July 2012 - Issue 03

# Signet magazine

The magazine of
The Society of Writers to
Her Majesty's Signet

## *SUMMER BALL 2012*

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EXCLUSIVE INTERVIEW

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# The Scottish Sale

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## Edinburgh

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## WS SUMMER BALL

Members and guests danced the night away at the WS Society's Summer Ball in May. After dinner, Callanish played both contemporary and Scottish country dance music which kept the dance floor full all night long. The atmosphere was relaxed, with a touch of glamour.

# Deputy Keeper's Letter

I expect that most members will have been as fascinated as I was by the excellent BBC documentary *RBS: Inside the Bank That Ran Out of Money*, though I had a particular interest, as my late father, a chartered banker of the old school and latterly a senior manager, had spent all his working life with RBS. I doubt anyone could have been more proud of that institution, but before his death in 2008 he had begun to express doubts about the leadership of "Fred the Shred" who was "not a banker", and the board that ought to have been reining in his more obvious excesses. I know that you will enjoy the articles in this edition by Ian Fraser, lead consultant on, and Jeremy Peat, contributor to, that documentary. That I write this as the LIBOR rate-fixing scandal unfolds just adds piquancy to the story.

On the topic of pride, I have mentioned before the important role it plays in membership of the WS Society. Our research in the development of the *Vision and Strategy* document showed that there are two sides to the membership equation: the heart and the head. On the heart side sits pride. We continue to build into our strategy the development of opportunities to exhibit that; for our members to showcase the Society, what it stands for, and our magnificent building. The "revamped" Summer Ball, held in May, is a good example of that, as the photographs show. Many members contacted me after the event to say how much their guests had enjoyed the evening, and the splendour of the setting.

The next opportunity will be when the Pommery Champagne Café Bar is once again in the Lower Library for the duration of the Edinburgh Festival Fringe. And, of course, by next year we hope that there will be a more permanent opportunity for members to bring guests to the Library for coffee or a light lunch, as the space once again becomes a centre for meeting and working in a way that suits the practices of the 21st century, while respecting the past.

I spoke in the January edition of the magazine about the role of DKS not being all dinners and champagne, and here we are again, with evidence on these pages that might lead you to think otherwise. Pride has obviously developed as the theme of this letter, and proud as I am of my membership of the Society and role in it, that is as nothing compared to my pride at the proficiency in Scottish country dancing being shown by my husband, Neil, in the photograph on the opposite page. Little did we both think, as we were put through our paces in the run up to the "Quali Dance" as Prom Night was called back then, that our primary school *pas de bas* training would come in so handy!

**Caroline Docherty**
**Deputy Keeper of the Signet**

*The Deputy Keeper of the Signet is the most senior membership representative of the WS Society.*

# Loss *of* trust

Scottish banking was once renowne
Today the association is rather diffe
journalist IAN FRASER gives his v
of RBS and HBOS and calls for a L

RBS former Chief Executive Fred Goodwin became the face of the UK's banking meltdown.

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eveson-style enquiry.

A few weeks after the bailouts of Royal Bank of Scotland and HBOS in October 2008, Prime Minister Gordon Brown told BBC News that: "What has happened is we have had a banking crisis which started in America… This is an international crisis that has not been generated in Britain". Brown was not the only politician to be in denial about the causes of the UK banking crisis.

In an interview the previous month, as HBOS was being acquired by Lloyds TSB, Scotland's First Minister Alex Salmond accused "a bunch of short-selling spivs and speculators in the financial markets" for causing the Edinburgh-based bank's narrowly averted collapse. With the benefit of hindsight, such claims were clearly ludicrous. For RBS and HBOS were not laid low by short-sellers or events beyond their control in the United States (although these may have played a part in tipping them over the edge); they failed because of the stupidity, hubris and greed of their management.

with banks' balance sheets, pursuing quixotic yardsticks like return on equity – and by extension enhancing their own earning-power and status – they clean forgot the fundamentals of banking. Alarm bells ought to have sounded long before the October 2008 implosions. For example when RBS splashed out $10.5 billion on Charter One in May 2004, RBS did not seem to mind that the Ohio-based bank's balance sheet was stuffed with a form of subprime lending. By December 2007, Charter One had $9.3bn of "home equity lines of credit" (HELOCs) and $11bn of mortgages secured by second liens on its books.

But unlike HSBC with its $15bn Household Finance Corporation deal, Goodwin refused to acknowledge he had been sold a pup. Even once the credit crisis was in full swing he failed to admit or accept that any of Charter One's loans were impaired.

"So where is RBS on all this?" asked John Hempton of Bronte Capital Management in May 2008. "Answer: delusional. They have taken no charges and all the goodwill from the Charter One acquisition, which remains on RBS's balance sheet unimpaired".

Hubris was already starting to get the better of Goodwin. He splashed

By 2005, investors were becoming a little concerned that Goodwin might have his priorities wrong. After one investment analyst accused him of being "a megalomaniac" who was more interested in scale than shareholder value, the RBS board commissioned PR firm Brunswick to check whether this view was widely shared. It turned out it was. But the board shied away from sacking Goodwin, opting instead to hobble him by banning further acquisitions.

To escape from M&A "cold turkey", Goodwin dashed headlong into areas he did not really understand, sowing the seeds of the bank's collapse two years later. He gave RBS's investment banking arm, led by Johnny Cameron and Brian Crowe, its head. The unit went hell for leather into the US structured finance market, as well as the leveraged-buyout and commercial property markets in the UK and Europe, but at the worst possible point of the cycle.

RBS Greenwich Capital, the bank's Connecticut-based structured finance arm, became one of the leading players in collateralized debt

## ONE ANALYST ACCUSED GOODWIN OF BEING A "MEGLOMANIAC".

In a report published last December, even the FSA blamed the Edinburgh-based bank's collapse on factors including the "significant weaknesses in RBS's capital position", "over-reliance on risky short-term wholesale funding" and "concerns and uncertainties about RBS's underlying asset quality". But the regulator added that "the multiple poor decisions that RBS made suggest that there are likely to have been underlying deficiencies in RBS management, governance and culture which made it prone to make poor decisions".

This is edging towards the truth. Put another way one could say that Sir James Crosby (HBOS chief executive from September 2001 to June 2006), his successor Andy Hornby, and Fred Goodwin (RBS CEO from March 2000 to October 2008) were so obsessed

out £18m on a private jet, £6m on the conversion of a St Andrew Square town house, £350m on a campus-style headquarters at Gogarburn and $400m on a US headquarters with the world's largest trading floor. Black Mercedes 600 SELs with peaked hatted chauffeurs were on call 24/7 wherever he went. He indulged himself with a permanent suite in the Savoy hotel, recruited his boyhood heroes Sir Jackie Stewart and Jack Nicklaus as £1m-a-year "ambassadors" for the bank, had fresh fruit flown in daily from Paris to the executive suites at Gogarburn and Bishopsgate and deluxe pies hand delivered by favourite pie-makers Yorkes of Dundee at all times of day and night. He also became so obsessed with interior décor at the bank's global network of offices that he is said to have ripped out acres of thick pile carpet if it was the wrong shade.

obligations (CDOs) (which basically meant it "structured" or "engineered" teetering debt built on a foundation layer of subprime loans issued to US consumers with little propensity to pay them back), first as a manufacturer/distributor and then as a hoarder. RBS leapt up the rankings of CDO underwriters becoming a top five player, alongside players like such cautious institutions as Bear Stearns and Lehman Brothers, with CDO volumes increasing 134% in 2006 alone.

By mid 2007 other Wall Street players recognised the CDO market was what derivatives expert Janet Tavakoli has described as a "fraud to cover up a fraud" and sought to "derisk" their portfolios, which basically meant selling as much as they could, as fast as they could, to easily duped European

banks. But RBS preferred to cling on to the fiction that its portfolio of "super-senior tranches" of CDOs was largely unimpaired, at the same time as clinging onto these tranches in the vain belief that the credit crisis was a mere "blip" and valuations would recover.

The FSA – known to some as the "Fundamentally Supine Authority" - puts these sorts of things down to "poor decisions" and a "bias towards optimism". The Americans see it rather differently. In a lawsuit filed last September, the Federal Housing Finance Agency (FHFA), an arm of the US government, took out a criminal action for "hoodwinking" Fannie Mae and Freddie Mac by selling them $30.4 billion of misdescribed residential mortgage-backed securities (RMBS). Sometimes the "owner occupancy data was materially false", claimed the FHFA, adding that RBS also "furnished appraisals that they understood were inaccurate and that they knew bore no reasonable relationships to the actual value of the underlying properties". The FHFA also accuses RBS of "systematic disregard of their own underwriting guidelines". The case, which RBS is determined to fight, is scheduled for 2014.

Seemingly motivated by a playground desire to avoid RBS being leapfrogged by Barclays, Goodwin then doubled up on RBS's exposure to the most toxic parts of the financial markets by paying €71bn for the Dutch bank ABN AMRO. The deal completed four months after the credit crisis had erupted but Goodwin failed to adjust the price.

This deal basically destroyed RBS's already dangerously over-stretched balance sheet, and meant RBS's wholesale funders shied away, refusing to roll over loans, given their knowledge of the further nasties that lurked on ABN's balance sheet (after all, many of them had parked them there). For RBS, by now the largest and most toxic bank in the world with a $3 trillion balance sheet, was being kept alive thanks to some £100m of secret, emergency loans from the US Federal Reserve and Bank of England.

Then, in what must be one of the most shareholder unfriendly diktats in history, FSA chief executive Hector Sants forced Goodwin to tap his shareholders for more cash through a rights issue. Goodwin and the rest of the RBS board, together with advisers Merrill Lynch, Goldman Sachs and UBS, persuaded investors to chuck a further £12bn into the RBS money pit. The money obtained was almost entirely lost. Hundreds and possibly thousands of former NatWest and RBS staff who took out loans to buy shares in the rights issues have been cleaned out financially as a result and, having sacked them, they may face eviction by RBS from their homes.

There are many people I know who describe this rights issue as the "crime of the century". But according to the FSA, Goodwin and his co-directors were not responsible for any corporate governance failures. They just made a few bad decisions.

Given this clearly regulatory failure, the RBOS Shareholders Action Group – comprising more than 8,000 retail and institutional investors – is filling the vacuum and on March 12 pushed the green light on a £3bn legal action against Goodwin, his co-directors Sir Tom McKillop, Johnny Cameron and Guy Whittaker and the bank itself. The action group is being represented by Bird & Bird and a team of five QCs. Proceedings are expected to start in London's High Court this year.

Of course it is wrong to lay all the blame for what happened at HBOS and RBS on the banks' respective chief executives. Every major decision was rubber-stamped by non-executive directors, voted on by seemingly somnambulant institutional investors and pored over by legal and other advisers such as the "magic circle" firms Allen & Overy and Linklaters. But this corporate governance superstructure, despite costing hundreds of millions of pounds in fees, failed utterly.

The "tripartite" regulatory framework introduced by Gordon Brown in 1997 was, if anything, worse, sitting idly by while the likes of Goodwin leveraged their banks as many as 70 times. (It has also been suggested that the FSA was complicit in helping the banks bury some of their more virulent frauds and misdeeds – just ask me or look at my website (ianfraser.org) if you would like to know more).

And where were the auditors in all this? Should they not at least have recognised that RBS's and HBOS' s capital positions were dangerously weak, leverage was out of control and "assets" less solid than made out? You would like to think so. But the audit process too seems to have failed utterly.

In keeping with Deloitte's "embedded" approach at RBS, KPMG failed to raise any red flags about HBOS, despite fanciful valuations given to most of its corporate "assets" and a series of alleged frauds and misdeeds in its corporate lending arm (some of which are currently the subject of one of the UK's largest ever fraud inquiries, led by Thames Valley Police and the Serious Organised Crime Agency). Yet despite the seeming inability of Deloitte and KPMG to detect anything might be going ever so slightly awry at RBS and HBOS, the Financial Reporting Council, where ex-RBS director Sir Steve Robson remains a director despite his part in RBS's downfall, has no current intention of probing either Deloitte's or KPMG's bank audits.

Five years into the banking crisis,

THERE ARE MANY PEOPLE I KNOW WHO DESCRIBE THIS RIGHTS ISSUE AS THE "CRIME OF THE CENTURY".

the banking world remains very much in denial and a long way from recovery. There is a patchwork of yet-to-be-implemented reforms, including "ring-fencing" from the Independent Commission on Banking, higher capital and liquidity requirements from the Basel Committee and "bail-ins" from the European Union. But these proposed reforms have ignored the elephant in banking's room – that the banking industry has appears to be an ethics-free zone. Both before and after the crisis there have been instances of treating customers, depositors and shareholders with contempt, and basically of banks appearing to regard themselves as "above the law".

This is why I and others believe that it is not too late for a wide-ranging, independent, Leveson-style public inquiry into the banks. The inquiry would scrutinize all the parties involved in this sorry episode, including bankers, institutional investors, brokers, credit rating agencies, accountants, other professional advisers, the FSA, the Treasury and the Bank of England. Without such an inquiry, it seems unlikely that banks and financial institutions will be able to regain our trust.

*Ian Fraser is a journalist, writer and broadcaster. His blog is at* ***ianfraser.org*** *He is the son of Sir Charles Fraser WS.*

# Inside the rise and fall of RBS

Former Group Chief Economist at RBS JEREMY PEAT is proud to have been associated with the bank but sad and angry about its decline and fall.

One day late in 1992, whilst working away as Senior Economic Adviser at the Scottish Office, I received an offer from the then Dr George Mathewson to take over as Group Chief Economist at RBS, on a two year secondment.

I had been in the same job at New St Andrew's House for some eight years, needed a change but wanted to stay in Edinburgh. Given the increasingly positive reputation of RBS under Dr George this seemed too good an opportunity to turn down - especially on a secondment, i.e., retaining firm hold of my civil service comfort blanket. (The basis of the secondment, as set out by Dr George, was along the lines of "see if you can make any sense of what economists do here; if you can maybe you stay, if not the secondment will have done you good"). I moved over to St Andrew Square in early 1993, and stayed in that post until retirement in March 2005.

The majority of my tenure at RBS was through a series of remarkably good years for the bank and hence those working for the company, but towards the end there were a few difficult years. As the whole of Scotland now knows, and Ian Fraser's article forcefully reminds us all, those difficult years were the precursor to a series of dramatically awful, catastrophic years for RBS, and indeed for HBOS.

But it is important to remember the good days. RBS grew rapidly, domestically and internationally and across a broad sweep of financial sector activities. However, right through to the early years of this century it remained a customer-focused bank; one where the customers really mattered. That was the case in the UK but also in the US, where Citizens Bank grew steadily via a series of (initially) small acquisitions, but remained essentially the community bank that it had originally been when a tiny organisation in Rhode Island. Chief Executive Larry Fish boasted of Citizens' inherent caution and local focus, as well as its financial success.

Expansion in Europe got underway, as a corporate bank, and joint ventures were a feature of the growth and diversification of RBS – including Tesco Personal Finance and the

Virgin One Account. There was also the continuing great success of the innovative Direct Line, first in motor insurance and then more widely.

Over this period the management of the bank was tight and collegiate in approach, with the now Sir George working closely with and listening to experienced bankers and those who really understood the risks inevitably involved as the organisation grew. The great majority of those within the bank's executive were, I would venture to suggest, proud to be a part of this successful Scottish company, which was acquiring a growing domestic market share and extended international presence, while remaining true to its essential ethos. This still applied for a period following the acquisition of NatWest – in which Fred Goodwin played a mighty role having recently arrived from National Bank of Australia as CEO-designate - although with the benefit of hindsight the stresses were beginning to show.

Then it all went so terribly wrong. This change broadly coincided with the time when Fred Goodwin actually took over as CEO. At around the same time Citizens moved from small acquisitions to large ones; moved out of its core territory of New England into New York State and then the Mid-West; and rapidly increased its activities in commercial and corporate banking. The "community" bank rapidly became a major bank for business, with major ambitions - and risks - to match.

There was also a move into China, broadly successful, and then the crunch decision to go ahead with the purchase of ABN AMRO – the dramatically wrong move at the dramatically wrong time. Even at that time it was nigh on impossible to find anyone outwith the bank who saw anything but massive danger in this move for ABN. But we are told the board approved unanimously and despite the apparent lack of due diligence. This approval and the events that followed demonstrated a notable failure of corporate governance.

Throughout the period post NatWest purchase the search for growth intensified – being fifth largest in the world was not enough. In addition to seeking acquisitions this required rapid organic growth in the treasury world and across corporate and investment banking, as financial crisis and global recession loomed. Of course the message must have been to continue to be risk aware, risk averse even. Of course there must have been advice internally to beware of the US housing market and its widespread implications. But when targets in corporate and investment banking were based upon rapid growth which could not be achieved without taking more risks, and when financial incentives were related to those high stretch growth targets, then the risk issue inevitably loomed less large in practice in the decision-making mantra. As we all know, it ended in tears. Those tears were shed by those who cared – and still care for - the institution and of course by the many thousands who lost jobs, capital and income as the share price tumbled and dividends ceased.

Ian Fraser refers to the rights issue. To many people at that time purchasing extra shares at a price of £2 per share for a remarkable institution to which they remained so attached seemed close to a no-brainer. Surely the management had everything under control and just needed this step to restore order? Wiser heads took a cautious approach and avoided throwing good money after bad. But for those who remembered the great years of the bank rationality was not always the first response.

RBS was a great Scottish success story in so many ways. I remain proud of having been associated with RBS during a great decade; and so very sad and very angry about the decline and fall. I hope that we have learned lessons about corporate governance generally as well as about oversight of the banking sector, but have my continuing doubts.

*Jeremy Peat is former Group Chief Economist at Royal Bank of Scotland. He is a Director of the David Hume Institute and Chair of the Board of the Royal Zoological Society of Edinburgh.*

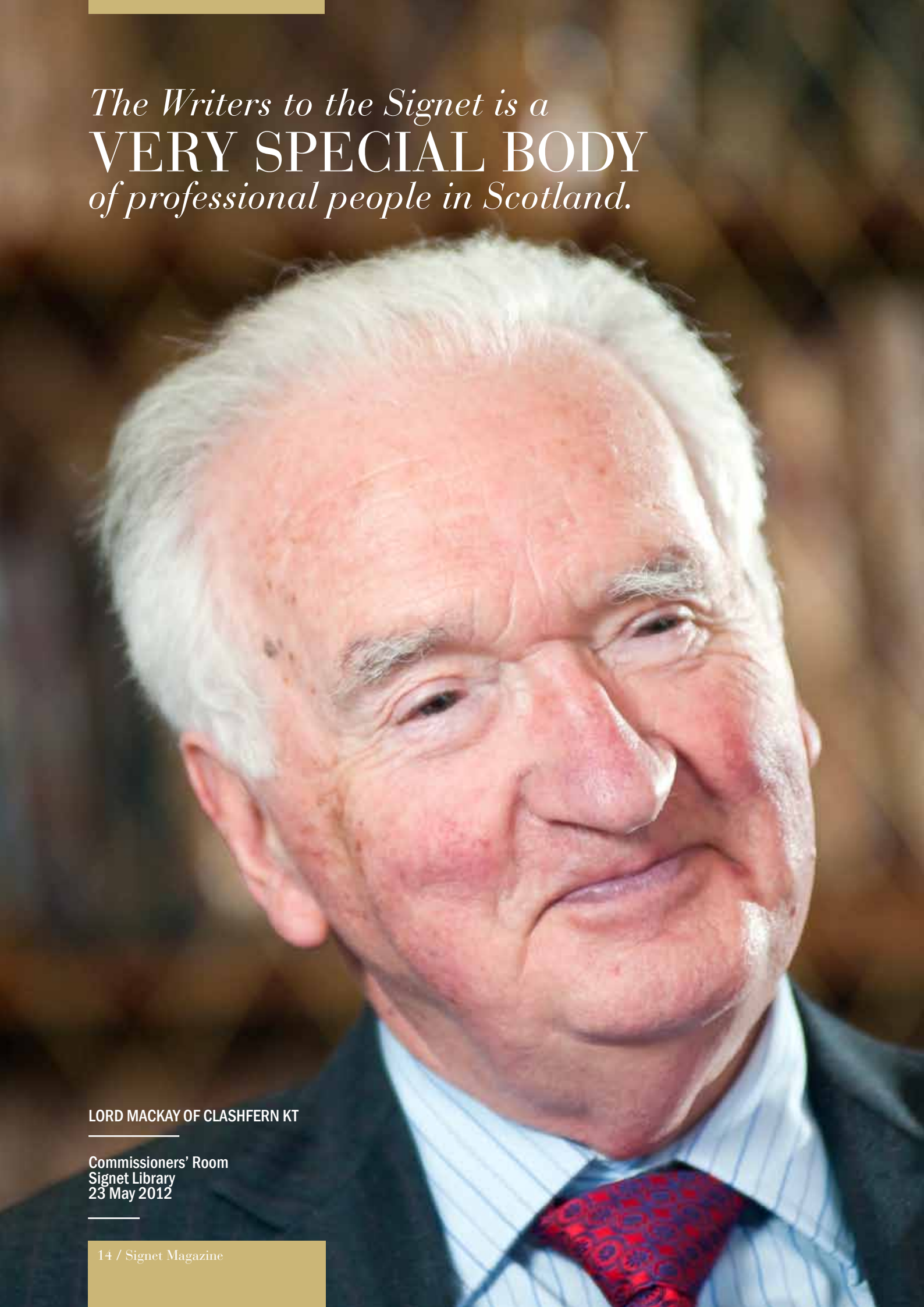
RBS WAS A GREAT SCOTTISH SUCCESS STORY IN SO MANY WAYS. I REMAIN PROUD OF HAVING BEEN ASSOCIATED WITH RBS DURING A GREAT DECADE; AND SO VERY SAD AND VERY ANGRY ABOUT THE DECLINE AND FALL.

# John Russell of Roseburn WS

*Clerk to the WS Society and Secretary of Royal Bank of Scotland*

John Russell of Roseburn became a Writer to the Signet on 3 April 1749. He was one of many Writers to the Signet who served as officers of Royal Bank of Scotland. His portrait by Allan Ramsay hangs in the Minto Room at the Signet Library.

*The Writers to the Signet is a*
# VERY SPECIAL BODY
*of professional people in Scotland.*



LORD MACKAY OF CLASHFERN KT

Commissioners' Room
Signet Library
23 May 2012

# LORD MACKAY OF CLASHFERN

## Part 1

## *From the Highlands to High Office*

To mark his fifth year as Keeper of the Signet, Lord Mackay talked to ROBERT PIRRIE in the Commissioners' Room at the Signet Library. In the first of a two part feature, Lord Mackay speaks about his Highland roots and how a visit to Marks & Spencer brought news of a government appointment in the offing.

As a young man James Mackay studied mathematics before deciding to pursue a career in law. From the outset he set his sights on success at the Scottish Bar. He practised as an Advocate from 1955, becoming a QC in 1965 and was Dean of the Faculty of Advocates before being appointed Lord Advocate in 1979. Judicial office in Scotland in 1984 was followed within a year by his appointment as a Lord of Appeal in Ordinary of the House of Lords, then the UK's highest court of appeal. An already distinguished career was to become unique when, in 1987, Prime Minister Margaret Thatcher invited Lord Mackay to become Lord Chancellor of Great Britain and he was to become the longest continuously serving Lord Chancellor in the 20th century. Many other honours have followed, including his appointment as a Knight of the Thistle in 1999. In 2007 he was appointed Lord Clerk Register and *ex officio* Keeper of the Signet.

With typical modesty and lack of ceremony, Lord Mackay kindly agreed to talk about his life and career and there follows a record of the first half of this conversation.

**Robert Pirrie –** James, it is five years since you became Keeper of the Signet by virtue of being appointed to one of Scotland's most ancient offices of state, Lord Clerk Register. You have been a very engaged Keeper for us and, as people always say to me, you're very approachable and a great figurehead for the Society. What does the position mean to you?

**Lord Mackay –** Well, it's a terrific privilege to be an Officer of State in Scotland with no executive role at all except in relation to admission of Writers to the Signet. On the other hand, it is an important position in the profession in Scotland and I've been very devoted for many years to the profession in Scotland and all its interests and when I was invited to take this appointment I was very delighted and honoured to do so. And it gives me great pleasure to come and meet the young people who want to join the profession. I'm glad to see that there are still people who want to do that, and the Writers to the Signet is a very special body of professional people in Scotland and I think they do a great deal to maintain the high standards of the legal profession in Scotland. I am very much in support of that and therefore very willing to come and be involved in anything that I can be that promotes the profession and in particular, of course, the Writers to the Signet.

I have many memories of this building and indeed of this very room. Where we are sitting now [the Commissioners' Room in the Signet Library] is where I often appeared in arbitration. Some I remember extremely well and it's a great chapter of very interesting work.

**RP** - Do you remember any colourful occasions here?

**Lord Mackay –** There's one arbitration that sticks in my mind that we had here where Millers, who were instructing me a lot, had put up buildings in Clydebank that leaked, and, of course, there were difficulties about that as you can imagine. They had balconies that leaked and the designers were being invited to

contribute their views to this. When I looked at the way in which the balcony linings were put on it seemed to me inevitable that they would leak because it was folded up at the corner where three faces were meeting. In that little point in the corner there was bound to be vulnerability.

Ultimately we won that arbitration, and the other arbitration that really sticks very much in mind again was for Millers but it was in the Royal Faculty of Procurators' building in Glasgow. I remember looking out at the façade of the Stock Exchange, I think they were changing the inside and keeping the façade or something. That was a case about a company from London who had required Millers to build or alter an aircraft factory in Clydebank. The other side were claiming against us and we had a counter claim, if I remember rightly. They produced a gentleman who had looked at the claim and he had valued the claim and he was produced for the opposition so I said to him, what was your value of the claim? Oh, you can't ask that, I can't answer that. Why not? Why not? I mean it's pretty relevant to the deal that we're dealing with, if you've got a view of it, I imagine the arbiter would like to hear it. And, of course, the arbiter did want to hear it, and he asked the chap to answer the question and the chap gave the figure, and, well, I mean they hadn't much of a case after that! That was just an example of what can happen in arbitration.

And that case went to the House of Lords because there was a question as to what was the proper law of the contract and also what was the proper law of the arbitration. And I had to make good the proposition that the proper law of the arbitration could be different from the proper law of the contract. They argued that the proper law of the contract was Scots because it was the system of law closest to the performance of the contract. There was a split amongst the Law Lords about that. Lord Reid and Lord Wilberforce were in favour of Scotland as the proper law. The other two Law Lords were against it and Lord Guest said that he was of the opinion with the majority of their Lordships that it should be England. So the proper law of the contract was decided to be English law by a majority but all five however held that the proper law of the arbitration was Scottish and therefore the remedies that you could have would be Scottish remedies and there was no appeal to the Court in those days from a Scottish arbitration. So we succeeded and that became quite an important case. I think it's in 1970 appeal cases or something like that. [*Whitworth Street Estates (Manchester) Limited v. James Miller & Partners Limited* [1970] AC 572.]

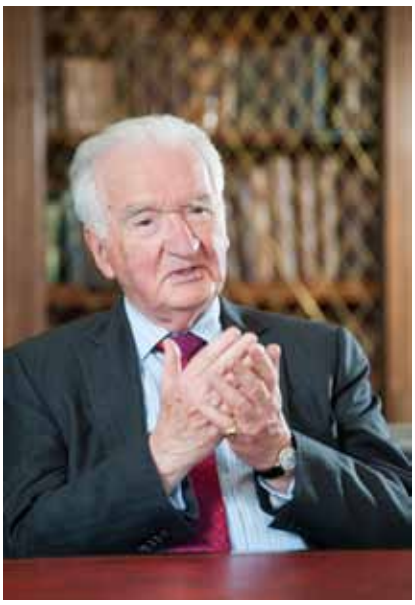
**RP –** Of course, you didn't start your studies in law, which a lot of people will not realise.

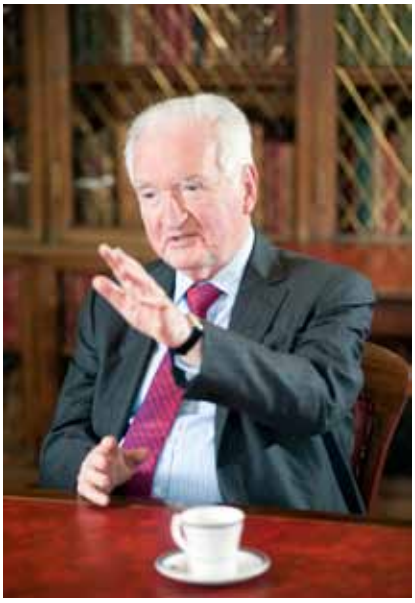
**Lord Mackay** - No, I began my studies at school and in university in mathematics and I took a degree and graduated at Edinburgh and then I taught for two years as a lecturer at St Andrew's. At that time you weren't allowed to move straight on and so I was invited to take an appointment at St Andrew's which I did for two years and then I went to Trinity in Cambridge and I took a degree in maths there. When there I met Michael Atiyah [Sir Michael Atiyah whose undergraduate and postgraduate works took place at Trinity College from 1949 -1955] who is one of the leading mathematicians of his generation in the world, the winner of the prize for mathematics that's equivalent to the Nobel Prize in other disciplines [the Abel Prize often described as "the mathematician's Nobel Prize", awarded to Sir Michael Atiyah in 2004 for the Atiyah-Singer theorum]. And he was a good friend of mine, but when I saw his capabilities I realised that my role wasn't in academic mathematics for the rest of my life.

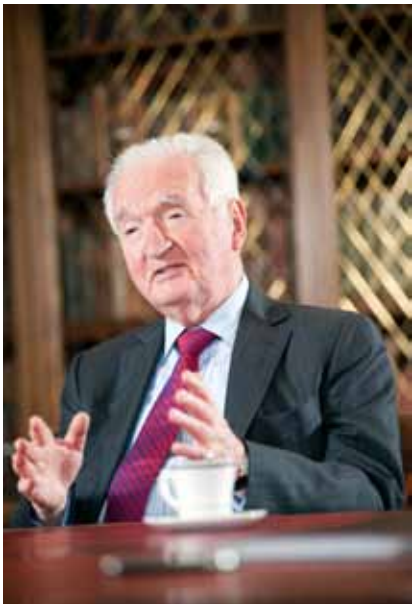
My mother had passed away and my father was here [in Edinburgh] on his own and I had done all the mathematics that Edinburgh University had to offer in the ordinary course of events, and so I came back and thought I'd like to do law and never regretted that decision.

**RP** - You mentioned your father and you were born and educated in Edinburgh. Had your father come down from the Highlands?

**Lord Mackay** - Yes, in as far as I was educated it was in Edinburgh [at George Heriot's School]. My father was born and brought up in Clashfern in Sutherland, between Scourie and Laxford, that's in the North West of Sutherland and he came down to Edinburgh as a young man to seek work. And he worked here in different capacities, including ultimately on the railway at Balerno. And he didn't enjoy good health. He had a spell in hospital down in Comely Bank, the Royal Victoria I think you'd call it. He had a spell there, he didn't have good health. But he was a very fine person







and very interested in church and theology. A great reader of second hand books, and a reader in second hand bookshops and purchaser of their wares, mostly in biography and church people and so on and also in theological books.

And my mother was a widow in Thurso and she came down to Edinburgh - I think it was 1917 or something like that. She'd lost her first husband very suddenly in Thurso. He was in business there and he just went out at lunchtime and came home dead. So it was quite a shock to her. She was quite a young wife at that time but by then she had met my father and they got married in 1921 and after some considerable time I came along, the only child, in 1927. [Lord Mackay was born on 2 July 1927.] When I went to the House of Lords my surname being Mackay, you couldn't call yourself the Lord Mackay because the chief of the Scottish clan retains that. There is a Lord Mackay - Hugh Mackay [14th Lord Reay, Baron Mackay] is the chief of the Clan Mackay, and one of his titles is Lord Mackay. So I had to look for some title connected with some place or other and I thought of Clashfern. It was in honour of my father really. He'd passed away, of course, some considerable time before that. But there were some of his relatives still alive at that time and they were absolutely delighted. And it's nice, I think it's a nice name. It's easy to spell, and also fairly easy to pronounce. I think it's quite a good choice, and I'm often asked, is it the only Clashfern in Scotland? I met somebody in a restaurant one day and he said to me, which Clashfern is it you are? And I said all of them! And he said there's a Clashfern somewhere near Fort William where he came from. So there'll be more than one like most places, they're not unique by their name.

It's really quite interesting that connection with Clashfern. And of course my letters patent when I was made a Life Peer in 1979 refer to Eddrachillis which is the Parish in which Clashfern is located in the County of Sutherland. And the County of Sutherland is the smallest county in the United Kingdom, I think, so far as population is concerned, not for size, but population.

And it's most interesting to me that my successor as Lord Chancellor was Lord Irvine of Lairg [Derry Irvine, who was born in Inverness, appointed as successor to Lord Mackay as Lord Chancellor in 1997 following Tony Blair's Labour election victory]. And his letters patent also were connected with the County of Sutherland. And his middle name is Mackay as well. He's Alexander Andrew Mackay Irvine. So he's got Mackay in the middle of his name as well. It's quite extraordinary but there we are. It's a bit of a coincidence.

**RP** - So you obviously have this connection with the Highlands. How do you think that has informed your outlook? How would you say...?

**Lord Mackay** – Well, you know, Robert, although I was born and brought up in Edinburgh, we went a lot to the North, to the Highlands. Actually my mother's brother had a small farm in Caithness and he had seven children and his wife passed away leaving one of them extremely young. And my mother and father being more or less free from any responsibility by that time went up a lot there. We went at school holidays, that sort of thing. And, of course, before, right before I was in school I was up there, and it was great, it was valuable to me to have company of my own age. Most of them were older than me. And so I was very connected with Caithness and Sutherland all my life really.

[Lord and Lady Mackay were later to move house to Cromarty at the end of his time as Lord Chancellor. This period will be covered in the second part of the interview to be published in Signet Magazine later this year.]

**RP** - Going back to your legal career. You were at the Scottish Bar obviously, starting in the 1950s?

**Lord Mackay** – I became an Advocate in 1955.

**RP** – So you practised at the Bar in the 50s, 60s and 70s until your appointment as Lord Advocate [in 1979]. What's your memory of practising at the Bar at that time?

**Lord Mackay** - Well, there was nothing like so many people as there are at the Bar now. Nothing like it. But, of course, there wasn't so much litigation, at least generally speaking. When I was called in July 1955, I was called by myself. There was nobody else. I had devilled [trained as an Advocate] for Bertie Grieve who became Lord Grieve and he was in the same group as Lord Emslie who became the Lord President. I was also friendly with Alistair Johnston [later Lord Dunpark]. And so I was introduced to a pretty busy group of Advocates and I found myself getting involved in their work quite a bit. And then when they took Silk as they gradually did their practices tended to

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come to me in quite a large number.

So I became really pretty busy as a junior. And pretty hard work. I always tried to give everything I could do, in the sense of doing your work properly and trying to be ready and so on. And I had the advantage of having been at Shepherd & Wedderburn as a law student. In these days you could go to the Bar just like that if you wanted to. But I didn't feel that that was wise. I had to do the three year course on law in Edinburgh University. So I managed to get a position as a sort of law student, not an apprentice, at Shepherd & Wedderburn. I didn't become an apprentice because I wanted to burn my boats really. I didn't want to have the option of being a solicitor still. You know, I thought that would be unwise. I just had to make a success of it, you know. And I think that's good that way. One of the things I think about education today is that children coming up to that sort of stage have so many choices that it's very difficult to make a choice and stick to it. And once you've chosen, if you start looking at the others, it damages your drive in what you're doing. So anyway that was my theory. So I was with Shepherd & Wedderburn. Ivor Guild was the head of the Court Department when I went there. He's still flourishing in the New Club in Edinburgh and a Writer to the Signet, of course. The head of Shepherd & Wedderburn then was Sir Ernest Wedderburn who was Deputy Keeper of the Signet. So I was early introduced to the Writers to the Signet. And that helped me too. They didn't have a terrific amount of litigation work at that time. They had some but not a terrific amount. But they did give me some cases and I cut my teeth on some of these.

One of the earliest debates I remember was a case where somebody had fallen out about an oil drill or something of the kind. And it came up for debate and Robert Howat McDonald [later Lord McDonald] was on the other side. He was a good bit senior to me at the Bar. He was on the other side. And I don't know, it's hard to recall these things fully, but once I got going… I mean I was pretty shy I think it would be fair to say. I think people would have thought of me as quite shy. Maybe not, but I thought I was pretty shy. I never took part in debating clubs and things, societies. I was a member of the Speculative Society but I didn't take very much part in it, to the sort of minimum, because it wasn't in my blood, a debater of that sort of sense. But when it got to the law, debating the law, that was rather different and I just had a terrific time. And Lord Hill Watson entered the spirit of it and he questioned me and, looking back, he gave me a really superb time. It gave me a sort of confidence in legal argument and in carving it out that I wouldn't have thought of before. So it was a great start from a very generous man, Lord Hill Watson. Incidentally, I was once at a meeting where Jock Cameron [Lord Cameron] was there. He was introducing Lord Hill Watson to make a speech and he told us that Lord Hill Watson is a good judge. A very good judge. He said, you don't need to tell him the same thing seven times over before he understands it. He said, no, with him five times is quite enough. Well that was Lord Hill Watson. I owe him a terrific debt, really.

**RP –** What was the Bench like? Were they sometimes quite ferocious?

**Lord Mackay** - Oh yes. I don't think I'll mention the name of one but Bett [Lady Mackay] used to say if I was going to appear before him I couldn't take my breakfast. He was very friendly to me after it, but he was frightening and he had to have everything absolutely right, he was ready to pick on anything. He did it in a way that made you feel slightly stupid. And it wasn't difficult to do that for me anyway. I got to know him very well latterly. But when I was a junior at first he was rather a formidable character. There were other formidable characters later but that was, that was early on.

And I had some very interesting cases as a senior too. I was in the Argyll divorce case as a junior to George Emslie. [In 1963 the 11th Duke of Argyll divorced Margaret Campbell, Duchess of Argyll, is a case that made headlines and scandalised high society.] I also acted for the Duke in the case that the Duchess brought against him which he gave up at the last minute. So I got some insight into family law as well, and did a lot of other divorces as well. But that was the lead, that was the main one. That got us to the House of Lords as well, on a question about confidentiality.

> Bett and I were in Marks & Spencer for some reason or another. And he said to me, "JAMES, I HEAR YOU'RE GOING TO BE LORD ADVOCATE". I SAID, "WHAT?"

**RP** - And your career at the Bar ultimately culminated in your being appointed Lord Advocate.

**Lord Mackay** - That's right. I had also been the Sheriff Principal of Renfrew and Argyll from 1972 and then that finished when they decided to make the Sheriff Principal full time. Then I was approached to become a part-time member of the Scottish Law Commission. And I was also the Vice Dean of the Faculty of Advocates by that time. And then I was elected Dean of the Faculty at the end of 1976. And in fact I was Dean until I became the Lord Advocate in 1979.

**RP –** And did your appointment as

Lord Advocate come as a surprise to you?

**Lord Mackay** - It certainly was. An extraordinary surprise. I'd never been in politics of any kind whatsoever. I'd never seen myself anything to do with politics at all. And it was really a very odd thing. But one of my colleagues was down in Marks & Spencer on a Friday. Bett [Lady Mackay] and I were in Marks & Spencer for some reason or other. And he said to me, James, I hear that you're going to be Lord Advocate, I said, what? He said, yes. I said, I would rather they had told me by this time. I was at home on Monday morning and I got a message from Downing Street to say that the Prime Minister would like to speak to me. So needless to say I made myself available and she [Margaret Thatcher] spoke to me and she asked me if I would become Lord Advocate. And I said, well, Nicky Fairburn is QC and he is a Member of Parliament. Yes, she said, but, if you would become the Lord Advocate, he would become the Solicitor General. So I said, well in that case I can't refuse that appointment. Perhaps I should have thought for a minute because the drop in income was not insignificant! As the Dean of the Faculty I was much in demand.

**RP** - And how would you say things changed for you once you became Lord Advocate and part of the political world?

**Lord Mackay** - I think it was very good for me. I was introduced to the world of politics and to the matters of the press and so on and introduced to it fairly gently because I was fairly junior in the political hierarchy, the Lord Advocate, although a senior minister in Scotland, second to the Secretary of State for Scotland, is not much in England. Except that the Attorney General, who was Sir Michael Havers at that time [subsequently Lord Havers and Lord Mackay's predecessor as Lord Chancellor of Great Britain], took an interest in me and he told me it was his suggestion to the Prime Minister that I should become Lord Advocate because he'd met me when he'd come up to Scotland some time before the election. I worked a lot with Sir Michael and he used to nominate me for doing English cases in the House of Lords and that was an extraordinary experience and I maintained my position as an Advocate quite a bit even after being the Lord Advocate. And I also appeared from time to time for the Crown in Scotland as well, including some planning decisions, that sort of thing. So I continued to be an Advocate really until I became a judge in 1984. [Lord Mackay's appointment as a judge of the Court of Session in Scotland was followed in 1985 by his appointment as a Lord of Appeal in Ordinary ("Law Lord") of the House of Lords which was the highest appellate court in the UK prior to its replacement with the Supreme Court of the UK.]

**RP –** And life changed again...

**Lord Mackay** - Yes it did. Immediately, to be a judge in Scotland was interesting. At first, because I had been Lord Advocate, I couldn't do criminal work, but I think it was six months or something then I became a criminal judge as well. I did quite a few criminal cases too. Then I was appointed to the House of Lords and there's a good story about that. I treasure it, because it's about real people. I was sitting in Glasgow, in the High Court, a criminal trial, and I was coming home from court in the afternoon walking up Argyll Street. That morning's papers had my appointment and, as I recall, there was a big photograph in the Daily Record. Coming home up Argyll Street these two chaps were sitting on a seat and as I passed one of them said, "Lord Mackay". So I came over to him and he said, "We see you got a wee bit of promotion - we were all very pleased". I didn't know for whom he was speaking! Anyway, I thanked him kindly then went on. There was something about that that really stirred my heart a bit.

When I was invited to become a Lord of Appeal in Ordinary, I had been asked by the Lord Advocate, Kenny Cameron, whether I would be willing to accept the appointment. Having considered it, I said, yes, I would. I heard nothing until I got a letter from the Appointments Secretary at the Cabinet Office to say that Mrs Thatcher had sent me a letter a month before and she was wondering why I hadn't answered! I had never received the letter! Whatever happened to it nobody knows. But anyway...

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*In the second part of this feature,* ***From Court Room to Cabinet Room****, to appear in the next edition of* ***Signet Magazine****, Lord Mackay talks about his time in government, the importance to him of Lady Mackay and his family, and an awkward day keeping Mrs Thatcher waiting.*

# In camera

## The WS Summer Ball
## 18 May 2012

# Her Majesty's Signet

On 5th July 2012 Her Majesty The Queen installed her grandson, His Royal Highness Prince William, Earl of Strathearn, a Knight of the Thistle at St Giles Cathedral. As is customary on such occasions, Her Majesty and the royal party processed to and from the Signet Library. The Queen has visited the Signet Library regularly during her reign. To mark the Diamond Jubilee, KAREN BASTON explains the history of the WS Society's relationship with the monarchy.

The WS Society's history is deeply intertwined with that of the monarchy. The Signet and its functions come to us from the medieval Kings of Scotland. The Society has demonstrated its loyalty in a variety of ways since its official foundation in the sixteenth century. These expressions have taken forms beyond the important function of keeping the Signet. Writers to the Signet have raised regiments, participated in ceremonies, and greeted monarchs during their visits to Edinburgh.

The use of a signet ring to demonstrate royal authority goes back to the 1300s in Scotland. Robert I and his son David II both used a ring to seal official documents and one of them had it engraved with the arms of the King of Scotland. The Signet was no longer a ring by the early fifteenth century and it was kept by a clerk. This Keeper of the Signet had great political importance since the use of the Signet was connected with the will of the king. The Keeper of the Signet became a royal secretary and member of state in 1444. A group of writers emerged thereafter to assist the king and his council and by the time the College of Justice came into being in 1532 these writers were already organised into a guild. The Society of Writers to His Majesty's Signet became official in 1594 when James VI's secretary, Sir Richard Cockburn of Clerkington, granted a commission to the Keeper of the Signet and eighteen Writers.

The Society's minutes record some of the various ways its members have honoured successive kings and queens. Whether fighting in battles or delivering loyal addresses, Writers to the Signet have supported their monarch. In celebration of our current Queen's Diamond Jubilee this year we look at some examples of the close royal relationship from the late seventeenth century to the present.

Writers to the Signet joined advocates and "certain clerks of session" on 13th June 1679 to raise a regiment "for his majesty's service" against those "who have risen up in rebellioun [sic] in the West against his majestie". Sir William Sharp of Stoneyhill, keeper of his majesty's signet, and Hugh Wallace, WS were chosen as lieutenants. The Battle of Bothwell Brig ended the alarm but the Society, which had paid a third of the cost of raising the regiment, was keen to know where the colours and liveries were to be stored so that they could "be made forthcoming when use sall [sic] be of them upon any future occasion".

The same year saw a visit to Scotland from James, duke of York (later James VII) as the king's high commissioner when members of the Society donned their ceremonial gowns in honour of the occasion.

Although the Society's minutes do not discuss the momentous events of 1688-1689 and the resulting change of monarch from Stuart to Orange, the Society warned masters to look after their excitable apprentices after rioting occurred when James VII established a Roman Catholic chapel at Holyrood Palace in 1688. The minutes are then quiet because the Signet was shut from July, when the king and the Scottish Parliament entered into a dispute about which had the right to appoint the Lords of Session, to October, when the new king William of Orange arrived in Britain. On 18th April 1696 the Society declared its loyalty to William's "most sacred person and government" and to the protestant religion while expressing its distaste for "the late king James and the pretended prince of Wales and all their agents".

The Jacobite uprisings saw Society members on both sides of the conflicts. The Society itself remained loyal to the Hanoverian kings each time. Members were advised in 1715 to "take care what persons they take into their chambers as prentices or servants, and that they should entertain none but those who should be well affected to the government, and make no disturbance in the place". Nevertheless, a non-practising member of the Society, Charles Chalmers of Portlethin, died at Sheriffmuir while fighting for the Pretender.

The Society's minutes are again quiet about the events surrounding the Forty-five. The accounts were given and the Signet office was put in order. That the accounts are nearly the only thing mentioned is interesting: the Society's treasurer, fiscal, and substitute keeper had joined the Jacobite forces to act as fund raiser and treasurer for Bonnie Prince Charlie's army. Sir John Hay of Restalrig WS raised £5,500 from Glasgow merchants for the cause but, despite his experience as a treasurer for the Society, proved not to be up to the challenge of financially managing an army. Hay fled to France after Culloden. Another member, Mr Colquhoun Grant WS played a notable role on the Jacobite side at the Battle of Prestonpans and was honoured by Charles at his first levee at Holyrood.

The Society joined the rest of the College of Justice to wait on the victorious Duke of Cumberland in 1746. The Lords of Session were "resolved to wait on his royal highness in their formalitys, attended by their clerks, the advocates and writers to the signet" and the Society agreed. But the Society had a problem: what were the "formalitys" of the WS Society? The Keeper looked into the matter. The legal profession had been required to use gowns since an act of parliament of 1609 and the Society had worn gowns of some sort to greet James, Duke of York as the king's representative in 1679. By the mid-eighteenth century, the Society's legal dress code was in abeyance: no one even remembered what colour the gowns had been in 1679. It was clear that gowns were required to meet the Duke as the king's representative and the Keeper left a gown in the Society's hall as a pattern. Furthermore the new gowns were to be black since it was deemed more suitable than red and they were to be made of "Scots shalloon", a type of woollen material. The creation of the new gowns demonstrated loyalty since, in addition to honouring the Duke of Cumberland during his visit, it promoted Scottish industry and showed a willingness to put the events of the rebellion in the past. The Society went further, too. Later in the year the members passed a motion to promote the manufacture of woollen cloth by agreeing that all members "should appear dressed in the same against their next general meeting in June". The selection of materials was more than an expression of fashion. The clothing part of the Society's "formalitys" remained woollen until 1901 when they were replaced by silk. The Society also added a baton for its officer in 1746.

The Society continued to offer support for military ventures. The Lord Provost of Edinburgh asked for the Society's support in 1778 "for raising a regiment for his majesty's service in America". The meeting of 19th January responded unanimously that "it is the duty of all his majesty's good subjects to testify, on this very important occasion, their loyalty and attachment to his majesty's person and government, and their zeal for the honour and dignity of the nation". The Society pledged five hundred guineas to raise a regiment to fight for the king and raised the funds quickly via a voluntary tax on all letters passing the Signet.

Members of the Society continued to offer their service and support for the military in the next centuries, reflecting the Society's enduring loyalty to monarch and country.

When George IV visited Scotland in 1822, the WS Society planned how best to greet him. A committee was appointed "for the purpose of considering the most suitable means of testifying the sentiments of dutiful and affectionate loyalty towards his majesty's sacred person". The committee decided that "a dutiful and loyal address be presented to his majesty by the Society" by the Keeper of the Signet, the Deputy Keeper, and fifteen members of the Society. The hall and recently completed library were to be put "in a proper condition for his majesty's reception, in case it shall be his majesty's pleasure to inspect them". To make a royal visit more likely, the Society also took care "to intimate to the lord provost their willingness to grant the use of their hall for the accommodation of his majesty and the distinguished persons who may be invited to partake of the civic feast". After the visit, the minutes report that "the Society's offer of the hall having been accepted, it was used as the general drawing-room at the entertainment given to his majesty on Saturday 24th August". The Upper Library, then still owned by the Advocates, greatly impressed the king who called it "the most beautiful room I have ever seen".

The accession of Queen Victoria prompted a display of loyalty in 1837. Members of the Society met in the outer house and organised themselves in order of seniority so that they could process "in their gowns" to the Royal Exchange to hear the official proclamation. They then processed to Castle Hill for a second proclamation. Fifty years later, the Society celebrated Victoria's Golden Jubilee by installing a stained glass window in the Upper Library. The design includes both the royal arms and the arms of the Society.

The special relationship between the Society and the head of state continues to the present day. The story of that relationship – following the journey of the Signet from private seal of the Stewart dynasty to symbol of the state in modern Scotland – is in microcosm Scotland's story. And so will it continue.

# LETTER FROM AMERICA

Following the collapse of another international firm, Dewey & LeBoeuf, RANDY GORDON asks if the era of law firms as stable institutions is over.

In recent weeks, I have been thinking about the concept of "virtue in the profession" in light of the collapse of the venerable international firm now known as Dewey & LeBoeuf. The narrative of that firm - one containing threads of a distinguished tradition and the corruption of commerce - is in many ways representative of a vocation that can no longer call itself a profession, yet cannot quite call itself a business either. So let me take a few paragraphs to sketch out a central aspect of the problem that all law firms face and how they might meet the challenge.

Over 50 years ago, C.P. Snow decried the rise of what he called the "two cultures". He meant this metaphor to capture an inability to communicate between communities of scientists, on the one hand, and literary intellectuals, on the other. Snow's analysis seems right to me, and it may be useful to frame a discussion of virtue with the notion of "culture" in the Snowian sense of responding alike to a problem, situation, or subject "without thinking about it". Two "cultural" obstacles stand in the way of virtue in the legal profession, only one of which, the second, can I take up here: first, separate cultures have grown up around the legal academy and legal practice; second, legal practice itself has migrated from one culture to another. Each of these divergences is antithetical to the notion of virtue. But before moving to specifics, we need to pause and consider what virtues should obtain in the context of law.

As Alasdair MacIntyre has noted, in heroic societies (think of the Iliad or Beowulf) virtues and roles were inseparable, and the concept of virtue coincided with the notion of excellence (e.g., a great runner displays excellence of the feet). To bring this into the present, MacIntyre develops the concept of a "practice" in his *After Virtue*. His point is, I think, that once an activity becomes "institutionalised" (in the late Professor Sir Neil MacCormick's sense of the word), it qualifies as a "practice" (in MacIntyre's sense of that word). In any event, a few of the contrasting examples that MacIntyre proffers should sharpen the focus: tic-tac-toe is not a practice, chess is; throwing a ball - even with skill - is not a practice, football is; bricklaying is not a practice, architecture is. By these lights, I think we can safely categorise lawyer-work as a practice.

MacIntyre goes on to identify two types of goods associated with a practice. The first are "externally and contingently attached" to practices "by the accidents of social circumstance". These goods are external because there are multiple paths to their attainment - for example one can achieve fortune through not only a myriad of practices but through an accident of birth, a roll of the dice, or a great train robbery. This is to be contrasted with the goods internal to a particular practice: namely, "those goods (1) that we can specify only in terms of, or with examples drawn

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WHO COULD GRAB IT.

from, the practice and (2) that can only be recognised by the experience of participating in the practice in question". What does this mean for lawyers?

If a lawyer from 1950 was parachuted into the present, I suspect the most startling change he would notice in the legal landscape (and it would almost inevitably be a "he") would be the overall number of lawyers and the size (both in terms of number of lawyers and geographic scope) of law firms. Why the explosion? There are many reasons, but, in sum, there was a lot of money to be made by those who could grab it.

And one way to grab it was to create very large, highly leveraged firms that could siphon off "premium" work at premium rates. This comes at an associated cost in terms of the older "partnership" model in which the partners actually knew one another, socialised together and made decisions as a group. Now, large firms are impersonal - they are bureaucracies, really - and decisions (to quote Abe Krash, a retired Arnold & Porter partner) "that were once influenced in significant part by tradition, loyalty, and regard for past contributions to the firm, are now determined by bottom line, objective factors". The lock-step system of compensation has been replaced by an "eat what you kill' system, i.e., a system geared to business generation".

So why do firms now emphasise profitability above all when it so clearly serves to enhance only the external goods of the practice (i.e., money and its collateral prestige)? The short answer is "lawyer mobility". Time was, there were virtually no lateral moves at the partnership level, a situation facilitated by stable client relationships. But as client loyalty waned, a market developed for lawyers with portable business. In effect, then, the internal goods of the practice are held hostage to the external.

What this means is that Aristotelian "friendship" (i.e., the virtue that holds institutions together) is no longer possible in law firms. Indeed, it has been replaced by a pervasive sense of anxiety because competitors are always-already poaching key clients, younger lawyers do not develop strong loyalties because they see their future riddled with contingencies, management seems to care only about profitability, and even highly successful partners can see their careers hit the rocks by a client defection. But above all, as one commentator tartly puts it, "Large firms view good lawyers as expendable".

I wish I could end on a wholly positive note but I think that the classical lawyer virtues will continue to exceed our grasp so long as the problems I have identified with multi-national corporate law practices persist. And they will persist. So what are we to do? Ironically, I think one answer is for firms to throw off the shackles of professionalism and behave more like business and be allowed to - for instance - enter non-competition agreements with their partners or burden business generated at the firm with a continuing royalty. Or, as Bill Henderson has suggested, law firms outside the primary capital markets may find ways to build solid (perhaps not solid gold) practices around like-minded lawyers. I have my doubts, but the conversation is worth having, if you believe, as I do, in the value of stable institutions.

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# WILLIAM ROUGHEAD'S *friends*

Following our celebration of the life of William Roughead WS in the last issue of SIGNET MAGAZINE, the Signet Library has welcomed visitors to use the Roughead Collection. Roughead had many distinguished admirers, including authors and historians. By KAREN BASTON.

The WS Society is celebrating Roughead this year since it marks the sixtieth anniversary of his death in 1952. The Roughead Collection, now held in the Commissioners' Room, was gifted to the WS Society by Roughead's family in the same year. The collection comprises Roughead's books on criminology. A project is underway to add the collection to the Signet Library's online catalogue. One of the most enjoyable aspects of this work is finding the treasures tucked inside Roughead's books. Roughead kept an assortment of correspondence and photographs in his books. The inscriptions, letters, and postcards are addressed to Roughead from the authors of the books and they often give him credit for inspiring their authors.

Roughead was not alone in his pursuit of crime and exploration of criminology. His work inspired other writers to explore the dark side of human nature. Roughead was generous with his materials and insights and he often lent books and provided feedback for his fellow criminologists. As evidence from his library of crime books shows, Roughead's network of correspondents included Edward Pearson, Horace Bleackley, H. B. Irving, and Sir Arthur Conan Doyle.

**Edward Pearson**

Edward Pearson (1880-1937) was a Librarian of Congress and, like Roughead, a true crime pioneer. Pearson wrote to Roughead in 1923 - the letter is in Studies in Black or Red (Roughead Collection, R340.9 P31) - to thank him for book recommendations and to announce his "plan to tread somewhat in your foot-steps - that is, one on American murder trials. Since a celebrated double murder in Massachusetts when I was a school-boy, twenty-five years ago, the subject has always fascinated me, and your books have tempted me to try the same field". Pearson's best known work, *Studies in Murder*, was published in 1924 and featured an essay on the axe murderer Lizzie Borden - the celebrated double murder case that had caught his attention when he was a boy - which Roughead greatly admired. The two authors were firm friends and Pearson visited Roughead during his visits to Scotland. Roughead's copy of Pearson's edition of *The Autobiography of a Criminal, Henry Tufts* contains the inscription: "'For: William Roughead, from his friend, admirer, and assistant toiler in the same vineyard. Edmund Pearson. March, 1930".

**Horace Bleakley**

The historian and criminologist Horace Bleackley (1868-1931) did research on Roughead's behalf. Roughead's copy of his *Some Distinguished Victims of the Scaffold* (Roughead Collection, R343.9 B61) is bound with a letter containing notes from the British Library. Another letter in the same book is from Bleackley's son who introduces himself and hopes to meet his father's friend on his next visit to London. Roughead acquired some of Bleackley's antiquarian books after his death including three pamphlets dated 1752 about the trial and execution of Elizabeth Jeffryes and John Swann for murder (Roughead

Collection, R343.1 J388(1-3)).

**H.B. Irving**

Another of Roughead's correspondents, H. B. Irving (1870-1919) was the son of the famous Victorian actor, Henry Irving. The younger Irving also acted before turning to criminology and writing. Roughead's copy of his *Studies of French Criminals of the Nineteenth Century* (Roughead Collection, R343.9 Ir8) contains not only a letter from Irving to Roughead dated 31 July 1912 but also a photographic postcard featuring "Mr. H. B. Irving as Dr. Jekyll" which shows that he retained his taste for the theatrical. Roughead gave books as gifts as well as receiving them. His copy of Irving's *Last Studies in Criminology* (Roughead Collection, R343.9 Ir8) has a letter from Irving thanking him for the gift of a book.

**Arthur Conan Doyle**

The best known of Roughead's friends today is Sir Arthur Conan Doyle (1859-1930). The two worked together to put the famous Oscar Slater miscarriage of justice right. Conan Doyle introduced Roughead to the journalist William Park when he was investigating the Slater case. Roughead's copy of Park's *The Truth about Oscar Slater* (with the prisoner's own story) (Roughead Collection, R343.1 Sl15) contains letters from both Conan Doyle and Park and the inscription "To W Roughead from A Conan Doyle with best regards July 31st 27".

Roughead did not only keep messages from the authors of his books: he also kept correspondence with their subjects. His copy of John Buchan's biography of Andrew Jameson, Lord Ardwall (Roughead Collection, R340.92 B85) contains a letter dated 19th July 1909 from Jameson to Roughead which thanks him for his gift of his book on the Deacon Brodie trial and his loan of his *Introduction to the Porteous Trial.*

Roughead was acknowledged as a leader in criminological studies by the editor of *The Black Maria*, or, *The Criminals' Omnibus* (Roughead Collection, R 343.9 H66) who inscribed the work: "To William Roughead one of the first drivers of the Black Maria from Henry Hodge, Sept. 1935" when it was published. The work included Roughead's study of the Mary Blandy murder trial of 1752.

Since only some of Roughead's books have been catalogued so far, it is hoped that more of his friends will come to light. Roughead's influence on the development of the true crime genre is profound. The letters and inscriptions in his books reveal an international network of true crime pioneers who followed Roughead's example and who relied on his friendship and support.

Sir Arthur Conan Doyle

# OSCAR SLATER: *what happened...*

In the last edition of SIGNET MAGAZINE we told the story of William Roughead WS and the Oscar Slater trial, one of the most notorious Scottish criminal cases of the 20th century. What happened after Oscar Slater was acquitted at his second trial in 1928 is less well known but just as intriguing. By KAREN BASTON.

In July 1928 Oscar Slater became a free man. Having spent nearly two decades in prison for a crime he had not committed - the brutal murder of the Glasgow pensioner and jewellery collector Miss Marion Gilchrist in 1908 - Slater had won a fresh trial. The questionable evidence that had been used to convict him in 1909 was challenged by the noted criminologist William Roughead WS who had not only attended Slater's original trial but had published his concerns about the evidence of the case in his books for the Notable Scottish Trials series. Roughead continued collecting materials about Slater in his scrapbooks after the appeal including newspaper cuttings and correspondence. These are preserved in the Roughead Collection which was given to the Signet Library by the Roughead family in 1952.

Roughead and a group of fellow campaigners, who included Sir Arthur Conan Doyle, the Glasgow journalist William Park, and the Lord Advocate Craigie Aitchison, had worked to bring Slater's cause to public attention and then to court. But the appeal case generated legal costs and, despite donations from supporters (some of whom fully expected to be repaid in the event of a successful appeal), Slater was left with debts to pay. Conan Doyle thought that Slater should ask for £10,000 (about £1.5 million today) in compensation from the government for the time he had wrongly spent in prison. Slater, presumably eager to put a speedy end to a bleak chapter in his life, accepted £6,000 (about £902,000 today) from the Scottish Office in August 1928. He had not taken advice from his influential supporters and they saw the amount as too little since it did not include his legal costs. They were also horrified to learn that Slater would be required to pay income tax on the payment.

Slater meanwhile seemed diffident about repaying the money spent on his behalf. Conan Doyle, who hoped that the government would offer Slater more so that he could be reimbursed, wrote to *The Times* describing the lack of any forthcoming payment as "very unfair" in a letter to the editor of 17th September 1927. He went on to say that he was "quite ready to meet my own promises and guarantees – and the lawyers engaged have been most generous in their treatment – but it seems a shocking travesty of justice that, having worked so long to set this wrong right, I should now be asked to pay a considerable sum in addition".

> "FORTUNATELY THERE ARE *NOT MANY OSCAR SLATERS* IN THE WORLD".

The House of Commons debated the question of Slater's legal costs in November 1928. Inspired by this, Slater approached the House of Commons directly to request funds: "I should have thought that the

Government in common fairness ought not to expect me to bear the costs of this case", he wrote from Ayr on 5th December. He went on, "I might add that as a consequence of my conviction I lost personal property and incurred expenses - prior to the appeal - amounting to about £1,000". Slater argued that his payment only covered the cost of his compensation and pointedly reminded the officials of his "18 years 11 ½ months imprisonment". Furthermore, the "payment of £6,000 was suggested and accepted merely as a consequence of my wrongful conviction and subsequent imprisonment".

Slater claimed in the *Evening Dispatch* of 13th September 1929 that he had offered Conan Doyle money for his expenses after his appeal but had been turned down. He argued that Conan Doyle had in effect already been paid since "he made money out of me. He wrote eight articles about me for the Scottish newspapers, and was paid £400". Slater said he had pleased by Slater's behaviour and he was not "prepared to submit to such treatment, and I shall be reluctantly driven to assert my rights in a court of law unless this man has the common decency to pay for his own debts of his own free will and without compulsion".

**Oscar Slater**

The Scottish Office replied quickly and Slater had his answer in a letter of 13th December: "His Majesty's Government are not prepared to make any payment in addition to the ex gratia sum of £6,000 which was paid to you in August last". This was the government's final answer on costs.

Conan Doyle was appalled by what he saw as Slater's ungentlemanly unwillingness to repay those, especially himself, who had bankrolled his appeal. The two entered into a bitter public dispute. Conan Doyle eventually paid the outstanding legal bill of £330 with his own money in May 1929. He wrote to the *Empire News* on 2nd May stating that had Slater lost his appeal he would have "cheerfully taken this heavy expense upon myself, but as he has received £6,000 compensation it seems a monstrous thing that these charges should be met by me". Furthermore, he was not been vulnerable upon his release from prison and that "everything was done for me. My appeal was arranged by men who, I thought at the time, were my friends".

The *Daily Mail* interviewed both parties and published a report on 14th September 1929. An exasperated Conan Doyle responded to Slater's statements of the day before saying "One can only think he is mad - deranged perhaps by his experiences". As for making a profit from Slater's experiences, Conan Doyle was adamant: "Making money! For 18 years I worked for him. I wrote a book about him which sold for 6d. and never brought me a penny. I wrote one or two articles for the London Press, but I never wrote for the Scottish papers and certainly received no such renumeration as £400... Fortunately there are not many Oscar Slaters in the world".

Slater, meanwhile, was found enjoying the good life in Brighton. He reiterated his accusation that Conan Doyle had used him to make a profit financially and morally: "He raised a subscription for me and people said "How good he is". But I did not want a subscription. I had got £2,000 from the newspapers, and I offered to pay my own expenses. They would not hear of it then, when there was fame to be won, but now, when all the fame is gone, they ask me to pay".

Conan Doyle privately wrote to Roughead in an undated note to thank him for his support during these trying times: "Many thanks, my dear Roughead. Such things are more than money". But there was a plan afoot that could resolve the conflict. In the same note Conan Doyle continued: "Slater has a libel action which he will win against a Scotch paper. £500 will be paid to settle it. I have a lawyer who proposes to intercept this sum in court and deduct £280 which is due to me. Rather a good scheme".

The *Evening Dispatch* reported that Slater's libel award had been arrested at "the instance of Sir Arthur" and that "the action is now pending in the Court of Session" on 13th September. The action was eventually settled out of court when Slater paid Conan Doyle £250 towards his personal expenses.

Slater remained in touch with Roughead, even sending him a Christmas card in 1930, and Roughead continued to collect material about him for his Slater Case scrapbooks. He made the news again in 1936 when he married Miss Lina Wilhelmina Schad in Glasgow where he had settled. The couple later retired to Ayr where Slater died in 1948.

*We are very grateful to Lord Cullen of Whitekirk for kindly drawing our attention to this sequel to the Oscar Slater trial.*

# TRANSFER *of* property

At one time a transfer of property in Scotland involved symbolically handing over a clump of ground or a stone or similar object on the property itself. Written documents followed and title deeds were entered in a register. Today a transfer can be made online using the latest technology. What has not changed is that solicitors are at the centre of land dealings. PROFESSOR STEWART BRYMER WS urges solicitors to embrace change.

Looked at over the past 400 years, the pace of change in conveyancing could legitimately be described as being somewhat glacial. That pace has accelerated considerably in the past 20 years, however, with the changes to the formalisation of deeds; the abolition of the feudal system; the codification of the law of real burdens and the introduction of online registration of title (know as Automated Registration of Title to Land or ARTL). There has, quite literally, been an explosion of activity in the practice of conveyancing. This article will consider what effect these changes have had and will likely have in the years to come for both solicitors and clients. It is important, however, to consider these changes against the backdrop of the significant developments that there have been in the legal services market generally.

Change is a dynamic, powerful, and, to some, frightening medium. Of one thing we can be sure, however, is that change will happen. As Professor Stephen Mayson said recently: "There is much to be won – and lost – in this new world of legal services. The competitive inefficiencies and lack of strategic discipline that have characterised the legal services market will soon be behind us. It is time to reconstitute the modern law firm. As ever, fortune will favour the brave".

Over the years, solicitors engaged in residential property conveyancing ran profitable businesses based on the practice of conveyancing, estate agency and related services. Many of these solicitors were innovative and strived to improve the quality of their service to clients. These changes, by themselves, however, were not enough. Other forces were at work. These included the reform of outdated procedures and established systems, much of which was associated with the feudal system; increased consumer expectations and, most recently, a move towards conveyancing being a digital, online activity. The pace of that change is irreversible and as was stated in an article in the Journal of the Law Society of Scotland in 2008, the "perfect storm" is upon the legal profession with the problems associated with the banking industry being just one destructive wave in a storm that has been brewing for decades. The author of that article, Malcolm Mackay, went on to say that "… when the storm subsides, many of the inefficiencies that have been masked by a rising market will be laid bare". That prediction has come to pass.

As service providers, solicitors must be responsive to change, no more so than how they market their expertise and then process the work on behalf of clients. Many solicitors still seem to subscribe to the theory that the client will come to them. The reality, however, is that consumers will shop around before buying legal services. We all use search engines and price comparison sites when buying goods on the internet. While it can be argued that purchasing legal services on the basis of price alone is not necessarily the best answer for a prospective purchaser, we have to recognise the reality of the situation and seek to differentiate ourselves in some way from the competition – both legal and non-legal. Why then is it that some firms that were once prominent in residential conveyancing and estate agency have been overtaken by competitors? It is suggested that

the main reason is that the successful firms tend to have an increased focus on client care and service generally. Clients have long-complained about over-charging; value for money; lack of service and more. Many such complaints are unfounded but we cannot argue with the perception that exists. We have contributed to that perception by demonstrating an alarming degree of complacency and an over-reliance on time recording as a billing tool rather than as a means to manage our businesses more efficiently.

There can be no doubt that we will have to be much more consumer-focused in our service delivery. The reality is that consumers today want more for less.

So what does this mean for conveyancing?

Much, but not all, of what is done in conveyancing is capable of being commoditised. We have already seen matters such as re-mortgage work moving to specialist firms. Case management systems have greatly enhanced the ability of solicitors to provide their services more efficiently. These systems will only improve. Likewise, the move towards more consolidation in standard contractual terms has simplified the negotiation of the contractual stage (missives) which, in many cases, had become something akin to a war of attrition with the respective solicitors arguing over relatively minor points. During such often unnecessarily protracted periods, the most important point is often forgotten and that is that there is no deal for the sale of a property until the contract has been concluded. The collaborative regional initiatives within the solicitors' profession to standardise contract wording (known as the Combined Standard Clauses) have helped the process and more developments are required – hopefully in the form of a single set of clauses for use across Scotland, albeit with schedules containing clauses which are of particular importance in certain areas of the country. Why should this not be the case? If so, who will take the initiative? What have solicitors got to gain from resisting this development? Is it that they fear that they will somehow lose their grip on the conveyancing process? It can be argued that that grip is already considerably weakened as a result of competition. More such competition is on the way.

Automated Registration of Title as a concept is sound. Sadly, the reality is somewhat different and, although 57,470 transactions have taken place using the system, solicitor confidence in the process is very low. That lack of confidence is justified given the patchy roll-out and implementation that has taken place largely as a result of the recession. There are deeper, more fundamental issues that require to be resolved in order to get ARTL back on track however. The sooner this happens, the better. With the requisite investment, ARTL can still be the success that it promised to be.

The other significant change that will soon be upon us is the enactment of the Land Registration (Scotland) Bill and, in particular, the provisions (ss 92 - 94) which will allow missives to be completed electronically. The new legislation will amend the Requirements of Writing (Scotland) Act 1995 and, subject to necessary safeguards being put in place with regard to fraud, etc., digital signatures will soon become a reality. It is important at this point to state that an electronic missive is no more than a change of medium. It is not an erosion of the solicitor's role in the conveyancing process. Public key infrastructure (often referred to as PKI – essentially, a secure online platform) is necessary for digital signatures to function securely. Digital signatures will be used for more than just concluding missives and registering deeds under ARTL. We may also see the introduction of online storage of electronic deeds. The Law Society of Scotland is already planning to introduce an electronic Practising Certificate in October 2013. That is a very positive development and it is inevitable that the authentication process adopted by the Law Society will provide for a digital signature for all practising solicitors. Armed with these benefits, solicitors should be well placed to better promote their services.

There are inevitably some who are cautious about change and who look for reasons why proposed developments will not work. Such views reached their pinnacle around the turn of the millennium and will no doubt remain for as long as there is a fear of the unknown. Why should missives based on agreed standard clauses not be concluded electronically? What is there to fear other than change itself?

Although there are many competing pressures on conveyancers, it should also be noted that a recent survey commissioned by First Title Insurance plc and carried out by You Gov/Sixth Sense in England and Wales revealed that house buyers are overwhelmingly positive about the service they receive from their conveyancers. That should be used as a foundation for change. There is scope for optimism among quality conveyancers. The benefits of legislative reforms and other developments provide a level playing field for firms, be they large or small. There is considerable opportunity for solicitors who wish to provide a specialist, quality service at reasonable prices rather than average quality at low prices. Conveyancing can be seen as a blend of private client services which solicitors are best placed to provide – but only if we can sharpen our consumer focus and delivery. We all like to receive good service. Why not therefore strive to provide excellent service using IT and other innovations to differentiate ourselves from the competition? Some firms are already doing this and have transformed their market share as a result. The message is simple: embrace change and move forward with confidence.

"...THE INEFFICIENCIES THAT HAVE BEEN MASKED BY A RISING MARKET WILL BE LAID BARE".

*Stewart Brymer is an acknowledged expert on Scottish property law and Honorary Professor in law at the University of Dundee.*

# Modern construction *of* contracts

In this precis of his recent paper for a WS Society seminar on contract law, JAMES MURE QC of AxiomAdvocates discusses modern judical approaches.

***"When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean – neither more nor less".***

***"The question is," said Alice, "whether you can make words mean different things".***

***"The question is," said Humpty Dumpty, "which is to be master – that's all".***

Lewis Carroll's words, taken from a children's story published almost 150 years ago, appear readily applicable to the state of play in the current realm of contract law.

Those making contracts in the course of their business can benefit from an understanding of the common pitfalls in the drafting of commercial contracts and the processes used in their judicial interpretation. Such an approach could better equip the agreements they enter into against a later need for judicial construction of meaning. When interpreting a contract, the focus is traditionally on what is actually said by the parties, whether in writing or by oral agreement. This way of thinking was distilled by Lord President Dunedin back in 1905 as "Commercial contracts cannot be arranged by what people think in their inmost minds. Commercial contracts are made according to what people say". In this article, I hope to shine some light on the "modern" approach to construction of contracts by the courts in order to provide food for thought when contemplating how to go about wording agreements.

This is a period of dynamic change in the construction of contracts. Fixed doctrines are passing away as we grapple with issues posed by courts, academics, law reformers, businessmen, regulators and consumer groups. Early works on the construction of contracts, such as Bankton's *Institute*, offered what was, for the 1750's, a pretty full analysis in some ten pages. MacBryde's 1997 work covers the topic in 47 pages and, in contrast, the fifth edition of Lewison LJ's *The Interpretation of Contracts* (2011) gives us 862 pages of analysis! These texts are supplemented by countless academic articles following and commenting upon both judicial dicta and comparative law. February 2011 also saw publication of the Scottish Law Commission's *Discussion Paper on Interpretation of Contract* ahead of possible law reform.

An understanding of the law on construction of contract needs to be alive to the arena of concern, discussion and reform, as the various interests and voices seek to move the agenda onto their chosen ground. The methodology used by the courts in construing the meaning of what is "said" in a contract has evolved over the years and will continue to do so. Since the 1970s, decisions concerning interpretation of contracts have emphasised an objective, purposive approach and encouraged the inclusion of breadth of background knowledge. The set of circumstances relevant to the making of the contract is known as the "matrix of fact'' and comprises anything which a reasonable man would have regarded as relevant in the same situation the contracting parties found themselves in.

During the 1990s there was a further retreat from literal interpretation culminating in Lord Hoffman's oft-cited 5 principles cited in the case of *Investors Compensation Scheme Ltd v West Bromwich Building Society*. This contextual approach to interpretation of contract meaning instructs consideration of relevant background circumstances (being knowledge available to parties in that situation, exclusive of pre-contractual negotiations), along with giving meaning to the words used within their correct business context and the alignment of what the contract seeks to achieve with business common sense.

Despite his Lordship's observation that in taking such an approach, "almost all the old intellectual baggage of "legal" interpretation has been discarded", he stated in a later case that the only controversial points of his decision were in hearing background information without it being required to clear up a particular ambiguity in the contract terms, and in giving effect to a meaning outwith the conventional usage of the words used, in order that they were construed so as to fit with business common sense.

Questions abound as to what evidence a court may admit when reaching a view on the meaning of words: How far should the court consider external evidence? What is commercial or business common sense? Should pre- or post-contractual actions be referred to?

The common intention of the parties must be determined objectively; the courts do not seek to read minds, but rather to infer a presumed intention - which may or may not be the actual intention of the parties. This traditional approach remains key in Scots and English law in sharp distinction to the Continent.

Debate continues over whether courts should have regard to pre-contract negotiations. The starting point for construction is to ask what a

reasonable person in the position of the parties would see as the meaning the words were intended to convey. This is an objective approach, which is intended to give effect to the "reasonable expectations of honest people". It is imperative to understand, however, that such a construction does not necessarily result in finding actual intention nor understanding of the parties. The court informs itself with the knowledge available to the parties at the time of the contract and asks what a reasonable person, thus informed, would have understood by the wording used. However, a key element of this background information, prior communing between the parties, is excluded at law. The courts have tended to regard such evidence as unhelpful due to its subjective nature.

There is further issue over the role of the factual matrix when contracts affect multiple parties over long periods of time. Where a contract secures the interests of various creditors using different instruments issued at different times and in different circumstances, each individual set of contractual circumstances will be unique. Where this is the case, the wording of the instrument itself is paramount. Lord Collins elucidates: "[the deed should be] interpreted as a whole in the light of the commercial intention which may be inferred from the face of the instrument and from the nature of the debtors business. Detailed semantic analysis must give way to business commonsense".

Judges wrestle with finding meaning to fit with a contract's commercial rationale. Again, the court's primary consideration is to seek the objective intention of the language used. The final language and meaning arising will be a compromise between two disparate commercial interests. Current thinking was summarised by Lord Clarke in the 2011 case of *Rainy Sky SA v Kookmin Bank* holding that "the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other". It is not necessary that one construction should flout common sense, indeed, the resolution of an issue of interpretation involves checking each of the rival meanings against other provisions of the document and investigating its commercial consequences. This begs the question how best to plead and prove the nature of the manner of business to enable your argument to win at the end of the day. Those that are "actually involved in commercial contracts" may thus be better placed than the courts to discern commercial good sense.

There has been a series of recent authoritative Scottish cases reflecting this dynamic flux. The 2009 matter of *Forbo-Nairn Ltd* v *Murrayfield Properties Limited* required the construction of a contractual obligation to grant title in certain terms. The court said that when searching for the meaning of contractual terms it was "difficult to find a better starting place" than the terms' natural or ordinary meaning. There was no suggestion that the old canons of construction be superseded or may require reassessment. The decision emphasised the importance of treating the clause as a text; a salutary reminder that text as the primary source remains key in UK law. The recent modern approach, with its push towards a greater appreciation of background and willingness to approach textual meaning rather than merely its words, must not detract from the centrality of the text.

In the interesting 2010 case of *Luminar Lava Ignite Limited v Mama Group plc* the courts required to construe a non-competition agreement preventing night clubs putting on "late night entertainment in direct competition on a like for like basis". The issue was whether the agreement prohibited the defenders from operating any discotheque or just one offering similar types and styles of entertainment. Evidence of prior communings, including discussions as to the type and style of entertainment to be offered, were deemed inadmissible in a finding for the defenders, allowing them to continue to host late night entertainment providing it attracted different clientele than the pursuer.

On appeal, Lord Hodge overturned that decision and prohibited any form of disco in the defender's venue. He stated that the Lord Ordinary had erred in excluding the prior communing, noting: "Evidence of the factual background to the contract is relevant where the facts are known to both parties and those facts can cast light on either (i) the commercial purpose or purposes of the transaction objectively considered or (ii) the meaning of the words which the parties used in their contract... Facts which are known only to one party are not admissible as part of the surrounding circumstances. […] Knowledge which was reasonably available only to one party would not form part of the factual matrix which could assist the court in the construction of the contract".

Implication of terms into a contract is an exercise in the construction of the instrument as a whole. In the case of *Attorney General of Belize v Belize Telecom* Lord Hoffmann warned against the dangers of treating the various tests for implication as if they had a life of their own, noting "the implication of the term is not an addition to the instrument: it only spells out what the instrument means". The point is discussed further by Judge Vos, concluding that "it is permissible to assume that the reasonable observer had knowledge that the parties did not in fact have, certainly if that knowledge is as to established and well-known legal principles... it seems to me that the same will apply to the knowledge of the reasonable observer when one considers the construction of a contract as much as when one considers the implication of a term".

It is evident that the courts are seeking out a meaning which best fits the commercial purpose, and the whole scheme of the transaction and deed. We seem to have welcomed onto the stage at once the interpretation of the reasonable observer, the reasonable address and the reasonable (and indeed honest) person. Will they turn out to be one and the same? The Scottish Law Commission, in considering whether to leave further development to the common law, recently decided that "a new statutory scheme of interpretation is the best way of maximising both certainty and fairness".

This survey illustrates how the courts may differ in their conclusions in construing meaning to a contract. Contract law has long been the subject of active and vigorous debate. Court decisions and academic writing provide constant reminders of the pitfalls surrounding contracts which are not open, transparent and competently worded. It remains the case that a deceptively simple point of construction can end up resolved in favour of different parties at each level of the court hierarchy, and often for different reasons. The advice to be taken is thus to be as open, transparent and clear as possible.

*James Mure was called to the Bar in 1995 and took Silk in 2009.*

# Signet Accreditation


David Halliday and Lynn McMahon outside Halliday Campbell's offices in Edinburgh.

Signet Accreditation provides a means for lawyers to differentiate themselves with an independent credential of effectiveness in their area of practice. The lawyers of Halliday Campbell WS resolved to put themselves to the test. Partner DAVID HALLIDAY explains why and what it was like to achieve accredited status.

For any of the thousands of solicitors practising in Scotland today, new clients or new instructions are likely to have been hard-won. Halliday Campbell is a dedicated commercial litigation practice, offering services to both businesses and other solicitors who do not have our litigation specialism. We are experienced practitioners, offer keen rates and do not compete in other practice areas, all of which helps. However, as the aphorism has it, "No one ever got fired for buying IBM". How could we prove to potential clients that our service and skills at least match those of the bigger firms and what, in the awful jargon, would be our "USP"?

For us, the very clear answer was provided by the WS Society's Signet Accreditation programme. Drawing on research of experiences in other jurisdictions (particularly Australia), the programme's innovative methodology combines open-book examination, home assignment and interviews with clients played by actors to provide a thorough assessment of a solicitor's technical ability, client-focused skills, practice management,

contextual understanding and ethical awareness. Accreditation is offered across a range of practice areas: commercial property, corporate, in-house, employment and, ideally for us, commercial litigation. Committees for each practice area decide upon the scope and method of assessment. As the scheme's promotional literature says, accreditation allows lawyers to differentiate themselves from their peers and provides potential clients with independent evidence of their key skills and commitment.

I expected to have to work hard for the prize of accreditation and was not disappointed. It is expected that candidates will feel ready to apply three to six years after qualifying but frankly I think that any solicitor of any experience would find the programme very challenging indeed. It is not like an exam. It deliberately aims to be something for which you cannot swot or cram. Candidates have to decide themselves whether they think they have the right level of experience and expertise to put themselves forward. They then have to meet an overall pass rate of 70%. My colleague, Lynn McMahon, also decided to submit herself as a candidate. For a firm of our size, that was quite a commitment. Over a fortnight or so, we both juggled the usual client and business tasks with a pretty testing schedule of assessment. The temptation to talk about the questions and issues raised in the papers was almost overwhelming but was one we both managed to resist until the whole process was over. There were a few moments of light relief along the way. One imaginary scenario presented to us was that of a commercial dispute and we were video recorded meeting the "client" who was played convincingly by an actor. We both found that we quickly forgot that we were in an artificial scenario, closely questioning the "client" on technical matters.

However, the occasional artificiality notwithstanding, we both felt that the various stages of assessment had been well thought out and replicated as nearly as could be the reality of what faces us in everyday practice. I think we both learned something new and gained valuable insights simply from participating in the process. It was made very clear in the papers given to us before we started that the successful candidates would be those who listened to what the client wanted and engaged him in the process rather than treating him only as the passive recipient of advice. The sense of that is, I am sure, something of which we could all be usefully reminded from time to time. The incentive for critical analysis of our styles and practices, brought by the fact that our pleadings were going to be reviewed by peers, was also no doubt beneficial.

The relief when the fortnight was over was matched by a real feeling of achievement and satisfaction when we were told that we had both met the standard required for accreditation. And there indeed is our much sought-after USP: all our fee earners are Signet Accredited commercial litigators. Successful candidates can style themselves as Signet Accredited and use the programme's logo on stationery and the like and we are actively encouraged to go out and evangelise about the benefits of the scheme to clients and colleagues alike. Of course, other Scottish solicitors for whom we provide litigation services understand the extent of the achievement. More unexpectedly, the value and wide recognition of the WS Society's brand, both in Scotland and abroad, has made our accreditation a hugely useful marketing tool in general. All sorts of clients and potential clients have remarked on our accreditation, have clearly been impressed by it and interested to learn more about what it all involved. I do not doubt for a minute that the time and effort we invested will pay very real dividends in the firm's performance in winning new work.

We would stress, though, that anyone and everyone will have their own reasons to consider seeking accreditation. The stated aims of the programme are to provide an incentive and opportunity for solicitors and law firms to become better at what they do, to promote an improvement in service delivery to clients and to assist consumers in recognising solicitors and law firms with specialist advisory skills. It is all hard work and cannot be undertaken lightly but there is not a lawyer and not a firm in the country that would not applaud those aims.

We cannot rest on our laurels, though. Accreditation lasts for three years and we can be required to go through further assessment if it is felt that changes in the practice area make that appropriate. In the meantime, we have to complete 30 hours relevant CPD each year. The commitment is, then, ongoing and testing. But that, of course, is the whole point.

I DO NOT DOUBT FOR A MINUTE THAT THE TIME AND EFFORT WE INVESTED WILL PAY VERY REAL DIVIDENDS IN THE FIRM'S PERFORMANCE IN WINNING NEW WORK.

# MACVEY NAPIER (1776 - 1847)

# Writer to the Signet, PROFESSOR, *Editor*, Librarian

The WS Society received its first book in 1697 when George Dallas of Saint Martins presented a copy of his recently published *System of Styles* but it was not until 1722 that the Society's library was established to collect texts for the benefit of its members. Curators looked after the growing collection and catalogued it throughout the eighteenth century until the first librarian, John Cameron, was appointed in 1793. Cameron arranged the library's books and started a new catalogue before mysteriously disappearing from the records after collecting his salary in 1801.

Despite Cameron's efforts, the library was in a poor state by 1804 when George Sandy WS spent a year arranging the nearly 5,000 books and writing "Ex Libris Bibliothecae Scribarum Signeto Regio" on the title page of each one. Sandy then produced a new catalogue. Although he only spent fifteen months working on the library, Sandy left a legacy of professionalism. He was appointed as Principal Librarian but was unable to continue in the role because the pay was too low and he had to resign. Sandy remained a Curator of the library for life. His resignation ushered in an era of long-serving Librarians to the Writers to the Signet who were active in the intellectual worlds of the 19th and 20th centuries.

The first of these was Macvey Napier (1776-1847) who was admitted as a WS in 1799 and became Librarian to the WS Society in 1805. He held this post until 1837 when he resigned it to become a Clerk of Session. Napier's tenure saw the library's collection increase from the 5,000 volumes that Sandy had so carefully inscribed to about 40,000. He was also in post when the library moved to its new Signet Library building and in 1815 he was awarded 500 guineas by the Society for his "superintending and advising during the whole progress of the work, the fitting up of the hall and library, and in removing and making a new arrangement of the books".

Despite his undoubted and enduring contributions to the Signet Library, Napier is now better known for his literary activities. He contributed to the *Edinburgh Review* from 1805 and became its editor in 1829. Napier's editorial policies were sometimes resented by his authors, notably Thomas Carlyle whose long articles he regularly cut. Napier served as the editor of the *Edinburgh Review* for eighteen years and worked with many of the leading authors of the day including Thomas Macaulay, Charles Dickens, William Thackeray, John Stuart Mill, and Henry Cockburn.

In 1813 the publisher Archibald Constable selected Napier as the reviser of a new edition of the *Encyclopaedia Britannica*. Napier recruited authors like Dugald Stewart, William Henry Playfair, Walter Scott, and Francis Jeffrey to write articles and the Supplement to the sixth edition of the Encyclopaedia appeared in twelve half volumes between 1815 and 1824. Napier then went on to edit the seventh edition of the work which appeared in full in 1842. Napier's contributions to science and literature were recognised by Royal Societies of London and Edinburgh: he was elected to both.

Napier was also a teacher. He supported Robert Bell's conveyancing lectures by ensuring that they were held in an appropriate venue and he was elected as the conveyancing lecturer after Bell's death in 1816. Napier was appointed as the first professor of conveyancing at the University of Edinburgh in 1825. He held the chair until his death and, despite his other numerous commitments, never neglected his academic duties.

Napier was a prolific buyer of books for the library. He was especially keen to acquire works by the mathematician John Napier of Merchiston (1550-1617) from whom he claimed descent. The Napier Collection now in the Malcolm Room is the result. Many of the books are first editions from the logarithmist's lifetime. Napier also collected for his own library and he had thousands of books of his own. Some of these came to the society after his death when they were purchased by his successor as librarian, David Laing.

Napier was one of the librarians commemorated when the Signet Library named its rooms in 1989.

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