

## THE ORIGINS AND DEVELOPMENT OF THE ENGLISH LEGAL PROFESSION

1. So far we have been discussing the development of the institutions of English law and governance without any explicit reference to the development of the legal profession. I want to remedy that deficiency today making use of some the materials that we have in this room that show what lawyers in the later Middle Ages and early modern periods used to do their jobs. But first a word or two about origins.
2. The origins of the English legal profession are controversial, so let us begin with a few points about which everyone is agreed.
  - a. Today the English legal profession today is divided between barristers and solicitors. Barristers have the right of audience in the central royal courts; solicitors are office lawyers. Virtually everyone is agreed is that the barristers are virtually the direct descendants of the serjeants of the Middle Ages who had the exclusive right of audience in the Common Bench and who had the right of audience in the court *coram rege*, but here it was not exclusive; it was shared with apprentice serjeants and perhaps with others as well. Virtually everyone is also agreed that the modern solicitor is at least in part the descendent of the attorney of the Middle Ages. These people could not plead before the central royal courts, but they could and did enter appearances.
  - b. Everyone is agreed that there was an order of serjeants by the middle of the 14th century. Regular calls of serjeants can be posited from at least the latter part of the reign of Edward III, and beginning with Richard II we can reconstruct who virtually all of them were. From this period to the end of the 19th century, when the order of serjeants died out, there are approximately 1000 known names, half of which are from the 19th century. Think about that number.
  - c. The middle of the 14th century is also the period in which we can be sure that serjeants were being trained with formal moots and readings. Approximately at this time or perhaps a little later, but certainly before the end of the 14th century, these training sessions were taking place in the four inns of court, which exist to this day. These were not the only inns. There were inns of chancery, which were attended not only by aspiring pleaders but also by aspiring chancery clerks. There was a serjeants' inn, where the lawyers who had become serjeants went.
  - d. A professional literature developed that was narrow and technical, far from the learned sweep that characterizes some of the passages in Bracton. The pleader was trained first in the writs; in short, he began in the inns of chancery with those aspiring to be chancery clerks. Then he learned the counts. The first books of counts appear late in the reign of Henry III, a date that suggests that training pleaders began earlier than the mid-14th century date we've been discussing. *Novae Narrationes* is the most famous. It went through a number of editions in the late 13th and early 14th centuries. As the art of pleading--of answering the counts--developed, books came to be devoted to this topic. The most important are the Year Books. They record first counts, then pleas, in actual cases. The pleas turn out to be critical as the counts ossify. Yearbooks are our most important source for this period. And Year-Book-style reporting continues well beyond the period when the YBB as such end in Henry VIII's reign.

- e. But if we are sure that the basic outlines of the English legal profession existed by the middle of the 14th century, it is considerably less certain how far back we can trace it. Many today would push it back into the reign of Edward I, but no one would trace it as far back as the period of the earliest plea rolls. Yet we have already seen that there were men as early as the earliest plea rolls surrounding the central royal courts, who were in some sense specialists in its proceedings. The author of *Glanvill* was certainly one of these; the authors of *Bracton* were others. But these men are judges or judges' clerks, not representatives of parties. There are also attorneys in the earliest plea rolls, but most of these men are clearly not professionals. Hugh Polstead Sr. and Jr.
  - f. In order to understand how we get professionals out of this group, we need to understand a bit more about the development of procedure in the 13th century. The pattern of the ancient law suit. Claim, denial, judgment, proof. Writ or bill, count, denial, judgment, proof. Then proof, judgment. But proof before an assize or jury requires a hiatus.
  - g. The first half of the 13th century is a period of multiplication of writs and refinement of counts. Even in the early 13th century we hear of counters who may have been professionals, but they do not identify themselves as a professional group. A sense of cohesion and discipline probably does not begin until early in Edward I's reign. With the multiplication writs we need some kind of mechanism to keep track of them and to teach others about them. The development of the register of writs and the inns of chancery.
3. The Year Books:
- a. Who wrote the YBB? beginning in reign of Edward I--3d year law students.
  - b. What interests them? What can disrupt the ancient pattern of law suit: the pattern of count, denial, judgment, proof. When the jury intervenes in lieu of the ordeal, the issue is when will the def. be allowed to plead something other than a general denial. The answer is "not often". The ancient pattern has a firm grasp on men's minds, but sometimes, fortunately, the system allowed one to try out pleas without formally making them. So the YBB normally record the proffer of plea and the arguments about whether it should be allowed. Over time a large number of issues surface and if we work hard we can see the development of substantive law. But it is substantive law only in the sense that the plea will be allowed or not allowed. We should avoid, on the one hand, thinking that the general denial always means what it says, and on the other thinking that when the plea is allowed or discussed that the participants are thinking in substantive terms.
4. *Paris v. Page*, (Mats. p. VII-1). My comments are interleaved with text using the outline letters.

PARIS v. PAGE<sup>1</sup>

Y.B., Pasch., 1 Edw. II, pl. 1 (1308)

ed. F.W. MAITLAND, YEARBOOKS 1 & 2 EDW. II: 1307-9, Selden Society, 17 (London, 1903), pp. 11-12<sup>†</sup>

Simon of Paris brought a writ of trespass against Walter Page, bailiff of Sir Robert Tony, and divers others, and complained that on a certain day they took and imprisoned him etc. wrongfully and against the peace etc.

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<sup>1</sup> Proper names are taken from the record.

<sup>†</sup> <Public domain?>

- a. “Simon of Paris brought a writ of trespass against Walter Page, bailiff of Sir Robert Tony and divers others.” That’s the writ. “And complained” (this is the count) “that on a certain day they took and imprisoned him etc. wrongfully and against the peace, etc.” The specifics, such as the day and the place which would have been in the count are left out.

*Passeley* for all, except [Walter] the bailiff, answered that they had done nothing against the peace. And for the bailiff he avowed the arrest for the reason that Simon is the villein of Robert, whose bailiff Walter is, and was found at Necton in his nest,<sup>2</sup> and Walter tendered to him the office of reeve and he refused and would not submit to justice etc.

- b. “*Passeley* for all, except the bailiff, answered that they had done nothing against the peace.” A general denial. We have no idea what is going on here. A general denial can mean everything from ‘nothing like this ever happened’ to ‘I want to tell the jury what my excuse is’. “And for the bailiff he avowed [a strange word in this context, normally used in *replevin*] the arrest for the reason that Simon is the villein of Robert, whose bailiff Walter is, and was found at Necton in his nest [which would, under certain circumstances, justify the seizure] and Walter tendered to him the office of reeve [which only a villein could have] and he refused and would not submit to justice etc.”

*Toudeby* rehearsed the avowry and said that to this avowry he ought not to be answered, for that Simon is a free citizen of London and such has been these ten years and has been the king’s sheriff in the said city and has rendered account at the Exchequer;<sup>3</sup> and this (said he) we will aver by record; and to this very day he is an alderman of the town, and we demand judgment whether they can allege villeinage in his person.

- c. “*Toudeby* rehearsed the avowry and said that to this avowry he ought not to be answered, for that Simon is a free citizen of London and such has been these ten years” [a year and a day was thought to be enough to prevent the lord from claiming as a villein a man who had been living in a city] and has been the king’s sheriff in the said city and has rendered account at the Exchequer; and this we will aver by record; and to this very day he is an alderman of the town, and we demand judgment whether they can allege villeinage in his person.” In modern terms: there’s no triable issue of fact here because the contrary appears as a matter of record.

*Herle*. With what they say about his being a citizen of London<sup>4</sup> we have nothing to do; but we tell you that from granddam and granddam’s granddam he is the villein of Robert, and he and all his ancestors, grandsire and grandsire’s grandsire, and all those who held his lands in the manor of Necton; and Robert’s ancestors were seised of the villein services of Simon’s ancestors, such as ransom of flesh and blood, marriage of their daughters, tallaging them high and low, and Robert is still seised of Simon’s brothers by the same father and same mother. And we demand judgment whether Robert cannot make avowry upon him as upon his villein found in his nest.

- d. *Herle* [senior serjeant, about to become chief justice]. “With what they say about his being a citizen of London we have nothing to do [essentially he admits the allegation], but we tell you; but we tell you that from granddam and granddam’s granddam he is the villein of Robert, and he and all his ancestors, grandsire and grandsire’s grandsire, and all those who held his lands in the manor of Necton; and Robert’s ancestors were seised of the villein

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<sup>2</sup> For this phrase, see Y.B. 21–2 Edw. I, p. 449; 33–5 Edw. I, p. 205.

<sup>3</sup> Simon of Paris was sheriff of London in 1302–3. For his election see R. Sharpe, Letter Book C, p. 114. It appears from the civic Letter Books that he was mercer, alderman, chamberlain and a very active citizen. For his will see Sharpe, Calendar of Wills, i, 309.

<sup>4</sup> Or ‘a citizen of the king.’

services of Simon's ancestors, such as ransom of flesh and blood, marriage of their daughters, tallaging them high and low, and Robert is still seised of Simon's brothers by the same father and same mother. [All of these are marks of villeinage. There was some issue whether villeinage was inherited from the mother or the father, Herle is arguing that in this case it makes no difference.] And we demand judgment whether Robert cannot make avowry upon him as upon his villein found in his nest." Herle is pleading in the right of villeinage. Can't I make this avowry?. But this is not a replevin case; it's a trespass case, so the answer to that question may be 'no'.

*Toudeby*. We are ready to aver that he is a free man and of free estate, and they not seised of him as of their villein.

- e. *Toudeby*. "We are ready to aver that he is a free man and of free estate, and they not seised of him as of their villein." Backs off, he concedes that the avowry may be proper under certain circumstances. Mentions this strange word 'seisin'.

BEREFORD, J. I have heard tell that a man was taken in a brothel and hanged, and if he had stayed at home no ill would have befallen him. So here. If he was a free citizen, why did not he remain in the city?

- f. "BEREFORD. I have heard tell that a man was taken in a brothel and hanged, and if he had stayed at home no ill would have befallen him. So here. If he was a free citizen, why did not he remain in the city?" Typical Bereford remark. The 3d year law students loved it. It looks like he's going to decide for Herle. But the remark is misleading. The court refuses to decide, and adjourns, as you can see from "at another day" in the next speech.

At another day *Toudeby* held to the assertion 'not seised of him as of his villein nor of his villein services.'

*Passeley*. Whereas he says that we were not seised of him as of our villein, he was born in our villeinage, and there our seisin began, and we found him in his nest, and so our seisin is continued. We demand judgment.

BEREFORD, J. One side pleads on the seisin, and the other pleads on the right; in that way you will never have an issue.

*Herle*. Seised in the manner that we have alleged.

BEREFORD, J. The court will not receive such a traverse. You must say that you are seised of him as your villein and of his villein services.

And so [the defendant's counsel] did. Issue.

- g. The next exchange is hard to follow. Let me assert to you that the way Bereford sets it up, there's no way that Walter can win. And he doesn't, as the record tells us. It took four years to get the jury, and by the time they get it, Sir Robert Tony is dead, and his heir is perhaps an infant. But the jury came in and rendered a verdict on behalf of Simon for 100 pounds, a huge sum for what turns out to have been a few hours spent in the pokey at Necton.
5. My story so far has said little about the attorneys. Their origins as a profession are disputed. Let me give you two theories and suggest that they are not mutually incompatible.
- a. Attornies start off as local lawyers who work for lords. They serve as stewards of their manorial courts; they sit in for them as suitors in the county court. When the lord has business with the central royal courts, he sends them to Westminster to engage a serjeant and do what they can do to keep the costs down. These attorneys get quite good at manipulating the processes of the central royal courts to their clients' advantage, and they

bring what they learn back to the local courts, so that the local courts become more and more like the central royal courts.

- b. The attorneys begin in the central royal courts. They are basically local men with a local clientele, but what happens is that the lords invite them back to the local area to serve as suitors for them in the county court and sewards of the manor court. Hence, the practice of the central royal courts penetrates that of the local courts.
- c. I'm not sure that we have enough evidence to decide whether as a general matter the attorneys work from the bottom up or the top down, particularly since the end result is the same on both theories. And since the end result is the same, it's quite possible that both processes were at work.

#### DISPLAY

[The order here differs slightly from that in the display catalogue, because it proceeds in the order that we will use when we look at them.]

1. Manor Rolls. Selections from the rolls of Chartley (Staffs.), 1283–1416 and Littleton-Pannel (Wilts.), 1329–1452.
2. Letters patent. Mortmain license to John Norys of Canterbury, 11 April 1408.
3. Corpus juris civilis: Codex cum glossis et tabula. Recently redated to c. 1325.
4. Ranulf de Glanvill. Tractatus de legibus et consuetudinibus regni Angliae. c. 1300.
5. Custumal of Normandy. Summa de legibus Normannie. c. 1300.
6. Henry de Bracton. De legibus et consuetudinibus Angliae. c. 1300.
7. Magna Carta cum statutis. ?1326.
8. Magna Carta cum statutis. c. 1300.
9. Registrum brevium. c. 1380.
10. Registrum brevium and Novae narrationes. c. 1325.
11. Year books 4–11 Edward III (1329–1337). c. 1340
12. Year books 7–13 Edward III (1332–1338). c. 1350.
13. Novae narrationes and Abridgement of the year books. c. 1425.
14. Year book 9 Edward IV (1469). ?1490.
15. Thomas Littleton. Tenores novelli. ?1482.
16. Anthony Fitzherbert. La graunde abbregement de le ley. 1516.
17. Henry de Bracton. De legibus et consuetudinibus Angliae. 1569.
18. Les reports de Serjeant Bendlowes. c. 1630.
19. William Chapple. Notebook. 1741.
20. The proceedings at the Sessions of the Peace, and Oyer and Terminer, for the city of London and county of Middlesex on Thursday the 14th, Friday the 15th, and Saturday the 16th of May... Number V for the year 1741.
21. William Pynchon, *et al.*, Record of cases before the magistrate of Agawan, Springfield, Massachusetts (1638-1702).

22. The Capitall lawes of New England (1643).