

THE LEGAL PROFESSION IN SCOTLAND.

II. THE PRACTITIONERS.

The division of the legal profession in Scotland into barristers and solicitors is comparatively modern. The first lawyers of whom there is any trace in Scotland were the Imperial or apostolic Notaries admitted by the Emperor of the Holy Roman Empire or by the Pope. In the early middle ages we find them coming from the Continent to Scotland and employed in drawing up important deeds and protocols and acting as clerks to the Courts and in arbitrations. For long there appear to have been no native Notaries. The first notice we have of these is in the later middle ages, in 1469, when Parliament provided that Notaries were no longer to be made by the Emperor but were to be admitted by the King—the Bishops first examining and certifying them. For some time after this Clerical Notaries continued to act, and it is only after the institution of the Court of Session in 1537 that purely lay Notaries appear, that Court having assumed the power of admitting them. Soon after its foundation the Ecclesiastical Courts seem to have given up their power of admission, and the Civil Court to have become the sole authority. To this day the Court of Session continues to admit Notaries. A separate examination exists for them, and every solicitor also who chooses to apply is admitted. Their importance has much diminished. They do conveyancing work and are still required, according to the European common law, for certain formal acts, such as attesting the deeds of blind persons, protesting bills and making maritime protests.

The next legal practitioners of whom we have any notice were the Advocates. We know that they existed long before the foundation of the Court of Session, and that certain of them practiced both in the higher and lower courts. In the earlier times there were no solicitors and an Advocate was the representative of his client in Court, doing everything in connection with the case which was required. Each Court, Supreme or Inferior, at its discretion admitted its own Advocates. They were usually clerics and usually educated abroad. The word advocate, though now limited in common use to the counsel in

the Supreme Court, originally included every kind of procurator. A relic of the old use of the word advocate remains in Aberdeen in its use by the Society of Advocates there who are a body of law agents. The probability is that the name has been preserved there from Aberdeen having at one time been the seat of an important local Commissary Court.

From having originally been all Advocates the legal practitioners in Scotland have come to be divided into two distinct classes. The division was gradually introduced. The Advocates connected with the Supreme Court retained the most valuable of their privileges, the monopoly of appearing in that Court for clients, and side by side with them grew up various bodies of solicitors, who did the work connected with cases which could be done outside the Court, and who competed successfully with the Notaries for the bulk of the conveyancing work. The Faculty of Advocates of Scotland are the direct descendants of the Advocates who existed before the division of the profession. These Advocates, properly so-called, are admitted by the Supreme Court, and have now right to plead in any Court in Scotland. They form an old corporation, the origin of which is lost in the middle ages. They are a numerous body—far more numerous than there is occupation for—and have been so for a long time past. From the late middle ages to this day they have been great encouragers of learning in Scotland, possessing one of the largest libraries in the United Kingdom, especially rich in manuscripts and in early printed books. The part they have played in the public life of Scotland has always been distinguished.

The oldest body of solicitors is the one known as the Clerks or Writers to the Signet. They were originally the clerks in the office of the Crown Signet, or lesser seal with which writs issued from the Court of Session were sealed. Some of these clerks came in time to be employed to draw these writs, and from this humble beginning has come one of the most dignified of the legal corporations of Scotland. Advocates not caring to quit the Court of Session, it was left to the Clerks to the Signet not only to draw the initial writs but to take, under counsel, the whole charge of the process. At first they were not recognized by the Court as having a regular position. Even so late as the seventeenth century the only persons whom the Court recognized as having charge of cases were the Advocates themselves.

The next body of solicitors in importance is the Society of Solicitors before the Supreme Court. Although now a large and

important body, their origin was of a similar character. The first of them were what were called the Advocates "First Clerks." To these, in the same way as to the Clerks to the Signet, the Advocates had been in the way of entrusting the management of cases so far as it could be done out of Court, and they came to be recognized as having the power to act for them in all such matters.

The third set of solicitors had their origin in the procurators in the Lower Courts, who originally could act in them only. Each County possessed at least one Society of them, and some of these Societies, like the Faculty of Procurators in Glasgow and the Society of Advocates in Aberdeen, were bodies of learning and influence. In the lower Courts the division of the profession was never carried out. If it had been it would, as in England, have extinguished them. The Advocates admitted by the Supreme Court were recognized apparently at a very early date as having the right to appear in all the lower Courts, but they rarely did so. The Procurators or Writers admitted by the Sheriffs were both counsel and agent in the Sheriffdoms where they were admitted, and out of them were not recognized. Matters continued in this unsatisfactory position until reformed by the Law Agents Act of 1873, passed by Lord Young when he was Lord Advocate. Under this Act all the solicitors acting in the Supreme Court got power to plead in the local Courts, and the solicitors in the local Courts power to act as agents in the Supreme—all being put upon the same footing. The power likewise of the local Courts to admit solicitors was taken away and the whole power vested in the Court of Session. Every solicitor admitted by the Court of Session has now equal privileges with the others, but the old corporations are still kept up. For the sake both of social position and of the libraries nearly every solicitor still joins one of them.

The way in which the work is practically divided between counsel and agents is readily enough understood. In the Court of Session counsel must be employed and they act only when instructed by an agent. So strict is this rule, that no counsel can even speak of the case to a client except in the agent's presence. After the agent has taken the instructions he communicates them to counsel, and it is the latter's duty when duly crammed to draft the written pleadings and to conduct all the oral proceedings in Court. In cases where evidence has to be taken, the agent ascertains who the witnesses are and what they have to say, and gives notes of this to the counsel, who examines them in Court. In the lower Courts the solicitors do the work both of

counsel and agent and are fully qualified to do so. In rare cases they may call in the help of counsel and when they do so the case is conducted in this respect in the same way as in the Court of Session. Counsel, however, have no right of free audience when employed in the Sheriff Court. As the volume of business begun in the Sheriff Courts is many times larger than that begun in the Court of Session, the experience which the solicitors in the lower Courts have of practicing on the American plan as both counsel and agent is very large.

Outside of Court work counsel do little in Scotland, except the giving of written opinions upon cases prepared by the Law Agents. They never draft deeds, though in important cases they sometimes may revise the deeds which the agents draw. In conveyancing work the solicitors have practically superseded the Notaries and, indeed, almost do the whole of it. Law agents in Scotland also do a good deal of work which in other countries falls to bankers and land agents.

The remuneration of counsel and agents is naturally very unequal, but never extends to the large incomes which are earned in England and elsewhere. A well-employed counsel may earn possibly twice as much as a Judge of the Supreme Court, and the successful law agents are sometimes said to earn even more. But these are very exceptional cases, and from them earnings taper down rapidly till in many cases they dwindle away to nothing.

Opinion is a good deal divided as to whether the division ought to be maintained. The strongest argument in its favor is that it has grown up of itself, apparently in order to satisfy a felt want. It has some advantages and many disadvantages. It has the effect of creating a class of men who are better adapted for work in Court and better qualified for filling judicial offices, but this again is got at the cost of a good deal of hardship. Many of the younger counsel are precluded from employment altogether, and the sphere of the agent is hardly so dignified as that held by the other branch of the profession. The seniors in both branches, who have made their position, naturally are against change, but amongst the juniors there are strong opinions for it. It can hardly be said that the public has an opinion on the subject. The public in Scotland as in England, take little interest in any legal matters and look upon the discussion on this point as something purely academic.

I have reserved to the last the saying of something concerning the education of the legal profession. Before the sixteenth

century Scotch lawyers were necessarily educated abroad. In the early middle ages they frequently went as far as Italy, and in the lists of students of the old Italian universities which have been preserved numerous Scotch names are found. When the French universities were founded Scotchmen thronged there and some few studied in Oxford. When the three old Scotch universities were founded about the middle and end of the fifteenth century, provision was made for founding law schools in them. At St. Andrews and Glasgow, the law schools apparently took no hold, but at Aberdeen, probably in consequence of the existence of the Commissary Court already mentioned, the School of Law seems to have thriven, and it has existed from its foundation there in 1505 in unbroken succession to the present day. When that University was founded four chairs were established, two of these being legal, one of the Civil or Roman Law and the other of the Canon Law. At that time it was thought unnecessary to make provision for instructing in Scots Law. In 1505 the whole body of it was insignificant. In the long roll of professors there are many distinguished men, some afterwards Lords of Session. The Chair of Canon Law died out in the seventeenth century, and it is noteworthy that it was in 1640 that the first professor of law was appointed who had been educated in this county. The teaching till a much later time was simply that of the Roman Law and from the books preserved in the old library one may gather the nature of their studies. The folios of Azo, Bartolus, Gothofredus and Cujacius with hosts of the works of minor civilians stand there, now almost unread. After the seventeenth century the supply of works on Roman law seems to have fallen off, as if the interest in it had flagged. Probably the school then fell considerably in importance owing to the opening of law schools in Edinburgh and Glasgow. These schools were founded shortly after the Union between England and Scotland and took considerably larger dimensions than the school at Aberdeen. Notwithstanding, however, the foundation of these schools in Scotland, most of the Advocates continued to get their education abroad. In the later middle ages France had been the country they had chiefly frequented, many Scotchmen remaining there as teachers. After the Reformation it was the Low countries—Leyden, Utrecht and Groningen—which they chiefly frequented. This custom endured to the end of last century, when it fell gradually into general disuse. It cannot be said to be altogether abandoned yet. Now, however, when Scottish lawyers go abroad to study

it is usually to Germany where the most flourishing schools of Roman law are now found. The abandonment of Latin as the language of instruction was fatal to the frequentation of the Dutch law schools by pupils from other countries.

The Scotch law schools cannot be said to be well furnished. The best furnished is Edinburgh with seven teachers; the next is Glasgow, with five, and then comes Aberdeen, with three. The teaching is not supplemented to any considerable extent by teaching outside of the universities—the only place where that is attempted being Glasgow, where a somewhat ambitious attempt has been made. In St. Mungo's College there—which is a private school not entitled to grant degrees—there are some twelve teachers, and they furnish a better programme than any of the universities.

The universities alone grant degrees in law. Whether they had ever done so in old times after examinations, is not clear, but if they did, the practice had fallen entirely into disuse, and was not revived till 1860. The degree of LL.D. is still merely an honorary degree, but the universities now grant the degrees of LL.B., and B.L. The former is granted in Edinburgh and Glasgow, and the latter, in these two universities and also in Aberdeen. The former degree requires a curriculum of three years and to pass in seven subjects; the latter a curriculum of two years and to pass in four subjects.

Except for the bar, attendance at a university is not compulsory. Advocates have to attend a limited number of law classes, but if they choose to attend the university and to take degrees there, they save themselves a considerable amount of trouble. In general knowledge, a person passing for the bar must either take the university degree of Master of Arts¹ or pass an equivalent examination. In law, if he choose to take the degree of LL.B., he gets through his examinations as a matter of course.

The education of the solicitors is seriously hampered by the necessity they are under of serving a long apprenticeship. In the ordinary case a solicitor has to serve an apprenticeship of five years, but if he is an M.A., it is limited to three years. In most cases there is reason to believe that the longer apprenticeship at all events, is spent in learning what would easily be learned in half the time. The result of it is to leave young solicitors with

¹ In Scotland the degree of B.A. is not granted. The Scottish M.A. degree is equal to the American and English B.A.

comparatively little time for the study of law. In general knowledge if a solicitor is not a Master of Arts he must at the beginning of his apprenticeship pass an examination which is practically equal to the matriculation examination of the universities. At the conclusion of his apprenticeship he is at liberty to go up for examination in law. It is not requisite that he should have attended any classes in a university. He requires to pass in three subjects—Scots Law, Conveyancing, and Forms of Process. If, however, he chooses, he may attend classes, and he usually does so. This law examination takes place before a body of eight examiners appointed by the Court of Sessions. Of these at present three are teachers of law and five are practicing law agents. If the candidate has taken a law degree—either that of LL.B. or B.L. at a Scotch university, he is excused from further examination except in process. The B.L. degree was specially instituted for his advantage.

What is most wanted in Scotland in legal education is, firstly, a higher standard for general knowledge, and, secondly, a higher standard for law; but as long as the present apprenticeships are kept at their great length, it seems impossible to expect that young men can find the time necessary for study. If five years of a young man's life is to be taken up in doing work, most of which could be done by a typewriter, it is impossible that he can give time either to general or legal education. Probably it is too much to expect that Scotland will follow the example of America and abolish apprenticeships, almost entirely, but certainly a very considerable reduction in their length would be a practical reform of great advantage. Unless the period for study can be extended, nothing except an increase of cram can be expected from raising the standard of examination. Greater development of the schools is wanted, but at present there is no room for it. The annual number of students who enter for training for the bar is not more than from a dozen to a score. The bulk of the students at all the three Scottish schools are training for solicitors and they have hardly time even for the present classes. If they could devote more time to the law school, subjects could be divided and added to, till a really good curriculum could be supplied.

I trust these notes on the legal profession in Scotland may interest some in America. The comparison of systems is always profitable. In comparing systems, we can always find something to admire, something to criticize and much whereof to think.

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