What is a Profession - the Rise of the Legal Profession in Antiquity

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WHAT IS A PROFESSION? THE RISE OF THE LEGAL PROFESSION IN ANTIQUITY

WHAT do we mean by the term “profession?” Is it any more today than a name for certain callings which have a traditional dignity and for certain other callings which in recent times have achieved or claim a like dignity? The distinction between the professional and the amateur, of which we have heard so much in the absorbing interest of sport, has done much to make a professional connote a money-making activity. In the face of the modes of thought engendered by sport, it is not easy to impart to this generation the conception of a group of men pursuing a common calling as a learned art and as a public service—no less a public service because it may incidentally be a means of livelihood. In the practice of law we have never lost this older idea of a profession of lawyers. Yet it was sorely tried in the reign of pioneer modes of thought in nineteenth-century America. Recent investigations of combinations of lawyers, physicians, and their runners in some of our large cities, show how a purely business conception and business organization, along the lines which govern in commercial and industrial activities, may grow up as a spontane-
ous product of the conditions of practice in large urban communities, and may impair the public administration of justice.

Historically, there are three ideas involved in a profession, organization, learning, and a spirit of public service. These are essential. The remaining idea, that of gaining a livelihood, is incidental.

It is true today that almost every calling is organized in some sort of trade association. Also it is true that, except as a growing number of states have gone back to the common-law organized profession of lawyers, in many and in some of our most important states we have no all-inclusive or responsible organization. An increasing number of states have incorporated their bars. But the profession in most of the older states still look upon this as a doubtful innovation. In half of our jurisdictions there is no bar in the sense of the Bar of England or the Faculty of Advocates in Scotland, or the Colleges or Societies of advocates in continental Europe. Simply there are so many hundred or so many thousand lawyers, each a law unto himself, and for most practical purposes, it must be said, accountable only to God and his conscience—if any.

Yet you must not infer from this that an organized profession of lawyers is wholly analogous to a retail grocers' association, or that there is no difference between an organized bar and plumbers' or lumber dealers' associations. The conditions of an unorganized body of lawyers in the United States in the last century made bar associations in some respects seem like trade associations. But the profession as organized in the rest of the world is another thing, and the want of organization with us was a remnant of a general attempt to deprofessionalize the traditionally professional callings and put all callings in one category in all respects which was characteristic of the formative era of American institutions. Even without formal organization, the legal profession in this country has on the whole preserved a tradition of solidarity and traditional incidents of professional organization which have been of much value for our administration of justice. But the ideal of the profession involves an inclusive and responsible organization, and a movement back to that ideal has been gaining in strength.

A true profession, both in idea and as a matter of history, is a learned profession. An unlearned profession is a contra-
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Learning, the pursuit of a learned art, is one of the things which distinguishes a profession from a calling or vocation or occupation. Professions are learned not only from the nature of the art professed but because they have historically a cultural, an ideal side which furthers the effective exercise of that art. Problems of human relations in society, problems of disease, problems of the upright life guided by religion are to be dealt with by the resources of cultivated intelligence by lawyer, physician, and clergyman, and to carry on their tasks they must be more than resourceful craftsmen, they must be learned men.

What is most important, however, a profession is practised in a spirit of public service. "A trade," says Professor Palmer, "aims primarily at personal gain; a profession at the exercise of powers beneficial to mankind." In a society in which free competitive self-assertion seemed the basis of the social order, lawyer and grocer and farmer alike seemed to be freely competing in order to acquire, each for himself, as much of the world's goods as he might honorably. But we are having to outgrow that conception. The lawyer is not bartering his services as is the artisan, nor exchanging the products of his skill and learning as the farmer sells wheat or corn. There is no such thing as a lawyers' or physicians' or clergymens' or teachers' strike. The professional man does not measure out his service in proportion to reward, even if, when he can do so, he measures his honorarium by the extent of service rendered. His best service is often rendered for no equivalent, or for a trifling equivalent, and it is his pride to do what he does in a way worthy of his profession even if done with no expectation of reward. "No professional man," says Professor Palmer, "thinks of giving according to measure. Once engaged he gives his best, gives his personal interest, himself. . . . The real payment is the work itself, this and the chance to join with other members of the profession in guiding and enlarging the sphere of its activities."

It would be idle to assert that there is nothing of selfishness in the pursuit of a profession. But its ideal is not one of individual success in competitive acquisitive activity. And because ideals operate powerfully to shape action, professional activity, even at its worst, is restrained and guided by something better than the desire for money rewards.
Today many other callings beside the three or four original professional callings, law, medicine, the ministry, teaching, are claiming professional status. Such, for example, are journalism, engineering, business administration. Each of these, as is true indeed in greater or less degree of all callings, renders a public service while also providing a livelihood. Each is coming to involve the application of what is or may be a learned art. Each may very likely be carried on in the spirit of a public service. It is significant that whereas one hundred years ago Americans were inclined to deprofessionalize callings, they now seek to reprofessionalize the older professions and to professionalize many new callings.

This change of attitude seems to be part of a general movement away from the extreme regime of competitive individual self-assertion which prevailed in the last century and toward a regime of cooperation. However this may be, in the course of such a movement it is a great advantage to the original established and recognized professional callings that they have a tradition of organization, of learning, and of a spirit of service, so that it will prove easier to set them in line with the requirements of the future than callings in which such traditions must emerge and establish themselves by a slow process of growth.

Let us begin, then, with the assumption that you are entering upon a profession with a long and honorable history, high ideals, and great traditions—"an order," says D'Aguesseau, "as old as the magistracy, as noble as virtue, as necessary as justice."

If it were possible to make a system of law a body of plain simple rules, capable of offhand infallible interpretation by any plain man, there might be no need of counsel to assist judges by argument as to the meaning and application of laws. But it is not possible to have a complete body of plain and simple rules of this sort. The essence of life is change and laws must govern the conduct of life. However, plain and simple the rule, the facts to which it must be applied change continually and so deprive it of the clarity of meaning and simplicity of application which it may once have had. Lawyers are not needed to wrest plain rules from their plain meaning but to give to rules which have never been or have ceased to be plain in all their applications a meaning which will achieve the pur-
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poses of justice. As I have said elsewhere: “let us not forget that so-called interpretation is not merely ascertainment of the legislative intent. If it were, it would be the easiest instead of the most difficult of judicial tasks. Where the legislature has had an intent and has sought to express it there is seldom a question of interpretation. The difficulties arise in the myriad cases in respect to which the lawmaker has no intention because he had never thought of them. Indeed, perhaps he could never have thought of them.” Yet such cases must be decided, and the general security requires that they be settled by law, i.e., by applying an authoritative technique to the laws provided for like cases. This can be done well only after argument by those who know the technique and have had experience in applying it.

Nor are questions of fact, on which tribunals must pass, as a rule, so simple or so easy to solve that the untrained man may pass upon them with assurance without trained assistance. Questions of fact between A and B are seldom presented as a plain proposition that A owes B. Usually that simple result follows from a complicated series of disputed facts, very possibly disputed in good faith at each step in the series. It is a rare controversy which does not have two sides, each believed in, in good faith, by honest men. In order to decide such controversies satisfactorily, the case of each party must be presented thoroughly and skillfully, so that things are put in their proper setting and the tribunal may review the whole case intelligently and come to a conclusion with assurance that nothing has been overlooked, nothing misapprehended, and nothing wrongly valued. The litigant cannot do this for himself. It can only be done by well trained specialists.

Proper presentation by a skilled advocate saves the time of the courts and so public time and expense. It helps the court by sifting out the relevant facts in advance, putting them in logical order, working out their possible legal consequences, and narrowing the questions which the judge must decide to the really crucial points. Good advocacy reduces the work which falls upon the judges to a minimum of decision upon the vital points in carefully sifted materials. When it is remembered that courts in our large cities often have over one hundred thousand or even more than one hundred and fifty thousand cases before them in a year, the importance of this
saving of the time and energy of the judges will be appreciated. Experience has shown abundantly the waste involved in inexpert presentation of causes by laymen or inexperienced or inept practitioners. The litigant who argues his case in person is proverbially a pest of the courts. It requires training and experience to enable one to order the materials, select the significant items, appreciate the legal bearings of each, and direct argument to the controlling points. Stevenson says that the difference between Homer and an ordinary poet is that Homer knew what to leave out. Certainly, understanding of what, in a complicated mass of details, should be left out, is the test of the advocate. The layman arguing his own case is likely to assume that all the facts and all the items of a course of dealing were created free and equal.

Along with training and experience, advocacy in order to be a help to the courts and an aid to the administration of justice demands the professional spirit. In order to further justice, in order to insure that the machinery of justice is not perverted, those who operate the machinery must not merely know how to operate it. They must have a deep sense of things that are done and things that are not done. They need the guiding restraint of a professional spirit to prevent misuse of the machinery, to prevent waste of public time in useless wrangling, to promote proper forensic treatment of witnesses, so that witnesses will not be unwilling to come forward to testify. They need it to inspire confidence on the part of courts in being able to rely upon what counsel represent to them, instead of having to waste time in looking up everything because unable to assume the face of things as presented by the advocates.

Nor is the agent's function superfluous in the world of today. Simply from an economic standpoint there is a very great saving of public time and public money in having cases prepared thoroughly and intelligently in advance of trial. The trial brief, prepared carefully beforehand for the advocate, insures that the crucial points will be distinguished from irrelevant details and completely presented, that time will not be wasted in futile quests for evidence which a preliminary investigation would have shown does not exist, and that the energies of judge and advocate will be directed to the real issues in the controversy. Nothing could be more mistaken
than the notion that the activities of attorneys and the technical requirements of proof are causes of needless delay. I remember sitting as a member of an athletic board to try an athlete accused of professionalism. The case against him was based on a postal card in which he was said to have accepted an offer to hire him for summer baseball at a resort. Many testified to having seen the card and to its contents and when I suggested that it would be better to produce or account for the card itself, I was told that we would have no technicalities but would hear all the evidence and decide on the merits. So the hearsay evidence went on till finally the card was found and produced and it turned out that the principal accuser had misread it and started unfounded rumors which were all there was of the case. A lawyer working up the case would have demanded to see the card and would not have rested till he found it or it was accounted for. That would have ended the matter. It would not have taken half a day of trial to show there was nothing to try.

As to the function of advising upon the law, it is enough to say that every man his own lawyer is as wasteful as every man his own advocate. When a layman draws his own will, he seldom appreciates the contingencies which must be provided for. When the will comes to be carried out, the courts must find out what he meant, and the difficulties will arise, not from his untechnical statement of what he meant, but from his not having meant anything about matters which must be settled from his words. Lay-drawn wills and conveyances drawn by real estate agents and notaries public are a notorious source of wasteful litigation.

It remains to note the branches of professional activity. Perhaps the oldest is the adviser's function—the function of advising as to how to conduct legal transactions and bring and defend legal proceedings. Out of this develops the law-teaching function and the jurisconsult's or law-writer's function. Another function hardly less old than that of the adviser is that of the agent or attorney. A later development is that of the advocate. In addition, there are certain specialized functions, as, for example, those of special pleaders and of conveyancers, which have or have had importance at one time or another. These functions, or some of them, may be highly specialized and performed by independently organized groups
of practitioners, or may be combined in various ways, or may be undifferentiated in a common body of lawyers, as in the United States. The aggregate of those who perform these functions or some one of them under license from some public authority may be called the profession of law.

Turning now to the beginnings of the legal profession in antiquity, we may start from law and lawyers in Greece, since Rome learned from Greece, the Middle Ages from Rome, and we from the Middle Ages.

1

LAW AND LAWYERS IN GREECE

Greek law is the law of city-states. But in classical Greek thinking, law in the lawyer's sense is not clearly differentiated from other agencies of social control. We must remember that even today, after law, recognized or established and enforced by politically organized society, has become the paramount agency of social control, it by no means bears the whole burden. The internal discipline of the household, the internal discipline of religious organizations, of fraternal organizations, of trade, professional and business associations, and of social clubs, as well as neighborhood, community, and general public opinion, still play a large part in constraining men to avoid anti-social activities and leading or pushing them into the paths indicated for the maintenance and furtherance of civilization. In classical Greece these things are not well differentiated from law. The Greek word which we translate as law is used to mean ethical custom, religious rites, law in general, a rule of law, and social control as a whole.

Moreover, while the Greek city was a politically organized society, it was very close to and in some respects in transition from a kin-organized society. Much of its ethical custom and codified customary law spoke from an older tribal society. It was at most tending to, but had by no means attained a stage of, what might be called strict law—that is, one in which social control through norms recognized or established by politically organized society has been set off definitely from religion and ethical custom and is governed by ideas of certainty and uniformity in that ordering and of rule and form as the means
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thereto. Classical Greek law was tending toward but had by no means attained this stage of legal development. In consequence, classical Greece did not develop lawyers, for law and lawyers go together. Yet here, as in nearly every connection in the social sciences, the germs of our institutions may be found in Greece.

In a kin-organized society and in a religious-organized society the received forms of transactions, the received modes of appealing to the king or magistrate for redress, and the received norms of decision are a tradition of a priestly caste, or, later, of an oligarchy by which alone they are known and handed down. Hence when one wished to know how to carry out a transaction in such wise as to give it legal efficacy, or how to bring a legal proceeding, or how to carry on a litigation, or how to predict a decision, or, if called on to judge a controversy, how to decide, he consulted some one of those who knew the received tradition. We shall see presently in another connection how at Rome these repositories of the received tradition grew into jurisconsults. In Greece also we see the germ of the jurisconsult's function in what were called interpreters.

According to the Greek dictionary-writers of antiquity, from whom most of our information comes, these interpreters were resorted to for authoritative pronouncements on the traditional law. But this traditional law, so-called, was much wider than what we should call law. It included religious rites and usages, so that of the three categories of interpreters, described in the sources, only one had to do with authoritative materials of judicial decisions. Indeed, where causes were decided by large bodies of citizens analogous to popular assemblies, no interpreter could predict what the course of decision would prove to be and the advice of the interpreter was not so much counsel as to the law as a general explanation of the probably expedient course of action. At Athens in cases of homicide, arson, and some like crimes, jurisdiction was in the Council of the Aeropagus, made up of the acting and former magistrates, and that tribunal was governed by traditional custom. In this limited field there was scope for the jurisconsult's function. Beyond this the interpreters ceased to be of importance. They have been said to be "a special group of jurisconsults." But this is far-fetched and doubtful.
Another type of person of whom we must take account are the scribes. But they can hardly be thought of as lawyers although some part of the lawyer's function has been differentiated from their manifold tasks. The scribe is an oriental institution, while the lawyer comes rather from the west.

On the other hand, we may trace a continuous development of the advocate of today from those who represented or assisted others in litigation in Greek tribunals.

In primitive law, the kin group rather than the individual is the legal unit. Hence, in the beginnings of law, in politically organized societies still close to an older kin-organization, dependents are represented before tribunals by the head of the kin group. If one is not a dependent, he must represent himself. There is no advocacy. The kin group speaks through its head on behalf of dependents because their cause is its cause. The kinless man, the emancipated man, the man who is not a dependent, speaks for himself. So it was in Athens and doubtless in Greece generally.

Yet there were certain exceptions and relaxations. A city could only speak through a representative, and in public prosecutions (for the beginnings of law do not distinguish crime and tort and the normal proceeding to enforce a penalty is private) and impeachments a representative of the public was called for in the nature of the case. Also an accused might call in some one (probably originally a kinsman or the head of the kin group) to stand beside him and assist him, and to a less extent this sort of assistance was allowed to an accuser. Also in certain rare cases the tribunal might authorize a parent, a friend, or a member of the same tribe to complete or supplement the explanation of his case made by the party in person. One who thus represented a city or the public or assisted accused or accuser or supplemented another's exposition of his case was called a synegoros. He was to some degree an advocate. The same name, synegoros, was given to one who was chosen to speak on behalf of the state with respect to proposed legislation.

A more significant institution for our purpose is that of the speech-writer (logographos).

In order to understand his function we must remember that in the Athenian polity there was little of what we now call separation of powers. Political and judicial functions were
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little differentiated. The citizen was both legislator and judge. The people judging and the people deliberating and legislating were not well distinguished. The ordinary tribunal was a large body of citizens under oath to decide a particular cause and addressed not as jurors (dikasts) but as citizens. These dikasteries, as they were called, might contain as few as two hundred and one or four hundred and one, or as many as fifteen hundred and one citizens. Obviously, it was a difficult task for the ordinary man, even at Athens, where citizens were accustomed to public speaking in the political assemblies, to present one's own case before so large a tribunal. The timid, the inexperienced, the ignorant were at a great disadvantage before such a court as compared with a single judge, who by questioning can patiently and skilfully bring out what is to be said on both sides. In the Greek trial each party made a speech in the course of which he adduced evidence, brought forward witnesses, and cross-examined his adversary in connection with his several points as he went along with his narrative. The speech was undifferentiated, or little differentiated, narrative, proofs, and argument. In a case of any complexity it called for a degree of skill beyond the everyday citizen. Hence the average litigant employed a speech-writer or logograph who, for a fee, drew up a speech and turned it over to his client. The client learned it by heart and delivered it before the tribunal.

Obviously, the speech-writer was not an advocate. Yet the Roman orator, from whom the advocate of today is derived historically, took the Greek orator for his model. Moreover, the successful speech-writer had to be something very like a lawyer. He had to be well versed in Athenian law and procedure. He might have to argue that the popular tribunal should adhere to the law. In the next case he might have to argue that the tribunal, as juries sometimes do, should run away with the law and decide on sympathy or emotion or lay ideas of a square deal. In either event he had to know the law which was to be applied or dispensed with. Also he had to know the psychology of the Athenian juries and be sensitive to their passions and prejudices. Above all, he had to know how to adapt the speech which he wrote to the age, the condition, the character of his clients and make it seem to flow naturally from the mouth of the speaker. All this is closely akin to the task of the advocate.
There was no clear differentiation of the agent's function from that of the advocate. Indeed, syndic (which came to mean agent) and synegoros (which denoted something very like an advocate) are often used as synonyms. Syndic means etymologically one who intervenes in a legal proceeding. Obviously, a city-state, a foundation, an association, and the like, could not appear in court in person. They could only be represented by agents. It is significant that the name given to these agents was the same as that given to the representative of a city-state before the Amphictyonic Council, but also the same as that often given to synegoroi, and to one who assisted the demarch, or presiding official of an Attic deme, or township, in a prosecution or when the deme was proceeded against before the popular tribunals.

In Greece we have the beginnings of lawyers rather than lawyers as we know them in developed legal systems.

2

LAW AND LAWYERS AT ROME

I

The Development of Representation at Rome

In the Roman law of the later republic and especially in the classical Roman law of the early empire, we find law in the sense of the legal ordering of society well set off from other agencies of social control and law in the sense of an authoritative body of materials for the guidance of judicial action well differentiated from ethical custom, religion, and public opinion. Also, there is a well developed legal procedure, with a system of actions leading to defined remedies and grounded in defined legal duties established by definite legal precepts by which the judges consider themselves bound. In other words, there is law in the lawyer's sense.

In the later republic and early empire, an intending litigant had to go before the praetor or judicial magistrate and point out the particular provision of the edict upon which he relied as the basis of his action. One not thoroughly versed in the law would need advice or, better, would need someone to make the application to the judicial magistrate on his behalf.

But there was another difficulty which called no less or
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even more for representation of litigants before the magistrate in the preliminaries of legal proceedings. As the Roman state outgrew the confines of the city of Rome, the persons on whose behalf applications were to be made to the praetor of Rome, and those who had to ask that the formula include a statement of their defense, might live at a distance and it might be very inconvenient for them to be at Rome to make personal applications and requests. Also, as the law of the city of Rome came to be the law of the world, litigation according to the Roman law was carried on in the provinces. In the provinces the governor had the jurisdiction and authority of the Roman praetor. But the provinces were often of wide extent and there was the same difficulty and inconvenience in personal attendance and personal applications. This need for representation in legal procedure led to a practice of appointing agents or attorneys.

There were two modes of appointing a representative for litigation, the formal and the informal. The agent appointed by the older or formal mode was called a *cognitor*. He had to be appointed by the party using a set form of words in the presence of his adversary. The person named as *cognitor* might be either present or absent, but if absent it was required that he consent and undertake the attorneyship.

An agent for litigation appointed by the later and informal mode was called a *procurator*. He might be appointed by any words amounting to instructions to sue or defend, as the case might be, and without the presence or even the knowledge of the adverse party. Indeed, it was enough that the *procurator* undertook the agency in good faith and undertook that his principal would ratify what he did. He could begin an action without producing his instructions and it became a usual practice not to produce the instructions until the trial before the *judex*. Thus far, you will have seen, the procedure was very much as by an attorney at common law or solicitor in chancery or by a proctor in the ecclesiastical courts or the civil law.

Roman law, however, did not have modern ideas of agency. What the agent did was not thought of as done by his principal. What the agent did he did himself, as the law saw it. But he was bound contractually that the benefit of what he did should inure to his principal and the principal was bound con-
tractually to indemnify the agent for loss and expense incurred in his carrying out the agency in good faith. Applying these notions to procedure and bearing in mind the idea of the beginnings of law that parties other than dependents must carry on their legal proceedings in person, it is evident that the plaintiff’s cognitor or procurator must be taken to be carrying on his own case and the defendant’s cognitor or procurator to be defending his own case. Hence if, let us say, Lucius Titius (The Roman John Stiles) is cognitor or procurator for Aulus Agerius (let us say Peter Plaintiff) who is suing Numerius Negidius (let us say Dan Defendant), the formula delivered to the judex would read: “If it is proved that Numerius Negidius ought to pay to Aulus Agerius ten thousand sesterces, O judex condemn Numerius Negidius to pay to Lucius Titius ten thousand sesterces.” In like manner, if Negidius was defending by a cognitor, say Publius Maevius, the formula would say that if it was proved that Negidius owed Agerius ten thousand sesterces, the judex was to condemn Maevius to pay Titius that amount. Thus the judgment might be in favor of one attorney and against another, on the case of one principal against the other. But there was a contractual duty on the one side to account for the benefit of the judgment and on the other to indemnify against it. Accordingly, an action might be brought by the attorneys or by the parties as the case might require, to charge the real defendant with the judgment, or to give the real plaintiff the benefit of it. Later, the simpler device obtained of a transfer of the judgment to and against the real parties by operation of law. When this step had been taken the agents for litigation had become truly attorneys.

In Justinian’s law (and before) the formal mode of appointment of cognitors had become obsolete. Also much old law as to objections which a defendant might interpose as to the competency of a procurator had been done away with. The praetor’s edict had forbidden persons under the age of seventeen, the deaf, the blind, women, and persons of bad character from making applications on behalf of others in litigation. Soldiers also were not competent to act, even on behalf of a parent or wife, and could only represent themselves so far as they could do so without breach of discipline. Thus it is evident that while there was no profession of attorneys or agents for litigation, and except for the cases prohibited by the edict, any
one might be appointed for the case in hand, yet certain persons had begun regularly to act in this way.

We know from Latin writers of the Empire that there were habitual practitioners in the courts who were of a very low type, despite the provisions as to character in the praetor's edict. Perhaps one need not say that to allow the defendant to challenge the character of the plaintiff's lawyer, by way of a dilatory plea, and thus put off a trial of the merits, was to offer a cure worse than the disease. It provided no effective check upon the low and unscrupulous type of practitioner which is apt to develop from the need of representation in litigation and the opportunities which that need offers for preying on the ignorant and extorting from the timid. So long as a body of agents for litigation is unorganized, subjected to little or no scrutiny before entering upon that calling, and without the check of discipline by responsible authority, serious abuses have always followed.

Much remained to be done before the Roman procurator became the attorney or solicitor of today. Yet when we compare the procurator with the beginnings of agency in litigation in Greece, we must recognize that great progress has been made. The old idea that the litigant must conduct his case in person had disappeared as to the technical legal proceedings leading to the trial. A class of, on the whole, skilled and experienced agents for litigation had developed, and the crude idea of the agent as assuming the litigation had been superseded by a recognition of the agent for what he was, a representative, and of the principals as the real litigants. There had even been some development of judicial checks upon the personnel of the calling. The praetors had at least tried to confine the calling to men of good character in a position to give their time to cases without interfering with their other tasks. Thus when we leave the Roman law in its final form for the ancient world, we are well upon the road to one important branch of the legal profession as we know it today.

II

The Development of Advocacy at Rome

In order to understand the role of the advocate at Rome, we must look somewhat more closely at Roman legal proced-
ure. First, then, of criminal procedure. In some cases, after preliminary inquiry and condemnation before a magistrate, there was appeal to and trial before an assembly of the people. This trial before the people necessarily came to an end when a world state succeeded to a city state under the empire. In other cases, the prosecution was tried before what we may well call a jury of from thirty-two to seventy-five *judices*. This trial before a jury decayed under the empire and an inquisitorial procedure before magistrates developed in its place. In others, a penalty was sued for according to the course of a civil proceeding. Here there was a trial before one or more (sometimes a considerable number) of *judices*. Thus Roman criminal procedure of the classical era afforded much the same scope for an orator as trials before the popular tribunals at Athens:

As to civil procedure, it was divided into two stages—a stage *in jure* before the magistrate, and a stage *in judicio* before the trier or triers.

In the stage before the praetor or judicial magistrate the purpose was to frame the issues to be tried and appoint a *judex* or a number of *judices* to try them. There might be a hearing at this point as to whether the action desired should be given to the plaintiff. If it was allowed, the praetor settled the formula or set of instructions to the *judex*, containing what in our law we should call the pleadings of the parties and directions as to what judgment to enter in case certain issues were found or not found.

When the formula was complete, the parties joined in what is called the procedural contract. That is, they undertook to abide the result of the submission to the *judex* and the judgment was binding on them by virtue of that contract. Under the later empire the *judex* is no longer a private person chosen as arbitrator, he is an official. The plaintiff submits a written statement of his case and the defendant in like manner a written statement of his defense. There is no formal procedural contract. Also, the court could refer some particular point to the oath of a party, leaving other issues to be tried, so that a cause might not be tried as a whole but only on issues remaining unsettled.

At the trial, there might be speeches with introduction of
evidence in the course of the speech, as in the Greek practice, or speeches followed by evidence, or a speech for the plaintiff, a speech for the defendant, opening their respective cases, then evidence on each side, then speeches by way of summing up; or there might be evidence followed by speeches on each side. There was no limit to the number of orators who might speak, but, though six are known to have spoken on each side in one case, usually there were not more than four on a side. Also, one might speak on his own behalf and have his argument reinforced by the speeches of from one to four orators. When more than one they were supposed to divide the points. But Cicero tells us that they frequently forgot this and made separate set speeches without having heard the argument they were to answer. Thus they tired the court by going over the ground already traversed by those who had preceded them.

Originally, the proceedings in judicio took place in the forum; and we have spoken of a court and of a place where orators are heard as a forum ever since. Strictly, the forum was the market place, the natural place of meeting for the ordinary folk of the city. It was in an irregularly shaped open space between the Capitoline hill and the Palatine hill, narrowing at the end next the Palatine with a branch of the sacred way on either side. The narrower end was the Comitium or meeting place of the assembly of citizens in the earliest times. The wider end was the forum. The Comitium was raised above the level of the forum. The rostra or platforms for public speaking were at the end of the Comitium nearest the forum, so that the speakers, who in old times had addressed the assembled citizens, could speak to the senators who were wont to stand here outside the senate house. But later, the speakers turned toward the forum and spoke to the body of the people who were assembled on that side, and the forum came to be used chiefly for judicial proceedings. Still later, basilicas were built around the forum and were used for the trial of civil actions, state trials, however, still taking place in the forum. The word basilica means literally "royal." So a basilica is a royal hall, i.e., one in which the king sat to do justice. The Roman basilica was an oblong building with a broad nave ending in a semi-circular apse and flanked by colonaded aisles or porticos. As the matters coming before tribunals became more complicated and as permanent judges began to sit in them, the old open air trial became obsolete and the trials
were held in the basilica. In Christian times basilicas were taken for churches, and the court house became the model for the church.

Roman practice permitted a litigant to be represented at the trial by an advocate. But he was not called advocate originally. Cicero tells us that an advocate was one who assisted with advice on points of law or by his presence as a person of influence gave weight to one side of a case. One who engaged in public speaking, either in the popular assemblies or in the courts, was called an orator. He was, like Cicero, both statesman and advocate. When he appeared in court to argue, he was called a patronus causarum or simply patronus, and the person he represented was called a client. These terms take us back to the origin of Roman advocacy in the relation of the head of a patrician household to his dependents in the polity of the old city. In that polity those who were not members of patrician households attached themselves to some household as dependents, and slaves who were freed were still in a relation to the master who had freed them and was said to be their patron. These dependents were called clients. They were entitled to be protected by the patron. Particularly, the patron was bound to appear in court for his clients, originally as representing the kin group of which they were taken to be members, and to explain the law to them, since knowledge of the old customary law of the city was a monopoly of the heads of patrician households. Thus this duty of the patron toward his client was the basis both of the advocate’s function and of the jurisconsult’s function as they developed at Rome.

In the beginning, the patron, as to his dependents, was both jurisconsult and advocate—both legal advisor and trial lawyer. Indeed, even in the classical period, although a differentiation had gone on, the same person might be both. Also with increasing complexity of social and economic development it became increasingly necessary to resort to jurisconsults and to be represented by an advocate. Thus a patron who had numerous clients in the older sense, when he had formed a habit of answering questions and arguing cases might find that others, not technically his clients, were resorting to him to obtain the benefit of his knowledge, experience, and skill. As he undertook to advise and represent them, they became his clients to that extent and the term client came to have the new meaning which it bears today.
Public speaking was the high road to a political career. The great men of the city sat in the courtyards of their houses to give advice and the ambitious young men prepared themselves for a forensic career by attending and taking notes of the advice given and by listening to the forensic exertions of noted orators. At seventeen, the Roman youth laid aside the dress of a boy (toga praetextata) and took on that of a man (toga virilis). He then went to the forum with a company of friends and was introduced by some distinguished citizen, preferably of consular rank, as a practitioner in the courts. The function of jurisconsult and that of advocate had already begun to be differentiated by Cicero's time and well differentiated in the classical period.

In Cicero's time there were what we should regard as serious abuses of advocacy, such as might be expected from the composition of the trial court in republican Rome. One of the advantages of a permanent judiciary trained in law is that it is not to be swayed from decision upon the law and the evidence by appeals to prejudice and emotion. In a common-law trial the tendency to be moved by such appeals is mitigated by the charge of the judge. In a Roman proceeding in judicio there was nothing but the formula to hold in a judex who was inclined to run away with the law. Accordingly, we see in some of Cicero's speeches for the defense quite irrelevant rhetorical devices for working upon the feelings of the tribunal, and he tells of more than one case where such advocacy prevailed at the expense of the law. Indeed, the advocate's dramatic efforts were often supplemented by those of the parties and their friends. An accused came before the tribunal dressed carefully for his part, sometimes accompanied by a swarm of friends dressed in mourning in token of their sympathy and sorrow. But these sorrowing friends might be brought in also to intimidate the tribunal. Hence, it was found necessary to forbid any appearing in that role beyond relatives within a near degree.

Another abuse was extreme license of oral examination. There was no law of evidence in our sense of that term, as, indeed, there is not today in the Roman-law world. Any one who had anything to say about the case could say his say for what it was worth. There were rules as to the capacity of witnesses and as to quantum of proof, and witnesses who had taken part in certain formal transactions (e.g. a formal con-
veyance of property) were bound to appear and testify. Also, the orators regularly argued that the uncorroborated evidence of one witness ought not to suffice for conviction in a criminal case and vouched the character, social position, or wealth of witnesses in support of their credibility. But there were no rules of admission or exclusion and the orator could examine any number of prominent persons on their hearsay opinion favorable to his client and set forth to the jury their high standing as giving weight to this substitute for evidence. In criminal cases it was a matter of course to bring in these laudatores, or witnesses to character, and Cicero tells us that to have less than ten of them was thought hardly respectable. One need not say that for political reasons this sort of evidence was given lightly and perfunctorily, yet might lead tribunals away from the real case. It was prohibited in 52 B.C. by legislation at the instance of Pompey. But this legislation did not endure. The older practice was restored after the triumph of Caesar.

Cross examination was highly developed. The Roman advocate knew and the Roman books on advocacy taught, what common-law advocates well know, but even experienced advocates sometimes forget, namely, not to press cross examination too far but to be content when they have the answer they sought, and not to ask questions on cross examination on crucial points unless they know for certain what the answer must be.

High water mark of Roman advocacy was attained in the last period of the republic and the beginning of the empire. The great advocates of the generation before Cicero and his older contemporaries are known to us from Cicero's dialogue de oratore. That dialogue, Cicero's orations, many of them delivered before the tribunals, and Quintillian's treatise, de institutione oratoria, are our chief authorities. The treatise of Quintillian (c 35-95 A.D.) has been classical ever since and is still worth reading by those who make a serious study of the subject.

Later under the empire, although the development of the law went forward, advocacy began to degenerate. In part, the system of permanent judges and obsolescence of the popular tribunals made for greater importance of the jurisconsult and less of the advocate. In part, the development of law from the
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Time of Cicero to the third century made for a certainty and uniformity in which the role of sheer advocacy in bringing about forensic results was continually less. Tacitus (c 55-120 A.D.) tells of the beginnings of this decadence. In place of the rigorous training and apprenticeship of the advocates of the late republic, he says that those who intended to become advocates formed no habits of study, took no pains to prepare themselves, and pretended to despise knowledge of law as something unnecessary for their calling. He says that they cultivated declamation and ornaments of style and so delivered speeches after school models, filled with rhetorical commonplaces.

But this was not the worst. Pliny the Younger (61 or 62 - c 113 A.D.) tells us that a bad practice had grown up of hiring a *claque* to applaud forensic speeches, so that, he says in one of his letters, if you wish to know how an advocate acquits himself you do not need to listen to him. It is enough to wait for the applause since you may be sure that the worst speaker has the loudest applause. This advocate's *claque* may have been a development of the crowd of supporters, the mourning friends, and the character witnesses of an earlier time. If we may believe Ammianus Marcellinus, a Roman historian of the fourth century A.D., the advocates of that time both at Rome and in the provinces, had fallen very low. No doubt his somewhat extravagant picture of them is in part a caricature. Yet we must not forget that there is sometimes more truth in a caricature than in a photograph.

In the fifth and sixth centuries, great improvements took place which gave to advocacy something very like its modern organization. Indeed, the modern continental organization is simply a development of the Roman in this its final form. The advocates ceased to be merely orators. They were not merely trained in rhetoric. They had studied in one or another of the law schools. A certain number was fixed for each court, and those attached to a court formed a sort of corporation. The law recognized the fees and fixed the scale. Professional discipline was provided for. Thus the main lines which exist today had become established.

In the fifth century and first quarter of the sixth, legislation moves steadily toward a well organized bar for each of the great courts. A statute of 468 prohibits the practice of
advocacy by those not admitted to practice. One of 440 limits the pretorian advocates to 150, and in 460 it is enacted that the number shall not be raised beyond 150 by recognizing assistants. In 469 a statute provides that there shall be 50 at Alexandria; in 474, 64 are recognized to practice before the pretorian prefect at Constantinople, and 15 are said to hold first rank next after the advocates of the fisc or legal representatives of the government. In 486, 150 are provided for in the prefecture of Illyria, and in 508, 30 in Syria. Meanwhile a statute of 452 had provided for two advocates of the fisc (an office which seems to go back to the reign of Hadrian) who were to be lawyers of the highest reputation. In the sixth century, the number of advocates before the pretorian prefect at Constantinople was reduced to 80. But a certain number of supernumeraries was allowed.

It remains to speak of the remuneration of advocates. In the beginning, the patron advised his client and supported his client's case or defended him because these were duties the patron owed to one dependent upon him. In consequence, when regular advocacy arose the assistance rendered to suitors in the forum was gratuitous. Of necessity, however, as there came to be a profession of advocates, requiring time and study and preparation if one were to undertake another's case, and as the client was no longer a dependent of a patron but one who sought to employ the skill and training and experience of an orator who stood in no relation to him, a practice sprang up of paying a gratuity to the advocate. It was natural also that those who had trained themselves for forensic exertion should, in a changed social order, employ their skill and training and experience as a means of making money. But the old idea was so strong that this was felt to be an abuse and a statute known as the *lex Cincia* (204 B.C.) forbade any one from accepting money or gift on account of pleading a case.

It must be remembered that under the republic the calling of orator opened the way to the highest political preferment. Those who followed it were in the public eye, and in any time and place where office is held by tenure of popular election, publicity is the politician's chief asset. Moreover, at this time the orators were usually members of wealthy families. They were men of rank and distinction with a strong sense of duty and trained in the older ideas which made advocacy a duty
to be performed without reward. They could well afford to despise remuneration for a service done for quite different motives than expectation of gain. Later, the ideas and motives which made advocacy a gratuitously performed duty ceased to exist. Political office no longer depended on popular election. Advocates were no longer as a matter of course heads of wealthy houses, scornful of gain. Men came to practice advocacy if not as a money-making calling, certainly as a means of livelihood. Yet the lex Cincia stood as law, and, indeed, Augustus reinforced it by procuring a resolution of the Senate prohibiting advocates from taking fees under penalty of a fourfold forfeiture.

One need not say that such legislation could not be enforced, and Tacitus tells us of a debate in the Senate in the reign of Claudius in which strong arguments were made for remuneration of advocates. The old patrician houses had passed or were passing. Those who were to come forward to do the work of the state would have largely to do so by way of the forum. Hence a strong legal profession was required for other reasons than as an aid to the due administration of justice. But to insure such a profession there must be a possibility of pursuing it in a society of individual competitive acquisition. Claudius was moved by such considerations and fixed the maximum fee at 10,000 sesterces, or 100 aurei (about $475) and made advocates liable to prosecution if they accepted more.

If you look at the statue of St. Yves, the patron saint of the lawyers, a great advocate of thirteenth-century France, you will see he carries in his left hand a bag marked 10,000, that is, the 10,000 sesterces fixed as the maximum by the Roman law. Thus the medieval artist sought to bring home to us that our patron saint was so great an advocate that every one always gave him the maximum fee, and yet so honest and law-abiding that he never took more.

In the decadence of advocacy, many abuses grew up as to fees, such as accepting a gift by way of fee in advance and then refusing to go on with the case, taking gifts by way of fee from both sides, and taking bribes not to exert the advocate's best efforts. In consequence, in the reign of Trajan a resolution of the Senate required an oath by both parties before trial that they had not given or promised any sum of
money to their advocates. Thus the fee, not exceeding the legal amount was to be paid after trial. This regulation also proved ineffective. In Justinian’s codification in the sixth century we find legislation from the third century on, which shows that fees were habitually paid in advance and deals with the abuse of receiving them and not conducting the case.

This history of the remuneration of advocates at Rome has had a profound effect on remuneration of advocates in the modern world. In the Middle Ages, when modern institutions were formative, the Roman law was supposed by the learned to be binding upon all Christendom. Later in the seventeenth and eighteenth centuries it was held to be embodied reason. Moreover, Quintillian’s treatise, discussing the whole subject of remuneration of advocates very sensibly, yet on the whole took the traditional position that advocacy was a service gratuitously rendered for its own sake, for which the advocate might honorably accept a fair honorarium, voluntarily bestowed on him as a gift, but for which no bargain as to compensation and nothing in the way of hire was permissible. The influence of the great treatise of antiquity was decisive, if anything more than the rule of the Roman law was needed.

III
The Development of Legal Advisors at Rome—The Jurisconsults

There were three purposes for which a lawyer might be needed at Rome. First, one might need an agent or representative in the proceedings in inure; second, he might need a trial lawyer in the proceedings in iudicio; third, he might need an advisor as to wills and conveyances and formal transactions and as to his legal rights and duties. For the first he had a procurator. For the second, he retained an orator or advocate. For the third, he consulted a jurisconsult. The Roman jurisconsults have played a leading part in the development not only of Roman law but of all law. Both from the standpoint of the history of the legal profession and from that of a lawyer’s general culture, they deserve a whole lecture to themselves. But such a lecture would be nothing less than an account of the development of Roman law from the generation before Cicero to the end of the third century A.D. The great
work of the jurisconsults was done as law writers and law teachers.

After the Twelve Tables (450 B.C.) the form of the Roman law was threefold: (1) The written law, the Twelve Tables; (2) an undefined mass of uncodified tradition, and (3) a growing mass of "interpretation."

Also there came to be a certain amount of legislation upon legal matters (apparently none of it relating to private law) and of interpretation of that legislation. Along with the still uncodified tradition, the interpretation was handed down traditionally in the pontifical college and connects with the earlier time when social control was quite undifferentiated and law was merged in religion.

Interpretation, i.e. the traditional development and application of the texts of the written law, handed down traditionally in the pontifical college, became the foundation of the legal science of a later period. Except for occasional legislation, it was the way in which the law grew, although more or less unconsciously, since men were slow to admit that they could change the ancient customs deliberately and avowedly.

Except as codified in the Twelve Tables, down to the beginning of the fourth century B.C., law was a tradition possessed exclusively by the patricians who alone were eligible to the priesthood. The great men, who knew the tradition, sat in the court of his house and advised his dependents, drew legal documents for them, and, if need be, conducted causes for them.

A new stage of legal development begins with the divulging of the traditional formulae of actions by the secretary of Appius Claudius just before 304 B.C. Half a century later (253 B.C.) the first plebeian pontifex maximus began to give consultations in public, where students could listen and take notes and learn the law as a subject of public study. Knowledge of the law ceased to be a matter of oral transmission of tradition in the pontifical college. The traditional element in the law became secularized. Those who knew the law gave advice to all comers who might in their turn become learned in the law and give counsel. In addition, those learned in the law gave opinions to the judices, who were not learned in the law and might require advice in applying the formula. These
opinions, called *responsa* became increasingly important in making and shaping the law so that Cicero enumerates *jurisperitorum auctoritas*, the authority of those learned in the law among the forms of Roman law in his time. This development of jurist-made law culminates in legislation whereby the opinions of the jurists acquired formal legal standing. Augustus began the practice of licensing jurisconsults, who might then give opinions on questions of law with the authority of the emperor behind them. Later, Hadrian made the opinions of the jurisconsults binding upon the judge, in case they were agreed, though apparently only for the case in hand.

Throughout the classical era juristic writing was the chief form of the law. In the republican period juristic writing takes the form of commentaries on the *ius civile*, the law of the city, or strict law, i.e. the Twelve Tables and the traditional law of the city as traditionally interpreted. Later came commentaries on the edict and presently collections of *responsa* or opinions of jurisconsults on questions submitted to them. Still later come commentaries on the writings of the great jurists of the past and treatises on particular subjects or particular branches of the law. In addition, there were institutional treatises for students and practical handbooks. The whole is a body of legal writing quite without parallel until recent times, and standing in relation to the law as the literature of Greece has stood in relation to letters.

Along with writing, teaching became a major function of the jurisconsult. Indeed, after the third century, when legislation superseded juristic writing as the growing point of the law, the law teacher took the place of the practitioner-writer. From that time in the civil law the jurisconsult is a law teacher.

Looking back over the development of law and the administration of justice at Rome and in the Roman world it will be seen that the three main functions of the lawyer, the agent's function, the advocate's function and the jurisconsult's function were well developed. Here as elsewhere in the legal order, the Romans laid well the foundations upon which the Middle Ages and the modern world have built.