

Ben Wur Ain Inner Hoose

(Scots in Scots Law)

by Jon Kiddie, Advocate



- [1] *'That the Court of Session, or College of Justice, do, after the Union, and notwithstanding thereof, remain, in all time coming, within Scotland, as it is now constituted by the Laws of that Kingdom, and with the same Authority and Privileges, as before the Union...'*
- [2] And, thus Article XIX of the Treaty of Union of 1707 preserved our Scots law and legal system notwithstanding the two parliaments having determined to become a single Parliament of the United Kingdom.
- [3] Scots law is an anomaly of the English-speaking legal world. While English common law forms the basis for many other legal systems, it is not so with Scots law. And, while Scotland too has its own common law, it developed much later,^[1] is in many important aspects quite distinctive, and, in theory at least, shares its claim as a base element with Roman law. Hence, in comparative legal studies, Scots law is known as a 'mixed system', which has drawn both on its own common law customs as well as its more academic 'civil' tradition of scholarly endeavour.
- [4] So, what of the Scots language in our law ? Here the situation is somewhat more complex. First, and notwithstanding that, in linguistic terms, the distinction between language and dialect might be moot (at least for modern practical purposes), Scots does enjoy some

recognition as a language in its own right, e.g. by the Scottish Government itself,^[2] as well as by UNESCO.^[3] In terms of historical analysis, it is hard to dispute its language credentials, where it essentially evolved out of the same group of Germanic languages imported to these islands by the Angles, Saxons, Frisians, Jutes, *et al*, following Roman evacuation in the mid-5th century BC. Various, the evolution of English, on the one hand, and, on the other, Scots, has been both divergent and convergent, e.g. divergent during the Great Vowel Shift of 1400—1700 BC, yet convergent during the reign of King James VI and I (lived, 1566—1625), and subsequently. Thus, to this extent, if Scots is merely a dialect of English, then by the same standard English is also merely a dialect of Scots (and perhaps more so, where Scots actually retains certain features of the original languages that English has lost).

- [5] And, two or three centuries pre-Union, Scots was definitely the language of law. This much is clear from certain Acts of the (original) Scottish Parliament still in force today, e.g. the Leases Act 1449, which is short enough for replication here in its entirety:^[4]

Of takis of landis for termes

Item it is ordanit for the sauftie and fauour of the pure pepil that labouris the grunde that thai and al vthiris that has takyn or sal tak landis in tym to cum fra lordis and has termes and yeris thereof that suppose the lordis sel or analy thai landis that the takaris sall remayn with thare takis on to the ische of thare termes quhais handis at euir thai landis cum to for sic lik male as thai tuk thaim of befoir.

- [6] Yet, the new Parliament of 1707, being common to the entire UK, and particularly in the larger context of societal linguistic levelling,^[5] it was inevitable that the language of statute would align. And, that it did so is also clear, e.g. from the Acts of Union themselves,^[6] as well as from certain more imminently pre-Union legislation such as the (Scottish) Claim of Right Act 1689, which is linguistically very similar to the (English) Bill of Rights 1689, i.e. written largely in English as opposed to Scots, albeit perhaps not according to the same orthography.
- [7] Thus, from the Union the language of statute, both North and South of the border, would henceforth be and nowadays remains English.
- [8] Yet, by virtue of said preservation of Scots law, the Scots language would nonetheless also retain some level of importance. Accordingly, for example, when the Claim of Right

Act 1689 was cited in the recent prorogation debate in front of the Inner House of the Court of Session,^[7] our highest civil court concluded of the government's decision to prorogate parliament that:

'Put shortly, prorogation was being mooted specifically as a means to stymie any further legislation regulating Brexit.'^[8]

Where the word 'stymie' itself may be of uncertain origin, yet tends to be closely associated with Scots usage, and is thought to derive from golf, which is, of course, a game of Scottish invention.

Institutional Writers

[9] These are erstwhile scholars of Scots law (now dead), whose treatises and other writings are considered definitive, or at least highly authoritative. Although not written in Scot, they might nonetheless display some Scots linguistic influence or tendency, for example:

- James Dalrymple, Viscount of Stair (lived, 1619—1695), Institutions of the Law of Scotland
- Andrew McDowall Bankton (lived, 1685—1760), Institute of the Laws of Scotland in Civil Rights
- John Erskine of Carnock (lived, 1695—1768), Principles of the Law of Scotland
- David Hume, Baron of Ninewells (lived, 1757—1838), Commentaries on the Law of Scotland, Respecting Trials for Crimes
- George Joseph Bell (lived, (lived, 1770—1843), Principles of the Law of Scotland
- Archibald Alison, (lived, 1792—1867, English-born), Principles of the Criminal Law of Scotland

Terminology for Legal System, Pairt Ane

[10] It perhaps goes without saying that, our legal system being having been preserved, many words and terms remain in use to this day, e.g. for courts, types of judges, and procedures, which are of Scots legal origin, and thus might appear foreign (or confusing) to an English-speaking lawyer from another jurisdiction absent any training in our system. To what extent these might be considered part of the Scots language *per se* is perhaps open to debate, especially where every jurisdiction has its own innate and distinctive terminology, much of which might be foreign even to lay citizens subject to its law, and more particularly where some of them are even rendered in Latin (yet where the same Latin is not used elsewhere). In any event, obvious examples include:

- Court of Session, i.e. equivalent of the English High Court and Court of Appeal, where the Court of Session operates both its Outer House (cases at first instance) and Inner House (appeals)
- Lord President / Lord Justice General
- Lord Justice Clerk
- Sheriff Court, i.e. broadly speaking equivalent of the English County Court, yet also with criminal jurisdiction similar to the English magistrates' court / Crown Court
- Sheriff Officer, i.e. equivalent of an English bailiff, pronounced 'bay-lif'
- Bailiff, i.e. an officer appointed by the Scottish Government to enforce fishing rules, here pronounced 'bay-ley'
- Advocate, i.e. 'barrister', although the two professions are not entirely identical North and South of the border, and where English barristers do also sometimes call themselves 'advocates' in a general sense
- Avizandum, i.e. the procedure where a judge 'makes avizandum' to consider his/her judgment in civil litigation.
- Sist, i.e. the procedure of putting litigation on hold, the English equivalent of which is 'stay'
- Leave, e.g. 'leave to appeal', where the English equivalent is 'permission'
- Reduce, i.e. to declare null a legal document, instrument or decision, where the English might use 'set aside' or 'quash'
- Confirmation, i.e. the procedure for appointment of an executor in the estate of a deceased individual, where the English equivalent is 'probate'
- Delict, i.e. a civil wrong, where the English equivalent is 'tort', hence 'delictual' and 'tortious'
- Culpable homicide, i.e. manslaughter
- Plagium, i.e. abduction

Terminology for Legal System, Pairt Twa

[11] Yet, certain other words and terms that remain in use do have a distinctively more Scots flavour to them. Perhaps the most obvious, and most frequently used, is 'assoilzie', the verb, which is pronounced 'assoiley' where the 'z' actually represents the letter 'yogh', otherwise sometimes rendered 3 (the same as in the traditional Scottish shop name, John Menzies):

- Assoilzie, i.e. to vindicate or absolve the defender in civil litigation, i.e. to grant absolvitor

Scots Laws

[12] Beyond said terminology for our legal system, some of our actual laws and legal concepts also have a more distinctively Scots flavour, albeit the extent to which these remain in use is debatable, and likely varies depending on practice area. Examples include:

- Anent, i.e. in respect of or concerning
- Bairn's part, i.e. a child's right to succeed to part of his/her deceased parent's estate
- Eavesdrop, i.e. a servitude right to allow one's house to drip water onto a neighbour's property, and nothing to do with clandestinely listening in on someone else's conversation
- Furth of, i.e. beyond the borders of
- Hamesucken, i.e. assault on a homeowner in his/her own home
- Haver, i.e. a custodian of documents or other tangible items, and not a verb meaning to talk nonsensically or uninterestingly
- High Court of Justiciary, i.e. our highest criminal court, where 'justiciary' derives from 'justiciar', being a now obsolete term for the Lord Justice General
- Law burrows, i.e. a rare yet still competent civil procedure for seeking financial security against criminal acts
- Poind, i.e. a form of debt enforcement against the debtor's moveable property, pronounced 'pind'
- Riever, i.e. a robber
- Spuilzie, i.e. civil theft (note the use of yogh again, where this word is pronounced 'spooley')
- Stouthrief, i.e. burglary
- Tack, i.e. a lease (as in the Leases Act 1449, above), hence 'tacit relocation', i.e. where a lease renews itself by automatic operation of law
- Tailzie, i.e. a now obsolete right of certain heirs to succeed to the deceased's estate (again, note yogh)
- Teind, i.e. 10% of revenue from land, erstwhile used to pay clergymen
- Thole, i.e. to tolerate, e.g. 'to thole an assize', meaning to stand trial, where 'assize' refers to the jury, who are 'seated' i.e. 'assis' in French (from 'asseoir', to sit)
- Tinsel, i.e. forfeiture, e.g. 'tinsel of the feu'
- Tocher, i.e. dowry, now obsolete
- Umquhile, i.e. formerly, cognate = 'somewhile' (?)
- Zairs / yairs, i.e. fishing enclosures (again, yogh)

Use of Scots by Scots Lawyers / Lawyers in Scotland

[13] Nowadays, undoubtedly a lawyer practising in Scots law can thrive with no knowledge of the Scots language *per se*. Indeed, there are numerous non-indigenous lawyers who do this, and also a certain number of indigenous Scots lawyers who practise law 'furth' of Scotland, yet relying on legal training undertaken in this country. English, Anglicized and other non-Scots accents abound across our legal system.

[14] However, to an extent it depends on practice area. Those dealing with the public at large, e.g. solicitors in general practice, and perhaps criminal advocates, may benefit from understanding the parlance of their clients, sometimes considered 'vernacular' parlance, and which very often includes Scots, to varying degrees. Hence the apocryphal war story of the genteel advocate examining a witness in a prosecution:

Advocate: And, what did you do next?

Witness: Ah jist went oer the road tae the garage fur tae get crisps an ginger.

Advocate: I see. And, can you please tell the court, what were the surnames of these two gentlemen whom you met, Chris and Ginger?

[15] And, finally for a bit of fun, the special defences and other defences known to Scots criminal law as explained by 'umquhile' Scots senior lawyer and dinner party raconteur:

- **Criminal Special Defences**

- Alibi — '*Ah wisnae there*'
- Incrimination — '*It wisnae me, a big boy done it & ran away*'
- Self Defence — '*He banjoed me first*'
- Consent — '*He wanted me tae dae it*'
- Coercion — '*He made me dae it*'
- Insanity — '*Ah'm no the full shilling*'
- Automatism — '*Ah wisnae feelin' masel*'

- **Other Criminal Defences**

- Necessity — '*Ah hud tae dae it*'
- Provocation — '*He wis askin' fur it*'

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1. In English law, the term 'common law' is used to refer to the law of the land common to that land, as handed down by custom and tradition, and as recognised as such by English courts, where it owes its original inception to legal unification during the reign of King Henry II (reigned, 1154–89), e.g. the Treatise of Glanvill, which codified English law, thus supplanting manorial & ecclesiastic jurisdictions, & imposing royal justice across the entire nation; by contrast, in Scotland it was not until the Heritable Jurisdictions (Scotland) Act 1747 that any analogous endeavour was undertaken.
 2. www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2015/09/scots-language-policy-english/documents/scots-language-policy-english-pdf/scots-language-policy-english-pdf/govscot%3Adocument/scots%2Blanguage%2Bpolicy%2B-%2Benglish.pdf
 3. United Nations Educational, Scientific & Cultural Organization
 4. As still in force, where part was repealed by the Statute Law Revision (Scotland) Act 1906
 5. At least among the so-called learned classes
 6. Union with Scotland Act 1706, and Union with England Act 1707
 7. Cherry v Advocate General for Scotland [2019] CSIH 49
 8. Per Lord President Carloway, para.54