



The Scottish Justices Association

The Scottish Justice – eNewsletter

June 2021

Welcome to the second of this year's newsletters. This comes to you at a time when most JP courts are beginning the long process of returning to some kind of normal practice. We are still some way off achieving this and questions about how the backlog of cases is to be addressed still remain to be answered. Many of you, however, will by now have experienced your first court sitting for some time, and I'm sure will be pleased to have done so. For some this return to the bench will have been easy; for others it may take several sittings before you feel comfortable in the role once more. Whatever your personal circumstances, do share any concerns you may have about returning to court with your sheriffdom support teams who are there to help you. If anyone feels they would like to share their experience of returning to court with other members, the Association is always keen to receive articles for future publication.

In this edition of the eNewsletter, Grace Macleod, Chair of the Scottish Justices Association shares some thoughts on how she sees her role and on current topics being dealt with by the Association and there is also an update from Dennis Barr on business matters of the Association. David Caddick has provided another interesting book review and Richard Scott relates his experience of "the man in the wig".

The Association continues to work hard on behalf of all members and the Executive Committee hope you find this newsletter an informative and interesting read. If you've any comments or thoughts on any of the articles in the newsletter, or wish to submit articles for future publication, these can be sent to editor@scottishjustices.org

Update from Grace MacLeod, Chair of the Scottish Justices Association



Our last edition of the Scottish Justice contained reflections from Gordon Hunter, whom I took over from as Chair of the Association. Now, at nearly half-way through 2021 it is time that I put pen to paper to state my intentions going forward.

Of course, these are not yet ‘normal’ times but as the Courts start to open up again, we are getting back to some sense of normality, albeit with a few long days to deal with the backlog of cases. During the lock down period your Executive has continued to meet via Zoom and I know that remote training, as organised by the JTACs, has been taking place via Web-ex. We were thankful to have altered our Constitution at the AGM in 2019 to allow for remote meetings and voting via electronic means and the introduction of self-nominations meant that elections for places on the Executive were held for the first time in several years. In his note to members below, Dennis Barr, the Association’s Secretary, has more to say about this year’s elections and the election process.

One role as Chair is to keep the Objectives (as outlined in the constitution) in mind when measuring performance and having read through these I felt that a review was timely. Therefore, a working group was set up and has come up with suggested changes to the Constitution to include a ‘Mission Statement, Vision and Objectives’ to help us identify where we can make progress in promoting the role of the JP. We will put these suggested changes to members at the next AGM in November.

What saddens me is the observation that many JPs feel undervalued in the work that they do. The SJA meets regularly with the Scottish Courts and Tribunal Service (SCTS) and this is not a feeling that I get when talking to the Executive Director of the Judicial Office, who recognises the importance of the JP Court. We have always been treated with respect and given information e.g. on case numbers when this has been asked for. So, I wonder where the problem lies? We have read some interesting reviews by David Caddick on the history of lay justice and indeed our secretary, Dennis Barr, is preparing an article on this very topic for the Commonwealth Magistrates and Justices Association (CMJA) journal due out later this year. I would invite you to read Richard Scott’s article, ‘Have JPs Started Wearing Wigs?’ on his experience and to consider how best we can engage with all relevant parties to represent the interests of JPs in issues which might impact their role. Two recent examples, still on the table, are the payment of realistic day rates for loss of earnings and carer expenses but there will be more issuesso let us have them!

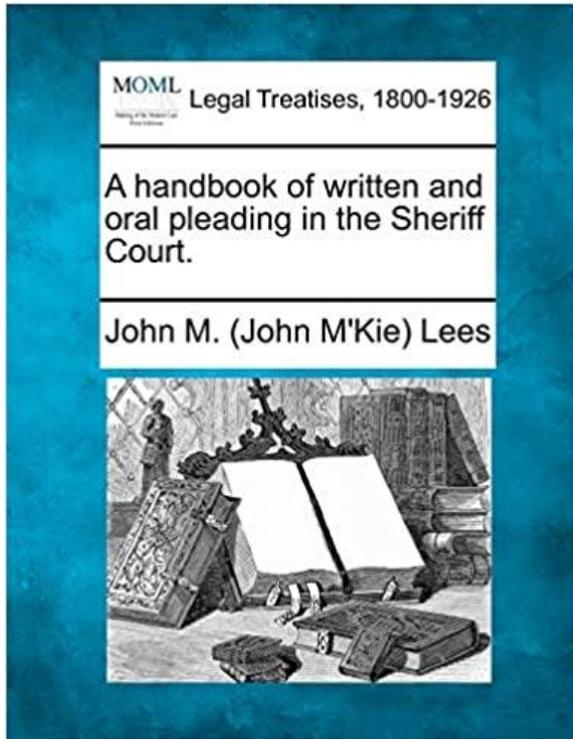
I am honoured to be your Chair and would like to thank the two previous Chairs whom I have served under, Gordon Hunter and Tom Finnigan, who have been excellent ambassadors for the role of the JP in modern day society. I would like to carry on with this work and would be happy to hear from you in relation to any matters that you feel the Executive should address. I can be contacted via your local SJA representative, via the Scottish Justice email or via the SJA website on www.scottishjustices.org/contact which also contains information on all members of the Executive.

Grace MacLeod
JP North Strathclyde
June 2021

A Handbook of Written and oral pleading in the Sheriff Court (2nd Ed)

Sir John M Lees KC

William Hodge and Company Ltd, Edinburgh and Glasgow 1920



A review by David Caddick MBE JP, GH&I

The first edition of this book was written by Sir John M Lees and published in 1888, the second revised edition was published in 1920 by Thomas Alexander Fyfe to reflect the changes in law and procedures since the first edition. As its title implies this book is a guide for defence agents to successfully plead on their client's behalf in both criminal and civil proceedings in the Sheriff Court. Much of the book focusses on procedures and the law and is essentially aimed as a 'how to guide' for the defence agent to help them ensure that they are fully prepared to go to court. Of course, most of this is out of date and of passing historical interest, but there is much timeless, sound, and pragmatic advice for the aspiring defence agent on oral pleading in court. This advice is also applicable to JPs and may help improve our own court craft.

For example, the fundamental art of finding the truth in court proceedings is stated as:

"It should never be forgotten that the purpose of a proof is only to elicit the true facts of the case upon which an argument may afterwards be based". (Page 88 para 210)

A good reminder for today's JPs. I especially like the guidance which is given concerning the spoken word, and I particularly admire the style and language in which this advice is written. For example:

"If a thing is worth saying, it is worth saying well, and, whilst he should endeavour to avoid all inopportune or inappropriate embellishment, it is well worth taking pains to clothe his argument in well-chosen language. The fewest words, but the best words, often present a more cogent and convincing argument than a torrent of eloquence". (P116/117 para 277)

How many of us have encountered a torrent of eloquence in court and been left bemused as to the point that was being made? Following on from that I really like the following explanation, and the Maxim which I think many people should take to heart, not just in the courtroom but in life in general:

"Speech is silver, but silence is gold, is a maxim of frequent truth in regard to cross examination". (P91 para 216)

The fundamental human nature of the court is also explored and the reactions of the judge to the way that a defence agent acts in court is noted thus:

‘A judge, however experienced he may be, is a human being and not a machine, and is therefore liable - though in a less degree it may be than an ordinary person - to take insensibly a bias against a person who is acting unfairly.’ (Page 110 para 262)

In amplification the following advice is tendered:

“For the same reason, an agent should abstain from discourtesy to his opponent or to the witnesses. There is nothing in forensic practise more unjust, more degrading, more offensive, and more injurious to a pleader and his client than wilfully and needlessly to insult a witness, and the court may disallow insulting questions.” (Page 110 para 263)

Good advice indeed. The necessity of having a sound case is also highlighted:

“Neither is it good pleading to indulge in random and extravagant denunciation. Its only effect can be to intimate to the judge that the person who uses such language is conscious he has a weak case, and is trying to make strength of language pass for strength of argument.” (Page 121 paragraph 290)

Or as my dear old Mom used to tell me ‘You can’t make a silk purse out of a sow’s ear’. The advice against dirty tricks or other sorts of questionable courtroom practise is very clear:

“Alike, therefore, from self-respect, from courtesy to the witness, and for the sake of his client, the agent should aim to win his case in a fair and honourable manner, and in no other.” (Page 110 para 262)

The need to be impartial and win the argument based on logic and fact is also explored. Any personal views are to be avoided:

“Anything that savours of intimating the agent’s own personal belief is bad pleading. To do so is to make himself a witness without being sworn, and the impropriety of so doing has on many occasions being commented on but especially in the famous trial of Dr Palmer.”¹ (Page 121 paragraph 289)

Finally, the essence of the nature of court business, and in particular trials, is summarised using an example from Johnson and Boswell:

“The duty of an agent to argue his client’s case, though it may not command his own opinion, is thus stated with his usual force by an eminent layman - Dr Samuel Johnson - in

¹ Doctor Palmer was a notorious murderer also known as the ‘Rugeley Poisoner’ or the ‘Prince of Poisoners’. He was a medical doctor who was convicted of the murder of his friend John Cook by poisoning him with strychnine in 1855. He was also suspected of poisoning several other people including his brother and his mother-in-law as well as four of his own children and made large sums of money collecting on life insurance. The reference to Dr Palmer refers to Palmer’s defence lawyer, Mr Shee, who against all legal conventions told the Jury that he personally believed Palmer to be innocent. It clearly did not work as Palmer was executed by hanging at Stafford Prison on 14 June 1856. As he stepped onto the trapdoor on the gallows he is alleged to have said to his executioner: “Are you sure that its safe?” Who said health and safety was a modern phenomenon?

answer to Boswell's question – "But what do you think of supporting a case which you know to be bad?" " Sir you do not know it to be good or bad till the judge determines it." (Page 118 paragraph 282)

Wise words indeed, as it is up to us, the Judges, to determine whether the case is good or bad.

In conclusion, I ask the question what can we Justices, in the 21st century, take from this volume that is over 100 years old, and the first volume even older? Apart from the joy of reading such an informative book of its time, 2 things stand out to me. The first is that I should try to be more precise and more eloquent in my use of language in court. The second, and perhaps the most important, is that I should only speak when it is necessary. To that end, I have already written in my bench book 'Speech is Silver but silence is Gold' as a reminder, and in the future I will definitely try to use 'the Fewest Words but the Best Words.'

David Caddick, MBE JP GH&I

A Note from the Association's Secretary

Executive Committee Elections

Every year there are elections to the SJA Executive Committee as one of the three representatives from each Sheriffdom has their term of appointment expire. This policy is designed to allow a number of JPs in each Sheriffdom to serve on the committee and contribute to the development of the SJA as an effective representative body. In addition there are, in some Sheriffdoms, more than one position vacant due to the retirement of existing committee members or due to an existing vacancy. Based on the successful experiment last year the Executive Committee has decided to continue to allow members to self-nominate themselves for election to the committee, without the need for a proposer and seconder.

Last year resulted in elections being required in two Sheriffdoms due to the number of self-nominations, and allowed the committee to reach seventeen out of a total permitted membership of eighteen (there is still a single outstanding vacancy in Lothian & Borders Sheriffdom).

The Executive Committee have appointed an Election Sub-Committee to oversee the entire process and full details will be issued by them very shortly. The Executive Committee would however wish to invite as many members possible to apply for a position on the Executive Committee and to represent the JPs in their Sheriffdom.

2021 AGM

Again building on the experience of the past twelve months, the Executive Committee has decided that this year's AGM will again be held using Zoom meeting software technology. Last year we comfortably exceeded the quorum required for the meeting, and holding it in the evening in mid-week appeared to suit a large number of members.

Accordingly the 2021 AGM will be held on Wednesday 17th November commencing at 7:00pm. This is clearly a very early indication of the date and further information will be

circulated in due course, including the SJA Annual Report & Accounts. Please do make a note of the date in your diary and the Executive Committee hopes that as many members as possible will attend, from the comfort of their own homes.

Dennis Barr JP
Secretary

Have JPs started wearing wigs?

No, this is not a reference to my lockdown hair style, but is a question posed to me by a fiscal in a post-court chat during the brief period between lockdowns at the end of 2020. I replied that as far as I was aware, JPs were not wearing wigs and I enquired why he asked. The fiscal told me that the last time he had appeared in the JP court, a few weeks earlier, he was surprised to see a JP he did not recognise and that the JP was wearing a wig. It took me a few moments to figure out what had happened. I asked the fiscal “Could it have been a summary sheriff who presided over the court?” The dawn of realisation spread across the fiscal’s face and he asked me “So when did that start happening?” and I answered “I don’t know, this is the first I have heard of it.”

While that might seem a fairly innocuous exchange, let’s just examine the implications. First, the fiscal, a full-time professional working in the criminal justice system, had not been told that summary sheriffs were presiding over the JP court. Second, I, as one of the JPs who sits in that court, had not been told that I would be substituted by a summary sheriff. The reason for this decision is not apparent to me as it seems that the risk of running the court with a summary sheriff is the same as the risk of running it with a JP. But that is not my point – once such a decision had been made, I would expect that those involved in the running of that court would be informed of the decision. To be clear, I am not talking about cases being called and continued administratively. Summary sheriffs sat in court with fiscals and defence agents present and conducted substantive business. I felt that it was disrespectful to me and other JPs to allow us to find out by accident that summary sheriffs were sitting in the JP courts.

It got worse. In my last court before the 2021 lockdown, I turned up at the same court to preside – supposedly – over a mixed court of pleading diets, proofs and a trial. When the trial was called, the fiscal stood up and told me that the trial would not proceed, that the two co-accused were not present and that witnesses had been stood down. The fiscal did not make a motion to adjourn but simply informed me that the trial would not proceed. I was puzzled by this unorthodox approach and upon enquiring of the fiscal why the trial would not proceed, she informed me that the sheriff clerk depute had told her that no trials could proceed where there were multiple accused persons, as it would not be possible to maintain social distancing in the dock. On that basis, the fiscal had stood down the two accused persons and the witnesses. She was however unwilling to make a crown motion to adjourn as the situation was not of the crown’s making.

I turned to the one defence agent present who to put it mildly was fizzing. (I have to say that at this point I was a bit fizzy myself.) He pointed out that he was fully prepared and had put time aside for the trial. He had been contacted by the fiscal to warn him of the situation and had agreed to act for both accused on this occasion to help out the other agent. His clients were dismayed that the trial could not proceed as they wished the matter to be resolved. He was not prepared to submit a defence motion to adjourn as notwithstanding the absence of his clients he had wanted the trial to proceed. Faced with the reality that we had no accused and no witnesses, and in the absence of a motion to adjourn from either party, I had no choice but to adjourn the trial *ex proprio motu*. On

making enquiries with my SLA, she investigated with SCTS and confirmed that this was indeed a rule that SCTS had made, but that prior to her enquiry on my behalf, nobody had informed her of this.

The past year or so has been an unprecedented period which has posed challenges to all involved in the courts – and to every section of society. So we should not be surprised if difficulties have arisen and it would be naïve to think that everything would go smoothly in a situation for which nobody was properly prepared. But the pandemic has exposed underlying issues in the way we as JPs are treated and regarded. SCTS and the senior judiciary have had to make difficult decisions about the running of the courts in a public health context. I do not envy them in this and while I might not agree with every decision they make, I would not challenge such decisions because I assume they are taking expert advice and are looking at the broader situation in a way that I cannot. But I would expect that once such decisions have been made, they would make sure that all stakeholders, including but not restricted to the JPs who preside over the JP courts, would be informed. It is, frankly, astonishing that nobody thought to let the JP community and SLAs know about important decisions which had a direct bearing on the work that we do. Clearly, in the situation above, SCTS did inform the sheriff clerk depute of the decision – how else would she have known? How difficult would it have been to also inform JPs and SLAs? To find out on the bench, when we are meant to be in charge of proceedings, is simply not acceptable.

The SJA Executive is aware of these issues and has raised the matter with SCTS. In addition, the SJA Executive is undertaking a review of the Aims and Objectives of the Association and communication has been identified as a key area for improvement. At the time of writing this article, the Executive is considering how this might be achieved, hopefully through collaboration with SCTS, the Judicial Office and the Judicial Institute. The review is also considering how to ensure that JPs are valued and respected. The events described above are symptomatic of a wider malaise in the way JPs are regarded and the Executive is determined to do all it can to address this.

Richard Scott, JP

And finally.....

A self-represented accused.

The accused stands in the witness box looking a little dishevelled after an obviously long evening before his appearance in Court and the strain of protesting his innocence throughout the short trial.

Stands the PF to begin cross examination with all the determination that three months in the job can muster when facing a self-represented accused.

“Now Mister Brown, you are charged with breaking into three cars on the night in question, are you maintaining your story that it wasn’t you who committed these offences?”

“I am, it wisnae me”

“Now Mr Brown, there are two police witnesses and a member of the public who have sworn to the fact that it was you, what do you say to that?”

“It wisnae me, I didn’t do no cars like they are saying.”

“Now Mr Brown, do you have any explanation as to why three people, two of them trained police officers would all make the same mistake?”

“I dinnie ken, but I’m absolutely, positively, 100% sure that it wisnae me they saw”

“Well then Mr Brown, would you care to reveal to the Court how you can stand there and basically call three witnesses liars in open Court”

“Well you say this happened on the 11th?”

“Correct the evening of the 11th of April”

“Well It’s dead simple then, ‘cause I was nowhere near Torry that night as I got lifted in the afternoon for doing over a flat in Bucksburn and I wis in custody until I appeared in Court on the 12th.....”

PF re-takes seat, crimson of face and looks resignedly at the bench,

JP, “Mr Brown you are found not guilty and are free to go”

“Aye, but only as far as the Sherriff Court” comes the retort from the retiring Mr Brown.

Outbursts in court

Mr Smith was in court on a double assault charge. The JP says to Smith “You’re charged with assaulting your wife to her injury with a shovel”. A voice at the back of the court yells out “You swine!”

The JP continues, “You are also charged with assaulting your brother-in-law with a shovel to his injury”. The same voice from the back of the court yells out again “You swine!”

The JP, having finally had enough of the interruptions, speaks to the man at the back of the court and says “Sir, I can understand your anger and frustration at these serious charges, but I will not have any more of these outbursts from you. Now what is the problem?”

The man stands up and addressed the JP, saying “For fifteen years I lived next door to Smith and every time I asked to borrow a bloody shovel he said he didn’t have one!”