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# The Lower Branch of the Legal Profession in Early Modern Scotland

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- A. THE CONTINENTAL PERSPECTIVE
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The lowly position of procurators in the *ius commune* tradition belies their practical importance. In Scotland a division is not simply to be drawn between advocates and procurators, but may be more appropriately made between practitioners who belonged to the College of Justice and those who did not. The Session Papers provide one of the fullest sources of information about the interaction between lawyers and their clients, and lawyers *inter se*. In this paper, an attempt is made to use them as the basis for an analysis of legal practice during the early modern period.

## A. THE CONTINENTAL PERSPECTIVE

In studies of the history of the legal profession in Scotland, law agents and members of the Society of Writers to the Signet have been curiously neglected. Part of the reason undoubtedly lies in their number, in the lack of any central list of the procurators who appeared before the myriad of local courts in early modern Scotland, and in the fact that their task was viewed as a mechanical and rather uninteresting

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one. Legal commentators, in both Scotland and across continental Europe, were not particularly sympathetic to procurators and practitioners in inferior courts.<sup>1</sup> This bias stemmed from the fact that authors of books about the law tended to be advocates, or at least to have qualified as advocates, and looked at their legal profession through the lens afforded by the *ius commune*. For that reason, they generally had a more favourable view of practitioners in the central and superior courts than of those further down the scale.

Most would have agreed readily with the view expressed by the French humanist, Hugues Doneau (1527-1591), that “the office of advocate is more praiseworthy, and has more dignity attached to it, than the office of procurator, which is worth little, so much so that the infamous are admitted to it, whereas an infamous person cannot become an advocate”.<sup>2</sup> Doneau’s later compatriot, André Tiraqueau (1488-1588), specifically included notaries in the same low category as procurators and contrasted the role of both unfavourably with that of the advocate, which was “praiseworthy and most necessary to the life of men”.<sup>3</sup> This reflects French culture where in many courts, prior to the eighteenth century, the procurator (or *procureur*), though traditionally described as *maître de la cause* or *dominus litis*, was permitted to speak only to the advocate (*avocat*) and was required to kneel while the latter pleaded in court.<sup>4</sup>

The low status and relatively minor value attached to the office of procurator was a position inherited from medieval canonists. Canon law, as Tiraqueau acknowledged, permitted an infamous person<sup>5</sup> to act as a procurator; Roman law

1 Modern studies of the legal profession also normally focus on those who enjoyed the rank of advocate, but some discussion can be found of procurators and attorneys. Relevant work in this field includes L Berlanstein, *The Barristers of Toulouse in the Eighteenth Century 1740-1793* (1975); L Waelkens (ed), “L’Assistance dans la Résolution des Conflits” (1997) 64 *Recueils de la Société Jean Bodin pour L’Histoire Comparative des Institutions*; W Prest, *Lawyers in Early Modern Europe and America* (1981); W T M Frijhoff, *La Société Néerlandaise et ses Gradués 1575-1814* (1981); R L Kagan, *Lawyers and Litigants in Castile 1500-1700* (1981); C W Brooks, *Pettyfoggers and Vipers of the Commonwealth* (1986); R Robson, *The Attorney in Eighteenth-century England* (1959); W Bowsma, “Lawyers and early modern culture” (1973) 78 *American Historical Review* 303; G Strauss, *Law, Resistance and the State: The Opposition to Roman Law in Reformation Germany* (1986); J-L Halperin (ed), *Les Structures du Barreau et du Notariat en Europe de l’Ancien Régime à nos jours* (1996).

2 H Donellus, *Commentariorum de iure civili liber decimusoctavus* (Frankfurt, 1626) 18.3: “Aduocati munus magis laudabile est, maioremque habet annexam dignitatem, quam procuratoris, quod est vile, adeo, vt etiam infames ad hoc admitantur: cum Aduocatus fieri infamis non possit.”

3 A Tiraqueau, *Commentarii de Nobilitate et Iure Primogeniorum* (Lyon, 1617) c 29 n 14: “videtur officium aduocati minime vile esse & abiectum, imo vero laudabile, vitaeque hominum maxime necessarium ... cum officium notarium & procuratorum sit vile”. Tiraqueau was a senator in the *Parlement de Paris* and his work was widely quoted.

4 Berlanstein, *The Barristers of Toulouse in the Eighteenth Century* 8.

5 In canon law a person found to be infamous (of evil reputation, *infamia*) came under certain legal disabilities reflecting his dishonest status: for instance he could not act as an advocate or procurator in court, or appear as a witness.

did not. This was the first difference between canon law and Roman law noted by the Leiden professor, J F Böckelman (1632-1681), in the chapter on procurators in his posthumously published *Tractatus de differentiis juris civilis, canonici et hodierni*.<sup>6</sup> But this was not always quite so clear. The Vicar General of Antwerp, François Zype (1580-1650), indicated that infamous persons could act in the courts of the Spanish Netherlands as procurators but not as advocates, although he added that due to the special dignity of the highest courts the infamous could not appear there as procurators.<sup>7</sup>

The main jurisdiction which did not make a distinction in rank between advocates and procurators was that of the Imperial Chamber (the *Reichskammergericht*) in the Holy Roman Empire, where procurators enjoyed virtually the same status as advocates. The highly influential writer Andreas Gail, in his discussion of practice there, noted the distinction widely drawn between advocates and procurators.<sup>8</sup> In general, he explained, it was true that an advocate held a public office which, once accepted, placed him under the authority of the judge who could compel him to exercise that office in a particular case. A procurator, on the other hand, voluntarily undertook a mandate to act on behalf of another and no judge could compel him to enter into any such contract against his will. In the Imperial Camera, however, this distinction held no sway because procurators could be compelled to undertake mandates, on account of their unusually high status in the Empire (where only doctors of law, or at least licentiates, were admitted as procurators).<sup>9</sup>

Medieval jurists such as Bartolus and Durantis had discussed at some length the nature of the procurator's mandate. Jean Imbert, a sixteenth-century *avocat* from Pontoise, drew a distinction between the position in the time of Bartolus and practice in the inferior French courts in his own day.<sup>10</sup> The rule that a procurator could not be admitted by the judge to act on behalf of a litigant unless he produced

6 J F Böckelman, *Tractatus postumus de differentiis juris civilis, canonici et hodierni* (Utrecht, 1694) c 70.

7 F Zype, *Notitia Iuris Belgici* (Antwerp, 1675) lib 1, *De postulando* n 3.

8 A Gail, *Observationum Practicarum Imperialis Camera* (Venice, 1613) obs 43.

9 Gail, *Observatio* (n 8) 43.9: "Fallit haec distinctio in Camera, quia per inde coguntur procuratores suscipere procurationem, atque Aduocati patrocinium. per tex. Ordinat. part 1. titu. 19. §. 5. Ratio, quia officium procuratoris in Camera non est vile, sed honorabile, tam ratione personarum (quod nemo ibi in numerum procuratorem recipiatur, nisi sit Doctor, vel Licentiatu[s]) q[uam] loci, quia Consistorium summi Principis, scilicet Imperatoris, & Statuum." [This distinction fails in the Chamber, because a procurator may be compelled to undertake an action just as an Advocate may ... . The reason is that the office of procurator in the Chamber is not rated lowly, but is honourable, as much by reason of the persons who hold it (since no one there is received into the number of procurators unless he is a Doctor or Licentiate) as by reason of the place, since it is the Consistory of the highest Prince, namely the Emperor, and of the State.]

10 J Imbert, *Institutionum Forensium* (Lyon, 1552) c 30.

a mandate was no longer being applied strictly. Instead, a procurator might appear without a mandate provided he produced one within a defined period of time. Alternatively, the court, by its own determination, might admit certain procurators to exercise a general mandate acting in all of a client's affairs, although unless the specific authority to act was ratified by the client within a particular period of time the procurator would be liable for any loss sustained.

Another influential writer, Johann Wissenbach (1607–1673), although noting the affinity between the roles of procurator and advocate, kept them distinct. In his discussion of Justinian's Code, he drew a number of contrasts. A procurator had a mandate, an advocate had none; a procurator had a master while an advocate had a client. Fundamentally, while an advocate required eloquence and legal knowledge, a procurator did not since it was the advocate who pled the cause and the procurator who merely administered it. An advocate could give security and could swear the oath *de calumnia* on his client's behalf; a procurator could do neither.<sup>11</sup> Wissenbach, a subject of the Empire though he largely taught in the Netherlands, did acknowledge that in his own day the offices of advocate and procurator were generally equivalent, and might be held by the same person.<sup>12</sup> However, most early modern writers made much of the difference in status and, by emphasising the qualities of the advocate, tended to downplay those required of the procurator. Wissenbach's former student at Franeker, Ulrich Huber (1636–1694), for example, required an advocate to be a good man, of prudence, integrity, modesty and good faith, as well as an expert in the law.<sup>13</sup> Bartolomeo Agricola emphasised the need for legitimate birth, ingenuity (*ingenium*), a good memory, a good reputation, and piety based on sound religious principles.<sup>14</sup> Advocates, according to François Zype, could achieve nobility of status despite obscure (though presumably legitimate) birth.<sup>15</sup>

11 J Wissenbach, *In libros iv priores Codicis Justiniani repetitae praelectionis* (Franeker, 1665), 2.5.13: “Advocatis conjunguntur Procuratores; quorum officia inter se quidem affinia, sed re ipsa tamen sunt distincta. Procurator est qui litem mandato domini persequendam suscipit, l.l.D.h.t. Multis rebus differt ab Advocato. Procurator mandato constituitur: est sine mandato. Illis mandans vocatur dominus: huic, susceptus, cliens. In Advocato peritiam juris exigimus & facundiam: in procuratore neutrum. Advocatus causam orat: procurator causam administrat. Ad advocato libelli sunt & preces: non fiunt a Procuratore. Advocatus jurat de calumnia l.2.pr C.de jurei.propt.cal.praest. non jurat Procurator. Procurator satisdat l.l.C.h.t. §.sin a.Inst. de satisdat. non satisdat.”

12 Wissenbach, *In libros iv priores Codicis Justiniani repetitae praelectionis* (n 11) 2.5.13: “Et hodie promiscuum fere est Advocati & Procuratoris munus, eoque una eademque persona conjunctim fungitur.”

13 U Huber, *Praelectiones*, 3rd edn (Utrecht, 1711) 3.1.

14 B Agricola, *Advocatus sive De Qualitatibus et Officio boni advocati relectio* (Neapoli Nemetum, 1618) c 17: “Cumprimis autem in Advocato requirimus Natales legitimas, vt scilicet ex iusto & legitimo matrimonio, abs ingenuis honestisque parentibus procreatus & natus sit.” [First, we require in the advocate legitimate birth, namely that he be the product of a valid and legitimate marriage, having been procreated by free and worthy parents.]

15 Zype, *Notitia Iuris Belgicae* (n 7) lib 1, *De postulando* n 4: “de Advocatis nemo dubitat: imo nobilis

An extreme example of the social and functional subordination of procurators to advocates may be found in the language used by Ephraim Nazius, whose 1677 dissertation, *De Conscientia advocati*, is considerably lengthier than its title might suggest.<sup>16</sup> For him, the advocate is to the procurator as the principal cause is to the instrumental cause; in short, if one is the writer, the intellectual force, the other is merely the pen, the tool of the trade. In an analogy more commonly drawn, the advocate is seen in the role of tutor, with the procurator cast in the less protective role of curator.<sup>17</sup> The common view was that, given that a procurator acted under a mandate, no person could act as a procurator until he (or, at least in canon law theory, she) reached the age of twenty-five. An advocate, on the other hand, subject to no mandate, could be younger but still had to be at least seventeen.<sup>18</sup>

Although a procurator might be much engaged in the cause, he acted only on the instructions of the advocate or client and performed mechanical, rather than intellectual, tasks such as handing in documents to the court and observing procedural time limits. According to Johannes Calvinus (or Kahl), the office of advocate was largely conducted outside the place of judgment, whereas the procurator could only exercise his role in the courtroom; procurators prepared the action with the pen (*magis agunt calamo*), advocates pled the case with the mouth (*ore*).<sup>19</sup> Nonetheless both were subject to judicial discipline. Once admitted into a court, the bad behaviour of either an advocate or a procurator might lead to the judge suspending them from their office. According to the Venetian jurist, Roberto Maranta, such discipline applied to advocates and procurators alike.<sup>20</sup>

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eorum status est, quamvis sit obscura natiuitas" [no one doubts of Advocates, first, that their status is noble despite the obscurity of their birth].

16 E. Nazius, *Dissertatio de Conscientia advocati quam ex auctoritate et consensu magnifici j[uris] c[onsul]torum ordinis in academia viadrina* (Pomerania, 1677) 1.9. Nazius probably gets the idea from Calvinus' definition (n 19 below), wherein he states that advocates operate with their mouths and procurators with their pens, but his allegorical use of the idea is rather more pointed.

17 J. Calvinus, *Lexicon Iuridicum: Iuris Caesaris Simul, et canonici: Feudalis item civilis, criminalis, theoretici, ac practici: Johannis Calvini, alias Kahl, Wetterani, Iuris Doctoris, & in Academica Heidelbergensi Professoris* (Hanover, 1619) sv *advocatus*; G. Durand, *Speculum Judiciale* (Tours, 1578) 1.9.6 ("advocatus, qui est quasi tutor clientuli").

18 E.g. Böckelman, *Tractatus de differentiis juris civilis, canonici et hodierni* (n 6) c 70; Agricola, *Advocatus sive De Qualitatibus et Officio boni advocati relectio* (n 14) c 12.

19 Calvinus, *Lexicon Iuridicum* (n 17) sv *procurator*: "Ideoque advocatorum munus extra locum iudicii peragitur: procuratorum non nisi in iudicio: illis causam instruunt, hi perorant; illi magis agunt calamo, hi ore." Presumably, the sense is that the intellectual preparation of the case by the advocate takes place largely outside the courtroom.

20 R. Maranta, *Aurea Praxis: vulgo Speculum Aureum* (Lyon, 1584) para 6 n 182. On misbehaviour and regulation, see J. Finlay, "Pettyfoggers, regulation, and local courts in early modern Scotland" (*Scottish Historical Review*, forthcoming).

## B. ADVOCATES AND PROCURATORS

As in most areas of law and legal practice, attitudes in Scotland were not out of step with mainland Europe. The central civil court was the College of Justice, endowed in 1532 and forming, in itself, a community within the burgh of Edinburgh.<sup>21</sup> The membership of the College included both the advocates, who at least from the seventeenth century acted through their own corporate structure in the Faculty of Advocates, and the writers to the signet who, probably from an earlier date, had formed their own society (the Society of Writers to the Signet, referred to henceforth as the “WS Society”). Both structures had an internal hierarchy, the advocates under their Dean and his council, the writers under the Keeper of the King’s Signet (who was depute to the King’s secretary) and a council made up of a number of senior writers known as commissioners.<sup>22</sup> Both of these structures were designed to maintain discipline over members, although serious misbehaviour and illegal activity were dealt with directly by the judges.<sup>23</sup>

In regard to the distinction between advocates and procurators, an advocate when appearing before the bench was normally described in the College simply as a procurator. Although ten “general procurators” were licensed when the College was founded in 1532 to act generally for clients in all their cases, the incidence of special procurators, that is, men who were not regularly active before the court but who were mandated to act on an occasional basis, typically in a single case, rapidly declined. Within a generation of the endowment of the College in 1532, professional advocates had established a *de facto* monopoly there, and although a general procurator was typically described as an advocate when outside the court these terms were interchangeable.<sup>24</sup> Scotland’s central court therefore was similar to the *Reichskammergericht* and other courts in which there was no functional difference between procurators and advocates; in 1605, for example, when William Napier was admitted as an advocate, it was no contradiction for him to declare that he was resolved to follow the calling “of ane advocat and proc[uratu]r”.<sup>25</sup>

During the seventeenth century Scottish advocates, like Thomas Craig of

21 The College of Justice was founded in 1532 using funds endowed by papal grant; although the College may be regarded as synonymous with the Court of Session, the institutional history of the Court of Session goes further back than the sixteenth century.

22 Society of Writers to HM Signet, *A History of the Society of Writers to Her Majesty’s Signet* (1890) xl–xli.

23 See J Finlay, “Ethics, etiquette and the early modern Scots advocate” 2006 JR 147.

24 Advocates in criminal cases, before the justice depute, or commissioners of justiciary, were typically referred to as prelocutors or prolocutors, rather than procurators. The difference is simply that in criminal cases they typically were speaking on behalf of a party who was present; the same terminology is also found in the College of Justice, although over time it became increasingly unusual for parties to attend personally and the designation “procurator” is increasingly found.

25 National Archives of Scotland (henceforth NAS), Books of Sederunt, CS1/4/2 fol 347Hv.

Riccarton and Sir George Mackenzie of Rosehaugh, under the influence of *Ius Commune* commentators, stressed the nobility of their status.<sup>26</sup> It is in this that they fall to be distinguished from those working in the inferior courts in which almost anyone could be mandated to act as an agent or as a procurator before the judge.<sup>27</sup> “Country writers” and others with experience of legal documents and procedures were not necessarily ill-suited to perform the task of managing an action on behalf of another, and those with sufficient forensic skill could supplement their income by arguing cases before judges in the inferior courts. The courts in which they operated were various: the courts of the High Admiral of Scotland and his local deputies; the commissary courts (the secular courts which inherited much of the jurisdiction of the courts of the bishops’ officials after the Reformation); the sheriff courts; the bailie courts in the burghs; and the local baron and justice of the peace courts. It was in the sixteenth century, as advocates grew in status and specialisation, that the more mechanical oversight of processes came to be the province of the writer, or law agent, with advocates restricting themselves to work of more intellectual consequence. By the eighteenth century the expressive term “doer” was often applied to an agent, while the advocate was often referred to colloquially simply as the “lawyer”.

The relationship between local agents and Edinburgh agents operating at the centre can be seen, for instance, in the case of *George Laing v John Kidd and others* in 1785.<sup>28</sup> This was a counter-petition to an action in which the issue at stake was the typical one of a landowner, John Eiston (who happened to be a solicitor in Edinburgh), enclosing his land in Falkirk by building a dyke and, in so doing, closing off a public road. The matter was first dealt with by the justices of the peace, with Eiston’s “country procurator” acting for him. Before the justices had made a final decision, this procurator “borrowed up the process in the Inferior Court, and transmitted it to their Agent in Edinburgh, who, in about ten days thereafter, lodged it along with answers in the Bill-Chamber”.<sup>29</sup> The procedure

26 J W Cairns, “Alfenus Varus and the Faculty of Advocates: Roman visions and the manners that were fit for admission to the Bar in the eighteenth century” (2001) 28 *Ius Commune* 203; J Finlay, “Advocacy, patronage and character at the eighteenth-century Scots bar” (2006) 74 *Tijdschrift voor Rechtsge-schiedenis* 95.

27 In 1765, for example, a saddler in Glasgow was objected to as a witness because he had acted as agent for the defender at an earlier stage of the process and it seems clear, from the context, that law agent is meant: *Information for John Fairie, smith in Rutherglen, defender, against Mary Barr*, Advocates Library, Session Papers (henceforth ALSP), Arniston Collection (1765) vol 79 no 35.

28 *The Petition of George Laing, writer in Edinburgh*, ALSP, Miscellaneous Papers (1785) ser vii vol 6 no 2. Laing’s action actually concerns expenses.

29 The phrase “Agent in Edinburgh” is potentially ambiguous. It almost certainly refers to a member of the WS Society, who was a member of, and thereby enjoyed a number of privileges within, the College of Justice; but unregulated agents in Edinburgh, who were not members of the WS Society, also operated, without effective sanction. See C below.



being adopted was that of using a bill of advocacy, which was simply a means of transferring an action from an inferior to a superior court. Although proceeding by bill rather than summons, an advocacy was not a stand-alone process; it required some decision or interlocutor in the inferior court that might be reconsidered and, if necessary, rectified by the superior court.<sup>30</sup> In this case, however, there was nothing to be advocated since no decision had been taken by the justices. The purpose of referring the matter into the hands of Mr Walker, the Edinburgh agent, and then in time to another writer, George Laing, appears purely to have been to delay the outcome of the action in the inferior court, which was already three years old in 1785, by entering the process into the expensive labyrinth of the College of Justice.<sup>31</sup> Edinburgh writers could, if required, postpone final outcomes by procedural means; they were regularly accused of presenting petitions and bills to the Lords on the last night of the session in order to maximise delays.

### C. WRITERS AND AGENTS IN THE COLLEGE OF JUSTICE

It is in the precincts of the College of Justice that the development of the lower branch of the legal profession is best documented. The act book of the WS Society survives from 1594. Originally writers to the signet were concerned exclusively with acting as clerks to the Keeper of the Signet, drawing up all documents to which the King's signet could properly be applied including, most importantly, summonses by which actions were initiated in the College of Justice.<sup>32</sup> Members of the society were also members of the College of Justice and within that court enjoyed a monopoly as well as a number of privileges, including freedom from taxation, customs dues and the like, exemption from obligations to perform military service, and the right to be allowed to attend the bar of the court. All members of the College of Justice enjoyed exemptions from taxes imposed upon the inhabitants of Edinburgh because, in theory, they were regarded as resident in Edinburgh only in order to service the needs of their clients.<sup>33</sup> Membership of the WS Society was limited, although the ideal number of twenty-four, mentioned in

30 The matter is discussed at length in another case, *Information for James Wallace of Caversbank, defender against William M'Kechnie weaver in Paisley, and John Snodgrass writer there, Procurator-fiscal of the Sheriff-court of Renfrew, pursuer*, ALSP, Arniston Collection (1766) vol 85 no 2.

31 It was only in 1870 that it was recommended that a "country procurator" be permitted to retain charge of an action raised in an inferior court once it came to be conducted before the Supreme Court: *Fourth Report of the Commission appointed to inquire into the Courts of Law in Scotland* (C 175) (1870) 502. Under s 15 of the Law Agents (Scotland) Act 1873, the only law agents entitled to borrow processes in the Supreme Court in Edinburgh were those with a place of business in Edinburgh or Leith.

32 See the short account in J B Barclay, *The SSC Story 1784–1984* (1984) 5-6.

33 In modern terms there is some parallel with the tax arrangements of international and supranational bodies, such as staff of the EU institutions in Brussels and elsewhere, and United Nations staff in New York.

1594, was too small ever to be realistic.<sup>34</sup> Even so, there were considerably fewer writers to the signet at any one time than there were advocates.<sup>35</sup>

At the prompting of the magistrates of Edinburgh, the Lords of Session in 1715 ordered that lists be drawn up of the clerks, extracters, and servants of all those who qualified as members of the College of Justice.<sup>36</sup> The writers to the signet were required to meet to draw up a list of those whom they employed in their writing chambers, but they also had to include a list “of all such as are Employed about the session as Nottars or Designed writers in Ed[inbu]r[gh] who are not writers to the Signet”. A similar list, of writers, notaries and agents, was to be prepared by the principal clerks of session so that both lists together would be as comprehensive as possible. This acknowledges the existence of a group outside the WS Society, operating as agents in the College. Periodically, attempts were made to suppress such unregulated agents. Since they were not members of the College they had no privilege to attend the bar of the court, and macers were instructed to prevent attendance by agents in 1604 and again in 1610. The Faculty of Advocates had to employ keepers in the court to keep the bars free of unauthorised persons, and agents were among their targets. In 1685 the Dean and Faculty presented a picture of the Outer House in chaos:<sup>37</sup>

such is the croud of agents and others unconcerned in the place that it is impossible for the Clerks to service their ordinar clients papers or for the ordinarie when he is upon the Bench to hear for the noise they make on every syde or for the supplicants to speake to the clerks when neidfull.

The ordinary concern of these agents was the management and pleading of legal actions in the inferior courts. In 1594 the writers to the signet had been prohibited, by the internal rules of their society, from acting as procurators in the courts although this prohibition was increasingly ignored as time went on.<sup>38</sup> The small groups of local procurators in the inferior courts, known variously also under the title “writers”, “agents” or “doers” (or, in Aberdeen, “advocates”), clearly might have a financial interest in persuading their clients to allow them a continued role in managing an action, and in consulting counsel, if it was removed from their court to the College of Justice. Properly, however, a corresponding agent who

<sup>34</sup> *History of the Society of Writers to Her Majesty's Signet* (n 22) xlv.

<sup>35</sup> According to one source, for example, in 1644 there were 89 advocates but only 51 writers to the signet: National Library of Scotland (henceforth NLS) FR339r/11(i). The same source records 19 advocates' servants.

<sup>36</sup> NAS, CS 1/10 fol 183r.

<sup>37</sup> NAS, CS 1/8 fol 76v. For other references in the seventeenth century to this chronic problem, see J H Begg, *A Treatise on the Law of Scotland relating to Law Agents* (1873) 11.

<sup>38</sup> Barclay, *The SSC Story* (n 32) 5. The local equivalent of this, the sheriff clerk acting as a procurator, was illegal but there are instances where it was alleged to have happened.

was a member of the College, in other words a writer to the signet, should have been instructed to manage the action before the central court since such agents, as well as being authorised, had experience of the minute books, registers and clerks' offices.

Apart from these local agents, the only other groups positively prevented from managing actions on behalf of others before the court were the servants of judges and clerks of session. The reason for excluding servants of the clerks of session, as expressed in 1682, was that clerks and their servants were entrusted with processes and writs which they were charged with extracting and, presumably, with which they might otherwise be tempted to tamper.<sup>39</sup> The clerks were to provide caution (surety) under a bond in which their servants promised, on pain of a fine of £100, not to act as agent in processes. Despite this, it is clear that extracters employed in the three offices of the clerks of session did continue to act as agents. In 1751 the Lords again had to act to prevent what they referred to as "this bad practise" and in 1763 James Leslie, an extractor in the office of the clerks of session Alexander Home and Alexander Tait, was briefly imprisoned for it.<sup>40</sup>

In 1690 the Lords prohibited their own servants from agenting or delivering informations to the court except in their own actions or in actions in the name of their master.<sup>41</sup> During this period there was a considerable problem with the Lords being solicited in the street and at home by litigants, and others, on their behalf. This measure seems designed to prevent the judges' own servants being suborned to facilitate improper access by parties and their advisers. Judges each had their own box, kept on a bench in Parliament House, into which papers were to be placed and to which they had the only key; each judge was to send for his box at 7pm after which no further papers were to be received that day, in his lodging or anywhere else.<sup>42</sup>

The problem of the unauthorised agent continued into the eighteenth century and was solved only when the judges decided to impose a system of licensing on agents who were not members of the College. It was thus enacted:<sup>43</sup>

That no person, Except Clerks to his Majestys Signet, and first Clerk to an advocate from and after the first day of February seventeen hundred and fifty five shall be permitted to Act as an Agent or to commence carry on or Defend any action or Actions in the Name and behalf of any other person or persons in this Court unless such person shall be admitted and Inrolled as an Agent or Solicitor in this Court.

39 NAS, CS 1/8 fol 32r.

40 NAS, CS 1/13 fol 150r; for Leslie see CS 1/14 fol 179r. There were six principal clerks of session, split into three separate offices.

41 *The Acts of Sederunt of the Lords of Council and Session, from the 15th of January 1553, to the 11th of July 1790* (1790) 187 (7 Nov 1690).

42 NAS, CS 1/9 fol 30r (29 Nov 1690).

43 NAS, CS 1/14 fol 24r-v.

The size of the problem is evident from the number who appeared seeking admission. In March 1754 a committee of two judges (Lords Elchies and Auchinleck) was set up in order to draft an Act of Sederunt governing the trial of agents seeking to be admitted to manage processes.<sup>44</sup> Even before 1 February 1755 more than a dozen writers were admitted as “agents or solicitors”, taking the oath *de fidei administratione* and promising obedience to the Lords and respect for the privileges of the College.<sup>45</sup>

This recruitment of new authorised practitioners into the College of Justice followed a period of particular tension with the established monopolists, the WS Society. This must explain a curious incident in June 1738 when the writers to the signet “according to antient custom compeared in their gowns and desired to know the lords pleasure as to any injunctions they thought fitt to give them in the execution of their office”.<sup>46</sup> The Lords, predictably, instructed them, and those under them, to behave themselves. In 1750 the Lords had no objection when the writers to the signet, through the Lord President, requested permission to wear their gowns in court “according to the Antient custom”.<sup>47</sup> Events took a more aggressive turn in 1788 when the WS Society attempted to exclude agents from the benches of the Inner House, persuading the judges to enact an Act of Sederunt to this effect and, allegedly, making it financially worthwhile for the macers to enforce it rigorously. The Society placed a newspaper advertisement indicating the new policy; no-one was to sit on the benches in the Inner House except advocates and writers to the signet in their gowns.<sup>48</sup>

By this time, thanks to an Act of Sederunt in 1772 which was issued on the same day as new regulations for messengers-at-arms, a Society of Agents had been formed, with its own praeses, clerk and examiners.<sup>49</sup> The Society of Agents objected to this new measure imposed in the court, pointing out that since 1754

44 NAS, CS 1/14 fol 13r (8 March 1755). Lord Elchies died on 27 July 1754; the final Act of Sederunt was published in August.

45 Thirteen were admitted prior to 1 Feb 1755, and a further 59 were admitted in the year following (all of them by 26 July 1755): NAS, CS 1/14 fol 49v.

46 NAS, CS 1/13 fol 80v.

47 NAS, CS 1/13 fol 140v. The custom actually dated back to a regulation dated 8 Nov 1609: *History of the Society of Writers to Her Majesty's Signet* (n 22) xlvii.

48 The following advertisement, dated 1 July 1788, was placed in the newspapers: “On Monday the Writers to the Signet came to the resolution of using their Gowns in future, both in the Outer and Inner House; and the Court of Session have issued an order prohibiting any person to sit on the Benches of the Inner House, except Advocates and Writers to the Signet in their Gowns.”

49 *Acts of Sederunt* (n 41) 575-576 (10 March 1772). The context may be significant since the measure in respect of agents followed a scandalous case of misconduct and dishonesty involving messengers-at-arms which led to reform in the court of the Lord Lyon and encouraged the Lords of Session to focus on agents in their own court. The case is found among the Session Papers: *Information for John Campbell-Hooke of Bangeston Esq; Lord Lyon, and Thomas Brodie his depute, chargers against Charles Copland and John McColl, suspenders*, ALSP, Armiston Collection (1765) vol 80 no 38.

there had been no difference in status between them and the writers to the signet and that they all had the same expenses and paid the same taxes and fees.<sup>50</sup> Evidently this petition was successful. The 1778 Act, which does not appear in the edition of the Acts of Sederunt published by authority of the court in 1790, was presumably cancelled. The Society of Agents was eventually incorporated by royal charter in 1797 as the “Society of Solicitors in the Court of Session, Commission of Teinds, and High Court of Justiciary in Scotland”, the forerunner of the Society of Solicitors in the Supreme Courts of Scotland under which title it was reincorporated on a statutory basis in 1871.<sup>51</sup> The 1797 incorporation did not preclude a further attempt by the WS Society to assert its privileges.<sup>52</sup>

#### D. WRITERS TO THE SIGNET AND ADVOCATES

Given the mutuality of their interests as members of the College of Justice, it is perhaps unsurprising that the incorporation of advocates and writers to the signet into a single society was mooted in 1599. The scheme, however, came to nothing and, when it was revived in modified form in 1633, the writers voted against it.<sup>53</sup> In social terms there was considerable intermarriage between and across both branches but, professionally, they remained distinct and steps were taken to ensure this remained the case. In 1608, for example, the WS Society disciplined its member, Harry Wilson, for occupying the same chamber as an advocate; he was required to find a writing booth for his own use or face expulsion.<sup>54</sup>

Despite this professional distance, writers and agents in Edinburgh had a close working relationship with advocates with the latter generally working from home or from lodgings which were normally in or near the High Street where the courts were situated. In the Faculty’s list of advocates for the year 1758, for example, there is appended to a number of the advocates’ names the names of agents and writers to the signet who seem to have acted as contacts.<sup>55</sup> Those wishing to see the advocates Patrick Home or Sir John Stewart had to “apply to Thomas Cockburn

50 *Memorial for the Society of Agents or Solicitors admitted and enrolled in terms of the Acts of Sederunt 1754 and 1772 Humbly Offered To the Consideration of the Right Honourable the Lords of Council & Session*, 5 Aug 1788, NLS, FR339r/24(iii).

51 Begg, *Treatise on Law Agents* (n 37) 12.

52 *The Society of Solicitors before the Court of Session v The Keeper, Commissioners, and Society of Clerks to the Signet* 25 Feb 1800 FC. The Society of Clerks to the Signet is simply another name for the WS Society. The papers from this case are preserved in the Signet Library.

53 *History of the Society of Writers to Her Majesty’s Signet* (n 22) 234, 262-263.

54 *History of the Society of Writers to Her Majesty’s Signet* (n 22) 239.

55 A number of rolls of advocates are preserved in the Faculty’s records. Advocates failing to attend the roll-call were fined: see e.g. J M Pinkerton (ed), *Minute Book of the Faculty of Advocates* vol 1: 1661-1712 (Stair Society vol 29, 1976) 149. The 1758 list is in the Faculty’s records, NLS, FR339r/24.

senior writer", the advocates Francis Garden and Alexander Gordon could be applied to via the writer Thomas Riddoch, while Robert Dick and Alexander Wight could be contacted via "Will Hendry, Delvin's clerk", presumably Hendry being a servant to the writer John Mackenzie of Delvine. Next to the name of the advocate Sir Archibald Grant is the phrase "Apply Mr Lockhart to send Lauchy Grant to see sir Arch[ibal]d Grant". This is not to overlook the importance of advocates' servants. In 1734, for instance, it was John Bisset, servant to the advocate Alexander Garden of Troup, against whom complaint was made by the writer Andrew Currier for the failure to return an outgiving within a reasonable time.<sup>56</sup> The process given out had been transmitted by Bisset to the defender's agent, and Bisset argued that the delay in returning it was not caused by any fault but purely by the pressure of business on the agent with whom he was in regular contact.<sup>57</sup> Dealing with processes was merely one aspect of the regular working contact that was maintained between advocates, their servants, and writers to the signet. This often took a structured form, as when advocates and writers co-operated together on committees dealing with common interests, sometimes in conjunction with the local council in Edinburgh and sometimes for separate *ad hoc* purposes. An example of the latter was the administration of a testamentary trust fund created by the Edinburgh professor, Lawrence Dundas, which took effect in 1735: awards of bursaries were made to three prospective students in the town's College at the discretion of a group which included judges and delegates drawn from the Faculty of Advocates and the WS Society.<sup>58</sup>

Writers, and the sons of writers, did occasionally seek and gain entry as advocates in the College of Justice. They were neither so numerous nor was their number so concentrated as the advocates' servants who gained admission prior to 1664.<sup>59</sup> In the period from the admission of John Rollok, servitor of the advocate Andrew Ayton of Logie, in July 1631 to the admission of William Weir, servant of John Fletcher, in November 1664, former servants of advocates accounted for more

56 The outgiving consisted simply of the documents, primarily the summons, used in process which were signed by the advocate and given out on request by the defender for inspection and, usually, copying. The pursuer's advocate had to draw up a list of all documents given to the other party and sign it, the defender's advocate had to check the list and subscribe and date it: J Ivory, *Forms of Process before the Court of Session* (1815) part III.

57 *Petition and answers for John Bisset, servitor to Mr Alexander Garden of Troup, advocate; to the petition and complaint of Andrew Currier Writer to the Signet*, ALSP, Drummore Collection (1734) vol 2.

58 NAS, CS 1/12 fols 35v, 61r, 134v. Appointments to this committee were still being made in 1762: CS 1/14 fol 175r.

59 The sons of writers who themselves became members of the WS Society had the privilege of exemption from entry dues; advocates' servants also became writers to the signet, such as Richard Guthrie in 1627, former servant to the advocate John Shairp of Houston: *History of the Society of Writers to Her Majesty's Signet* (n 22) 250.

than 12% of all advocates admitted.<sup>60</sup> In the same period two agents, a commissary, a sheriff-depute, and a “solicitor for the kirk” were also admitted, along with the sons of thirteen advocates, three Lords of Session, two commissaries, two town clerks and two writers in Edinburgh. James Cunningham, a servant (and probably a relative) of the late judge, Sir Andrew Cunningham, Lord Woodhall, was also admitted. For both advocates’ servants and writers, admission to the bar was a significant improvement in status. For the majority of the writers admitted before 1750, entry was gained through presenting a bill narrating the candidate’s experience of municipal law rather than what was regarded as the ordinary and more honourable method of admission by private examination and public lesson based on Roman law.<sup>61</sup>

This does not mean that a background as a writer necessarily created a professional disadvantage, particularly in the seventeenth century, and writers’ entry as an advocate was not invariably through the extraordinary bill procedure. John Frank provides an example, if an unusual one. In June 1691, at the age of about fifty-three, Frank was admitted advocate following the ordinary route of examination on a title of Roman law.<sup>62</sup> This followed five years in which he acted as treasurer of the WS Society, although his original admission to the Society, which came as late as 1682, apparently occurred without his serving the necessary formal apprenticeship.<sup>63</sup> As an advocate, he was soon appointed to a Faculty committee to meet delegations from the WS Society and the town council in order to discuss maintenance of the Outer House and the vexed question of a tax to rid the streets of beggars. In January 1692 the Dean, Sir Robert Colt, clearly keen to benefit from Frank’s practical experience and wider perspective, appointed Frank to his council, and less than a year after his admission Frank was promoted further to act as the Faculty’s treasurer.<sup>64</sup>

Another writer-turned-advocate, William Black, also had some involvement in the financial affairs of the Faculty.<sup>65</sup> Black was the first writer to be appointed

60 In the period from John Rollok (28 July 1631) to William Weir (24 Nov 1664), no less than 19 former servants to advocates were themselves admitted as advocates. In that period 155 advocates in total were admitted.

61 Seven men designed as writers in the sederunt books were admitted as advocates in the books of sederunt prior to 1760. They all fall into the span 30 July 1647 to 26 July 1692, in which time the books of sederunt indicate that 222 advocates were admitted. On the process of admission for advocates, see the work of J W Cairns, in particular “Alfenus Varus and the Faculty of Advocates” (n 26) esp at 220-223.

62 NAS, CS1/9 fol 39r; Pinkerton, *Minute Book* (n 55) 101.

63 *History of the Society of Writers to Her Majesty’s Signet* (n 22) 330-331, 333-335. Originally a writer, he was admitted a WS on 2 Jan 1682 (at 322).

64 Pinkerton, *Minute Book* (n 55) 104, 107, 110-112. The proposed tax has a complicated history dating back to 1686; members of the College claimed exemption from it, and although a compromise was reached it continued as an issue well into the eighteenth century.

65 Pinkerton, *Minute Book* (n 55) 181. Black’s petition for entry narrated that he had “been apprentice to

following an Act of Sederunt of 25 June 1692 in which the judges, referring to recent applications for admission as advocates by intrants petitioning for entry without undergoing examination in Roman law, prescribed that they would make no future dispensation unless “they be first well informed of the persones integrity, good breeding, honest deportment and fitness for exercising the office of an advocat and that he has attended the house a considerable tyme for qualifieing himself in order therto”.<sup>66</sup> On the face of it tightening up on entry by bill might have been to the advantage of long-serving writers. The latter group must have been concerned at the relative ease with which some candidates in the 1680s had gained entry by bill on the basis of the claim to a foreign education alone. A good example is the contrast between the treatment given in 1686 to George Morrison and John Richardson. Morrison was admitted advocate, in his own words, “merely upon the accompt of his being valetudinary” and too ill to attend the examination on Roman law for which his foreign education, he claimed, had prepared him.<sup>67</sup> The writer Richardson, however, was admitted following some twenty years’ attendance in the College “in the qualitie of agenting processes at Law”.<sup>68</sup> The rule adopted in 1692, however, did not ease the way for writers to become advocates since its immediate effect was to decrease the prospect of admission by any means other than examination in Roman law.<sup>69</sup> In the decade prior to that Act, eighty-five advocates had been admitted by the Lords and, of this number, fourteen had entered by bill. In the decade following 1692 only two advocates (William Black and John Belsches) entered by bill, with ninety-four entering by examination on Roman law; this represented a drop from 16.5% admitted by bill to a mere 2%.<sup>70</sup>

Although writers to the signet only rarely became advocates, they remained eligible for appointment to a number of legal offices connected to the College of Justice. Under regulations published in 1672 they enjoyed the exclusive right to act as clerk to services of heirs conducted upon commission by the macers of the College. It was argued that as macers were commissioned in this regard to act as sheriffs *in hac parte*, then the writer to the signet concerned in such a

James Allan wryter to the Signet for the space of three yeares and thereafter having attended the House, and agented in processes for the space of sixe yearies”: NAS, CS 1/9 fol 64v.

66 Pinkerton, *Minute Book* (n 55) 116-117; *Acts of Sederunt* (n 41) 200; NAS, CS 1/9 fol 61v. Black was admitted on 26 July 1692: NAS, CS 1/9 fol 64v.

67 NAS, CS 1/8 fol 61r.

68 NAS, CS 1/8 fol 101r.

69 It is clear that the impetus behind the 1692 change came from the Faculty of Advocates. For further discussion of admissions during this period, see J W Cairns, “Advocates’ hats, Roman law and admission to the Scots Bar 1580-1812” (1999) 20 *Journal of Legal History* 24.

70 From 25 June 1692 to the admission of Henry Foulis on 4 June 1702 (NAS, CS 1/9 fol 211r). Belsches was admitted by bill on 24 July 1694 (NAS, CS 1/9 fol 95r). On the success of the Faculty of Advocates in minimising admission on trial by bill, see Cairns (n 69) at 44-48.



process was the equivalent for the purpose of a sheriff-clerk.<sup>71</sup> By article 19 of the Treaty of Union, after ten years' service, a writer to the signet became eligible for appointment as a Lord of Session, although there is no example before the Union of a writer becoming a judge without first being admitted as an advocate.<sup>72</sup> Many less illustrious offices, however, were taken up by writers, sometimes giving them exotic-sounding titles. Just prior to the harvest vacation in 1749, for example, the writers John and Hugh Buchan were jointly appointed under-keepers of the Horning Chamber, with responsibility for the Register of Hornings.<sup>73</sup> James Anderson WS, well-known to historians as the editor of the *Diplomata Scotiae*, held the office of Postmaster-General for Scotland for a couple of years.<sup>74</sup> More locally, among the most significant offices to which an agent might aspire was that of procurator fiscal, a court officer appointed by an inferior judge in order to facilitate the prosecution of certain crimes; more mundanely, writers were also employed as extracters, writing out copies of decreets and sentences issued by inferior courts, or as clerks to incorporations. In 1723, for example, the writer Archibald Blair purchased from the town clerks of Edinburgh a commission to fill a vacancy and become one of the three extracters in the bailie court.<sup>75</sup>

## E. THE TRAINING OF WRITERS AND AGENTS

In 1610 the WS Society determined that a seven-year apprenticeship was necessary for its new members and that new indentures agreed between master and servant were to be recorded in the Society's register of acts.<sup>76</sup> If the master died, then the apprentice would be transferred to another master but still had to serve

71 *Memorial for George-James Duke of Hamilton, and his tutors v Mr Charles Brown Writer to the Signet*, ALSP, Meadowbank Collection (1763) vol 30 no 17, 2. The writer thus acting was normally the agent for the purchaser of the brieve being served, but the macers were obviously free to select another provided he was also a WS. If the agent for the purchaser was not a WS, he therefore had to employ a WS to act as clerk.

72 For example James Scougal, an advocate in Aberdeen and commissary of Aberdeen, was admitted as an advocate in the College of Justice on 14 June 1687 (NAS, CS 1/8 fol 125v) on the basis of his knowledge of municipal law; he was then elevated to the bench as Lord Whitehill on 15 Feb 1694, by which time he had become one of the commissaries of Edinburgh (CS 1/9 fol 123v). Scougal's father, John, however, was himself a Lord of Session under the title of Lord Whitekirk (elevated 17 Feb 1661). Gilbert Elliot, first Lord Minto, a WS who became an advocate in 1688 (having failed his first trial the preceding year), had become clerk to the Privy Council before his elevation to the bench in 1705: Pinkerton, *Minute Book* (n 55) 82, 85.

73 NAS, CS 1/13 fol 133r. A horning was a declaration of outlawry, whereby a party's goods would be escheat to the Crown. The completion of such procedure was narrated and recorded in the appropriate register.

74 *History of the Society of Writers to Her Majesty's Signet* (n 22) 5. Anderson was also son-in-law to John Ellis, advocate, whose father, also John, was a Dean of Faculty.

75 *Memorial for Archibald Blair, extractor in the Town-clerks Chamber of Edinburgh*, ALSP, Drummore Collection (1739) vol 3.

76 *History of the Society of Writers to Her Majesty's Signet* (n 22) 245.

the full seven years. Fairly soon, however, this limit was disregarded and there developed a considerable variance in the length of apprenticeships.<sup>77</sup> A three-year indenture entered into between the Edinburgh writer to the signet, John Cook, and Andrew Robertson in 1630 may be generally representative.<sup>78</sup> Robertson's father, Gilbert (who was himself a writer), paid Cook an apprentice fee of £100 Scots. In return, Cook promised "to instruct & learne the said andro robertson in all thingis belonging to the foirsaid calling [i.e. "the art and calling of wrytting to the signet"] according to his capacitie & the knowledge of the said Jhone". Gilbert undertook to supply his son with meat, clothing and bedding for the duration of the apprenticeship, while Andrew was also to come armed with a musket and other weaponry sufficient to meet his obligations under a rule imposed in 1627 prescribing that each apprentice bring with him "a competent stand of musterable arms".<sup>79</sup> There was a clear concern to protect the reputation of the profession. One clause permitted Cook to debar Andrew immediately from his service should Andrew engage in fornication, adultery or any similar "abominable" act, and if Andrew should fail in his obligations a penalty of £10 Scots was payable to Cook for each failure by Gilbert as his cautioner. In the event, this penalty was incurred (though the reason was not specified), and the apprenticeship was not discharged until 1635, although whatever Andrew's misdemeanours Cook was able at that time to state that Andrew had served him "dewelie and honestlie And that I can say nothing to his charge".

In order to qualify as a writer to the signet, an apprentice first required to become a notary. This was reiterated by a resolution reached in April 1684 by the WS Society, and it followed a complaint a year earlier by Laurence Oliphant.<sup>80</sup> Oliphant had been appointed clerk to the admission of notaries in the College of Justice by the Lord Clerk Register in February 1680 with the authority, *inter alia*, to retain the protocol books of deceased notaries.<sup>81</sup> The complaint stated that five men had inadvertently been commissioned to become writers to the signet without first becoming notaries. The reason why writers had to be notaries, Oliphant asserted, was that they required the range of experience which acting as a clerk to a notary could provide, including participating in the service of heirs, in resignations in the Court of Exchequer, and in drawing up appraisings, instruments

<sup>77</sup> *History of the Society of Writers to Her Majesty's Signet* (n 22) xlv.

<sup>78</sup> NAS, Henderson of Fordell Papers, GD172/2398. Legislation introduced during the reign of Queen Anne brought Scotland into line with earlier English legislation and required indentures to be stamped, with stamp duty payable in respect of them; it also required that all sums received in consideration of the apprenticeship be stated *in gremio*: 8 Ann c 9 ss 35-36.

<sup>79</sup> *History of the Society of Writers to Her Majesty's Signet* (n 22) 251.

<sup>80</sup> NAS, Cromartie Papers, GD305/158/13.

<sup>81</sup> NAS, CS 1/7 fols 147r, 153r.

of sasine and other legal instruments.<sup>82</sup> Promotion to notary was certainly seen as a stepping stone. The writer Robert Drummond, for example, narrated in 1744 the history of his previous twelve years in Edinburgh indicating that he had begun as apprentice to the writer Charles Farquharson, moving to the writing chamber of Charles' father, Alexander, after Charles died, and then setting up on his own when Alexander died.<sup>83</sup> In 1736, "to enable him the better to earn his Bread", he entered as a notary public and in 1744 sought to add further to his business by gaining a commission as a messenger-at-arms.<sup>84</sup>

Another formal qualification was that no-one could enter the WS Society unless he was aged at least twenty-five. By the eighteenth century, however, it is clear that many writers completed their apprenticeship and began practice at a much younger age. In 1742 John Murray had already completed a full apprenticeship when, aged only twenty, he sought (initially without success) the office of Keeper of the Minute Book in the College of Justice.<sup>85</sup> Murray, the son of a member of parliament who had been apprenticed to the clerk to the signet Hugh Crawford, probably served a five-year apprenticeship similar in its terms to the five-year indenture which Robert Sym entered with Crawford in 1729.<sup>86</sup> Sym's apprenticeship ran less smoothly. When it was some way advanced, Sym, still a minor and struggling financially, got married to Jean Reid. Although he was later to become a clerk to the signet in his own right, it was claimed of Sym, in the week he married, that he "was not worth a shilling in the world" and that his new wife had had to pay the arrears of rent which he owed to his landlady.<sup>87</sup> Such penury is not surprising given the nature of the relationship between master and apprentice in the lower branch of the legal profession. Crawford is known to have accepted the common opinion that apprentices managed processes on behalf of their masters not in return for any payment, but for the benefit of instruction alone.<sup>88</sup> Indeed it was the master, through the apprentice fee, who received payment, although the fee varied in accordance with the status of the master and the length of the apprenticeship required. In the bailie court of Leith, for example, a three-year apprenticeship

82 NAS, Cromartie Papers, GD305/158/13.

83 *Memorial for Robert Drummond writer in Edinburgh against James Lindsay etc.*, ALSP, Elchies Papers (1744) vol 15 no 9.

84 This was not an uncommon combination. Robert Young, writer and messenger in Edinburgh, also acted as notary, for example in the poiding of James Jollie in 1758: *Copy of the Pursuer's Proof in the Process at the Instance of Robert Davidson brewer in Canongate against Thomas Rannie merchant in Edinburgh, and Thomas Ratray writer there*, ALSP, Meadowbank Collection (1759) vol 17 no 9, 1.

85 NAS, CS 1/12 fols 160v-163r.

86 *Information for Robert Sym, clerk to the Signet, defender against Elizabeth Sutherland, mantua-maker in Edinburgh, pursuer*, ALSP, Arniston Collection (1772) vol 109 no 26.

87 *Information for Elizabeth Sutherland, pursuer against Robert Sime Writer to the Signet, defender*, ALSP, Arniston Collection (1772) vol 109 no 26.

88 *The petition of Mr David Couper writer in Edinburgh*, ALSP, Elchies Papers (1743) vol 14, 5.

with an existing procurator was necessary for admission and the same duration is found in Dumfries, where it was noted in 1785 that Robert Gordon's father had paid 300 merks to the writer Robert Ramsay as an apprentice fee, and by the middle of the eighteenth century this sum was the least that was commonly taken in Aberdeen.<sup>89</sup>

Aberdeen had one of the strongest, and apparently most lucrative, local bars in the country and the advocates there enjoyed a reputation for more than ordinary skill which brought them employment from neighbouring counties.<sup>90</sup> It would seem that apprentices at Aberdeen also began young. In 1768 the twenty-year-old Edinburgh writer, George Crookshanks, gave evidence in a proof that he had been clerk to David Morice, an advocate in Aberdeen, for the three or four years up to January 1765.<sup>91</sup> This would make him as young as thirteen when he began working in Morice's office. The quality of the training received by apprentices in Aberdeen was questioned in 1744 in the course of a rather heated dispute concerning the post of Professor of Civil Law in King's College, Aberdeen. Charles Hamilton-Gordon alleged that his competitor, James Catanach, had gone straight from grammar school to be apprenticed to an Aberdeen advocate. Eventually, Catanach himself was appointed a procurator before the courts in Aberdeen, albeit, so Hamilton-Gordon alleged, this was at a time "when any Person, however illiterate, might have got that Favour for a very small Piece of Money, without any Examination".<sup>92</sup> There may have been some substance to this. The Society of Advocates in Aberdeen introduced regulations tightening up its admission process after it was incorporated by royal charter in 1774. However, in 1782 it acknowledged that its education was still inferior to that provided in Edinburgh by the WS Society.<sup>93</sup>

Whatever the quality of the training – and there is some evidence of competition for places as an apprentice – the relationship between master and apprentice

89 *The petition of Robert Gordon, writer in Dumfries*, ALSP, Miscellaneous Collection (1785) ser VII vol 6.

90 A brief history is given in J A Henderson (ed), *The History of the Society of Advocates in Aberdeen* (1912).

91 *The petition of poor James Lundie against David Morice, advocate in Aberdeen*, ALSP, Armiston Collection (1768) vol 84 no 26, proof, 13.

92 *Information for Mr Charles Hamilton-Gordon, advocate, against James Catanach, procurator in Aberdeen*, ALSP, Elchies' Papers (1744) vol 15 no 7, 21. For discussion of this case see R L Emerson, *Professors, Patronage and Politics: The Aberdeen Universities in the Eighteenth Century* (1992) 65-69; J W Cairns, "Lawyers, law professors, and localities: the Universities of Aberdeen 1680-1750" (1995) 46 *Northern Ireland Legal Quarterly* 321.

93 *Alexander Laing writer in Aberdeen, petitioner, The Society of Advocates in Aberdeen, respondents, case for the respondents*, Signet Library Session Papers (henceforth SLSP) (1782) 177:8 p 2. The fee charged to members of the WS Society for admission to practise in the courts of Aberdeen was less than that imposed upon those who were apprenticed in Aberdeen. One of the witnesses whose testimony is recorded in the proof in this process, John Innes, son of the commissary clerk, was only 14 when he began attending courts as his father's clerk: *ibid*, *Proof for the President and Society of Procurators* 25.

did not always run smoothly.<sup>94</sup> It is particularly interesting that George Crookshanks, having trained in Aberdeen, should have removed to Edinburgh very early in his career. It was certainly the case that writers occasionally feared that their apprentices, if they set up independently, might take away some of their clients. The relationship of trust between master and apprentice was fundamental. In one case concerning client confidentiality, counsel asserted that:<sup>95</sup>

Clerks are supposed to be intimately acquainted with the secrets of their master's business, by which means, if clerks are allowed to open their mouths in a court of justice in matters intrusted to their master in confidence, no master can be secure of his business for a day.

By the early eighteenth century there were too many advocates chasing too few clients and times were just as difficult for writers and agents, particularly in times of political upheaval. David Couper averred that when he employed William Ruthven and gave him a lectern in his writing chamber in Edinburgh in 1719, he had very few clients, since most of them, being Jacobites, had recently been attainted and only two or three remained.<sup>96</sup> In 1759 James Gilkie, former apprentice to the Edinburgh writer William Wallace, made some extraordinary claims in an action which he brought against Wallace.<sup>97</sup> Wallace was alleged to have been so afraid of losing clients to Gilkie that he took advantage of two recent thefts of pocketbooks from writers in Parliament House to insinuate that his own apprentice was responsible. The writers concerned, being told by Wallace that Gilkie had pilfered things from his own office and that he was recently sporting new clothes, executed a search warrant in respect of Gilkie's rooms. Finding nothing, they took him to a tavern and offered to compose and subscribe for him a written declaration of innocence; cautiously, they also persuaded him to sign a declaration promising not to bring any action against them. Gilkie's explanation of his new clothes provides some insight into the life of an apprentice. Obligated to live off a private rental income of only £6 per year, Gilkie was required, as he put it,

94 *Answers for Alexander Innes, commissary-clerk of Aberdeen, to the petition of Christian Shepherd, relict of the deceased William Mowat, wright in Aberdeen*, ALSP, Meadowbank Collection (1760) vol 19 no 35, 2. In this case the apprentice, James Mowat, died of consumption less than a year into the apprenticeship, but the fee paid was held to be not returnable since the non-performance of the indenture was not the master's fault. The master, Alexander Innes, asserted that he had given the apprentice a trial in his writing chamber before taking him, since there were always several offers for each vacant apprenticeship.

95 *The petition of Sir Alexander Grant of Dalvey, Baronet*, ALSP, Arniston Collection (1767) vol 90 no 2, 17.

96 *The petition of Mr David Couper writer in Edinburgh*, ALSP, Elchies Papers (1743) vol 14, 1.

97 *Memorial for James Gilkie and the Procurator Fiscal of court, pursuers; against William Wallace writer in Edinburgh, defender*, ALSP, Dregghorn Collection (1759) vol 2. Wallace the writer is not to be confused with a contemporary advocate of the same name.

“to be saving on his Cloaths, and on every other Article of Expence”. Thanks to his limited wardrobe, Gilkie’s appearance was evidently not impressive. Having formed the resolution to gain admission as a notary, “he was advised by some of his Friends to make a Stretch, and dress better than he had hitherto done”. To do so, he had taken out a loan from a family friend and had purchased the clothes which Wallace, he claimed, had been able to use as a ground of suspicion against him in a calculated bid to damage his reputation and thereby his fledgling career. In the end, Wallace’s defamatory allegations were found to be groundless. He was ordered to make a palinode, and to pay damages, but the case serves as an example of how badly wrong the relationship between master and apprentice could go.

## F. CLIENT RELATIONS

Bankton described procurators in the inferior courts of Scotland “as a kind of advocates of a lower rank”.<sup>98</sup> They generally required a written mandate and an action might be delayed until one was produced.<sup>99</sup> But before a procurator could refer a point to the contrary party’s oath a special mandate was required.<sup>100</sup> Scots law was not unique in preventing a procurator from hazarding his client’s case on the oath of his adversary; the same rule was discussed by Imbert in his *Enchiridion Iuris Galliae* (1556), in which he makes reference to a case decided in 1543 in the *Parlement de Paris*.<sup>101</sup> In the absence of a written mandate, Scots law required as proof of the lawyer-client relationship either the oath of the client or the evidence of two witnesses. While an advocate’s word was accepted as proof of his mandate, a procurator required more. Even so, the regulations in local courts might make some allowances for those who had been admitted to practise there. To give an example, the sheriff depute of Argyll, in drafting proposed regulations in 1782 on the form of process before the sheriff court at Inverary in 1782, included the following point:<sup>102</sup>

98 Bankton, *Inst* 4.3.30.

99 E.g. *Information for Alexander Brown servitor to the Duke of Queensberrie against Anna Chalmers*, ALSP, Forbes Collection vol 3, 2929. The papers are undated, but the action took place in 1704-1705, at which time Brown alleged that Chalmers made her procurator appear without a mandate in order to delay the action. Insistence on a written mandate reflects standard continental practice, e.g. at the Conseil Provincial de Namur and at the Grand Conseil de Malines: C Vael, “Avocats et procureur au Conseil Provincial de Namur” (1997) 64 *Recueils de la Société Jean Bodin pour L’Histoire Comparative des Institutions* 206; A Wiffels, “Procureurs et avocats au Grand Conseil de Malines” (1997) 64 *Recueils de la Société Jean Bodin pour L’Histoire Comparative des Institutions* 177.

100 *Hardie v Allan* (1709) Mor 12248; *Inglis v Fuller* (1712) Mor 12249.

101 J Imbert, *Enchiridion Iuris Galliae* (Lyon, 1556) 268.

102 NAS, SC54/23/6.

7. That upon the day of comparance, and in all the after procedure, the parties may either appear personally, or by a pr[ocurato]r of court; such pr[ocurato]r, when appearing for a defender, having a written mandate or the copy of citation served against him; but when the parties appear personally, they shall not be allowed to take out the process, but only to see the same in the clerk's hands and to prevent irregularity the papers drawn by the parties must be also signed by one of the procurators of court.

The rules about procurators having to sign for outgivings reflect similar provisions in the College of Justice governing advocates and their clerks.

The reference to a “procurator of the court” is identical to terminology used of the procurators before the College of Justice in the 1530s, and before the Lords of Council (forerunners to the College) in the 1520s. It reflects the process of formal admission of certain procurators to act before the court. An advocate in the College of Justice had a right of audience before that and all inferior courts, and this was much wider in scope than the right of audience of a local procurator. In *Rutherford v Wemyss* in 1785, counsel made the following distinction:<sup>103</sup>

An advocate is admitted under the immediate inspection of the supreme Court; and it is the peculiar privilege of his office to appear before every judicatory of the kingdom, and his gown alone is sufficient mandate for that purpose. This is not the case with the procurators admitted by the inferior courts. They are intitled to appear before those courts alone by whom they have been vested with the character. Their privilege cannot extend beyond the jurisdiction of the court by whom they are admitted: it is by no means so extensive as those that are enjoyed by the members of the Faculty of Advocates.

Not all agents or writers acted as procurators. Even those who did so spent much of their time in their writing chambers, carrying on the normal array of private client work that formed, and forms, the more instrumental and “mechanical” side of the law. Business was also conducted elsewhere; for example, in Edinburgh writers often held consultations with advocates in taverns and in coffee-houses the names of which occasionally appear in the records, such as the Laigh coffee-house, the Exchange coffee-house, Muirhead's coffee-house, or John's coffee-house which was near the Mercat Cross. Writers were involved in drafting deeds, such as securities, marriage contracts, and memorials for the opinion of counsel; ensuring the registration of bonds and instruments in the appropriate registers; and acting as trustees on sequestrated estates, working as curators and factors and assisting in reaching arbitrated settlements. Some writers had very limited beginnings. As a young man, the writer to the signet Alexander Goldie was, for example, mainly sent on errands for his father to register bonds in the clerks'

103 *Information for the Reverend Mr James Wemyss and others, members of the presbytery of Kirkcaldy, and for the Reverend Messrs Thomas and William Greenfield ministers of Edinburgh, defenders; against John Rutherford writer in Kirkcaldy, pursuer*, ALSP, Miscellaneous Papers (1785) ser 7 vol 6, 9-10. The rule that “Lawyers [sc advocates] are not obliged to produce any Mandate” is also mentioned in a case in 1760: *James Paton, petitioner*, ALSP, Arniston Collection (1760) vol 50, 5.

offices.<sup>104</sup> On the other hand, the prominent writer John Pringle may have been as young as nineteen when he became factor to the sequestrated estate of the Earl of Buchan.<sup>105</sup> Everyday responsibilities for a law agent included dealing with clients' monies, especially rental income, and retaining custody of their papers. In this regard most writers took particular care to fulfil their fiduciary duties. For example, writers acting as trustees for creditors would lend out money at interest to appropriate borrowers (sometimes other writers) in order to produce short-term returns for the beneficiaries.<sup>106</sup>

Inevitably, the records tend to focus on cases where duties were breached rather than examples of good or praiseworthy conduct. A number of writers were praised by the judges in 1753 for their part in the "laudable undertaking", supported by the Dean and Faculty of Advocates, of examining and reporting on the hogsheads of historical documents which were originally removed from Scotland by Cromwell and, since their return, had been left to decay in the Laigh Parliament House.<sup>107</sup> On the other hand, writers often got into difficulties when they became involved in the murky world of parliamentary and council elections, which were a breeding ground for allegations of corruption, undue influence, bribery and prevarication. In 1766, the young clerk Robert Logan, who worked in the office of the writer George Greig, town clerk of Fortrose, copied private correspondence connected to a recent council election kept locked in his master's desk, and passed it on to a relative of his who was his master's political opponent.<sup>108</sup> This was apparently done in order to prove an attempt to fix the election in a move aimed ultimately at upsetting a parliamentary election the following year. For his prevarication, and breach of trust, Logan was pilloried, declared infamous by the Lords of Session, and pronounced incapable of ever again bearing any public trust. Neither Logan nor his master seems to have emerged from the affair with much credit, but difficulties in the context of local politics were not unusual and they often ensnared significant legal practitioners.

Writers were subject to a high standard in maintaining clients' papers. William Douglas, for example, who had in his custody a bond by Richard Waddell in favour

104 *Information for Alexander Goldie, Writer to the Signet, purchaser of the estate of Ryes against James Aitken*, ALSP, Falconer Collection (1744) vol 1 no 195, 5. Goldie later suffered mental health problems culminating in a feud with the advocate Alexander Lockhart: see Finlay (n 23) at 174-175.

105 According to his evidence 30 years later in the proof in the case of *Mr William Hogg v Henry-David Earl of Buchan*, ALSP, Arniston Collection (1766) vol 85 no 9.

106 *The petition of Archibald MacHarg writer in Edinburgh, factor for the creditors of the deceast Colonel Johnston of Graitney, charger*, ALSP, Arniston Collection (1768) vol 84 no 1.

107 NAS, CS 1/13 fols 180v, 182v.

108 *Answers for Robert Logan writer in Fortrose, to the petition of Lewis Ray, John Bremner, George Greig and others, present Magistrates and Counsellors of the Borough of Fortrose*, ALSP, Arniston Collection (1767) vol 90 no 2. Logan was aged only 19, and his humble petition to the Lords, part of this process and dated 10 Aug, makes sad reading.



of his client Patrick Hog, was punished by the Lords of Session in 1685 for the “unwarrantable giving up of ane privat band” after Waddell seized it from him, even though the threat of violence had been used.<sup>109</sup> Writers were understandably anxious not to have their integrity questioned. James Ogston petitioned the Lords of Session to punish a former client of his, whose family he had served for thirty years, for suggesting that he had taken papers from the client’s charter chest and given them to his adversary.<sup>110</sup> In return for being subject to this duty of care in regard to clients’ papers, writers enjoyed a tacit security in them (generally referred to as a hypothec) in regard to the payment of their accounts. Mungo Graham, a writer whose business was running into difficulties, employed in 1738 another writer, John Lithgow, to manage eight or ten processes on his behalf.<sup>111</sup> When Graham was obliged to enter the debtors’ sanctuary at Holyrood two years later, Lithgow was left with a considerable number of papers which he refused to hand over, asserting his right to retain them until paid in full for his services.

Part of the management of a process, always reflected quite prominently in recorded accounts of expenses, involved having legal documents printed, particularly for onward transmission to the College of Justice. For the printing of session papers such as petitions, answers, informations and memoranda, Edinburgh writers in particular maintained relationships with local printers whom they would also pay to insert advertisements in the newspapers which they printed. On this basis, although the writer William Robertson’s marriage to Agnes Hamilton turned out to be unhappy, it may have been commercially shrewd.<sup>112</sup> Agnes was the granddaughter, and one of the heirs, of the formidable Agnes Campbell, widow of the printer Andrew Anderson, and the power behind the Anderson printing press which had a shop conveniently placed for legal business in the south-east corner of Parliament Close.

Due to Thomas Ruddiman’s link to the Faculty of Advocates, the Ruddiman printing house, which from January 1724 printed the *Caledonian Mercury* three times a week, became a natural home for the printing of law papers.<sup>113</sup> The day-to-day running of the press was overseen by Walter Ruddiman, Thomas’s brother and business partner. From 1751 the house was employed by the writer William Taylor

109 NAS, CS 1/8 fol 87v.

110 *The petition of James Ogston writer in Edinburgh*, ALSP, Hamilton-Gordon Papers (1742) vol 36 no 22.

111 *The petition of Mungo Graham writer in Edinburgh*, ALSP, Hamilton-Gordon Papers (1740) vol 25 no 22.

112 The relationship is revealed in *The petition of William Robertson belt-maker in Edinburgh*, ALSP, Hamilton-Gordon Collection (1744) vol 41 no 5. There were probably a number of marital links between printers and lawyers. Alison, daughter of Thomas Ruddiman’s third marriage, was herself married in 1747 to the advocate James Steuart: G Chalmers, *Life of Ruddiman* (London, 1794) 125.

113 D Duncan, *Thomas Ruddiman* (1965) 72-75.

to print his papers and advertisements. An action some years later indicates that the relationship was a fluid one, with Taylor running an account and making occasional payments for work done, either receiving a receipt therefor, or witnessing an appropriate credit being entered in the company's account book. In 1768, when Taylor wanted to clear up the account and pay off any outstanding sums, he claimed to find irregularities such as printing orders being charged to him which he had not requested. Taylor was keen to avoid litigation and to arbitrate; he was even willing to refer the matter to Walter Ruddiman's own law agent.<sup>114</sup> Ruddiman, however, insisted on a proof before the sheriff in which other printers, and his own servants, deponed that he had on several occasions overcharged Taylor, including charging him a guinea for printing the answers to a petition which Taylor was not involved in defending.

The typical print run for a legal paper to be presented to the court was fifty to sixty copies. This was sufficient to supply the judges' boxes on three occasions should that prove necessary through repeated reclaiming petitions by the opposing party. It is clear that some extra copies might circulate in Parliament House and that this might result in amendments being made before copies of the final version were placed in the Lords' boxes. This suggests a very quick turnaround time for producing amended copy. It is clear that the first edition of a paper could be produced overnight and this might explain why agents so often took care to ensure "drink silver" was paid to the journeymen printers. In 1740 the writer David Dickson received back the printed copies of his answers by 10 am the day after he sent them to the printer, but, following advice from his friends, it was an amended version that made its way to the judges that evening.<sup>115</sup> The writer Edward Cutlar complained that just prior to the end of harvest vacation in 1733 his opponent had printed no less than 170 copies of a paper which he then distributed in order, it was alleged, to defame Cutlar as widely as possible in the community where he did business.<sup>116</sup>

## G. FEES

Procurators were entitled to payment on the basis of their mandate and, if need be, were entitled to sue. In the absence of a written mandate, it was also possible, if evidence sufficed, to argue that a procurator had operated for the benefit of his

114 *The petition of William Taylor, writer in Edinburgh*, ALSP, Arniston Collection (1767) vol 84 no 23.

115 *Answers for David Dickson to the petition and complaint of Mr Archibald Murray, advocate and James Hay of Tarbet, writer in Edinburgh*, ALSP, Hamilton-Gordon Collection (1741) vol 41 no 50, 2-3.

116 *Petition and answers for Edward Cutlar writer in Edinburgh to the petition of John Barber wright in St John's Clachan*, ALSP, Hamilton-Gordon Collection (1737) vol 4 no 35, 1.

principal as *negotiorum gestor*.<sup>117</sup> The question of fees was a difficult one given the litigiousity of the early modern period. When expenses were found to be due against him, a party had the right to see and object to the account of expenses rendered by the other side and objection was often taken to what were regarded as excessive amounts paid in fees to law agents. The fees of advocates, and their clerks, and agents, could amount to a sizeable proportion of the final cost of actions.

The main mechanisms for trying to reduce the high costs of litigation were statutory fee regulation, and judicial taxation of expenses to provide a measure of accountability for costs incurred. The regulation of fees in Scotland had mixed success. An attempt to regulate the fees of advocates failed in the seventeenth century, and they continued to receive honoraria according to the perceived merit of their service although typically they were paid in multiples of a guinea. On the other hand, the fees charged for producing written papers in processes and extracts of court decreets were made subject to control. By statute, extortion by writers to the signet and clerks of session was prohibited, and from the institution of the College of Justice the fees which they could lawfully charge were regulated, at so much per sheet, bill or deed.<sup>118</sup> A system was created whereby a collector of clerks' dues was appointed in the College to receive the payments directly from clients and then transmit them quarterly to the clerks who had earned them. The collector, and the clerks, had to swear at the beginning of each court year that they would act in accordance with the regulations. From time to time the fees were revised to reflect increases in the cost of living. In regulations laid down in 1695, pursuant to a statute in 1693, any clerk taking a payment directly from a client to which he was not entitled was to be deprived of office permanently and fined. Naturally, the clerks were not particularly happy with such regulation and complained that the fees did not keep up with living costs. In 1728, for example, a petition to the Lords by the clerks to the signet, making reference to regulations laid down in 1675 setting the fees for signatures and bills of advocation and suspension, stated "that there has been no augmentation of these fees tho it be now more than fifty five years since they were made and its nottour that the Expense of liveing is twice as high as it was then".<sup>119</sup> Nor was the system free of

117 E.g. *The petition of William Dingwall of Brucklay*, ALSP, Arniston Collection (1766) vol 83 no 4, 8: "[T]he only footing an agent can come against a person, whose business he had transacted, for indemnification, is either *ex mandato*, or *tanquam negotiorum gestor*, if that person had been benefited by his agent."

118 T Thomson and C Innes (eds), *The Acts of the Parliaments of Scotland, 1124-1707* (Edinburgh, 1814-75) vol ii, 360 [1540 c 16], vol iv, 616 [1621, c19], vol viii, 87 [1672, c 40, art 33]. Most recently, art 5 of the *Articles of Regulation concerning the Session* (1695), reinforced the admission oath of the clerks in which they promised to take no more than the yearly salary and fee allowed by their office: see *Acts of Sederunt* (n 41), 209.

119 E.g. NAS, CS 1/11 fols 173v-174r.

corruption. Complaints were still made of inappropriate payments. For their part, the clerks in 1753 complained that writers had contrived a means of avoiding paying them the appropriate fees which remained due even if the parties resolved their dispute without the need of an extract.<sup>120</sup> The case that they highlighted, a decade-long litigation in which decretet had just been pronounced for the sum of £7,664 Scots, involved a writer's clerk borrowing the process on the pretence of making a reclaiming motion and then using it to frame a discharge of the debt, thus avoiding the need to have the final decretet extracted and hence payment of a fee to the clerks of session.

The essentially private nature of the relationship between agents and clients meant that payments between them could not in practice be subject to direct public regulation. However, the accounts handed in by agents were subject to being taxed by the court.<sup>121</sup> At this stage, parties were often willing to complain about the inflated "gratification" which they claimed had been paid to their opponents' agents. A typical approach was for an unsuccessful party charged with costs to compare the service of his own agent, and what he had paid for it, to what his opponent had paid to his agent in the same case or what others had paid in like cases. In 1758, for instance, James Boyle was involved in a case against the Provost and Magistrates of the burgh of Irvine which went to the House of Lords and in which, not unusually for the period, the Lords reversed the decision of the Court of Session.<sup>122</sup> The usual practice, when the House of Lords reversed the decree in this way, was not to award costs against the respondent; unfortunately for Boyle, a statute applied in his case which automatically allowed the appellant to recover the costs of the case. In seeking to abate those costs as far as possible, Boyle argued that the seven guineas paid by the magistrates to their agent were too much for a process that was dealt with unusually quickly, lasting only a single session, and he compared it to other types of process where much less would be paid for more work done. He had to admit that his own agent had charged more or less the same, but the Lords had abated this account quite substantially in his costs and he sought a similar abatement for the other side. The Magistrates argued that, in principle, the courts should allow some latitude and only interfere where an excessive charge had been made or unnecessary steps or costs incurred. In this case, they argued, although the action was dealt with quickly, it took up much of

120 NAS, CS 1/13 fol 183v.

121 It was pointed out in 1870 that "country agents", who did much of the preparatory work, had much of their accounts disallowed when the case came to be taxed: *Fourth Report of the Commission* (n 31) 502. The *Report* recommended the legalisation of agreements between country and Edinburgh agents to divide the profits of litigation.

122 *The petition of James Boyle of Montgomerieston, Esq. and others*, ALSP, Dreghorn Collection (1758) vol 1 no 11.

the agent's time during its dependence, and he had to go to considerable trouble in investigating the town's records and books of incorporation. The sum paid, they affirmed, "was the smallest Sum the good with a good Conscience allow their Agent, from the Knowledge they had of the great Trouble and Attendance he was put to in that Affair".<sup>123</sup>

Agents were sometimes accused of inflating fees by doing more than was necessary either through fraud or incompetence. A good example in which both were alleged is the case of the Edinburgh writer William Gray in 1743.<sup>124</sup> Gray had been employed in a conveyancing transaction in which William Dickson of Kilbucho and his son, the advocate John Dickson, sold to James Denham of London the lands of Birthwood on the estate of Coulther. Gray's fee might not have been disputed had another of William Dickson's sons, David, not himself been a writer. David Dickson suggested that the matter be referred to an independent writer for his opinion on the true value of the work done. Gray, it was alleged, had written and charged for several instruments where a competent man would have written only one, and he had carried out a search of the public registers going back eighty years in order to establish a prescriptive progress of title when only a search of forty or fifty years was necessary. In fact, John Dickson had already instructed another writer to make an adequate search, and it was alleged that all Gray was supposed to do was purchase a copy of that search from the other writer. To make matters worse, Gray was alleged to have paid the other writer seven or eight guineas, but fraudulently to have been given a receipt for fourteen which sum was included in the charge he then passed on to his client.

Nor was a long-standing relationship any guarantee for the client. Sir James Sinclair had employed the writer Charles Mackenzie for many years as his agent without complaint only to find that, when Mackenzie fell sick, in late 1735, his business affairs were passed to the writer to the signet Andrew Alves.<sup>125</sup> Sinclair later claimed that Alves overcharged him and forced him by the threat of imprisonment to subscribe two bills representing considerably more than was owed. Alves was alleged to have instructed a messenger to threaten to have Sinclair, who was in severe pain from gout, carried in a chair to the Tolbooth in Edinburgh. In the end Lord Arniston, in fining Alves for "unwarrantable proceeding", seems to have been more concerned that Alves had brought a diligence procedure during the dependence of an action against Sinclair rather than at his apparent heavy-handedness.

123 *Answers for John Cuming of Migarholm, MD present provost, and other magistrates of the Burgh of Irvine to the petition of James Boyle and others*, ALSP, Dreghorn Collection (1758) vol 1 no 12.

124 *The petition of David Dickson, writer in Edinburgh*, ALSP, Hamilton-Gordon Papers (1743) vol 25 no 47.

125 NAS, CS228/A/2/1, *The petition and complaint for Sir James Sinclair Bart* (1739).

## H. CONCLUSION

The clear distinction in most *ius commune* jurisdictions between advocates and procurators can be seen in Scotland but requires some qualification. In Scotland there was a distinction in status, education and function between advocates and writers to the signet. Yet, as inhabitants of Edinburgh and members of the College of Justice – and thus immediately and directly subject to the jurisdiction of the Lords of Session – both groups had much in common. Both had an obligation to relieve poverty, not only among their own members and dependants but also by organising representation for poor litigants. The College's sederunt books contain annual lists of the names of advocates and writers to the signet for the poor. It was argued in 1723 that just as the advocates served at the bar of the court, so the writers served in their writing chambers, and members of both groups, through their different forms of service, could qualify themselves for admission as Lords of Session.<sup>126</sup> This similarity of obligation and aspiration emerged from social links and common experience. An early example arose in 1637. At that time advocates, clerks and writers to the signet, rather than risk compulsion and the loss of their freedom from burgh taxation, voluntarily joined together, as proof of "thair godlie dispositioun to the fartherance of Godis service", to offer to pay to the council, for the supplement of ministers' stipends, eleven pennies for every twenty shillings in rent they paid in respect of their houses, chambers or booths within the burgh.<sup>127</sup>

There is a case for arguing that a stronger distinction might be drawn between members of the WS Society, who were often the sons and sons-in-law of advocates, writers and merchant burgesses, and, on the other hand, agents and procurators in the localities who generally seem to have been of lower social rank. Some local agents, such as John Young, who in 1785 sought to establish a practice in the bailie court of Leith, were former apprentices to agents in the College of Justice.<sup>128</sup> A number were highly respected and trusted. But many local practitioners lacked appropriate training. A memorandum, preserved in the state papers and written shortly after the 1745 Jacobite rebellion, suggests that many low and unscrupulous men filled the ranks of the agents, writers and clerks outside of the cities and enjoyed considerable, and not always positive, influence.<sup>129</sup> The standard of

126 NAS, CS 1/11, fol 69v.

127 NAS, CS 1/5 fols 113r-114r. The same proportion was to be paid in respect of the value of chambers used by writers who had a life interest in the premises, or who held them in heritage (presumably under burgage tenure), or who been gifted the use of them by the owner.

128 *Memorial for John Young Writer, late in Edinburgh, now in Leith, pursuer in an advocacy against Charles Hogg, Dionysius Thomson, and Alexander Nielson, styling themselves the Society of Procurators at the Court of Leith*, ALSP, Arniston Collection (1765) vol 80 no 24.

129 NAS, State Papers, RH2/4/368/2, fol 315v.

competence of those who emerged from local apprenticeships varied considerably. To allegations of malpractice may be added claims of incompetence, such as that made in 1739 against the town clerk of Inverkeithing in Fife, John Cant, as having poor Latin and being incapable of writing out a legal title or having it properly attested.<sup>130</sup>

By the early nineteenth century Scottish legal practice had seen an element of equalisation. Members of the WS Society no longer monopolised business in the College of Justice and other agents, if competent, might be admitted. Advocates were no longer marked out by their foreign education. The ready availability of domestic legal education in the universities in the later eighteenth and nineteenth centuries assisted this equalising process, particularly with the shift, which has been demonstrated at the University of Glasgow, from a speculative to a more parochial and practical form of legal instruction intended primarily to service the needs of local writers.<sup>131</sup> In Edinburgh, members of the Society of Solicitors at Law were required, from 1780, to serve a three-year indenture with an existing member, to act as a clerk for a further three years, to attend the Scots law class at the University of Edinburgh, to pass examinations in regard to legal styles, procedure and substantive law, and to pay admission dues.<sup>132</sup> This entitled them to practise before the commissary, sheriff and burgh court in the city. In Glasgow, the charter which incorporated the Royal Faculty of Procurators in 1796 was slightly different, requiring a five-year apprenticeship under a member, followed by one year's service as a clerk and attendance for at least one session studying Scots law at any university (although normally members would have attended Glasgow University).<sup>133</sup>

The eighteenth century also saw stronger regulation in Scotland's inferior courts. Local bars were established, with regulations set out by inferior judges, such as the bailie of Leith in 1722, governing the admission of procurators and how they should conduct themselves.<sup>134</sup> In Aberdeen, the Society of Advocates set out twenty-three "Golden Rules" of conduct in January 1764.<sup>135</sup> Elsewhere other procurators, out of self-interest, formed their own, often very small, local

130 *The petition and complaint of Hugh Grandison late baillie of Inverkeithing and ors against John Cant late town clerk of the said burgh*, ALSP, Hamilton-Gordon Collection (1739) vol 31 no 29.

131 See J W Cairns, "From 'speculative' to 'practical' legal education: the decline of the Glasgow Law School, 1801-1830" (1994) 62 *Tijdschrift voor Rechtsgeschiedenis* 331.

132 *Answers for The Society of Solicitors before the Commissary, Sheriff, and City Courts of Edinburgh, to the petition of John and Thomas Robertson, printers in Edinburgh*, SLSP (1781) 192:8.

133 *Royal Charter erecting the Royal Faculty of Procurators in Glasgow into a Corporation and Body Politic 6th June 1796* (Glasgow, 1954) 32-33.

134 *Memorial for John Young writer, late in Edinburgh, now in Leith, pursuer in an advocacy against Charles Hogg, Dionysius Thomson, and Alexander Nielson, styling themselves the Society of Procurators at the Court of Leith*, ALSP, Arniston Collection (1765) vol 80 no 24.

135 Henderson (ed), *History of the Society of Advocates in Aberdeen* (n 89) ix-x.

societies.<sup>136</sup> Sometimes such societies came to be incorporated by royal charter, as happened, for example, in 1780 with the Society of Solicitors at Law in Edinburgh and in 1803 with the Faculty of Procurators in Paisley.<sup>137</sup> With industrialisation, the social and economic needs of the country required increased standards and greater scrutiny of local legal practice. By means of bill procedure, through advocations of processes from local courts and suspensions and reductions of interlocutors pronounced at first instance, local malpractices in distant courts could come under the supervision of the College of Justice in Edinburgh. For instance, parties might be unable to obtain a procurator to act in their local court. Whereas advocates at the bar of the College of Justice had always been subject to being compelled to act on behalf of difficult clients in unpopular causes, local procurators were under no such constraint.<sup>138</sup> As late as 1761, the merchant Thomas Loutit could find no procurator to act for him in the sheriff court against Andrew Ross, the powerful chamberlain of his native Orkney.<sup>139</sup> He was reduced to drafting his own defences which were not “in the Law Stile”. The defamatory language in which he chose to do so led him into further difficulty until, in the end, the judges in Edinburgh became involved. Differences remained between centre and provinces, between advocates and writers to the signet in Edinburgh and procurators and writers in the inferior courts; and the inherited bias of the *ius commune* left long traces. But as supervision from the centre became increasingly effective, local regulation of lawyers gained inspiration from the model of the central court in Edinburgh where more effective quality control over the admission of all agents had begun in 1755. By the close of the eighteenth century, the lower branch of the profession was beginning to assert itself.

136 See Finlay (n 20).

137 Begg, *Treatise on Law Agents* (n 37) 18.

138 As well as undergoing compulsion to act for defenders, advocates might be prompted by the court to offer their services to pursuers, as seems to have occurred in 1788 when the advocates Alexander Abercrombie and Charles Hope, and the writer Robert Sym (see n 86), offered to act for a Mr Fennel, late of the Theatre Royal: *The Glasgow Mercury*, no 554, 261, 12 Aug 1788.

139 *The petition of Mary Loutit, only child of the deceased Thomas Loutit of Tenston, late merchant in Kirkwall*, ALSP, Meadowbank Collection (1761) vol 24 no 3.