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ENGLISH LEGAL PRACTICE: ITS APPLICABILITY TO AMERICA

By GEOFFREY MAY* and BASIL H. POLLITT**

Had Samuel Butler made a third expedition to Erewhon, he would doubtless have remarked the strange manner of settling legal disputes. Erewhonians, like Americans, do not usually appear in person before the judge to present their claims; they cannot so easily speak his professional language. Unlike Americans, Erewhonians cannot employ attorneys to appear in court to represent them. It seems that only a bewigged barrister can act as interpreter to the judge of what the litigant's solicitor tells him. The very wig which makes the barrister audible to the judge deafens him to the speech of the laymen; he can be approached only by the solicitor and not by the potential client.¹

It is not a mere coincidence that the English system is largely identical with the Erewhonian. In England too, legal practice is divided between two exclusive monopolies. With minor exceptions all the care of clients, all the non-litigious handling of the law, is intrusted to the relatively large group of solicitors: solicitors start the suits, and often settle them, organize and advise business enterprises, act as the family physicians of the legal profession. The barristers are specialized, as surgeons are specialized: their operating theatre is the court-room. Most contentious and litigated work is theirs exclusively. Again

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¹ For Butler's preliminary observations on Erewhonian trials see *Erewhon*, Ch. 11.

somewhat like surgeons, the barristers' employment can come only through the solicitors.²

Social institutions are rooted in the economic and cultural life around them. In England as in Erewhon this cumbersome professional system did not spring fully armed from the head of a British Zeus; more like Topsy, it just "grew". It developed out of an organization of society essentially different from that of the twentieth century. It matured amid the guild mechanism of a mediæval England; its development depended on the stratification of society into sharply divided social classes. That it persists in England today is in part an evidence of social rationalization, of adaptation to a system which has intertwined itself with many of the visible aspects of British life. It may also be an evidence of an adherence to a framework, old and superficially beautiful, which has already been gnawed hollow by the termites of economic change.

I

In the British system there is no question of priority as between the egg of legal training and the hen of legal practice. The distinction in practice depends almost entirely upon the historical development of the training agencies. Those agencies, particularly the Inns of Court, built up limitations and traditions like the other guilds which flourished beside them. As an introduction, then, to the division in practice it is well to consider at some length the differentiation in training.

An English youth looking forward to a liaison with the law, has to make his choice between the exclusive branches of the profession.³ If the paeans of tradition⁴ are ringing in his

² Kales, *A Comparative Study of the English and the Cook County Judicial Establishments*, 4 Ill. L. Rev. 303, 312.

³ In Scotland the choice is between advocate and law agent.

⁴ Some of the amusing distinctions which tradition has imposed are brought out in an article, *Lawyers and Law Practice in England and the United States Compared*, by a Lawyer of Both, 9 Green Bag 223: "When we speak of the legal profession in England we must remember that it consists of two branches, which, though interdependent and essential to each other, are quite distinct and in many respects dissimilar. . . . The two great branches of it are called 'the higher' and 'the lower'. The lower branch is that of the attorney or solicitor. . . . The higher branch is that of the barrister or counsel. . . . the higher branch only is called 'the bar'. No attorney or solicitor is ever spoken of as 'a member of the bar'. Socially as well as professionally he is the inferior, and language is made to emphasize the distinction. His (the

ears, he will doubtless decide to become a barrister. For a barrister, he will have heard, is the superior of a solicitor; he is an "esquire", a solicitor only a "gentleman". A barrister, he knows, is associated with those "pleasant places" which have been sung by Spenser and Lamb. The solicitor, on the other hand, breathes the less rarefied atmosphere of Dickens and seems somewhat grubby in his connections with a commercial-looking building in Chancery Lane.

Having decided to become a barrister, whether or not he attends a university the aspirant will have to be accepted by one of the four Inns of Court. Though his educational training need not be extensive—he will have only had to pass "matriculation"⁶—socially he will have to meet a traditional standard.

attorney's) legal rank is that of 'gentleman', the barrister's is 'esquire', and they are respectively so described in deeds and other legal documents. He is 'admitted' to the rolls of the profession, but the barrister is 'called to the bar'. His place of business is his 'office', that of the barrister is his 'chambers'. He is 'employed' by his clients, counsel is 'retained'; his remuneration is called his 'costs and charges', that of counsel is his 'fee'. For ignorance or carelessness in the conduct of his cause the attorney is responsible in an action for negligence; counsel is under no such responsibility, however ignorant or negligent or careless. The terms 'crassa negligentia', and 'crassa ignorantia', are inapplicable to 'the bar', and are the exclusive privilege of the lower branch of the profession. The attorney cannot open his lips in any of the superior courts, even to ask for delay until the arrival of counsel, while counsel has audience everywhere from a police court to the House of Lords. The attorney is undistinguished by dress from 'the madding crowd', while counsel is clothed in wig, and gown, and bands, the insignia of his order. The attorney 'instructs' counsel, but counsel follows the instructions only just so far as he pleases, the whole conduct of the cause from the moment at which the 'brief' is delivered resting wholly in the discretion of the counsel. Counsel in court always speak of each other as 'my learned friend', but never so speak of the attorney who instructs them; and even attorneys, speaking in the inferior courts in which they have audience, never presume to make use of the word 'learned' in referring to each other, 'my friend' being the nearest approximation to the language of the bar permissible to them. An attorney is stationary, practicing in the city or town in which he and his family reside, while the barrister (if practicing at common law), though having chambers and residing in London, or some other large city, attaches himself to a 'circuit', and two or three times every year 'goes circuit'; that is to say, he follows the judges from one assize town to another, for the trial of civil causes, or criminal cases, and is known and distinguished by the name of the circuit to which he belongs. Thus a barrister is described as 'Mr. Jennings of the Northern Circuit', while an attorney has no such itinerant description, but is simply 'Mr. Jennings of Manchester'. 'Respectable' is the word which marks the highest reach of the attorney's life, while 'eminent' is the honored description of the successful counsel. No one speaks of an eminent attorney or of a respectable counsel, for of course all counsel are respectable, and of course also no attorney is eminent."

⁶ Matriculation corresponds roughly to the American college entrance examinations.

His hopes will be dashed immediately upon application if his hands are soiled by labor; "it is not the custom of this Inn to call to the bar any person who is engaged in trade". Notwithstanding the traditions of the Inns of Court, or maybe because of them, he will learn that social acceptability is somewhat synonymous with a heavy purse. Should he be so daring as to aspire to the more aristocratic of the Inns, he will be expected to have ready a cheque for £208 13s. 3d.

Having surmounted the social and economic barriers which stand guard around the Inns, the aspiring law student may then begin to "read" for the bar. He may already have framed his law degree from a proper university, or he may soon expect to do so; nevertheless he will spend many months and usually from two to three years in passing the two sets of examinations which will, in addition to certain gastronomic exercises, qualify him for the English bar. If he has already studied law at the university, he will not find it necessary to attend the formal lectures offered by the Inns of Court through the Council of Legal Education;⁶ but he will have paid for them whether he attends or not. If he takes the advice of his more learned fellows he may well invest, at a very considerable added expense, in the services of a tutor, a junior barrister who will cram him with enough standardized information to attain a "second", or occasionally a "first", in his examinations.⁷ With competition such as it is among young barristers, the recognition that one obtains from passing the bar examinations with honors may pay an ample dividend.

Besides the intellectual activities, the student at an Inn has to undergo another form of treatment, also expensive. He must eat twelve terms of dinners (six to a term unless he is a member of a university) over the minimum period of three years. That is, he must sit through a dinner "in hall", dressed in a dark suit and a black robe, must sit from grace through benediction,⁸ and, whether he eats or not, may rest assured that

⁶ Composed of five benchers of each Inn, and headed by the Director of Legal Education.

⁷ A "third", or mere passing grade, is not difficult to obtain. Graham Brooks in the preface to his 137-page outline, "All You Need for the Bar Final", says, "A full knowledge of everything contained in this book is by itself ample for . . . answering well all questions normally asked".

⁸ Without reading a newspaper.

his dinner will be charged to his account. As a young law student, this requirement will be more trying to his digestive processes and to his pocketbook than to his patience. But if he is, like many another student, a civil servant in the far reaches of the Empire, whose promotion depends on his call to the bar, as in many capacities it does, it may prove a burdensome duty to return each leave to London to consume the required seventy-two dinners and may exhaust his youthful years in their accomplishment.

When the examinations are passed, when the dinners have been digested (or otherwise), and when a bencher of his Inn has perfunctorily vouched for his character, the student may follow the mace-bearer before the bench to hear the treasurer⁹ mumble an incantation, after which he is privileged to drink champagne at the barrister's table among his new colleagues. But unlike a young American lawyer who has demonstrated ability in law school, he will not immediately begin to be self-supporting. He will probably have to dig more deeply into his pocket for another hundred guineas, a fee to a practicing barrister for the privilege of gaining experience from six months association with him. He may have to pay still further fees to join a circuit "mess", so that he may follow the court to the assizes. Over the period of the next ten years he may gradually become self-supporting and may whet his appetite for the silken robes that belong to a K. C. and the more tangible rewards that they sometimes indicate.

If the resources of the young barrister are not adequate to carry him through ten years of economic dependence (or if he has no hopes of marriage with a solicitor's daughter),¹⁰ he may resign from the bar and retrace his steps to a point where his road diverged from that of an embryo solicitor. He will have certain advantages in later practice for having been called to the bar before becoming articled to a solicitor: his period of apprenticeship may be shorter and his professional prestige eventually greater. A long road will still lie ahead.

The course which the intended solicitor pursues is radically different from that of the barrister. The law that he learns is even different; it pertains to the minutiae of legal activity rather

⁹ Characteristically the chief officer of the Inns of Court is not the president but the treasurer.

¹⁰ See 30 L. Times 134.

than the broad generalities. Roman law and constitutional law are less important to him than are the number of days which must elapse between the filing of pleadings. The process whereby he learns these details is an appropriate one; by constant association with a solicitor's office he comes to assimilate them. This assimilation by practice is more a matter of theory than of actuality; the articled clerk may spend more time in the reading which will help him to pass his examinations than in the activities of the solicitor's business.

The cost of a solicitor's education is less than a barrister's. The ordinary fee which he must pay for his articles is a hundred guineas. There are added expenses involved in his work with the Law Society,¹¹ which offers him lectures in preparation for the two sets of examinations which he must negotiate. The cost is greatest in the matter of time; if he has not attended a university he must ordinarily spend five years in apprenticeship, and otherwise three—rather longer than a barrister. Balanced against this extension of time is the opportunity to become self-supporting more quickly after he is granted his certificate to practice. The wise young man becomes articled to a solicitor with whom he sees an opportunity for employment after he has completed his apprenticeship.

II

Unfortunately we cannot pause to trace each bypath of historical development which helped to form the two highroads of present-day British practice. We cannot follow leisurely the progress of the bar from Rome through Normandy to medieval England.¹² We cannot stop to admire the robes and "high renown" of Chaucer's "sergeant of the law",¹³ observe his precedence, his exclusive prerogatives, his fall from power.¹⁴ Nor shall we describe the humbler apprentices, the direct fore-

¹¹ The official organization of solicitors.

¹² See Cohen, *The Origins of the English Bar*, 30 L. Quar. Rev. 464, 31 *ibid.* 56, 32 *ibid.* 411, 35 *ibid.* 300, 36 *ibid.* 81, 274. For early references to lawyers see *Chronicon of the Monastery of Abingdon*, Vol. II, p. 1 (Rolls Series 1858) and *Close Rolls*, 170, 174.

¹³ *Canterbury Tales*, Prologue, lines 311-326 (Skeat's text).

¹⁴ In general concerning Sergeants see Ballard, *Two Problems in Legal History*, 24 L. Quar. Rev. 392, and Mathew, *The Decline and Fall of the Sergeants-at-Law*, 35 *ibid.* 264. Interesting customs are recounted in Dugdale's *Origines Juridicales*.

fathers of modern barristers,¹⁵ and the rise to power of the King's Counsel in the time of Elizabeth.¹⁶ What is essential for us to recognize is this: already in the fourteenth and fifteenth centuries the Inns of Court¹⁷ were highly developed and were carrying on essentially the same functions in training lawyers as they carry on today;¹⁸ their atmosphere and activities were fundamentally aristocratic; and was their exclusiveness that led to the distinction between barristers and solicitors.

The distinction came about in this way. The position of the *attornatus*, the direct ancestor of the modern solicitor, was fairly established by the Statute of Westminster Second.¹⁹ Such attorneys were eligible to membership in both the Inns of Court and the preliminary Inns of Chancery, and had the right of audience along with other classes of lawyers. Their loss of this right, their confinement to the non-litigious aspects of the law, came as a direct result of action by the Inns of Court. These greater Inns discouraged and later excluded attorneys. Since the judges recognized the exclusive prerogative of the four Inns to confer the right of audience, this shutting out of the attorneys fostered an artificial distinction between advocates and non-advocates.²⁰

¹⁵ See Plucknett, *The Place of the Legal Profession in the History of English Law*, 48 L. Quar. Rev. 328.

¹⁶ Holdsworth, *The Rise of the Order of King's Counsel and Its Effects on the Legal Profession*, 36 L. Quar. Rev. 212.

¹⁷ "The greater inns", as opposed to "the lesser inns", the Inns of Chancery.

¹⁸ See Holdsworth, *The Legal Profession in the Fourteenth and Fifteenth Centuries*, 23 L. Quar. Rev. 448, 456: "In each of the greater inns there were about two hundred students: in each of the lesser inns there were at least one hundred; and they were peopled by students for the most part of noble birth; and there these students learnt not only law, but history, scripture, music, 'dancing' and other Noblemen's pastimes as they used to do which are brought up in the King's house. Many sent their children to be educated in these Inns, though they 'desired them not to live by the practice of the Lawes'. The two Universities taught only the civil and canon law, the Inns taught English law. And thus, because they gave an education more practically useful to those who were to be men of affairs in that litigious age, they came themselves to form 'an university or schoole of all commendable qualities requisite for Noblemen'.

¹⁹ Chapter 10. In general see Bruner, *The Early History of the Attorney in English Law*, 3 Ill. L. Rev. 257 (translated by J. H. Wigmore).

²⁰ Holdsworth, *The Legal Profession in the Fourteenth and Fifteenth Centuries*, II, 24 L. Quar. Rev. 172, 177: "Moreover it is clear that at this period attornies at law were rapidly becoming a distinct class. The old distinction between the attorney and the pleader was

The exclusiveness of the Inns, of the bar itself, has withstood the onslaught of King and of Parliament. They have no being in statutory law; their existence and their powers rest solely on a medieval tradition.²¹ So firm is their resistance to statutory control, or even recognition, that their legal right to hold their vast properties was long in question. Their members, the barristers, likewise are extra-legal. They are subject to control only by the Inn of which they happen to be a member; they are in no sense subject to censure (other than through contempt of court) by the judges before whom they practice—the judge can only report their failings to the benches of their Inn for discipline.²²

still preserved; unprofessional attornies were still legally possible; but there are many evidences that attornies for the purpose of legal business were recognized of the court and under the supervision of the judges. As such they were allowed to plead their clients' cases in court, and to become members of the Inns. They may perhaps have been more numerous in the Inns of Chancery than the Inns of Court; but they might clearly be members of either. They were not yet confined to the Inns of Chancery. In fact there was as yet no clear division in these respects between the two branches of the profession. Attornies and junior apprentices were classed together at this period, as in the reign of Edward I. As the old legal distinction between the office of an attorney and the office of a pleader tended to grow more faint with the enlarged powers which litigants had of appointing attornies, and with the rise of professional attornies, it might well have happened that the distinction would have been obliterated. But in the following period the distinction was revived, and given its modern significance, mainly by the action of the Inns of Court and the judges in first discouraging and then excluding attornies. The result of this step was to deny the attorney the right to plead in court for his client, because, as we have said, it is only the call to the bar by the Inn which could confer this right. *Thus the separation of the profession into two branches, though it has an ancient origin, has been perpetuated by an artificial rule; and, the ancient reasons for it having been lost sight of, it has appeared to many to be a meaningless division.*"

²¹ The note in 2 Halsbury's Laws of England 357 (and Lord Halsham's edition, II, 473), introducing the subject of Barristers, shows that the article discusses matters of etiquette only, not of law.

²² John W. Davis, Traditions That Distinguish Barrister and Solicitor of English Courts: 93 Central L. Jour. 242: "A barrister educated at one of the Inns of Court and admitted by its benchers to the bar enjoys in his wig and gown a singular immunity from legal restraint. He is not an officer of the court and the court neither admits him to practice nor has power to disbar him from his profession. He takes no oath of service, nor even of allegiance for an alien may enjoy full professional status at the English bar. The functions which he is permitted to perform fall into three classes, i. e.—advising upon questions of law; drafting pleadings, conveyances and other documents; and acting as an advocate in the courts. So long as he is of the junior bar he may receive pupils in his chambers; but once made King's Counsel this and the labors of drafting are beneath his professional dignity. To him and to him alone are open all the judicial offices of

Solicitors, on the other hand, are probably the most statute-ridden of all professions.²³ Almost every detail of their professional life is subject to minute statutory regulation. Parliament has decided the exact amount that shall be charged when a solicitor's clerk makes a telephone call in a client's behalf.²⁴ Judges, themselves barristers in background, see that the statutory tethers binding solicitors are not loosened.

The English legal profession presents, then, a strange anomaly. One branch of the profession, having excluded the other branch from its privileges, nurtures its own exclusiveness by successfully resisting regulation and by clothing the other branch in statutory straight-jackets. This system has withstood the onslaught of political change. The question which must yet be answered is, can it withstand the erosion of gradual economic evolution? Before considering the answer to this, however, let us examine the support which the system may still claim.

III

In support of this double system even its English advocates present weak arguments.²⁵ Many of them hark to Adam Smith and his economic theory of the division of labor. Like him they allege that certain benefits will be derived from specialization:

the Kingdom as well as the great political posts of Lord Chancellor, Attorney General and Solicitor General.

²³ Davis, *ibid.*: How different the lot of the solicitor! The law, it is true, gives him a quasi monopoly of litigation by ordaining that no one but a properly enrolled solicitor or a litigant in his own person can "sue out any writ or process or commerce, carry on, solicit or defend any action, suit, or any other proceeding in any court in England, or act as a solicitor in any cause, matter or suit, civil or criminal". But it accompanies this grant with a degree of statutory regulation and legal supervision to which perhaps no other profession is anywhere subject.

²⁴ The Solicitors Act, 1932 (22 and 23 Geo. 5, c. 37), consolidating the Solicitors Acts, 1839 to 1928, contains all the statutory regulations. See incidentally *The Annual Practice 1938*, for statutory rules and orders.

²⁵ It is difficult to give an exact citation for each of the arguments for and against the present British system, since many of the arguments are repeated in several articles. A reader wanting to pursue the discussion might begin with the late great Birkenhead's address before the American Bar Association, 9 *Am. Bar Assn. Jour.* 769, and with Professor Kales' articles in 4 *Ill. L. Rev.* 303 and 9 *ibid.* 478. He might then read these further articles in favor of the British system: 20 *L. Jour.* 719; 60 *ibid.* 44; 16 *Washington L. Repr.* 681; 4 *L. Times* 263; 12 *ibid.* 77, 227, 281; 20 *ibid.* 133; 58 *ibid.* 199; 71 *ibid.* 413; 76 *ibid.* 432; 9 *Green Bag*, 255.

improvement in dexterity, saving of time, facility through concentration on a single object, and selection of workmen for the work they can do best. They fail often to see that such arguments for specialization do not apply to professional activity as they apply to industrial. Too great a concentration in one type of legal work may have disadvantages, may cast the profession into the mold of a trade, and may make for greater inflexibility of the law in relation to social change. But even if the division-of-labor argument were applicable to the legal profession, we should have to confess that the present British system does not effect it on a satisfactory basis: tradition, money, and personal prejudice all enter into the selection of one or the other branch of the profession. In industry there are selective processes which tend to sort workers into their proper pigeon holes; in the British legal system the partitions between the spheres of work are so immovable as to afford no analogy to industry. This statement suggests the final answer to the Adam Smith argument, that under a less rigid system than the British, there may be an actual sorting process which does help the lawyer to find the niche which he is best qualified to fill.

The other type of argument in favor of the British system is more difficult to meet because it contains a larger kernel of truth. The English bar is relatively fearless and independent; counsel are more disinterested and seem to have a better perspective than lawyers under a system of fusion; and better judges may be developed if they are selected from a bar specializing in advocacy. Granting the truth of these statements, one can only question whether they depend on the barrister-solicitor distinction or whether their roots lie deeper in English legal life. The independence of the bar may result not from employment by solicitors instead of by clients; it may result from the assurance of class, the freedom from financial dependence on one's earnings, and the absence of competition from a group of lawyers who are willing to accept questionable cases in the hope of monetary gain. The quality of the judges may not derive so largely from trial practice (are our American judges who have specialized in trial practice generally better?); it may result from the esteem in which judicial position is held in England, the permanence of its tenure, the promise that it gives of advancement, the very substantial salaries that it carries. Whether

it is better for counsel to be disinterested rather than partisan and definitely allied with the client, is a matter of policy which raises issues more profound than the form of professional organization.

Not every English lawyer is an advocate of the present system. During the last century many a solicitor felt the discrimination against his class and looked to the rich fruits in the Temple Gardens as a dessert which should be shared with him.²⁶ At the present time the appetites of solicitors seem to be more moderate: they do not so frequently advocate outright fusion as a more extensive right of audience.²⁷ Some solicitors prefer a right of reciprocal transfer.²⁸ Still others might urge an official trial bar to replace the privately paid barristers, the "hired Hessians" of the law.²⁹ Most solicitors are probably content in their humble role as gentlemen when they realize that with relatively few exceptions their income is quicker than the barristers', is more assured, and promises to be relatively greater as fewer and fewer cases are litigated.³⁰

The present arguments for fusion have a decided appeal to reason.³¹ The expense of the divided system, borne largely by the litigants, is considerable. Nor does the added expense always afford commensurate return: the solicitor may know more about the case than a barrister, who may never have seen the client before entering the court-room. A fused system would not be impracticable in England; solicitors always have the

²⁶ Solicitors today whose complaints are based on financial reasons are those who practice by themselves or in small firms; their difficulty is not related to the bar but to their fellow solicitors who practice on a larger scale and who can employ relatively cheap clerks whose work will be remunerated with the statutory fees established for solicitors.

²⁷ See report of the Law Society meeting January 26, 1934: 177 L. Times 85.

²⁸ 22 Irish L. Times 563; 32 Solicitors' Jour. 807.

²⁹ 4 Jour. of Crim. L. and Criminology 654, 661.

³⁰ Court costs and legal fees are so high in England as compared with the United States that, with the leveling of incomes since the War, fewer persons can afford the luxury of trials in the High Court. Besides, the movement for arbitration is far stronger in England than in this country.

³¹ The leading articles containing arguments in favor of fusion are: 7 Scottish L. Rev. 129; 8 *ibid.* 297; 23 L. Jour. 49; 47 *ibid.* 368; 49 *ibid.* 263; 79 *ibid.* 402; 28 L. Mag. and Rev. (5th series) 426; 18 Green Bag 444, 496, 544.

right of advocacy before referees and masters and have always appeared in the county and magistrate courts. In fact, some solicitors are even now among the better-known advocates in England, notwithstanding their limited opportunities for trial work. Such being the case, it is by no means sure that the standard of advocacy would be lowered under a fused system; an experienced solicitor may be more able than an inexperienced barrister, and doubtless there would be a sifting of the fused group to bring to the fore those men who are most capable in trial work. If this contention is correct, it is difficult to understand how the bench would be harmed by a wider choice in the selection of judges. After all, most of England's self-governing dominions have a fused system.

Possibly the strongest arguments against the present system are not rational. Solicitors and clients claim with justice but with little logic that their choice of counsel is seriously circumscribed. They have in theory the choice of any of the hundreds of barristers who are engaged in practice, the choice even among the thousands who have been called to the bar. Actually there is a sort of negative Gresham's Law at work: if one party obtains the services of a K. C., the other party is practically forced to do so.³² If one party obtains the services of a well-known K. C., his opponent is also forced to obtain one of the popular leaders of the bar. To a reader of the *Times* it would seem that half a dozen barristers—yes, actually fewer than that—are trying most of the important cases in England. This concentration of business leads to a sad situation for the clients. Practically forced to brief a leader for any important case, and to pay lavishly for his services, the client may never have the benefit of his appearance in person. Rushing from one court to another these mighty champions find themselves unable to appear in every court-room in which their own cases are being heard.³³ When one has paid for a K. C.'s deftness in trial work, it is poor consolation to have only the honor of his name in the report of the case.

³² This fact increases the cost considerably, since the honorarium of a K. C. is not only greater itself but a junior must also be briefed to assist him.

³³ See 78 L. Times 314.

IV

Even if the barrister-solicitor system were an ideal arrangement for present-day Great Britain, the question of its desirability for transplanting to America would still have to be answered in the negative. The British practice is an outgrowth of British tradition, a tradition in this respect quite alien to America. The seeds of this divided relationship never sprouted vigorously in this country, not only because of the absence of the aristocratic distinctions which gave it birth, but because of the essentially different geography, government, and economy. In a country sparsely settled, composed of many sovereign political sub-divisions, and in some sections undeveloped, there is not opportunity for the same type of specialization that there is in a single well-populated and thoroughly integrated country.

The transplanting of an institution depends for its success on the economic soil. In England there is but one jurisdiction, in Great Britain but two. The same barristers appear before the courts at Westminster, in Cornwall, in Durham. It is commonly said that there are but five hundred practicing barristers in England, probably not half that number who are financially supported by their practice. England is a jurisdiction of forty million people; compare that with our western American states. In a thinly populated state how could a group of barristers support themselves?

The only basis for the English system of specialized advocates is a considerable volume of litigation. In England there is noticeable a tendency away from litigation, a tendency which is radically affecting the position of the bar. At this station in our cultural development could we wisely adopt a system which places a premium on advocacy at the very time when litigation is being discouraged from all points of view?

This does not mean that there may not be specialization in legal practice. American specialization, however, is largely based on substantive rather than adjective law.³⁴ On the seacoast we have questions of admiralty; in the desert we have questions of water rights. Perchance it is better, certainly more realistic, for American lawyers to devote themselves to one or

³⁴ This does not deny that in our large cities there is specialization in trial work and appeal work.

another of the subjects which circumstances concentrate for them, rather than on the method of preparation or presentation.

If we cannot adopt the English system, even in its rough outlines, might we not adopt something similar to it? The answer is, we have tried to do so. Subsequent to the American Revolution there were several traces of a divided system: at an early date even the Supreme Court of the United States distinguished between attorneys and counsellors.³⁵ One American state still preserves a real distinction among legal practitioners. In New Jersey an attorney or, in the Court of Chancery a "solicitor", has certain limitations, notwithstanding his admission to the bar; he attains the full status only when he becomes a "counsellor", after a minimum period of three years' practice.³⁶ The New Jersey system avoids the great difficulty in the English system, the practical impossibility of interchange between the two branches of the legal profession. Possibly on the basis of the New Jersey experience we might in America create an extension of the probationary period,³⁷ might require a certain degree of familiarity with legal practice through office experience before conferring the right of advocacy. Such an experiment, however, would be an extension of our own American experience rather than a transplanting of the British.

American lawyers, steeped in the traditions of their own form of the common law, may feel a professional nostalgia for the British forms of practice. American laymen, dissatisfied with legal administration in their own county, may look for greater greenness in far fields. What they should see in the British system is not the form but the substance. The substance is a fine tradition of professional integrity. The form is a mere set of checks which help to maintain this tradition. We in America should have checks too, checks to maintain—or is it, to create?—a similar professional tradition. The checks, though, should be different.

³⁵ *Ex parte Hallowell*, 3 Dall. 410; *Thorne v. The Victoria*, 23 Fed. Cas. No. 13,988.

³⁶ See Rules of the New Jersey Supreme Court Relating to Admission of Attorneys and Counsellors, Rule 7 (adopted February 14, 1931). See also Rules of the New Jersey Supreme Court, 1929, Rule 161; Rules of the Court of Errors and Appeals, 1931, Rule 2a; Rules of the New Jersey Court of Chancery, 1930, Rule 40.

³⁷ The United States District Court in New Jersey has provided for a probationary period for practice in federal courts.

Instead of thinking to establish tradition by rubbing Britain's partially tarnished magic lamp, we might well look more closely about us for the means to improve our own conditions, to attain the refinements which we admire abroad. We could improve the standard of our bar by raising the qualifications of applicants for admission still higher, by making the character examination still more searching, by causing the grievance committees of our bar associations to be still more alert and rigorous. We might improve the average of our legal education by requiring that a student should know something more than the trade aspects of the law, should have a cultural background which will lend dignity to his profession.³⁸ We should try to educate the public to appreciate high-grade legal work, not by the awarding of prizes and material recognition alone, but by eliminating the basis of popular misconception. In England, quite apart from the barrister-solicitor system, newspapers are not allowed to turn the court-room into a circus; possibly we, too, should enact statutes requiring that reports of trial be only a fair summary of what happened in court. Such reports might educate the public to appreciate the refinements of court-room techniques. And finally we must struggle to improve the calibre of our judges, who are the crowbar for raising the standards of the legal profession.

³⁸ This does not mean that we should look to England as a model. English legal education as offered by the universities is less developed than the American; the universities do not really equip their students with an adequate knowledge for practice even in its general outlines. This may result in part from the fact that the universities have not the final responsibility and in part from the fact that relatively little legal education in English universities is of a graduate nature—this possibility because of the extended period which the student will later have to spend in perfecting his legal knowledge. This deficiency in university training might be resolved if the professional societies later stopped the gaps. They hardly do. The "readers" who offer the lectures for the Inns of Court have not only inadequate time in which to give a professional education but they have inadequate interest: they are usually members of university faculties who supplement their income through this added perquisite. Moreover, they face a considerable difficulty because the students are divided between those who already have a university legal education, those who are but recently out of secondary schools, and a considerable group of Colonials, particularly East Indians, whose whole educational background is essentially different. The readers are thus almost forced to be dictatorial, and the students tend to learn by rote rather than by an understanding based on adequate discussion. Compare Hollond, *Legal Education in England and America*, 59 *L. Jour.* 456.

The British system provides a means of distinction between types of lawyers. In America, too, we want a distinction. But we want it on the basis of merit and accomplishment.