

# THE STAIR SOCIETY – THE EARLY YEARS

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## Introduction

When Shepherd & Wedderburn handed on the administration of the Society's affairs to Chiene & Tait in 2004, the records, which had lain largely undisturbed for many years, were withdrawn from storage and placed into the custody of the National Library of Scotland along with the Literary Directors' files covering the period since the 1970s. The administrative records provide a comprehensive view of the formation and history of the Society. Tom Drysdale, the Society's Secretary & Treasurer, dipped into them and there follows a selection of what he found.

## The Proposals

Like the New Town of Edinburgh, the Stair Society started with Proposals. These were published on 1 June 1934 and appear to have been widely circulated within the legal profession in Scotland, as well as in England and what were then known as the Dominions (Canada, South Africa, Australia and New Zealand). The Proposals set out a convincing case for the formation of a Scottish legal history society. The identity of their author or authors is not known, but they are likely to have been written by some of the leading legal figures of the time, whose identity will become clear as the story of the Society unfolds.

The Proposals narrated the lack of historical research into the law of Scotland as compared with the position in England and suggested that:-

it would be difficult to imagine a more attractive field of study than that which the history of the law of Scotland offers. Not only is the legal system of Scotland perhaps its most distinctive national heritage, but it is also of unique interest among the legal systems of the world in that it affords the only instance of the combination in theory and practice of the Civil Law and the Common Law, the two great rivals for supremacy in the legal world. On the one hand it has drawn its inspiration largely from the law of Rome, yet unlike the continental nations under the Civil Law it has no code; on the other hand, while it shares the respect for precedents distinctive of the Common Law, it has also been systematised in the works of authoritative institutional writers. As a practical compromise between code law and case law it is a characteristic product of the Scottish genius.

The Proposals went on to quote from a paper read by Professor Levy-Ulmann, of the Chair of Comparative Civil Law in the Faculty of Law, Paris, before the General Assembly of the Society of Comparative Legislation in Paris in February 1924<sup>1</sup>, who

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<sup>1</sup> Translated and published in *The Juridical Review*, vol xxxvii, p 370

stated that “Scots law as it stands gives us a picture of what will be some day (perhaps at the end of [the twentieth] century) the law of the civilised nations, namely a combination between the Anglo-Saxon system and the continental system”.

These assessments disregard the importance of the other mixed jurisdictions, identified by later scholars such as Professor Sir T B Smith, and overstate the part which Scots law would play internationally in later years, but they encapsulate the optimism which existed at the time, on the strength of which the Stair Society was founded and flourished.

The Proposals went on to assign four reasons to the neglect of legal research in Scotland:-

1. the absence of encouragement from the Universities and other bodies concerned with legal education in Scotland;
2. the fact that little or no inducement to such study had been held out in the shape of scholarships or other awards;
3. the consequent want of students trained and qualified for the work; and
4. the inaccessibility of the material.

The authors of the Proposals were confident that if interest could be awakened in the study of the history of Scots law, the first three of these deficiencies could be met, and they identified the remedying of the fourth deficiency as their target. They drew inspiration from the work of the Selden Society in England, founded forty seven years previously, which by 1934 had published some fifty volumes of historical material. They referred to a wealth of material existing in Register House, the Sheriff Courts, the Library of the Faculty of Advocates and “other great libraries, professional and general, in private muniment rooms and elsewhere” and they identified the need for a systematic survey of the existing material. The Proposals continued<sup>2</sup>:-

If a history of the law of Scotland is ultimately to be produced, what is required in the first place is a complete survey of the existing material, printed and unprinted, and the selection, editing and publication of what is found to be most valuable and significant. The task will employ many hands and much time, but until it is accomplished and the material is thus made available, the history of the law of Scotland cannot be written. The legal profession in Scotland has a tradition of scholarship. There may not be many who themselves have time, inclination or aptitude for legal research, but there must be few who are not interested in its results.

It will be shown that as the work of the infant Society developed, a few outstanding scholars emerged, who despite in several instances being leaders in the legal profession and holders of high public office nevertheless found that time and had that inclination and aptitude.

The proposals thus were that a Society should be formed to undertake in Scotland the same work which had been carried on, and was still being carried on, by the Selden

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<sup>2</sup> Proposals, pp 4 and 5

Society in England and that it might be called The Stair Society, “in honour of the greatest name in the history of Scots law”; that it should issue volumes from time to time to its members and that it should charge an annual subscription of one or two guineas (£1.05 or £2.10)<sup>3</sup>. Potential targets for early publication were identified as Hope’s *Major Practicks* and selected annotated cases from the *Acta Dominorum* and it was suggested that the “fundamental treatises on Scots law such as *Regiam Majestatem*, *Quoniam Attachiamenta* and the *Leges Burgorum*, which were in almost daily use in the Scottish courts two or three centuries ago, would provide attractive material for a skilled editor”.<sup>4</sup> It was soon to become evident that these texts, and several others, would command the early attention of the Society.

The Proposals concluded by stating that a “small provisional committee” had been formed to make known the project and to ascertain the likely interest in it, with a view to holding an inaugural meeting. The “small committee” in fact consisted of thirty three of the leading figures in the profession, including all three of the Scottish Lords of Appeal (Dunedin, Thankerton and Macmillan), the Lord President (the first Lord Clyde), two other Senators, the Dean of Faculty, Professors of Law at the Universities of Aberdeen, Edinburgh and Glasgow, several leading members of the Bar and leaders of the solicitor branch of the profession across Scotland. This “small committee” did its work well: the “likely interest” was overwhelming, as soon became apparent.

### **The Launch**

The Society’s records do not disclose how the Proposals were circulated but it is apparent that they enjoyed wide publicity. In an address to the Jubilee meeting of the SSC Society in October 1934, Lord Macmillan referred to the proposal to form the Society, the main task of which would be the editing and publishing of “judicious selections” from the early legal material available in the Register House and elsewhere.<sup>5</sup> “I hope”, he said pointedly, “that the Stair Society will soon be sufficiently influential to bring pressure to bear in those quarters where so niggardly a spirit has hitherto been shown towards our national records.”

Lord Macmillan later thus recorded the response to the Proposals in his memoirs<sup>6</sup>:-

The response was remarkable and at the inaugural meeting held in the Signet Library<sup>7</sup> over which I presided I was able to announce that nearly 600 replies had been received from individuals and institutions, including the Prime Minister [Ramsay Macdonald]. Not only the profession in Scotland, but legal scholars in England, in the Dominions, the United States and several foreign countries were

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<sup>3</sup> Proposals, p 5

<sup>4</sup> Proposals, p 6

<sup>5</sup> Referred to in *Law and Other Things* by Lord Macmillan, published by Cambridge University Press, 1937

<sup>6</sup> *A Man of Law’s Tale*, published by Macmillan & Co Limited, London, 1952, p 214

<sup>7</sup> His memory was deficient here; it was in fact held in the SSC Library

represented in the first membership enrolment. The press were most encouraging and The Times in a leader applauded the enterprise.

The Times article (not in fact a leader) was published on the same day as the Proposals and quoted extensively from them.

The notice calling the inaugural meeting for 17 November 1934 listed 561 individuals (including the Prime Minister) who had intimated their willingness to become members of the Society. The vast majority of these were members of the Scottish judiciary, the Bar and the solicitor branch of the profession in Scotland and the number represented a significant proportion of what was then a much smaller profession than it is today – less than 150 practising advocates and about 3000 enrolled solicitors.

The notice also listed 38 institutions, societies and other entities, who were willing to join. These included all the principal libraries in Scotland holding legal collections and several in England, as well as libraries, law schools and universities in Northern Ireland, Switzerland, Canada, Australia and the United States. Finally the notice contained a footnote that favourable responses had been received in ten instances, their identities not disclosed but possibly all of them canny Scots, conditionally on the subscription not exceeding one guinea.

The atmosphere in the SSC Library at 11 o'clock on the morning of the inaugural meeting must have been electric. In those days Saturday morning would have been normal working time in the Courts, at the Bar and in solicitors' offices, so there would have been a feeling of an outing from work. The minutes of the inaugural meeting record that the hall was completely filled. Those present included the Lord President, Lord Clyde, the Lord Advocate, W G (later Lord) Normand, the Lord Justice-Clerk, Lord Aitchison, Lords Murray and Mackay, the Dean of Faculty, Sir William Chree KC, the Deputy Keeper of the Signet, Sir William Johnston, the President of the SSC Society, W M Whitelaw, and many members of the Bar, the WS Society, and the SSC Society, as well as numerous representatives of legal societies throughout Scotland. This was of course several years before the founding of the Law Society of Scotland, which did not come into existence until 1949. The minutes continue:-

Apologies for absence were intimated from M. des Longrais, Directeur a l'Ecole des Hautes Etudes, Paris, Dean Roscoe Pound of Harvard University and Mr R W Hale of New York, who cabled their greetings and good wishes for success, and Lord Alness, Lord Salvesen and Lord Fleming.

The infant Society was not short of influential friends. Lord Macmillan took the chair.

Office-Bearers were elected - Lord Macmillan as President<sup>8</sup>, Lord Clyde as Vice-President, Dr David Baird Smith as Chairman<sup>9</sup> and W G Normand KC as Vice-

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<sup>8</sup> Lord Macmillan was born in 1873. A son of the manse, he was called to the Bar in 1897. He was appointed (non political) Lord Advocate in the Labour government of 1924, working at the English Bar after the government fell. He was a Lord of Appeal from 1930 to 1947, except from 1939 to 1941, when he

Chairman.. Members of Council included Professor R K Hannay, Historiographer Royal for Scotland and Professor of Ancient History and Paleography at Edinburgh University,, William Angus, Curator, Historical Department, General Register House, Professor (later Sir) Ernest Wedderburn, soon to be appointed Deputy Keeper of the Signet and at that time Professor of Conveyancing at Edinburgh University, Andrew Dewar Gibb, who had just succeeded William Gloag as Professor of Law at Glasgow University, and David Robertson, Town Clerk of Edinburgh. Hector M'Kechnie, Advocate, later Sheriff, was elected Literary Editor, Dr C A Malcolm, then Librarian of the SSC Library and later to become a distinguished Librarian of the Signet Library, was appointed Secretary<sup>10</sup> and Hugh (later Sir Hugh) Watson, also a future DKS, Treasurer. The annual subscription was fixed at one guinea, rather than the two guineas which had previously been proposed, with a view to encouraging younger members of the profession to join.

At the inaugural meeting Lord Clyde gave the first of several eloquent speeches which were to be recorded in the annual minutes and which were to mark him out, along with a few others, as a dominant influence in the development of the Society. He expressed the opinion that much material bearing on the history and development of Scots law in early years might be found in the Vatican and in some of the colleges on the Continent. With regard to native sources, these were perhaps not very extensive but they had not yet been explored and that was the first and most useful thing the Society could undertake. It must never be forgotten, he said, that the broad stream of the Law of Scotland was the product of three tributaries – first and most of all the law of Rome, second the law of the Feu and third the Law of the Canon; and that the vehicle that introduced them into Scotland, and the authoritative learning that moulded them into one homogenous system, was the Church. He felt that it was in the ecclesiastical history of the law that most information would be found.

The Times duly reported the inaugural meeting on the following Monday (19 November) under the headline “Edinburgh, Nov 18. The Stair Society: Remarkable Response to Proposal”. “The inaugural meeting of the Stair Society”, it recorded,

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served as Minister of Information in the wartime government. He remained President of the Society until his death in 1952.

<sup>9</sup> Baird Smith was a Glasgow solicitor. He was Dean of the Royal Faculty of Procurators from 1934 until 1937 and remained as Chairman of Council until the end of 1948, when he retired due to ill health. He died in 1951

<sup>10</sup> Dr Malcolm was a remarkable man. Born in 1875, he became apprentice librarian at the SSC Library in 1892 and was appointed Librarian in 1900, when his master, John Minto, moved to the Signet. He studied part time at Edinburgh University, graduating MA in 1914, and PhD in 1922, his thesis being the origins and development of the office of sheriff. After 43 years at the SSC Library, in 1935 he was appointed librarian of the Signet at the age of 60 and he remained in post there for 26 years, retiring a few months before his death. In his obituary in the Herald, published on 13 April 1961, Professor Sir TB Smith wrote “Such was his generosity of spirit and range of knowledge that probably no-one has researched into the history or law of Scotland during the present century without help from Dr Malcolm of the Signet Library, as he was widely known. This debt is recognised by authors of prefaces of hundreds of books published in many lands”. Dr Malcolm was Secretary of the Stair Society until January 1961 and he was made an honorary life member of the Society at the AGM in March that year.. Sadly he did not enjoy that distinction for long, since he died the following month.

which has been formed to study and advance the knowledge of the history of Scots law, was held in Edinburgh yesterday, when Lord Macmillan presided over a large gathering of lawyers. Lord Macmillan said that they must all be gratified with the remarkable response made to the proposals issued last June for the formation of a Scottish legal history society. Doubts had been expressed in some quarters as to whether there really was sufficient enthusiasm to justify the creation of yet another society, but the project had been fully justified, their membership at this early stage being greater than that of the Selden Society, which had existed in England over a long period of years for a similar object.

The first Council meeting was held immediately after the inaugural meeting of the Society. The Literary Director's remuneration was fixed at £250 *per annum*. Dr Malcolm was not so fortunate, his being fixed at twenty five guineas (£26.25), although this was not agreed until the following year.. The Literary Director's remuneration was reduced to £105 in 1937 because by then it was found that "his labours had become lighter"<sup>11</sup>.

The total number of members of the Society at the end of its first year is stated in the first annual report as being 682, including 630 individuals and 52 institutions. An analysis of the individual members shows that by far the largest number of these were solicitors (359), with senior and junior advocates forming the second largest group (91). There were 33 academics. More detailed membership statistics, including the figures up to 1947, are shown in Appendix 1.

### **The First Volume**

At the first Council meeting Mr M'Kechnie was asked to review the historical materials available in the Advocates' Library, the National Library and elsewhere for the purpose of compiling the source book which was to form the Society's first publication and to secure the necessary collaboration of members. He appears to have proceeded rapidly with his remit, because by the next Council meeting, five weeks later, he was able to submit a "list of works" and it was decided to proceed to publication of the source book by the end of 1935. At the Council meeting on 8 May that year the Council approved an estimate of £277.50 from Robert MacLehose & Co Limited for the printing of 750 copies of the volume, which was to run to 500 pages, each of 48 lines and approximately 480 words, all in accordance with a specimen which was laid before the meeting. The total costs of publication came to £405. These and the publication costs of the remainder of the Society's publications up to Volume 12 are shown in Appendix 2.

The volume, entitled "The Sources and Literature of Scots Law", is an impressive work. It consists of no less than thirty eight essays, divided into four sections comprising native sources, non-native sources, indirect sources and special subjects. Some twenty eight authors contributed (five of them with two essays each) and, as with so many aspects of the Society in its early years, they included many of the leading lawyers of the time,

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<sup>11</sup> Council minutes, 20 November 1937

including judges and members of the Bar as well as academics and practising solicitors. As Lord Macmillan stated in the Introduction:-

Perhaps the chief attraction of this first review of the of the origins of Scots Law lies in its suggestiveness.....Again and again, as the pages are turned over, vistas of wide fields of study are revealed which for the scholar have all the allurements of fresh discovery.

Thus along with all the sources which might be expected, one finds in an essay on the Law Merchant by Lord Murray reference to the Scottish staple at Veere in the Netherlands as being “presumably the only instance of a foreign state permitting the administration of Scots Law within its territory” (Camp Zeist?) and in an essay on the influence of the Law of Moses on Scots Law Dr John Gardner, a solicitor in Stonehaven, traces the origins of the Scots law of sanctuary.

There was only one fly in the editorial ointment. The minutes of of the Council meeting held on 5 July 1935 record that Mr M’Kechnie had had to return one article to the author “in respect that it was not on the lines required. The writer of the article had been asked to rewrite it, but had declined to do so”. Dr Baird Smith came to the rescue and undertook to rewrite it. The minutes do not disclose the identity of the errant author nor the subject, but it must have been either the article on Roman Law or the one on Canon Law, both of which bear Dr Baird Smith’s name.

The minutes of the Society’s first AGM, held in the Signet Library on 30 November 1935, record the enthusiasm with which the first volume was met by the members, Lord Macmillan as president noting the “indefatigable zeal” applied to it by Mr M’Kechnie as well as the “directing genius” of Dr Baird Smith. Lord Clyde captured the mood of the Society in characteristic style. He is recorded as saying:-

“.....that there was always a moment of doubt and hesitation when a ship was about to be allowed to slide down the slips lest some mishap might befall. That moment of anxiety, so far as the Stair Society was concerned, was over and past. The ship was well launched and [the members present] had heard a description of some of the voyages she was expected to make in the coming years.”

In an editorial note to the first volume, Mr M’Kechnie explained that there was no index, since the table of contents was considered to be sufficiently comprehensive to make this unnecessary. The welcome accorded to the volume was however, in the words of Lord Macmillan “in many quarters accompanied with a friendly remonstrance at the absence of an Index”<sup>12</sup>. This was made good early in 1939 by the publication, between volumes 4 and 5, of an index running to some sixty pages, prepared by Dr J C Brown who was General Editor of the *Scots Law Times* and himself a contributor to the first volume. The Council agreed to pay Brown a fee of £40 for the index, but at his request they later agreed to increase it to £50, as he had underestimated the amount of work involved<sup>13</sup>.

<sup>12</sup> Note to the Index, dated 25 February 1939

<sup>13</sup> Council minutes, 14 May 1938

## The Society's Crest

Although it is not mentioned in the minutes, it is apparent that the question of the Society's crest was an early item of business and one which was quickly resolved. There exists with the Society's records an official extract of a letter of consent dated 28 January 1935 and registered in the Court of the Lord Lyon on 1 March 1935, in which the incumbent Earl "as present representative of, and possessor of the armorial bearings of, the 1<sup>st</sup> Viscount of Stair" had "pleasure in consenting to the use of the Viscounts (sic) arms as an historical illustration, upon books and notepaper, same being duly marked as those of the Viscount.....".

At the Council meeting on 14 May 1938 it was agreed to invite the Earl of Stair to become an honorary member of the Society. The invitation must have been made and accepted because the Earl is listed as an honorary member from 1939 onwards.

## Baron Hume's Lectures

The plans for the publication of Baron Hume's lectures, a project which took twenty two years to complete, are much more fully documented and an interesting story lies behind the initiation of the project. The Council minutes of 30 September 1935 record that:-

It was.....arranged that the MS. of Baron Hume's *Lectures on Scots Law* should be transcribed at a cost of £7. 14. 6d and placed in the hands of Mr G Campbell H Paton, Writer, Glasgow, to be edited.

Hume was the nephew of the famous philosopher and shared his name. Having been called to the Bar in 1779, he held the chair of Scots Law at Edinburgh University from 1786 until he was appointed a Baron of Exchequer in 1822. He forbade publication of his lectures during his lifetime, and in his will, but copies were in circulation during the time he held the chair and were cited in court, many of his pupils reaching the bench. It is recorded in the minutes of the Society's second AGM, on 28 November 1936 that:-

Mr Campbell Paton was preparing for publication Hume's Lectures on Scots Law. Baron Hume, he recalled, had left these lectures in [manuscript], and by his will had forbidden their publication, probably because the [manuscript] did not have the advantage of his final revision, without which his "Law" might, in some respects, be open to criticism.

By this time Lord Macmillan as President of the Society had concluded correspondence with Hume's descendents, in which they readily agreed to the publication of the lectures and M'Kechnie had sought, and obtained, the approval of the Lord Advocate, who had confirmed that the public interest would not be prejudiced if the lectures were published. The Lord Advocate was T M Cooper QC, a member of the Society's Council and later to

become its Chairman. The correspondence relating to these consents is held in the Society's archives.

With these consents in place, Campbell Paton proceeded to edit the lectures, but it must have seemed like a labour of Hercules. The first volume was published in 1939 but the second did not see the light of day until ten years later, Campbell Paton having meantime been in active naval service during the war. The remaining four volumes in the series were published in 1952, 1955, 1957 and 1958. The last volume includes a biography of Hume by Campbell Paton which runs to some eighty five pages and is itself a work of considerable scholarship. The volume also contains a list of some of the students who studied under Hume, including a Lord Chancellor (Brougham), three Lord Presidents (Boyle, Colonsay and Hope – though the last of these is only accorded the dignity of Lord Justice-Clerk in the list), twenty four senators, Thomas Carlyle, Sir Walter Scott, numerous professors of law and history and, incongruously, a professor of chemistry at St Andrews University.

At the Society's fifth AGM, on 25 November 1939, Lord Clyde paid tribute to Campbell Paton's work, observing that while Hume's lectures were comparatively modern, they were of importance in showing the development of the common law since the days of Stair and Erskine. He considered that the lectures ought to be of very considerable value to the student of the history of the law of Scotland. It is apparent, however, that by the spring of 1940 members of Council had applied themselves to studying Campbell Paton's work. The minutes of the Council meeting on 21 May that year record:-

With reference to Hume's *Lectures on Scots Law* a question had been raised as to the desirability of continuing the annotations to the text as fully as had been done in vol 1. It was agreed that the editor had admirably performed that work but doubts were expressed that certain subjects in future parts of the work might entail unduly long annotations. Dr Baird Smith was requested to advise the editor to compress as far as convenient such annotations in the volume he had in hand.

Baird Smith clearly succeeded in the diplomatic mission with which he was thus entrusted. While the footnotes in the first volume often take up as much as half the page, those in subsequent volumes are dramatically shorter. It would be wrong, however, to belittle Campbell Paton's achievement in editing the lectures: his work remains by far the largest single project which the Society has undertaken.

### **Lord Clyde's Contribution**

The first Lord Clyde's immense contribution to the Society in its early years is highlighted in the Society's records. While still Lord President (and before the Society was founded) he had found time to translate and publish in two volumes Sir Thomas Craig's *Jus Feudale*. He was elected Vice-President of the Society at its inaugural meeting, the year before he retired from the Bench, and the Society was fortunate to have the support and enthusiasm of a scholar of such immense intellectual capacity and output

at this stage of its development. At the AGM on 28 November 1936 it was reported that he was editing Sir Thomas Hope's *Major Practicks*, the first volume of which was issued the following year as the Society's third publication. In his introduction, Clyde referred in detail to a controversy which had long existed as to the authenticity of Hope's authorship of this work, there being doubt as to whether he or his son, who shared his name but took the judicial title of Lord Kerse, was the true author. Clyde established beyond doubt that Hope himself was the true author and at the AGM on 20 November 1937 Lord Macmillan, in paying a generous tribute to Lord Clyde, described the introduction as "a delightful piece of detective work".

The second and last volume of Hope's *Major Practicks* was published in 1938 as the Society's fourth publication. Clyde himself acted as chairman of the AGM that year but modestly did not mention the publication. This omission was remedied by Lord Normand and also by T M Cooper, who gave a hint that the Society was perhaps willing to take advantage of Lord Clyde's goodwill when he commented that:-

Lord Clyde's capacity for work of the kind he had undertaken, had been so triumphantly proved that [the members] looked forward to his continued efforts in the production of further volumes."

Lord Clyde had given signal service to the Society but there remained one more task for him to perform, as we shall shortly discover.<sup>14</sup>

The minutes of the AGM held on 14 December 1944, following Lord Clyde's death, record this tribute from Lord Macmillan:-

"As Vice-President he presided more than once at our annual gatherings and he contributed a learned edition of Hope's *Major Practicks*. We came into being just a little too late to have the privilege of including in our series his monumental translation of Craig's *Jus Feudale*. In his exact and scrupulous scholarship and his devotion to the law of Scotland, in the practice and administration of which he spent his life, Lord Clyde represented in the highest degree those interests which we were founded to foster.

But if the lights were extinguished in respect of one intellectual giant, they still shone brightly on another, in the form of Lord Cooper, lately Lord Advocate and recently

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<sup>14</sup> Lord Clyde was the outstanding lawyer of his generation. Born in Dollar in 1863, the son of a distinguished teacher of classics, he was called to the Bar in 1887. By 1901, when he took silk, he had established the heaviest junior practice at the Bar. He was appointed Solicitor General in 1905 in the closing months of the Unionist government and was Lord Advocate from 1916 to 1920, when he was appointed Lord Justice-Clerk and then Lord President in the same year.. He was elected Dean of Faculty in 1915 and had the unique distinction of being asked to continue as Dean after being appointed Lord Advocate the following year. He had a lifelong interest in politics and was MP for West (later North) Edinburgh from 1909 until he was appointed to the Bench in 1920. He deplored the establishment of the National Library of Scotland out of the Advocates' Library in 1925 but he accepted office as a Trustee and from 1936 he was Chairman of the Board of Trustees and its main driving force. He died in 1944 – Oxford Dictionary of National Biography, OUP, 2004.

appointed Lord Justice-Clerk. At the same meeting in 1944 Lord Normand, who had succeeded Lord Clyde as Lord President in 1935, moved up to succeed him as Vice President of the Society and Lord Cooper was elected Vice Chairman in his place. Cooper had been a member of the Society's Council since its inception (except for a brief gap between 1939 and 1941) but his main contribution to the Society, as a scholar, still lay in the future.

### **A Decision on Lord Hermand**

Professor F P Walton, formerly Director of the Royal School of Law in Cairo, contributed an article entitled *The Courts of the Officials and the Commissary Courts, 1512 – 1830* to the source book published in 1935 and at the Council meeting on 1 July 1937 it was reported that he was preparing for publication an edited text of Lord Hermand's *Consistorial Decisions, 1684 – 1777*. George Fergusson had been one of the four Commissaries for Edinburgh from 1775 until his elevation to the Bench in 1799, taking the judicial title of Lord Hermand. There were no printed decisions of the judges of the Commissary Court and it was the habit of the judges to keep manuscript collections of their decisions. Hermand's manuscript was such a collection and appears to have lain undisturbed in the Commissary Court from the time of Hermand's elevation to the Bench until 1930. As Walton records in his introduction:-

The manuscript, which is written in a very clear hand, is a thin folio of 323 pages with several blanks. It bears on the title page the date 1777 and the initials "G F". In 1930 some tradition about it must have survived, because a search was made for it in connection with the case of *Burman v Burman*, 1930 SC 270, before Lord Murray as Lord Ordinary. He says in his note that his clerk 'after extensive enquiry "rediscovered" the [manuscript] in the forgotten archives of the Commissary Court' (at p 271)."

Walton describes how it was transferred at his instigation to Register House in March 1936, before which it was lying "in a battered and broken-backed condition" in the Commissary Office.

By the Council meeting on 21 May 1940 Walton's work had been completed and it was reported that the volume would be published during the summer. But there was a problem. As the minutes of the meeting record:-

The typescript was meanwhile held back until the Council's decision was given on the question whether certain indelicate passages in the original text should be omitted and marked by asterisks or be printed in full. He read letters received from Lord Macmillan, Mr T M Cooper and the editor, each of whom expressed disapproval of reproducing the original text in the questioned part. After discussion the Council unanimously decided that their duty was to reproduce the entire text of the author.

This must have been a difficult problem to resolve, but those present at the meeting included Lords Clyde, Normand, Aitchison and Carmont, as well as Dr Baird Smith, so there was no lack of authority behind the “yes” vote. Time has not permitted the present writer to identify the offending passages in the published work, a task which remains for future research.

As with so many of the Society’s publications, the introductory sections to Walton’s work are of great scholarly importance. He himself established in the introduction that the folio which had been so badly treated over the years was indeed the work of Lord Hermand, while there is a masterful biographical sketch of Hermand by his kinsman, James (later Sir James) Fergusson of Kilkerran which, in the words of Lord Macmillan at the AGM on 30 November 1940 “went far to rehabilitate the reputation of that unduly depreciated Judge”. As a former Keeper of the Records of Scotland (from 1949 to 1969) Sir James was due to address the Society at its AGM in 1973 on the subject of “The Background to a Lord of Session” (Hermand?) but he died a week before the meeting and his address was read by the Society’s Chairman, Dr John Imrie.

### **Scholarship Problems**

It was reported to the Council at its meeting on 30 September 1935 that a scholarship provided by the Carnegie United Kingdom Trust to enable the recipient to undertake research in early Scots law (of which there is no previous mention in the minutes) had been awarded to Mr J A Crawford, a law graduate of Edinburgh University and a founder member of the Society, who had elected to investigate the *Acta Dominorum Concilii* in Register House. Mr M’Kechnie suggested to the meeting that extracts which Mr Crawford made from the *Acta* might prove useful for future publication by the Society. Thus began one of the less happy chapters of the Society’s history and one which continued for the next eight years.

At the Council meeting on 14 May 1938 Dr Baird Smith reported that the Carnegie scholarship awarded to Mr Crawford was about to expire. It is recorded in the minutes of the meeting that:-

From reports he had received it appeared that some dissatisfaction had been felt at the small amount of work returned by Mr Crawford and the absence of any commentary on the extracts made from the Register of Decreets.

Lord Macmillan suggested that some form of supervision should be introduced (there apparently having been none previously) to ensure the efficiency of the work, and Professor Hannay stated in Mr Crawford’s defence that the script of the Decreets of the 16<sup>th</sup> century, which were the particular subject of Mr Crawford’s study, was the most difficult in all the Registers and that long practice was necessary before facility in reading and copying could be attained. It was agreed that Professor Hannay and Mr H M Paton, Curator of the Historical Department, Register House (who was a founder member of the Society and who joined the Council in 1943), would act as Mr Crawford’s supervisors.

So far, so good. But by the Council meeting on 20 December 1938 (eight months later) Dr Baird Smith was expressing disappointment at the neglect of Mr Crawford in furnishing the Council with a report on his work. Mr M'Kechnie reported that he had been in touch with Crawford, who had promised to send in his report at an early date. By June 1939, at a meeting of the Council's Business Committee, M'Kechnie reported that he had received Crawford's report which, along with the extract from the register made by Crawford had been submitted to Baird Smith and to Lord Normand, who had decided that they should be filed for later publication along with the continuation by Mr Shearer, Crawford's successor in the scholarship<sup>15</sup>.

The matter then went silent for three years, but it re-emerged at the Council meeting on 21 July 1942, when M'Kechnie reported that the *Acta* for 1501-'02 would be ready for issue by the end of 1942 or early in 1943. Discussions must have been going on behind the scenes, because the minutes of the AGM on 28 November 1942 recorded the following startling statement by Dr Baird Smith:-

The Society were fortunate .....in having again obtained the services of Lord Clyde in an editorial capacity. His edition of *Acta Dominorum Concilii* would be ready, he hoped, early in 1943.

Thanks to Lord Clyde's timely intervention, the *Acta* at last emerged into the light of day in 1943, although the exact date of their publication has not been ascertained. The title page describes them as having been transcribed by Crawford, who by then had been called to the Bar, and having been edited with an introduction by Lord Clyde. The introduction runs to over forty pages and is again a scholarly work in its own right. In it Lord Clyde explains that the *Acta*, so far as preserved, run from 1478 continuously down to the founding of the College of Justice in 1532, those covering the period 1478 to 1495 and 1496 to March 1500-01 having been published previously in 1839 and 1918 respectively, and that the volume now published covered the period down to 27 January 1502-03. At the end of the introduction he gives fulsome credit to those in the Registers and Records of Scotland and others who had helped bring the work to fruition but ominously he does not mention Crawford. The final curtain had apparently been drawn on an unhappy episode.

But not quite, because there was a sting in the tail for Mr Crawford. It is apparent from discussion at the Council meeting on 27 November 1943 that there were a large number of errors in the transcription of the *Acta*, which even Lord Clyde's eagle eye had failed to detect. The Council, no doubt wisely, decided to let the matter rest.

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<sup>15</sup> There is an interesting question here. Was this Ian H Shearer, Advocate, who edited *Selected Cases from the Acta Dominorum Concilii et Sessionis* (from May 1532 to 5 July 1533, which was published as the Society's fourteenth volume in 1951, and who as Lord Avonside was President of the Society from 1975 until 1987?

## The War Years and Lord Cooper's Contribution

The first tangible casualty of the war was a dinner which the Council planned to hold in Parliament Hall on the eve of the AGM in November 1939<sup>16</sup> and which was cancelled. The idea of such a dinner was revived at the AGM in 1947 but it is recorded in the minutes of the AGM held the following year that although the date and place of a dinner had been fixed (the minutes do not identify these), it had to be cancelled because of the illness of Lord Macmillan and the inability of the Master of the Rolls, Lord Greene (who was to be the principal guest) and several senior members of the Society to attend. The idea of a dinner was finally abandoned in 1950<sup>17</sup>.

It was reported to the Council at their meeting on 28 November 1941, and to the AGM the same day, that the library of King's College London, an institutional member of the Society, had been destroyed by enemy bombing. Dr Malcolm on his own initiative had gifted them a replacement set of the Society's publications and this action was approved by Council. At the same meeting Council considered the suggestion that a reduced subscription be charged to those members of the Society who were on military service but it was decided not to pursue this, since no-one had asked for a reduction.

The Society's minutes in the war years contain several references to the problems of progressing work to the stage of publication. In November 1940 Dr Baird Smith was asked to write an introduction to the volume on the *St Andrews Formulare* which was being prepared for publication and "agreed, provided the war, which had deprived him of the assistance of his partners, was ended when he began"<sup>18</sup>. At the AGM in November 1943 Mr M'Kechnie reported that work by Lord Cooper on *Select Scottish Cases of the 13<sup>th</sup> Century* could not be published by the Society "owing to the restrictions placed by the Paper Controller". It is nevertheless remarkable that, despite problems of this kind, the Society was able to publish five volumes between 1940 and 1946.

The importance of the *St Andrews Formulare* was explained thus by Lord Clyde at the AGM in 1939:-

The *Formulare* of St Andrews .....belonged to a department in the history of the law of Scotland which was perhaps more recondite and certainly more difficult to get at than were the ordinary civil departments of the law. They touched canon law. Its contributions to the body of the law of Scotland were quite as great and quite as important as the contributions of the civil law of Rome.

The editing of the *Formulare* was started by Professor Hannay and completed after his death in 1940 by Gordon Donaldson, who later occupied the same chair as Professor Hannay and who, like him, became Historiographer Royal (and was President of the Society from 1988 until 1992). The work, which was published in two volumes, in 1941 (issued early in 1942) and 1942 (dated that year but distributed in 1944), runs to nearly

<sup>16</sup> Minutes of Business Committee, 23 June 1939

<sup>17</sup> Council minutes, 16 February 1950

<sup>18</sup> Council minutes, 16 November 1940.

800 pages. Despite the erudition of its editors it must have presented a somewhat daunting prospect to the ordinary members of the Society as they received their copies, because it is printed mostly in Latin.

There must have been real casualties of the war amongst the membership, although there is no comprehensive record of these in the Society's archive. The minutes of the AGM in November 1942, however, record the death in action at sea of Professor James Watson, whom they describe as "one of the most brilliant of Celtic scholars". The minutes continue:- "The Council had hoped to have from him and his brother, Mr Hugh Watson [the Society's treasurer], a transcript of and an Introduction to the manuscript *Justiciary Records of Argyll and the Isles, 1673-1747*". Professor Watson's work on these records must have been at an early stage. They were published by the Society in two volumes, in 1949 and 1969, without any reference to him in the prefatory sections. While still in preparation in 1947 they were described by Mr M'Kechnie as containing "a great deal of human interest about the people of the Highlands, their manners and customs"<sup>19</sup>.

Despite his responsibilities as Lord Advocate and later as Lord Justice-Clerk, Lord Cooper was actively pursuing research projects on the Society's behalf throughout the war years. It was reported to the AGM in November 1942 that "the Council desired to see a fresh edition of *Regiam Majestatem* which the Lord Justice Clerk might give" and to the AGM a year later that "the Society were fortunate in having fresh light on the *Regiam Majestatem* by the Lord Justice Clerk, and his work would probably form the volume for 1945". Lord Cooper explained to the Council at its meeting on 17 February 1944 that:-

it had been the practice of the 17<sup>th</sup> and 18<sup>th</sup> century Courts to regard Skene's edition [of the *Regiam*] as the authoritative one, but as [the] *Regiam* was an early 13<sup>th</sup> century compilation based on Glanvill the Court prior to the 17<sup>th</sup> century must have used a different version from that of Skene. There were about 17 different manuscripts, of which the most important were those known as the Ayr, the Drummond and the Bute.

Lord Cooper told the Council that Mr John Buchanan of the editorial staff of *The Scotsman*, who was in attendance at the meeting, had undertaken work on the collation of the manuscripts and on his recommendation the Council agreed to pay Mr Buchanan an honorarium of £100 to assist him in bringing the work of collation to a conclusion.

The *Regiam* was issued in 1947 as the Society's eleventh volume and in his preface Lord Cooper paid tribute to the assistance which Mr Buchanan had given to him in its preparation. Lord Cooper's introduction, running to more than fifty pages, is (like so many of its predecessors) itself a work of great scholarly interest and at the AGM in December 1947, Professor G A Montgomery referred to the publication as "one of the most important – if not the most important – publication so far undertaken by the Society". "The prodigious labours undertaken by Lord Cooper", he continued, "had resulted in the production of a monumental work which had taken its place as a classic in

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<sup>19</sup> Minutes of AGM, 19 December 1947

the legal realms of Scotland". In 1946 the Society had published as part of its tenth volume an edition by Lord Cooper, with assistance from Gordon Donaldson, of the Register of Brieves as contained in the Ayr and Bute manuscripts and in the *Quoniam Attachiamenta*. Again, Cooper's 32 page introduction to the manuscript of about the same length, is an important scholarly work.

By now times were changing and Britain, including the Scottish legal profession, was coming to terms with post-war conditions. In the minutes of the AGM in December 1947 Lord Cooper, by now Lord President, but still Vice Chairman of the Society<sup>20</sup>, is recorded as summing up the position as follows:-

It is more than probable that in the next few years the legal profession will be subjected to the process which has overtaken the medical profession of being made in part a subsidised state service....The loaves and the fishes will bulk more and more largely in our minds, the dead hand of bureaucracy will threaten to stifle the professional ideal and law will tend, if we are not careful, to degenerate into a trade or mere mechanical art. Such an institution as the Stair Society can do something to save the situation by keeping alive the spirit which has ennobled the best periods of jurisprudence in the past.

Nearly sixty years have passed since Lord Cooper spoke those words. What more appropriate endorsement could the Society seek today?

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<sup>20</sup> He succeeded Dr Baird Smith as Chairman in 1950. Like Lord Clyde before him, Cooper was the outstanding lawyer of his generation. Born in 1892, he was *dux* of George Watson's College at the age of 16 and medallist in English, Latin and Greek, achieving second place in mathematics. He was called to the Bar in 1915 and after wartime service in London he returned to the Bar in 1920, taking silk in 1927. He was elected Conservative MP for West Edinburgh in 1935 and in that year he was appointed Solicitor General and then Lord Advocate, being considered one of the most efficient and popular holders of that office. He succeeded Lord Aitchison as Lord Justice-Clerk in 1941 and was appointed Lord President in 1947. In that office he exercised a major influence in preserving the separate identity of Scots law in the post war era. A shy man, he never married but he was devoted to children and it was said that he never failed to converse with a cat. He died in 1955 – Lord Keith of Avonholm, Dictionary of National Biography, 2004.

## Appendix 1 – Membership Statistics

The notice calling the inaugural meeting of the Society contained a list of those who had intimated their willingness to become members, including 561 individuals and 38 institutions. The first volume, published at the end of 1935, includes a list of members which contains the names of 601 individuals and 54 institutions. The first list includes the names of Ramsay Macdonald, who was then Prime Minister, and Roscoe Pound, who was at the time Dean of the Harvard Law School. The second list includes these two (although Macdonald had by then demitted office) and also the name of John Buchan, Lord Tweedsmuir, who was Governor General of Canada. An analysis of the lists discloses the following information:-

Designation	Number in notice of inaugural meeting	Number on roll 1935
Writers/solicitors	195	212
WS	89	94
SSC	51	53
Total solicitors	335	359
KC	45	39
Advocates	62	52
Total Bar	107	91
Judiciary	25	29
Academics	22	33
Miscellaneous	72	89
Total individuals	561	601
Institutions		
Scotland	12	22
England	8	10
Northern Ireland	1	1
Switzerland	1	1
Canada	2	3
Australia	2	3
United States	12	14
Total institutions	38	54

### Notes

1. The analysis of individual members by designation is approximate, since some designations are unclear.
2. The judiciary includes Lords of Appeal, Senators of the College of Justice, sheriffs (principal and substitute) and a number of English and foreign judges.

The membership numbers for the period 1935 to 1947, taken from the annual reports, discloses the following information:-

Year	Individuals	Institutions	Total
1935	630	52	682
1936	623	79	702
1937	633	87	720
1938	See note		690
1939	576	91	667
1940	552	91	643
1941	518	90	608
1942	488	90	578
1943	481	90	571
1944	469	90	559
1945	447	89	536
1946	438	89	527
1947	430	91	521

#### Notes

1. There is an obvious discrepancy between the numbers of individual members in 1935, as between the two tables, no doubt explained by the different dates at which the totals were taken.
2. The annual report for 1938 does not give a split between individual and institutional members.
3. By way of comparison with the above figures, the membership numbers at 30 September 2005 were 370 individuals (including 26 students) and 151 corporate members, including law firms as well as institutions, making a total of 521, exactly the same as the figure for 1947.

## Appendix 2 – Publication Costs

The publication costs for Volumes 1 to 12 of the Society's publications and the index to Volume 1 (which is not numbered) are shown below. These have been rounded up to the nearest pound and they do not include various minor costs such as transcription expenses.

Volume number	Volume name	Publication costs £
1	Source Book	405
2	Acta Curiae Admirallatus	288
3	Hope's Major Practicks 1	357
4	Hope's Major Practicks 2	307
	Index to Volume 1	99
5	Hume's Lectures 1	341
6	Lord Hermand's Decisions	161
7	St Andrews Formulare 1	344
8	Acta Dominorum Concilii	293
9	St Andrews Formulare 2	389
10	Register of Brieves / Memorial on Old Extent	425
11	Regiam Majestatem	511
12	Justiciary Records of Argyll and Isles 1	396