The Scottish Bar: The Evolution of the Faculty of Advocates in Its Historical Setting

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Although the expression "advocate" is used in early Scottish statutes such as the Act of 1424, c. 45, which provided for legal aid to the indigent, the Faculty of Advocates as such dates from 1532 when the Court of Session was constituted as a College of Justice. Before this time, though friends of litigants could appear as unpaid amateurs, there had, of course, been professional lawyers, lay and ecclesiastical, variously described as "fore-speakers," procurators and prolocutors. The functions of advocate and solicitor had not yet been differentiated, though the notary had been for historical reasons. The law teacher was then essentially an ecclesiastic. As early as 1455, a distinctive costume (a green tabard) for pleaders was prescribed by Act of Parliament.¹ Between 1496 and 1501, at least a dozen pleaders can be identified as in extensive practice before the highest courts, and procurators appeared regularly in the Sheriff Courts.²

The position of notary also flourished in Scotland as on the Continent, though from 1469 the King asserted the exclusive right to appoint candidates for that branch of legal practice. It was exercised mainly out of court.³ By the Act of Institution of the Court of Session, the designation "advocate" is applied to the procurators who have qualified to plead before that court. It was provided "that thaer be a certain nommer of Advocates and Procurators to the nommer of ten persons of best name, knowledge and experience admitted to procure in all actions." The business of the court soon required this limit to be exceeded. By 1587, when advocates were first allowed in cases of treason and before the Criminal Courts,⁴ the Corporation of Advocates comprised 54 practitioners. The numerical strength of the faculty over the centuries has fluctuated but, bearing in mind the increase of the national population, is probably approximately

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² Lord Cooper, Selected Papers 231 et seq. (1957).
the same percentage today as in the 16th century, and much less than in the 18th and 19th centuries. The exclusive privilege of appearing before the Supreme Courts in Scotland has always been restricted to a small group. In 1762, the number of those who had been admitted to the faculty was 210, in 1794 there were 236, in 1810 nearly 300, in 1826 nearly 400 and 1832, the year of the First Reform Act, a peak figure of 442 was reached. In 1848, numbers had fallen to 425. This was maintained up to 1861 though only about 120 were actually in practice. The status of advocate was sought for its own sake, even by those who would not have practiced. In 1876, there were 377 members of the Faculty of Advocates of whom about 130 actually attended the courts and in 1966 there were some 300 members of whom just over a third are in daily attendance at courts.

The development of the corporate existence of the faculty can be traced with reasonable accuracy and it is clear that the present specialisation of function did not always exist. Thus, Mr. David Ayton, a prominent advocate, was "doer" to the Earl of Rothes, and as late as 1762 advocates resisted attempts by law agents to organize themselves as a separate branch of the profession. The Society of Writers to His Majesty's Signet was fully organized in 1594 but on the establishment of the Court of Session in 1532 they had been, as were the advocates, incorporated in the College of Justice itself. Advocates and Writers to the Signet united to defend their common privileges and at one time fusion of these two bodies seemed probable. Though in their origin merely professional associations of lawyers like others throughout the country, through their close connection with the central courts they established themselves as exclusive and influential groups, restricting admission to their ranks by social, financial and educational controls. An applicant for admission was moreover required to have undergone a practical training or apprenticeship under an established member of the group, from whom he learned not only the necessary skills but also the ethos of the group. The division of the legal profession in Scotland between advocates and solicitors might well have taken a different course, i.e., between legal bodies incorporated in the College of Justice and those not so privileged, i.e., those who belonged to the Faculties of Procurators who practiced in other courts. Indeed, a provision of the Act of Union

6. 20 STAIR PUBLICATIONS, INTRODUCTION TO SCOTTISH LEGAL HISTORY 29 (1958).
in 1707 provides for the possibility of appointing Writers to the Signet to the Bench. By specialisation of function, however, the Society of Writers to the Signet has merged without losing its identity into the solicitors' branch of the profession, which has since 1949 required membership of the Law Society of Scotland. The Faculty of Advocates, shedding the function of law agents and specialising in advocacy, came to regard itself and be regarded as a legal elite. Its own image of itself and the popular image have not always been accepted at face value by experienced practitioners outside the group.

Partly through Acts of Sederunt passed by the judges and partly through a growing sense of professional solidarity, the advocate's role and position in the community was worked out. As from 1582 the faculty elected one of its number to the office of Dean corresponding to the Batonnier in France. In meetings of the Faculty, the Dean takes precedence over the Lord Advocate, and successive holders of the office of Dean have been the acknowledged leaders in all matters of professional etiquette and in asserting the Faculty's rights and privileges. The Faculty has always been an exclusive "club" restricting membership by controls, qualifications, financial contribution and to some extent by a social exclusiveness. Until 1967, the formality of a ballot for a new intrant took place. The first advocates seem to have been admitted, without any trial of fitness, on the personal knowledge of the Judges, but in 1610, the Faculty petitioned the Court that none should be admitted who had not either studied philosophy at some university and thereafter law for 2 years or had been brought up "under some old learned Advocate" for 7 years, and had given proof of his ability to the Faculty. By Act of Sederunt in 1619, 12th February, an examination and thesis in the Civil (Roman) Law was made compulsory as the ordinary mode of admission. An extraordinary method was, however, prescribed according to which an intrant was examined in Scots law only. In this case, he paid double fees and composed no thesis. Qualification through the Civil Law was regarded as the more honourable mode of entry. By Act of Sederunt, 28th February, 1750, the Court of Session on the representation of the Faculty enacted that examination in Scots law should be necessary but that this should be preceded by examination in civil law one year earlier. No one under the age of 20 was eligible for the examination in civil law. After success in both examinations an intrant completed
his qualification as before by public trial and thesis in the Civil law. On 17th November, 1866, the Faculty itself laid down regulations as to entrance which correspond in general to those which apply today, that is to say, an intrant is examined in general scholarship and in law, or more usually offers proof of having taken a first degree in Arts at a University followed by a degree in law.

In considering the importance of legal education, for the aspirant to practice in the Court of Session, it must be observed that facilities for such education have seldom been adequate in Scotland. The Reformation stultified earlier developments in law teaching, and the vested interests of the Faculty of Advocates itself frustrated the learned tradition in Scottish universities. There were honourable individual exceptions in men such as Erskine, Millar, Hume, and Bell, but no distinguished law schools. Up to the Napoleonic Wars, it was normal for those who intended to become advocates to study for several years at a foreign university. Until the 17th century, political ties with France naturally attracted Scotsmen to French law schools. Later fathers of Hanoverian Protestant sympathies preferred to send their sons to Dutch universities and from James Boswell we have a record of the third generation of a Scottish legal family to pursue this course. This custom of foreign study and education provided Scots Judges and advocates of the past with a more cosmopolitan and European outlook on legal and social problems than may be observed in their successors who, if they have studied outside Scotland, have usually done so at Oxford or Cambridge. Much of the anglicising of Scottish law comes from the mid 19th century and may well be due in part to the anglicising of so many of those who practiced and administered it after the European-trained generation had died out. The anglicisation of the Scottish middle class is in itself a phenomenon on which extensive research could be undertaken. Some consideration of it, in connection with the Faculty of Advocates is, however, essential since this small group, Scottish in origin, and professionally immobile, has been influential in the national life far beyond the field of law. For the sake of perspective, the social setting of the faculty and its members will be described briefly as at different key periods before and

8. See Boswell in Holland passim (Pottle ed. 1952).
after the union with England. Social and political factors rather than legal trends should determine the divisions, but, as with any historical process, dates indicate watersheds rather than boundary walls.

*From the Institution of the Court of Session to the Restoration, 1532-1660*

Until after the Restoration, the members of the Faculty of Advocates had a high status, but the Faculty itself had little control over its own membership. Those deemed eligible had either studied abroad or had gained experience as auditors over a considerable period of time. The Judges controlled admission—sometimes, it was suggested, without discrimination—and those who were admitted were anxious to keep numbers low. Among the privileges then enjoyed were the exemption of advocates as members of the College of Justice from taxation and priority for the hearing of their personal actions in the court. In 1589, 70 advocates who had already been admitted objected to the institution of a Chair of Law in Edinburgh, allegedly because they were not fully employed and because there was already "as much law in Edinburgh as siller to pay for it." The Faculty's distrust of legal education in Scotland except under its own control, which still to some extent continues, may be contrasted with its encouragement of intrants to acquire higher education in the liberal arts and its permissive attitude to legal studies abroad.

Before the Reformation, though Elphinstone's Foundation at Aberdeen was intended to provide legal education for laymen, university law teaching in Scotland was based on the Civil, Roman, and Canon law. Those who studied in Scotland were largely "clerks" and one of the important consequences of the Reformation was the laicizing of the legal profession. There was, of course, no University Law School in Edinburgh, and this seems to have been largely due to the hostility of the Faculty of Advocates. Lord President Reid's bequest in 1558 to endow a College of Arts and Law in Edinburgh was misappropriated, and, though in 1590 the College of Justice and Town Council contributed to establish a Professor of Law, neither of the two persons appointed taught law at all. The Book of Discipline in 1560 contemplated a year course in Municipal (i.e., Scots) and Roman law, to be given at St. Andrews,
Glasgow, and Aberdeen, but not in Edinburgh and significantly also replaced the study of Canon law with Scots law. However, these proposals were not implemented. It may be that frustration was due to the influence of the Geneva theocracy upon that of Scotland. The Geneva ministers opposed the erection of a law faculty there because "those who apply themselves in this Faculty are, for the most part, of dissolute habits, being young men of quality." Certainly, those who aspired to practice in the Court of Session were, in general, young men of quality. They sought their basic legal education in the law schools of France and picked up their knowledge of the specialties of Scots law through observing the business of Parliament House and through private instruction from established advocates. An apprentice advocate acted as "servitor" or "devil" to his master and, on occasions could appear for him in court.

Sir Thomas Craig, who wrote his first treatise on Scots law for the benefit of the students, compiled it in the last years of the 16th century and first few years of the 17th. He had taken an Arts degree at St. Andrews and then studied law in Paris before admission to the Faculty of Advocates. He practiced for 45 years. Of him Lord Clyde has written9 "the tradition of the Bar to which he was called in 1563 has always fostered and happily still fosters among its members, a blend of professional and public ambitions favourable to the attainment of a poise of mind in which conscientious loyalty to precedent and authority is balanced by broad conceptions of legal principle. Craig is never a mere lawyer, Law as he sees it is the science of right and occupies its proper place in relation to the wider Sciences of Government, Politics and of Humanity itself." His Lordship does not refer to Craig's successful political trimming over half a century which covered the Reformation and the Union of the Crowns. Despite his eminence as advocate, Craig was not appointed to the bench. The custom of appointing Senators of the College of Justice exclusively from senior advocates was a later development. Between the years 1538 and 1605 only one third of the Bench was appointed from the Bar.

Sir Thomas Hope who was admitted in 1605 also practiced for over 40 years and for 17 years as Lord Advocate. Omond in his "Lord Advocates of Scotland"10 observed that he "was not only a great statesman, but a very great lawyer. He had an

9. CRAIG, JUS FEUDALM, Translator's note xx (Lord Clyde ed. 1934).
10. 1 OMOND, LORD ADVOCATES OF SCOTLAND 145 (1883).
immense practice at the Bar and in accordance with the custom of his profession, invested his gains in the purchase of land. . . . Three of his sons were on the Bench. . . . There is a vague tradition that when pleading before his sons Sir Thomas used to remain covered and from this circumstance Lord Advocates acquired the privilege of pleading with their hats on. It is more probable that the Lord Advocate's privilege of wearing his hat in Court originated from the fact that as an Officer of State he sat covered in the Parliament House and therefore claimed the right to appear covered before the Judges in the Tolbooth.”

The position of the Lord Advocate who combines the roles of political and legal adviser with that of public prosecutor must be noted specially. The Lord Advocate was nominated one of the Judges on the institution of the College of Justice, but Sir John Nisbet of Dirlton was the last person to combine the offices of Lord Advocate and of Senator of the College of Justice. He was appointed in 1664. The Lord Advocate still sits on a special seat within the bar, though the Dean of Faculty (cf. Bâtonnier in France) takes precedence of the Lord Advocate in domestic faculty matters. The offices of Dean and Lord Advocate have been held by one person concurrently, but this is a situation unlikely to recur. The institution of the office of Dean of Faculty, first recorded in 1582, assisted greatly in developing a corporate sense in the faculty. As with the general framework of the College of Justice, the precedent for this office was presumably the Parlement of Paris. It is not certain when the special costume worn there was adopted in France.

The original dress worn by advocates before the Faculty became a separate corporation was a green gown or “tunikil” but this seems to have gone out of use at an early date. Only in 1609 was a definite system of legal dress fixed for Judges and advocates. Significantly, no discrimination was made between advocates and writers to the signet, who as with the clerks of court, were to wear a black gown with a dark or better black lining of stuff or fur. This dress was prescribed by James VI. The symbol of the advocate’s gown or robe as a mark

11. Cf. 1 REGISTER OF THE PRIVY COUNCIL OF SCOTLAND 303 (2d series 1877); 7 id. 163-66.
of office and prestige seems to have become firmly established. In 1649, John Maxwell who had “bought pleas,” a practice condemned in all civilian systems, was deprived of office by the Lords of Council and Session. The Act of Sederunt for the 21st December recorded that they ordered “the said John Maxwell to be extrudit forth of the House and declared incapable ever hereafter to plead before their Lordships In Sign and Token whereof that a Maisser [Macer] should be commendit to rent his Goun in sunder and pull it over his shoulders in presence of the said Lords and the Haill Advocates, their Servants and Agents, to be called in of Purpose to behold the same.” The ceremony was thrown open to the public as well as to the advocates though the public were not normally then admitted to hear cases. The Lord Chancellor of Scotland at the same time exhorted and admonished “the Advocates and others to be circumspect in their Carraidge and Dealings with the Leidges.” It would seem that the Judges wished to make a public example of one who appeared guilty of unprofessional conduct of which they were then the arbiters and that the assembling of the Faculty was intended to give a general warning by a particular condemnation. The extract also seems to show that the writers and servants or servitors (devils or clerks) to advocates were part of the professional group involved.

Omond has little good to say of the lawyers of Scotland at the Restoration. “Lawyers and politicians they are all dull, cruel, avaricious ruffians, they are continually drunk both at the Council Chamber and at home.” Relations between bench and bar were apparently most unhappy, the bench seeking to enforce its will on the advocates and the latter asserting their independence in an arrogant manner. Advocates came to court long after the official hour, they exacted exorbitant fees, prolonged their speeches to increase their emoluments and treated the Judges rudely. In 1670, a result of the report of a Royal Commission, maximum fees according to the rank of an advocate’s client were prescribed. At first the advocates refused to accept this situation and for two months refused to plead. The advocates also resented the fact that noblemen asserted the right to enter the Court of Session which was otherwise closed against the public when they were pleading. This led to

14. 1 OMOND, LORD ADVOCATES OF SCOTLAND 70 (1883).
15. 1 FOUNTAINHALL, HISTORICAL NOTICES passim (1868).
16. 1 OMOND, LORD ADVOCATES OF SCOTLAND 70 (1883).
remonstrances between Faculty and bench and to armed uproar between the advocates’ servants (who may have included “devils”) and the “lackeys” of the nobles. The attitude of the advocates at this time indicates true corporate spirit and the preparedness to assert their privileges in contest with the most powerful men in the land. In 1674-75, a substantial and influential element were even prepared for a time to secede from the courts or accept banishment as a gesture of professional protest and solidarity when Charles II, at the request of the Scottish Judges, prohibited appeals from the Court of Session to the Scots’ Parliament. Among the ultimate consequences of this action were the reassertion in the Claim of Right 1689 of the right to appeal to Parliament and in the invocation of the jurisdiction of the British House of Lords after the Union.

The secession of the advocates led by Lockhart, Mackenzie, and Cunningham was connected with the maladministration of justice in the Court of Session itself after Lord President Stair had called a cause out of order to oblige Lauderdale. Under Charles II, there is evidence of advocates corrupting or attempting to corrupt the bench and Acts of Sederunt were passed against “soliciting the Lords.” There were no notable scandals such as involved Bacon and Macclesfield in England, but modern standards of professional integrity had not been achieved. A. D. Gibb considers the extent of judicial corruption. It seems probable that each judge had what was called a “peat” or “pate” being a member of the bar who was able to influence his patron, the Judge—direct approach being apparently deemed too indecent. It is impossible now to discern how far corrupt Judges were moved by love of gain and how much by political and social interest. It seems probable that the former was comparatively unimportant if indeed it played any part at all, and Lord President Gilmour’s contemptuous denunciation of the Cromwellian Judges as “a wheen kinless loons” goes to support this view. In another place he comments: “Scotland was a small country, the aristocracy, a small minority and the administration of law almost exclusively in their hands. Powerful families deemed nothing more natural than that their kith and kin on the Bench, no kinless loons like the Cromwellian Judges,

17. 2 Fountainhall, Historical Notices passim, especially 632, 621 (1868).
19. 1 Fountainhall, Historical Notices 248 (1868).
21. Id. at 63.
should favour their relatives wherever an issue arose which involved one of them." It was not until 1762 that recruitment to the Bench of the Court of Session has been exclusively from the Faculty of Advocates, and among the most venial judges of the 17th century were no doubt some of the Extraordinary Lords who were nominees of the King who could sit or not as they pleased, were not required to have any legal training and received no official emoluments. The right of lay peers to vote in the House of Lords' appeals provides a basis of comparison.

Whatever the thoughts of individual advocates at the Restoration, their general manners were probably characteristic of men of their privileged class at that time. Those most venial and cruel were aspirants to office rather than the body of advocates as such. At a time when defence by counsel in cases of treason or felony was forbidden in England, advocates in Scotland did defend those accused of political or other grave crimes. The Faculty image gained consequently in prestige both internally and in the eyes of influential groups. From 1672, when the Justiciary Court was founded, probably dates the tradition of free legal aid in criminal matters which since October 1964 has been replaced by Statutory Legal Aid. A fee of 500 merks was required by the Faculty of every intrant advocate in this period and the Faculty also gained substantial control over entrance examination. In 1680 Sir George Mackenzie secured the founding of the Advocates' Library equipped with the leading treatises from the Continent of Europe. This collection like the institutional works written by Stair and Mackenzie at the same time show that the law of Scotland on paper, as in the legal background of the leading advocates, was European and cosmopolitan, whatever defects there may have been in the administration of justice in the country. The library of the Faculty of Advocates was to serve as the one national library of the country until 1925 when the National Library of Scotland was established largely on the old foundations and leaving to the advocates control over the legal material. Amid the political and religious controversies of the 17th century a strong sense of unity within the faculty itself gave it strength and authority. Advocates took care of each other. Thus, Mackenzie, known to the frequenters of conventicles as the 'Bluidy Advocate' seems to have warned Stair (a Presbyterian and sympathiser with the

23. 2 FOUNTAINHALL, HISTORICAL NOTICES 698 (1868).
House of Orange) to flee before action could be taken against him. Mackenzie connived at Stewart's hiding in London despite his political opposition which could have grounded a prosecution. In 1702, the Faculty, or at all events the Dean in their name, submitted an address to Parliament “concerning the meeting of Parliament,” and other public matters, and in fact protesting against the meeting of Parliament after the death of William III. The estates considered that the Faculty merited punishment for acting “extrinsic to their ordinary administration,” but the fact that they so acted is in itself significant. No punishment was ever imposed. Here was a small body which contended that no more than four new intrants should be admitted each year, yet speaking with authority and impunity to the estates. The last Scottish Parliament met in May, 1703. In it the Lord Advocate sat ex officio as did the Judges. Members of the bar had taken an active and influential part in the work of the Scottish Parliament and it had developed vigorously from 1688. The Union was destined to change radically the Scottish Advocate’s role in politics.

Though apparently it had been necessary in 1675 to insist that advocates should wear their gowns in court, the traditional costume had remained in use. In the drawing of the funeral procession in 1681 of the Duke of Rothes, Lord High Chancellor of Scotland, though the advocate’s dress is in general that laid down by James VI, there is some deviation between that worn by the advocates and that of the writers to the signet. The advocates’ gowns have braiding and tassels which are not on the writers’ gowns. The whole bar wore bands and full bottom wigs, the wig, of course, being part of a gentleman’s dress at that time. The only body in the profession which seems to have worn the plain stuff gown now worn by advocates were the university professors. It appears that between 1587 and 1604 a distinction had been made between Advocates for the Inner House and Advocates for the Outer House “which after it had gone into desuetude was attempted to be got renewed in the year 1670, but the project being very offensive and obliging to the Bar, the promoters thereof thought fit to drop it.” Thus until quite modern times, the functions and status of all

advocates remained equal. Not until 1897 was a roll of Queen's Counsel for Scotland introduced.

The 18th and 19th Centuries

The information available on the Faculty of Advocates is much more satisfactory in the 18th and early 19th centuries than in earlier times. Indeed Boswell, Walter Scott, Cockburn, and Stevenson have presented well known images which, though distorted occasionally in detail, are, on the whole, reliable, and vivid. Cockburn has no real successor and the biographies of Inglis, Ardwall, and Salvesne and the autobiographical Man of Law's Tale by Lord Macmillan are infinitely less revealing as secondary sources. Fortunately, field work can take over when source material dries up. The Union of 1707 had immediate but also long term consequences for the Faculty. The Agreement itself safeguarded in terms a number of the vested interests of the ruling classes in Scotland, the law, the church, the royal burghs and the heritable jurisdictions, yet it became clear very soon that anglicisation of Scottish institutions would succeed, partly through English policy and partly through the pliancy and connivance of the self-interested Scot. The effect of the Union on Scots law as such was immediately apparent in limited areas, due to statutory innovation and in civil cases when Scottish litigants invoked, as litigants always will, the ultimate court of appeal, the House of Lords, in which only English Judges sat until the last third of the 19th century. In general, the orientation of Scots law remained in the European tradition until the early 19th century. The Faculty of Advocates remained and remains proud of its privileges even when, especially after that time, it had been prepared increasingly to surrender vital principles of a national yet cosmopolitan jurisprudence under pressure of the more powerful economic and political influences of England. Advocates, though few in number, have always taken a leading part in the cultural life of the country and the Golden Age of Edinburgh owed much to them.

Unlike the Scots involved in British affairs in the life of the Palace, of Parliament and of administration generally, those who spent their lives in the faculty and in the College of Justice gradually became out of focus with other institutions of British importance. The other remaining specifically Scottish
institution, the Church, was riven by sectarian disputes, while many of the gentry remained with Rome or drifted to Anglicanism. The great extension of British rule overseas followed the Union and paradoxically fostered the world wide proliferation of English law. The Scottish bar remained essentially Scottish. Those who were non-Scots who sought entry to the Faculty were from Mauritius or the Cape where a Romanistic system had survived British occupation. In most countries, lawyers take a leading part in the political life of the central legislature. Scotland proved the exception. It was almost impossible to be both an active advocate and a Member of Parliament due to the factors of distance and the existence of different legal systems in Scotland and England. On the other hand, the Lord Advocate's office became far more influential after the Union than it had been before, when it had only been one of the offices of State. After the abolition of the office of Scottish Secretary, the Lord Advocate's control of advancement in the profession eventually resulted in excessive political partisanship within the faculty, for personal rather than for public reasons. This led to intense internal conflicts but not to destruction of corporate spirit nor of the public image.

A full description of the organization and the functioning of the Court of Session and the Faculty of Advocates in the immediate post-union period is contained in the preface to Forbes' Decisions. Of the Faculty, he writes "the whole society goes under the name of the Faculty of Advocates, a very honourable body into which none are admitted but such gentlemen as have spent several years in the study of the laws, though many of good estates commence as Advocates with no other view than the honour of being members of it." Examination was in the control of the faculty who appointed examinators and balloted on the intrants' performance. Thereafter, if successful, the intrant had allocated to him a text from the civil law and on an appointed day "was allowed to stand in one of the Lords' places covered when he makes his harang." Advocates, Forbes noticed, were sometimes though rarely admitted by trial on Scots law "in which case the candidate has no speech to the Lords before admission, but admission upon a trial in the civil law is more honourable." Not until 1750 were advocates required to pass an examination in Scots law. The tradition of European study in France and the Netherlands continued as has been noted until the time of the Napoleonic Wars, though it fell off con-
siderably towards the end of the 18th century, due in large measure to the emergence of a number of effective law teachers in Scotland, such as Erskine, Bell, and Hume in Edinburgh, and Millar in Glasgow.

When the College of Justice was inaugurated, it had been installed in the Tolbooth, but in 1632, Charles I had ordered a new building for the Scottish Parliament and for the Lords of Session. Occupation was deferred for some years due to civil war and usurpation. Nevertheless, from 1661 the Lords had sat customarily in the Parliament House and from the Union they sat on there. There was something of the symbolic in this arrangement. Though the other organs of Government had their seat in London, the College of Justice continued to occupy the Parliament House. In the Inner House, the Judges sat at a semi-circular bench served by 6 Principal Clerks, and at one corner, a Judge attended to Bill procedure. In the Outer House, or Great Hall, in 1741 there was one side bar,\textsuperscript{27} and a raised fore bar which the advocates reached by climbing some steps as their cases were called. The public had access to the hall and their noise disturbed the pleaders until new courts were constructed in the building, a development which was made particularly necessary when the Court of Session was reorganized in the early 19th century.

In the 18th century specialisation in function between advocates and others engaged in legal business became clearly defined. The notary was restricted to the chamber practice of a modern solicitor, while the functions of the modern solicitor in litigation before the Supreme Courts was shed by advocates. Originally, advocates had themselves acted as agents (attorneys), but afterwards handed over the practice of solicitors to others including the servitors or first clerks.\textsuperscript{28} In 1718, Spottiswoode\textsuperscript{29} states: "Generally speaking every advocate has two servants, one who takes care of his client's affairs and the other who waits on his person." In this way the advocate's role was kept clean. He did not discuss business but offered a specialised professional service. He did not, however, specialise as in England regarding the type of case he would take in the higher courts, and would accept criminal and civil work of all kinds.

\textsuperscript{27} In South Africa, "the Sidebar" refers to Solicitors or Attorneys as distinguished from the Bar, the advocates.
\textsuperscript{28} Advocate General v. Moncrieff, 10 D. 987, 989 (1848).
\textsuperscript{29} J. SPOTTISWOODE, FORMS OF PROCESS 50 (1718).
Until the early 19th century there were a number of central courts, now absorbed in the Court of Session and the High Court of Justiciary, which were always the most important. The expression “clerk” or “servitor” has acquired in modern use a meaning of somewhat inferior social status. The designation “clerk” in Scots law has often implied substantial status, as with the Lord Justice-Clerk, Lord Clerk Register and Principal Clerk of Session, the last of which offices Walter Scott was pleased to hold. Clearly so far as social distance is concerned, Boswell did not regard it as at all unusual that his clerk (first clerk), should be of the company invited to dinner. He, it will be recalled, was sufficiently conscious of social distance within the profession as to question whether Judges should be so free with advocates in roistering out of court in taverns.

Interlopers seem to have taken it upon themselves to act as solicitors as appears from the Act of Sederunt, 10th August, 1754, which narrates that “several persons who are not members of the College of Justice have taken it upon themselves without any warranty or authority from this court and without any trial or admission to manage agent and solicit causes.” The right so to act was restricted to advocates’ first clerks, writers to the signet (who for the first time were given official sanction to act as agents) and others admitted by the court under regulations to be made. The Act of Sederunt of 10th March, 1772, was to the same effect and the faculty itself drew up regulations to ensure that first clerks should be properly qualified. In 1774, a charter was given to the Society of Solicitors before the Supreme Court (S.S.C.) and in 1850, the advocates’ first clerks were merged in this Society.30

Mr. Nicholas Phillipson31 in the course of research as yet unpublished, has from a historian’s point of view examined the social structure of the Faculty of Advocates from the Union until 1850. He concludes that the key to how the Union was made to work in Scotland and the way in which the administration was carried on despite ultimate control from London, is to be found in the structure of the Faculty of Advocates. He observes “the pool from which the native administrative talent for such a successful administration could be drawn lay in the

30. See 1 Mackay, Practice of the Court of Session 120 (1877); cf. Advocate General v. Moncrieff, 10 D. 987 (1848).
31. The present writer is much indebted to him for valuable information which she acknowledges gratefully.
Faculty of Advocates,” for a legal career by definition based the person concerned in Scotland. It may be recalled that between 1725 and 1926 (except for 5 years in the mid-18th century) there had been no Secretary of State responsible as such for Scottish affairs. The Lord Advocate was not only the public prosecutor and legal adviser to the government but was also made generally responsible for Scottish affairs. Moreover, the Lord Advocate's powers of patronage were immense—Scotland's “manager,” Dundas, being the classic example. He achieved his position through membership of the Faculty of Advocates and largely from that same body made his control effective. The Faculty was small in size and it was a social elite. The social status of the members of the Faculty changed strikingly during the period covered by Mr. Philipson's research, and his conclusions tend to complement certain provisional conclusions which the present writer had reached regarding the anglicisation of the Scottish middle class from about the mid-19th century. It is from that period too that T. B. Smith in his Studies Critical and Comparative, traces the jurisprudential decline in self confidence in the Scottish bench and an increasing tendency to anglicise the content of Scots law.

The Social Structure of the Faculty of Advocates

Phillipson's research on the structure of the faculty from the Union of 1707 to 1850 discloses how closely it reflects that state of political power in Scotland during that time. At its beginning, only 4.5% of intrants were born of fathers who were not landed proprietors. However, in the last quadriennium this element represented 59.75%. After the Napoleonic Wars, recruitment from the unlanded classes rises continually. One factor of course in this striking change in the composition of the faculty was the rise of the middle class, but of equal or even greater significance is the altered representation of the various landed interests. In the first quinquennium, a third of the 45 intrants were sons of peers and baronets while in the final quinquennium, when the intake was 46, none of this class was admitted. Phillipson concludes that after the '45 Rising, the upper Scottish gentry both great and of medium importance gravitated towards London. “With the exception of the law, lucrative patronage lay to the South, and legal success was usually governed by the lawyer's relation to the Government in London.” Prior to the First Reform Act, especially during the era of Henry Dundas,
The Scottish patronage was a factor of tremendous importance. In Scotland, the county constituencies corresponded to some extent to the Rotten Boroughs in England, since voting was restricted in the Scottish Counties to the King's freeholders, a very small group. Cockburn in his Life of Lord Jeffrey\textsuperscript{32} observed that there were probably not above 1500 or 2000 county electors in all Scotland, "a body not too large to be held, hope included, in the Government's hand." Control of these constituencies through patronage was the major object of successive administrations. The influencing of the landed men especially of the great families was important, though Dundas himself preferred to influence individuals.

It would appear that over the century and a half covered by the research mentioned above, though the proportions of the landed and unlanded change strikingly as do the contributions made by the classes greater and lesser gentry, the "minor gentry" remain a constant force within the Faculty. Their lack of wealth and influence based them for a much longer period in Scotland, and the Faculty of Advocates offered the one satisfying career for a Scotsman of talent in his own country. The great men went South drawn by the magnet of political power, and became in effect Britons, southern English in their interests but with estates in Scotland which gave them influence and prestige. Men of family but of less fortune, unless they elected to practice at the bar in Edinburgh, were also increasingly drained from Scotland. The Armed Forces and the East India Company, where promotion depended on patronage, in particular provided occupation and opportunity for the ambitious Scot in the 18th century. His successors in the 19th and 20th centuries were recruited by the I.C.S. or Colonial Service. To the general drift south of talent and wealth, the Faculty provided at least a check. One thing which has been very apparent before and since the Union is that the Faculty has valued its separateness and will never willingly accept its absorption in a "British" legal profession. The Faculty has essentially been a national profession except for a few "outsiders" from Mauritius and the Cape in the 19th century. Cockburn in the mid-19th century, reviewing the scene from the late 18th century, often returns to the theme\textsuperscript{33} "the legal profession in Scotland has every recommendation to a person resolved, or compelled, to remain

\textsuperscript{32} I. Cockburn, Life of Lord Jeffrey 75 (1852).
\textsuperscript{33} Id. at 85.
in this country. It has not the large fields open to the practitioner in England, nor the practical seat in the House of Commons, nor the lofty political and judicial eminences, nor the great fortunes. But it was not a less honourable or a less intellectual life. It is the highest profession that the country knows; its emoluments and prizes are not inadequate to the wants and habits of the upper classes; it has always been adorned by men of ability and learning who are honoured by the greatest public confidence." The cultural gifts of the members of faculty were particularly apparent in the period of which Cockburn writes. This tradition has survived, but not as a general characteristic of advocates as a whole.

It may be recalled that Edinburgh's Golden Age including its Indian summer are covered by the personal experience of Cockburn and the generation by which he was reared. Hume, Adam Smith, Robertson, and others live in the memory as great figures. The leader of the scientific Whigs, many of whom were advocates, was Lord Kames, a Judge. One of his disciples, John Millar of Glasgow, an advocate and professor, had an enormous influence on the education of British statesmen, including Melbourne. Only after the Tory reaction at the time of the Napoleonic Wars did Oxford and Cambridge assume "nursery duties" for British politicians. The leading figures of the Golden Age, largely inspired by Kames, included speculation on law in their very wide interests, and Adam Smith came to be cited almost as a legal authority in court. It was characteristic of men like Kames that their zeal for law included Social Anthropology, Comparative Jurisprudence, and Economics. Profoundly interested in the historical approach, they also were champions of reform of the law. The intellectual vigour of the Scottish lawyers has probably never been greater than in the 18th century, and in a sense, they formed and led the life of the country. In George Washington's library at Mount Vernon, there is still exhibited Kames' treatise, The Gentleman Farmer, written in his 80th year, after 30 years of duty spent on the bench, and much longer as a legal author.  

Yet Cockburn notes in 1853 with regret and a degree of fatalism that "the century that is passing away has every chance of leaving Scotland but an English county. I feel my own indig-

nation often roused. But though particular examples may justify this, it is useless and wrong to resist the general current."

"Old Scotland," he concluded, "could live only in memory and in the character of the people, their nature, literature and in their picturesque and delightful language which is disappearing." Cockburn in the mid-19th century was already recognizing the increasing anglicisation of the urban middle class; and as has been noted this element was becoming increasingly represented in the Faculty of Advocates. Subsequent to the period covered by Phillipson and Cockburn, the trend of anglicisation extended to a much wider section of the middle class, though the process is continuous and its effects in varying degrees are apparent from the mid-18th century. Boswell is indeed an example and a prototype. The desire to master southern English speech has probably characterised many in the various generations of advocates since his time. When Jeffrey went up to Oxford in 1792 he commented: "the only part of a Scotsman I mean to abandon is the language, and language is all I expect to learn in England." The result, Lord Holland remarked, was that "though Jeffrey had lost the broad Scotch at Oxford, he had gained only the narrow English." Of many could the same have been said over the past two centuries.

Yet Boswell and others of his outlook were passionately attached to their landed estates in Scotland and to their family interests. In this respect they were Scottish in outlook though looking to London for social and intellectual stimulus. Boswell was almost obsessed by the idea that Auchinleck must pass in the male line, whatever sacrifices this might involve for his daughters whom he adored. Advocates who came from unlanded families put the seal on a successful career by acquiring small estates. Thus, Robert MacQueen who became Lord Justice Clerk Braxfield was the grandson of a gardener, son of a writer (legal) but had made a substantial fortune at the bar which he spent on an estate. To this day, Monday is not a court day in the Court of Session, allegedly because in past times the advocates and Judges required this day to look to their estates. Moreover, when a Senator is raised to the bench, he takes his seat with a judicial title which may be that of his estate. This happens less frequently today than formerly, and indeed Cock-

35. 2 H. COCKBURN, JOURNAL 295-96 (1874); see also H. COCKBURN, MEMORIALS i, especially 28 et seq., 113 (1856).
36. See 1 H. COCKBURN, LIFE OF LORD JEFFREY 46-47 (1852).
burn condemned the practice, as long ago as 1850 since “good lawyers” by this time were no longer landed men. At all events, the element of minor gentry which maintains its influence in the Faculty today, though less so than in the 19th century, is recruited now as then from those whose fathers were not landed, and whose estates have probably changed hands quite frequently in the present century. The position of the minor gentry in the faculty probably remained constant throughout the remainder of the 18th and 19th centuries. Its influence today is probably less due to numerical factors than to personalities which, of course, have always been important in faculty affairs.

At the present time a high proportion of advocates are the sons of lawyers. During the century and a half covered by Phillipson’s research, 25% of those admitted to the Faculty were from legal families. He designates as “dynasties” families in which over three or more generations from father to son provided lawyers including at least one intrant to the Faculty. He also includes some exceptional cases where one generation had not produced a lawyer. It was found that the greater gentry produced 9 dynasties, the medium gentry 31, minor gentry 16, and the non-landed 10. However, “the 9 dynasties of the greater gentry produced 58 advocates (6 per family) and 27 Judges (or 2 per family) including 4 Lords President. The dynasties of the lesser (i.e., medium) gentry produced 142 advocates (or 4 per family), 39 Judges (1 per family) including 4 Lord Presidents. The 16 dynasties from the minor gentry produced 41 advocates (or 2½ per family), 13 Judges (or 4/5 per family) and the unlanded produced 24 advocates (2½ per family) and 4 Judges (2/5 per family).”

By 1800 however, the dynasties had declined. Only 4 of those from the greater gentry survived and 16 from the medium. The same period, however, saw the dynasties of the “minor” gentry reach its peak from which there was subsequently a decline. The non-landed element had not established dynasties at the turn of the century but reached its peak of 10 in 1830, a figure which remained constant until 1860 at least. The late emergence of such dynasties is in itself significant. Writing of Robert Forsyth who had been admitted in the late 18th century,

37. 2 COCKBURN, JOURNAL 260 (1874). Yet recently Mr. Shaw and Mr. Shearer took their seats on the Bench with the judicial titles respectively of Lord Kilbrandon and Lord Avonside.
Cockburn commented: \(^{38}\) “The Faculty of Advocates which was then a highly aristocratic body and used to curl up its nose at every plebian who tried to enter, objected to his admission.” Forsyth was eventually admitted, but to 1967 the formality is observed of balloting on entrance after the “public examination.” Professional and intellectual competence have not guaranteed admission as a right. Moreover, toughness of moral fibre has been required of each successive social group to gain acceptance into the faculty.

Until the time of Dundas, the “establishment” of the Parliament House, its established legal aristocracy, controlled preferment in the profession. As advocates, however, became more dependent on fees and less on their own private fortunes, they were inclined to look more to political influence for preferment, a situation which still survives in large measure. Before Dundas, however, preferment especially to the highest offices was a dynastic matter. During the century from the Revolution to 1787 with short interruptions, the Lord Presidents were appointed from the houses either of Dalrymple or Dundas of Arniston, and until 1831, nomination to that office still lay in the gift of Robert and his son, Henry Dundas.

**The 20th Century**

The classes from which the Faculty is now recruited have changed noticeably from the period described by Phillipson. Subject to the heavy initial financial outlay required, the Faculty is democratic in recruitment and aristocratic in function. There remains an inner group of minor gentry, sons of wealthy professional mercantile or industrial families. Sons of the manse and sons of solicitors are in particular a substantial element. Those come from an essentially Scottish professional tradition. There has been a tendency for advocates in these groups to have taken a degree at Oxford or Cambridge, and, since the law degree there is designated B.A., many take their first degree in law there and are permitted to count it as a qualification in “general scholarship.” This has increased the trend towards anglicisation of the Faculty of Advocates in the sense that many of its members speak and think much as their opposite numbers at the English bar, though in some cases the enthusiasts for the Scottish legal heritage have shared their educational background

\(^{38}\) 2 id. 153.
between England and Scotland. Though increasingly the law of Scotland is being influenced by English law, and advocates rely, when it suits their case, on English authority, the faculty would resist to the uttermost any encroachment on its particular privileges—either through fusion with the English bar or fusion with the solicitors' branch of the profession in Scotland. The advocate's place in the community is still highly respected, ensures high social status and gives good prospects of a reasonable livelihood. The moderately glittering prizes of the bench in the Court of Session are reserved for advocates who have managed to persevere in practice. There are other openings for those who do not, and these are respected in the community. Leading solicitors may earn more or be equally able as lawyers, but their public image is not on the same level.

Nevertheless, the image of the Faculty is not what it was in Cockburn's time. Even he deplored the falling off of work in the Parliament House, a tale taken up more bitterly by Professor A.D. Gibb in the 1930's in his Shadow over the Parliament House. State subsidising of litigation has been a monetary blessing to the bar, but may have lessened the standing of advocate. Writing so close to the introduction of legal aid in Scotland, it would be unsafe to reach firm conclusions on this issue. Large enterprises, whose managers and directors command larger remuneration than advocates, are accustomed to employ specialists, and regard advocates much in the same way as they do other specialists. Moreover, as 80% of all enterprise in Scotland employing 200 or more employees are controlled from the South, those in control tend to view the Scottish advocate as operating in a provincial setting. The advocate's image in Scotland is more distinguished than in Britain as a whole. Within the legal profession in Scotland, the successful solicitor may regard the advocate with some envy on account of his popular image, but would not concede that it rested on professional ability. The Sheriff Court where the solicitor has equal right of audience, has extensive jurisdiction. Were divorce jurisdiction to be transferred to the Sheriff Court and were civil jury trial to be abolished the junior bar would suffer severe loss of earnings. Neither of these classes of litigation belonged to the Court of Session until the early 19th century. Retention of the status quo is defended by some on the grounds, not of logic and convenience, but by the argument that any change
would imperil the survival of the Faculty as a separate group. This argument indicates a sense of insecurity regarding the future. The traditions of centuries have given the Faculty of Advocates a special standing in the community. It remains essentially Scottish in recruitment and essentially Edinburgh in location. Whether in a changing social and economic environment it can retain its privileges and relative social status in the community cannot safely be predicted. Ultimately its privileges are safeguarded by the Union Agreement, as were those of other aspects of "the establishment" such as the Church, royal burghs and heritable jurisdictions. That Agreement has not proved an adequate safeguard for these other aspects. The Faculty may prove more fortunate, but is unlikely to recover the prestige it enjoyed in Edinburgh's Golden Age.