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INTRODUCTION

The thirteenth and fourteenth centuries were the formative era of the English legal profession, while the fifteenth, sixteenth and seventeenth centuries might be called the period of its consolidation. During this latter period, the barristers became thoroughly organized through the Inns of Court, and, together with the serjeants, they subsequently obtained a monopoly of handling all legal business in the higher (royal) courts.

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Professional lawyers made their first appearance during the reign of Edward I (1272-1307).[1] From its inception, the profession has been divided into two major branches, each performing distinct functions: the "pleaders" (*narratores, servientes,* serjeants and later the barristers) who merely "spoke" for the parties in court, and the attorneys (*attornati* and later the solicitors) who fully represented the parties. Each of these two branches was subject to different rules and restrictions. Soon also the apprentices *(apprenticii)* — a sort of advanced "law students" — received official recognition as "lawyers." In keeping with the educational and professional trends of the late Middle Ages, practitioners and apprentices alike resorted to collegiate life by congregating in "Inns."[2]

During the fourteenth century the serjeants came to be recognized as the undisputed leaders of the profession. They were appointed by the Crown from among the Benchers (or Readers) in the Inns of Court, usually upon recommendation of the royal judges. For a long time the royal Bench itself was recruited from among the ranks of the serjeants. But it is impossible to determine the exact time when the serjeants acquired a monopoly of promotion to the Bench,[3] or when the particular privileges attached to serjeanty became universally recognized. By the end of the fourteenth century

1. *Cf.* Chroust, *The Legal Profession during the Middle Ages: The Emergence of the English Lawyer prior to 1400, Part I,* 31 NOTRE DAME LAW. 537-601 (1956); *Part II,* 32 NOTRE DAME LAW. 85-140 (1956); *Part III,* 32 NOTRE DAME LAW. 268-299 (1957).

2. *Cf.* Chroust, *The Beginning, Flourishing and Decline of the Inns of Court,* 10 VAND. L. REV. 79-123 (1956).

3. This monopoly, which for all practical purposes had ceased to exist by the end of the seventeenth century, was formally abolished in 1873.

the serjeants had succeeded in forming a close guild, and until the dissolution of the Order of Serjeants in 1877, they dwelled in the Serjeants' Inns together with the royal judges.

Beneath the serjeants (and the judges) were the apprentices whose history is closely connected with the history of the Inns of Court (and Inns of Chancery.) The apprentices were the inmates or members of these Inns. They ranked either as Benchers, Readers, Utter-barristers, Inner-barristers, or "students." Upon his appointment to serjeanty, the former apprentice (or barrister) left his Inn and moved to one of the Serjeants' Inns. Although the Inns of Court were independent societies, the serjeants (and the judges) retained considerable control over matter affecting the qualification, education, and conduct of the inmates of the Inns; they assisted the Benchers in the performance of their many tasks; and they tacitly allowed those who had been called to the Bar by their Inn also to practice in their courts.

The Inns of Court were governed by the Benchers. The Readers took charge of the lectures and, occasionally, of the moots.[4] After having successfully read at his Inn the prescribed number of times, the Reader was usually promoted to the rank of Bencher.[5] Next in line to the Readers were the Utter-barristers, that is, those members of the Society who "for their learning and continuance are called by the . . . Readers to plead and argue . . . motes . . . and this degree is the chiefest degree for learners in the house next to the Benchers."[6] The remaining members of the Inn were called Inner-barristers or "students" who lacked experience as well as length of residence in the Inn.

Traditionally, the barrister (or the serjeant) addressed, and still addresses, the court or the jury during the actual trial of the case. He takes the part which his client would have to take if he were to conduct his case in person. In the beginning, the barrister (pleader) seems to have been a kind of casual helper who volunteered to speak for a litigant unable to plead for himself. Subsequently, he obtained official recognition by the courts as one suitable "to be of counsel" with the litigant. It is quite likely that initially the barrister owed the privilege of audience in the court to special leave by the courts. But at some unknown date this privilege came to be exercised by the four Inns of Court which with the silent approval of the judges began to claim the sole right of calling a man to

4. It will be noticed that all ranks below that of serjeant originally were referred to as "apprentices" or "barristers." The term "barrister" or "barrister-at-law" did not come into common use until the sixteenth century. At present "barrister-at-law" is the popular term signifying an utter-barrister. The term "inner-barrister" has long been obsolete.

5. During the seventeenth century the King's Counsel acquired a prescriptive right to be made a Bencher without having been a Reader.

6. Waterhouse, FORTESOCUTUS ILLUSTRATUS, OR COMMENTARY ON DE LAUDIBUS LEGUM ANGLIAE 543 (1663).

the Bar. The fact, however, that the barrister started out as a casual and detached helper, as a sort of "his master's voice," affected, and still affects, his relationship to the client: he cannot bind his client by anything he says in the court, neither may he be held liable for negligence in the conduct of a client's case.

At first, the barrister and the serjeant dealt directly with their clients. They advised them on all legal matters without confining themselves solely to litigation, and, at least until 1629, they could sue for their fees.[7] But after the Restoration, the barrister, whose attitude towards the attorney had become increasingly hostile, ceased to have direct contact with the client. As a result the client was compelled to turn to the attorney (or solicitor) for legal consultation and advice. Ironically, the solicitor thus became the barrister's foremost client; barring a few exceptions, the barrister had, and still has, no legal business but that which the attorney or solicitor brings to him. The initial steps of all legal business, and often the complete handling of it, was left to the attorney who, thereby, became a fully independent practitioner.

The other branch of the English legal profession is that of the attorney *(attornatus)* or, as he is called today, the solicitor. This branch is a combination of several formerly distinct professions: the attorney of the common-law courts, the old-type solicitor of the court of Chancery, the proctor of the former ecclesiastical courts, and the scrivener and conveyancer.

Attorneyship had become a profession probably by the fourteenth century and certainly by the sixteenth century, although unprofessional attorneys could still be found during the seventeenth century. The rise of the attorneys to professional status made necessary the regulation of their activities. Since the Royal Rescript of 1292, the attorneys had been under the supervision and disciplinary control of the courts. In fact, they had become "officers" of the court. In 1402 or 1403 a statute provided that all the attorneys "shall be examined by the Justices and by their Discretion their Names put on the Roll . . . and other Attorneys shall be put out . . ." so that attorneys "ignorant and not learned in the Law" could be excluded from legal practice.[8] This statute constituted, if not the origin of the Roll of Attorneys, at least its official recognition. It also established an examination of the candidate in order to ascertain his qualifications before admission to practice.

Subsequently, in order to guarantee professional competence a number of statutes and court orders were issued for the regulation, as well as limitation of, the ever growing number of attorneys.[9] But

7. See Bradford v. Woodhouse, Cro. Jac. 520, 79 Eng. Rep. 445 (K.B. 1619); Sands v. Trevilian, Cro. Car. 107, 79 Eng. Rep. 695 (K.B. 1628).

8. 4 Hen. 4, c. 18 (1403).

9. See Chroust, *The Legal Profession during the Middle Ages: The Emergence of The English Lawyer prior to 1400, Part I,* 31 NOTRE DAME LAW. 537, 598 (1956).

complaints about attorneys did not cease. Starky, in his dialogue between Cardinal Pole and Thomas Lupset decried the excessive number of avaricious and covetous attorneys who troubled men's causes rather than finished them. Like so many authors, critics and satirists of all ages, Starky probably generalized from some isolated instances, proving thereby only that at all times and in all places the alleged viciousness of the lawyer is, and always has been, an undying subject for sweeping condemnation.

After 1292, the attorneys and the junior apprentices had been classed together for about two centuries. The junior barristers undoubtedly were acting as attorneys, while the professional attorneys, as late as the early sixteenth century, were allowed to plead their clients' causes in the higher courts. Also, until about the middle of the sixteenth century, practicing attorneys were permitted to join the Inns of Court. Hence, the old division between attorney and pleader began to gradually disappear. But soon the serjeants and barristers, with the support of the judges, began to disapprove of the natural tendency of every attorney to follow his business into the courts whenever it was litigated. During the latter part of the sixteenth and throughout the seventeenth century the general aversion of the courts, serjeants and barristers to the attorneys gradually increased, culminating in their expulsion from the Inns of Court.[10] As a result, the attorneys were denied the opportunity of a sound legal education and of being "called to the Bar."[11] From then on the serjeants and the barristers alone could appear before the higher courts on behalf of a client. This situation, together with a number of restrictive statutes and court orders, created and perpetuated the bifurcation of the English legal profession. It established a lasting distinction in the membership, functions, duties and privileges of each major branch as well as in the relation of each branch to the courts and its treatment by the judges. This development, together with the rise of the law officers of the Crown during the same period, had far-reaching consequences for the whole profession.

The Order of Precedence

During the late Middle Ages and far into the seventeenth century, the King's Serjeants were at the head of the English legal profession, followed by the ordinary serjeants and the barristers. At the end of the seventeenth century the King's serjeants still took precedence over the King's Attorney (Attorney-General) and the King's Solicitor (Solicitor-General), who, in turn, took precedence over King's Counsel and those barristers who held a patent of prece-

10. See notes 57-58 *infra* and accompanying text.

11. About this "call to the Bar," see Chroust, *The Beginning, Flourishing and Decline of the Inns of Court: The Consolidation of the English Legal Profession after 1400,* 10 VAND. L. REV. 79, 112 (1956).

dence. The latter two groups had precedence over the common serjeant, who, by this time, was no longer at the head of the profession, and who also had lost, *de facto,* the exclusive privilege of being promoted to the royal bench, although this particular privilege was not officially abolished until 1873.[12]

As early as the Tudor period, the Crown began to appoint any barrister of its liking to the Bench. Soon the higher law officers of the Crown, including King's Counsel, who were often distinguished not for their professional achievements but for their loyalty, acquired what amounted to a prescriptive right to this promotion. Hence, the decline of the Order of Serjeants already had begun during the Tudor period.

In the eighteenth century, according to Blackstone,[13] the order of precedence in the legal profession was the following: (1) the King's Premier Serjeant; (2) the King's "Antient" Serjeant (the oldest among the King's Serjeants); (3) the King's Advocate-General; (4) the King's Attorney-General; (5) the King's Solicitor-General; (6) the King's Serjeant; (7) the King's Counsel and the Queen's Attorney and Solicitor; (8) the serjeant; (9) the Recorder of London; (10) the advocate of the civil law; and (11) the barrister. Blackstone, however, did not rank the attorney, common solicitor, or any other member of the "lower" branches of the profession.

The pre-eminence of those lawyers who represented the King is easy to explain in a time when the Crown had achieved its greatest power. The serjeants, at least in theory, were still the most respected members of the profession; and on account of their seniority, the King's Premier Serjeant and the King's "antient" Serjeant, until 1814, ranked first and second above the Attorney-General, the Solicitor-General, the "ordinary" King's Serjeant and the King's Counsel. The latter was also an officer of the Crown and, hence, outranked the common serjeant (but not the ordinary King's Serjeant), the advocate, and the barrister. The high position of the Recorder of London was probably due to the political and social importance of the city and its close ties with the government. The King's Advocate-General, who since the fifteenth century appeared for the Crown in ecclesiastical courts and the Court of Admiralty, took precedence over the Attorney-General and Solicitor-General because he was a Doctor of Law and thus ranked with the serjeant and above the attorney or solicitor.[14]

Until their order was abolished in 1877, the serjeants were organized in the Serjeants' Inns, while King's Counsel and the barris-

12. Judicature Act of 1873.

13. 3 BLACKSTONE, COMMENTARIES* 28.

14. In 1857 the advocate and the barrister were merged in one order.

ters were organized and supervised by the Inns of Court. The Inns of Chancery, on the other hand, had ceased to have any practical significance whatever. The advocates, until they were joined with the barristers in 1857, were organized and supervised by the Doctors' Commons.[15]

The Rise of the Law Officers of the Crown

The King's Serjeants

From the very beginning, the King sent out one or several of his "servants" (*servientes,* serjeants) to protect a legal interest of the Crown.[16] These King's Serjeants *(servientes regis ad legem)*, who were also legal advisors of the Crown and frequently represented the King in his courts seem to have become a regular institution during the reign of Edward I (1272-1307), and perhaps earlier.[17] Later they were summoned to the House of Parliament where, at least for awhile, they held a position of precedence over the King's Attorney (Attorney-General) and the King's Solicitor (Solicitor-General). In the course of the sixteenth century, the King's Attorney and the King's Solicitor began to replace the King's Serjeant as the dominant law officer of the Crown,[18] and after 1700 the Attorney-General was the only regular royal official who could take the initiative in all legal proceedings on behalf of the Crown (the King's Serjeant could act only on special instruction).

The gradual replacement of the King's Serjeant (a post abolished in 1814) in part was due to the fact that serjeanty was essentially a mediaeval institution. By tradition, the serjeant's activities were limited. By his training in the Inns of Court he had been turned into a common-law lawyer, and he always retained the somewhat limited outlook of a common-law lawyer. He took little interest in the political and constitutional questions of the time. Neither was he much acquainted with the newly arising courts or quasi-judicial agencies of the period. The King's Attorney and the King's Solicitor, on the other hand, could do considerably more than the serjeant and, hence, were more useful to the Crown. Unlike the

15. The Doctors' Commons comprised all the practitioners licensed to practice as advocates before the ecclesiastical courts and the Court of Admiralty (and the Court of Chancery). Like the Inns of Court, the Doctors' Commons looked after the interests of the profession, but unlike the Inns of Court, it was not a teaching body. Instruction in the law was left to the Universities of Oxford and Cambridge and, from the end of the sixteenth century, to the newly founded Gresham College. Any person seeking admission to the Doctors' Commons had to be a Doctor of Civil Law.

16. See Chroust, *The Legal Profession during the Middle Ages: The Emergence of the English Lawyer Prior to 1400, Part II,* 32 Notre Dame Law. 85, 108 (1956).

17. The King's Serjeants consisted of the King's Premier Serjeant (so constituted by special letters patent), the King's Ancient Serjeant (the oldest among the King's Serjeants), and the ordinary King's Serjeants.

18. See generally Belott, *The Origin of the Attorney-General,* 25 Law Q. Rev. 406 (1909).

common attorney, they were permitted to plead in the Court of Common Pleas.[19] They knew not only the common law as it was administered in the royal courts, but were also familiar with the law as it was administered in other courts which had sprung up during that period. Moreover, they understood the political and constitutional questions of the day, and were ready to adapt themselves to the great changes which took place in the domains of constitutional law and politics during the sixteenth and seventeenth centuries. In short, they were in touch with the times and, incidentally, shared the King's views on these matters.

The serjeants, as the case of Coke shows, could never be fully trusted to agree with the Crown on many legal, political or constitutional issues. They firmly insisted on the supremacy of the common law. The Crown which aimed at nothing less than absolute authority, found it expedient, therefore, to select for its legal advisors and lawyers, persons on whom it could rely for the "proper" attitude and "proper" answers. Consequently, the Order of Serjeants lost its former pre-eminence which passed on to the legal officers of the Crown, who, due to the exigencies of the modern state, by the end of the sixteenth century, and certainly during the seventeenth century, became the recognized heads of the English legal profession, although the King's Serjeants retained nominal precedence.

The King's Attorney or Attorney General

Since the thirteenth century, and probably earlier, the Crown had also its own attorneys, and beginning with the reign of Edward IV (1471-1483), its own solicitors. The extant records refer to *attornati regis* who seem to have appeared on behalf of the King in his courts. The appointment of an *attornatus regis* was always made by letters patent. During the reigns of Edward I, Edward II (1307-1327) and Edward III (1327-1377), the appointment was restricted either to a definite court,[20] or to a definite area[21] or to a definite business.[22] But after awhile a new policy was inaugurated: instead of

19. See, *e.g.*, Patent Roll., 13 Edw. 3, patent 2, no. 196, mem. 24 (1338).

20. During the reign of Edward II John de Norton was appointed King's attorney to represent the Crown in the Court of the King's Bench. Patent Roll. 6 Edw. 2, patent 1, no. 138, mem. 20 (1312). Walter de Fyngale was appointed to attend the King's business in Court of Common Pleas. Patent Roll. 16 Edw. 2, patent 1, no. 17, mem. 15 (1392). During the reign of Edward III, Alexander de Fyncham, John de Lincoln, Richard de Fryseby and Thomas de Shardelowe represented the Crown in the Court of the King's Bench, and Alexander de Hadenham and John de Clone attended the King's business in the Court of Common Pleas.

21. Edward III issued a patent of attorney to William de Nassefeld which empowered the latter to practice in all the courts held in the counties of Yorkshire, Northumberland, Cumberland and Westmoreland. Patent Roll., 37 Edw. 3, patent 2, no. 268, mem. 25 (1362).

22. Edward III issued a patent to John de Asshewell authorizing him to look into escheats, concealments, forfeitures, goods of felons, fugitives and other profits of the Crown in London and elsewhere. Patent Roll., 41 Edw. 3, patent 1, no. 270, mem. 20 (1366). The patent

having several legal representatives with specific though restricted commissions, a single attorney with wider powers (a sort of *attornatus generalis regis*) was appointed. During the reign of Henry IV (1399-1413) Thomas Derham, the King's Attorney, received a commission to represent the King in the Court of Common Pleas "and in all other courts."[23] Edward IV (1471-1483) extended this power by authorizing his attorney, John Herbert, to appear for the Crown not only in all courts of England, but also in the counties of Camarthen and Cardigan in South Wales. In addition, John Herbert was also authorized to appoint a deputy or deputies.[24] After that time the commission to represent the Crown not only became general for all courts and for all kinds of business but it also conferred the general right to choose substitutes. In this the *attornatus regis* differed greatly from the common *attornatus*.[25]

Since in theory the King was always presumed to be in court, the King's *attornatus* did not really represent his sovereign; he merely "followed the suit" on the King's behalf, safeguarding the prerogatives of the Crown.[26] This alone gave him certain advantages which the common attorney did not possess. Unlike the common attorney, he was usually a member of an Inn of Court where he had been called to the Bar. Hence, he could also plead for his royal client,[27] something the ordinary attorney was eventually prevented from doing. And, unlike the common attorney, he was not really an officer of the court, he was not admitted to practice by the court to which he became attached, nor was he under the disciplinary supervision of the court.

During the fifteenth century the King's Attorney began to rank with the royal judges and the serjeants. In the year 1460, for instance, the Duke of York consulted not only with the royal Bench and the King's Serjeants, but also with the King's Attorney as to the legitimacy of his claim to the English throne.[28] The House of Lords (collectively and individually) constantly sought the legal advice of the King's Attorney; and by the time of King Henry VIII, the King's Attorney had become an important member of that House. He not only drafted and amended bills, but took them to the House of Commons where he defended them. Soon he also began to advise, or

issued to William de Nassefeld (see note 21, *supra*) likewise specified the particular business he was to attend.

23. Patent Roll., 9 Hen. 4, patent 2, no. 379, mem. 11 (1406).

24. The patent of William de Nassefeld (see note 21, *supra*) also stipulated that he may have a deputy.

25. See Chroust, *The Legal Profession during the Middle Ages: The Emergence of the English Lawyer prior to 1400,* 32 NOTRE DAME LAW. 85-89 (1956).

26. See FINCH, (NOMOTECHNIA) DESCRIPTION OF THE COMMON LAWS OF ENGLAND 81 (1759).

27. See, *e.g.,* 2 Rolls of Parliament, 37 Edw. 3, no. 18, 227a (1362).

28. 5 Rolls of Parliament, 39 Hen. 6, no. 2, 376a (1460).

represent, the various offices and departments of the government, and he frequently conducted important state trials.

During the thirteenth, fourteenth and fifteenth centuries there were very few King's attorneys whose names are recorded. In the reign of Edward I to be sure, Thornton Inge, Lowther and Mutford appeared for the Crown, but it is not certain whether they did so as King's Serjeants or King's Attorneys. When toward the end of the sixteenth century and especially during the seventeenth century the House of Commons assumed greater importance in the administration of the realm, the King's Attorney or Attorney-General (and the Solicitor-General) became a member of the House of Commons[29] where he advised the House on legal matters.[30] With the subsequent development of the Cabinet, it also became necessary to include the Attorney-General in that governmental body.

The King's Solicitor or Solicitor-General

The office of the King's Solicitor or Solicitor-General probably originated during the reign of Edward IV. The first known letters patent commissioning a King's Solicitor states that the King, *de gratis speciali,* has appointed his *serviens* Richard Fowler as his solicitor *(solicitarius)* in all manners of pleas, suits and quarrels affecting the Crown within the realm.[31] During the reign of Richard III (1483-1485) certain remunerations and allowances became attached to the office of King's Solicitor.[32] As in the case of the King's Attorney, the solicitor was appointed by the Crown either "during good behavior," or "during the King's pleasure," or for life, although in the beginning he might have been a "deputy" of the King's Attorney who appointed him.[33] Like the King's Attorney, he was frequently employed by the House of Lords to advise the latter on various legal matters, including the drafting and amending of proposed bills.

The origin of the King's Solicitor in a way parallels that of the private or common solicitor.[34] Since the sixteenth century, private parties as well as attorneys employed solicitors as their clerks, assistants, and trusted stewards, who rendered certain services which either the client or the attorney, including the King's Attorney, could not, or would not perform himself. Hence the King's Solicitor prob-

29. 1 NORTH, LIVES OF THE NORTHS 113 (1744).

30. Since the Attorney-General and the Solicitor-General were also members of the House of Lords, although merely by writ of attendance, the question arose whether they could at the same time be members of the House of Lords and the House of Commons.

31. Patent Roll., 1 Edw. 4, patent 2, no. 493, mem. 10 (1467).

32. Patent Roll., 1 Rich. 3, patent 5, no. 556, mem. 7 (1483).

33. During the reign of Edward IV the King's Attorney had been empowered to appoint his own "deputy." This is also the period when the King's Solicitor made his first appearance.

34. See discussion *infra* p. 582.

ably originated as a "deputy" or "steward" of the King's Attorney, and for some time he was referred to as *"secundarius attornatus regis,"*[35] or as "a limb of Mr. Attorney."[36] It is not surprising, therefore, that he should be looked upon as being inferior to the King's Attorney. After 1530, the Solicitor-Generalship was considered a mere stepping stone to the Attorney-Generalship.[37] When the Crown began to commission only a single King's Attorney with wider general powers, it probably decided to appoint also the Attorney's "deputy" rather than let the King's Attorney choose his own "assistant." From that time the King's Solicitor or Solicitor-General became a direct appointee of the Crown.

Since for some time the positions of King's Attorney and King's Solicitor were considered "inferior" offices, originally they could not be held by common serjeants; the duties attached to these Crown offices were regarded as being incompatible with the duties, functions and the dignity of serjeanty. Common serjeants who were commissioned to one of these offices had to receive a "writ of discharge" which removed them from the Order of Serjeants.[38] Only the King's Serjeant was permitted to become Attorney-General or Solicitor-General with loss of rank.

In the course of the sixteenth century, when a large number of prominent lawyers held the positions of King's Attorney and King's Solicitor, these two offices began to acquire their present-day significance. They also became the springboard to the royal Bench, a privilege heretofore reserved to the serjeants.

The King's Counsel

The pre-eminence of the King's Attorney and the King's Solicitor gradually extended also to those men who acted as their councillors. Since the reign of Elizabeth I (1558-1603), there existed a body of men, learned in the law, who were referred to as the "King's Learned Counsel."[39] These King's Counsel, or Councillors at Law, were probably appointed and retained by the Crown on the recommendation of the Attorney-General.

Originally, the office of King's Counsel was rather vague in character; it was, as Francis Bacon put it, "without patent or fee."[40] But in the year 1603 King James I, by special letters patent, ap-

35. Wilkes v. Rex, Wilm. 322, 329, 97 Eng. Rep. 123, 126 (K.B. 1768). ". . . the Courts take notice judicially of the Attorney General, when there is one, they take notice of the Solicitor General, as standing in his place, when there is none." *Ibid.*

36. JOURNALS OF THE HOUSE OF LORDS, April 11, 1611.

37. *Ibid.*

38. DUGDALE, ORIGINES JUDICIALES, ch. 4 (3d. ed. 1680).

39. D'EWERS, JOURNALS OF ALL THE PARLIAMENTS HELD DURING THE REIGN OF QUEEN ELIZABETH II (1682).

40. 7 SPEDDING, LETTERS AND LIFE OF FRANCIS BACON 168 (1879).

pointed Bacon *Consiliarium nostram ad legem sive unum de Consilio nostro e rudite in Lege* — "our Councillor at Law and one of our Counsel learned in the Law."[41] The patent also stated that Bacon should have a place and precedence in all the courts; that he should enjoy all the advantages and powers pertaining to the office and necessary to the performance of his duties; that he should hold his office during good behavior; and that he should receive a yearly fee of forty pounds for life. The effect of this patent was, according to Bacon, that the office of "King's Learned Counsel" became "established and brought into ordinary."[42]

From that time on, the King's Counsel was a permanent rank in the English legal profession. He was directly appointed by the Crown to assist and advise the King and the law officers of the King, and he was paid forty pounds annually for his services.[43] Today he receives fees according to the work actually done. As an "assistant" to the Crown he was originally not permitted to appear in a case against the King unless by special leave. Later he came to be simply a barrister who on account of his professional eminence or political influence had been granted this exalted title. He ceased to perform the duties of assistance for which he had originally been created, although he was still affected with certain disabilities inherent in the office *e.g.* he could not appear against the Crown except by special license until 1920 when he was relieved of this disability.

The Professional Attorney

The Middle Ages made a sharp distinction between the pleader who merely assisted the litigant in court by speaking for him, and the attorney *(attornatus)* who fully represented or substituted for the litigant in court *ad lucrandum vel perdendum*.[44] The idea that a litigant may be assisted or advised by his friends who might also speak or plead for him, was generally accepted. Full representation or substitution by attorney for the purpose of litigation, on the other hand, was considered to be contrary to the notion, so common among primitive peoples, that every man ought to fight his own battles. Hence, substitution by attorney was granted only as an exceptional boon and then only after certain strict and cumbersome formalities of appointment *(attornatio)* had been observed. During the fourteenth century, however, the restrictions imposed upon the appointment of an attorney were gradually relaxed and representation by attorney for the purpose of litigation became more commonly ac-

41. Patent 2, James 1, p. 12, mem. 15.

42. 7 SPEDDING, LETTERS AND LIFE OF FRANCIS BACON 168 (1879).

43. 3 NORTH, LIVES OF THE NORTHS 128 (1744).

44. "To win or lose." See generally Chroust, *The Legal Profession during the Middle Ages: The Emergence of the English Lawyer prior to 1400*, 31 NOTRE DAME LAW. 537, 585 (1956).

cepted. At approximately the same time the attorney, but not the pleader, came under the supervisionary control of the courts. He also became a man learned in the law who was permitted to plead his client's case in court. He was often a member of one of the Inns of Court or Inns of Chancery, where he received the same legal education as any barrister. Thus it seemed that the two branches of the English legal profession were about to merge. But in the course of the sixteenth and seventeenth centuries the bifurcation of the legal profession was once more revived along former lines, though essentially for different reasons. Beginning with the sixteenth century the attorney's work not only differed considerably from that performed by the serjeants and barristers, but there existed also vast differences in the education, mode of appointment, personnel, discipline, and treatment by the courts of either the attorneys or the barristers.[45] These differences were stressed by a number of regulations and orders issued by the courts, the legislature and the Inns of Court.

The differences in the type of work done by either the barrister or the attorney (or solicitor) in the main were the following: The activities of the attorney were predominantly of a technical-practical and often clerical nature. He would draft documents of all sorts, have judgements executed, pay the various fees or costs of proceedings, take the appropriate steps in an action at the proper time, and determine the forms of action or pleading. In short, he was primarily concerned with setting into motion the technical machinery of the law, and with keeping it in motion. The barrister, being primarily an advocate was mainly concerned with argumentative litigation and, hence, with the principles underlying the rules of law. He studied the Year Books and the arguments of pleas recorded there. In the earlier common law, when the outcome of a trial depended greatly on highly technical pleas by counsel, the specialized work of the attorney and the loftier activities of the barrister or serjeant were fairly well integrated. The younger barristers often did the work of the attorney and thus learned the technical intricacies of the legal process, and the older and more experienced attorneys frequently pleaded their clients' cases in court.

When during the sixteenth and the seventeenth centuries the attorney began to concentrate on the technical part of legal practice by monopolizing the personal contacts with the clerks of the court and the clients, the division of work between attorney and barrister became more pronounced. Since the work of the barrister grew more involved and, hence, demanded more of his time and his attention, he was compelled to relinquish the technical aspects of his profession and, incidentally, to neglect a thorough training in this facet of his calling to the detriment of his practice. He also lost the oppor-

45. These differences were made official by a number of regulations issued by the legislature, the courts and the Inns of Court.

tunity of dealing directly with clients. "If young gentlemen will ever think to secure a practice to themselves," Roger North observed at that time, "they must . . . be mechanics and operators in the law as well as students and pleaders. Mere speculative law will help very few. . . ."[46]

This division of labor between the attorney and the barrister already became noticeable during the reign of Elizabeth I and was almost complete by the middle of the seventeenth century. In earlier days, that is, before written pleadings had been introduced, the pleader had close contact with his client. "He stood by the side" of the litigant and said what his client (or his client's attorney) wanted him to say. But with the introduction of written pleadings this situation changed radically. The attorney, on the client's instruction, now prepared the written pleadings, and at this stage the barrister was consulted only when legal difficulties arose. But the attorney alone could determine this and it was he, and not the client, who called in the barrister. The barrister, in turn, argued the case on the basis of the pleadings or "brief" prepared by the attorney and on the facts communicated to him by the attorney. He might actually never meet the client in person, and he could not sue him for his fee.[47] During the seventeenth century this division of labor was not a matter of regulation, but rather a rule of professional etiquette. "Attorneys at law," Coke observed, ". . . have *officium laboris* in following the advice of the learned and dispatching matter of course and experience."[48] And Lord Campbell maintained: "for a long time the attorney only sued out of process and did what was necessary in the offices of the Court for bringing the cause to trial and for having execution on the judgment."[49] In the year 1614, the Benchers of the Inns of Court asserted that "there ought always to be preserved a difference between a counsellor at law, which is the principal person next to the serjeants and judges in the administration of justice, and attorneys and solicitors which are but ministerial persons of an inferior nature."[50] This statement was repeated in 1631,[51] and in 1666 the attorneys were called "immaterial persons of an inferior nature."[52]

Important differences in the education of the attorney and of

46. 3 NORTH, LIVES OF THE NORTHS 89, 139 (1744).

47. See *e.g.* Bradford v. Woodhouse, Cro. Jac. 520, 79 Eng. Rep. 445 (K.B. 1619); Sands v. Trevilian, Cro. Car. 107, 79 Eng. Rep. 695 (K.B. 1628). This rule, which was first applied in the Court of Chancery, may go back to Roman practices. See *Chroust, The Legal Profession in Ancient Imperial Rome,* 30 NOTRE DAME LAW. 521 (1955).

48. Quoted in CHRISTIAN, A SHORT HISTORY OF SOLICITORS 87 (1896).

49. DOE, ON THE DEMISE OF BENNETT *v.* HALE AND DAVIES, 15 Q.B. 171, 185, 117 Eng. Rep. 423, 429 (1850).

50. DUGDALE, ORIGINES JUDICIALES 317 (3d ed. 1680). See also 2 Inner Temple Records 84.

51. DUGDALE, *op. cit. supra* note 50 at 320.

52. *Id.* at 322.

the barrister had also arisen. The barrister received his legal training in the Inns of Court where he attended the official Readings, Moots and discussions, while the attorney after his exclusion from the Inns of Court, served a kind of apprenticeship under the guidance of an experienced practitioner where he became acquainted with the practical technicalities, forms and processes of his profession. Indeed, it became a requirement for admission to practice that he serve five years as a clerk to an established attorney, barrister or judge. In addition, the attorney studied such technical books as the *Attourney's Academy,*[53] *The Practick Part of the Law,*[54] *The Compleat Solicitor,*[55] or the *Practicing Attorney.*[56] Since, as a rule, he no longer argued a case in court, he was no longer interested in the underlying principles of the common law. The barrister, on the other hand, aside from his studies and residence at one of the Inns of Court, prepared himself to plead and argue legal points successfully. Hence, he was more concerned with legal principles, rules, doctrines and theories as they were expressed in recent as well as older decisions. His primary sources of information, therefore, were the Year Books and the Statutes. He also stressed the art of discussion and reporting, as well as the techniques of examining witnesses and presenting facts.

There existed also sharp differences in the "appointment" of a barrister and of an attorney. The barrister was called to the Bar of his Inns; and the royal judges, wishing to retain control over the legal profession, permitted only those men to practice, and thus to enjoy a monopoly of audience in their courts, who had received the "call to the Bar" of their Inn.[57] Conversely, the attorney who had been barred from the Inns of Court since the middle of the sixteenth century, could not be admitted to the Bar. He was directly admitted by the judges of the court in which he intended to practice. This procedure had been established by the Royal Rescript of 1292, and was subsequently repeated by statute.[58]

In view of the differences in the education and "appointment" of the barrister and of the attorney, it is only natural that the personnel of each of these two branches of the legal profession should differ. The attorney was, first of all, an officer of the court, re-

53. THOMAS POWELL, THE ATTORNEY'S ACADEMY, OR THE MANNER AND FORM OF PROCEEDING PRACTICALLY UPON ANY SUITE, PLAINT, OR ACTION WHATSOEVER IN ANY COURT OF RECORD WHATSOEVER WITHIN THE KINGDOME . . .; WITH THE MODERNE AND MOST USUAL DEEDS OF THE OFFICERS AND MINISTERS OF SUCH COURT (1623).

54. THE PRACTICK PART OF THE LAW, SHEWING THE OFFICE OF AN ATTORNEY AND A GUIDE FOR SOLICITORS IN ALL THE COURTS OF WESTMINSTER (1678).

55. THE COMPLEAT SOLICITOR, ENTERING CLERK AND ATTORNEY (1668).

56. WILLIAM BOHUN, THE PRACTISING ATTORNEY, OR LAWYER'S OFFICE: CONTAINING THE BUSINESS OF AN ATTORNEY IN ALL ITS BRANCHES (2d ed. 1726).

57. See Chroust, *The Beginning, Flourishing and Decline of the Inns of Court: The Consolidation of the English Legal Profession after 1400,* 10 VAND. L. REV. 79, 112-114 (1956)

58. 4 Hen. 4, c. 18 (1403).

quested, by pain of disbarment, to be in constant attendance at the court to which he had become attached. His professional activities brought him in close contact with the clerical staffs of the court, and in many instances he could hardly be distinguished from a clerk. Generally, the attorney also came from a different social and economic stratum than the barrister. He or his parents rarely could afford the expense of a legal education in one of the Inns of Court. Consequently he was often looked down upon by his more fortunate brethren of the Bar as an "immaterial person of an inferior nature."[59]

The barrister, on the other hand, only occasionally came in contact with the clerical or ministerial aspect of the law or with the clerical staffs of the courts. He was usually the scion of the more prosperous and more influential families in the realm who could well afford to send their sons to the expensive Inns. The intellectual and social training he received there gave him a decided professional and social advantage over the average attorney. Through his Inn he came in contact with the leading personages of the realm, including the royal family. Most important, it was through the Inns that the barrister could gain an admission to the bar and to the most exalted ranks of the legal profession such as the Order of the Coif to which the serjeants and royal judges belonged.[60]

Because of the manner in which he was admitted to practice, the attorney was under the constant disciplinary control of the court. Already the Royal Rescript of 1292 and the statute of 1403 had given the courts complete supervision of all attorneys. Subsequent court orders and statutes made this control even more stringent and soon the many efforts to discipline and keep down attorneys amounted to a deliberate policy of restriction and oppression. The smallest infraction of a regulation by an attorney was severely punished. In 1605 an Act was passed to reform the "Multitudes and Misdemeanors of Attorneys and Solicitors at Law and to avoid unnecessary Suits and Charges in Law."[61] It was provided, among other matters, that an attorney must render detailed accounts to his clients for any and all disbursements made by him on his client's behalf. Any attorney who wilfully delayed his client's suit for his own gain, or who acted negligently or fraudulently or who demanded money to which he was not entitled, was to be "discharged" and stricken from the Roll of Attorneys. If an attorney failed to make an appearance to defend a writ, the plaintiff could sign a forjudger by which the defaulting attorney was struck from the Roll. If he evaded the payment of some fees on writs, he likewise was struck from the Roll and committed to the Fleet. The courts were especially severe on any

59. DUGDALE, ORIGINES JUDICIALES 317, 320, 322 (3d ed. 1680).

60. See FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE, 2 ch. 49 (1775).

61. 3 James 1, c. 7 (1605).

conduct which even remotely savored of disrespect to itself or to barristers and serjeants.

Beginning in the fourteenth century, the Royal Bench was recruited from among the ranks of the serjeants. The Bench and Bar were all members of the Order of the Coif. This union of Bench and Bar controlled the whole system of legal admission and legal education. The barrister, although ranking below the serjeant, was under the benign supervision of the judges and serjeants, who saw to it that one day he would perform creditably in the courts. Judges, serjeants and barristers were closely welded together by the strong ties of identical education, interests and pursuits as well as by friendly personal association. The natural result was that the barristers and serjeants were generally treated with consideration by the judges. Not being an officer of the court, the barrister was much less under the control of the courts than the less fortunate attorney. His Inn, to be sure, continued to maintain some disciplinary supervision over him — he could be disbarred either by the Benchers of his Inn or by the courts for unprofessional conduct,[62] and, in some extreme instances, for professional incompetence — but there existed no particular statute during the sixteenth and seventeenth centuries regulating the barrister. The attorney, by the rather harsh treatment which he received from the courts (and even from the clerks), was constantly reminded that he was subject to their merciless discipline which at times bordered on sheer pettiness. If the attorney departed only slightly from the proper course of conduct, there was but one punishment, he was simply stricken from the Roll of Attorneys.[63] Attorneys have never been the favorites of the English Bench. They were, as Blackstone observed, "peculiarly subject to the censure and animadversion of the judges." Lord Bramwell hoped that he would see the day when a motion could be carried to show cause why a solicitor or attorney should not be hanged solely because he was a solicitor or attorney. To denounce attorneys and solicitors was long a favored sport of the courts; and the occupation of attorney was frequently considered to be almost necessarily disreputable. Some judges went so far as to encourage this universal prejudice,[64] and throughout the seventeenth and eighteenth centuries both Bench and Bar always spoke of the attorney with undisguised disdain. As a result the attorneys had scant chance of receiving justice in the courts.[65]

62. Boorman's Case, March N.R. 177, 82 Eng. Rep. 464 (K.B. 1642).

63. See, *e.g.*, Jerome's Case, Cro. Car. 74, 79 Eng. Rep. 665 (K.B. 1628). The luckless Jerome was also thrown physically over the spiked bar and committed "to the Fleet," that is, imprisoned.

64. 3 CAMPBELL, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 83 (1857). See also the suspension of an attorney called Lawless. *Id.* at 84.

65. See the several instances cited in CHRISTIAN, A SHORT HISTORY OF SOLICITORS 159-165 (1896).

About the middle of the sixteenth century the Inns of Court began to exclude practicing attorneys[66] and relegate them to the Inns of Chancery.[67] Originally, this policy, which was intermittently pursued by the Privy Council, the judges, and the Benchers of the Inns, did not affect students who intended to become attorneys. Some of the orders of exclusion failed to meet with compliance for one reason or another. It happened that practicing attorneys at times were still admitted, provided they conformed to the educational requirements of the Inns.[68] Substantially the same orders were issued by the Privy Council and by the Inns during the seventeenth century.[69] In 1653 the Benchers of Lincoln's Inn resolved that "noe atturney, clerke, or common sollicitor shall att any tyme hereafter bee called to the bare. . . ."[70] After the Restoration the previous orders were simply repeated.[71] But in spite of these orders practicing attorneys were still admitted by leave of the Benchers,[72] although they were denied the "call to the Bar." By the end of the eighteenth century the policy of excluding practicing attorneys from call to the Bar was fairly well established. When the courts occasionally issued conflicting orders to the effect that all attorneys must, as a condition of their admission to practice, be members of an Inn of Court or Inn of Chancery,[73] this meant only that they had to have a regular and registered business address there, in order to be reached by either the courts or by clients.[74] Many complaints had been made about the large number of "vagabond attorneys" whose addresses were un-

66. See generally, Belott, *The Exclusion of Attorneys from the Inns of Court,* 26 L.Q. REV. 137 (1910).

67. The first recorded order for the exclusion of practicing attorneys from the Inns of Court is that of the Middle Temple of 1555. 1 MIDDLE TEMPLE RECORDS 104. In 1556 Lincoln's Inn (1 THE BLACK BOOKS 315), and in 1557 the Inner Temple followed suit. It will be noticed, however, that these orders were qualified declarations which probably had been prompted by the royal judges. The judges, it seems, disapproved of the custom of attorneys having chambers and keeping commons in the Inns.

68. In 1570, for instance, it was ordered at Lincoln's Inn that a certain Mr. Lodge should be called to the Bar provided he ceased within the year to practice as an attorney. 1 THE BLACK BOOKS 372.

69. See, *e.g.,* 2 INNER TEMPLE RECORDS 58, 74, 249; 2 THE BLACK BOOKS (Lincoln's Inn) 326, 455; GRAY'S INN PENSION BOOK 296; 2 MIDDLE TEMPLE RECORDS 836; 3 MIDDLE TEMPLE RECORDS 1097.

70. 2 THE BLACK BOOKS 400; 3 THE BLACK BOOKS 126. This latter order was issued in 1679 by Lincoln's Inn.

71. See *e.g.,* 3 INNER TEMPLE RECORDS 30.

72. 3 James 1, c. 7 (1605). See also 3 James 1, c. 23 (1605) — During the seventeenth century the courts repeatedly ordered attorneys (and solicitors) to be admitted members of the Inns of Court or Inns of Chancery in order to acquire "better management of the business of law." PEACOCK, RULES AND ORDERS IN THE COURT OF THE KING'S BENCH 97 (1811). A further reason for this order was that attorneys might be found when their services were needed or when process was to be served on them. It appears, however, that the judges relied upon the Benchers to keep practicing attorneys out of the Inns of Court and thus compel them to enter the Inns of Chancery.

73. PEACOCK, RULES AND ORDERS IN THE COURT OF THE KING'S BENCH 19, 97 (1811).

74. *Id.* at 19.

known, thus making it impossible to serve process. But, the courts could not compel the Inns of Court to admit attorneys to residence. If, by the action of the Benchers, an attorney was prevented from settling in one of the Inns of Court, he was, according to the order of 1704, "to take chambers or dwellings in some convenient place and leave Notice with the Butler where his chambers or habitations were, under pain of being put out of the Roll of Attorneys."[75] Finally, by the rule of the King's Bench,[76] a remedy for "vagabondage" was devised: the masters of the court were required to prepare an alphabetical list in which every attorney practicing within ten miles of London or Westminster was to enter his name and place of abode, or the place where he might be served with process. This list was open for general inspection.

The exclusion of the practicing attorneys and solicitors from the Inns of Court also deprived them of the benefit of a professional organization which could exercise some effective control over them and, at the same time, protect their professional interests. This exclusion was also to the disadvantage of the attorney's clients in that it denied them the safeguards which the discipline and supervision of a close knit organization can provide. While the Inns of Court supplied the place of a "trade guild" for the regulation of the barristers, the Inns of Chancery (to which the attorneys and solicitors were relegated) exercised no such supervision.[77] There is even some evidence that attorneys seem not to have been allowed to remain in peace at the Inns of Chancery. The records of Barnard's Inn contain an order made in 1629 for a "Mr. Harvey, late student of that house, to give up his chambers, as he practiced as an attorney."[78] The disciplinary power of the judges, on the whole, likewise proved to be ineffective.[79] To remedy this situation, the "Society of Gentlemen Practisers in the Courts of Law and Equity," the forerunner of the present day Law Society, was founded during the early part of the eighteenth century. This Society apparently held its first recorded meeting February 12, 1739, although it may be presumed that it was founded at an earlier date. According to the *Spectator,* it met to discuss cases and compare opinions. It is also reported that "the Meeting unanimously declared its abhorrence of all male (malefide) and unfair practices, and that it would do its utmost to detect and discountenance the same."[80] A committee was appointed to consider how this might best be done. Two years later the committee was directed to "take into consideration any matters relating to the bene-

75. *Id.* at 97.
76. 8 Geo. 3, (1767).
77. CHRISTIAN, A SHORT HISTORY OF SOLICITORS 60 (1896).
78. *Id.* at 89.
79. *Id.* at 60.
80. *Id.* at 121.

fit of suitors and the honour of the profession."[81] The Society, which seems to have been disbanded in 1810, also looked after and defended the interests of the profession.

For over one hundred years after the statute of 1605[82] the attorneys escaped further regulation by Parliament. The courts, however, found frequent occasion to issue additional orders for the supervision and harassment of the profession. In 1616 it was provided that the number of attorneys admitted to practice in each court should be reviewed and, if necessary, reduced by the removal of the less competent.[83] In 1633 the Court of Common Pleas ordered that prior to his admission to practice every applicant for attorneyship must have served six years as a clerk of an attorney or, in lieu of this, prove that he had received some other acceptable legal training.[84] In 1654 the courts in Westminster ruled that no one could be admitted as an attorney unless he had served five years as a clerk to a judge, serjeant, barrister, attorney, clerk, or some other officer of the court.[85] Also, he was required to submit to an examination as to his ability and honesty. For this purpose the courts were to appoint every year a board of examiners composed of twelve or more practitioners. This new policy of admission was quite similar to the present English system.

Despite the harsh treatment from Parliament and the courts, the attorneys managed to gain certain privileges for themselves. In 1367 Parliament released John de Codryngton, an attorney, from military service, because this would work a great hardship on him and his clients.[86] Soon the courts conceded "that neither the Attorneys nor the Clerks of the Court should be pressed for Soldiers, not elected to any other office *sine voluntate sua* but ought to attend the service of the court."[87] They could not be forced to be church wardens, overseers, or tithingmen, and they could be sued only in the court to which they had been admitted to practice.

In 1729 an Act was passed for "The Better Regulation of Attorneys and Solicitors," the first really effective and comprehensive regulation of the profession.[88] This Act which reflected to some extent the gradual rise of the attorneys and solicitors in the public esteem, provided that no one should practice law as an attorney or common solicitor unless he had taken an oath. The judges were to

81. *Ibid.*

82. 3 James 1, chs. 5, 7, 23 (1605).

83. CHRISTIAN, A SHORT HISTORY OF SOLICITORS 80 (1896).

84. *Ibid.*

85. CUNNINGHAM, THE HISTORY AND ANTIQUITIES OF THE FOUR INNS OF COURT . . . , extracted from DUGDALE, ORIGINES JUDICIALES 87 (3d ed. 1680). See also CHRISTIAN *op. cit. supra* note 83 at 81.

86. 2 Rolls of Parliament 96.

87. George Venable's Case, Cro. Car. 11, 79 Eng. Rep. 615 (1625).

88. 3 Geo. 2, c. 23 (1729).

examine according to their discretion the fitness and ability of the person seeking admission. Any candidate must have been bound by contract to serve as a clerk for five years prior to his application and must have served accordingly. Hence he was called an "Articled Clerk" after the Articles of Clerkship which were part of the Act of 1729. From these articled clerks arose a distinct class of law clerks who enjoyed a somewhat higher status than the ordinary law clerks. Any sworn attorney was entitled to admission as a solicitor also, and the restriction of attorneys to that one court in which they had been sworn, was removed. They were to endorse every writ issued by them and, as a further protection of clients, the provision of 1605[89] concerning the remuneration of attorneys, was re-enacted and enlarged. The Act of 1739[90] extended the coverage and also added various small amendments to the Act of 1729. In 1791 the Court of the King's Bench, in cooperation with the Court of Common Pleas, laid down some further rules for attorneys and solicitors which supplemented the Acts of 1729 and 1739.[91] Every person wishing to be admitted to attorneyship had to have a notice exhibited in the office of the court for one term. Objections could be raised against his admission for the lack of qualifications, character, or for some other reason.[92] In 1793, Lord Kenyon, by no means a friend of attorneys and solicitors, stated that he believed that "the majority of the attorneys were honourable men, and of service to the community."[93]

Near the close of the eighteenth century the inferior and ministerial nature of attorneyship ended. At approximately the same time the relations of the attorney and barrister (or serjeant) to the client were stabilized. The rule which requires that the instructions for the barrister should come from the attorney rather than directly from the client probably dates back to the eighteenth century. But it is safe to assume that this rule merely defined a practice which had been observed for some time.[94] Originally, clients had direct access to the serjeant and barrister.[95] But soon the attorney began giving legal advice to parties, and their advice frequently was heeded without resort to the professional opinion of a serjeant or barrister. By the eighteenth century, because of what Roger North called the "supercilious neglect" by the barristers and serjeants of the more laborious technical aspects of their work,[96] the attorneys regularly

89. 3 James 1, c. 7 (1605).

90. 12 Geo., 2 c. 39 (1739).

91. CHRISTIAN, *op. cit. supra* note 83 at 167.

92. 61 GENTLEMAN'S MAGAZINE 2, 771 (1791).

93. CHRISTIAN, *op. cit. supra* note 83 at 168.

94. See in general, DOE, ON THE DEMISE ON BENNETT V. HALE AND DAVIS, 15 Q.B. 171, 117 Eng. Rep. 423 (1850).

95. *Ibid.*

96. NORTH, DISCOURSE ON THE STUDY OF THE LAW 40 (1824).

advised clients as well as initiated and conducted legal proceedings. Hence the present-day relationship of attorney (or solicitor) to the client, to a large extent is the result of the barrister's defection or dereliction.

This new relationship between attorney and client to the exclusion of the barrister was first defended on the ground that it increased the aloof dignity of the serjeant and barrister. Subsequently, it was justified with the observation that by avoiding all contact with the client, the barrister was more likely to form an impersonal, comprehensive, and balanced opinion of the case than the attorney or solicitor who was too closely associated with the preliminary steps of the case and too personally acquainted with the client to retain an objective and disinterested view. In *Doe, on the demise of Bennett v. Hale and Davis,*[97] Lord Campbell declared in 1850:

> There certainly has been an understanding in the profession that a barrister ought not to accept a brief in a civil suit, except from an attorney; and I believe that it is for the benefit of the suitors, and for the satisfactory administration of justice, that this understanding has been generally acted upon. But we are of the opinion that there is no rule of law by which it can be enforced. . . . The advantage to be derived from subdividing the business of conducting a suit, and having two orders in the profession of the law . . . became more and more felt. . . . I highly approve of the demarcation . . . and I believe the intervention of the attorney between counsel and the party has greatly contributed, not only to the dignity of the Bar, but to the improvement of English jurisprudence.

In other words, it was felt that it would be better that the attorneys who form the administrative branch of the profession should prepare the case out of court which the barristers would argue in court.

As late as 1846, the Court of Common Pleas held that there existed no binding rule of law prohibiting the barrister from accepting a brief directly from a client instead of from an attorney or solicitor. But the rule that the barrister must take his instructions only from an attorney or solicitor had been insisted on by the Society of Gentlemen Practicers and had become settled usage during the eighteenth century. The barrister knew that if he did not conform to this usage, he would get no further briefs from attorneys or solicitors.

The relations between these two branches were further adjusted in the course of the nineteenth and twentieth centuries, primarily with the help of their respective professional organizations such as The Law Society, the Inns of Court and the General Council of the Bar of England and Wales.

The designation "attorney" or "attorney-at-law," after a long and troubled career, officially disappeared from the English legal system in the year 1874. The fusion of law and equity affected by the Judicature Act of 1873 was accompanied by the merger of the

97. See note 49 *supra.*

attorney and the solicitor. Despite some violent protests in favor of retaining "the good old Saxon word, attorney," the latter was abolished. Beginning November 2, 1874, all members of the profession of attorneys and solicitors were to be referred to as solicitors.[98]

The Solicitor

The solicitor, who transacted in the equity courts much of the same type of work done by the attorney in the common-law courts, is not mentioned in the earlier records. Equity jurisdiction was then considered "extraordinary jurisdiction," and it was in connection with equity jurisdiction rather than common-law jurisdiction that the solicitor made his first appearance. For a long time he was not even regarded as being a member of the legal profession, and he was considered inferior in rank to the attorney. As a matter of fact, he had no strictly defined legal or professional status. Unlike the attorney, he could not bind his client, nor was he appointed *ad lucrandum vel perdendum.* In the strict sense of the term, he was not an agent, but rather a person originally appointed to "solicit" or "expedite" causes which for some reason were held up in the chambers of the masters in equity. And finally, he was not compelled, like the attorney, to be duly qualified, to have his name entered into the Roll, or to practice under the strict supervision of the court. Briefly, the solicitor originally was a person who urged, prompted, solicited, instigated, or conducted business on behalf of other persons without being an attorney or a barrister. In the year 1589 the solicitors were defined as persons who, "being learned in the Lawes, and informed of their Masters cause, doe informe and instruct the Counselors in the same."[99]

The attorney could only practice in the particular court to which he had been admitted. At first the King's Bench and the Court of Common Pleas each had its own Roll of Attorneys, while the Exchequer had a staff of clerks who acted as attorneys. Soon, however, one and the same attorney began to practice in all the common-law courts,[100] until an order of 1564 again restricted each attorney to just one court.[101] But by what seems to have been an old custom, he was allowed to represent his client as a solicitor in other courts.[102] This fact alone not only helped the growth of a class of professional or common solicitors, but it was probably the main reason why the

98. The exact title is "Solicitor of the Supreme Court."

99. Thomas Smith, De Republica Anglorum 153 (Alston, ed.) This work was first published in 1583.

100. See also Doe *op. cit. supra* note 94.

101. The Practick Part of the Law 246, 301 (1678). See also *Praxis Utriusque Banci* 24 (1674).

102. See, *e.g.,* Thursby v. Warren, Cro. Car. 159, 160, 79 Eng. Rep. 738, 739 (K.B. 1629). ". . . an attorney may very well be a solicitor for his client in other courts, as well as in the court where he is attorney. . . ." *Ibid.*

solicitor ultimately became amalgamated with the attorney. The original limitations imposed upon the attorney's professional activities were to a large extent responsible for the emergence of a class of common solicitors. In addition, the centralization of the administration of justice at Westminster was a further cause for the development of the solicitor. A litigant living in the country and represented by a local attorney, might need an agent at Westminster to keep him informed of the progress of his case. This could be done adequately by the solicitor.

The activities of the attorney were restricted by certain technical rules as to his appointment, admission to practice, and functions. Since it frequently happened that he required certain services not directly connected with the litigation or the preparation of litigation, he often needed an assistant, agent, or "messenger." The *Compleat Solicitor* of 1668 mentions that the earliest solicitor was "the Leader to Attorney and the Intelligence to the Client."[103] Around the year 1600 the various orders issued by the courts began to make a distinction between the solicitor who only served a private client, and the solicitor who was an agent for the attorney.[104] The latter was called common solicitor, and it was his admission to practice which the courts wished to regulate and supervise.

By the end of the seventeenth century the common solicitor was qualified to be admitted to regular practice after he had continuously practiced as a solicitor for a private party for at least five years. The *Compleat Solicitor* points out that to be a solicitor is "a Work of no small difficulty for any one" and that he had "to be experienced in the Rules of Practice and Proceedings of the Court where his cause depends."[105] A later edition of the same work (1683) stated that:

> [T]o manage the causes both in Equity and at Common Law with Skill and Exactness will require the Genius and Qualification of a Compleat Solicitor, who should be a person not only reasonably well grounded in the Common Statute Laws of this Kingdom, but [also] . . . well acquainted with the practice of almost every particular court in *England.* [The Compleat Solicitor] ought to have a good natural wit [which] must be refined by Education. [This] education must be perfected by learning and experience. . . . Lest learning should too much elate him it must be balanced by discretion. And . . . to manifest all those former parts, it is requisite that he have a voluble and free tongue to utter and declare his concepts.[106]

The emergence and steady development of new courts, new jurisdictions and new quasi-judicial agencies in England throughout the

103. THE COMPLEAT SOLICITOR ENTERING CLERK AND ATTORNEY, Preface (1668).

104. This is brought out in Thursby v. Warren, Cro. Car. 159, 79 Eng. Rep. 738 (K.B. 1629).

105. THE COMPLEAT SOLICITOR ENTERING CLERK AND ATTORNEY, Preface (1668).

106. THE COMPLEAT SOLICITOR, Preface (1683 ed.).

sixteenth and seventeenth centuries, in the final analysis, stimulated the growth of a class of professional or common solicitors. This would also explain why the solicitors were principally connected with the Court of Chancery, the Star Chamber, and the Court of Requests. In the beginning representation before these courts was provided by their official clerical staffs; the litigant had to retain one of these clerks and, hence, was at their mercy. In the common-law courts, on the other hand, litigants had always enjoyed the right of appointing attorneys of their own choice. Although officers of the court, these attorneys were independent professional men. Furthermore, the attorneys who practiced in the common-law courts, as a rule, were not admitted to attorneyship in these new courts and had to be represented there by agents or solicitors. It is not surprising then that the solocitor became associated with these new courts. The special kind of work required there, to a large extent, was responsible for the advance of the solicitor from a mere servant of a private party or personal agent of an attorney to the rank and status of a professional man.

The clerical work in the Court of Chancery, like that in the Court of Star Chamber and Court of Requests, was carried on in a haphazard and dilatory fashion. Hence, some people had to expedite and "solicit" causes there. These solicitors were really what the earliest attorneys once had been, namely, private servants tending someone's business. It was clearly the rapid increase of business in the new courts or governmental agencies which stimulated and even necessitated the growth of the class of solicitors, especially after the practice of permitting the clerks of these courts to act as attorneys had been abandoned. Hence, "private agents" not connected with these clerical staffs had to be admitted to do business before these courts: "[I]n our age," William Hudson writes, "there are stepped up a new sort of people called solicitors, unknown to the records of the law, who, like the grasshoppers in Egypt, devour the whole land. . . . I mean those which are common solicitors of causes . . . [who] are the retainers of causes and devourers of men's estates by contention and prolonging suits to make them without end."[108]

During the fifteenth century, when the rise of the Court of Chancery was an accomplished fact, the common solicitors made their appearance. Only a century later they were officially recognized as a distinct class of legal practitioners (i.e. "common solicitors") with a professional status of their own alongside that of the attorney.

107. The members of the clerical staffs of the Common Law Courts (and the Court of Chancery) were also permitted to act as attorneys. But by the middle of the seventeenth century this practice was forbidden.

108. HUDSON, TREATISE OF THE COURT OF STAR CHAMBER (1792), quoted in 6 HOLDSWORTH, A HISTORY OF ENGLISH LAW 454 (1937). See also COOK, ENGLISH LAW 44 (1651).

This is borne out by the order of the Inner Temple of 1574, issued by the judges and the Privy Council, that practicing solicitors as well as practicing attorneys should be expelled from the Inn.[109] By 1605 the solicitors already were sufficiently numerous and prominent to share in the general animadversion against attorneys. They were classed together with the attorneys and subjected to substantially the same regulations,[110] although apparently they were still regarded as being inferior to the attorneys.[111] The attorney, we are told, had to be brought up in the King's courts, while the sole requirement made of the solicitor was that he must be known "to be a man of sufficient and honest disposition."[112] When the Star Chamber and the Court of Requests passed out of existence, the solicitor became connected mainly with the Court of Chancery. Naturally, he was also to be found in the common-law courts during the sixteenth century, although to a lesser degree.

By the middle of the seventeenth century, the solicitors had come to be regarded as a profession on a footing equivalent to that occupied by the attorney. No distinction was made between attorneys and solicitors in the Order of 1614.[113] For over one hundred years after that, the solicitors escaped further regulation by Parliament, although the courts continued to issue regulatory orders. In 1654 it was provided that common solicitors should not be admitted to practice unless they were also attorneys. But this order contained an important qualification; it was not to apply to "the management of evidence at a trial, to private solicitors, or to corporations, or to servants acting for their masters."[114] This rule, however, was never enforced and, probably, could never have been enforced.[115]

After the official recognition of the solicitor, the complete amalgamation of the attorney and the solicitor was only a matter of time, although differences of qualification were to remain for awhile. The attorney began to be admitted to practice in all the common-law courts, and even if he failed to gain admission to another court, he could still act as a solicitor in the court in which he was not admitted as an attorney. Conversely, the common solicitor, after having practiced for five years, could be admitted as a regular attorney. The Act of 1729[116] further speeded up this process of integration by allowing any attorney or common solicitor to practice in another court,

109. 1 INNER TEMPLE RECORDS 276. See also, 1 MIDDLE TEMPLE RECORDS 200.

110. 3 James 1, c. 7 (1605).

111. THE COMPLEAT SOLICITOR, Preface (1683).

112. *Ibid.*

113. 2 INNER TEMPLE RECORDS 84.

114. CUNNINGHAM, THE HISTORY AND ANTIQUITIES OF THE FOUR INNS OF COURT . . . extracted from DUGDALE (1780), quoted in CHRISTIAN, *op. cit. supra* note 83 at 80.

115. CHRISTIAN, *op. cit. supra* note 83 at 81.

116. 2 Geo. 2, c. 23 (1729).

provided he could secure the written consent of an attorney of that court.[117] It also stipulated that any attorney could be admitted as a solicitor, and that a solicitor admitted in one Court of Equity could also be admitted to another Court of Equity. In 1750 it was provided that every common solicitor could be an attorney.[118] And both solicitors and attorneys could become members of the Society of Gentlemen Practicers in the Courts of Law and Equity. Thus, by the middle of the eighteenth century the attorneys and solicitors, for all practical purposes, had become one single branch of the English legal profession.

One of the chief complaints about solicitors (and attorneys) was that they were too easily admitted to practice, and that many persons practiced the profession without having been properly admitted, among them persons completely ignorant of the law and even criminals. Hence, beginning with the eighteenth century the need for more stringent regulations of the solicitors and attorneys had become obvious. In 1729 Parliament passed a comprehensive Act prescribing the qualifications for admission of solicitors and attorneys, the exclusion of unqualified persons from practice, and provisions as to costs and fees.[119] To assume a more efficient control over them, the King's Bench in 1768 introduced a list of names and addresses of all solicitors and attorneys practicing within ten miles of Westminster. But it was not until later that the registration of annual certificates, the establishment of a system by which every country lawyer had to have an agent in London, and the rule that London solicitors must have a permanent address within three miles of the law courts for service of process, were instituted.

In the year 1857, the termination of probate and matrimonial jurisdiction of the ecclesiastical courts, combined with the decline of their other activities and functions, extinguished the class of proctors as a separate branch of the legal profession. Most proctors joined the ranks of the solicitors. Finally, the Judicature Act of 1873 merged the whole English legal profession, other than the Bar, in one single body which at that time received the official designation of "Solicitors of the Supreme Court."

The present-day solicitor,[120] who as has been shown, is actually a combination of several formerly distinct branches of the English legal profession, still undertakes the kind of work which, by tradi-

117. *Id.* at para. 10.

118. *Id.* at para. 15.

119. 8 Geo. 2, c. 23 (1729).

120. The more recent regulations concerning solicitors are: The Solicitors Act of 1932, 22 & 23 Geo. 5, c. 37; The Solicitors Act of 1933, 23 & 24 Geo. 5, c. 24; The Solicitors Act of 1934, 24 & 25 Geo. 5, c. 45; The Solicitors Act of 1936, 26 Geo. 5 & 1 Edw. 8, c. 35; The Solicitors (Disciplinary Committee) Act of 1939, 2 & 3 Geo. 6, c. 110; The Solicitors (Emergency Provisions) Act of 1940, 3 & 4 Geo. 6, c. 15; The Solicitors Act of 1941, 4 & 5 Geo. 6, c. 46; The Solicitors Public Notaries Act of 1949, 12, 13 & 14 Geo. 6, c. 21.

tion, is open to his branch of the profession. His right to be heard in court is limited mainly to appearances before inferior courts, such as the County Courts or Petty Sessions. He may appear in procedural matters before the judge or the master sitting "in chambers." Having a nearly complete practical monopoly of direct dealing with lay clients, he conducts all the preliminaries leading to litigation and he has a large share in the preparation of legal documents of a non-litigious nature. Except in those instances where the expert opinion of counsel (barrister) is required as a matter of formal necessity, the solicitor is the sole or, to be more exact, the preferred legal advisor in all non-litigious legal issues. This is only natural in a period where the dominant work of the lawyer has decisively changed from litigious advocacy to non-litigious counselling, managing and planning. Hence, the solicitor is almost invariably consulted in all important matters. He is not only the trusted advisor in delicate family affairs, and a leading figure in business consultations, negotiations and transactions, but he also plays a decisive advisory role on industrial boards and in policy meetings of the great industrial enterprises where he settles legal questions that may arise. In the eyes of the general public he has become the foremost representative and expounder of the law in England — much more than the barrister — especially since, unlike the barrister, he can be found in every city and almost in every village throughout the realm.

The over-concentration of courts and, consequently, of litigation in London, creates one of the most serious problems with which the English legal profession in its present-day organization is faced. Whenever an action is brought in one of the superior courts (the High Court, the Court of Appeal, the House of Lords or the Judicial Committee of the Privy Council) between parties employing solicitors who practice in the counties, the county solicitor must appoint a London agent who will brief a London counsel or barrister. The London agent will then pilot the action through the courts. Conversely, if the action is tried at Assizes, the county solicitor must brief a London barrister who is travelling with the Assize.

Since the solicitor deals directly with the lay client on a strictly business-like basis, he can bring an action to recover his fees; and as his client's "agent" he can bind the client within the scope of his ostensible authority. He enjoys complete legal immunity in the lawful conduct of his client's affairs, although he is legally liable for any negligence in handling the client's business. Under no circumstances may he divulge, or be compelled to divulge, privileged communications which he has received from his client in the course of his professional engagement.

The solicitor is liable not only to the penalties of law for illegal conduct, but also to professional censure for deportment prejudicial to the reputation of his profession. The professional conduct of the

solicitor, which has been the topic of many Acts of Parliament, is largely controlled and supervised by The Law Society. Founded in 1823, this Society is the successor of the former Society of Gentlemen Practicers in the Courts of Law and Equity. Originally established as a joint stock company and later incorporated by Royal Charter, it was formed for the purpose of fostering "the exertions of a recognized body of practitioners anxious to cooperate in promoting every measure calculated to afford facilities for professional practice, to remedy abuses and to sustain the just claim of their branch of the profession to the respect of the community at large." The general purpose of The Law Society was subsequently restated: to promote "professional improvement" and to facilitate "the acquisition of legal knowledge." Membership is, and always has been, voluntary, but it is estimated that more than two-thirds of all solicitors are members.

The governing body of The Law Society is the Council, consisting of fifty practicing solicitors who are elected by the whole body of members of the Society for a period of about four years. At the head of the Council is the president and the vice-president, each elected for a term of one year without opportunity of being reelected. The Society assists members of the profession in many ways. It maintains an employment and partnership registry, supports a library, it answers inquiries on all professional matters, investigates complaints against solicitors, whether made by members of the profession or by the general public, presses charges against and even "prosecutes" before the Disciplinary Committee solicitors who have violated professional rules of conduct, reviews all impending legislation insofar as it has a bearing upon the profession, and, whenever possible, makes recommendations and constructive proposals to the Ministers of the Crown concerning new legislation and amendments to existing laws in general. Conversely, The Law Society is frequently consulted by the government on all matters touching upon the profession. The Society gives evidence before Royal Commissions and governmental agencies. And finally, it promotes good relations between the profession and the general public, including the press.

Although the profession of solicitor is largely regulated by statute, The Law Society, notwithstanding its voluntary and private nature, has been entrusted by Parliament with the powers and duties to supervise and control the profession. Hence the solicitor actually finds himself under the control of a dual authority. As an official of the court he can be disciplined and, in certain instances, struck from the Roll of Solicitors by the Master of the Rolls for professional misconduct. In addition, he is also subject to the disciplinary control of The Law Society, whose Discipline Committee has the power, subject to an appeal to the court, to strike him from the Roll of

Solicitors or to impose a less drastic penalty for minor offences, including a fine up to five hundred pounds. The Disciplinary Committee is a permanent board, created by statute, consisting of nine past or present members of the Council of The Law Society, appointed by the Master of the Rolls. It hears all complaints of unprofessional conduct. Any person may prefer charges before the Disciplinary Committee, but, as a rule, proceedings before the Committee are conducted by The Law Society itself. The Law Society also has complete discretion whether or not to issue a practicing certificate, and whether to issue such a certificate subject to certain conditions. In all these matters there is always an appeal to the Master of the Rolls. Very few of these appeals, however, have any chance of success.

Parliament has authorized The Law Society to make the present rules which are aimed at preventing advertising, profit sharing with unqualified persons, undercutting, and "ambulance chasing." Parliament has expressly directed the Society to issue stringent regulations dealing with the money accounts kept by solicitors. To insure that these particular regulations are faithfully observed, each practicing solicitor is required annually to submit to The Law Society a financial report signed by a public accountant. The Law Society may, at any time, whether upon complaint or otherwise, inspect a solicitor's books and accounts. It also maintains and administers the Compensation Fund, from which, at the discretion of the Council of the Society, grants are made for the purpose of compensating lay clients for losses sustained through the dishonesty of a solicitor. Each solicitor is required by statute to make a contribution to this fund when taking out his annual practicing certificate. Probably the most important function of the present-day Law Society is the administration of the Legal Aid and Advice Act of 1949, passed by the British Labor Government.[121]

Parliament, by statute, has also regulated the training and admission of solicitors. Barring a few exceptional cases, every candidate is required to serve five years "under articles" of clerkship (Articled Clerk) with a practicing solicitor. He must pass a preliminary examination in general education and an intermediate as well as a final examination in law. He is also expected to have a certain proficiency in accounting. Before entering upon his clerkship he must, by way of a personal interview, satisfy The Law Society as to his character and fitness. During this interview the candidate is reminded of the fact that he is about to enter a profession whose foremost duty it is to serve the public rather than his own financial interests. There is no appeal from The Law Society's decision on the candidate's admission.

The management of the examinations for prospective solicitors

121. 12 & 13 Geo. 6, c. 51 (1949).

has been entrusted by Parliament to The Law Society which is also empowered to make special regulations and to appoint the examiners subject to approval by the Lord Chancellor, the Lord Chief Justice and the Master of the Rolls. The intermediate law examination covers the general principles of the law of property, contracts, torts, constitutional law, trusts and accounting. The final examination is a series of practical tests of considerable difficulty. Before taking the final examination the candidate or Articled Clerk is required by statute to have attended a course of legal studies of one year's duration at a law school approved by The Law Society. The Society has its own law school in London. After having successfully met all these requirements, the candidate may apply to the Society for a certificate of practice; and only upon receipt of this certificate is he admitted to membership of his profession.

The remuneration of the solicitor for professional services is regulated partly by statute, partly by a scale of fees established by a special Committee consisting of the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of The Law Society and one provincial solicitor. For special purposes the Chief Land Registrar is added to this Committee. In the main there are two systems of charging fees: one is based on each item of work performed by the solicitor (*per diem* basis); the other, applicable to most transactions in real property, is based on the value or amount of the consideration involved. Special rules determine which system is to be applied in each individual case. But neither system takes into account the skill, reputation or ability of the solicitor employed. The solicitor may agree with his client on a higher fee than prescribed by statute, but he does so at the risk of having it disallowed or reduced by the courts on the complaint of the client. Solicitor's fees for litigation, as a rule, are fixed by rules of the court and are likewise subject to disallowance or reduction. Unlike the barrister, solicitors often enter into partnerships and specialize in a particular branch of the law.

At present there exists a strong tendency for the barrister and the solicitor to work in closer cooperation, thus bringing to an end the old and bitter rivalry between the two. After the Second World War, on the invitation of The General Council of the Bar (the professional organization of the barristers), The Law Society agreed to the establishment of a Standing Joint Committee of representatives of these two professional organizations for the purpose of coordinating their respective professional interests and duties. This Joint Committee one day might bring about a complete integration of the whole of the English legal profession.

The Conveyancer, Scrivener and Special Pleader

The division of labor which separated the attorney and the barrister failed to assign to either certain aspects of legal practice,

such as conveyancing and pleading. During the late Middle Ages the scribes employed by monasteries, grandees and large landowners drew up the conveyances needed in the management of estates. These scribes or lay conveyancers still existed during the sixteenth and even the early seventeenth century.[122] As the law of real property grew, the complexity, variety, and frequency of demands made on the lay conveyancers became ever greater and ever more professional, and soon conveyancing was taken over by regular legal practitioners,[123] although the scriveners, at least in the City of London, also acquired a share of this legal business.[124]

Conveyancing did not at once become the peculiar or exclusive activity of either the attorney or the barrister. It was practiced indiscriminately, not only by both branches of the legal profession, but also by any person, although it seems that the barristers, at least during the seventeenth century, inherited the main share. *The Practick Part of the Law,* a manual for practicing attorneys published in 1676, makes no mention of conveyancing. It seems that the early barristers, as a rule, drew up the more involved legal instruments of the time, and only when the barristers' practice had grown too large did they leave conveyancing and the searches connected with it to the attorneys. Hence the same motives which led the barrister to abandon to the attorney the technical aspects of litigation, induced him to discontinue conveyancing. This development is reflected in Roger North's observation: "Anciently . . . all conveyancing . . . was done by the lawyers [scil., the barristers]. Now [the early eighteenth century] the attorneys have the greatest share. . . ."[125] Attorneys could be found in nearly every part of the realm, while the barristers, dwelled in or near London and Westminster. Hence, the attorney was much more accessible than the barrister to prepare deeds and conveyances, or to construe a legal instrument. Contemporary law contained no special provision excluding any person from the practice of conveyancing. Sheppard bitterly complained about this situation:

> Considering withal the mischief arising everywhere by the rash adventures of sundry ignorant men that meddle so much in these weighty matters [scil., conveyancing] there being now almost in every parish an

122. These lay conveyancers probably used Littleton's Tenures (of which there existed more than seventy editions prior to 1628) and, more likely, the first book of Coke's INSTITUTES. Coke upon Littleton, as well as John Perkins, THE PROFITABLE BOOK (first published in Law French in 1530, and republished in English in 1641 and again in 1657). There also existed a number of small books which, usually under the title of *Carta Focdi,* contained selections of conveyances as well as short notes as to their proper use. Mention should also be made of Thomas Phayre's BOOK OF PRESIDENTES, published in 1543, and William West's SYMBOLEOGRAPHY, first published in 1590.

123. 1 NORTH, LIVES OF THE NORTHS 93 (1744).

124. Not until 44 Geo. 3, c. 98, par. 14 (1804), was conveyancing restricted to the legal profession, that is, to solicitors, attorneys, proctors, notaries and barristers.

125. 3 NORTH, LIVES OF THE NORTHS 139 (1744).

> unlearned yet confident . . . scrivener, or an ignorant vicar or it may be a blacksmith, carpenter or weaver . . . either to judge a conveyance, and . . . to determine the strength and goodness of a title or estate . . . or to make a conveyance to transfer the property of things . . . as the most learned and best counsellor of them all. . . .[126]

The 1726 edition of Bohun's *The Practicing Attorney or Lawyers Office* enumerates conveyancing as one of the four main divisions of the attorney's practice, while in 1778 Lord Mansfield regarded conveyancing as the business of both the attorney and the barrister. In the City of London, however, the scriveners, who were organized in one of the old Livery Companies of the City, strongly resisted the attempts of the barristers, attorneys, and conveyancers to take over this kind of legal practice. The London scriveners were organized in a guild under the title of "Common Scriveners or Writers of the Court Letter of the City of London."[127] This guild, which existed since the fourteenth century, was incorporated in 1617. The scriveners claimed a monopoly in the city itself and for a distance of three miles from it in the art of preparing all "documents, charters and deeds, and all other writings which by the Common Law or Custom of the Realm required to be sealed." Like any other professional guild, the guild of scriveners also provided for the education of its members by an apprenticeship of at least seven years. Beginning with the year 1390, each member had to take an oath not to draw up instruments dated long before or after the actual preparation; and not to make any deeds touching inheritance or any other "Deed of Great Charge" without the good advice and "Information of Consaile."[128]

On account of the many mischiefs caused by unskilled and unscrupulous persons who had managed to enter the ranks of the scriveners, it was ordered in 1440 that only approved and examined candidates could be admitted to scrivenery. In 1497 it was provided that every candidate must subject himself to an examination in English grammar. If he failed he was sent to a "grammar school." A number of scriveners, the order of 1497 stated, had been discovered who had not "their perfect Congruity of Grammar which is the Thing most necessary and expedient to every person exercising and using the Sayence [science] and Faculty of the said Mystery [scil., scrivenery]."[129] After the incorporation of the "Writers of the Court Letter of the City of London" in 1617, the requirements of 1390 and 1497 were repeated, and an oath was imposed by which each scrivener bound himself to be true and just in his office, that all deeds would be well and truly done, and that they had been read over be-

126. SHEPPARD, TOUCHSTONE, Preface (1641).

127. CHRISTIAN, *op. cit. supra* note 83 at 142.

128. *Ibid.*

129. *Id.* at 143.

fore being sealed.[130] Until the Act of 1729, many scriveners also acted as attorneys, commission agents, accountants, bankers, moneylenders, and translators — activities which exposed them to much censure.

During the Commonwealth, the attorneys began in earnest to compete with the scriveners in London, and after the Act of 1729, the formerly independent profession of scriveners practically ceased to exist. Confronted with professional extinction, in 1748 the scriveners appointed a committee which the following year made an appeal to the Common Council of London, pointing out that most of the attorneys were "foreigners," while the scriveners were freemen of the City. All attorneys wishing to practice scrivenery should be compelled to become members of the guild. In 1752 the Common Council acceded to this petition over the strong protest of the attorneys. The ensuing litigation between scriveners and attorneys lasted for eleven years; but the attorneys won in the end.

Conveyancers, like clerks, could become members of the Inns of Court,[131] at least until 1794, and still continue to practice their craft, provided they did not practice as attorneys.[132] But they could not be called to the Bar. Their admission to the Inns indicates that there existed, or was thought to exist, a certain affinity between the conveyancer and the barrister.

During the sixteenth century written pleadings were introduced to supersede the old oral pleadings. Under the new system the several pleadings were exchanged by the attorneys of the respective parties, and subsequently entered in the record by the clerk. Hence, there was hardly a chance to detect or correct a fatal error until it was too late. The steady growth of technical rules at common law and in equity had necessitated strictness as well as precision in the pleadings. This trend became more elaborate and rigid as time went on, and litigants could get redress only if they could put their pleadings into a form which had been prescribed by the mass of technical and detailed rules coming from all periods in the long history of English law. The rules of pleading and their strictest observance were often of greater importance in formulating a clear-cut issue than the material merits of the case. The decisive nature of these rules tended to exalt them beyond all reason; and it was not uncommon that a strong case was lost simply because it was not properly presented in court. As a result, the art of drafting pleadings was stressed more and more.

During the seventeenth century, pleading itself became a special science, frequently mastered only by a specialist. Particular attention was given to the rules of common-law pleading in the offices of

130. *Id.* at 146.

131. 1 NORTH, LIVES OF THE NORTHS 64 (1744).

132. 4 THE BLACK BOOKS (Lincoln's Inn) 118.

the prothonotaries. The clerks in the prothonotary's office were for a time employed by the attorneys (and barristers) to draw their special pleadings. By the end of the seventeenth century these prothonotaries and their clerks could become members of the Inns of Court where they were "called to the Bar," provided they did not practice as attorneys or solicitors.[133] If they decided, however, to practice as attorneys or solicitors, and many did exactly this, they were excluded from the Inns and from the Bar. In this manner a new and independent class of draftsmen developed who were actually pleaders practicing as attorneys and solicitors.

The Serjeant-at-Law

In their long and rather renowned, history the serjeants played an important and, perhaps, decisive role in the development of English law and its administration. Beginning with the Reign of King Edward I, and continuing until the nineteenth century, usually no person was raised to the Court of the King's Bench, the Court of Common Pleas, or to the rank of Chief Baron of the Exchequer unless he was a serjeant and,[134] incidentally, a member of the Order of the Coif. Also, it was from among the ranks of the common serjeants that the King's Serjeants were chosen. As King's Serjeants they were, at least for awhile, the ranking legal advisors of the Crown. The serjeants also were the recognized authorities on parliamentary law. They were summoned to the House of Lords, as well as to the House of Commons, and several became distinguished Speakers of the House of Commons. Together with the judges of the high courts they were frequently commissioned to act as itinerant judges or judges of assize where they also had all the powers and privileges which the Attorney-General now has.

The serjeant, who as the *serviens regis ad legem* owed a duty to serve the King and all the King's subjects, was created under the Great Seal by a special royal writ which resembled the writ of summons used in the creation of a Peer. This practice of creating a serjeant continued without substantial change into the nineteenth century. It was treated as a matter of great solemnity, and the ceremonies attending his appointment for a long time were so elaborate and expensive as to rival those connected with a coronation.[135]

The degree and rank of serjeant conferred social as well as legal precedence. The serjeant had social precedence just below a Knight Bachelor and above a Companion of the Bath or a general or an admiral. In the law courts he was entitled to be heard before all other counsel. Such a practice, needless to say, put the counsel and

133. 3 The Black Books 82, 257; 3 Inner Temple Records 200, 323.

134. Fortescue, De Laudibus Legum Angeliae, ch. 51 (1775).

135. Upon his appointment the Serjeant swore "well and truly to serve the King's people," and the King's Serjeant swore "well to serve the king and his people."

the clients of advocates other than serjeants at a great disadvantage. The serjeants, although they were empowered to practice in any court, became an integral part of the Court of Common Pleas where for centuries they had a monopoly of practice.

During the Tudor Period the decline in importance of the serjeants could be seen in those instances where the degree of Serjeant was conferred as a purely formal preliminary to a judicial appointment. In the year 1545 King Henry VIII raised Lyster to the rank of serjeant and, on the same day, made him Chief Justice of the King's Bench. Thereafter, this precedent was repeatedly followed until the appointment to serjeant became a mere formality for a judicial appointment.[136] Another reason for the decline of the serjeants was the emergence of the higher law officers of the Crown. By the order of 1623 the Attorney-General and the Solicitor-General and, somewhat later, the King's Counsel succeeded in gaining precedence over the serjeant, "except the two ancientists." In 1814, a further order gave precedence to the Attorney-General and Solicitor-General over all King's Serjeants without any exceptions. Thus, for the first time, the Attorney-General became the titular head of the English legal profession. The death blow to the Order of Serjeants was delivered by the Royal Mandate of 1834 which, perhaps at the instigation of Campbell, the Attorney-General, abolished the exclusive right of the serjeants to be heard in the Court of Common Pleas. Although the serjeants tried to resist this Mandate, in the year 1846 Parliament passed a statute[137] which provided that "all Barristers at Law, according to their respective Rank and Seniority, shall and may have and exercise equal Rights and Privilege of practicing, pleading, and Audience in the said Court of Common Pleas at Westminster with the said Serjeants at Law. . . ." In 1873 a statute[138] abolished the necessity of even going through the formality of making a person serjeant before he was raised to the royal Bench.[139] No new serjeants were created after 1875, and in 1877 the remaining Serjeants' Inn was closed down.[140]

The Present-day Barrister

After more than six hundred years the barrister[141] still has a monopoly of audience in the High Court, the Court of Appeal, the

136. Coke, for instance, in 1606 was made a Serjeant and Chief Justice of the Court of Common Pleas at the same time.

137. 9 & 10 Vict., c. 54 (1846).

138. 36 & 37 Vict., c. 66, para. 8 (1873).

139. This statute became operative November 1, 1875.

140. The two most important of these Serjeant's Inns were on Fleet Street and Chancery Lane. In 1788 the Inn Fleet Street was given up. In 1834 the freehold of the Inn in Chancery Lane was purchased from the see of Ely. When, by the operation of the Judicature Act of 1873 serjeanty was doomed, the property was sold.

141. The designation "barrister" was not actually found in use before the fifteenth century.

House of Lords, and the Judicial Committee of the Privy Council, and the Assizes, where an important proportion of serious criminal cases are tried. But in the county courts, which are exclusively civil courts, and in which the vast preponderance of the day-by-day disputes between ordinary citizens are heard, barristers and solicitors alike have the right of audience. So too, barristers and solicitors alike, appear in the magistrates' courts and Quarter Sessions, which are for the most part criminal courts.

When addressing the court the barrister is fully entrusted with the conduct of the trial, taking the part his client would have to take if he conducted his case in person. Barring a relatively unimportant exception where legal aid is granted in certain criminal matters, the barrister, by convention, has no right of direct access to the lay client. The client can only approach a barrister through a solicitor. The practical result of this "exclusive" attitude, which is based on convention or etiquette rather than law, is that the barrister's work must all come to him from solicitors. A barrister must also practice law as an individual and may not form a partnership with another barrister or perhaps with a solicitor.

A barrister continues to be a member of the Inn of Court which has called him to the Bar, even though he may have his chambers or offices in another place, including another Inn. The overwhelming majority of barristers practice in London, although a few have chambers in other cities. As members of their Inn they are subject to its professional and disciplinary supervision. The Inn of Court still has the power to "disbar" one of its members, especially if the professional or personal conduct of a barrister has been such as to disqualify him morally from membership in an honorable profession. Such "disbarment," however, is subject to appeal to the Lord Chancellor and the Judges of the High Court. In matters of professional etiquette, as distinguished from moral conduct, the barristers are watched and to some extent controlled by the General Council of the Bar of England and Wales.

Not only every British subject, but also a foreigner may be admitted to the Bar, provided he has been called to the Bar by one of the four Inns of Court. To receive the "call to the Bar," a person must join one of these Inns, he must have passed a test of general education and have fulfilled certain requirements of fitness (but he is not required to have attended a law school or have acquired a uni-

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Up to that time we find pleaders and students divided into serjeants and apprentices. Somewhat later the apprentices were divided into Utter (or outer) Barristers who were sufficiently advanced in their studies to argue in the moots, and the Inner Barristers who were not allowed to argue in these moots, but had to attend for the purpose of instruction. Since they were placed either at the outer or inner end of the bar which separated them from the moot bench, they were called either utter or inner "barristers."

versity law degree), and he must keep a certain number of terms, usually twelve, which today involves nothing more than dining in the Hall of his Inn on a number of days, usually six in each term, four terms in a year. And finally, he must pass a qualifying examination of a predominantly theoretical nature. The Inns of Court have delegated the education and examination of students to the Council of Legal Education, an organization formed by the four Inns of Court. The Council organizes law courses and lectures conducted by Readers, but the student is under no obligation to attend. This somewhat "lax" policy of admitting persons to the Bar can be explained by the fact that, unlike the solicitor, the English barrister is simply a tested and qualified gentleman who, after having fulfilled certain, not too stringent requirements, is permitted to speak or act on behalf of a client before a court or advise him in his legal affairs.

The English Bar is now divided into two ranks: a comparatively small group of senior members known as Queen's (or King's) Counsel, and all other barristers who are called Juniors. Because they wear silk instead of the ordinary "stuff" gowns in court, the Queen's Counsel are referred to as "Silks" or "Leaders." They enjoy certain privileges and suffer certain disabilities. Technically speaking, they are officials of the Crown and, until quite recently,[142] could not appear against the Crown except by special leave. They occupy the front benches in the court; they have priority of audience; and, by custom, they receive somewhat higher fees than the Juniors. Conversely, they are prohibited by professional etiquette from undertaking certain kinds of business, such as the settling of pleadings, which remains the monopoly of the Juniors or "Outer Bar." There are no courts where appearance by Queen's Counsel is compulsory, but whenever a Queen's Counsel appears, a Junior must be briefed with him. Appointment as Queen's Counsel is made by letters patent of the Queen on the advice of the Lord Chancellor. It is given for a variety of reasons, usually for distinguished service and academic prominence.

The main classification of present-day barristers is into Common-Law Bar and Chancery Bar. The common-law barristers specialize in matters dealt with in the Queen's Bench Division and the Criminal Courts, while the Chancery barristers concentrate on matters dealt with in the Chancery Division of the High Court, such as corporation law, partnership, trust. Divorce and admiralty law, to some extent, have separate Bars, although many common-law barristers undertake divorce work, while Chancery barristers seem to do most of the probate work. But there is no hard and fast rule separating the common-law Bar and the Chancery Bar, and any barrister may undertake work in both divisions.

142. 1920.

The amount of the fee which the barrister receives for his professional services is a matter of agreement between him and the solicitor. For certain types of work, a more or less standard scale of fees has generally been recognized, and there are also a number of rulings of the General Bar Council prescribing the fees in certain circumstances. The barrister's fee is still regarded as being an honorarium or "gift of gratitude" rather than compensation or "wages" for services rendered. Hence, he may not sue either the lay client or the solicitor who instructs him for his fee. The solicitor is primarily responsible for securing the payment due to a barrister and, if necessary, The Law Society will exert pressure on the solicitor to secure payment.

The volume of legal business which the barrister attracts has substantially declined in recent times. Apart from a general reluctance on the part of the clients to engage in litigation because of its uncertainties, delays and expense, three major factors account for this phenomenon. One is that today, in commerce as well as in industry, the conduct of business in England frequently depends upon the maintenance of efficient liaison with the various governmental agencies. But in this new and increasingly important type of work the barrister has no place. A second factor is the steady improvement of the educational background of the solicitor. The present-day solicitor, whose professional education is often more thorough than that of the average barrister, finds it unnecessary to take "counsel's advice" in many legal matters which only half a century ago invariably would have involved consultation with a barrister. A third factor is the present-day trend, to be observed in every highly industrialized and commercialized country, that the vast majority of legal work consists in advising parties how to avoid getting into litigation rather than in assisting them in their litigations. Especially since industry and commerce, on the whole, are loath to engage in time-consuming litigation, the English legal profession is more and more called upon to share the responsibility for the appraisal of facts, their legal consequences and the choice of policy in the shaping of the client's business ventures. But in a situation where clients prefer to avoid litigation at any reasonable price, the dominant problem confronting the present-day legal profession of England is one of negotiation rather than litigation. Negotiation, however, is definitely the province of the solicitor whose professional activities also include the conference. Hence, the demand for the services of the barrister is today rapidly diminishing.

When King Henry II (1154-1189) began to send judges out from London to travel round the Kingdom and to hold Assizes to administer the King's law, the country became divided into different circuits. One or more judges were assigned to each circuit. As the judges moved from town to town, the clerk of the court and mem-

bers of the Bar went along.[143] Forming themselves into "communities" which reproduced some of the features of the Inns of Court in London, these lawyers adopted the custom observed by the Inns of Court of dining together at night in bar messes as they were (and still are) called. Although these bar messes possessed none of the disciplinary powers of the Inns of Court, they nevertheless maintained strict standards of professional behavior among their members, if by nothing more than the moral force of collective opinion. Any barrister who flagrantly violated the customs of the Bar was excluded from the bar mess and no other barrister on the circuit would hold a brief with him. In earlier days the etiquette of the Circuit Bar was extremely strict. Barristers were not permitted to use public conveyances, stay at public inns (or hotels) or associate with the solicitors and the public at the Assize towns.

The whole of present-day England is divided into eight circuits, each of which has its own Bar. Nearly every common-law barrister is now also a member of a circuit, but he can belong to only one circuit. By the custom of the Circuit Bar every barrister has to choose a circuit before he has made his reputation in London. He is permitted to change his circuit only once, and then only while he is still a Junior. Having made this choice he henceforth belongs to that Circuit Bar. He cannot try a case in another circuit except on a special retainer (for which he has to receive a special fee), and then only if he is briefed with a member of that circuit.

The Bar Council

The professional interests of the English Bar are represented by the General Council of the Bar of England and Wales, commonly referred to as The Bar Council, which came into being in 1895 by voluntary action of the barristers. The Bar Council, which succeeded the former Bar Committee, established in 1883, is a consultative and deliberative organization constituting a representative central body. It speaks and acts for the whole Bar in certain matters without superseding the traditional prerogatives and powers of the four Inns of Court. It derives its authority from the whole English Bar acting in general meeting.[144] By virtue of this authority it considers all matters affecting the profession, and takes such actions as it deems necessary. The Bar Council consists of fifty-eight members: forty-eight elected "delegates," the Attorney-General, the Solicitor-General (both of whom are *ex officio* members), and eight

143. The "leaders" of the Bar, together with their clerks, travelled in their own carriages, and the "juniors" either combined in twos or threes to hire a carriage or rode on horseback. With the advent of the railroads, the barrister began to travel back to London between cases. Only very few barristers hold chambers in provincial towns.

144. The functions assumed by The Bar Council (or the former Bar Committee) previously were assigned to the Attorney-General acting as the head of the English Bar.

additional members appointed each year, some of whom represent special bars such as the Parliamentary Bar, the Divorce Bar, the Tax Bar and the Patent Bar.[145] The officers of The Bar Council — the chairman, the vice-chairman and the treasurer — are elected annually. Every July the Bar Council, which convenes once a month during term time, meets with the whole Bar in the Hall of the Middle Temple at the Annual General Meeting of the entire Bar where some of the problems facing the Bar are debated. Extraordinary general meetings may be called at any time whenever a grave issue arises. The main business of The Bar Council is transacted either by the Secretariat or conducted by seven standing committees,[146] or by two joint committees (one with the Inns of Court and one with the Law Society), and by whatever special committee or committees may be appointed as and when required.

The prime objectives of The Bar Council, which are outlined in its Revised Constitution adopted in 1946, are the following: (1) maintenance of the honor and independence of the Bar; (2) encouragement of legal education; (3) improvement of the administration of justice; (4) establishment and maintenance of a system of prompt and efficient legal aid; (5) promotion and support of law reforms; (6) questions of professional conduct and etiquette; (7) promotion of good relations and cooperation between the two branches of the English legal profession; (8) promotion of good relations and understanding between the Bar and the general public; (9) promotion of good relations between the Bar and the legal profession in other countries; and (10) the protection of the public right of access to the courts and of representation by counsel before all courts and tribunals. The Bar Council, in full collaboration with The Law Society, also plays an important role in the administration of the Legal Aid and Advice Act of 1949. Probably some of the most important activities of the Bar Council have to do with professional conduct and etiquette. Although it has no specific disciplinary powers, which are still vested exclusively in the benchers of the Inns of Court, since its inception The Bar Council has given rulings in questions of professional deportment. But lacking official authority, it cannot enforce these rulings which are published in the Annual Statements. Any barrister who defies these rulings, however, would soon find himself shunned by his fellow barristers, by the better solicitors and by lay clients — so strong is the force of professional opinion which The Bar Council represents. The Bar Council also investigates complaints against members of the Bar and, where these complaints appear to be well founded, forwards them to the Inn of

145. Two of the appointed members of The Bar Council may be non-practicing barristers. All other members must be in active practice.

146. Executive, Law Reform, Professional Conduct, Legal Aid, Legal Education, External Relations and Court Buildings.

Court of which the barrister involved is a member. A considerable part of The Bar Council's work is related to the question of fees. It will give advice and assistance in cases of undue delay in the payment of counsel's fees or where the solicitor, although by etiquette under obligation to pay certain fees, declines to pay them. In such a case the barrister and the solicitor involved are invited to submit their dispute for arbitration to a board of which one member is nominated by The Bar Council and the other by The Law Society.

Conclusion

During the sixteenth, seventeenth and eighteenth centuries the lines of demarcation between the various ranks in the English legal profession grew distinct and rigid. At the same time new ranks developed. This development was due to certain changes which took place in the upper and lower rungs of the profession. The serjeants, who for a long time had been at the head of the profession, were gradually overtaken by the law officer of the Crown, especially the King's Counsel, who assumed ever-increasing importance. The dividing line between the attorney and the barrister, after a period of reapproachment, became increasingly sharp. The rise of the Court of Chancery as well as the growth of new judicial agencies brought about the emergence of the common solicitor who ultimately merged with the attorney. There also developed such special legal practitioners as the conveyancers, scriveners and special pleaders.

Today the barrister and the solicitor are still members of two separate and mutually exclusive branches of the English legal profession, each performing distinct tasks and duties. During the past few years, however, attempts have been made to bring about a closer cooperation and, perhaps, an ultimate amalgamation of the two. In essence, the barrister is still a tested and qualified gentleman who may speak on behalf of a client before a court, taking the part the client would have to take if he conducted his own case in person. The solicitor, after a long and arduous struggle, has become a respectable and, indeed, a respected lawyer, although he is still subject to strict control and supervision by a number of Parliamentary rules, by the courts of which he is an officer, and by his professional organization, The Law Society.