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

I

INTRODUCTION (1)

The barbaric invasions during the fifth and sixth centuries A.D. brought about the almost complete disappearance of the once highly developed and prosperous Roman legal profession1 in the West.2 During this prolonged period

* Part one of a three-part series.


2 It should be noted, however, that the legal profession of the East-Roman (or Byzantine) Empire was not affected by these events. But the barbaric invasions succeeded in almost completely severing the cultural ties between East-Rome and the West. Hence, the East-Roman legal profession which for centuries to come maintained the highest professional standards, had really no influence on the developments in the West during the early Middle Ages, except through the ecclesiastical courts which adopted some of the professional practices that were still observed in the East. But the effects of the ecclesiastical practices on the lay legal profession were not much felt until the twelfth, and perhaps the thirteenth, century.
of recurrent barbarism, one can hardly expect to find so progressive a social institution as an enlightened and properly functioning legal profession. The various Germanic tribes, which by force of conquest had taken over the West-Roman Empire, of course, had no lawyers in our sense of the term. Early Teutonic folklore does not mention any lawyers, and even in the more advanced Frankish law of the sixth and seventh centuries nothing resembling a legal profession can be detected.

It should also be borne in mind that this particular epoch was one of constant social, political, economic and legal fluctuations which deeply affected the notions of personal right, property, procedure and the administration of justice. Such a state of instability, needless to say, is not conducive to the existence or development of a class of people whose profession it is to advise others in the conduct of legal transactions and the institution or defence of proceedings, to act as an agent for the party or the litigant, and to plead causes for parties before a court.

It is an old axiom that a true legal profession — a class of trained and professionally acting experts who are conscious of their expertness and, hence, of their peculiar status within a given society — cannot possibly be found until there exists something like a fairly distinct and stable body of laws, a somewhat settled jurisdiction with regular courts manned by experts, and a fairly consistent legal procedure. For only then will the need arise for knowledge, skill and experience in ascertaining actionable claims, in presenting these claims in their proper form to the proper court, and in assisting the court in the application of the law to these claims. Obviously, all these prerequisites were conspicuously absent among the barbaric tribes, which frequently harbored crude and unstable notions about law and legal practices. In addition, the dialects of the barbarians were extremely primitive and often did not
go much beyond the ordinary purposes and needs of primeval life itself. Hence, viewed purely from a linguistic standpoint, any kind of refined legalism, remained wholly incomprehensible and even repugnant to the Germanic primitives.

(2)

The Germanic hordes, in the main, brought back to Western Europe many of the barbaric notions which are typical of primitive law and primitive peoples. They held that parties to a litigation, for instance, if they would submit to "arbitration" at all rather than resort to crude self-help, were to appear in "court" or before their "king" (or his representative), and conduct their cases in person. The underlying idea was that every man ought to fight his own battles, using his hands or tongue as the occasion required. Early Frankish custom, for instance, allowed no one but the king himself to be represented in court. For the king was a man upon whom exceptional demands were made, and, hence, could not be expected always to make a personal appearance either on the Bench or at the Bar. Some Germanic peoples, such as the Lombards and later the Franks, subsequently adopted a rule by which the king, and he alone, could assign a sort of "helper" or "pleader" to persons, who owing to their simpleness or infirmity did not know how to plead their own causes or how to continue their argument.

Perhaps such "helpers," who might be called the primitive ancestor of the medieval pleader, could be found

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3 The practice that the king may be represented in court can also be found in early Anglo-Norman law, where the privilege of representation originally was reserved to the king alone. Later, the king could grant this special privilege also to some favored and highly placed personage. Hence it might be said that the privilege of representation in court emanated from the king (in Normandy from the duke) who could vest others with this privilege.
among several Germanic tribes. The chroniclers of that
time refer to them by the rather unflattering name of
clamatores (criers). The Capitulaires of Charlemagne
(c. 800), when mentioning these clamatores, insist that
in each case they had to obtain the permission of the
king or his representative in order to plead in the place
of the party; that they should be persons “of mild and
peaceful disposition, fearing God and loving justice”; and
that they should not be influenced in their conduct by
undue eagerness for money.

By the eleventh century some of the Germanic peoples
started to make a crude and not always clear distinction
between the Vorsprecher (forespeka, prolocutor), who
merely spoke on behalf of the party without representing
it, and the attornatus, who was a sort of representative
or substitute for the party. In this they might have been
under the influence of certain practices observed in the
ecclesiastical courts and in canon law procedure.

II

THE GERMANIC FORESPEKA

(1)

The Germanic forespeka (Vorsprecher, forespreca,
jurisprecho, redesman rechtsprecher, spruchman,
rechtsager, asega, eosago, sagibaro, talman, prolocutor,
or plain “mouth-piece”), who is also mentioned in the
Frankish customs, was one who uttered the words which
the litigant himself was supposed to speak before the court,
but for some reason was unable to say. Since he merely
stated what the litigant wished him to say, even one of
the “judges” might act as a forespeka or Vorsprecher;4

4 The Germanic syllable “Vor” in “Vorsprecher” clearly indicates that
he was a “prompter” (Latin: praelocutor), rather than a “substitute”
(Fuersprecher) or “warrantor.”
and after he had spoken for his "client," he could return to
the Bench and take part in rendering the final decision.
This is but another instance of the practice, rather com-
mon among primitive peoples, of combining in one and the
same person the function of deciding a controversy and,
at the same time, serving as a spokesman for a party to
the controversy. Under certain circumstances the litigant,
if he wished to do so, could ask the court to appoint for
him a forespeka or Vorsprecher from among the people
present in court, including the "judges" themselves. Re-
Fusal by the court to grant the petitioner a forespeka with-
out sufficient cause was considered an "act of injustice."
Lawless persons as well as felons who had been caught
red-handed, however, were denied any assistance.

(2)

Apparently anyone could act as forespeka, except
slaves, serfs and other unfree or half-free persons. Also
excluded were perjurers, outlawed persons, heretics, per-
sons born out of wedlock, Jews, pagans, lame, blind or
dumb people, idiots and persons under the age of twenty-
one or over eighty years of age. More exclusively, in some
parts of mediaeval Germany only a person who also was
qualified to act as a judge was permitted to be a forespeka.
Only for a good reason could a qualified person refuse to
assume this role. And according to some local customs, a
party could be compelled by law to avail itself of such as-
sistance. This practice, however, seems to have been the
exception. The Sachsenspiegel (a compilation of German-
ic laws of the thirteenth century), for instance, merely
counsels every litigant to "retain" a forespeka, for other-
wise he may "run great risks." It is also interesting to
note that the appointment of a forespeka, as a rule, was
only for one day or "session." If, therefore, a trial was
adjourned, either he had to be reappointed, or a replace-
ment had to be chosen. Originally, the *forespeka* was merely a "helper" and, hence, had no claim to any compensation or fees. Some customs actually penalized the acceptance of a fee. The common opinion seems to have been that the administration of justice was a sacred matter which should not be defiled by commercialism. But, beginning with the latter part of the thirteenth century, fee-taking became gradually recognized in certain parts of continental Europe. The city of Luebeck, and the city of Hamburg, two leading commercial towns in Northern Germany, for instance, issued a schedule of legal fees in the year 1294.

(3)

The *forespeka* or *Vorsprecher* stood alongside the party in the presence of the court, where he pronounced the words or formulae the party itself was presumed to utter. He was not empowered to say what he thought proper or advantageous, for he was solely a "mouth-piece." His duty was to state what the litigant expressly wished him to say: no more and no less. If he would say something else, the party could publicly reprimand and rebuke him, and he might be fined for speaking out of turn. Thus the *Vorsprecher*, who was always subject to correction by the party, had no legal status of his own; he was merely "his master's voice" who enunciated "his master's words." His word was substituted for that of the litigant who could always disavow or "amerce" whatever the *Vorsprecher* had said. Because his statements did not commit the litigant until the latter had expressly or tacitly adopted them, the litigant actually had at least two chances to plead.

It seems, however, that in some localities the *forespeka* was to serve the cause of justice rather than that of the litigant. In this sense he was an "officer of the court" and
an instrument in the administration of justice. He was expected to state the law as it applied to the facts submitted by the parties. Hence he acted not so much in the interest of the litigant whom he assisted as in the interest of the court, that is, in the interest of a speedy and "just" termination of the litigation. This fact should also explain why in earliest times, at least in Germany, the court rather than the litigant appointed the forespeka, and why in some localities the court could compel the litigant to avail himself of the services of a forespeka. It also explains why he could be chosen from among the members of the court. The foremost task of the forespeka originally was to bring about a just result by assisting the litigant in doing "the right thing," rather than to help the "client" win his case. Subsequently, however, he identified himself with the party or interest for which he spoke.

(4)

The idea underlying the Germanic Vorsprecher was closely related to the primitive Germanic notion that every litigant or defendant had to appear in court in person and conduct his own case. Such a notion, as can well be imagined, greatly impeded the development of a true legal profession. Nevertheless, the Vorsprecher, with some important reservations, may be called the crude forerunner of the mediaeval lawyer in the West.

Like early Roman law, the early Germanic laws were devoid of our modern notion of agency. The idea that the words or acts of John Doe may be attributed to Richard Roe, and that Richard Roe shall be held liable for whatever John Doe has said or done because Richard Roe has been pleased to declare that this shall be so, is a rather recent notion. Still, in early days, a party was allowed to bring with him into court some friends and to consult
with them before he pleaded his case. The vassal, for instance, would always ask his lord to come along, while the lord would invite his friends to accompany him to court. Only in the case of treason or felony was the law adamant. Here the accused was not allowed to have any assistance. In all other litigations, however, the party gradually was permitted to have one of those “who are of counsel with him” speak for him and thus become his forespeka or “pleader.” In this manner, we must assume, the pleader, responsalis or narrator, as he was occasionally called in early England, made his way into the mediaeval courts. He did so, however, not as one who represented or substituted for the litigant, but as one who stood by his side and spoke on his behalf, provided that the litigant agreed to what he said.

III

THE GERMANIC ATTORNATUS

(1)

The term attornatus, or attorney, probably has the following origin. In early Germanic (and Anglo-Saxon) times the free men of each shire were regularly called together by the shire reeve or sheriff. This meeting was called the torn. Any man who for some reason found himself unable to attend the torn in person had a friend or relative represent him “at the torn”; he had an “attorney,” that is, a person “attorned,” who acted at the torn as his proxy and substituted for him. In French, the term “attorney” became atournee or atourner. Godofredus claims that this “loan word” from German existed in France as early as the eleventh century. Later it was latinized as attornatus, and gradually became a “legal”
term, referring, as it were, to a person prepared, equipped or instituted to act as a substitute for others in legal proceedings. But before that he was probably nothing more than a casual and severely restricted "messenger" or "errand boy," who, on the instruction of his absent "master," delivered a specified message or performed a definite act.

The *attornatus* in forensic matters is clearly distinguished from the *forespeka* or *Vorsprecher*. This is concisely brought out in the *Serjeant's Case*,5 where Lord Brougham stated the difference between the attorney and the pleader (*forespeka*): "If you appear by attorney, he represents you, but when you have the assistance of an advocate [scil., a pleader] you are present, and he supports your cause by his learning, ingenuity and zeal. Appearance by attorney is one thing, but admitting advocates to plead the cause of another is a totally different proceeding." The *attornatus*, therefore, was conceived to stand in the place of the litigant and, hence, was in court not merely with the litigant, but actually instead of the litigant whom he represented. He substituted for the party during the various phases of a litigation before the court; and his words or acts thus were presumed to have been those of his principal in the absence of the latter. As the representative of his principal, he was not merely an intermediary as was the *forespeka* or pleader. Hence, all the settlements, motions and pleadings made by the *attornatus* were made in the name of the principal and, therefore, were deemed to have been made by the latter, unless the principal himself appeared personally in court and disavowed or amerced his *attornatus*. The basis of the *attornatus'* peculiar status was his substitution for the party.

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5 This was a case in which the exclusive privilege of the serjeants to appear at the bar of the Court of Common Pleas was argued before the Privy Council in 1839. It is reported by *Manning, Serviens ad Legem* 125 (1840). Cf. 2 Hollesworth, *A History of English Law* 311 (4th ed. 1936).
Because the *attornatus* substituted for the litigant, early Germanic laws, which, as we have seen, lacked our concept of agency, were extremely reluctant and correspondingly slow in permitting an *attornatus* to appear in court in the place of the real party. Attorneyship, it appears, was restricted to civil cases and, as a rule, was forbidden in criminal cases. This interdict, according to the oldest customs of Brittany, was justified on the ground that the *attornatus* could not be hung in the place of the defendant. Like all primitive peoples, the Germanic tribes, on the whole, were averse to the notion of substituting one man for another in battle, be it on the actual battlefield or in the courtroom. The right to be represented by an *attornatus* was originally the exclusive privilege of the king. Subsequently, this privilege, by special royal grant, spread outward, so to speak, from the king. The king had many interests to protect and many duties to perform in many places at once and, hence, could not always be present wherever royal business was transacted. In consequence, he had to have a full and competent representative who would act in his place and in his behalf, be it either on the Bench or at the Bar. This special royal right or, better, this royal privilege, which above all was the result of circumstance, the king himself, and he alone, could confer upon any one of his subjects in the form of a "letter of grace," at first as an exceptional boon or concession, later as a more general rule. Such a concession, however, was by no means a matter of course. A special reason had to be shown why such an exceptional boon should be granted: the grantee was going abroad, perhaps, on some errand for the king, or he was too old and too infirm to travel to the king's seat of justice; or perhaps he was a special favorite to whom the king was indebted.

Naturally, there existed some important exceptions to
this general aversion against substitution by a full representative. The head of a household could always appear and substitute for any member of his household; the guardian could substitute for his ward; and the lord could stand up for his vassal or tenant. In early Frankish law, for instance, substitution was also permitted in the case of the infirm or totally illiterate. But even in those instances, where substitution was legally recognized, the designation of such a substitute had to be done by a solemn and formal act, and, as had been the case in early Roman Law, the substitute had to conduct the cause in his own name. In short, severe restrictions of many kinds applied to the appointment of an *attornatus*.

(3)

According to Germanic (Salic or Frankish) law, full representation was permitted only if the litigant transferred his claim to the representative (*laisowerpita*) or, in some exceptional cases, in the form of a limited mandate (*mandatum*). The so-called *Formulae Avernenses* of the eighth century provided that in keeping with old customs, as well as with certain royal ordinances, simpletons, widows and sick persons may appoint a representative by mandate. In some cases, the courts were empowered to assign such a representative. The *Capitulares* of 802 state that no one may make it a habit of representing another in court, for otherwise the experienced man would always triumph over an inexperienced adversary. Every person must plead his own cause, except in the case of simpletons and sick people. Here, the court may designate one if its own members or any person of good repute to act as the representative of the party. This privilege subsequently was extended to widows, orphans and poor people by the *Capitulares* of 817.
IV

THE PRE-NORMAN LAWYER IN ENGLAND

(1)

Whether English attorneyship goes back to pre-conquest Norman law and custom, is still hotly debated by scholars and historians. One theory, chiefly represented by the eminent German legal historian, Heinrich Brunner, as well as by some French scholars, holds that the English *attornatus* or attorney had its roots in the Norman *attornatus* or *atourner*, and that attorneyship was brought to England by the Conqueror in 1066, where subsequently it underwent some significant modifications. The other theory, which has become very popular among British scholars, insists that the term attorney is the product of Anglo-Norman Latin, coined by English authors and lawyers, and that it is an English rather than a Norman institution which, as a matter of fact, was adopted by the Normans in Normandy after the Conquest. If the second theory is correct, then it must be assumed that the *attornatus* is an English institution which owes its origin and meaning to the general political, legal and forensic conditions which gradually developed in England during the twelfth century and, especially, during the reign of Henry II (1154-1189).

(2)

Prior to the Conquest, the Anglo-Saxon law made some provisions for a primitive kind of legal representation, the exact nature of which, however, is not easy to define. The Anglo-Saxon customs concerning legal representation in certain respects also seem to have differed from the usual
notions of the Germanic forespeka (Vorsprecher) or attornatus. It is not impossible, however, that in their later stages, especially during the reign of Edward the Confessor (1042-1066), these Anglo-Saxon folkways were somewhat influenced by ideas borrowed from ecclesiastical courts and canonical proceedings. We are told that "if anyone seriously injured one in holy orders, or a foreigner, then the King . . . or the bishop . . . shall be to him as a kinsman and protector [pro cognitione et advocatio] . . . ."

A Saxon document of the year 997 relates that Aelfric and Aethelmaer were the forespeka (advocati) of Aethelric’s widow; and in a document, dated after 900, the writer states that a certain Helmstan “sought me out and prayed me to be his forespeca. . . . Then I spoke in his behalf [spaec ic him fore] and interceded for him . . . [and] he was allowed to plead at my intercession [fore mire forespeace].”

From these scanty records it appears that the typically Anglo-Saxon forespeka (or forespeca, forsprega, Vorsprecher, prolocutor) was something more than the usual Germanic forespeka, that is, more than a mere “helper,” friend or pleader, restricted to mere representation in speech. It seems that he was a sort of plenipotentiary, a kind of guardian, trustee or “attorney” who spoke his own words whenever he acted for a party. It also appears that, unlike the Norman, Anglo-Norman or continental-Germanic customs, the Anglo-Saxon practice did not consider the forespeka or pleader, and the attornatus as two basically separate branches of the legal profession. But how far Anglo-Saxon law permitted a litigant to be represented in court is not fully clear.

(3)

Anglo-Saxon sources also use quite frequently the term
advocatus when referring to the legal profession.\textsuperscript{6} This term, it seems, had two major meanings. At times it implies that the lord could come forward and act or speak as the compurgator of his vassal and thereby “warrant” the doings of his man; at times it suggests that the lord, within certain limits, may have been under a moral duty to take upon himself the task of standing up for his man and seeing him through his troubles, except in the gravest of charges or in the case of an open crime, where the lord may not even be of counsel to his man. Thus the lord came to be the defensor, tutor, protector or advocatus (advowson) of his man, in a word, a sort of “surety” or “warrantor,” who took upon himself the responsibility of his man’s action. In Anglo-Saxon society the “lordless” or “landless” man, against whom no redress could be had, had to have a “surety.” This warrantor was responsible for the appearance of his man in court and, at the same time, had to answer for his man’s misdeeds. This seems to have been the original meaning of the term advocatus or forspeka in Anglo-Saxon times: the lord stood by his man and, in a sense, between his man, the wrongdoer, and the plaintiff, the wronged person. The wronged person, therefore, never addressed himself to the wrongdoer, but always to the lord or “surety” (advocatus) from whom he expected redress.

Anglo-Saxon law also refers to “legal advice” (consilium) of which a litigant may avail himself if summoned to appear before a court. It seems that this consilium, which probably constituted some sort of legal assistance,

\textsuperscript{6} There is always a difficulty with Latin renditions of Germanic terms. Obviously, the term advocatus in this connection has a meaning all of its own, the real significance of which is not easy to determine. It seems that the anonymous translator or editor of the Leges Henrici Primi, the author of the Liber Quadrupartitus, or the editor of the Leges Edwardi Confessoris, arbitrarily rendered a typically Anglo-Saxon form of legal representation as advocatio. The Leges Henrici Primi are a compilation of Anglo-Saxon and Norman laws, compiled shortly after the Conquest.
was an important aspect of serious litigation. Any person of standing brought into court (the folk moot) his kinsmen, friends and followers. The latter would advise him in the conduct of his case and, if necessary, back him up if he got into a scrap. This *consilium* and the Anglo-Saxon *advocatus* seem to have merged gradually. The lord, acting as an *advocatus* (or *advowson*), could intervene for his man by becoming his "surety." But whenever the vassal had to answer in person, he might request that his lord be present for consultation. Thus the lord was under a moral obligation to help his vassal either through his counsel (*consilium*), or through giving "surety" (*advocatio*). The request for this advice or "surety" was part of a man's defense. But there seems to have existed also a *defensor* of children under the age of fifteen and of widows as, for instance, in the ecclesiastical courts. This particular *defensor* was more than merely a counsel; he probably was a real representative or *tutor*, and perhaps even one of the king's officials. Thus it appears that Anglo-Saxon law, at least shortly before the Conquest in 1066, in certain situations permitted and perhaps even encouraged the request for "legal assistance" (*peroratio*, *tutela*), legal representation or "surety" (*advocatio*), and "legal advice" (*consilium*).

V

THE NORMAN ATTORNATUS

(1)

In a general way, the Norman *attornatus*\(^7\) was a special substitute in all sorts of legal proceedings. He represented

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\(^7\) It has already been noted that scholars and historians disagree among themselves as to whether the *attornatus* was imported from Normandy to England at the time of the Conquest, or was transplanted from England to Normandy after the Conquest.
the litigant during the various stages of the controversy, and his words or acts were considered those of the absent litigant. According to Norman custom, he could be appointed only for a lawsuit already pending (in loquela quae est). Hence, the appointment of an attornatus (the attornatio) could not be made until the plaintiff had properly summoned the defendant. An attornatio for future litigation was not permitted. Conversely, a valid attornatio always presupposed a valid summons: a defendant who had appointed an attornatus could no longer dispute the fact that he had been summoned.

The Norman attornatus had only a special power, an appointment ad hoc. He could not act as a general attorney or generalis attornatus in all lawsuits of his "client." As a special attornatus, he was only entrusted with the complete management of a particular case, provided that the litigant or "client," the attornans, did not show up in court. If the latter made a personal appearance, the attornatus could be ignored. Thus, by merely appearing in court, the litigant could at any time take over the personal conduct of his lawsuit, without formally revoking the "power of attorney" (attornatio). It seems, therefore, that the Germanic forespeka or Vorsprecher could act only if the party to the litigation was present in court, while the Norman attornatus might be prevented from acting for the party if the latter should appear. This distinction may also help to clarify the difference between the functions of a forespeka and those of an attornatus. But in Normandy, the litigant could not arbitrarily substitute one attornatus for another, unless the former attornatus had voluntarily resigned. Neither could the attornatus himself transfer his power or mandate to a substitute or sub-attornatus. In England, on the other hand, the attornatus could be removed at will by the party.

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8 This would not show up in the "record." See the text, infra.
In Normandy, the appointment of an *attornatus* always had to be made in a court of record, that is, in the *curia ducis* or in one of the courts which had historically developed out of the *curia ducis*, such as the Norman Exchequer or the Norman Assizes, which, like the Frankish *missi regis* (commissioners of the king) during the Carolingian times, were courts of "travelling ducal commissioners." The "record" was nothing other than the testimony of the members of the court that a certain act had properly been performed in their presence. If afterwards challenged, the appointment could always be verified by the court itself. The Norman *attornatio* (appointment of an *attornatus*) required that the litigant or *attornans*, the appointee or *attornatus*, and the opposing party be personally present in the court where the appointment was made. Contrary to English law, a Norman *attornatio* made in the absence of the opposing party was considered null and void, unless it was performed in the presence of the Duke. Appointment merely by a written power was unknown in early Normandy.

VI

THE ECCLESIASTICAL LAWYER IN

THE MIDDLE AGES.

(1)

It would be something of an exaggeration to speak of

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9 Only after the year 1288 could the *attornatio* be performed in one of the lower Norman courts.
10 This rule was abolished in 1234 by a decree of the Parliament of Paris which also applied to Normandy.
11 In 1236, the great barons of Normandy acquired the right to appoint an *attornatus* by a written power, provided they had secured a royal license permitting them to do so.
a lay legal profession in mediaeval West-Europe prior to the thirteenth century. The Germanic peoples who, as we have seen, during the fifth and sixth centuries took over the West-Roman Empire, had little use and probably even less understanding for professional legal representation. The ecclesiastical courts and ecclesiastical forensic procedures, on the other hand, to a large extent followed the old Roman tradition of permitting representation in litigation by skilled professionals. It is to the ecclesiastical courts\textsuperscript{12} and their particular practices, therefore, that we must look for the most definite beginnings of a mediaeval legal profession both on the Continent and in England. As may be expected, the example set by the ecclesiastical courts, with some modifications, was eventually copied in the mediaeval lay courts, the more so, since for some time to come the same persons practiced law or acted as judges both in the ecclesiastical courts and in the lay courts.

(2)

During the later part of the sixth century, the Church had begun to legislate on matters concerning representation in ecclesiastical litigation. Among other matters, it paid some attention to the admission, conduct and duties of canonical lawyers.\textsuperscript{13} These regulations for canonical lawyers to a large extent were influenced by the traditions

\textsuperscript{12} Each bishop had his own court, while each ecclesiastical province had its own court of appeals presided over by the archbishop or the metropolitan. A final appeal could always be carried to Rome, thus making the Pope the supreme judge in all ecclesiastical matters.

\textsuperscript{13} The Corpus Juris Canonici contains two titles which deal with legal representation. One title is based on the Decretals of Pope Gregory IX, published around 1230, which include a regulation of Pope Gregory the Great of 596, one of Pope Alexander III (1159–1181), one of Pope Clement III (1187–1191), four of Pope Innocent III (1198–1216), two of Pope Honorius III (1216–1227), and six of Pope Gregory IX (1227–1241). The other title consists in the so-called Sixth or Sixth Book of the Decretals, published by Pope Boniface VIII (1294–1303) after 1298.
and rules of Roman law, which, wherever the need arose, were modified or expanded by Papal Decretals (decrees), rules laid down by Church Councils, or local statutes issued by bishops or ecclesiastical courts.

Any party appearing in an ecclesiastical court, whether as plaintiff or defendant, could appear either in person or by counsel. In some instances, especially when an involved issue had been raised, the court might insist on the appearance of a counsel in behalf of the party. Each party was at liberty to choose its own counsel, and in the case of an indigent, imbecile or child, the court was under a duty to assign counsel to the litigant. Counsel had to accept such an assignment under penalty of disbarment.

The ecclesiastical legal profession during the Middle Ages was divided into proctors and advocates. The distinction between these two branches of the profession may be reduced to the following principles. If a party appeared by proctor, the proctor represented the party. But if the party had the assistance of an advocate, the party had to make a personal appearance in court, supported, aided, counselled and advised by the advocate on all matters of law and procedure. Hence, the ecclesiastical proctor was similar to the early mediaeval attornatus, while the advocate to some extent corresponded to the mediaeval pleader, forespeka, Vorsprecher or narrator.

14 A cursory inspection of the Corpus Juris Civilis of Justinian, especially of the Codex, will immediately divulge the extent to which the ecclesiastical regulations of lawyers were dependent on Roman law. Cf. Chroust. The Legal Profession in Ancient Imperial Rome, 30 NOTRE DAME LAW. 521, 579 (1955).

15 The ecclesiastical advocatus probably originated with the defensores ecclesiae and the defensores pauperum of the early Church. The Church, adopting Isaiah 1:17: "Relieve the oppressed, do justice to the fatherless, plead for the widow," from the earliest times permitted representation of the distressed (miserabiles personae).
Under certain conditions, one and the same person could act both as a proctor and as an advocate in the same case, for the same client. An advocate could also be a proctor, while a proctor could not always act as an advocate, since the requirements for an advocate were much higher than those demanded of a proctor.

(4)

The ecclesiastical proctor was a kind of "officer," appointed by the court or elected by the client to represent a party which empowered him to appear in its behalf and to manage its cause. But this general power of representation did not include the right to dismiss an action, settle with the adversary, or to do anything beyond the mere prosecution of a claim or the offering of the proper defense, unless a special mandate had been given. Neither was he entitled to substitute another person in his place. On the other hand, he could take an appeal without special authorization. Originally, any person of age and of good character, possessing a modicum of education, could be a proctor. Excluded were judges, women, serfs, slaves, excommunicates, and infamous persons. Also, a parish priest could not receive such an appointment, unless he acted in the interest of his parish church or the parish poor. A person belonging to a religious order had to have special dispensation from his superior in order to act as a proctor.

The appointment of a proctor, who was a sort of agent, but not a party to the litigation, had to be made in court by a formal act at the beginning of the hearing. In England, he could also be appointed by a "power of attorney" under seal. This power of attorney was to be exhibited in court and entered into the record or register. The appointment was for the duration of the litigation; in fact,
special appointments for just one act or for a special occasion were considered an abuse of process and, hence, were forbidden. As soon as the issue was joined, the client could no longer change or dismiss his proctor, unless he had notified the court and the adverse party of his intention, and then only for good cause.

There existed a number of provisions and rules as to the supervision and discipline of proctors. They were to display a restrained and dignified conduct in the presence of the court, refrain from "loud speech and babbling, and behave themselves quietly and modestly." They were not permitted, under pain of suspension or disbarment, to buy the litigation, acquire an interest in the case, demand an excessive fee, or betray their client's confidence to the opposing party. In sum, they were expected to fulfill their duties honestly, sincerely, and in a manner becoming to a gentleman.

(5)

The appointment of an advocate, as a rule, was left to the discretion of the party. But whenever an involved issue was raised, the court could insist that the litigant avail himself of the professional advice of a competent advocate in order to expedite proceedings and maintain a high level of forensic litigation. Also, for the same reason, no proctor was permitted to plead a difficult case without the assistance of an advocate; the court might even refuse to receive a plea which had not been subscribed by an advocate. The advocate was required to secure a written mandate either from the party for which he was pleading or from the court before which he intended to plead. If the client could not write, this mandate could be signed by the litigant's parish priest (in France by a notary) or by two competent witnesses.
The professional duties of an ecclesiastical advocate, which were very similar to those enforced during the latter part of the Roman Imperial period, contained the following provisions: The advocate had the duty of secrecy, and he was to abstain from all collusion and from patronizing an obviously unjust cause. He was not permitted to resort to dishonest, disreputable or dishonorable practices, or to purchase the litigation, or to contract for a share in the litigation. He was enjoined from indulging in abuse of process, and from tampering with evidence. He was to treat with utmost courtesy the court, the officers of the court, the adverse party and the opposing lawyer. He had a right to a reasonable compensation for his professional efforts, although he had no actionable claim to a legal fee.

No person could be admitted to the practice of an advocate unless he had studied canon and civil law for at least five years. Later, particularly in England, this requirement was reduced to three years. Before being admitted to practice, the candidate had to state under oath, or prove by some other form of evidence, that he had complied with this requirement. Still later it became a common practice to admit any person who had received a Doctor of Laws. As a rule, the advocate was admitted to practice by the bishop who, after having ascertained that the candidate possessed the necessary qualifications, granted him a license either for general practice or for handling a particular case before the bishop's court.

The admission to proctorship, with some modifications, was determined by the same rules which applied to advocates.16 Prior to his admission the candidate also had to

16 The Archbishop of Canterbury, who commissioned proctors, required, for instance, that the candidate pass through an apprenticeship.
take an oath before the bishop to the effect that, among other things, he would be faithful to his client and that he would not pervert or delay justice. If he failed to live up to his oath, he could be fined, suspended, and even permanently disbarred.

VII

THE MEDIAEVAL CLERGY, THE ROYAL CIVIL SERVICE AND THE LEGAL PROFESSION

(1)

The old Germanic custom provided that wherever legal representation was permitted, any free man might speak for or represent another in court. Naturally, a person who had some education and training, including a command of the court's language and a facility in reasoning or arguing effectively, would be qualified to give more valuable assistance than an untrained or certainly an unlettered person. In mediaeval society clergymen were practically the only people who possessed some of that general education and learning which is necessary to present or plead a case intelligently and convincingly. Thus, it came about that until the thirteenth century, and far into it, the clergy was very prominent as legal practitioners, not only in the ecclesiastical courts, but also in the lay courts. As a matter of fact, for some time clergymen predominated so much in the lay courts that it was said about them: Nullus clericus nisi causidicus (there was no clergyman who was not also a legal practitioner).

(2)

The Roman Emperor Justinian (527-565) already had
prohibited any clergyman from pleading in lay courts, whatever the nature of the cause: whether it was one in which he had a personal interest, or in which his Church or monastery or parish was involved. The reasons given for this interdict were that no loss ought to befall the Church, and that the ministers of the Church might not engage in activities which could interfere with their religious duties and spiritual activities. But subsequently there arose some difference as to the propriety of clerics practicing law, and the custom seems to have varied in different places. In the Western part of Europe, in the main, the Justinian interdict was ignored. There the clergyman, because of his education, became an indispensable person in all matters pertaining to the orderly transaction of public business, be it in the chanceries or in the courts.

But beginning with the thirteenth century, in France as well as in England, the clergy gradually withdrew or came to be barred from the practice of law in lay courts. At the Council of Mainz in 813, clerics and monastics were prohibited from taking an active part in any secular law suit, except when the Church or a Church interest was involved, or when they were defending orphans or widows. This prohibition was frequently restated, especially at the Third Lateran Council (1179), the Fourth Lateran Council (1215), and the Fifth Lateran Council (1512-1517). In 1164, it was ordained that the taking of holy orders entailed an absolute disqualification for the practice of law in lay courts, and at the Fourth Lateran Council the clergy was solemnly admonished not to appear on any occasion as lawyers in a secular law suit, except in cases affecting themselves or on behalf of the poor and the distressed. Aside from these official pronouncements and interdicts, the steadily increasing number of skilled and experienced lay practitioners during the thirteenth century
made the legal assistance of clergymen unnecessary and, in some instances, undesirable. In 1217, the Archbishop of Salisbury laid down a rule that "neither clerics nor monastics are to appear as advocati in a secular court, unless in their own causes or in those of the poor." This rule was later incorporated in the so-called Constitutions of Cardinal Otho in 1237.\(^\text{17}\)

\(^{3}\)

Between 1160 and 1250, we witness a steady progress in the development of the English attornatus. It is also during this period that we discern the emergence of a sort of lay legal profession. Already in the time of Glanville (who died in 1190), laymen, though in small numbers, began to replace the clergy as legal practitioners. This development paralleled the gradual secularization of the royal Bench. In 1178, King Henry II (1154-1189) appointed two clerics and three laymen to a "permanent and central court." From this time on it was not unusual that laymen on the Bench should preside over their ecclesiastical brethren. When Henry III (1216-1272) ascended to the throne, many clerics were still members of the Bench and the Bar, but at the time of his death in 1272, the lay element was beginning greatly to outweigh the clerical element. Also, by 1272, the divorce of the ecclesiastical Bench and Bar, and the lay Bench and Bar, had become almost complete.\(^\text{18}\) The secularization of the English Bench and Bar, which continued under the reign of Edward I (1272-1307), was closely related to the further growth of a class of professional legal practitioners in general. As a matter

\(^{17}\) These Constitutions may have furnished the model for the regulation of pleaders in secular courts.

\(^{18}\) A certain Thomas de Wayland, who lived during the second half of the thirteenth century, was first a clerk and a sub-deacon. But when he attained success as a lawyer, he concealed his clerical status, married twice, and became a knight.
of fact, towards the end of Edward I’s reign the majority of English lawyers in the royal courts were professional laymen. The so-called *Mirror of Justices*, presumably completed before 1290, observes that “no counteur [pleader] should be a man of religion or an ordained cleric.”

(4)

The gradual emergence of the professional lay lawyer during the thirteenth century was also not without far-reaching effects upon the future composition of the royal Bench. Until the reign of Henry III (1216-1272), and far into it, the great majority of the royal justices, like most of the other royal clerks or officials, were technically clergymen. In other words, since the royal justices, as a rule, were promoted to the Bench from the clerical staff of the Crown, the royal Bench originally was part of the royal civil service. And since the royal civil service was composed predominantly of clergymen, the royal Bench was practically monopolized by the clergy.

During the reign of Henry II (1154-1189), out of forty-eight royal justices, most of them clergy, only about eighteen had been practicing lawyers prior to their elevation to the Bench; under Richard I (1189-1199), twelve out of thirty-six; and during the reign of John I (1199-

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19 By the end of the thirteenth century the practice of law had become sufficiently lucrative to enable a legal practitioner to support himself without holding any Church benefices.

20 *Mirror of Justices* (composed between 1285 and 1290). It should be noted, however, that the *Mirror of Justices* is a most unreliable source.

21 This does not mean, however, that these “clerics” also undertook parochial or diocesan duties. As a rule they were not priests or even deacons but had received only the lowest orders. But on account of their clerical status they were able to receive church benefices and derive emoluments from the Church. During the Middle Ages in England, this was a common method of making provisions for “civil servants,” including the royal justices. For the Church was comparatively rich, while the Crown was comparatively poor; and, although salaries paid by the Crown were attached to royal positions, they were small and payment was irregular.
six out of twenty-two. But due to the many political crises which marred the reign of Henry III, the royal officialdom, including the royal justices, came under a cloud. It became highly suspect of extreme partisanship and, in consequence, was widely distrusted and disliked. The practical effect of this was momentous: it brought about a distinct movement away from the civil service element (and, incidentally, from the clerical or ecclesiastical element) in the administration of justice throughout the realm. Thus, beginning with the latter part of King Henry III's reign, a tendency became noticeable to recruit the royal Bench from the Bar, that is, from the ranks of the active legal practitioners rather than from the ranks of the royal clerks. This trend, however, asserted itself only slowly. Out of one hundred justices appointed by Henry III, about eleven can be presumed not to have previously practiced law.

The new policy of promoting men from the Bar to the Bench happened to coincide with, and probably was also stimulated by, the emergence of a professional class of lay practitioners as well as the gradual secularization of the English legal profession. In selecting his new justices from among practitioners, Henry III had two distinct possibilities: he could fall back on the ecclesiastical or canon lawyers, who were mostly clergymen, or he could resort to the common law lawyers, who for some time had been practicing before the royal courts and who were predominantly laymen. In view of the gradual withdrawal of the clergy from lay practice, and heeding the growing unpopularity of clerics as practicing lawyers — an unpopularity which was related to the general distrust of the clerical civil service of the Crown — it was not entirely surprising that Henry III should begin to choose lay lawyers, that is, common law practitioners.
VIII

THE SOCIO-HISTORICAL POSITION OF THE LAY LAWYER IN MEDIAEVAL ENGLAND

(1)

The Norman Conquest of 1066, although it apparently brought no special body of written laws or a particular jurisprudence to the English Isles, decisively molded and influenced the future of the English legal profession in that it transplanted to the island some of the social, political and legal notions of Normandy. At the same time, quite a few of the existing Anglo-Saxon legal ideas and legal practices were retained. In this sense, the early Anglo-Norman period of English institutional history was one of adaptation as well as innovation, and the result was that the Anglo-Norman law concerning legal representation and legal assistance was neither Anglo-Saxon nor Norman, but a blending of the two.

(2)

During the first one hundred and fifty years of Norman rule, we occasionally hear about some famous "lawmen"

22 Be this as it may, the Normans definitely introduced into England the institution of "trial by battle." This manner of settling all sorts of controversies, at least among "gentlemen," was much practiced in Normandy, but had been unknown among the Anglo-Saxons. Such trials by battle were often fought by champions rather than by the litigants themselves. Hence the champion, in a way, might be regarded as a kind of crude forerunner of the "lawyer." But since the champion had to be a "chivalrous volunteer," it seems that hired professional champions were forbidden, although this interdict apparently was constantly violated, as the frequent reappearance of the same champions in all sorts of squabbles indicates. As a special boon, the citizens of the city of London, by royal decree, were exempt from being tried by battle. We have on record a report that a professional champion, a certain Elias Piggun, found guilty by a jury of having accepted money for his efforts in behalf of a litigant, was punished by having his hand and foot cut off — certainly a drastic method of terminating his professional career. But, gradually, the nonsensical practice of trial by battle was replaced by "trial by jury."
in the realm.\textsuperscript{23} Herlwin, the Abbot of Bec, is said to have been a man “deeply learned in the law,” who gave many opinions in secular causes. Two monks,\textsuperscript{24} Sacol and Godric, and Alwin, a secular priest and possibly an \textit{advocatus}, together with many other \textit{causidici} (pleaders?, lawyers?), are reported to have practiced law with much success. In the fourth year of his reign (in 1070), William the Conqueror summoned to London “all people . . . who were learned in his law,” namely, the common lawyers and pleaders of his time. Lanfranc, a native of Italy who became archbishop of Canterbury in 1070, is known to have been an able and successful lawyer; he personally pleaded and argued some of the most important cases in the realm. Aegeric, the ex-bishop of Chichester, around the year 1071 was considered a man well versed in the law, much sought after for legal advice; and William Rufus, who appeared in many law suits, was called an \textit{invictus causidicus}, a lawyer who never lost a case.

Most of the major litigations during the early Anglo-Norman period seem to have involved either high Church dignitaries, monasteries, or some of the great barons of the realm. Though law and legal procedure already had begun to be somewhat technical, it had not yet become the exclusive possession of a professional class of experts. Many of the bishops, earls, barons and sheriffs apparently were still capable of speaking in court and representing themselves with success. But the many disputes among

\begin{footnotesize}
\begin{enumerate}
\item About 1134, Gervase of Canterbury reports that the quarrels between Theobald, the Archbishop of Canterbury, and Henry of Winchester led to much litigation. “It was then that . . . lawyers (\textit{causidici}) first were called into England [from abroad], of whom \textit{magister} Vacarius was the first.” What Gervase had in mind here is that the many quarrels among Church dignitaries resulted in many appeals to Rome as well as in frequent requests that Rome send some experienced canon lawyer to England.
\item In those days, a monk in England apparently could remain a lay person who was permitted to have or acquire money for his own use. Hence, it would not be unusual for a lay lawyer to live in a monastery, or use the monastery as his “law office,” and still be called a monk.
\end{enumerate}
\end{footnotesize}
the grandees of the realm gradually brought about more elaborate legal pleadings. Subtle legal distinctions, here-tofore unknown, were drawn, and the courts began to insist more and more on form and formality. Forensic proceedings became more regular and more businesslike. As a result, law, and especially the administration of justice, passed out of the state of casual family squabbles and became something of a science as well as an involved technique. But these are the very conditions conducive to the rise of the professional lawyer. The new situation soon called for the services of a skilled expert. After Lanfranc, the foreign born scholar and jurist who was probably the first "professional" lawyer in Anglo-Norman England, there were other legal practitioners, that is, men who made it a practice and perhaps even a profession to assist others in their litigations.

(3)

The fact that in Anglo-Norman times the King was frequently represented by one of his clerks or "friends," whether as his judge or as his attorney-agent, gradually led to the identification of the principal with his agent, including his attorney, pleader or clerk. King Stephen (1135-1154), when involved in litigation, employed a certain Aubrey de Vere to represent him and to act in his behalf as his substitute. This Aubrey might be called the first known King's counsel or serviens regis in a judicial inquiry in which the Crown appeared. Richard of Anesty, in his many law suits, engaged a whole train of "friends, helpers and pleaders," among them Master Ambrose and Ranulf Glanvill, two celebrated legal authorities and lawyers.

25 In 1139, there probably existed no legal machinery for making the King of England a defendant. Hence, in 1139, the King could not be sued or charged in the ordinary way, but merely be made the subject of a "judicial inquiry" (placitum).
Soon, in litigation after litigation, the parties began to appear *per procuratorem* (by counsel), or at least sought to secure the assistance of a competent and experienced lawyer. In this they were not always successful. The Abbot of Abington, who had a quarrel with Godfrey de Lucy, in 1176 vainly tried to retain the services of some prominent lawyers, all of whom refused him because they were unwilling to incur the displeasure of so powerful a man as Godfrey and his father Richard de Lucy, the King’s justiciar. Since Godfrey was attended by a “long train of *advocati,*” the Abbot, who also admitted that he had never studied law or attended a “law school,” found himself in a serious plight. From all these accounts it may be gathered that by the end of the twelfth century advocacy already was an art and that the regular study of law was a recognized institution.

(4)

The new system of administering justice after the Conquest, as well as the dispatch of an ever-growing amount of legal business of quite a new kind, gradually brought about a new method of pleading (*placitandi*) and, thus, helped to develop a new class of pleaders who, in the course of time, would become professional lawyers. During the reign of Henry II (1154-1189), the legal representative, or to be more exact the pleader (*narrator, placitator*), became a more familiar figure. Since Henry II, in a way, initiated “the rule of law” in England, this steady increase of lawyers and pleaders in England is by no means surprising. In addition, the law of the land became more unified and centralized by the institution of a permanent court composed of professional judges who knew English law, as well as by the frequent mission of itiner-
ant judges throughout the realm. These innovations, to a large extent, also removed the many evils arising from the distinction between ecclesiastical and lay jurisdiction that had been introduced by William the Conqueror. But more than that: in the long run they led to the birth and expansion of the English legal profession.

The example of ecclesiastical courts, where every litigant enjoyed the advantage of competent legal assistance, and the ever-increasing legal formalism suggested the idea that in the lay courts, too, resort should be had to the aid of a competent legal advisor or “helper.” But it is nearly impossible to determine the exact date when professional lay lawyers or legal practitioners first appeared in English history in any appreciable numbers—when, in other words, a professional knowledge of the law became the exclusive possession of a distinct class of legal practitioners. The professional lawyer cannot possibly be found until there has been established a distinct body of laws, a fairly consistent procedure and a settled jurisdiction with regular courts. But we know that it took some time before these elementary conditions were reached in mediaeval England, and we cannot even determine with any degree of accuracy when the common law of England actually began. Prior to that period, we can hardly expect to encounter legal practitioners, who make it their calling to advise actual and prospective litigants in the conduct of their causes, or who conduct these causes in their behalf. In any event, the First Statute of Westminster of 1275 did not yet draw a sharp line of demarcation between the professional lawyer and the casual “legal

26 It may be claimed that the following events in English legal history created an atmosphere favorable to the development of an indigenous English legal profession: The Assize of Clarendon of 1166, the Inquest of Sheriffs of 1170, the Assize of Northampton in 1176, the creation of special officers (servientes regis) to keep the pleas of the Crown (about 1181), the Great Assize of 1189, and the Magna Carta of 1215.
assistant.” Neither did it abolish the latter. The author of this statute still recognized the fact that anyone might come into court and speak in behalf of a litigant. Thus, it seems that the class of casual “legal assistants” did not disappear until a later date.

(5)

It already has been shown that during Anglo-Saxon times and far into the Anglo-Norman period the litigant, as a rule, conducted his own case. Parties in those days were mostly the great men of the realm, who apparently possessed some ability to cope with the rather fluid and amateurish legal or procedural provisions in existence. As a matter of fact, even the exact meaning of the term *advocatus* in early England is somewhat obscure.\(^{27}\) While the accepted use of this term denoted one who presents another's case in court, at times it is difficult to distinguish whether in any given situation the early *advocatus* might not suggest a special protector whom both clergy and laity sought out whenever they found themselves in legal difficulty. In this latter sense the *advocatus* was probably nothing more than a “casual assistant” or a powerful “friend,” rather than a skilled professional adviser or assistant. Persons who appeared in behalf of a litigant were often rank amateurs, in other words, friends (real or imaginary), relatives or some influential connection of the party. Hence, they were often referred to as *amici* or *jugales*. These “friends,” as they may be expected, could not demand a regular fee for their efforts, although they were entitled to a “gift of gratitude.” The interdict against

\(^{27}\) It should be noted that the Middle Ages had a great variety of Latin designations for the legal practitioner: *procurator, mandatarius, dominus, auctor, causidicus, placitator, disputator, tutor, assertor, defensor, patronus litigator, actor, nuntius, advocatus, narrator, patrocinator, clamator, relator, serviens ad legem, attornatus, and prolocutor.*
charging or accepting fees in some places was enforced as late as the fifteenth century. The assistance which a person afforded to a friend in distress was considered something that ought to be rendered gratuitously. Any reward which the latter might bestow upon his helper and protector was purely honorary, not done in discharge of a legal obligation, but of a personal debt of gratitude. Also, it is not likely that at this time any one class of persons or any particular branch of the legal profession had exclusive audience either in the royal or the lower courts.

Originally, every "lawful" and free man in the realm could represent or plead for another person in court, acting either as a "friend" or as the protector of the litigant. Under certain circumstances even women might have acted as "attorneys." A wife could represent her husband, and a daughter might be her father's responsalis or attornatus. A bishop could appoint one of his clerics, an abbot one of his monks, and a baron one of his knights or his steward. It is doubtful whether there was ever a period in English institutional history when a litigant was not permitted the assistance (consilium) of a friend when pleading or defending himself before a court. Certainly he was permitted such friendly assistance and advice as early as the reign of Henry I (1100-1135), and possibly before that time, unless he was charged with treason or felony.

A change in the method of representing others, however, can be observed towards the end of the twelfth and particularly during the thirteenth century. Some more experienced men, taking advantage of the increased litigiousness of the times, seem to have made it somewhat of a regular practice to assist and advise others in their legal affairs. Certain names constantly and consistently appear
and reappear in the records as legal practitioners in nearly all major litigations. In any event, after 1292, the year in which the *Year Books* were started, we find that almost all the great law suits of that period are conducted by a small group of men, such as Spigornel, Howard, Lowther (or Louther), Hertpol (or Hertepole), King, Huntingdon and Heyham. This may be taken as an indication that certain people had made it a practice and perhaps even a profession to represent in court whoever would employ them for hire. But, for some time to come, the number of experienced and perhaps professional legal practitioners, which seem to have developed around the King's courts, remained extremely small. These practitioners were in no sense of the term "officers of the court." Neither did they as yet constitute a closed and organized class of professional men. The age of the guilds had not yet arrived.

The great barons, the high Church dignitaries, and especially the Crown, as might be expected, were engaged in frequent law suits before both ecclesiastical and lay courts. Undoubtedly, they soon began to retain lawyers on a more regular basis. It even happened that in view of the great dearth of good and experienced lawyers in England, they employed some famous foreign advocates, particularly a renowned canon lawyer from Italy, whenever they litigated before an ecclesiastical court. Already at a fairly early stage, the King, it seems, permanently retained a number of lawyers or *attornati* to plead his many cases for him. But whether these lawyers were free to represent other people when no interest of the Crown was involved is not clear. Later, we know, a King's counsel had to have special permission to appear for a private client against the Crown. During the reign of Edward I (1272-1307), and perhaps even earlier, the Crown also began to retain its own special pleaders who were frequently referred to as "king's servants" or *servientes re-"
gis, a title which subsequently was changed to servientes ad legem (serjeants) when they took employment from clients other than the King.

But while in the ecclesiastical courts of England a class of professional lawyers had already existed at a fairly early stage—ecclesiastical procedure, as has been shown, encouraged and at times even enforced the appearance of skilled professional lawyers—only very few professional lawyers could be found in English lay courts prior to the thirteenth century. The only persons mentioned in the earliest records as having been learned in English law were the King's justices (and perhaps some of the King's clerks or attornati). Prior to the reign of Henry III (1216-1272), and far into it, these royal justices, as a rule, were selected from among the King's clerks or from among members of his secretariat where routine business had made them familiar with the law of the land. But these clerks, as we have seen, were often themselves clerics and, therefore, also familiar with canon (and civil) law as well as with ecclesiastical procedure. As a result of the prevailing dearth of truly competent and skilled English lawyers during the twelfth and the greater part of the thirteenth century, a great deal of legal business had to be transacted by people who were anything but learned in the law. The knight, the country squire, and the "gentleman" would frequently be employed as "lawyers" or as judges in the Assizes and county courts. The freeholder of a shire or the monk of an abbey, besides acting as jurors, would often preside over some minor court.

(7)

Not until towards the close of the Middle Ages did lawyers, attorneys as well as pleaders, become truly professional men who received a regular fee and made a living by
practicing law. The evolution of a professional Bar during the Middle Ages was closely related to one of the decisive factors in late mediaeval socio-economic history, namely, the emergence of an urban civilization which gradually replaced feudalism. This urbanism, in turn, brought about the rise of the guild system. It was this guild system which, in the field of law and legal practice, definitely encouraged and promoted the formation of a close professional order of skilled legal practitioners. Obviously, such a professional order has a tendency to perpetuate itself by a variety of means which often amount to a veritable policy: firstly, by devising a definite and, wherever feasible, strictly supervised system of training, education and rules of admission in order to replenish its ranks, maintain high professional standards, and keep out undesirable or unqualified persons; secondly, by protecting itself against unwanted competition through the monopolization of its skills and skilled services; and, thirdly, by enhancing its standing and prestige within the community in which it operates through the establishment of a definite and, as a rule, strictly enforced code of professional conduct. This has been the case with nearly every skilled profession, craft or guild during the more advanced stages of every age. It is not surprising, therefore, that in the city of London a legal profession should develop more rapidly and more efficiently than in any other part of the realm. It was probably this organized class of profes-

28 This feudalism is also reflected in the kind of litigation which is typical for the time. Most cases arose out of the feudal tenures of land which were further complicated by the gradual fusion of families and races. Hence most of the law suits relate to real property. Maitland has classified the various actions during the early reign of Henry III (1216-1272), recorded in Bracton’s Notebook, under the following main headings: (1) Writs of Right; (2) Dower; (3) Writs of Entry; (4) Assizes of Novel Disseisin and of Nuisance; (5) Assizes of Mort d'Ancestor, Nuper Obiit, Cosinage; (6) Assizes Utrum; (7) Assizes of Darrein Presentment, Quare Impedit, etc.; (8) Miscellaneous proceedings (later called real or mixed actions, often related to trespass); (9) Personal actions (including actions on fines); (10) Criminal proceedings (including appeal); (11) Proceedings in appeals on error, false judgments, etc.; and (12) Prohibitions.
sional lawyers in London which, beginning with the year 1220, wrested from the King a number of important concessions. The London lawyers probably followed the practice and traditions which for a long time had been observed in the ecclesiastical courts. Thus, it may be maintained that the first professional attornatus to a large degree was the secular equivalent of the canonical proctor, while the first professional pleader or narrator became the secular counterpart of the canonical advocate.

(8)

The formative age of the English common law and the common law courts is the period from Henry II (1154-1189) to Edward I (1272-1307), while the latter part of Henry III's (1216-1272) reign, and the reign of Edward I as well as that of Edward II (1307-1327) and Edward III (1327-1377), might be called the formative era of the English legal profession. Prior to Henry III, and probably during the first half of his reign, there were hardly any professional lawyers in the central courts. In early England, trials and proceedings were frequently quite informal and often could not be distinguished from mere family quarrels. The King, if he preferred to preside in person at the trial, was usually attended by such nobles, clergymen and trusted advisors as happened to be at court at the very moment. Naturally, even prior to the period of Henry III or Edward I there are traces of “lawyers” of a sort.

Around the year 1200—the earliest recorded plea dates back to the year 1181—the “original writ” came into general use. A written document of any kind, however, requires expert composers and skilled interpreters. Thus, the introduction and further development of the writ contributed to the rise of a class of legal advisors and expert legal “assistants.” Also, the steady growth of the King’s interventions, measured by the extension and con-
stant increase in the use of royal writs, had such an effect that trials, inquests, and hearings gradually became so numerous that their management frequently had to be delegated to some "royal deputies" who, in the course of time, became a regular "bench," namely, the King's Bench. But delegation invariably tended to convert into routine and officialism what formerly, when still handled by the King himself, had been gloriously informal and devoid of technical refinement. This routine, among other things, demanded a stricter procedure, a set of definite rules, a rigid system of pleading and consistent decisions. The formalism of English law and procedure, which becomes apparent during the thirteenth century, is closely related to the delegation of the King's judicial functions to functionaries or officers. These innovations, and especially the growth of officialism, in turn necessitated the assistance of expert helpers. For by now the average man could hardly be expected to understand, appreciate or make full use of the newly emerging machinery of the King's court in all its technical complications and implications.

(9)

In view of the increasing complications attending litigation in the royal courts, it is not surprising that as early as around 1239, William of Drogheda should write about the art of advocacy. 29 His observations and instructions may be called a manual for the successful practice or "trade" of law in both lay and ecclesiastical courts. This manual, which purports to make an exhaustive study of the art of successful advocacy, including the ways of trickery and chi-

29 These passages on advocacy are part of William's Summa Aurea de Ordine Iudiciorum (1239). William was in orders, a teacher at Oxford, and probably a practicing advocatus. His Summa is under the influence of the Decretales of Pope Gregory IX of 1234, and the Constitutiones of Cardinal Otho of 1287 (see text, supra), both of which dealt with advocacy in ecclesiastical courts.
canery, is the first of its kind written by an Englishman.

In a very practical vein, William maintains that before going to law, a lawyer, aside from considering and comparing the economic resources of both parties, should also weigh the relative merits of his case and, if the merits and the economic advantage be on the other side, avoid unnecessary expense by settling out of court rather than litigating. If the opponent, though he be rich, is not a lawyer or jurisperitus, the advantage is definitely on the side of the lawyer and he should proceed with the case irrespective of its merits. But if the opponent is both a lawyer and a wealthy, influential man, it is better to avoid litigation.

According to William, lawyers were “invented” to advise judges on how to proceed, especially in the case of a minor. Pleading (postulare) is the presentation of a demand to one who has the authority to satisfy or reject the demand. With the exception of heretics, women (unless the latter plead for themselves or for their husbands), slaves, infamous persons, minors under seventeen years of age, excommunicated persons, monks (unless they appear for themselves, the poor, their parish church, or their monastery), and illegitimate persons, any one may plead for himself or for a friend. But no man may be advocatus and judge (or assessor) in one and the same case. Neither should a man be admitted to advocacy unless he is an examinatus et probatus. The advocatus must at all times show respect for the judge and should compliment and flatter the court whenever possible. He may not address the court or the adversary in rude or violent language, except when the case demands such language. Also, he should not bicker or bargain, but whenever feasible “soft-soap” the court. He should be brief and courteous, constantly vouch for the good faith of his client as well as his own, and, if possible, cast sly aspersions and doubt upon the character and motives of the adversary.
William then points out that, since the statements made by the *advocatus* are held to be those of the client, the latter is bound by these statements, provided he is present, understands what is being transacted, and does not object. If the *advocatus* makes a mistake, the client has three days from the final decision to make an interlocutory appeal (*revocare errorem*). Wherever feasible, the *advocatus* should combine all grounds of action into one single plea, but sue as many defendants as possible. If there are several causes of action, he must choose the most promising, that is, the one by which he can get the largest award; nevertheless, he should always reserve the right also to plead the other causes. To aid his memory and in order to prevent possible tampering with evidence, a good *advocatus* will always keep a record of everything which transpires during the trial. When pleading, he should state the facts pure and simple, in the accepted “modern fashion” and avoid old-style oratory. But if he brings an action for injury, unless the adversary be a powerful man “to whom respect must be shown,” he should exaggerate the damages as much as he can and, wherever possible, not even shy away from outright lying. Also, he should plead differently before a learned judge than before an ignorant one capable of being deceived. When representing a defendant in a bad case, he should use dilatory tactics and be sly as well as tricky; but if he has a good case, he should press his advantage relentlessly and ruthlessly. In other words, he may resort to all kinds of unprofessional and even unethical practices “to get the job done.” Judges may be bribed, and it is always wise to contact the judges’ friends in advance of trial.

Much of the professional advice which William of Drogheda offers to the practicing lawyer desirous of winning his case at all costs is objectionable. His suggestions, it must

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30 While William of Drogheda had previously defined his *advocatus* as a “pleader,” he now describes him as an *attornatus*. 
be conceded, often do not deserve very pretty names. Also, he does not always distinguish clearly between the proper functions of an *advocatus* and those of a *procurator* (proctor), *responsalis* or pleader. One definite activity of the early mediaeval lawyer, however, becomes obvious from his statements: the lawyer conducts the legal arguments in court, and while doing so, he discusses with the Bench the law which applies to the facts submitted in evidence.

(10)

Analogous to the practice prevailing in ecclesiastical courts, the English legal profession of the thirteenth century already consisted of two somewhat distinct classes or branches, namely, the narrators (pleaders or serjeant-counteurs) and the *attornati*. The exploits of the pleaders can be gleaned from the *Year Books*, while they figure but little in the *Plea Rolls* which were more concerned with the activities of the *attornati*. It is difficult, however, to ascertain exactly when these two functions — the pleader and the *attornatus* — became the separate provinces of English legal practice. The earliest *Plea Rolls* of this period seem to indicate that the same men apparently performed the tasks of *attornati* and pleaders (*narratores*). This would be natural at a time when legal practice was not yet professionalized. But the constant recurrence of the same names in the earliest records suggests, as we have seen, the existence of a small group of men who apparently made it a habit to "practice law" either as regular pleaders (or narrators) or as regular *attornati* during the thirteenth century, and perhaps earlier. In any event, it could be maintained that by the end of the thirteenth century the distinction between the status and function of the *narrator* or pleader and those of the *attornatus* was fairly well in effect. This distinction subsequently led to the rise of two separate classes of legal
practitioners in England, both of which still persist in our own time. It may also be surmised that towards the end of the thirteenth century, both branches of the English legal profession became "professionalized," if by the term "profession" we mean the activities of an expert and skilled man who by his specialized efforts is particularly qualified to engage in a particular activity. After the year 1292, nearly all the major law suits in the realm were conducted by professional lawyers, and it was not only in the King's courts that we find the earliest professional lawyer at work. By the middle of the fifteenth century, the need for professional legal assistance received official recognition. In the fall of 1432, the Privy Council ordered a temporary suspension of all litigation in London, because, owning to the plague, "all our serjeants and attornati . . . have left the City of London so that plaintiffs and defendants cannot get the advice absolutely necessary to their suits."

As soon as something like a true legal profession comes into existence, professional opinion becomes one of the most powerful forces which influence the development and the stabilization of the law. Here, too, we are reminded of the fact that the history of law, especially that of the common law, should be written against the background of the great lawyers and legal practitioners rather than around kings, heroes or courts or, perhaps, around "the law itself" as a supposed "idea" which unfolds itself in the course of history. During the reign of Edward I (1272-1307), it became impossible to uphold a writ which all the serjeants condemned; and frequently the legal opinion of a serjeant seems to have been to the mediaeval reporter as important as the official pronouncement of the court itself.

(11)

It was the rise of a distinct class of professional lawyers
or practitioners which, as previously noted, stimulated a tendency to recruit the Bench from the Bar. Out of nine serjeants during the reign of Edward I (1272-1307), seven were raised to the royal Bench, and out of sixteen King’s attornati, four became justices in the King’s courts and one a Baron of the Exchequer. With the further growth of the profession during the reigns of Edward II (1307-1327) and Edward III (1327-1377), this trend came to be almost universal. This was by no means surprising: the legal practitioners of the time, especially the serjeants, had gradually consolidated into a small but very active group of professionals which was strongly united, as all professional classes sooner or later will be, by an esprit de corps. Its relatively few members were in constant and intimate contact with one another. They were drawn together by a common interest in the law, legal procedure and in a consistent as well as regular administration of justice throughout the realm. In addition, during term time the serjeants and justices lived together in their hospitia or Serjeant’s Inns where they constantly discussed their cases on an informal basis simply as serjeants, without distinction between those serjeants who had been promoted to the Bench and those serjeants who still practiced at the Bar. Such a situation, of course, created a close relationship between Bench and Bar.\footnote{From the Year Books we learn that the lawyers in their arguments occasionally tried a clever fallacy. But the court, which, as a rule, consisted of men who had been elevated from the Bar to the Bench, was not easily taken in by such tactics, and good-humoredly it would remind the lawyer of this fact. Once, when a particularly subtle point was raised by a lawyer, the Bench remained unimpressed, for one of the justices happened to remember that when he was still a practitioner he himself had once tried the same approach without success.}

Also, when the same justices are constantly addressed by the same lawyers, they cannot but influence one another. In their rather businesslike attitude, the practitioners would constantly compare the decisions of the justices and, by reminding them of their previous decisions, would com-
pel them to adopt a consistent and settled course of juris-
diction. Conversely, the Bench would do the same thing as
regards the pleas or arguments of the practitioners, forcing
them to act in a businesslike manner. Of equal importance
was the fact that the justices and the practitioners had gone
through the same course of training and apprenticeship in
the Inns of Court, something which certainly made for mu-
tual understanding and close cooperation. As a practical re-
result, the justices, in the main, were the equals of the most
outstanding and learned members of the Bar; and the lead-
ing lights of the Bar were the equals of the greatest of jurists
on the Bench. Such close ties and contacts between Bench
and Bar were of the utmost importance for the proper de-
velopment and working of the common law system. The
most efficient way of combining the permanent courts of
the realm with the newly emerging and quite self-conscious
legal profession was to choose the permanent judges from
among the permanent practitioners, or to be more exact,
from among the class of serjeants who, at least for the mo-
ment, had become the most important and certainly the
most honored branch of the English legal profession.

IX

THE RESPONSALIS

(1)

Ranulf of Glanvill, who as early as about 1160 was a
"legal consultant" in the famous case of Richard de Anesty
v. Mabel de Francheville, is credited with the composition
of a legal treatise between 1187 and 1189.32 In book one,
chapter twelve, the author deals with the contemporary

32 The accepted title of this work is, Tractatus de Legibus et Con-
suetudinibus Regni Angliae ... compositus viro Ranulfo de Glanvilla. It is
doubtful, however, whether Glanvill actually wrote this work which has
long borne his name.
rules governing legal representation. He maintains that a sick person, unable personally to appear in court on account of bed-fastness, may send "a qualified (sufficiens) responsalis in his place, who represents him ad lucrandum vel perdendum (to win or lose)." Hence, "whoever on the appointed day should appear in the place of the party and offer to undertake the defense, whether authorized by a letter of the party or not — if it be known that he is 'related' (coniunctus) to the absent person, shall be received in court in the latter's place ad lucrandum vel perdendum." Thus, it appears that during the latter part of the twelfth century some sort of legal representation by a responsalis was permitted (and even required), provided that the party, in this case the defendant, had a good reason for failing to make a personal appearance in court when summoned. The responsalis of Glanvill, as the passage, ad lucrandum vel perdendum, suggests, is definitely a sort of primitive attorney or substitute, especially if his actions were subsequently avowed by his "principal." He was admitted to representation under certain restricted circumstances in particular situations. This becomes obvious from the court's control over the responsalis, which was exercised by a number of stringent rules defining his status as well as his powers. These rules, among other things, also distinguished him from a mere bailiff.

A defendant, who was seriously or permanently ill, was permitted to have a special representative to answer for him in court. As a matter of fact, to have a responsalis seems to have been compulsory for the bed-fast defendant. The responsalis, who could substitute only for the defendant, was definitely a special exception from the general aversion to representation, and might be explained only by the involuntary nature of this kind of substitution. But the re-

33 Bracton, on the other hand, maintained that there was a great difference between a responsalis and an attornatus. It should be noted here that the earliest Plea Rolls often used the term responsalis.
sponsalis strictly speaking was not an *attornatus*, at least not until much later when the formal *attornatio* had developed. 34 By that time the responsalis had merged with the *attornatus*. This is what Coke means when he stated that "the statutes that give the making of attorneys have worn out responsales."

(2)

In the beginning the responsalis, who seems to have been a casual representative, was probably a near relative, including the wife, the son or even the daughter of the defendant. But he could also have been a friend, a person to whom the defendant owed some form of allegiance, or someone especially designated in writing. Later, however, the requirement of relationship — the *coniunctio* of Glanvill, as well as the written "power of attorney", the *letterae* of Glanvill — was discontinued. Anyone, it seems, could make an appearance in behalf of a sick person and answer the complaint in the latter's place. But when this happened, a writ was issued by the court, which sent four "investigators" to the defendant's bedside to ascertain whether he had actually appointed a responsalis, whether he would authorize the answers as made by the responsalis, and whether he would be in full accord with whatever the responsalis says or does *ad lucrandum vel perdendum*. In other words, the four emissaries had to investigate whether the defendant wished to make the responsalis his *attornatus*. The responsalis became a sort of *attornatus*, representing the sick defendant *ad lucrandum vel perdendum*, only after the person, who had appointed him in the first place, had also "attorned" him in the presence of the four investigators. The latter, who sometimes were also called

34 In England the *attornatio* as well as the designation "*attornatus*" did not come into general use until the thirteenth century. It is also during the thirteenth century that the responsalis began to disappear as a special branch of the English legal profession when he merged with the *attornatus*. 
servientes regis, subsequently testified in court as to the defendant's reply; and if they should agree in their report, the responsalis formally assumed the role of an attornatus. He became in fact a limited attornatus whose words or acts, however, had to be ratified by the defendant.

The attornatio of the responsalis presumably took place in the presence of the four investigators and not, as was the case with the attornatio of a regular attornatus, by a royal writ or in the presence of the court.\(^{35}\) For it seems that the answers which the defendant gave to these four emissaries were tantamount to a sort of attornatio. The responsalis, therefore, may be called the forerunner of the attornatus. For, if properly avowed in the presence of these emissaries, the responsalis, with some limitations, seems to have corresponded to the attornatus of a later time. But the designation attornatus, it will be noticed, did not come into general use until the thirteenth century, at least not in the case of the defendant.

When this happened the term responsalis had to yield to the designation attornatus, although, in memory of the responsalis, the pleading of the attornatus, even when he represented the plaintiff, for a long time was still referred to by the anachronism respondere.

(3)

If Glanvill's treatise contains reliable information, it can be assumed that towards the end of King Henry II's reign (1154-1189) a party could appear in court by substitute.

\(^{35}\) Obviously, the early responsalis of Glanvill was not the attornatus of the thirteenth century, despite the fact that he could be "attorned." Also, the appointment of a responsalis originally was not ad lucrandum vel per- dendum (in this Glanvill errs); he could be contradicted by his "principal," who might refuse to accept whatever his responsalis had said or done. Hence, the "non-attorned" responsalis was similar to the narrator, although his functions were not the same: inasmuch as his principal was absent, he did not have to stand by his side, as the narrator did.
This means that already at a relatively early stage in the emergence of the English legal profession the permanent incapacitation of the defendant led to the establishment of special rules which, as a special privilege, permitted him to be represented in court. Glanvill, to be sure, does not mention the *attornatus* by that name, but seems to refer to him or his earliest form as *responsalis*. This, in turn, would indicate that in 1189 the term *attornatus* was not yet in common use, although some of the attorney's functions were already recognized. In other words, as early as King Henry II's reign a person engaged in civil litigation in one of the King's courts, with some important qualifications and under certain circumstances, had the opportunity of appointing a limited legal representative. It is interesting to note that a similar situation existed in mediaeval continental Germany.

X

THE ENGLISH ATTORNATUS

(1)

The term attorney or *attornatus*36 first appears in English records during the latter part of the twelfth century. About 1187 or 1189, Glanvill reports that the King37 had reprimanded his Sheriff: "You have appointed as a substitute (*attornastis*) others in your place . . . which is contrary to custom." Hence, *attornare* (to make an attorney) signified to deputize, and *attornatus* meant a deputy or substitute — one who takes the place of another. This is also the meaning of the term *attornatus* in the *Pipe Rolls* of 1162-1168 which contain what seem to be the earliest known

36 Also the following forms can be found in early English records: atturre, attourne, atturney, atturne, atturnye, atturneie, or atorne.

37 King Henry II (1154-1189).
references to the *attornatus*. In the year 1180 we encounter a certain Paganus, who was the *attornatus* of the Sheriff of Exeter (*gerens vices vicecomitis*, one who carries on business in the place of the Sheriff). It has already been shown, however, that the term *attornatus* did not come into general use until the thirteenth century.

The *attornatus*, in the main, represented or substituted for the litigant during the various phases of a litigation. In the absence of the party his acts or words were deemed to be those of the party. As the representative of the litigant he was his substitute and not, as in the case of the pleader (*Vorsprecher* or *narrator*), merely an intermediator. Hence, all his admissions, denials, arguments, pleadings, motions or settlements were considered those of his principal *ad lucrandum vel perdendum*, unless the principal himself personally appeared in court and disavowed him immediately.

(2)

The early English *attornatus* was hardly a professional man. Like the *responsalis*, he was a person who answered in court for the party; and as in the case of the *responsalis*, his activities in court, even when he represented the plaintiff, originally were referred to as *respondere*. It has already been stated that according to some historians the English *attornatus* was the product of the particular legal and forensic conditions which gradually developed in England during the latter part of the twelfth century, especially during the reign of Henry II (1154-1189). He probably started out as a simple "errand boy" or casual "mes-

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38 Five in all. In 1159, King Henry II, by writ, permitted the Abbot of Abingdon to "*mittat senescallum suum vel aliquem alium in loco suo*" (put in his place his steward or some other person). The King also ordered that the judges receive "the man whom he [scil., the Abbot] should send in his place." Although this was definitely a sort of *attornatio*, the writ does not contain the designation *attornatus*. 
senger" charged with the performance of some minor task such as delivering or taking a message, delivering or picking up a document, hearing a judgment, offering an excuse, picking up a chattel or a deed, etc. Originally, therefore, the functions of the *attornatus* were quite casual; apparently they could be performed by nearly everyone, including a woman. All this would indicate that in its early English use the term *attornatus* had no specific technical, professional or even legal meaning. This amateurish *attornatus*, at least in England, was the forerunner of the professional *attornatus* of a later date. But during the latter part of the twelfth, and certainly during the thirteenth century, a more complete form of representation gradually came into use. There emerged a representative or *attornatus*, who turned out to be of greater usefulness than the mere *responsalis* in that he more fully represented the party, especially the plaintiff. It is not impossible, however, that the improved English *attornatus* in some ways was an imitation of the proctor or *procurator* as he could be found in the ecclesiastical courts.

It is not always clear whether the earliest *attornatus*, who sometimes was called *placitator*, was empowered only to take a particular step in the proceedings in which he represented the litigant and, hence, did not greatly differ from the *responsalis* (except that he could represent both the plaintiff and the defendant, while the *responsalis* answered only for the defendant); or whether he had the power without limitation to commit all the acts which the litigant himself could do in the proceedings. It seems also that in the beginning, when the *attornatus* was still a non-professional representative, the principal himself had to be present in court to vouch for him, for otherwise the *attornatus* might not be received. But it is not clear whether this refers only

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39 Bracton actually refers to a "nuntius."
to the appointment of an *attornatus* rather than to his activities. Neither is it obvious whether this observation refers to the pleader rather than to the *attornatus*. And finally, the powers and functions of the *attornatus* were not yet definitely distinguished from those of the pleader; in some instances, no doubt, the designation *attornatus* was also applied to a pleader by an inaccurate reporter. Be this as it may, there still remain a few baffling problems: the litigant could at any time revoke the appointment (*mandatum*) of an *attornatus*, but he had to abide by the words or acts of his *attornatus* (or *responsalis*), whether the latter came to terms or obtained a judgment. Bracton, writing about 1250, claims that the *attornatus* represents the person of the principal in almost all matters; and, although a person has appointed an *attornatus*, he may proceed in person if he wishes to do so. This becomes evident from the following incident: In 1201 a certain de Gines, "who had put in his place B., his son, and W. de Curton, came personally into court and removed (*amovit*) them, saying that he intended personally to prosecute [his case]." Also, it appears that the *attornatus* had more powers than the *responsalis*, who, as a rule, was limited to representing the defendant and to taking just one particular and definite step in the proceedings. This is probably the meaning of Bracton's remark that "there is a great difference between the *responsalis* and an *attornatus*."\(^4\)\(^0\) The *attornatus*, once properly appointed, had the power to bind the party, something which apparently was not the case with the *responsalis*. His appearance in court, or his default, was considered equivalent to the personal appearance or default of the party; and he could commit the latter to a particular plea. In addition, as Britton around 1290 points out, he could not withdraw pending the proceedings without the consent of his client. Needless to say, such a representative had to be a person of great in-

\(^4\)\(^0\) This statement might be a later gloss on Bracton's original text.
tegrity as well as a man who fully understood law and the intricacies of English legal procedure.

Because the *attornatus* fully substituted for the party, early Germanic law was slow and extremely reluctant in permitting a full attorney to appear in court in the place of the litigant. Hence, in the beginning of English legal history the right to litigate through an *attornatus* was very limited and it asserted itself only gradually. Naturally, even in the beginning there existed some noteworthy exceptions to this general interdict against having an attorney. But, in the main, the appointment of an *attornatus*, as shall be shown presently, for a long time to come was subject to severe restrictions and, hence, had to be made under elaborate and highly restrictive safeguards.

(3)

The full *attornatus* was without doubt of great help especially to the wealthy landowners who had land in different counties, as well as to the lords, barons and the high ecclesiastics, who were involved in many and often prolonged litigations but found it impossible or inexpedient personally to appear in court. Perhaps because of the fixing of "one central court in a certain place" after the year 1225, and particularly because of the rise of the Court of Common Pleas, there was a sudden growth of professional attorneys in mediaeval England during the thirteenth century. It was during this time that they gradually assumed a more definite and more distinct shape; and it was then that the *attornati*, skilled in their vocation, became a group of men who began to make money by representing others in court or by giving legal advice to them. Especially toward the end of the thirteenth century, the *attornatus* ceased to be a mere amateur assisting his friends in court or playing the role of a simple errand boy delivering a message. But the very moment the *attornati* had come to be a class of pro-
fessional men, their powers and duties became quite com-
plex. Differing from the bailiff, the *attornatus*, like the party
he represented, could now speak to the Assize, to the jurors,
to the adversary or his representative, and to the court.

Hence, it is not surprising that the first “professional”
legal practitioners in England should have acted as *attor-
nati* and should sometimes be called by that name, although
some of their functions were rather those of the pleader or
*narrator*. Undoubtedly, they were remunerated for their
services and, hence, were really professional men. By the
year 1300, and probably long before that time, there existed
a number of professional and paid *attornati* in the City of
London. It may be surmised, therefore, that between 1270
and 1300, the *attornati*, like the *servientes* or serjeants,
were beginning to be recognized as “full-time lawyers.” The
difference between the *attornatus* and the *serviens*, which
developed gradually, was chiefly due to the particular kind
of work which the *attornatus* had been doing for some
time: he carried on business with the clerk of the court and
bought the writ, something which the *serviens* did not
do.

(4)

Beginning with the last decades of the thirteenth cen-
tury the English *attornatus* constantly progressed both in
professional stature and in importance, although he never
succeeded in attaining the renown or honor which the ser-
jeant achieved. Soon he instructed the counsel or pleader
(or serjeant), and sometimes we hear the court asking him
whether he will avow what his pleader had said in his be-
half. This would indicate that he had assumed full control
of the proceedings: he was allowed to select and appoint
the pleader or serjeant to plead for him, and he was respon-
sible for whatever the pleader said or did. There were also
several instances of two *attornati* being mentioned in the same appointment. We are told that in 1275 one William of Bolton practiced “in partnership with other pleaders.” It is not improbable that in this kind of partnership one appointee was the principal *attornatus* or perhaps even a *generalis attornatus*.

For the further development of the English *attornatus* throughout the realm, the Royal Rescript of 1292 was of the greatest importance. This Rescript, which often is also referred to as *De Attornatis et Apprenticiis (Of Attorneys and Apprentices)*,41 in a way did for the English legal profession what the City Ordinance of 1280 did for the legal practitioners in the city of London.42 In the Rescript, addressed to John de Mettingham (or Metingham), Chief Justice of the Court of Common Pleas,43 King Edward I commanded the Chief Justice and his brethren “that they should in their discretion look out for and appoint a certain number [of *attornati*] from every county among those who are of the best standing and the most willing to learn according as they think it would be in the best interest of their court and of the King’s subjects; further, that those so chosen shall follow the court and deal with the business there, and no one else. And it appears to the King and his Council that one hundred and forty such persons may be enough. Nevertheless, the aforesaid judges may, if they think fit, create more or less [*attornati*].”

(5)

The Rescript of 1292, it seems, had been designed primarily for the regulation of *apprenticii* or *addiscentes* be-

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41 This title was added at a later date, possibly after 1402.
42 It is quite possible that the Royal Rescript of 1292 was influenced by the London City Ordinance of 1280.
43 John Mettingham was a *serviens regis ad legem* in 1276, judge of the Court of Common Pleas in 1278, and Lord Chief Justice of the Court of Common Pleas in 1292.
fore they had chosen a particular branch of the profession. It appears that the *apprenticius* at this stage was still undifferentiated, that is, undecided as to whether he should become an *attornatus* or a *narrator* (pleader). This decision was to be determined by a *numerus clausus*. The Rescript probably owed its origin to some person or persons of influence who thought that the profession of the *attornati* was growing too rapidly and too recklessly. It might possibly have originated with the "staffs" of professional *attornati* who had become attached to the royal courts and from amongst whom prospective clients, as a rule, chose their representatives. These "professionals" might have feared too much competition. The author or authors of the Rescript, like the city fathers of London in 1280, also were concerned with the adequate legal training of the aspirants to attorneyship. The ecclesiastical courts, it will be remembered, had long ago established a scheme of selecting qualified lawyers, adequately trained in the canon law. In 1280, the city of London, perhaps following the example of the ecclesiastical courts, had decided that the time was ripe for the regulation of the legal profession in the city. Twelve years later the Crown, perhaps taking a hint from London, likewise laid down some standards of professional proficiency. But notwithstanding the Royal Rescript of 1292, it must be assumed that the King did not at once abandon the right to issue his writ allowing a petitioner to appoint as his own *attornatus* any person he wished to select.

By the Royal Rescript of 1292, those *attornati* who received the approbation of the royal court acquired a sort of monopoly of representing clients as well as what seems to have been a monopoly of pleading in those courts to which they had been admitted or "appointed." It is here that we can discern the beginning of a process which in the course of time will make the *attornatus* (and the lawyer in general) an "officer of the court" which appointed him and
to which he became attached. At the same time, he came under the disciplinary supervision of the court. The Rescript probably marks also the point at which the attornatus became distinct from the pleader, narrator or serjeant. Hence, it might be assumed that the Rescript of 1292 marks the beginning of the bifurcation of the English legal profession.

(6)

After the year 1300, the attornatus and, incidentally, the English "lawyer," began to emerge even more clearly. During the earlier stages of his evolution, one could never be completely certain about the specific nature and function of the attornatus, and all generalizations about his activities are somewhat inaccurate or premature. The legal practitioners of the twelfth and thirteenth centuries were not lawyers practicing with any kind of public or official authority, but men whose authority to act was their own personal authorization and the approval of the party for which they worked. Just as the whole English legal system of that time was still very much in a state of flux, so also the lawyer's position in this system, as well as the names by which he was referred to, was still quite indefinite. Thus about 1290, we find attornati who act like pleaders or serjeants, and serjeants or pleaders who conduct themselves like attornati. Also, for some time to come, the distinction between a casual ad hoc attornatus and a professional attornatus remained unknown. It is safe to assume that around the year 1300, there were several rather than merely two branches of the English legal profession. But the attornatus of that time had one distinction: he was the first definite figure to emerge in the general growth of the English legal practitioner.

The Royal Rescript of 1292 must have been constantlyvio-
lated. The Statute of 1322,\textsuperscript{44} for instance, found it necessary to prohibit the admission of \textit{attornati} by inferior officers of the royal courts (clerks) rather than by the justices themselves. We are also told that Edward II (1307-1327) complained of the fact that the Barons of the Exchequer admitted attorneys in courts other than their own. The restriction of the number of \textit{attornati} admitted to practice in the royal courts apparently did not keep down their number. The one hundred years which followed the Rescript of 1292 witnessed a large increase in the number of professional \textit{attornati}. It is estimated that during the fourteenth century the number of \textit{attornati} in the realm increased from a modest one hundred and forty, which had been considered sufficient in 1292, to more than two thousand. The cause for this rapid growth in the number of professional \textit{attornati}, it must be conceded, lay to a large extent in the litigiousness of the time. This litigiousness, in turn, was closely connected with the prevailing forms of law as well as with certain legal practices which often amounted to plain chicanery or outright malpractice.

\textit{(7)}

The King, too, had his \textit{attornatus} or \textit{attornati}, at least at a time when attorneyship was an established institution. In the year 1278, the Crown retained an \textit{attornatus regis} (a King's attorney) in its law suit against the Bishop of Exeter. After that date the \textit{attornatus regis} appeared rather regularly, often taking the place of the \textit{serviens regis}. But even as the King's attorney he still had to produce the "King's commission" (or that of the Chancellor), and failure to do so could land him in jail. For, as Judge Inge pointed out, "the peccant lawyer, even the King's, must take the usual consequences." Justice Harry le Scrope, in

\textsuperscript{44} 15 Edw. 2, c. 1.
1313, held that "he that sueth for the King cannot omit or change aught to the King's possible disadvantage, for he is not in the position of an attorney. Any stranger may appear on behalf of the King, and if he make a mistake the King's right ought not to be lost." This special royal "privilege" is a mere survival from the original forensic omnipotence of the English King in his own courts. When Justice Scrope stated that "any stranger may appear on behalf of the King," he could have added, "or for anyone else." But Scrope did not imply that any unauthorized person could simply jump up in court and take over the case for the Crown or for any other party. The casual *attornatus*, who might be admitted by indulgence, was merely a deputy. Hence, he was not treated by the court with the same consideration as the regular *attornatus* of a client or of the Crown.

Not only the King, but also many of the great lords of the thirteenth and fourteenth centuries, wishing to protect their many interests, retained a particular *attornatus*. Such an *attornatus* often acted as the lord's deputy, representing him either at the Bar or on the Bench (in the Baron's court or the manorial court). This becomes rather evident from the First Statute of Westminster, in 1275, which proclaims that no sheriff shall suffer "barretors to maintain quarrels in their shires, neither stewards of great Lords, nor others, unless he be attorney for his Lord, to make suit or give judgment in the counties. . . ." The King probably would designate one of his *servientes* or clerks to act as his *attornatus*, just as he would promote one of his *servientes* or clerks to be his representative on the Bench. But it is not always clear whether this royal *attornatus* was merely an appointee *ad hoc*, or whether he was a *generalis attornatus*,

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45 The underlying idea was that every loyal subject of the King could spring to the King's defense.
46 3 Ew. 1, c. 33.
that is, the general representative plenipotentiary of the Crown. Thus, we read that in the year 1295 "because John . . . is at the King's command, . . . he may have general attorneys in all his law suits." Aside from the King and the great barons, the city of London which, like any large corporation, constantly stood in need of competent legal representation, also had its city *attornatus*. It would not be amiss to assume that London followed the provision contained in the First and Second Statutes of Westminster of 1275 and 1285 respectively.

In 1298, the city of London appointed William of Grantham (Granham or Graham) city *attornatus* to be its representative in the royal courts and "to receive annually so long as he be attorney twenty shillings." In August of the same year, "the freedom of the City" was granted to William of Grantham, "attorney before the King, *viz.* before Sir Roger de Bracbasoun [Chief Justice] and his fellows. . . ." In the records of the city, this William, who was also a serjeant or *serviens ad legem*, \(^{47}\) is often referred to as a *generalis attornatus* (general attorney) of the city before the King and the justices of the King's courts. The term *generalis attornatus*, which probably goes back to the Second Statute of Westminster of 1285, signifies here the "attorney general" of the city or corporation of London, that is, a representative plenipotentiary who, like the ecclesiastical *generalis procurator*, had a general power of attorney to act for and represent someone else, not only *ad hoc*, but for all purposes and in all law suits, especially in all future litigation. But in connection with the office of "city attorney," the adjective *generalis* may also have meant *communis attornatus*, the attorney of the commonwealth, who, among other things, had also to serve the city poor.

\(^{47}\) The city attorneys of the city of London often were called *servientes ad legem*, while the attorneys of the Crown were referred to as *servientes regis*. Later these two designations merged.
During the reigns of Edward I (1272-1307) and Edward II (1307-1327), we are able to witness an extraordinary growth of a class of professional attorneys. This growth was probably due, at least in part, to the control exercised over the *attornati* either by the commonality of London since 1280 or by the royal courts since 1292; and partly to the rapidly increasing frequency with which permission was granted to appoint both special and general *attornati*, either by statute or by writ. It also appears that by this time the *attornati* were regularly remunerated by their clients, partly in cash and partly in kind. But this growth of professional *attornati* apparently was soon followed by incidents of distinct malpractice. Hence, the Second Statute of Westminster of 1285 also provided penalties for serjeants, pleaders and attorneys who engaged in unprofessional conduct. Lawyers were made liable to be sued not only for defrauding clients, but also for negligence in the conduct of causes. They were penalized if they were found guilty of any manner of deceit or collusion in the King's courts, or if they consented to such practices. But it is interesting to note that for some time it was the pleaders and serjeants about whom most of the complaints were made. In the city of London, as shall be shown presently, the professional conduct of attorneys (and pleaders) had been regulated by the City Ordinance of 1280.

In the year 1402, the Commons complained that in the past a great many instances of legal malpractice had oc-

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48 Serjeants, at least in earlier times, had "tenure," and, hence, could accept only a "token of gratitude."

49 The City Ordinance of 1280, unlike the Royal Rescript of 1292, applied to attorneys as well as pleaders. It also provided that in the city of London no attorney might engage in the profession of a pleader.
curred and were still occurring throughout the realm. As a result of this complaint, in the same year, a statute was passed which embodied the first consistent attempt to regulate more stringently the profession of *attornati* in England. This statute, which, among other things, also recognized a Roll of Attorneys, is said to have been framed by Chief Justice Gascoigne, and, in part, reads as follows:

> For sundry damages and mischiefs that have ensued before this time to diverse persons of the Realm by a great number of attorneys, ignorant and not learned in the law as they were wont to be before this time, it is ordained and [e]stablished that all the attorneys shall be examined by the justices and by their discretions, their names put on the Roll, and they that be good and virtuous and of good fame, shall be received and sworn well and truly to serve in their offices, and especially that they make no suit in a foreign county; and that the other attorneys shall be put out by the discretion of the said Justices. . . . And if any of the said attorneys do die or do cease [to practice law], the Justices for the time being shall make another in his place. . . . And if any such attorney be thereafter notoriously found in any default of record or otherwise, he shall forswear the Court and never after be received to make any suit in any Court of the King.

Here, then, we find, if not the origin of the Roll of Attorneys in the royal courts, at least the official recognition of such a Roll. Entry in the Roll required an “examination” in order to ascertain the moral and professional qualifications of the candidate before his final admission to the practice of law. It also provided for disciplinary supervision of all *attornati*, to be exercised by the royal justices. Thus, in the year 1442, an attorney found guilty of professional misconduct was attached and kept in the

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50  *4 Hen. 4, c. 18* (1402).
51  The city of London had such a Roll of Attorneys since the year 1280. See text, infra.
52  Chief Justice Gascoigne also issued a rule that all attorneys should be sworn every term to practice faithfully.
Fleet for several months. Subsequently he was fined and his name was stricken from the Roll of Attorneys. He was prohibited to appear in any court of the King or in any way to “meddle in the law therein,” until he had secured a full royal pardon. In 1439, under a statute, an attorney was fined forty shillings because his warrant was not “entered,” that is, because he had failed to pay for his license. In sum, the *attornatus* was directly admitted to practice by the court in which he intended to practice law, and he was under the direct disciplinary control of the court to which he had been admitted.

In many respects the Statute of 1402 is reminiscent of the complaint, made over one hundred years earlier, when the Mayor and the Aldermen of the city of London, as shall be shown presently, deplored the ignorance, incompetence and bad banners of many attorneys and pleaders.

In 1413, a statute was enacted which, dealing with attorneys, in certain respects worked for their protection as a class in that it prohibited certain people from competing with them in the practice of law. It stated that no Under-Sheriff, Sheriff’s Clerk, Sheriff’s Bailiff or Receiver, during the Sheriff’s term of office and while in his service, may act as an attorney in any one of the royal courts. This prohibition was intended to prevent these officers from perverting the course of justice by abusing or taking advantage of their official position. The same reason was back of a petition made by the Commons in 1392 in which it was suggested that no clerk attached to any of the King’s

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53 18 Hen. 6, c. 9.
courts might be admitted as counsel or *attornatus*. In this fashion, the *attornatus* gradually acquired professional standing and professional monopoly.

(10)

As time went on, a sense of professional privilege developed among English attorneys and lawyers in that the person of the *attornatus* gradually became disassociated from the particular cause which he represented. He could no longer be held liable for the wrongful deeds of his client and, hence, had grown to the full stature of a lawyer. Although only in the year 1562, by the Statute against Forgery, was it enacted that an attorney was not to be punished for pleading a forged deed for his client if he himself was not a party to the forgery, this "immunity" of the *attornatus* is certainly older than the Statute against Forgery.

The type of work done specifically by the *attornatus* of the fourteenth and fifteenth centuries, as distinguished from the services rendered by the pleader or the serjeant, tended to bring him into much closer contact with the client and the officers of the court. To be sure, the pleader or serjeant would still have to be consulted whenever certain involved issues should come up in court, but it was usually the *attornatus*, and not the client, who knew when such issues arose and how they could be stated clearly and precisely to the pleader or serjeant.

(11)

By the end of the thirteenth century, it became obvious that in the face of the ever-increasing complexity of social

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54 In 1391, it was ordered that attorneys should be at liberty to search the rolls of proceedings. This made them independent of the "good will" of the court officers.

55 5 Eliz. 1, c. 14.

56 This statute would indicate that in earlier days an *attornatus* might have been liable for this misconduct of his client.
life the old *attornatus*, this special *ad hoc* agent with limited powers, no longer could be considered an adequate and efficient representative in certain situations. Hence, the stage was set for the appearance of a new type of attorneyship, namely, the *generalis attornatus*, or general attorney, who was no longer subjected to the severe and at times frustrating limitations which were imposed on the old *attornatus*. The new *generalis attornatus*, as will be shown presently, marks the beginning of modern attorneyship in the English speaking world. †

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