During the late 1970s and early 1980s, the House of Lords under the determined leadership of Lord Diplock developed a distinction, wholly new to those who were brought up on Dicey, between ‘public law’ and ‘private law’. The distinction first appeared in a Scottish case in the speech of Lord Fraser of Tullybelton in Brown v Hamilton District Council where judgment was delivered at the same time as two cases in which the distinction was used to explain the nature and scope of judicial review in England: O’Reilly v Mackman and Cocks v Thanet District Council. Soon afterwards Lord Wilberforce felt it necessary to warn against using ‘public law’ and private law’ as other than ‘convenient expressions for descriptive purposes’, and the soundness of the distinction has been doubted in Scotland, notably by Professor AW Bradley and Lord Clyde.

Lord Fraser’s speech in Brown was the catalyst for a new approach to administrative law in Scotland. It led to the setting up of the Dunpark Committee on the procedure for judicial review of administrative action nearly all of whose recommendations were (unusually) implemented without delay. This led in turn to a new growth area in the work of the Court of Session, Scotland’s supreme civil court.
No tribute to a great Irishman would be complete without a drop of history and a dash of reminiscence, so the editor's suggestion that I should write about Scots administrative law gives me the excuse, as quondam senior counsel for the appellants in *Brown*, to explain how the public/private law distinction came to appear in it. The story also serves to illustrate a truth well known to advocates, forgotten by judges and hidden from academic commentators — that the law is created more often by accident of circumstances than by purity of doctrine.

It is difficult now, given the volume of cases going through the courts in England and Scotland, to appreciate the relative novelty in historical terms of administrative law in its new form. A subject called 'administrative law' had, it is true, been taught in the Scottish universities for many years but the content of the course is reflected in the definition given in an encyclopaedia of Scots law published in 1930:

"[Administrative law] is a term used by the Scottish University Commissioners, and borrowed from Continental usage. It may be held to include the great body of statutory law, dealing with police, burgh, county, and local government, poor, public health, education and similar subjects. Perhaps the details of taxation, stamps, excise, and customs fall under this head."

Only those students who struggled to understand Professor JDB Mitchell's enigmatic expositions of constitutional law and, later, Community law were encouraged towards less arid pastures. His concern was both moral and practical, and deserves to be restated:

"We lack a real system of public law, and as a result both individuals (corporate or human) and the state suffer. The individuals are left increasingly to rely on benevolent discretion and the state is impeded, since our reliance on the cumulation of procedural safeguards has slowed the machinery of society to an unacceptably extent. . . . The real issue is . . . one of policing administrative morality."

In the courts, Lord Reid was the first to recognize that the problem was one of substance as well as procedure:

"We do not have a developed system of administrative law — perhaps because until fairly recently we did not need it. So it is not surprising that in dealing with new types of cases the courts have had to grope for solutions, and have found that old powers, rules and procedures are largely inapplicable to cases which they were never designed or intended to deal with."

But there is little opportunity to attack the substance if the procedures are arthritic and Scottish procedure was in need of replacement surgery. The occasion for change proved to be the Housing (Homeless Persons) Act 1977. By the mid-1970s the problem of homelessness in Britain had become a matter of acute public concern but, for a variety of reasons, government was disinclined to legislate. So the task fell to the Member of Parliament for the Isle of Wight, Stephen Ross, who was successful in the curious lottery by which backbench members are allowed to initiate legislation in the House of Commons. As luck would have it, the relevant government department already had a draft Bill in a bottom drawer. This was brought out, dusted down and given its second reading in the House of Commons on 18 February 1973 as the Housing (Homeless Persons) Bill.

The terms of the Bill required local housing authorities to make accommodation available to those who fulfilled three conditions: that they were 'homeless', or 'threatened with homelessness'; that they had a 'priority need'; and that they had not become homeless or threatened with homelessness 'intentionally'. Responsibility for determining whether these three criteria were met was placed upon the housing authority. There was no provision for review of, or appeal against, the authority's decision — a classic example of leaving the individual to rely on benevolent discretion.

Introducing his Bill, Mr Ross remarked that:

"There is a lot of feeling that there should perhaps be an appeal procedure against a refusal by a housing authority [to provide accommodation for a homeless person], but to date nobody has come forward with a satisfactory solution to that problem."

A proposal to allow for appeal to a special tribunal was subsequently defeated in Committee.

When the Bill reached the House of Lords later the same year, Lord Gifford, a crusading barrister, moved an amendment to provide, *inter alia*, that:

"A county court in England and Wales, and the sheriff in Scotland, shall have jurisdiction . . . to determine any question

(a) as to whether [the applicant] is homeless or threatened with homelessness

(b) as to whether [he] has a priority need . . ."

Introducing his amendment, Lord Gifford warned the House that:

"Your Lordships can, I think, be sure that things are going to go wrong . . . What worries me over this Bill is that we are imposing a duty on authorities to give specific assistance to specific classes of people, but there is no provision at all for enforcing that duty. What is one to say to a person who is wrongly refused accommodation? Should one say: 'Complain to the Ombudsman'? — surely a useless remedy as far as the individual is concerned; 'Make an application to the High Court for an order of mandamus' which is equally time-consuming and useless in resolving the situation; 'Make a fuss in the public press'? That often happens already to no effect."

Unfortunately for those who were homeless but (as often happens) fortunately for the development of the law, Lord Gifford's predictions were proved right but his amendment was unsuccessful. The Bill reached the statute book in a form which imposed duties on local authorities without saying whether, or if so how, the performance of those duties might be subject to judicial control. Section 3 of the Act did, however, require local authorities to give notice of...

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10 Hansard vol. HC 926, cols. 902–3.
11 Hansard vol. HC 934, col. 1647.
12 *Hansard* vol. HC 786 cols. 700–703.
their decisions and of the reasons for them—a requirement more readily recognizable nowadays than it was then as the hallmark of an act susceptible to judicial review.

Quite soon after the Act came into force disappointed applicants began to take their cases to court. In England they tried both the High Court and the county courts. In the High Court the route to judicial review had been simplified by the reform in 1977 of Order 53 of the Rules of the Supreme Court and subsequently by Section 31 of the Supreme Court Act 1981. But there were those who thought that the High Court was not the most suitable place to determine whether in individual cases up and down the country, local authorities were justified in deciding that applicants were or were not ‘homeless’, ‘threatened with homelessness’ or ‘intentionally homeless’. Although the county courts did not have jurisdiction to conduct judicial review as such, they could award damages for breach of statutory duty and the Court of Appeal held that a decision on homelessness could be challenged in a common law action if damages in the county court. In Scotland, where prerogative writs and Chancery orders are unknown, the jurisdictional position ought to have been clearer than it was in England.

There was an extensive armoury of suitable forms of action: suspension (broadly equivalent to prohibition), interdict (injunction), declarator (declaration), the petition 16 to require performance of a statutory duty (mandamus), a parallel form of action 17 to require performance of other civil obligations and, last but not least, the action of reduction by which an act having legal effect is declared null and deprived of effect. Reduction (recognizable to Community lawyers as the action for annulment) seems to have no precise equivalent in England though it has been said to be ‘akin to certiorari’. 18 Advocation, the true parallel to certiorari, though still available in criminal procedure, was abolished in civil cases in 1868 and replaced by ‘appeal’ to the Court of Session as part of the process by which a conventional hierarchical relationship was established between the Court of Session and the lower courts, especially the sheriff court.

The sheriff courts had developed from feudal origins to become local courts of general jurisdiction in both civil and criminal matters. The Court of Session was created in 1532 by King James V as a supreme, but functionally unrelated, civil court of general jurisdiction. The Court of Session was not an appellate court but over the years, in rather the same manner as the Court of King’s Bench, it developed a ‘supervisory jurisdiction’ to fill this gap in the Scottish judicial system. 19 The reform of 1868 was valuable from the point of view of judicial architecture but, as it turned out, it deprived the system of a useful procedural tool.

The Scottish system differed most notably from the English in that the same forms of process could be used in actions against public authorities and against private individuals. Thus the action of reduction was equally available to set aside an unlawful decision of a public body or the contested will of a private individual. Scotland therefore avoided the jurisdictional complications left over from the distinctions between courts of law and courts of equity and between the prerogative writs and other forms of process. Differences in the respective jurisdictions of the Court of Session and the sheriff courts had been eroded by giving the sheriff court concurrent jurisdiction in fields previously reserved to the Court of Session, whose remaining exclusive jurisdiction was largely a ragbag of points of purely historical interest. However, the action of reduction was available only in the Court of Session, although the historical and legal significance of this was not apparent in the early stages of Brown.

The defect in Scottish procedure to which the Homeless Persons Act drew attention was that, despite the range of remedies available, there was no quick way of testing the lawfulness of decisions such as those of housing authorities under the Act. Even in cases where special procedures for judicial review had been institutionalized by statute—compulsory purchase orders, special roads orders and town and country planning decisions 20—the procedure of review was cumbersome and could take many months.

Onto this infertile ground dropped, in June 1979, the case of the Brown family (father, mother and two small children) who had lived in a council house in Hamilton of which the mother was the registered tenant. The rent was not paid and the family was evicted. The father then applied to the council for accommodation as a ‘homeless person’ under the Act. This was refused on the grounds that he was ‘intentionally homeless’—an eminently arguable legal point.

An action was raised in the local sheriff court seeking declarator that Mr Brown was a homeless person with a prior need of accommodation and an order requiring the council to provide him with it. The council challenged the competency of the action on the ground that only the Court of Session could grant such remedies. The sheriff reviewed the authorities cited to him (drawn without distinction from ‘public law’ and ‘private law’) and concluded that there was no reason why the action should not proceed in the sheriff court, remarking that it was in everyone’s interest that it should do so. 21

The local authority appealed to the Court of Session and the case came before the Second Division consisting of the Lord Justice-Clerk (Lord Wheatley), Lord Kissen and Lord Dunpark. By this stage a queue of homeless persons cases was pending before the courts and the Lord Justice-Clerk did little to conceal his determination that they should not come to the Court of Session. Hardly, at the best of times, a judge before whom it was easy to plead, 22


‘Every day we see signs of the advancing tide. This time it is two young families from Italy. They had been told of the European Economic Community. Naturally enough, because it all stemmed from a Treaty made at Rome. They had heard that there was freedom of movement for workers within the Community. They could come to England without let or hindrance. They may have heard, too, that England is a good place for workers. In Italy the word may have got round that in England there are all sorts of benefits to be had whenever you are unemployed. And best of all they will look after you if you have nowhere to live. There is a special new statute there which imposes on the local authority a duty to house you. They must either find you a house or put you up in a guest house. So let’s go to England,’ they say.

‘That’s the place for us.’

14 Under section 91 of the Court of Session Act 1868.

15 For deed of factum praestantis or specific implement.

16 R v East Berkshire Health Authority, ex parte Walsh [1985] QB 152, per Sir John Donaldson MR at p. 162.

17 Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947, first schedule, paras 15 and 16; Special Roads Act 1949, first schedule, paras 14–16; Town and Country Planning (Scotland) Act 1972, sections 232 and 233.

1980 SLT (Sh.Ct.) 81.
Lord Wheatley was particularly prickly when faced with an argument he did not want to hear. For this and other reasons the appeal turned into a forensic assault course which took more than 18 months to complete. After the first hearing the parties were told to amend their pleadings in order to amplify the facts. This gave the pursuer the opportunity to reframe his claim as a ‘declarator of nullity’—a device (ultimately unsuccessful) intended to reach the same result as reduction but in a form that was competent in the sheriff court. He also added a claim for damages.

There followed a second hearing on the new pleadings. Three weeks later, before judgment was delivered, Lord Kissen died suddenly. All the signs were that the court was split, Lord Kissen tending to agree with the Lord Justice-Clerk on policy but with Lord Dunpark on the law. Only after a third hearing was the case finally decided with Lord Robertson, who replaced Lord Kissen, agreeing with the Lord Justice-Clerk and Lord Dunpark dissenting.

The argument in the Court of Session turned largely on the interpretation of a passage in the opinion of Lord President John Inglis in Forbes v Underwood. Inglis was the towering figure of Scots law in the later nineteenth century and his dicta have at least the authority of the House of Lords, if not of holy writ. His dominance of the Scottish legal scene can be gauged from the fact that he had already been Dean of Faculty (the elected leader of the Bar) for five years when he defended Madeleine Smith on the charge of poisoning her lover in 1857 and that he held in succession all the great legal offices in Scotland until he died in office in 1891 after 33 years as a judge and 24 as Lord Justice-General and Lord President.

In Forbes, the question was whether a sheriff had jurisdiction to compel one of two arbiters (arbitrators) who could not agree, to concur in nominating a ‘oversman’ to resolve the difference between them. In the course of his opinion, Lord President Inglis said:

The question whether the sheriff has jurisdiction in such a case is, I think, one of very great importance. The position of an arbiter is very much like that of a judge in many respects, and there is no doubt whatever that whenever an inferior judge, no matter of what kind, fails to perform his duty, or transgresses his duty, either by going beyond his jurisdiction, or by failing to exercise his jurisdiction when called upon to do so by a party entitled to come before him, there is a remedy in this court, . . . The same rule applies to a variety of other public officers, such as statutory trustees and commissioners, who are under an obligation to exercise their functions for the benefit of the parties for whose benefit those functions are entrusted to them. . . . Now all this belongs to the Court of Session as the supreme civil court of this country in the exercise of what is called, very properly, its supereminent jurisdiction. It is not of very much consequence to determine whether it is in the exercise of its high equitable jurisdiction, or in the performance of what is sometimes called its noble offician. But of one thing there can be no doubt, that in making such orders

[Assuming] that the decision cannot be so classified, the question remains whether it was a decision which may completely be reviewed and quashed in the sheriff court . . . Every wrong must have a remedy. Where an applicant for housing accommodation is deprived of his rights under this Act by a decision of a housing authority which is fundamentally null, or so obviously wrong that no reasonable housing authority could have reached it on the facts before it, he is entitled to apply to the courts for enforcement of his rights. As the Act has failed to provide a remedy for him, his only recourse is to the equitable jurisdiction of the courts. . . . I find that the sheriff has no jurisdiction to review and quash decisions of housing authorities, purporting to act in pursuance of this Act, on the ground of fundamental nullity. That is the sole prerogative of the Court of Session in the exercise of its supereminent jurisdiction by providing a remedy where no other exists.
Lord Dunlop's dissent opened the way to an appeal to the House of Lords. A problem that faces the Scottish advocate in the House of Lords is that he knows the judges less well than those at home. Usually, though not always, the two Scots law lords sit in Scottish appeals but the quirks and predilections of the others are frequently known, if at all, from anecdotal evidence only. The safe course is to prepare every possible line of argument and see which of them runs.

Two particular lines of research suggested themselves. The first was to find out more of the background to the dictum of Lord President Inglis in order to prove that it did not apply only to judicial or quasi-judicial acts. The other was to read the recent speeches of Lord Diplock since it was a fairly safe bet, given the subject matter, that he would preside.

The first line of research enabled us to date, almost to the day, the beginning of administrative law in Scotland. One of the great judges of the eighteenth century was Patrick Grant, Lord Elchies, who made a Collection of Decisions. His object was admirable: as his editor puts it, it was 'to record with the utmost brevity the principle of law decided by the court, and his great legal powers are shown in the singular ability with which all unnecessary circumstances are rejected, and those alone preserved which entered materially into the decision'. (Oh for an hour of Elchies!) He also made notes for the instruction of his son in which he 'preserved his own view of the case and those of the leading judges who differed from him in opinion; and the votes of the court'. His editor remarks that 'In no instances are the Notes more valuable than in those cases where general questions that had been argued before the court, were either compromised or decided upon other grounds'.

On 8 February 1751, Elchies records that the court heard the case of Sutherland of Swinze concerning the enrolment of landowners with a right to vote in parliamentary elections. The first question was whether those responsible for enrolment, the Commissioners of Supply, had duly taken the oath and were qualified to act. The second was whether their decision not to enrol the pursuer was 'iniquitious'. The defence on the second point was that 'These Commissioners are Commissioners of Parliament, and none of their proceedings can be reviewed by the courts of law'. Elchies says:

We were very unwilling to determine this last point, because of difficulty, and likewise of manifold inconveniences on both sides, therefore we determined the first, and found these Commissioners not capable to act, and dismissed the complaint.

Four days later, on 12 February 1751, in the case of Gordon, Elchies records that:

we were forced to determine the question that we so carefully avoided on the 8th in Sutherland of Swinze's case, viz. the objection to our jurisdiction or powers of revising or altering the proceedings and sentences of the Commissioners of Supply.

The court, with Elchies himself in a minority of one, asserted its jurisdiction and struck down the decision of the Commissioners. But the birth of Scots administrative law seems to have been attended with some confusion:

The President who was of the same opinion with me could not vote having declared himself - and Justice-Clerk was of opinion of the [majority] but did not vote because he did not hear the debate. Pro were Minto, Drummore, Haining, Strichen, She-walten but Muckle was non liquet [he declined to vote], and I hardly knew Dun's opinion, who was in the chair.

Study of the old reports showed that, already by the early nineteenth century, the Court of Session had defined the scope of its supervisory jurisdiction in terms which, as summarized in Lord Ivory's notes on Erskine's Institute, Lord Diplock described as at the hearing as 'remarkably modern':

The privilege of appeal to the supreme Court not being expressly prohibited, an exclusion of its jurisdiction is not to be presumed. Even when a final and conclusive jurisdiction is conferred in the broadest terms, still if the inferior court exceed its powers, or refuse to act, or otherwise proceed in a way inconsistent with and not recognized by the Statute, the Court of Session may competently review the proceedings and give redress. Upon the same principle, where a particular jurisdiction is appointed under a canal, or road, or other local act, to determine all questions that may arise in carrying such act into execution; if the statute trustees do not follow the terms of the act, or exceed the powers thereby given, the party aggrieved is not limited to the statutory or local jurisdiction, but may at once apply for his redress in the Court of Session.

Research also showed that the 'statutory trustees or commissioners' to whom Lord President Inglis referred in Forbes were none other than the statutory ancestors of the modern local authorities. The acts submitted to judicial review in many of the older cases would certainly be categorized nowadays as 'administrative' or 'executive' rather than 'judicial' or 'quasi-judicial'. Indeed, once the historical context was understood, the cases proved a fortiori that such administrative or executive acts could be reviewed only in the Court of Session, being the only Court with power to grant a remedy where no other exists.

(Why then do Ivory's notes, Forbes and other authorities persistently refer to the authors of such acts as 'inferior judges', 'inferior courts' and 'inferior jurisdictions'? Initially at any rate, the reason seems to be that many local administrative or executive functions were performed by justices of the peace and sheriffs. The dividing line between the executive and the judicial was not clearly defined, and those who created the Scottish system of local government paid scant regard to Montesquieu. Later, perhaps, the judges of the Court of Session may have thought it prudent to maintain the fiction that in exercising administrative law in Scotland, unlike England, an appeal to the House of Lords is available without leave against a non-final decision of the Court of Session and against a non-final decision where there has been a dissent in the Inner House. It is interesting to speculate whether Donoghue v Stevenson would ever have reached the House of Lords if leave to appeal had been required. The case was disposed of very cursorily in the Court of Session - see the procedural history at 1932 SC (HL) p. 33.

In Scotland, unlike England, an appeal to the House of Lords is available without leave against a non-final decision of the Court of Session and against a non-final decision where there has been a dissent in the Inner House. It is interesting to speculate whether Donoghue v Stevenson would ever have reached the House of Lords if leave to appeal had been required. The case was disposed of very cursorily in the Court of Session - see the procedural history at 1932 SC (HL) p. 33.


Sutherland of Swinze v Sutherland of Langwell M. 2436, Elchies no 52.


Erskine's Institute of the Law of Scotland, Nicholson's edition (1871), I.ii.17, Ivory's footnote 15. (This citation gave rise to the most recondite question ever put to the author as counsel. Lord Fraser asked: 'Mr Edward, can you remind me of the date of Lord Ivory's notes on Erskine?')

The answer regrettably was No, so proving that counsel can never do too much homework before appearing in the House of Lords.)

Lord Fraser of Tullibeleon in Brown, 1963 SC (HL) at p. 43. (An intrusive negative confuses the report of the argument on this point towards the foot of page 38.)
The hearing in the House of Lords turned out to be another forensic assault course since Parliament was in recess and the hearing was in the Lords' Chamber with counsel appearing in full-bottomed wigs at the Bar of the House. On such occasions a rostrum is erected just inside the gates to the Chamber with just enough space for counsel addressing the House to stand at a small lectern (looking down at the judges) and his opponent to sit perched on a small upright chair with his notebook on his knees. Juniors and instructing solicitors sit immediately behind and below, so the speaker must be careful not to step backwards. In Brown, senior counsel for the respondents, a former Olympic sprinter, created an additional hurdle for himself when, on the morning of the second day, he rose to speak and found that he had left his spectacles in his hotel.

As it turned out, the House showed little interest in the results of the research into the origins of Scottish administrative law. For reasons of listing Brown was heard before the two English cases, Cocks and O'Reilly, and it did not need much perspicacity to see that Lord Diplock was impatient to get on, regarding Brown as a case of importance only in so far as it might affect the theory of judicial review which he was later to expound in O'Reilly. So the second line of research - into Lord Diplock's previous speeches - proved to be more important than the first.

Lord Diplock's most recent pronouncement had been in Swain v The Law Society,34 which concerned the Law Society's compulsory indemnity scheme for solicitors. The question was whether the brokerage commission paid by the insurance brokers to the Society could be applied for the benefit of the profession generally or was to be held by the Society in trust for the contributors to the scheme. The Court of Appeal had held in favour of the contributors.

In the House of Lords, the case was argued for the Law Society on the basis that there was a 'fundamental legal distinction between public law and private law. The remedies for breach of a public duty are public law remedies.' In his speech, Lord Diplock said:

In dealing with the appeal it is, in my opinion, essential throughout to bear in mind that in performance of its functions the Society acts in two distinct capacities: a private capacity as the successor ... to the Society of Gentlemen Practisers in the Courts of Law and Equity; and a public capacity as the authority upon whom ... various statutory duties are imposed and powers conferred by the Solicitors Act 1974.

When acting in its private capacity the Society is subject to private law alone. It is quite otherwise when the Society is acting in its public capacity. . . . [What] they do in that capacity is governed by public law; and although the legal consequences of doing it may result in creating rights enforceable in private law, those rights are not necessarily the same as those that would flow in private law from doing a similar act otherwise than in the exercise of statutory powers.35

This passage seemed to offer the solution to a problem that remained in spite of the successful research on the first point. It could not be denied that a person

wrongfully refused accommodation by a housing authority would be entitled to damages for breach of the authority's statutory duty. Nor could it be denied that an action of damages for breach of statutory duty could be raised in the sheriff court. Why, then, could the sheriff court not rule on the lawfulness of the authority's decision? To insist that this preliminary question must be determined in the Court of Session seemed pedantic and formalistic. Yet there was a legally qualitative difference between the right to a lawful decision and the right to damages for a breach of statutory duty which, ex hypothesi, did not arise until the housing authority's decision was shown to be unlawful. Lord Diplock's distinction between public and private law and the nature and means of enforcement of the duties they create was, whether doctrinally sound or not, a way of defining that difference.

The argument turned out to be conclusive in Cocks, the English case on the same point.36 Lord Bridge, who recanted the views he had expressed in the Court of Appeal in De Falco,37 adopted the same line of reasoning as Lord Diplock in Swain:

[The] functions of housing authorities under the Housing (Homeless Persons) Act 1977 ... fall into two wholly distinct categories. On the one hand, the housing authority was charged with decision-making functions. These are essentially public law functions. The power of decision being committed by the statute exclusively to the housing authority, their exercise of the power can only be challenged before the courts on . . . strictly limited grounds. . . . On the other hand, the housing authority are charged with executive functions. Once a decision has been reached by the housing authority which gives rise to the . . . housing duty, rights and obligations are immediately created in the field of private law. Each of the duties referred to, once established, is capable of being enforced by injunctive and the breach of it will give rise to a liability in damages. But it is inherent in the scheme of the Act that an appropriate public law decision of the housing authority is a condition precedent to the establishment of the private law duty. . . . The fallacy is in the implicit assumption that the court has the power not only to review the housing authority's public law decision but also to substitute its own decision to the contrary effect in order to establish the necessary condition precedent to the housing authority's private law liability.38

Lord Fraser, delivering the only speech in Brown put his finger on the same point:

The decision on whether the respondent was a homeless person, and if so whether he had become homeless intentionally, is one which in terms of the Act of 1977 is entrusted to the housing authority and to them alone. Their decision effectively determines whether the authority has the duty of making accommodation available for the respondent. . . . A mere declarator that the decision was one which they were not entitled to reach does not get rid of the decision, nor can it open the way for the housing authority to reach a different decision if, on further consideration of the matter in the light of the Court's decision on matters of law, it thinks fit to do so. In a case such as this, where the housing authority is both the decision-making authority and the decision-implementing authority, the proper procedure is for the decision to

34 [1983] 1 AC 598.
35 [1983] 1 AC at p. 600 (argument) and pp. 607-8 (Lord Diplock).
36 Cocks came on immediately after Brown. When counsel for the appellants began to develop the argument, Lord Diplock observed (with truth) 'I think you have had a spy here'.
37 Supra, note 14.
be reduced so that a different decision, creating different legal rights for the private party in the position of the respondent, can be made.\(^{39}\)

Except perhaps for his reference in the last sentence to 'the private party', Lord Fraser (unlike Lord Bridge) did not so much as hint at the public law/private law distinction until the second last paragraph of his speech, and then only in suggesting that there might be 'advantages in developing special procedure in Scotland for dealing with questions in the public law area, comparable to the English prerogative orders'. Immediately before making this suggestion, he observed that 'the question whether the sheriff court has jurisdiction in this case is entirely separate from the question whether the County Court would have jurisdiction in a similar case in England'.\(^{40}\) So, although the words 'public law' entered the vocabulary of Scots law in Lord Fraser's speech, they do not seem to have done so as part of his reasoning on the issue in the case.

Lord Fraser had been a lecturer in constitutional law and had written a short textbook on the subject. He was later principal editor, author and co-ordinator of the article on 'Constitutional Law' in the Stair Memorial Encyclopaedia of the Laws of Scotland. As a judge he was cautious and he was not at all likely to enunciate new constitutional theories unless necessary. In the case of Stevenson v Midlothian District Council two months after Brown, he repeated his call for a new procedure without using the words 'public law' at all.\(^{41}\)

Useful as the public law/private law distinction was for forensic purposes in order to catch the attention of Lord Diplock, Lord Fraser clearly did not regard it as essential to an explanation of why, in Scotland, certain acts can be challenged only by recourse to the supervisory jurisdiction of the Court of Session. If one bears in mind that Brown, Cocks and O'Reilly were argued successively and that the judgments were delivered in inverse order, his use of the words 'public law' in his plea for speedier and cheaper procedure was surely no more than a shorthand reference to what had, by that time, been said by Lord Diplock in O'Reilly and Lord Bridge in Cocks. In the words of Lord Wilberforce, 'public law' was 'a convenient expression for descriptive purposes'.

So there is no need to accept, if one does not want to, that the public law/private law distinction has been made part of the law of Scotland just because of what was said by Lord Fraser in Brown. Nevertheless, there is an important conceptual distinction between acts, such as delictual acts, which give rise directly to a right to damages or other civil remedies, and acts, such as administrative acts, which must first be deprived of legal effect before such a right can arise. (The distinction is well understood by Community lawyers and underlies Articles 33 and 34 of the ECSC treaty.) If nothing else, Lord Diplock's public law/private law distinction assists in focusing this basic point.

Judges have to find words to express new ideas and it is usually easier to borrow words that are already used in a similar context. New vocabulary helps us to discard formulae that have become stale or fossilized. What is dangerous is not the borrowing as such but the fallacy of supposing that the borrowed vocabulary reflects something that exists independently and immutably in the real world. That is simply to substitute one fossil for another.

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\(^{39}\) 1983 SC (HL) at p. 46.

\(^{40}\) 1983 SC (HL) at p. 49.

\(^{41}\) 1983 SC (HL) 50 at p. 59.