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# Legal Profession during the Middle Ages: The Emergence of the English Lawyer Prior to 1400 XI

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THE LEGAL PROFESSION DURING THE MIDDLE  
AGES: THE EMERGENCE OF THE ENGLISH  
LAWYER PRIOR TO 1400\*

XI

THE ENGLISH GENERALIS ATTORNATUS

(1)

Until 1285, the year in which the Second Statute of Westminster was enacted, the *attornatus*, as a rule, could be appointed only as a special agent *ad hoc* for a particular law suit already initiated. The precise wording of the old writ *de attornatio* definitely excluded the granting of a general power of attorney for all law suits. If a party wished to appoint an *attornatus* for any other court, or for more than one law suit—in other words, if it desired to appoint a general attorney or *generalis attornatus*—the authority to do so had to be secured by a special writ. Such a writ was by no means a matter of course. The opportunity of appointing a special *attornatus ad hoc* was still strictly limited, and this limitation applied to an even greater degree to the appointment of a general *attornatus*. The writ permitting the appointment of a general *attornatus* usually recited some extraordinary reason why such an exceptional favor should be granted: the grantee was going abroad, perhaps on a crusade or on some official business for the king; or he was the abbot of a monastery or a high Churchman. Also, the University of Oxford petitioned for leave to appoint a *generalis attornatus* and was permitted by special writ to do so for a period of three years.

\* Part two of a three-part series.

## (2)

The Second Statute of Westminster of 1285, in chapter ten, which is often called *de gratia speciali*, provided that in certain instances, namely, whenever the grantee possessed lands in different counties, he might in the presence of a royal justice appoint a general attorney (*facere possint generalem attornatum*) to represent him in all matters and in all pleas which might arise in the royal courts or in the Assizes. Such a *generalis attornatus* was to have full powers until the plea was terminated or until the client should remove him. This drastic innovation constituted a decisive break with the past and, in a way, ushered in the modern conception of the attorney. From the year 1285 on, under certain circumstances, an *attornatio* could be made before any royal court (and no longer only before the court where the particular law suit was pending); the appointment could be general, that is, for any and all law suits or legal business; and it could be made in advance of the commencement of the law suit. Thus, for the first time in the realm, the *attornatio* was no longer dependent on a special *ad hoc* grant, at least not in certain types of litigation.

A further advance in the appointment of a general attorney was made shortly thereafter when the Royal Ordinance of 1299, chapter three, frequently referred to as *de libertatibus perquirendis*, stated:

. . . [P]eople dwelling beyond the sea that have lands or rents in England, if they will purchase letters of protection or will make general attorneys, they shall be sent unto the Exchequer. . . Also such as be not able to travel and people that dwell in far countries from the Chancery which plead or be impleaded shall have a writ out of the Chancery to some sufficient man that shall receive their attorney when need is.

In other words, a *generalis attornatus* could be made only

by special royal grant, issued either by the King himself, or by his Chancellor, or by one of the King's itinerant justices. Britton, writing around 1290, also knew of the distinction between a *specialis attorney* and a *generalis attorney*. He maintained further that a *generalis attorney*, appointed by special royal patent, could appoint, remove, or replace any special attorney,<sup>1</sup> while a general attorney appointed in court or before an itinerant justice had no such power.

The *Mirror of Justices*, probably composed between 1285 and 1290 and, hence, possibly under the influence of the Second Statute of Westminster of 1285, also recognizes a *generalis attorney*. It states that such a general attorney may appoint and remove special attorneys. And around 1290 Britton remarked that "some [people] . . . who . . . do also make general attorneys . . . do well and wisely." Thus, already by the year 1290 the legal literature of the time expressly mentions the *generalis attorney* and distinguishes him from the special *attornatus*.

### (3)

It has already been noted that in the year 1298, one William of Grantham was appointed city attorney by and for the city of London. The records show that he was to "remain attorney . . . on behalf of the Commonalty of the City of London . . . to the end of his life . . .," and the accounts of the city constantly refer to him as "*generalis attorney* of the Commonalty before the justices of the King's Bench."<sup>2</sup> The successors of William of Grantham

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<sup>1</sup> The special attorney, however, could always retain or dismiss a pleader or serjeant.

<sup>2</sup> The position of *generalis attorney* for the city of London was not a very lucrative appointment, being paid a mere twenty shillings a year.

in the office of *generalis attornatus* for the city were William de Burgh (de Burgo, or Burghley), Thomas de Palmere, Harscolph de Withewelle, Thomas Harold and William de Wyckeham. Since the city of London had many law suits before the royal courts and the city courts, it is quite likely that by the year 1300 London needed more than one *generalis attornatus* or city attorney at one time. The *generalis attornatus* probably was not only the official city attorney, but also a sort of pauper's attorney for the city poor.

It is safe to assume that the *generalis attornatus* representing the city of London was chosen from among the outstanding legal practitioners in the city. As early as 1280, a city ordinance required that only competent men should be admitted to the practice of law in London. This enactment in large measure accounts for the generally high quality of London lawyers. It is not surprising, therefore, that William of Grantham, the *generalis attornatus* of the city, subsequently should have been raised to the rank and degree of a serjeant-at-law, a well deserved promotion in view of his professional eminence. The *generales attornati* of London were professional men in the true sense of the term. In a great many prominent law suits they appeared before the royal courts, where they distinguished themselves by their skill, knowledge, and professional deportment. This is further evidence that they were professional lawyers rather than political favorites.

(4)

A further break with the original restrictions imposed on the appointment of attorneys occurred in 1436-1437 by a statute,<sup>3</sup> which provided that Abbots, Priors and other

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<sup>3</sup> 15 HEN. 6.

ecclesiastics might be represented by a *generalis attornatus* in all courts, provided that the appointment had been made under seal of their Abbey or Church. Also, all temporal subjects of the Crown could do the same under their seal in all suits already commenced or about to commence. The appointment under seal of such a *generalis attornatus* no longer required the personal presence in court of the appointing party or *attornans*.<sup>4</sup> Thus, the increasing complexity of social and economic life, which characterizes the waning Middle Ages, gradually swept away the outmoded notions about legal representation and many of the impractical inconveniences which had been their product. The *generalis attornatus* and the right to appoint such a general legal representative mark the beginning of modern attorneyship in the English speaking world.

## XII

### THE APPOINTMENT OF THE ATTORNATUS

#### (1)

During the greater part of the Middle Ages, the appointment of an *attornatus*, the *attornatio*, was both an unusual and a solemn matter, to be allowed only on special or compelling grounds and then only with the proper formalities. Among the Lombards, for instance, a special authorization of the King was necessary for the *attornatio*, except in the cases of widows and orphans, who ap-

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<sup>4</sup> In the Court of Chancery, it will be noted, these new and revolutionary ideas about attorneyship were not accepted at once. The compulsory examination under oath of both parties made it necessary for them to be personally present at the *attornatio*. As late as the reign of Edward IV (1461-1483) a Chancellor declared that the personal attendance of the parties at the *attornatio* was a requirement of the natural law.

parently were under the tutelage of the sovereign. Under Frankish law, where the *attornatus* had to conduct the case in his own name,<sup>5</sup> the permission to do so likewise had to be obtained from the King or the King's representative. Naturally, the *attornatio* was restricted to civil litigation. As in the early stages of all legal systems, so also in Anglo-Norman England full representation in litigation by attorney was definitely the exception. It was an exceptional privilege, or to be more exact, a special royal favor which the King, and only the King, could grant, and then only on fairly rare occasions. According to Anglo-Norman law, an *attornatus* could be made in either of two ways: in one of the royal courts and in the Assizes which were "courts of records," or out of court, that is, before the King in person, who then issued a special writ or writ *de attornatio*. The right of record, it will be noticed, at first was conceded only to those courts in which the King sat (or was presumed to sit) in person.<sup>6</sup> For originally it was the King, and the King only, who actually granted the license of appointing an *attornatus*. Apparently there was no particular charge or fee for such a writ.

This restrictive policy connected with the appointment of an attorney seems to have been without rhyme or rea-

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<sup>5</sup> In early Roman law the *cognitor* or *procurator* likewise carried on the litigant's case in his own name.

<sup>6</sup> Or in which the King was represented by his justices. Since in the beginning the "right of record" was limited to the *curia regis*, the *attornatio* could only be made in the *curia regis*, because the King presided there personally. In other words, the record was conceded only to those courts in which the King sat. Hence there existed a relation between the right of record and the power to admit an *attornatus*. Later the *attornatio* could be performed "before the King's justices sitting on the Bench" (*coram justiciis in banco residentibus*). Thus the King's personal presence was no longer required for either the record or the *attornatio*, for the King was deemed to be fully represented by his justices. Also, while in earlier days the *attornatio* in one of the King's courts required a special license of the King, in Glanvill's time this was no longer the case. Anyone, being otherwise authorized to do so, could appoint an *attornatus* in the King's court.

son, especially in view of the fact that the practice of compelling the litigant's personal and constant attendance in one of the King's courts was singularly cumbersome and dilatory. The litigant was required to travel to and attend the court each day of the term while his case was pending. For the King could not be kept waiting, and the litigant had to plead his cause whenever the King saw fit to grant him a hearing. In addition, travel to the seat of the King's justice in those days was often a difficult, expensive, and even dangerous undertaking.

(2)

In contrast to Normandy, the presence of the adversary in court during the *attornatio* was not required in England. According to English law, the King was always presumed to be present in a royal court (or court of record) and, hence, any *attornatio* made in a royal court was considered to have been made in the presence of the King. And an *attornatio* made in the presence of the King did not require the presence of the opponent. In Normandy, however, the personal union of the Duke and the ducal court (*Exchequer*) had been abolished after a while. Hence, an *attornatio* in a Norman ducal court always required the personal presence of the adversary because the appointment was not deemed to have been made in the presence of the Duke.<sup>7</sup> In England, the absent party always had an oppor-

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<sup>7</sup> In Normandy, the *attornatio* before the Duke in person did not require the presence of the adverse party. But an *attornatio* in the court in the absence of the opponent was considered an "abuse," because the adversary would be unable to prove by the record an *attornatio* made in his absence and would thus be barred from disproving it. The advantage, therefore, would be on the side of the *attornans* who could always dispute the fact of the *attornatio* if the case had gone against him. The record would not be available to the opponent, since he did not know what parties or justices were present at the *attornatio* and, hence, could not cite the record. In Normandy, the record was the testimony of the members of the court who testified at the request of the party which had the burden of proof.



tunity to "get the record" and establish the fact of the *attornatio*, because every *attornatio* was entered in the Roll.<sup>8</sup> In the earliest Rolls such an entry usually read as follows: "John Doe puts in his place (*ponit loco suo*) to gain or lose (*ad lucrandum vel perdendum*) Richard Roe against James Coe in a plea (*placitum*) concerning debt."

If an *attornatus* was to be appointed in a law suit pending in a non-regal court, the *attornatio* for this particular suit had to be performed before the King or the King's justices (*coram rege vel justiciis suis*), who then issued a writ which authenticated this *attornatio* and ordered the sheriff to permit the *attornatus* thus appointed to represent the petitioner in a specified law suit pending in the sheriff's court. The writ usually was issued in the following form:

The King to the Sheriff, or to any other person presiding in his (*te.*, the sheriff's) court, Greetings. Know that John Doe has before Me, or My justices, put Richard Roe in his place to gain or lose (*ad lucrandum vel perdendum*)<sup>9</sup> for him in his plea which is between him and James Coe concerning a plough of land, and therefore I command you that you receive the aforesaid Richard Roe in such plea to gain or lose.

According to Glanvill, this writ was called a *breve de recipiendo responsalem*, and in the Statute of Wales of 1284, it is referred to as a writ *de attornatio*. It was used in lieu of the record; it attested that the *attornatio* was made out of the court where the litigation was pending, but that it was performed in the presence of the King or the King's justices

<sup>8</sup> Entry in the Roll enabled the court to bear testimony as to the fact of the *attornatio*. The earliest Rolls (*rotuli*), which date back to the reign of Richard I (1189-1199), contain many such entries.

<sup>9</sup> The expression, *ad lucrandum vel perdendum*, for instance, appears as early as the year 1198 in the law suit which the Abbot of St. Augustine (Canterbury) entertained against the Men of Thanet. The defendants nominated thirty men to represent them "*ad lucrandum vel perdendum . . . in this law suit . . . against the Abbot.*" Cf. also Glanvill (1187-1189), Book I, c. 12. The expression comes probably from Tacitus, *GERMANIA* 24.

and, hence, did meet all the legal requirements of a valid *attornatio*. It could also be granted for a law suit pending in a royal court. The person appointing an *attornatus*, that is, the *attornans* or principal (and later the principal's general attorney) had to be present at the *attornatio*, while the appointee, at least in earlier days, could be absent, provided he was a person known to the King or to the court. But later the presence of the *attornatus* at his *attornatio* was required.

(3)

A later and equivalent variety of the old *attornatio coram rege* (in the presence of the King) was either the *attornatio coram cancellario* (in the presence of the King's Chancellor), who could act in the King's place and in the King's name, or the *attornatio* before the itinerant justices in a law suit pending before the Assizes. But the itinerant justices had to notify their brethren of this fact. In exceptional cases the Chancellor could send one of his clerks to the *attornans* to go through the required forms of the appointment. Subsequently, the Chancellor forwarded a writ to the King, attesting the *attornatio* so made. If either party was bedridden, or beyond the sea, or in the Holy Land on a crusade, or in the personal service of the King, the latter could, *ex gratia sua*, give any official of the Crown the power of accepting an *attornatio*. But a defendant in a case where imprisonment might follow, could not make an *attornatus*, either before the King, the King's justices, the Chancellor (or his clerk), or before a special representative of the King. For the rule was that "no one ought to be imprisoned for another's crime."<sup>10</sup>

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<sup>10</sup> This remark is a survival of the old identification of the *attornatus* or full substitute with his principal, and the substitute cannot possibly be imprisoned (or hanged) for the misdeeds of his principal.

In the English royal courts several stringent provisions were attached to the appointment of an *attornatus*. Originally a litigant could not make such an appointment in a law suit not already commenced. "No one can be received as an *attornatus* in a plea which shall be, but only in a plea which is [pending]." Such an appointment would have no effect. In other words, in earlier times the appointment of a general attorney or *generalis attornatus* was not permitted. Hence, a valid *attornatio* could not be made until the plaintiff had properly summoned the defendant. For only then the law suit was deemed to have commenced. A defendant, who had properly appointed his attorney to represent and defend him, therefore, could not dispute the fact that he had received the summons. It was also held that "no man ought to be admitted as *attornatus* for any one in any plea before he has proved himself the *attornatus*." Thus in 1302, Theobald de Verdoun lost by default his case against Nicholas, the Archbishop of Armagh, because Theobald's *attornatus*, a certain Peter Coulok, had failed to produce his "warrant" in time, that is, at the outset of the trial.

## (4)

The old writ *de attornatio* as well as the records (*rotuli*) attesting the *attornatio* frequently recite the formula "*ad lucrandum vel perdendum*."<sup>11</sup> This formula also applied to attorneys under Germanic law on the continent. It signified rather drastically that a properly appointed *attornatus*, in the main, had the power to say or do what the litigant himself would have said or done had he personally appeared in court. Hence, the acts or words of the *attornatus*, unless immediately disavowed by the litigant or by the party, were deemed to be the acts or words of the litigant, whether done

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<sup>11</sup> Cf. note 9, *supra*.

to his advantage or disadvantage. But it is not always clear whether this formula was intended to cover all the possible procedural steps without exception. The historical evidence seems to indicate that at least in earlier times the *attornatus*, as a rule, was appointed to perform a specific act, such as a motion for continuance, or the delivery of a deed, or the making up of a record. From all this it would follow that originally the *attornatus* could be appointed to perform only some limited task. As a special (and often casual) attorney he had only special powers; he could not act as a general representative in the whole litigation. It was probably in contrast to such a restricted *attornatio*, limited to a specific act, that the formula *ad lucrandum vel perdendum* was introduced. In any event, at a later date the powers of the *attornatus* were gradually enlarged until he acquired unlimited control over all the issues related to the law suit in which he represented a party. This seems to be the meaning of the formula *ad lucrandum vel perdendum*.

(5)

Notwithstanding a valid *attornatio*, the principal himself could at any time make a personal appearance in court and take over the management of the case, if he chose to do so. The management of the particular law suit to which the *attornatus* had been appointed, therefore, was not completely within his discretion, unless his principal should decide not to appear in court. In this the early English *attornatus* radically differed from the ecclesiastical *procurator*. Since originally the *attornatus* was appointed only to represent an absent party, it follows that the party, merely by appearing in court, could at any time take over the conduct of the case without the necessity of formally re-

voking the "power of attorney." In the Leicester Charter of 1277, it was stated that the plaintiff or defendant could at any time "fully state his suit . . . by himself, if he knows the law." But, apparently beginning with the reign of Edward I (1272-1307), the removal of a duly appointed *attornatus* required a special form. This was done because it had become manifest that parties frequently disavowed their *attornati* dishonestly, merely in order to delay proceedings or confuse the opponent. After that, the general rule seems to have been that no qualified and duly appointed *attornatus* could be removed unless the person who originally had appointed him came into court in proper person, and in the presence of the adversary formally disavowed his *attornatus*, or unless he gave someone, usually a *generalis attornatus*, the power of attorney to do so. Conversely, a man properly "attorned" could not on his own volition retire from the case while the proceedings were pending without the consent of his principal. A general attorney or *generalis attornatus*, however, could appoint and, hence, remove a special attorney. If a person had been appointed *attornatus* while the law suit was pending in a lower court where it had been commenced by royal writ, and if afterwards the law suit was removed to a higher (royal) court, the *attornatus* was not automatically disavowed by the removal of the suit. But his authority seems to have expired on the death of his principal or if judgment had been given, although the former is by no means certain. He could not appear, however, in matters arising from the judgment he himself had secured, unless he was a general attorney.

If several *attornati* had been appointed, any could appear and fully represent the principal, provided he had been properly attorned. If an *attornatus* should die after his appointment, the principal was judged to be in default, unless he could prove the sudden death of his *attornatus*. But

where the principal, before going on a crusade or abroad on some of the King's business, had appointed two *attornati*,<sup>12</sup> and both died during his absence, all trials in which he had become involved were stayed until his return.

(6)

At least prior to the Royal Rescript of 1292, nearly every one not expressly prohibited by law could be an *attornatus*, although he might be required to produce his credentials. These earliest *attornati* probably were no more than friends or relatives who, as we have seen, took perhaps a message to the court in lieu of their principal. They were a sort of casual messenger who did all kinds of small jobs for other persons, and they even could serve as witnesses for their principal. Such messages, however, gradually became routine, and the employment of these messengers came to be a fairly frequent practice. As time went on, certain individuals apparently were attorned again and again, probably because they had acquired a reputation for being successful *attornati*. They might even have gotten enough business to make it a kind of profession or practice to represent others in litigation. This should also explain why beginning with the thirteenth century certain names of *attornati* are mentioned again and again in the earlier *Plea Rolls*. The records indicate, for instance, that in the year 1297 one hundred and forty-two *attornationes* took place in one term, and that only about fifty-six *attornati* received these appointments. This may be taken as an indication that the more important legal business had begun to be monopolized by certain men who apparently made representation in litigation a sort of professional occupation.

The increasing frequency with which *attornati* were used to represent or substitute for others, in turn, led to

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<sup>12</sup> A crusader could appoint more than one "general attorney" or *generalis attornatus*.

gradual regulation of this sort of representation by statute. The first set of laws dealing with the *attornatus*, especially with his appointment, were the so-called Provisions of Merton, 1235 (or 1236),<sup>13</sup> later called the Statute of Merton. This statute provided that "every Freeman which oweth suit to the County, Trything, Hundred, Wapentake, or the Court of his Lord, may freely make his attorney to those suits for him." Obviously, this provision referred to the lower courts, but not to the royal courts. The inconvenience of constant personal attendance in a royal court, which ultimately led to the relaxation of the many restrictions regarding the appointment of an *attornatus*, apparently was recognized by the First Statute of Westminster, 1275,<sup>14</sup> which stipulated that "a tenant, after he had once appeared in court, shall no longer be compelled to make a personal appearance, but shall make his attorney to plead for him."

## (7)

But it still took some time before the practice of permitting the appointment of an *attornatus* became universal. By the Statute of Edward I, 1278,<sup>15</sup> also called *de gratia speciali*, defendants were permitted to appoint an *attornatus* in pleas touching on "Wounds and Maims." The Second Statute of Westminster, 1285,<sup>16</sup> conferred on certain people the general power of making an *attornatus* (really a general attorney) in the royal courts.<sup>17</sup> Persons who had lands in different shires could appoint a *generalis attornatus* to represent them in all pleas in the circuit of the King's justices. The appointment was to be made in the

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<sup>13</sup> 20 HEN. 3, c. 10.

<sup>14</sup> 3 EDW. 1, c. 42.

<sup>15</sup> 6 EDW. 1, c. 8.

<sup>16</sup> 13 EDW. 1, stat. 1, c. 10.

<sup>17</sup> The so-called Statute of Merton, as we have seen, had been confined to the lower courts.

presence of the royal justices. Such an *attornatus* "shall have full power in all pleas until such are terminated or the principal shall remove him." The innovation of the Second Statute of Westminster of 1285 constituted a decisive break with former practices. The *attornatio* could take place before any royal justice, and the appointment could be made generally, that is, for all and any law suits, whether pending or contemplated. Thus for the first time in English legal history, the notion was abandoned that an *attornatio* could be made only by special royal grant, and that it had to be limited to a representation *ad hoc* in a specific law suit already commenced.

According to the *Domesday* of Ipswich, which dates back to the reign of Edward I (1272-1307), even the bailiff was authorized to accept the *attornatio* of both the plaintiff and the defendant in any law suit already commenced in one of the local courts. This *attornatio* could be made in court or out of court, with or without the opponent's presence. The *Mirror of Justices*, as a rule a most unreliable source, maintains, however, that an *attornatio* made in one of the lower, that is, non-regal courts, if allowable at all, had to be made in the presence of the adversary because of the record.

(8)

In 1299, as we have seen, a further statute was passed<sup>18</sup> which in its extension in a way superseded the old institution of the *responsalis*. It enabled persons dwelling beyond the sea to appoint a *generalis attornatus*. Subsequently this privilege was extended to persons who on account of illness or debility were unable to travel to the seat of the King's court, the Assizes or the Chancery.<sup>19</sup> The Statute of Edward II, 1318,<sup>20</sup> gave tenants the general and unqualified right to appoint general as well as special at-

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<sup>18</sup> 27 Edw. 1, stat. 2.



torneys in the royal courts, while the Statute of Richard II, 1383,<sup>21</sup> extended this right to all persons who had departed, or were about to depart, from the realm by royal license. The Statute of Henry IV, 1405,<sup>22</sup> permitted persons "out-lawed by erroneous process of law," to appoint a *generalis attornatus* in England.

The Ordinance of Henry V, 1415,<sup>23</sup> (or 1416), temporarily granted ecclesiastics, abbots, and priors in specified parts of the realm the right to appoint general attorneys in all suits of debt or trespass, provided that these *generales attornati* had been appointed under seal of their Church or monastery. This Ordinance, which was to be in force only until the next Parliament met, was supplemented the following year by a circular letter, setting forth that, until next Parliament, all subjects of the Crown, religious and lay alike, might appoint *generales attornati* to represent them in the lower courts in any suit of debt, trespass or contract, already begun, or about to begin. In 1430 or 1431, Henry VI renewed the temporary Ordinance of Henry V of 1415-1416<sup>24</sup> and its supplement of 1417, but without limitation of time. Finally, in 1436, a statute<sup>25</sup> provided that all persons, religious or lay, might under their seal appoint general attorneys for all courts, including the lower courts, without limit of time "in all kinds of law suits." Henceforth

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<sup>19</sup> The so-called *Hengham Magna* (about 1270-1290), in chapter seven, on *de attornatis faciendis* (on the appointment of *attornati*), states that the defendant may appear in court and appoint attorneys in the absence of the plaintiff. He may certainly make two attorneys if he is seriously ill or the victim of fraud, at whatever stage the law suit may be. Both the defendant and the plaintiff may appoint attorneys by the following formula: John Doe puts Richard Roe in his place against James Coe for his suit about a plough of land.

<sup>20</sup> 12 EDW. 2, c. 10.

<sup>21</sup> 7 RICH. 2, c. 14.

<sup>22</sup> 7 HEN. 4, c. 13.

<sup>23</sup> 4 HEN. 5, c. 1.

<sup>24</sup> 9 HEN. 6, c. 10.

<sup>25</sup> 15 HEN. 6, c. 7.

any subject of the Crown could make his *generalis attornatus* prior to the summons of the defendant in any law suit. Also, since the new *attornatio* could be made under seal, it no longer required the personal appearance of the *attornans* in court.

## (9)

Despite the many statutes which gradually relaxed the restrictions attending the appointment of an *attornatus* (the special attorney as well as the general attorney), prior to the sixteenth century the right of making an *attornatus* was never recognized as certain or universal. The general mediaeval-Germanic policy as regards the full substitute in litigation was never directly changed. But a number of statutory exceptions, extending from the reign of Henry III (1216-1272) to that of Queen Elizabeth I (1558-1603), practically invalidated this policy. Idiots, for instance, it was expressly stated, for a long time had to appear in person, and the statutes of the fifteenth century still treated the *attornatio* as something exceptional and even irregular.

## XIII

## THE PLEADER

## (1)

It could perhaps be maintained that, with some important modifications, the Germanic *Vorsprecher* or *fore-speca* embodies the beginning of the medieval legal profession, or at least of the medieval lay lawyer. The customs and folkways of early medieval times required that, barring a few unimportant exceptions, the litigant appear in court in person and conduct his case in his own words.

This general practice, which amounted to a veritable policy, as well as the absence of a workable "law of agency" among the Germanic peoples, greatly impeded the emergence and development of a true legal profession during the earlier Middle Ages. Still, a party was permitted, except in the case of felony where he must answer at once and in person, to bring into court with him one or several friends with whom he could consult before making his plea. Gradually, when some of the strict rules concerning legal assistance were relaxed, those "who were of counsel" to the litigant came to be permitted to speak for him in his stead. In this manner the "friend" became the litigant's pleader: a litigant was permitted to put forth someone else to speak or plead for him, but was not bound by the words or deeds of this pleader. For the litigant could always disavow or "amerce" whatever his pleader had said or done.

It was thus that the pleader made his way into the early English courts, not as one who represented or substituted for the litigant—in this he differed fundamentally from the *attornatus*—but as one who stood "by his side" and spoke in his behalf. In this sense he was merely a sort of "mouth-piece" who, whenever he spoke in behalf of the litigant, was always subject to correction or disavowal.<sup>26</sup> Hence a pleader's statements did not bind the litigant until the latter had expressly or tacitly adopted them. Such a situation actually gave the litigant more than one chance to plead, and the primary, though certainly not the sole, object of retaining a pleader was this opportunity of having several chances to plead. The chief advantage of having a pleader, at least in the early days, therefore, consisted in the fact that it was permissible to disavow a mistake made by the pleader, and so to avoid losing the action by a verbal slip. This technique was reflected in the custom, ob-

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<sup>26</sup> See part one, Chroust, *The Legal Profession During the Middle Ages*, 31 NOTRE DAME LAW. 542 (1956).

served in the King's court as well as in the local courts, of asking the litigant whether he would abide by his pleader's statements.

(2)

In the early records the pleader may have been referred to by all sorts of names. Since he made his first appearance in the rather informal and inconspicuous way of a "friend" who merely stood beside the litigant and provisionally spoke for him, it is extremely difficult to ascertain whether such pleaders were commonly employed in early England. Obviously, prior to the thirteenth century there was no such thing as a class of professional pleaders. The records, in any event, do not take notice of them unless they were expressly disavowed by the litigant. But it is safe to assume that in one form or another pleaders were employed in any important case throughout the twelfth and thirteenth centuries, and it may be surmised that by the middle of the thirteenth century there were persons, skilled as well as unskilled, who seem to have made pleading in the courts a sort of profession.

In the course of the thirteenth century the amount of litigation in the King's courts increased considerably. At the same time the relations between lay courts and ecclesiastical courts were still fairly close. Hence it is not unlikely, at least during the earlier part of the thirteenth century, that a number of persons took advantage of this favorable situation and practiced as "lawyers" in both lay and ecclesiastical courts. In this manner certain practices which were observed in the ecclesiastical courts might have furnished a model for the conduct of pleaders in the lay courts. References are made to pleaders by 1235, and subsequently references to their activities increase considerably. The earliest records also seem to indicate that the great litigations in the realm during the

thirteenth century were conducted by a relatively small group of pleaders, whose names appear and reappear in almost every important case. It would perhaps be too much to call these pleaders "professionals," but it would not be unreasonable to surmise that on account of their skill and reputation they were regularly called upon for their services whenever an important case was litigated or an exalted personage was involved in litigation. It is also possible that some of these pleaders were permanently attached either to the King's staff or to some of the great personages of the realm.

(3)

The "professional" pleaders, unless attached to a particular person, often sat in court and perhaps even on the Bench, waiting to be employed by some litigant. It was probably not unusual that on occasion they would intervene as *amici curiae*. The contemporary reporters, in any event, seem to have had high regard for their proficiency in the law, mentioning their sayings with almost as much respect as they quoted the opinions of justices. The pleader, who in the course of England's forensic history appeared by a number of names, was destined, as the serjeant-at-law, to become the most spectacular representative of the English legal profession. By his many and often scintillating forensic activities he left an indelible mark on the legal history of England.

XIV

THE NARRATOR

(1)

By the late twelfth and early thirteenth centuries, law and pleading were becoming so complicated and full of

pitfalls that the general public constantly needed assistance and advice when involved in litigation. In addition, the proceedings in the Anglo-Norman royal courts were carried on either in Norman French or in Latin. The natural consequence was that parties, as a rule, found themselves incompetent to conduct their own causes, and hence were compelled to employ persons conversant not only with law and procedure, but also with the official language of the courts. The average litigant no longer felt confident that he could tell his tale in court without making some fatal slip,<sup>27</sup> and therefore would call upon the assistance of an experienced *narrator or countour* (*counter, countor, or conteur*), who would tell the tale for him. These narrators or *narratores*, who later were known by the name of pleaders, serjeant-counteurs or barristers, soon became a regular profession. The first reference to a *narrator* dates back to the year 1239, when a Magister Lawrence successfully defended Hubert de Burgh against the Crown.

(2)

The ordinary way of bringing a complaint before the King's justices was by writ. Inasmuch as the smallest mistake, even a grammatical error in Latin, could be fatal to the plaintiff's case, the writ had to be carefully worded and accurately styled. It could not subsequently be altered or amended. But with the exception of the justices sitting at Westminster, the judges also had the power to hear all manner of complaints by what was known as a "bill." This bill, needless to say, was really nothing other than a sort of petition. The power to hear a bill was derived from the King's extraordinary and residual duty to have justice

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<sup>27</sup> The collection of early Germanic legal formulae known as the Malberg Gloss provided that a suit for a bull would fail if the animal were described as a bull. One must use the ancient legal designation, "a leader of the herd." Similarly, a goat must be called "the browser upon leeks," and the forefinger "the arrow-finger."

done whenever ordinary means had failed,<sup>28</sup> and the justices were bound to exercise this extraordinary power. A bill in Eyre could be drawn by anyone. The records show that they were frequently composed by nearly illiterate people. Such bills (but not the writs) might freely be altered or amended when they came before the court, if it were found that they did not correctly or clearly set forth the complaint. Errors which would have been immediately fatal in a writ could be corrected without detriment to the complaint. The justices of Eyre, not being bound by any of the ordinary rules of procedure, often inquired into a complaint brought by a bill, and even interrogated the parties, something unknown in the writ system. Some of these bills actually were in the form of a narrative. Probably for this reason the term *narratores* came to be applied to the persons who drafted or presented these bills. Originally, to be sure, these bills were presented by the petitioner in person in his own words; but he might also have engaged someone who was conversant with the art of writing as well as with the Norman-French or the Latin language.<sup>29</sup> As this practice became more widespread, such a helper, who reminds us of the ancient Greek *logographer*,<sup>30</sup> often accompanied his "client" to court. Those who spoke Norman-French would call him *conteur* or *countour*, which in Latin became the *narrator* or, in some instances, the *perorator*.

(3)

The *narratores*, who were nearly always laymen, in time would constitute a separate branch of the emerging

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<sup>28</sup> Where there was no writ to meet the case, a bill might be obtained whenever a wrong or a hardship had been suffered.

<sup>29</sup> Since the domain of the *attornatus* or the pleader was the writ, the litigant could not engage either.

<sup>30</sup> Cf. Chroust, *The Legal Profession in Ancient Athens*, 29 NOTRE DAME LAW. 339, 345 (1954).

English legal profession. In any event, by 1275 and perhaps as early as 1268, the *narratores* were recognized as a separate class of legal practitioners. Soon the term *narrator* began to replace the designation of *placitator*, but, except by the illiterate, the narrator was never identified with the *attornatus*, *advocatus* or *causidicus*. It is interesting to note that the homely *narrator*, who, unlike the *attornatus*, was never appointed by writ, apparently had been unknown prior to the thirteenth century, when we hear only of the *placitator* or the *attornatus*.<sup>31</sup> But after about 1250 he is frequently mentioned. Bracton, for instance, seems to treat him as a distinct member of the contemporary legal profession, contrasting him with the "counsel." Thus it would appear that the *narrator* was developing between 1200 and 1250. After that date his role seems gradually to have been absorbed by that of the serjeant, who, as shall presently be shown, was also called serjeant-counter. In 1247, Thomas de Mareshal, for instance, referred to himself as *serviens* (serjeant) *narrator*. And in 1377 David Hanmeare was appointed, "by the King's will and command to be one of the *servientes* of His laws, and a *narrator* for the King in any of His courts whatsoever for any plea of the King . . . ."

As time went on, the *narrator* came to be considered a pleader. Before he was replaced by the serjeant, he also assisted the *attornatus* in composing pleas, writs and bills. Thus it may be maintained that the *narrator*, like the pleader, first emerged as a "friend" who told the court informally what he could about the litigant and the litigant's case, and certainly did so better than the litigant might have done. Later he became a person who told the court in a formal way his own story. After that he be-

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<sup>31</sup> In his *Note Book*, Bracton has preserved several references to *narratio*, dating back to the years 1218, 1220 and 1229. Thus it seems that while the term *narrator* was not in use much before the year 1250, his activity, the *narratio*, was already known by 1218.



came a man who devised the litigant's plea. Finally, he became a skilled person who even argued the law for his "client." Thereafter he was absorbed or replaced by the *serviens ad legem*, the serjeant-at-law.

## XV

### THE SERVIENTES (SERJEANTS)

#### (1)

Since the days of the Norman Conquest the Crown had many legal interests in many places concurrently. Obviously, the King himself was a very busy man who could not possibly be present wherever a royal interest was to be secured. Hence he sent one of his "servants," a *serviens regis* or serjeant, in his place.<sup>32</sup> In the beginning he would probably dispatch a man appointed *ad hoc*, that is, an *attornatus*, who was especially designated and, perhaps particularly qualified to represent the King in a particular controversy.<sup>33</sup> If this man had proved himself effective and capable, the King would retain him on a regular basis as a sort of *generalis attornatus regis* (a general attorney of the Crown) and he would become a *serviens regis ad legem*—a lawman in the regular service of the King appointed generally to take care of the King's legal affairs. As far as we know, the first advocatë *regularly* employed

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<sup>32</sup> The *Domesday Book*, which might date back to the year 1086, already refers to a *serviens regis*. When Ursus de Habetot, Bishop of Durham, was tried in 1088, one of the *servientes regis*, namely, the Sheriff of Worcestershire, was sent to summon the Bishop.

<sup>33</sup> The writ of appointment reads as follows:

"Rex c. Willielmo Herle, salutem: quia de advisamento concilii nostri ordinavimus vos ad statum et gradum Servientis ad Legem in quindena Sancti Michaelis proxim' futur' suscipiend', vobis mandamus firmiter injungentes quod vos ad statum ad gradum praedictum ad diem illum in forma praedicta suscipiend' ordinetis et preparetis: et hoc sub poena mille librarum. Teste meipso etc."

by the Crown was probably Lawrence (Laurence) de Brok, who in 1253 represented the King in a cause. This Lawrence evidently was a *serviens regis*, although he was never referred to by that designation.

Some scholars have insisted that the first *servientes regis* were created during the early part of the twelfth century. What seem to be the better authorities, maintain, however, that these *servientes ad legem* did not regularly appear before 1275 or 1276,<sup>34</sup> and probably not until later. The term serjeant, it seems, was derived from the French word *serjanz* and goes back to the Latin term *serviens* (one who serves). The English form, *sergantes*, on the other hand, cannot be found until about the year 1200. The first known record of a *serviens regis* in court is that of a certain Hugh de Louthur in 1292. But the serjeants certainly practiced law before that date. The First Statute of Westminster of 1275, chapter 29, provided that "If any Serjeant, Pleader, or other do any manner of deceit or collusion in the King's Court . . . he shall be imprisoned . . ." And in 1292 it was stated that any serjeant-countour guilty of champerty would be fined and imprisoned.

(2)

Probably in the year 1310, King Edward II (1307-1327) commanded William Herle, who died in 1347, to assume the rank and status of a *serviens ad legem*.<sup>35</sup> From this it would follow that about the year 1300, or perhaps a little earlier, the class of serjeant had received full royal recognition, and that every serjeant was appointed by royal com-

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<sup>34</sup> Persons in the employ of the Crown, such as royal emissaries, who had no traditional titles, were usually called *servientes* or *servientes regis*. They appear at a relatively early stage. But the particular category of *servientes (regis) ad legem*, it seems, was not created until the end of the thirteenth century.

<sup>35</sup> Cf. note 33, *supra*. The writ which appointed William Herle to the rank of *regis* is the earliest known writ of this sort.

mand (*gratia regis*). The fact that both in 1275 and 1292 the serjeant was made subject to legislation should also indicate that by that time the *servientes ad legem* already existed as a regular class of legal practitioners. In any event, in 1260 Bracton apparently did not yet know of the serjeant, while thirty years later, that is, about 1290, Britton was quite familiar with the practicing serjeant.

The serjeants, it seems, emerged as the *servientes regis ad legem*. But soon other people employed them and they became simply serjeants. In the so-called *Mirror of Justices*, probably compiled before 1290, the following remark can be found: "Countors are Serjeants wise in the law of the realm, who serve the commonalty of the people, stating or defending, for hire, actions in court for those who have need of them." The importance as well as the advantage of employing a serjeant was strongly stated by Justice Berrewik: "The want of a good serjeant makes the defendant lose his money."

(3)

While the average serjeant apparently mastered some Latin, French and English, the ordinary litigant would know only either English or Norman French. If he wished to address the court in the proper language, he had to find a man who could speak the court's language. But this was really the function of the *narrator*. The only tri-lingual people in early England were the clerics. And it was from among the ranks of the clerics that the King, as a rule, selected his *attornati* and *servientes*, at least in the beginning. The title "serjeant," however, was only gradually accepted. For some time he was still called *narrator*. It is also interesting to note that around the year 1300 the list of the legal practitioners who are mentioned in the reports for a given year, are almost exactly the same as the list of serjeants and *narratores*.

The surviving records seem to indicate that by the end of the thirteenth century the serjeants were already established as a distinct branch of the English legal profession, although they were probably still referred to by their older title of *narrators* or pleaders (*countours*). They were ready to be hired for their services and they began to exercise the traditional and titular functions of the old *narrator* or pleader. At the same time, they were conscious of the fact that they were subject to supervision and discipline. They were skilled specialists, because only a specialist could understand the intricate pleadings which were the vogue in a system where law and pleading were thoroughly interlaced. Moreover they spoke the official language of the court. Their activities in court to a large extent were determined by the fact that the pleadings actually developed in the course of argument. Hence their chief work seems to have been argument, frequently on and in the terms of the writ. It also appears that later they drew up their own pleadings. For written pleadings had gradually come into general use, and it was only natural that the man who had to use these pleadings in court should also compose them in advance.

(4)

Judging from the *Year Books*, the relationship of the serjeant to the *attornatus* may be described as follows. While the serjeant, as a rule, did all the talking, the *attornatus* usually was mute, unless he avowed or disavowed whatever the serjeant had said. But this happened only on rare occasions. In the *Year Books* the *attornatus* is barely mentioned at all, although he had to "stand by the serjeant." For it was the *attornatus* who knew the facts and, hence, could prompt the serjeant in these facts, after the latter had completed his arguments. The serjeant, at least in earlier times, very seldom began by citing the ma-

terial facts underlying his case. He would rather exhaust every possible argument based on the writ or on points of law before he would take his stand on the facts, no matter how strong they were. But he would not carry his objections on points of law too far, unless he was fairly sure that the court agreed with him. Especially if he knew that the material facts behind his case were strong enough to win his case, he would not press his legal arguments to a point which might lead to an adverse ruling and thus deprive him of an opportunity of ever setting up the facts. But whatever the serjeant did or said did not bind the litigant unless and until the litigant (or the litigant's *attornatus*) had avowed him. Such a situation, it goes without saying, invited what may be called "tentative pleading": the serjeant experimentally may have offered a certain plea, but on discovering that he was getting nowhere and that he would be defeated if he continued with that plea, he would not let himself be avowed by his client, but would try another course of argument. According to the *Plea Rolls*, moreover, the respective roles of the serjeant and the *attornatus* are reversed. For whatever is recorded in the *Plea Rolls* is put in the mouths of the actual parties to the litigation or, more often, in the mouths of their *attornati*, who had full power to represent or substitute for them, and, hence, to bind them.

## (5)

Judging from the earliest *Year Books*, the serjeant carried on his work in court orally, for in the beginning only the *attornati* or "counsels" submitted written pleadings. He did so apparently with little preparation and little knowledge of the facts which previously had transpired. Hence he was often in the dark about the factual issues at hand until he had wrung some admissions from the opponent or the opponent's "lawyer." As a result, whatever

a serjeant said about material facts might, or might not, correspond with the facts of the case. Whenever an alleged statement of fact might be material, the serjeant always had to get himself "avowed" or "confirmed" by the litigant or the *attornatus*. For these facts, as a rule, were known only to the party or the party's *attornatus*, but not necessarily to the serjeant, unless the party or its *attornatus* had seen fit to enlighten him, which was rarely the case.<sup>36</sup>

It also seems that the serjeant opened the pleadings. After that he might have taken some exceptions to the opposing pleadings until an agreement was reached by the parties. It was his business to address the court in certain prescribed forms as well as to plead and reply to the exceptions to his own pleadings or writ. In the beginning the serjeant did not examine or cross-examine witnesses. The examination of the witness originally was the privilege of the court, which also interrogated the parties. The serjeant from time to time would naturally intervene in these interrogations in order to correct the answers or induce the court to ask certain definite questions. Subsequently this led to cross-examination by counsel.

From all this it would follow that the serjeant, who for the most part discussed law, often argued *ex tempore*: he would offer exceptions or answers to exceptions; he would argue upon the faults of process, and discuss the legal consequences of an ascertained or admitted state of facts. But while doing all this he would constantly grope through a host of controversial facts and fluid law in search of a stable point on which he could take issue. Hence it appears that there was always much room for surprise, and a successful serjeant frequently had to depend on quick thinking, solid legal knowledge, mastery of procedural rules, ingenious resourcefulness, and quick wit or repartee. But nowhere among the earlier serjeants do we find a

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<sup>36</sup> For this reason the party or its *attornatus* always had to appear in court personally with the serjeant.

trace of shallow oratory or flamboyant gesture. It is not surprising, therefore, that the body of serjeants who practiced law during the latter part of the thirteenth and during the fourteenth century was a very small group of exceptionally busy, and at the same time, outstanding and clever men. The *Year Books* of that period are full of praise and admiration for the brilliant serjeant.

(6)

The records indicate that some legal practitioners, including serjeants, were busier than others. But, with a few exceptions, if a man's name appeared once in the *Year Books*, it soon appeared quite frequently. Also, it was not unusual to see three or four "lawyers" on the same side in the same case, and in a really important case nearly half of the practicing bar might have been retained. Such extravagance in legal counsel was the object of a serious complaint in the year 1321, when it was stated that while in the past the King had been content with only two serjeants, he now retained nearly all of them. Naturally, the King was both a busy and a wealthy client, who not only needed but also could afford to retain a whole array of legal talent. But he apparently often did so only to deprive the other side of adequate legal representation. By the year 1330 the general rule seems to have limited a litigant to one serjeant. As a matter of fact, frequent complaints were heard that there were not enough serjeants to do the work at hand. Thus the retention of several, or even half, of all the available serjeants in one case might have caused much consternation, since there probably were not more than twenty practicing serjeants in the whole realm in the year 1300. As a result, the leading serjeants were constantly overburdened with important work and in all likelihood declined to undertake what they considered to be "small business."

It also happened that different serjeants appeared at different times in the same case. Thus around 1310, in an important case, Scrope and Westcote represented the defendant, while Herle and Hertepol appeared for the plaintiff. At the next term, when the case was continued, Westcote and Huntingdon were for the defendant, while Herle and Hertepol remained the serjeants for the plaintiff. But in the third term Westcote and Huntingdon appeared for the defendant, while Kyngesham and Warwick represented the plaintiff. Thus by the third term only Westcote, of the original serjeants, was connected with the case. This would indicate either that the client could dismiss his serjeant or that the serjeant could withdraw from the case.

(7)

The practicing serjeants of the late thirteenth and early fourteenth century gradually began to form a small and compact body of men who could easily be consulted as a group. The courts, the Chancellor, and later, Parliament, often asked for their opinion on certain legal matters. This curious fact also would explain why the *Year Books* refer to many cases or arguments in which a number of serjeants, listed by name, took an active part arguing and advising without it being stated whom they represented or that they represented any party whatever. The only intelligent explanation of this phenomenon is that at any important trial a number of serjeants would be present as "participating spectators" or *amici curiae*, who were glad to contribute to the discussion of some intricate legal problem. The approval or dissent of the serjeants was duly and respectfully recorded. In this, too, they acted with a strong sense of professional solidarity: they were *amici inter se* (friends among themselves) and, collectively, *amici curiae*. The court frequently inquired of the serjeants their opinion on certain questions of law, and final



disposition was made only with their consent. When the Bench finally had become recruited from among the rank of the serjeants, the latter could maintain that they were truly *amici curiae*.

The intimacy of the relation between the Bench and the serjeants, however, did not prevent the judges from speaking their minds quite freely on occasion. The *Year Books* abound with sharp remarks addressed to the serjeants. Judge Bereford apparently did not hesitate to tell the serjeants: "Get to your business. You plead about one point, they about another, so that neither of you strikes the other." Judge Hengham addressed them: "Leave off your noise and deliver yourself from this account." Or, "That is a sophistry and this is a place designed for truth." "There is nothing in what you say." And, "Do you think . . . to embarrass the court in this plea . . .? By St. James! you will not do so." are two remarks which have been attributed to Judge Bereford. Judge Malore once exclaimed: "Shame to him who pleaded this plea," while Judge Sharshulle once remarked sarcastically: "This is not the first time we have heard a plea of this kind." Taking issue with a statement made by one of the serjeants, Judge Pulteney observed rather rudely: "It will go to the winds, as does the greater part of that which you say." All this seems to indicate that despite the close cooperation between the Bench and the Bar, the former at times would feel compelled to put the Bar "in its place."

(8)

It may be surmised that early in the fourteenth century the serjeants were officially established and recognized as a distinct branch of the legal profession which had superseded the *narratores* and the old fashioned pleaders. We are told that in the year 1302 a plaintiff lost his complaint because "all the serjeants concurred that the writ could

not be supported by the case." When in 1322 Serjeant Geoffrey le Scrope addressed the court, "I hear from all the serjeants of England that it has been held . . .," he informed the justices on a point of law which for some time must have been discussed and approved by all his fellow-serjeants, who, in a spirit of professional fraternity, seem to have often met and discussed points of law. But such a fraternal spirit is but the forerunner of a closely organized guild. The strong solidarity among all the serjeants was greatly encouraged by their small number. Also, by the middle of the fourteenth century there existed many *hospitita* near Westminster where they could and probably did meet after their work in court was done. As early as 1290 we hear of a legal *hospitium* where serjeants and their apprentices apparently made it their habit to congregate and discuss law. Subsequently, as will be shown, these *hospitia* became the Serjeants Inns, the Inns of Court or the Inns of Chancery.

From the very beginning the serjeants occupied an honored position in the English legal profession. The fact that originally they had been, and in a way still were, *servientes regis*, should in part account for the general esteem in which they were held. Already during the reign of Edward I (1272-1307), as previously mentioned, the Crown adopted a policy of recruiting the royal Bench from among the ranks of the serjeants. Beginning approximately with the year 1300, more and more of the permanent justices in the royal courts were selected from among the serjeants, who at least for the moment constituted the most significant branch of the English legal profession. Bench and Bar, so to speak, were all serjeants, and with a very few exceptions, any serjeant who appeared at the Bar sooner or later also appeared on the Bench. In addition, during the fourteenth century, Parliament and the Council began to refer all sorts of legal

questions to both the royal Bench and the serjeants. This is a definite indication that Parliament and the Council considered the leading members of the class of serjeants the equals of the royal justices.

Also, during the reign of Edward I (1272-1307) and during that of Edward II (1307-1327), when the English legal class was about to emerge as a true profession, the serjeants were already a body of professional men distinct from the *attornati*. Both branches of the profession, the serjeants and the *attornati*, were becoming subject to definite rules and regulations. The serjeants, however, further consolidated their position, as well as their influence and standing, by forming a close-knit guild which gained control not only over all the serjeants themselves, but gradually also over the whole of the English legal profession. Monopoly of the task of pleading or judging in the highest courts of the land by a restricted and extremely cohesive group of men is possible only in an era where professional guilds are coming into their own. It will be noted that in England the guilds emerged during the fourteenth and fifteenth centuries, and by that time serjeanty was certainly a guild or "closed corporation."

At the head of the emerging legal profession or guild, and exercising a general control over it, stood the royal justices and the serjeants, closely allied with the Bench since they were members of the Order of Coif. They addressed one another as brethren. The promotion to the rank and status of a serjeant placed a man in the forefront of the English legal profession. It made him a member of the exalted though small body of skilled legal experts who administered the laws of the realm, and it placed him almost on an equality with the royal Bench. Thus it was actually within the fraternity of the serjeants that the royal Bench and the Bar became united. This union of Bench and

Bar, of justices and serjeants, supervised the whole system of legal administration and legal education, and also controlled the admission to the higher forms of legal practice before the royal courts.

(9)

The practitioners below the rank of serjeant, who were often referred to as "apprentices," remained outside the exclusive guild of the serjeants. But since they aspired to serjeanty, they were always under the supervision of the serjeants, who saw to it that these "junior practitioners" one day would cut a creditable figure in the courts. Although the Inns of Court and the Inns of Chancery did not come into full flowering until the fifteenth century, judges and serjeants on the one hand, and the "apprentices" or "junior practitioners"<sup>37</sup> on the other, became closely welded together by the strong ties of similar education and training, identical interests, common pursuits, and close personal association. All these factors contributed heavily to the development of a single-minded class of lawyers throughout the realm.

The serjeants were selected by the Crown<sup>38</sup> and generally nominated upon the recommendation of the royal justices. It is impossible, however, to fix the exact date when the serjeants secured their position of eminence among English lawyers. We know that the rule that only serjeants were eligible for promotion to the royal Bench was not yet in force during the reign of Edward I (1272-1307). This rule must gradually have grown up in the course of the fourteenth century, presumably during the

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<sup>37</sup> Apprentices or junior practitioners, as a rule, were all those men who, although they already had been admitted to practice, had not yet been promoted to the rank of serjeants.

<sup>38</sup> It is only natural that a *serviens regis* should be selected by the King himself. After the serjeant had become a *serviens ad legem* who served all sorts of clients, the mode of selecting him was retained.

reign of Edward III (1327-1377), when the practice of appointing only professional lawyers to the royal Bench had become almost universal. Thus by the end of the fourteenth century, nearly all the royal justices were former members of the order of serjeants; at approximately the same time the serjeants alone could be heard in the Court of Common Pleas, the principal court of the realm. Whenever a vacancy occurred on the royal Bench, the King, by letters patent would order one of the serjeants to assume the position and rank of a justice. The letters patent were delivered by the Lord Chancellor; the Master of the Rolls would read the oath of office; and the Chief Justice of the court would assign to the newly appointed justice and former serjeant his particular seat on the Bench, a seat which he would retain for life. As a royal justice, however, the serjeant always retained the coif.

(10)

The dignity as well as the professional standing of the serjeants during the fourteenth and fifteenth centuries certainly did not suffer from the considerable compensation they received by this time. The title "serjeant" itself, in the words of Fortescue, was "a name full of dignity." They ranked as knights and, like mediaeval noblemen, they surrounded themselves with elaborate and costly pageantry. Like any officer of a royal court, they could be sued only in their own courts (usually the Court of Common Pleas). It was only by special royal writ that a serjeant could withdraw from serjeanty. Serjeanty, according to Fortescue, was not only a degree but also a state, "not less worshipful than the degree of Doctor of Laws."<sup>39</sup> It was

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<sup>39</sup> Fortescue, who wrote during the fifteenth century, seems to have linked the serjeant to the Doctor of Laws in Oxford or Cambridge, comparing the Inns of Court with the Colleges in these two famous Universities. There existed, indeed, a certain resemblance, which was perhaps the result of deliberate imitation on the part of the serjeants: the robes, worn both by

a sort of public office or better, perhaps, a "tenure." However, this does not mean that the serjeant was feudally provided with lands. Nevertheless, the word serjeant seems to imply a more permanent relationship of employment than is usually the case with the ordinary litigant and his lawyer. The term serjeant excluded mere casual engagement; he was the servant or *serviens* of someone, but at times it is difficult to determine whom he served. The serjeant was on the way up to the royal Bench, and already he was regarded as an *ex officio* member of the Court of Common Pleas, which he soon began to monopolize. Serjeants soon also became members of Parliament. During the reign of Edward III (1327-1377) several complaints were made against having lawyers and serjeants in Parliament.

(11)

Serjeants were raised to their exalted status and rank by appointment. The two chief justices, with the advice and consent of their brethren, every so often submitted to the Chancellor a list of the names of those legal practitioners (apprentices, barristers or pleaders) who were reputed to be the most outstanding or illustrious lawyers in the realm below the rank of serjeant. These nominees were men who had been practicing and learning law (later also "teaching" law in the Inns) for at least sixteen years. The Chancellor, in the name of the King, then sent to these men a royal writ commanding them under heavy penalty to take upon themselves the degree and status of a serjeant. In 1383, for instance, John Cary, E. Clay, and another

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the Doctor and by the serjeant; the coif, which was possibly the equivalent of a Doctor's hat; the feast on taking the Doctor's degree or upon being initiated as a serjeant; and the requirement that the candidate for a Doctor's degree had delivered two successful readings or lectures, and the rule that a candidate for serjeanty had to have been a successful practitioner when still an "apprentice."

person were ordered by a special "writ of summons," probably the first of its kind on record, to take the degree of serjeant. The penalty for disobedience was one thousand<sup>40</sup> pounds. It seems that the King in Council (Richard II, 1377-1399) had nominated them, presumably because at the time there were not enough serjeants to attend to the existing volume of business. John Cary, however, ignored the writ and was duly attached in 1385, whereupon he secured a royal pardon.

Upon entering the status of a serjeant, the elect had to take the following oath: "You shall swear well and truly to serve the King's people as one of the serjeants-at-law, and you shall truly and faithfully counsel them that you be retained with, after your cunning; and you shall not defer or delay their causes willingly, for the covetess of money or other things that may turn you to profit; and you shall give due attendance accordingly." The passage in the serjeant's oath, "you shall well and truly serve the King's people," also was interpreted as signifying that he had to represent, free of charge, the poor in any court of the realm. Failure to do so could result in his suspension.

(12)

The ceremonies and pagentry attending the elevation of a man to the rank of a serjeant were both lengthy and very costly.<sup>41</sup> The serjeant-elect had to provide a feast comparable to a king's coronation; he had to distribute liveries and golden rings in profusion; and he had to maintain these festivities for seven full days. Like a mediaeval grandee, he was expected to spend a fortune on these protracted solemnities.<sup>42</sup> Also, he had to pay a

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<sup>40</sup> In some cases one hundred pounds.

<sup>41</sup> Fortescue remarks that "none of those elect persons shall defray the charges growing to him about the coastes of this solemnitie, with lesse expences than the summe of four hundred markes."

<sup>42</sup> To quote Fortescue: "But I will add that on that day among other rites they keep a feast like that at a coronation, which lasts seven days:

*Continued on page 123*

formal farewell to his Inn of Court, of which he ceased to be a member on becoming a serjeant. Subsequently he moved into a Serjeant's Inn, where also the judges dwelled during term time.

The number of serjeants, as may be judged from these expensive initiation rituals, must have been very small, and it is not surprising that some persons were most reluctant to take upon themselves so expensive a promotion. Thus in 1383, John Cary, as we have seen, turned down a royal request to become a serjeant, probably because he could not meet the huge expenses connected with this promotion. Between 1415 and 1417 several men balked at being made serjeants, claiming that they could not afford the status of a serjeant. They only gave in when threatened with dire consequences if they should persist in the refusal. In addition, before assuming the rank of serjeant, these men insisted that the Crown guarantee them remunerative work, enabling them to recoup some of their expenses.<sup>43</sup> In 1440 a certain William Ayscogh

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part of [the expense] for each is the cost of a gold ring of the value at least of forty pounds in English money. Well I remember that when I took this degree, I paid for the rings I distributed fifty pounds, for each new Serjeant must give a ring of the value of 26 shillings 8 pence to every Prince or Duke or Archbishop then present and to the Chancellor and the Treasurer: similarly to every Earl and Bishop, to the Keeper of the Privy Seal, to each Chief Justice, to the Chief Baron of the Exchequer one worth 20 shillings and one worth one mark to every Lord of Parliament, Abbot and Prelate of high rank, or great Knight, to the Keeper of the Rolls of the royal Chancery and to every judge, present: rings of less price, but suitable to the rank, respectively, of each Baron of the Exchequer, the *camerarii* [Receivers of Exchequer], in short, to officials and notables serving in the King's courts. So that not the lowest clerk, especially in the Common Bench, fails to get a ring proportionate with his grade. Moreover, they give rings to other of their friends. Then, too, they distribute largely a livery or uniform, not only to their own serving folk but to others, personal acquaintances who during the festivities will wait upon them and look after them."

<sup>43</sup> The Crown apparently had insisted on these appointments because of the dearth of serjeants at the time. This shortage had led to a number of serious complaints: the general public could not find adequate legal assistance or have their cases handled with dispatch; yet the lawyers felt they could not afford the promotion to serjeanty because, as Dugdale has put it, "of the grand Feasts made at the reception thereof . . . and the large retinue for attendance they then had. . . ."



complained that after having been made a serjeant "to his grete expenses and costes" only two years ago, he was now elevated to the Bench and "all his Wynnings that he sholde have hade in the said office of Serjeant" were lost, making him a poor man. The fact that some "apprentices" could sustain the heavy expenditures attending the promotion to serjeanty would indicate either that they were wealthy men in their own account or that the practice of law in which they were engaged as "apprentices" had been very lucrative.<sup>44</sup>

The huge initial outlay connected with elevation to serjeanty seems to have been, on the whole, a good investment, however. It is believed that no lawyer throughout the realm made as much money through the practice of law as the serjeant. As a matter of fact, serjeants were taxed at the same rate as barons or aldermen of the city of London. And taxes have always been a fairly reliable measure of a man's income. Fees paid to serjeants by their various clients were much larger, probably twice the amount, than those paid to *attornati* and ordinary barristers and "apprentices." In addition, the serjeants soon acquired a monopoly of pleading in the Court of Common Pleas, the most important court in England. Practice in this court alone made serjeanty an extremely remunerative occupation. But they could also practice before any other court of law, including the Assizes, as well as before the Chancellor or the Council.

(13)

In the early days churches frequently were used to transact the serjeant's legal business. Thus the middle aisle of the old St. Paul's Cathedral in London, which was destroyed in the London fire of 1666, was the place where serjeants usually had their "law offices." Each had a

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<sup>44</sup> "Apprentices" could contract for fees which, in turn, were enforceable by law.

special pillar assigned to him, and it was there that he received clients, took notes, gave consultations or disposed of other legal business. In the relationship between the serjeant and his client the following facts stand out. Usually the client or his *attornatus* approached and retained the serjeant by contract for a fixed period. Such a contract, including the provision for fees, was then enforceable by law, although later the serjeant could not demand a fee and, hence, was unable to sue for it.<sup>45</sup> Conversely, and as a result of this contract of employment, the serjeant could be sued by the client for negligence if he did not properly conduct the case of the client. Out of this situation several disputes arose before the courts as to the serjeant's fees or conduct. In 1436 Judge Pastow stated that if a serjeant undertakes "to plead my plea and do not, or do it in another manner than I told him whereby I have loss, I have an action on the case;" and in 1440 a certain Stokes argued that if a serjeant fails to show up on the day set for trial and thus loses his client's case, the client has "an action of deceit." The King as well as other litigants paid the serjeant partly in cash and partly in kind; they were often rewarded for their services by liveries of cloth or robes or other valuable "presents." The various statutes forbidding maintenance of the serjeant were never seriously enforced and, hence, were soon totally relaxed.

## XVI

### THE NARRATOR, THE ATTORNATUS, AND THE SERVIENS

#### (1)

Strictly speaking, the *narrator* (*countour*) was not

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<sup>45</sup> During the Middle Ages both the *attornati* and the serjeants could sue for their fee. But in 1629 or 1630 it was laid down that the remuneration of a serjeant was "not duties certain growing due to contract for labour or service, but gifts. . . ." In other words, as in Roman Law, the serjeant was entitled to a *honorarium* rather than to *merces*. This rule first appeared in the Court of Chancery (*Moor v. Row*).

identical with the *serviens* (serjeant). Originally, the *narrator* was a private person who might, or might not, have been also an *attornatus* (or *responsalis*). The *narrator* merely told the party's tale, but he did not argue before the court. When the King, for instance, sent his *serviens* to court, the *serviens* was also the King's *attornatus*. At least in the beginning, he simply "told the story," and nothing more. But in his role as the King's representative or *attornatus*, the *serviens* gradually began to argue also. In other words, he did not limit himself to playing the role of a mere "reporter" but assumed the part of an "arguer at law." He became one who not only told the King's tale, but who debated with the court on points of law as well as the application of the law to the set of facts he had just recited. This gradual transition from a mere "teller of the tale" to an "advocate" constituted a decisive step in the development of the early English legal profession. Parties more and more frequently sought out the services of a *serviens* who apparently could do more than a mere *narrator*, in that he now also argued their cases. Nevertheless, as has already been shown, for some time to come the *serviens* was still referred to as *narrator* (or *countour*, *counter*). It could be maintained, therefore, that the early *serviens* or serjeant, especially when he was retained by a private, that is, non-regal party, was nothing more than an argumentative *narrator*.

In the beginning the terms *responsalis*, *narrator*, pleader, *attornatus*, *serviens* or serjeant, not to mention such designations as *advocatus*, *procurator*, *causidicus* and *concillarius*, basically were but faint differentiations of the fundamental notion of legal representation or legal assistance in early England. Only in the course of time did these various differentiations become more definite. This would also explain why they were frequently used as synonyms. It may not be amiss to presume that at least for

a while the *attornatus* might have done all the legal work expected of a lawyer, both in and out of the court. Hence the *attornatus* as one time might have assumed the distinct duties of the *responsalis*, *narrator*, and *serviens*. Or he might have called in and collaborated with the *narrator* or the *serviens*, as, for instance, a general medical practitioner may call in a specialist in a particularly difficult case. The *attornatus* and the serjeant (*narrator* or pleader) were finally to emerge as two parallel workers, who, within their own groups comprised the two main branches of the English legal profession.

(2)

The *attornatus* gradually asserted himself against the *serviens*, while the *narrator* died out, or perhaps was gradually absorbed by the serjeant. The disappearance of the *narrator*, like that of the *responsalis*, is easy to explain. The *narrator*, like the *responsalis*, had come into existence for a special and limited purpose. He started out as a casual "helper." But somehow he never managed to become a true professional: With the advent of professionalism, which raised the *attornatus* and the serjeant to eminence, the amateurish *narrator* and *responsalis* simply disappeared. Originally, the *narrator* perhaps was midway between the *attornatus* and the *serviens*, but at the end he was absorbed by the latter.

The particular position held by the *serviens* may be gathered from the fact that there is not one instance on record where a man on his own authority constituted himself as a *serviens*, or where a party disavowed a *serviens* as such. The *narrator* (*countour*) or the *attornatus*, on the other hand, not only could constitute himself as such, but he could also be, and certainly was, disavowed. Naturally, there were always instances where a *serviens* was also named as an *attornatus*, but this might

have been in those cases where by express leave of the court they were acting for persons under a disability. Sometimes it is not clear whether a legal practitioner was a *narrator* (*serviens*) or an *attornatus*. Thus a certain Johannes de Tilton (Tyltone) seems to have been both. In any event, this Tilton at times argued alone, but in a case tried in 1292 he acted as an *attornatus* and introduced and avowed a *serviens*. But in 1304 he was a *narrator* or *serviens*. Also, in 1338 an *attornatus* is named who was also a *narrator*. It is fairly safe to assume, however, that by the year 1300 the *servientes* no longer made it a regular practice to act as *attornati*. Especially after the two classes—the *attornati* and the *servientes*—had become two distinct branches of the English legal profession there was little “changing of pleas” between the two. Nevertheless, whenever one of the various ordinances and statutes promulgated either by the Crown or by some commonalty such as the city of London regulated the activities of the *servientes*, the *attornati*, as a rule, were also dealt with.

## XVII

### THE LAWYER IN THE CITY OF LONDON AND IN THE PROVINCES

#### (1)

As unlikely as it may seem, the city of London with all its commercial, industrial and urban institutions and enterprises was not, as has been surmised, the first commonalty in England which regulated its legal profession. The city of Leicester, it appears, did so as early as 1277, three years before London took this decisive step. The important Leicester Charter of 1277 reads as follows:

Whereas attorneys have not been wonted to be taken except in court and in the presence of the parties, and that for the plaintiff only, by which many people have lost their . . . business or their pleas, it is provided that the one party or the other, so wishing, may appoint an attorney and this as well in the absence of his adversary as in his presence; and that the attorney may be received in his place to do as he himself would do, except only . . . in the pleas which may be pleaded by attorney;<sup>46</sup> and that before two witnesses who may bear witness to the attorney [the *attornatio*] if need be.

Of special interest is the remark that the original practice seems to have allowed an attorney only to the plaintiff, and that the *attornatio* originally was permitted only in the presence of the defendant.

(2)

During the twelfth and thirteenth centuries the city of London probably enjoyed more privileges than any other part of the realm. It was a town of considerable local independence and close local organization. The Crown, it seems, had every reason to be on good terms with the fickle citizenry of London. Most of the litigation arising within the city was probably of a commercial nature and, hence, was decided in the local courts. It must also be assumed that there was much litigation. Hence it is not surprising that the local bar of London should assume a leading role throughout the realm and show the way to the rest of the English legal profession. Between 1220 and 1230 the *attornatus* was already a recognized institution in the city, and soon special regulations were passed by London concerning the legal practitioners there.

By the middle of the thirteenth century legal practice in the city of London must have been a thriving business.

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<sup>46</sup> This statement signifies that the attorney, because his particular task was primarily technical, had to plead the essential plea and no other.

It also has been said that legal quibbling was at its worst there. In 1259 Henry III gave the city a charter which granted the citizens the right to plead their own causes in their own local courts without the assistance of a lawyer or attorney: for the future no Londoner could be compelled to retain an *attornatus* in any plea, "whether in the Husting or in other City courts, except in pleas of the Crown or in pleas about lands or wrongful seizures. But everyone shall [if he chooses to do so] make his complaint with his own lips and the other side, too, without any technical objection so that the court, advised of the true facts, may do justice in the premises." Moreover, "foreigners as well as others" could make their attorney, both to plead and to defend as elsewhere in the King's Courts.<sup>47</sup> The citizens were to have "all their liberties and free customs" as regards the form and the manner in which they wished to plead or carry on their forensic business. Thus, after 1259 the citizens of London had special privileges in that they no longer were required to secure a special royal writ in order to appoint an *attornatus* in their own local courts. In addition, the charter also provided, "if any *attornatus (causidicus)* shall stipulate for his remuneration any part of the property involved in the case and is thereof convicted, he shall lose his fee and be suspended from practicing law." From the London Charter of 1259 it can be inferred that prior to this date the *attornati* of London, as a group, had become so powerful that they might have attempted, perhaps with the connivance of the city courts, to establish a professional monopoly and compel all litigants to retain one of them

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<sup>47</sup> A London Ordinance (?) of 1221 had prohibited a "foreigner" (*forinsecus*) who sued a citizen in the city to have an *attornatus*. "If a foreigner wants to implead a citizen [of London], he may not *facere attornatum suum* (make his attorney) in any way," for in such case it would be in his power, whether justly or unjustly, to embarrass and annoy a citizen. But if the foreigner possessed land in London and were himself sued, he could make his attorney, provided he secured a royal writ to do so.

in all law suits pending in the city courts. This "conspiracy" apparently was foiled by the charter.

(3)

The London City Ordinance of 1280, we are told, was issued "because oftentimes there were some who made themselves serjeants (*countors*)<sup>48</sup> who did not understand their profession nor had learned it." As regards these men the city fathers realized that:

. . . through their ignorance [of the law] the impleaded and the impleaders lost their pleas and their suits . . . and some were disinherited through their ignorant behavior. Seeing that everyone on his own made himself a serjeant (*countor*), such a one sometimes as did not know how to speak in court in the proper language, to the scandal of the courts . . . which allowed them so to be, . . . [and seeing] that through them the law was despoiled, the Mayor with his Aldermen . . . , at the request of the serjeants and *countors*, who understood their profession and who therein felt themselves greatly aggrieved, has decreed that henceforth such persons shall not be heard as do not reasonably understand their profession . . . . [Only] such persons [as know the law] shall hereafter be admitted [to practice] by the Mayor [and the Aldermen] . . . . This Ordinance . . . shall hold good for our serjeants, attorneys and essoiners who generally attend our courts and are constantly dwelling among us . . . . Each [practitioner] shall hold his own estate . . . ; no *countor* [serjeant] shall be an attorney . . . .

The duties of a London serjeant are described in the Ordinance of 1280 as follows: he should stand up while pleading, "without baseness and without reproach, without foul words and without reviling any man, so long as the court last." Under pain of permanent disbarment, no

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<sup>48</sup> The term *countor*, which is here synonymous with serjeant, is more frequently used in the city records. It seems that the city scribes wished to avoid the term serjeant because it was associated with the Crown, as may be gathered from the designation *serviens regis*.



serjeant or attorney could buy or have assigned to himself part of the litigation. Neither was he to take pay from both parties in any action, under pain of three years' suspension; but rather he should practice his profession well and lawfully. He was to do nothing to defeat justice under pain of permanent disbarment. The same penalty would be imposed if he contravened the ordinance in any way. Any legal practitioner who took money and afterwards abandoned his client, or went over to the opposing side would be penalized by twofold forfeiture and suspension from the case. If an *attornatus* or serjeant by his default or by his negligence lost his client's case, he could be imprisoned.

The London Ordinance of 1280 was part of the far-reaching legal reforms which were initiated by Edward I (1272-1307) and his Chancellor, Robert Burnell. These reforms, as may be gathered from the First Statute of Westminster of 1275, the Second Statute of Westminster of 1285, or the Royal Rescript of 1292 dealing with *attornati*, also included a thorough regulation of the contemporary English legal profession. In view of the many instances of chicanery, corruption, oppression, or other forms of professional misconduct, such a regulation was a matter of necessity while the exposure as well as the elimination of incapable lawyers was simply a matter of precaution. Another matter of precaution was the provision in the London Ordinance of 1280 that the mayor and the aldermen of the city of London would see to it that only competent and honest men were admitted to practice in the city courts. In this the mayor and the aldermen could always rely on the advice and cooperation of the competent lawyers who, in the words of the ordinance, had themselves requested a more thorough regulation of the profession. The mayor and the aldermen would record the admission of an attorney to practice in the city courts,

just as the royal justices would admit them to practice in their courts after the year 1292. For it was apparently the constant concern of the litigious city of London to promote good pleading and, at the same time, to protect the public against all sorts of legal malpractice. No attorney or serjeant was to practice in London unless he was "an intelligent person," that is, a man trained and learned in the law, and unless he had been properly admitted to the London bar. The Ordinance of 1280 also decreed that no serjeant was to be an *attornatus*, and no *attornatus* a serjeant, thus sanctioning the separation of the profession which endures in England to this day.

Under the City Ordinance of 1280 four lawyers were admitted as *narratores* to practice in the London courts in 1288-89, after they had sworn to observe the provisions of the ordinance. On the same day five additional men were admitted and elected by these four *narratores*, presumably as their clerks, and sworn to abide by the ordinance. In 1305 five persons were sworn as serjeants in accordance with the ordinance.

(4)

Towards the end of his reign, King Edward I (1272-1307) assured the good people of London that they might defend themselves against all pleas of the Crown. Perhaps as a consequence of this royal grant, in 1310 or 1311, three well-known pleaders (*narratores*, serjeants?), namely, Geoffrey of Hertepole, Edmund Passelewe and Robert de Malmethorp "were admitted to serve the Mayor . . . in matters affecting the . . . Commonalty before the Royal Courts." Each of these three lawyers was to receive from the city treasury four marks (about fifty-five shillings) yearly for his services. This seems to have been the first recorded instance of a general retainer or "city attorney."

In 1318 or 1319 John de Waldeshof was granted the freedom of the city and one hundred shillings for his efforts in behalf of London as "the sworn serjeant of the City." The first permanent common serjeant<sup>49</sup> of London, however, seems to have been Thomas Juvenal, who was elected to that office in 1291 "for life and during good behavior." In 1309 this Thomas Juvenal was succeeded by Thomas de Kent. In 1318 or 1319, Gregory de Norton was appointed common serjeant and pleader of the city at one hundred shillings a year.

The common *countor* (*communis narrator*) or "city attorney" had to swear that he would well and lawfully serve the city as a "common serjeant," and that he would keep and defend the laws, usages and franchises of the city within and without, according to the best of his ability; that he would defend the interests of orphans; that he would give good and lawful counsel in all matters touching upon the interests of the city; that he would advise the city of, and prevent, any impending "common harm"; and that at all times and in all places he would loyally, speedily and zealously tend to any legal business of the city. The common serjeant of London, it should be noted, was not barred from advising private clients. Part of his official duties were to be available to all citizens for legal consultations, at first probably without charging a fee.<sup>50</sup> Also, the common *counter* frequently acted as public prosecutor and as legal advisor to the city clerk. It seems that only the common *counters* of city attorneys of London had to swear a "professional oath," which, therefore, was primarily an oath of allegiance or of office to be taken by a public officer. Private legal practitioners in London, on the other

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<sup>49</sup> The term "common" (*communis*) in this connection meant that the serjeant was a *serviens communitatis*, a serjeant of the Commonalty. Hence he was also referred to as "our serjeant."

<sup>50</sup> The King's serjeants, at least in early times, could not advise or plead for private clients.

hand, apparently never swore a special oath that they would do their duties properly. They merely swore that they would abide by the City Ordinance of 1280.

(5)

After the year 1300 business in the city courts of London began to increase steadily. In 1309, owing to the number of law suits, "now greater than ever," it became necessary to raise the number of city judges from three to six and make them sit in two divisions.<sup>51</sup> Correspondingly, practice in the London courts became a very lucrative occupation. The number of competent lawyers, who practiced both in the city courts and in the royal courts, rose rapidly. Thus it appears that the various city ordinances or charters dealing with the regulation of the legal profession in London, did have wholesome effects, not only for the city but also for the whole realm and the profession.

The city of London was extremely jealous of its privileges and did everything to prevent encroachment on its jurisdiction. The oath of office demanded of the *attornati* and "common countors" reflects this fully: "The pleaders [and attorneys], who are commonly residing in the city for pleading, shall . . . not plead or give counsel against the usages and franchises of the city of London, but . . . [shall] maintain the same to the best of their powers." The pleaders, attorneys and serjeants were also enjoined that "they will not act as attorneys for anyone if they are not admitted [to practice] and in the Roll; that they will consult their records . . . so that their pleadings may be well and properly entered without any manner of tardiness; and that they will attend well and lawfully to the business of their clients without committing fraud or deception upon

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<sup>51</sup> About this time the chief clerk of the city received a raise in salary, "because he has more to do than ever."

their clients." In addition, they were also "strictly charged and sworn . . . well and lawfully to do their duty each in his own degree,<sup>52</sup> and well and lawfully to examine their clients and their complaints without champerty and without procuring any jurors or embracing (packing?) and inquests . . . and not to wrest any suit from its nature (meaning, not to introduce any irrelevant matter or pervert justice)." Also, they swore not to undertake to assist in ousting the jurisdiction of the city courts in matters where a non-citizen was a party.

(6)

The Ordinance of 1280 and subsequent regulations of the professional activities of lawyers in the city of London also indicate that each of the two branches of the London legal profession, the *countor* and the *attornatus*, began to be regarded as a separate professional class.<sup>53</sup> Although the Ordinance of 1280 did not expressly refer to the *attornati* as a class of people whose regular business it was to represent others in their legal affairs, it nevertheless seems to have implied that for some such persons the practice of law had become a regular and continuous occupation. Certainly the provision that no *attornatus* may be an *essoiner* or *countor*, or that no legal practitioner may accept pay from both parties, makes sense only if the practitioners acted in a professional capacity. It must be borne in mind that the city of London was a commercial and industrial town where ordinary people, and not only the grandees of the realm, litigated many law suits which arose primarily from trade and industry.<sup>54</sup> The city courts were busy, therefore,

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<sup>52</sup> This signified that no *attornatus* ought to be a serjeant, and no serjeant should be an *attornatus*.

<sup>53</sup> The author of the *Mirror of Justices* likewise considers each of these two branches to constitute a separate class of lawyers.

<sup>54</sup> The overwhelming majority of the cases in the royal courts of that time were concerned with tenures and "rights in land."

and since the demand for legal representation and legal advice on all matters of law must have been great and varied, there probably existed a considerable number of people who, by constantly acting for others, gradually acquired a professional attitude towards this kind of activity and also gained a professional reputation among their fellow citizens. This is perhaps the meaning of the passage in the Ordinance of 1280, which refers to those serjeants, attorneys and essoiners "who generally attend our courts and are constantly dwelling among us." It also appears that the ordinance attempted to draw a practical distinction between the "professional" or "regular" legal practitioner and the non-professional man. Professional lawyers, it seems, were those men "who generally attend our courts and are constantly dwelling among us." No doubt, any citizen or foreigner, as the ordinance proclaims, could choose the counsel he preferred, but if this counsel came to London from without the city, he must abide by the rules which apply to the regular (professional?) London practitioners.

(7)

For some time to come it was not unusual for the judges in the London city courts (and also for itinerant judges, who as "special judges" were appointed only to an assize) to have a "private practice" of their own. This custom was finally abolished by a statute in 1346<sup>55</sup> and a further statute of 1384<sup>56</sup> which decreed that neither justices nor Barons of the Exchequer should give legal counsel or be any man's counsel in any cause or plea, unless they had withdrawn from the Bench and returned to the Bar.

By the end of the thirteenth century the city of London

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<sup>55</sup> 20 EDW. 3, c. 1.

<sup>56</sup> 8 RICHARD 2, c. 3.

already recognized the legal profession as such, and subjected it to a number of controls. It may be maintained, therefore, that it was probably in London that the existence of a legal profession was first acknowledged in the realm. Due to the fact that it had become a commercial and industrial city, London was able to discard at a relatively early stage some of the archaic notions which were connected with mediaeval feudalism. Its burghers had come to be self-reliant and self-confident in an age where, as a rule, the ordinary person was of little account. No wonder that the city of London should also assume a leading role in the establishment and recognition of a legal profession, which, after all, was just another guild of commoners in a "guild-conscious" town.

## (8)

As may be expected, the development of a legal profession in the provinces was rather slow. The "country lawyer," it is safe to assume, probably made his appearance together with the itinerant justices, since several legal practitioners seem to have followed the itinerant courts into the countryside. The dearth of adequate lawyers in the provinces during the fourteenth and fifteenth centuries becomes evident from a petition of 1364 or 1365. At that time the Commons complained that owing to the uncertainty of the exact place where the itinerant courts sat, parties could never be sure in advance of competent legal assistance, since at some of these country places no good lawyer was to be found.<sup>57</sup>

At first the country lawyer seems to have been a plain, casual *attornatus*, but later he developed into a *serviens*. The Leicester Charter of 1277 already recognized the *attornatus* in court, provided he was properly attorned. But by 1277 the *narrator* as well as the *serviens* still was unknown. The distinction between the two branches

of the legal profession, which by the end of the thirteenth century was already accepted in the city of London, was, on the other hand, unheard of in the provinces. But since the royal courts sat in the provinces from time to time, it is not surprising that the serjeant, too, should make his way "into the country." Thus, at the Oxford Eyre of 1285, a *serviens* by the name of Robert appeared in court, and in the year 1300 a certain John de Maldone practiced as a serjeant in Lincoln. But barring these irregular and infrequent visitations, the general dearth of competent and permanent legal assistance caused considerable distress to litigants in the provinces for some time to come.

Such conditions were gradually remedied by the emergence of the English country lawyer, who by the fourteenth or fifteenth century succeeded in becoming a professional man. With the constant increase of litigation throughout the countryside, the number of professional country lawyers grew accordingly. This is borne out by the fact that a royal writ of 1350, which provided that no lawyer should be sent to Parliament, was to be circulated in all the counties. Unless there existed a considerable number of country lawyers, there would have been no reason to promulgate such a writ in every county. In 1384 a statute<sup>58</sup>

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<sup>57</sup> In 1415 the Commons again complained that with the exception of the two Chief Justices no judge had the power to receive the appointment of an *attornatus* unless "on the spot." Since there were several counties which apparently were seldom, if ever, visited by the itinerant courts, a great many people, who could neither personally appear in court nor appoint an *attornatus*, found themselves in a serious plight. Hence the Commons petitioned that all judges, no matter where they were, and "every serjeant of the King" should have the power to admit an *attornatus* in the country. The petition of 1415 actually seems to have launched the English country lawyer. This may be gathered from the famous petition of the citizens of Norwich, Suffolk and Norfolk of 1455 (later incorporated into 33 HEN. 6, c. 7), which bitterly complained about the excessive number of attorneys in these parts of the realm and their alleged mischievous activities. The remedy prayed for was that for the future there should be only six "common Attorneys" admitted to the "Court of Record" in Norfolk, six in Suffolk and two in Norwich.

<sup>58</sup> 8 RICHARD 2, c. 2.



decreed that no "man of law [ought] to be justice of the Assize . . . in his own county"—a further indication that the country lawyer had come into his own.

It is also fairly safe to assume that the old *narrator* originated in the circuit courts, that is, in the counties, while the *serviens regis* or serjeant developed at Westminster and London, where they lived and practiced their profession. But the original *attornatus* was probably the product of the whole of England rather than of any particular part of the realm: he could be found in the provinces as well as at the seat of the King's justice. The two earliest *Year Books* of 1292 and 1293, which to a large extent deal with trials in Eyre, contain the names of men who argued cases in court. These names indicate that they were mainly "local talent." In any event, they are not recorded in either Westminster or London. Hence it may be surmised that they were natives and residents of those parts of the realm in which they were practicing or in which the itinerant courts happened to be sitting at the time.

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