indebted. Two preliminary points arise which I will deal with in this paragraph of my decision. I refuse the application for postponement. Mr. Cooper on this issue submitted that this was a technical issue not necessitating the attendance of the claimant and that the claimant's representative had made no comment of substance in respect of the jurisdictional point. He submitted that an adjournment was not going to serve much purpose. I accept his submission. As I have already indicated there had already been one previous postponement of the oral hearing. The second print is the question of a valid appointment. There appears to be no appointment on the file for income support. This is in any event an appeal by the adjudication officer and as such is a valid appeal. I am prepared to accept de bene esse that there is a valid appointment in respect of the claimant and that the parties are properly constituted for the purposes of the issues now before me in this the adjudication officer's appeal.

3. The facts of the case are dealt with by the adjudication officer first involved in these appeals at box 5 of his written submission to the appeal tribunal. I set out that summary of facts as follows:-

"5.1 Mr. Blundell is single, aged 34. He lives as a member of his mother's household. His mother, Annie Moore, acts as his appointee.

5.2 Mr. Blundell was in receipt of supplementary benefit, by reason of incapacity, from February 1984 to February 1985, when he ceased to be entitled to supplementary benefit owing to the acquisition of capital.

5.3 On 20 November 1989 Mrs. Moore requested a claim form A1 in respect of Mr. Blundell to claim income support. The form was issued, and was received back at the Social Security Office, completed on 5 December 1989. The Secretary of State certified that the date of claim was 20 November 1989 (the date when the form was requested), income support was awarded and paid on that date. The only item on the form which could be construed as an indication of why the claim was made at the time was an entry at box 2(i) reading "capital reduced to £2,860.75, Bought the

Council House for that that I live in, paid repairs, adaptations in the house, as I am disabled, Holidays" .. This entry appears to have been struck through in a different colour ink. No request was made by Mrs. Moore at that time to consider backdating an award to an earlier date, nor was any evidence supplied to suggest that such should be considered.

5.4 Correspondence was received from a local authority welfare rights officer in October 1990 in regard to a request for an award of the severe disability premium and an appeal against non-payment of arrears of this premium. That appeal is dealt with in a separate submission. On 6 November 1990 the welfare rights officer was advised by telephone that no arrears of the severe disability premium could be paid for the period from October 1988 to October 1989 as Mr. Blundell was not in receipt of income support during that period. There was still no request from the welfare officer, or the claimant's appointee, to consider backdating the award.

5.5 On 4 October 1991, a letter, unsigned but clearly prepared by the welfare officer on behalf of Mrs. Moore, was received at the Social Security Office, applying for backdating of Mr. Blundell's claim to 5 December 1988, on the grounds that the claimant and appointee had good cause for not claiming earlier. ..

5.6 The adjudication officer accepted that good cause had been shown for not claiming earlier, but decided that the time-limit imposed by regulation 69 of the Social Security (Adjudication) Regulations applied and that no arrears of income support could be paid. Mrs. Moore has appealed against this decision."

The unanimous decision of the appeal tribunal set out at box 3 of their decision dated 10 February 1993 is as follows:-

"Throughout the date of claim was open to be reconsidered by the Tribunal and therefore further evidence should be supplied by the claimant and the Department as to whether or not the claim should be backdated."

In respect of those matters and of the submission of the adjudication officer then involved in these appeals dated 19 April 1993 the submission of the adjudication officer at that stage involved in these appeals dated 4 November 1993 and the further submission made by a letter dated 11 February 1994 of the Solicitor to the Departments of Health and Social Security the claimant through the representatives of his appointee has had the opportunity to comment and I have in the case papers observations by the representatives in respect of the two submissions first above referred to but no observations in respect of the submissions made in the letter dated 11 February 1994.

4. The relevant statutory provisions are referred to in paragraph 2 of the submission dated 19 April 1993 of the adjudication officer then involved in these appeals as follows:-

> "Section 1 of the Social Security Administration Act 1992
>
> Regulations 6(1), 19(1), 19(2), 19(4) and Schedule 4 of the Social Security (Claims and Payments) Regulations 1987."

5. In his helpful address to me at the oral hearing Mr. Cooper handed in a written submission which I have added to the case papers and which is headed with the claimant's name. He dealt with the issues of postponement of the oral hearing and of the appointment. These issues have been dealt with in paragraph 2 above of this decision. The main thrust of Mr. Cooper's argument was that I should follow the decision of a Tribunal of Commissioners being decision CA/126/1989 and the decision of the London Commissioner (Mr. James Skinner) being decision CSB/083/1991. He also referred me to a decision of another London Commissioner (Mr. J. Mesher) being decision CIS/628/1992. Discussion at the oral hearing ranged widely involving the issue of the jurisdiction of the Commissioner, the Welsh laws of Hywel Dda, the Acts of Union of England and Wales being the Acts of 1536 and 1542 (usually known collectively and hereafter as the Act of Union), the Union with Scotland Act 1706, the amending Act of 1707 and the "snail in the bottle case" of Donoghue v. Stevenson [1932] A.C. 562 as well as the differences between the common law of Scotland and the common law of England and Wales, the unitary jurisdiction of the United Kingdom Parliament together with the resolution of appeals in respect of revenue law throughout the United Kingdom.

6. I accept paragraph 5 of the submission of the adjudication officer involved in that submission dated 4 November 1993 which I set out below:-

> "I respectfully submit that the issues involving "back-dating" and the award of a severe disability premium were not dealt with by the tribunal because of the adjournment and that the tribunal did not make a final decision therefore, the above issues are not within the jurisdiction of the Commissioner."

I follow the decisions of a Tribunal of Commissioners being CA/126/1989, the decision of the London Commissioner in CSB/083/1991 and the decision of the London Commissioner being CIS/628/1992 and approve of the guidance there given in paragraph 6 to adjudication officers that is stated shortly that the matter can be dealt with afresh by an appeal tribunal to achieve a final decision. I would add that were I dealing with an appeal in respect of a decision emanating from Scotland (and whether I were so dealing by sitting in England, Wales or Scotland) I would follow the different decisions such as those of the Scots Commissioner Mr. J. Mitchell being decision CSIS/110/91 and Mr. Walker being decision CSIS/118/90. This somewhat schizophrenic approach is I think justified on the reasoning below by the

difference between the law applicable in Scotland and the law applicable in England and Wales. The Commissioner (hereinafter called the British Commissioner) has jurisdiction throughout Great Britain. The British Commissioner has no jurisdiction in the Republic of Ireland which has its own welfare system and welfare law is governed by its own Act being The Social Welfare (Consolidation) Act 1993 of the Republic. The function of the British Commissioner as to appeals is in the Republic carried out by the Irish High Court. Similarly the British Commissioner has no jurisdiction in Northern Ireland which has its own Social Security legislation which though similar is a separate jurisdiction and dealt with by Commissioners in Northern Ireland. The British Commissioner has no jurisdiction in the Isle of Man which has its own Social Security Act of 1982, substantially adopts the common law of England and the Manx High Bailiff acts as the Manx Social Security Commissioner. Finally the British Commissioner has no jurisdiction in the Channel Islands which do not form part of the United Kingdom except for the purposes of the British Nationality Act 1981. They have their own welfare arrangements and the basic law of the Bailwick of Jersey and the Bailwick of Guernsey (which is a separate jurisdiction from Jersey) is pre-1789, French law. The Channel Islands (which are not colonies) consist of two separate Bailwicks, the Bailwick of Jersey, (which is the largest island) and the Bailwick of Guernsey, comprising the Islands of Guernsey (with Herme and Jethou) Alderney and Sark (Alderney and Sark both have a large measure of independence within the Bailwick of Guernsey). There are no formal links between the two Bailwicks. See pages 44 and following of Wade and Bradley Constitutional and Administrative Law 11th Edition. The United Kingdom as a unitary State of four countries i.e. England, Wales, Scotland and Northern Ireland has three distinct legal systems each with its own courts and legal profession, namely England and Wales, Scotland, and Northern Ireland. The Royal Commission on the constitution 1969/73 (hereinafter called the Kilbrandon Commission) at paragraphs 57 to 59 sets out the position as follows:-

" 57. The United Kingdom is a unitary state in economic as well as in political terms. It has, for example, a single currency and a banking system responsible to a single central bank. Its people enjoy a right of freedom of movement of trade, labour and capital and of settlement and establishment anywhere within the Kingdom (although there is an exception in Northern Ireland in a restriction on employment imposed in the interests of Northern Ireland workers). Similarly all citizens are free to participate in trading and other concessions obtained by the United Kingdom abroad.

58. These are things that are held in common. But there are others that are not. Not all the people of the United Kingdom live under the same system of law, since the separate Scottish legal system which was in existence in 1707 was preserved by the Union settlement. Sometimes it is this separate legal system alone which causes the United Kingdom Parliament to pass special Scottish Acts or

to include special Scottish provisions in General Acts. In addition, the contents of the laws to which people are subject sometimes differs. The particular circumstances of Scotland, producing a requirement for different policies, may lead to separate Scottish legislation. Similarly, special measures applying only to Wales, concerning the Welsh language, for example, are on occasion separately enacted. The contents of the law diverge still more in Northern Ireland, which for a period of over fifty years had its own Parliament, with not only its own limited powers of taxation but considerable freedom to differ in some kinds of social legislation. In comparison with the whole body of the law, however, these exceptions are of form and content, even including the variations in Northern Ireland, are relatively minor. For the greater part, the people of the United Kingdom live under the same law. [My underlining.]

59. There are differences also in the relationship between the State and the Church. The Church of England is established in England, but both the Church of Wales and the Church of Ireland, which like the Church of England, form part of the Anglican communion, have been dis-established. In Scotland, the established church at the time of the Union was the Presbyterian Church of Scotland, and it has so remained. Thus there are established churches in England and Scotland, but not in Wales or Northern Ireland."

As indicated above the jurisdiction of the British Commissioner is confined to Great Britain. I turn therefore to the common law of England which was created by the Norman itinerant Judges out of the customs found in the shires. By about 1250 when Bracton wrote his Treatise on the Laws and Customs of England customary rules were unified and the common law became complete as the universal custom of the realm. In addition English law developed the principles of equity as a supplement on the common law filling in the gaps and making the English system more complete. This system started to be formalised by Lord Nottingham (Lord Chancellor 1673 to 1682) and was further developed by Lord Eldon (Lord Chancellor 1801 to 1806 and 1807 to 1827) making it nearly as rigid as the common law. Welsh law was customary law contained in such compilations as those of Hywel Dda (909-950 A.D.) to be found in 12th Century manuscripts and set out in volumes 1 and 2 of Ancient Laws and Institutes of Wales by command of his late Majesty King William IV by the Commissioners of Public Records. Welsh customary law as contained in the 12th Century manuscripts is much in advance of anything produced whether by the common law of England or by later statute until so far as the status of women was concerned at least the late 19th century with the introduction of the Married Womens Property Act and so far as the status of ilegitimate children is concerned is an advance even on the Family Reform Act of 1969. As to the status of women the Welsh customary laws of Hywel Dda would have given for example short shrift to the trust restriction known as "restraint upon anticipation" applicable to married women. It

will be recollected that it took until 1949 with the introduction of the Married Woman's (Restraint Upon Anticipation) Act 1949 for a married woman to deal freely with her interest under trust stated to be restrained from anticipation.

English law was to an extent introduced to Wales by the Statute of Rhuddlan 1284 and by the Act of Union of 1536 which purported to replace Welsh law referred to in the preamble to the 1536 Act as "sinster usages and customs differing from" English law and repealing the jurisdiction and laws of some one hundred and thirty odd semi-independent Marcher Lordships, together with the Principalities of North and South Wales - the subject matter of the earlier 1284 Act forming only part of what is now Wales. Although Offa's Dyke effectively formed the boundary between England and Wales and has done so for a millenium it was only by the Local Government Act 1972 which came into force on 1 April 1974 that the boundary between England and Wales was finally settled. The Act of Union is somewhat unusually drafted, whether they achieved their object may be open to question. At least one Marcher Lordship would appear not to have been referred to in the legislation. The legislation variously refer to "the Domynyon Principalitie and country of Wales" and seeks in a somewhat piecemeal method to replace Welsh customary law by the common law of England in the different Marcher Lordships. No reference is made to the Statute of Ruddlan, 1284 which refers to the administration of justice "in such form and fashion as justice is ministered and used to the Kinges subjects within the three shires of North Wales". This can only be an inferential reference to the 1284, Act under which considerable aspects of Welsh law survived. The two Tudor Acts are referred to in the Statute Law Revision Act 1948 as The Laws in Wales Acts of 1535 and 1542 but are more usually referred to as the Act of Union. They are variously referred to as of 1535 and 1536 and of 1542 and 1543. This is no doubt explained by the previous practice of numbering acts not by reference to the calendar year but by the session as now provided by the Acts of Parliament Numbering and Citation Act 1962, section 1.

The Act of Union with Scotland of 1706 refers only to England (and of course Scotland). It was not until the legislation usually referred to as the Wales and Berwick Act 1746 that it was provided that where the expression "England" was used in an Act of Parliament this should be taken to include the dominion of Wales and the town of Berwick on Tweed. This is of course not now the case since the Welsh Language Act 1967 provides that references to England in Acts thereafter should not include the dominion of Wales. Later legislation in regard to the Act of Union was also of a somewhat muddled nature. The Statute Law Revision Act 1887 repealed obsolete laws. Amongst these was listed clause 20 of the Act of Union of 1536. The intention was to repeal the so-called "language clause" of the 1536 Act and as late as 1937 the then Home Secretary (Sir John Simon) in a Parliamentary answer stated that this had been done in the Act of 1887. However the original Act of Union 1536 had no clause numbers and they were only numbered at a later stage. The legislature repealed the wrong section as the "language clause"

in the later numbered Act was clause 17. The legislature actually repealed clause 20 which provided for the setting up of a Commission to divide the newly created shires of 1536 into hundreds. Be that as it may it is now perhaps too late to deny the validity of the Tudor Acts and the position of Wales under the 1706 Act and accepting the validity of the Tudor Acts, English common law applies by express statute to Wales. The former separate jurisdiction of the Courts of Great Sessions applicable to Wales was terminated in 1830 from which date the English Superior Courts had jurisdiction throughout Wales. The position is dealt with in "The Welsh language, English law, and Tudor legislation" by P.R. Roberts, lecturer in the University of Kent at Canterbury reported in the "Transactions of the Honourable Society of Cymrodorion 1989. Although by statute English common law can now be accepted as applicable throughout Wales there are a number of statutory provisions expressly applying to Wales. Immediately after the union these were rare see for example the Welsh Bible and Prayer Book Act 1563 (which provided for the translation of the Bible and the Book of Common prayer into Welsh). However since the late 19th Century there has been an increasing volume of separate legislation see for example the Welsh Sunday Closing Act 1881 and the Coal Mines Regulations Act 1887 stipulating a knowledge of Welsh be a necessary qualification for the appointment of inspectors of mines. The Companies Act 1976 empowered a company to have its memorandum and Articles of Association in Welsh. There has been an increasing volume of separate legislation (see the Hughes-Parry Commission Report Legal Status Of The Welsh Language (CMND 2785)) including the introduction of the Welsh Language Act 1967 and now of course the more stringent provisions towards equality of the Welsh Language Act 1993. All of which may necessitate separate consideration of issues arising in Wales. The Welsh Language Act 1993 does not, as yet, go as far as the provisions in respect of Irish Gaelic. All legislation in the Republic of Ireland is in both Irish Gaelic and English - the Irish Gaelic text being the primary one. Scots Gaelic has no such legal status (spoken as it is by some 70 or so thousand people. However the Counsel of the Western Isles accords equal validity to Scots Gaelic and English. Of the British Commissioners, 3 are based in Scotland the remainder in England and a Commissioner visits Wales to sit at Cardiff in accordance with the statement made by the then Lord Chancellor in the debate in the House of Lords on 22 July 1986 as then in accordance with the Welsh Language Act 1967 (now see the more stringent requirement under the Welsh Language Act 1993). Scotland under the Act of Union of 1706 retained its laws and court jurisdiction (see article xviii and article xix). The British Commissioner wherever he sits has jurisdiction in England, Scotland and Wales. Gloag and Henderson's Introduction to the Law of Scotland, 9th Edition at paragraph 1.1 states:-

> "Enacted law. The law of Scotland consists partly of enacted law, which has the authority of some body having legislative powers and partly of common law, which is recognised by the Courts as binding on some ground other than express enactment."

At paragraph 1.21 the Gloag textbook states:-

> "Sources of common law. Rules of law which are not referable to any legislative enactment constitute the common law. It is spoken of by Lord Stair as "our ancient and immemorial custom," in which he includes the law of succession, and the law, in so far as not affected by statute of feudal conveyancing. The origin of these customs is not in every case ascertainable; but it is clear that the common law of Scotland is in considerable measure derived from the civil law, to a less extent, but in important particulars, from the common law. Though there was probably no period at which the civil law was accounted part of the law of Scotland, yet that law was explained and in some respects amended by the Dutch and French commentators of the 16th and 17th Centuries, is the basis of the Scots Law of Contract and of Property, apart from feudal conveyancing. .."

From the above it appears that Scots law contains a measure of civil law. Further the separate body of principles of equity for English law do not form a separate body in Scots law, Stair Memorial Encyclopedia of the Laws of Scotland Volume 22, para 399 states:-

> "The historical place of equity in the development in Scots law is no mere reflection of the English position. No separate equity court appears in Scotland. The Scottish commentators were given to searching for parallels to contemporary Scottish arrangements in the texts of Roman law. "Equity" does not obviously exist as a distinct branch of law at the present day. Nevertheless, the status of equity as a source of law is "now always much the same in Scotland and England".

The difference between Scots and English law was referred to by Lord Redesdale in <u>French v. Woolston 1 Sch & Lef 152</u> from which it will be seen that Scots Law has had a considerable effect on the development of English law. Lord Redesdale said in reference to Lord Mansfield [a Scotsman and Lord Chief Justice of the Court of King's Bench 1756 to 1788):-

> "Lord Mansfield had in his mind prejudices derived from his familiarity with the Scots Law, where law and equity are administered in the same courts, and where the distinction between them which subsists with us is not known .."

As referred to above Welsh law was in the preamble to the Act of Union 1535 referred to as "sinster usages and customs" so Scots law has not escaped castigation at the hands of Lord Maugham (sometime Lord Chancellor) who referred to Scots law as "those interesting relics of barbarism, tempered by a few importations from Rome, known to the world as Scots law", see Evershed LJ (as he then was) "Equity after Fusion; Federal or Confederate" [1948] Journal of the Society of Public Teachers of Law 171."
Scots law and the Scots legal system is dealt with in paragraphs 74 to 76 inclusive of the Kilbrandon report and I set

out paragraph 74 immediately below which illustrates the difference between the law of Scotland and the law applicable in England and Wales:-

> " 74. For a considerable period in the Middle Ages the Scottish legal system was based on Anglo-Norman law, but the Wars of Independence caused a complete break, after which little trace of English law remained. Scottish law has turned to the Continent for ideas and training and Roman law thus acquired a dominant influence in Scottish legal thinking. By the time of the Union a well defined and independent system of Scottish law had been established. This was recognised in the Union settlement, which provided for the preservation of a separate code of Scots law and the Scottish judiciary and legal system. Under Article XIX the two highest Scottish Courts - the Court of Session and the High Court of Justiciary - were to continue and were not to be subject to the jurisdiction of the English Courts. These bodies have remained respectively the Supreme Civil and Criminal Courts in Scotland while beneath them there is a completely separate Scottish system of jurisdiction and law courts, with a judiciary, advocates and solicitors, none of whom are interchangeable with their English counterparts. The provisions of the Article did not explicitly refer to appeal to the House of Lords. The High Court of Judiciary has remained the final court of appeal in Scottish criminal cases; but before the Union the Court of Session had been subordinate to the Scottish Privy Council as "the Supreme Judges of the Kingdom", and it soon became established that in Scottish civil cases the House of Lords had appellate jurisdiction. It has for many years been the custom to appoint two of the Lords of Appeal in Ordinary from the Scottish Bench."

As indicated above the British Commissioner has jurisdiction throughout Great Britain and whether dealing with a case emanating from Scotland or England and Wales he would normally seek to construe the relevant law to provide uniformity. A British Commissioner dealing with a case from England or Wales cannot in my view therefore regard Scots law as foreign - he has jurisdiction in respect of it. He is in a different position to that of the Chancery Judge Eve J. in the Revenue case of Re Hartland, Banks v. Hartland [1911] 1 Chancery 459 as that Judge had only jurisdiction in England and Wales. Though I would normally unhesitatingly follow a decision of for example the Scots Court of Session as I have done frequently in respect of for example the decision of the Scots Court of Session in "Appeal to the Court of Session under Social Security Act 1980, Section 14 by Delia Murdoch against a decision of the Social Security Commissioner" where there is or may be an inherent difference between the basic laws on the one hand of England and Wales and Scotland on the other I would not regard myself as bound by a decision of the Scots court. A single British Commissioner should normally follow a decision of a Tribunal of Commissioners unless there are compelling reasons why he should not. He should

normally follow the decision of another single Commissioner see decisions R(G)3/62 and R(I)23/63. I do not follow the tribunal decision in CA/16/1989 on those grounds here but on the grounds of the inherent difference between the two parts of my jurisdiction in Great Britain. The difference between the law of England and Wales on the one hand, and that of Scotland on the other is referred to by the Commissioner (Mr. W. Walker) in CSIS/118/90 at paragraph 16 thereof which I set out in full as follows:

> "Next is the attitude of the law of England to matters other than final decisions being taken to appeal. The trouble, as it seems to me, is that the Commissioner's jurisdiction is a British one and if the attitude or philosophy of the law of England is to be taken into account then so also does Scottish jurisprudence which is not quite the same on this issue. That this is a statutory jurisdiction has persuaded me that the attitude of different courts for their own reasons and in their own jurisdiction does not really help. The statutory jurisdiction must, in my judgment, be exercised upon the terms in which it has been defined by Parliament."

Where "the attitude or philosophy of the law of England is to be taken into account .. as so .. Scottish jurisprudence .." and there is a conflict between the two for myself I cannot see the conflict being resolved other than by the House of Lords. It would appear that despite the invitations on both sides of the border no case has been taken either to the English Court of Appeal or the Scots Court of Session. It would certainly seem a complex and costly way of resolving such a dispute and the use of a sledgehammer to crack a nut when the matter could be dealt with more simply as indicated in the decision being decision CIS/628/1992 by simply going back for a resolution of all issues finally to an appeal tribunal. Though in the instant case the resolution of the differences between the common law of Scotland on the one hand and the common law of England and (as statutorily applicable to) Wales on the other might not result in a substantial problem in the British Commissioner's jurisdiction in Great Britain it is apparent that the British Commissioner has to consider two separate common law jurisdictions and at some stage more fundamental problems of conflict might arise. The distinction between English and Scots law in regard to the issue of an appeal from a preliminary decision appear to be pinpointed in the "snail in the bottle" case of Donoghue v. Stevenson [1932] A.C. 562. I refer to Miscellany at Law by R.E. Megarry (sometime Vice Chancellor of the Chancery Division):-

> "Not even the most famous cases are always quite what they seem. MacKinnon LJ once extra-judicially said of Donoghue v. Stevenson, the "snail in the gingerbear bottle" case "to be quite candid, I detest that snail .." When the law had been settled by the House of Lords, the case went back to Edinburgh to be tried on the facts and at that trial it was found that there never was a snail in the bottle at all! That intruding gastropod was as much a legal fiction as casual ejactor. And Jenkins LJ has spoken judicially to the same effect. However,

whether this is so is by no means clear. Inquiry from the solicitors who were engaged in the case reveals that after the proceedings in the House of Lords, the action was compromised, some payment being made to the pursuer. Proceedings as to costs some 6 months after the decision in the House of Lords had been reported, but they appear to be of little help on this point, at all events to a mere southron. What does seem to be plain is that the case never went to trial and that there never was any judicial determination of snail or no snail.."

To my mind the snail case pinpoints the difference between Scots and English law on the issue of appeal from a preliminary decision. Had the snail in the bottle been an issue emanating in a court in England or Wales on the facts as referred to immediately above there would probably never have been a decision of the House of Lords on this aspect of the law of negligence at least not in that case. Turning to the analogy of Revenue law the provisions of the Taxes Acts are aimed at uniformity throughout the United Kingdom (as distinct from the British Commissioners jurisdiction in social security legislation in respect only of Great Britain). For Revenue law purposes although in matters other than Revenue law the law of Scotland is foreign as far as the Courts of England are concerned for Revenue purposes there is at least a strong presumption that the law applicable is the same. This results from the facts that the law is purely statutory. In I.R. COMRS v. City of Glasgow Police Athletic Association [1953] 1 All E.R. 747 it was decided that in considering the exemption of Charities, the Scots Courts must follow the English law relating to charities. In that case the House of Lords held that the English Revenue law must be regarded as part of the law of Scotland and not as foreign law and that therefore it is the duty of the Scots Court of Session in such cases to administer that law and to determine questions of law in regard to it and of course English courts must be guided by Scots decisions. This of course must mean that short of a decision of the House of Lords there can be no ultimate uniformity. Certainly in revenue matters the Court of Appeal in England and the Court of Session in Scotland have taken differing views see for example Parsons v. B.N.M. Laboratories Ltd [1963] 2All E.R.658 and Stewart v. Glentagart Ltd 1963 S.C. 300.

7. In accordance with my jurisdiction my decision is as set out in paragraph 1 of this decision.

8. Accordingly I have no jurisdiction to consider this appeal emanating as it does from England.

(Signed) J.B. Morcom
Commissioner

(Date) 18 October 1994