# Case and Comment

# Scotify! What Is It and Why Did We Do It?

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It is often said, if not necessarily well-known or understood, that Scotland is a part of the "third legal family" of mixed jurisdictions worldwide,[1] being constructed out of a blend of influences from the (big C) Common law tradition and the (big C) Civil law tradition.[2] Of course, as Gretton points out, the picture is rather more complicated than that:[3] Scots law is not merely a blend of the two "great" and learned legal traditions; some unpalatable concoction akin to red and white wine senselessly poured into a single glass.[4] "Some Scots law is Civilian, some is English, some comes from other sources, and some (not a little) is homegrown".[5] The result of this blend ensures that Scotland, all but inarguably, possesses a legal system which is quite distinct from any other in the world today.[6]

As an uncodified system possessing no clean break with any *ancien régime*,[7] it is fair to say that a particularly distinguishable feature of the Scottish legal system "when set beside that of other legal systems… is [its] great antiquity… and the

[1] See E.C. Reid, "Scotland" in V.V. Palmer (ed.), *Mixed Jurisdictions Worldwide: The Third Legal Family*, 2nd edn (Cambridge: Cambridge University Press, 2012), pp.216–276.

[2] "Big C" Common law—as it might be referred to in contradistinction to "small c" common law (which denotes the unwritten "customary law" of any given jurisdiction)—refers to the learned tradition of the English Common law as developed in the Royal Courts of that Kingdom in its formative period, distinguished in its particulars through its rejection of the textualist Continental European tradition which emerged from the so-called "second life of Roman law" and through its reverence of judicial precedent and *stare decisis* as generative of positive sources of law: See Sir Frederick Pollock and Frederic W. Maitland, *The History of English Law Before the Time of Edward I*, 2nd edn (Cambridge: Cambridge University Press, 1898), p.184. Big "C" Civil law, by contrast, denotes the Civil law tradition which grew out of the Citizens' law of Rome, while small "c" civil law denotes the non-criminal law of any given jurisdiction—hence, England is not a Civil law jurisdiction, but much of the content of its laws concerns civil matters. This usage is consistent with writers such as T.B. Smith, "The Common Law Cuckoo" (1956) S.A.L.J. 147.

[3] G.L. Gretton, "The Rational and the National: Thomas Broun Smith" in E.C. Reid and D.L. Carey Miller (eds), *A Mixed Legal System in Transition: T. B. Smith and the Progress of Scots Law* (Edinburgh: Edinburgh University Press, 2005), p.33.

[4] See A. Rahmatian, "The Political Purpose of the 'Mixed Legal System' Conception in the Law of Scotland" (2017) *Maastricht Journal of European and Comparative Law* 843, 844.

[5] Gretton, "The Rational and the National: Thomas Broun Smith" in Reid and Carey Miller (eds), *A Mixed Legal System in Transition: T. B. Smith and the Progress of Scots Law* (2005), p.33.

[6] P. Stein, "Legal Thought in Eighteenth Century Scotland" 1957 Jur. Rev. 1, 2.

[7] Political revolution and legal codification alike are wont to mark a break with the past, but Scotland has undergone neither. Although the nation was for a time militarily subjugated by Cromwell (in 1652), and integrated into the "Commonwealth of England" (in 1654), with its native legal institutions abolished, the constitutional changes effected by Cromwell did not long outlive him and Scotland was restored as an independent kingdom by 1660, with the Court of Session reopening in 1661 (see A.R.C. Simpson and A.L.M. Wilson, *Scottish Legal History: Volume One 1000-1707* (Edinburgh: Edinburgh University Press, 2017), pp.253–270. Though again politically united with England (albeit under very different terms) in 1707, forming the singular Kingdom of Great Britain, the Treaty of Union guaranteed the continuity and ongoing independence of the Scots legal system, with the effect that "as to judicial jurisdiction, Scotland and England, although politically under the same Crown, and under the supreme sway of one united legislature, are to be considered as independent foreign countries, unconnected with one another": *Stuart v Moore* (1861) 4 Macq. 1 at [49] *per* Campbell LC.

corresponding measure of continuity which can be traced from the earliest times of which there is any record right down to the present day".[8]

The antiquity of its system is a feature that Scotland shares in common with England, but the point of sharp distinction between Scots and English law emerges from the relative influence of Continental European legal thought upon the former,[9] which cemented the idea that law is capable of being treated as a rational discipline and systematised according to principles of right reason.[10] Hence, though "some Scots lawyers take the view that the identity of Scots law consists in the content of particular rules" this is not in fact—and never has been—so. "The true difference [between Scots and English jurisprudence] consist[s] in the [Scots'] commitment to the institutional scheme, or, in other words, to a more systematic approach".[11]

Due in large part to its Civilian heritage and at least partially systematised jurisprudence, "the law of Scotland has always been represented, and correctly so, as founding more upon principles than upon precedents (or, one may suppose, rules of other sorts)".[12] Yet while there ought to be no doubt of the ongoing relevance of the so-called Institutional writers to Scottish legal thought,[13] nor of the fact that "the way that [our] courts use writings [including 'non-institutional' works] is a distinctive feature of our case law… [and] not a surprising one in a small legal system",[14] it may now be thought trite to say (as Reid did some 30 years ago) that "from its English neighbour, [Scotland] has acquired a passion for case law, so that [its] mixed legal system has come to be powered by a Common law engine".[15] This poses problems from the perspective of one concerned with the ongoing viability of Scots law as a rational system, not least because—in the words of Lord Rodger of Earlsferry "it has to be borne in mind that the main problem with Scots law, as a system of civil law, is not that it has too many, but that it has too few, cases".[16]

Appropriately in a speech honouring his juristic predecessor, much the same point was made more recently by Lord Doherty, the latest Scottish appointee to the United Kingdom (UK) Supreme Court Bench: "if the Court of Session and the Supreme Court do not have sufficient opportunities to decide important points of

[8] W.D.H. Sellar, "The Continuity of Scottish Legal History: An Overview" in H.L. MacQueen (ed.), *Continuity, Influences and Integration in Scottish Legal History: Select Essays of David Sellar* (Edinburgh: Edinburgh University Press, 2023), p.15.

[9] See H.L.MacQueen, "Scots Law" in J.M. Smits, J. Husa, C. Valcke and M. Narciso (eds), *Elgar Encyclopedia of Comparative Law* (Cheltenham: Edward Elgar, 2023), pp.380–387.

[10] James Dalrymple (Viscount Stair), *The Institutions of the Law of Scotland, Deduced from Its Originals, and Collated with the Civil, Canon, and Feudal Laws; and with the Customs of Neighbouring Nations*, 1st edn (Edinburgh: Heir of Andrew Anderson, 1681), Book 1, Title 1, s.16; James Dalrymple (Viscount Stair), *The Institutions of the Law of Scotland, Deduced from Its Originals, and Collated with the Civil, Canon, and Feudal Laws; and with the Customs of Neighbouring Nations*, 2nd edn (Edinburgh: Heir of Andrew Anderson, 1693), Book 1, Title 1, s.17.

[11] P. Birks, "More Logic and Less Experience: The Difference Between Scots and English Law" in D.L. Carey Miller and R. Zimmermann (eds), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (Berlin: Duncker and Humblot, 1997), p.174.

[12] D.N. MacCormick, "General Legal Concepts (Reissue)" in *The Laws of Scotland: Stair Memorial Encyclopaedia* (Edinburgh: LexisNexis, 2008), para.11.

[13] A. Rahmatian, "The Role of Institutional Writers in Scots Law" 2018 Jur. Rev. 42.

[14] J.W.G. Blackie and N.R. Whitty, "Scots Law and the New Ius Commune" in H.L. MacQueen (ed.), *Scots Law into the 21st Century: Essays in Honour of W. A. Wilson* (Edinburgh: W. Green, 1996), p.81.

[15] K.G.C. Reid, "The Third Branch of the Profession: The Rise of the Academic Lawyer in Scotland" in H.L. MacQueen (ed.), *Scots Law into the 21st Century: Essays in Honour of W. A. Wilson* (Edinburgh: W. Green, 1996), p.47.

[16] Lord Rodger of Earlsferry, "Only Connect" 2007 Jur. Rev. 163, 168. Lord Rodger here seems to be speaking of Scotland's "small c" civil law, but the thought is equally applicable to the big C Civil element of Scotland's legal mix.

law the development of Scots law is liable to suffer".[17] While this is so, however, in a survey of the business conducted in the Inner House Reid has found that the net effect of the Courts Reform (Scotland) Act 2014 appears to have been to starve the Scottish Supreme Courts of their diet of civil case law.[18] As Reid himself put the matter,

> "Scotland, as a small jurisdiction, is short of case law and especially of appellate case law… More legally significant cases are needed in the Inner House and beyond, not fewer, and without more such cases the long-term health of Scots law, and perhaps of Scots private law in particular, will begin to look distinctly bleak."[19]

While lawyers in "pure" Common law jurisdictions may compensate for a lack of authoritative or useful domestic case law by drawing on cases decided in other Common law jurisdictions from across the globe, confident that the judges in, say, Ireland, or New South Wales, or British Columbia are (to a greater or lesser extent) drawing water from the same intellectual well, this option is not available to Scots.[20] We have to, in the words of the current case and comment editor of this journal, "make the most of what there is".[21] In considering case law from furth of the jurisdiction, "care must be taken to express [the] principles in a Scottish context",[22] since as a result of its singular legal history Scots lawyers are not confined to the Common law (nor for that matter the Civilian) *Denkzwänge*[23] which might fetter legal development or innovation. It is patent that Scots jurisprudence recognises concepts which are—if not wholly unknown to—at least unarticulated in either or both of the Common and Civil law traditions, and that as a result solutions to novel legal problems may be immanent in Scots law but simply unavailable to lawyers in other jurisdictions. It is, consequently, incumbent upon the Scots lawyer to properly analyse foreign case law, with reference to the principles of the Scots legal system, in determining the extent to which it is instructive—and certainly before seeking to rely on it as arguably "persuasive" authority.

[17] Lord Doherty, "A View from the Thames: Lord Rodger Memorial Lecture 2026" (Royal Faculty of Procurators in Glasgow, 19 May 2026), p.11, *https://supremecourt.uk/uploads/speech_lord_doherty_28052026_4922534e29.pdf* [Accessed 2 July 2026].

[18] "There has been a steep decline in Inner House business over the last 10 years. In calendar year 2016, 97 numbered judgments were issued by the Inner House. The corresponding figure for 2025 was 32. The Civil Justice Statistics show a similar if less vertiginous pattern of decline": K.G.C. Reid, "Why So Few Cases in the Inner House?—Part 1" (16 June 2026), *https://blogs.ed.ac.uk/private-law/2026/06/16/why-so-few-cases-in-the-inner-house-part-1/* [Accessed 2 July 2026].

[19] K.G.C. Reid, "Why So Few Cases in the Inner House?—Part 2" (22 June 2026), *https://blogs.ed.ac.uk/private-law/2026/06/22/why-so-few-cases-in-the-inner-house-part-2/* [Accessed 2 July 2026].

[20] It has long been advocated that Scots might fruitfully look to other "mixed" legal systems to develop its own case law: South Africa, of course, provides fertile ground for legal comparison and borrowing as the South Africans are in the main speaking the same "legal language" as the Scots—see, e.g., R. Zimmermann, K.G.C. Reid and D. Visser, *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (Oxford: Oxford University Press, 2004). Due to the singular nature of Scots law, however, any "borrowing" must be done with care, and it is not true to say that a court in any other jurisdiction will necessarily be drawing water from the same intellectual well as Scots jurisprudence.

[21] M. M. Combe, "A Comment on Case and Comment (Editorial)" 2018 Jur. Rev. 149, 150. I pray the forbearance of Mr Combe, here, since while comments on cases are ordinarily envisaged as short pieces of writing, and that editorial in particular is in many respects a paean to pithy writing, the "Scotify" contributions are each considerably longer than the Juridical Review's ostensible word limits. Nonetheless, the journal has in the past, as here, been willing to "allow a certain flexibility to ensure quality content has not been constrained by word count restraints": it is hoped that readers will find each of the forthcoming contributions interesting and useful in equal measure.

[22] See *Elliot v McCandlish* [2025] SC KIL 92; 2026 G.W.D. 8-63 at [31].

[23] Lit. "thought-constraints", of which see N. Jansen, "The Idea of a Legal Obligation" (2019) 35 *Acta Juridica* 35–37.

"Scotify"—in its first iteration a one-day event hosted at the University of Strathclyde's Technology and Innovation Centre, generously funded and supported by the Engage with Strathclyde programme[24]—was envisaged as a forum in which cases from furth of Scotland could be analysed with reference to the principles of Scots law, with a view to determining how, if at all, the reasoning in, if not ultimate outcome of, these cases might differ were Scots law to be applied to their facts. The importance of analysis of this kind cannot, of course, be overstated, yet as the late Professor W.A. Wilson emphasised "analysis is not everything. The choice of the right legal rule may be more important".[25] Due to the singular legal history of Scotland, Scots lawyers might often find that they have a wider range of possible rules to choose from than is available to their colleagues elsewhere in the world.

Consistent with the (in)famous(?) "IRAC" method of answering legal problem questions,[26] Wilson correctly and usefully identified that when faced with any legal problem (howsoever novel or pedestrian it may be) "analysis of the factual situation is the first stage and evaluation of the possible rules and selection from them of what is to be the law is the second stage".[27] Case law from jurisdictions other than Scotland provides an unlimited supply of interesting factual situations self-evidently worthy of legal analysis (for those facts have axiomatically already been litigated elsewhere). The peculiarities of Scots law inevitably mean that the process of analysing those facts must necessarily involve relating those facts, or issues, to discrete and different rules which may or may not be so much as superficially similar to those applicable in the jurisdiction whence the case originally arose. Scots lawyers, then, must be cognisant of the full array of their system's particular legal rules and prepared to deploy them to solve issues which have proceeded upon different bases elsewhere. Likewise, Scots lawyers must also be prepared to engage *critically* with foreign case law, to avoid the unedifying spectacle of attempting to cram inapplicable concepts or rules from abroad into a kilt in order to persuade the courts, on the basis of positive "judicial authority", to arrive at some outcome or another.[28]

As the architect of the "Scotify", the present author might well be expected to say that the results of this exercise proved interesting and I do, in fact, firmly believe that. But that is no reason to take me at my word: the five case commentaries which follow—I believe—provide ample evidence of the evident utility of "Scotify" as a concept. Scots practitioners faced with similar issues to those which arose in recent English cases such as *Re: WSP (A Child)*,[29] *R. v Foster*,[30] *Marks and Spencer*

[24] For details, see "Engage with Strathclyde", *https://www.strath.ac.uk/workwithus/engage/* [Accessed 2 July 2026].

[25] W.A. Wilson, "The Importance of Analysis" in D.L. Carey Miller and D.W. Meyers (eds), *Comparative and Historical Essays in Scots Law: A Tribute to Professor Sir Thomson Smith QC* (Edinburgh: Butterworth, 1992), p.171.

[26] That is—(identify the) Issue(s); (identify the) Rule(s); Apply (the Rule(s) to the Issue(s) identified); Conclude (stating the logical outcome of the given analysis).

[27] Wilson, "The Importance of Analysis" in Carey Miller and Meyers (eds), *Comparative and Historical Essays in Scots Law: A Tribute to Professor Sir Thomson Smith QC* (1992), p.162.

[28] This perhaps evocative imagery stems from the case of *Holdich v Lothian Health Board* [2013] CSOH 197; 2014 S.L.T. 495, in which defender's counsel averred that the pursuer was attempting to "put a kilt on *Yearworth [v North Bristol NHS Trust* [2010] QB 1]"—something that "could not be done" due to the fundamental differences between Scots and English property law, as well as the fact that the peculiar English notion of "bailment" was "so fraught with principles peculiar to English contract law and the proprietary torts that it cannot be equiparated with the Scots law on the subject" (at [18]). For critical comment on *Holdich*, see J. Brown, "'Still a Part of Me': Functional Unity and the Human Body in Scots Law" 2022 Jur. Rev. 80.

[29] *WSP (A Child) (Vaccination: Religious Objection), Re* [2023] EWHC 2622 (Fam); [2024] 1 F.C.R. 554.

[30] *R. v Foster (Carla)* [2023] EWCA Crim 1196; [2024] 1 Cr. App. R. (S.) 29.

*v BNP Paribas*,[31] *Crown Prosecution Service v Aquila Advisory*,[32] and *URS v BDW*,[33] will find here analyses which explore points of divergence and convergence between the Scots and Common law. Altogether more useful, however, is the methodology at the heart of these analyses; "Scotify" is, inherently, an infinitely repeatable process and, for that matter, one which learned Scots legal practitioners should already be engaged in when exploring the utility of non-Scottish case law.

[31] *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] A.C. 742.
[32] *Crown Prosecution Service v Aquila Advisory Ltd* [2021] UKSC 49; [2021] 1 W.L.R. 5666.
[33] *URS Corp Ltd v BDW Trading Ltd* [2025] UKSC 21; [2026] A.C. 409.