READINGS AND MOOTS

AT THE INNS OF COURT

EDUCATION FOR THE BAR

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From about the year 1300 until the late seventeenth century the bodies which became the Inns of Court dominated legal education in England. Not long before 1300 a body of learners or "apprentices of the bench" began to attend and sit in Westminster Hall to listen and take notes of the pleadings they heard there. During the next century an apprentice would probably have lived in a group, sometimes in part of a magnate's town house. There were about twenty of those Inns that we know of today. Four Inns, called the Inns of Court, were, by 1400, the most important. They began not as colleges but as places for students to live. The Latin description for the Inns of Court was hospicia hominum curiae legis temporalis, namely the Inns of the men of the Court of temporal, as opposed to ecclesiastical, law.

The student's instruction normally commenced in one of the Inns of Chancery. There he acquired an elementary grounding in the writs before gaining admission to one of the Inns of Court as an "inner barrister". As such he spent *seven years* or so attending the courts, performing "learning exercises" such as moots, and eating dinners with his fellows. Then he was uaually called to the bar and made, as they described it, an "utter barrister". Probably after that length of time he felt like an utter fool as well.

The moots copied the proceedings in the Court of Common Pleas. The junior members of the Inn did not play a full part in the arguments. At first they were called Masters of the inner bar or inner barristers, and later students. Some people these days like to describe themselves as members of the inner bar. They think it is a mark of distinction. Little do they know, or perhaps they are truly humble. The senior members of the Inn formed the Bench and were called Masters of the Bench or Benchers. The members who argued at the bar of the Inn, in imitation of the serjeants, were called Masters of the utter or outer bar, or utter barristers.

The meaning of "bar" in this context is not clear but it does seem that the description "barrister" was connected with the process of mooting.

The earliest known instance of the use of the term "barrister" is in the black books of Lincoln's Inn in Trinity Term 1455. They mention "two of the best barristers" of the Inn ("duo de optimis barrer"). The earliest use in a statute is in the Statute of Sewers of 1531-1532, not a very
salubrious place to start.

Halsbury goes on to say:

> "Call to the bar seems originally to have involved no more than being invited, after having taken part in learning exercises for the requisite length of time, to argue at a moot. Similarly, after attaining further seniority in his Inn, an utter barrister might be appointed to act as a reader, giving readings on a statute, and to sit on the bench at moots. Gradually, however, the position of barrister, like that of bencher, became a more formal rank or degree within the Inns, and calls to the Bar assumed great solemnity."

Professor Baker deals with the nature of moots at pp.lix-lxi and lxx of the most recent of the Society's volumes, vol. 105 on Readings and Moots at the Inns of Court, vol.II[1]:

> *"The masters' commons are further divided into three companies, that is to say, no utter barristers, utter barristers, and benchers.*
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> *Item, those that be no utter barristers are such as for lack of continuance in the house, or because they do not study or profit in learning, are not by the elders of the house called to dispute, argue and plead some doubtful matter in the law, which among them is called mooting, before the benchers and elders. Item, the utter barristers are they which, after they have continued in the house by the space of five or six years and have profited in the study of the law, are called by the elders or benchers to plead, argue and dispute some doubtful matter in the law before certain of the same benchers in the term-time or in the two principal times in the year of their learnings, which they call grand vacations; and the same manner of argument or disputations is called mooting. And this making of utter barristers is a preferment or degree given to him for his learning. Also the benchers are those utter barristers which, after they have continued in the house by the space of fourteen or fifteen years, are by the elders of the house chosen to read, expound and declare some statute openly unto all the company of the house in one of the two principal times of their learning, which they call the grand vacation in summer; and during the time of his reading he hath the name of reader, and after of bencher."*

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[1] See also now the same author's *Readers and Readings in the Inns of Court and Chancery* Vol. 13 in the Selden Society's Supplementary Series (Selden Society 2000).

"In the Lent and Summer vacations every day at night, except Sunday, Saturday, or some feast of nine lessons, before three of the elders or benchers at the least, is pleaded and declared in homely law-French by such as are young learners some doubtful matter or questions in the law, which afterwards an utter barrister doth rehearse and doth argue and reason to it in the law French; and after him another utter barrister doth reason in the contrary part in law-French also; and then do the three benchers declare their minds in English; and this is it that they call mooting. And the same manner is observed in the term-time."

"The new barristers (as before hath been intimated) are, for their degree, to perform each of them two several assignments of moots: which exercises are done in the hall in the term-time only, every Tuesday and Thursday night immediately after supper. The case is framed with apt and proper pleadings unto it by the two utter barristers who are to perform the assignment. These pleadings are recited by two gentlemen under the bar, one of which speaks for the plaintiff, the other for the defendant; which done, and the case briefly put out of those pleadings, and argued by the utter barristers, three of the benchers as judges argue the same case. ... And in these moots the benchers proceed as followeth. Immediately after supper the benchers assemble themselves in the bay window at the upper end of the hall; where standing in order according to their antiquity, there repair unto them two gentlemen under the bar whose turn it is to recite the pleadings. Who, after a low obeisance, demand whether it be their pleasure to hear a moot, and depart with an affirmative answer. Then the benchers appoint two amongst themselves to argue the case, besides one of the readers elect ... When it is agreed on who are to argue, all the benchers depart out of the hall, leaving the rest of the company there. The two arguers walk a turn in the court or garden until the hall be prepared and made ready for them; which being done, they return into the hall and stay at the cupboard, demanding if the mootmen be read. (During their stay at the cupboard there is oftentimes a case put unto them by one of the utter bar ...) But to return to the mooting: all parties being ready, the two benchers appointed to argue, together with the reader elect, take their places at the bench table, the ancient bencher sitting in the midst, the second on his right hand, and the reader-elect on his left. Then the mootmen also take their place, sitting on a form close to the cupboard and opposite to the benchers. On the one side of them sits one of the students that recites the pleading, and the other on the other side. The pleadings are first recited by the students, then the case put and argued by the barristers, and lastly by the reader-elect and benchers, in manner and form aforesaid; who all three argue in English, but he pleadings are recited and case argued by the utter barristers in law-French. The moot being ended, all parties return to the cupboard, where the mootmen present the benchers with a cup of beer and a slice of bread; and so the exercise for that night is ended."

"The description of the customs of the Middle Temple in 1539 depicts the exercises at readings as follows:-

> *'... in the same grand vacations, when that one of the elders doth read and expound a statute, such utter barristers as are of long continuance do stand in a place together, whereas they rehearse some one opinion or saying of him that readeth and by all ways of learning and reason that can be invented to impugn his opinion; and sometimes some of them do impugn it and others do approve it; and all the rest of the house given ear unto their disputations; and at last the reader doth confute all their sayings and confirmeth his opinion.'*

This is of particular interest because of the statement that the disputations were conducted by 'such utter barristers as are of long continuance' rather than benchers. But the much fuller account in the ensuing report on the inns of court makes it clear that the barristers merely began the discussion, and were followed by the benchers, serjeants and judges. We may suppose that the reporters distorted the picture by usually leaving out the remarks of the less important contributors. The relevant passage in the report reads as follows:-

> *'[The reader], openly in the hall before all the company, shall read from one such act or statute as shall please him to ground his whole reading on for all that vacation; and that done doth declare such inconveniences and mischiefs as were unprovided for, and now by the same statute be [remedied], and then reciteth certain doubts and questions which he hath devised that may grow upon the said statute, and declareth his judgment therein; that done, one of the younger utter barristers rehearseth one question propounded by the reader, and doth by way of argument labour to prove the reader's opinion to be against the law; and after him the rest of the utter barristers and readers one after another in their ancienties do declare their opinions and judgments in the same; and then the reader who did put the case endeavoureth himself to confute objections laid against him, and to confirm his own opinion; after whom the judges and serjeants, if any be present, declare their opinions; and after they have done the youngest utter barrister again rehearseth another case, which is ordered as the other was. Thus the reading ends for that day: and this manner of reading and disputations continues daily two hours, or thereabouts.'"*

It is encouraging to see that in the 1660s the mooters presented the benchers who presided with a cup of beer and a slice of bread for their efforts in adjudication, the English equivalent, I suppose, of the jug of wine and loaf of bread enjoyed by Omar Khayyam.

There is a suggestion that our system of law reporting commencing with the Year Books may have begun as the commonplace books of students who took part in these moots.

Those reports were fairly haphazardly organised in the 13th century but the system seems to have improved during 14th century.

If students initiated law reporting, it merely reflects the fact that the main stock in trade of a lawyer consists of an organised, readily ascertainable body of law. One of our major concerns must be to ensure speedy and accurate access to the law.

The moots or reading exercises were also very practical aids in developing skills in advocacy and pleading. They are the main skills, apart from knowledge of the law, needed for practice at the Bar as compared to practice as a solicitor.

In my view the Bar Association these days could be more active not only in maintaining the standards of legal education, but also in helping to develop barristers' practical skills. This does not require the reinstitution of the broad education provided by the Inns of Court, including instruction in dancing, that ceased or passed into an empty form before the end of Charles II's reign. Nor do we need to duplicate the seminars organised by the Law Society or the Association on recent developments in substantive law.

There is a significant role for the Bar, however, in supplementing those efforts and the practical training provided in the Bar Practice course with similar exercises for more experienced counsel. We should all be keen to continue to develop and improve our techniques of persuasion.

The English Bar has recently reinstituted moots to provide students and young barristers with some forensic practice. The pupillage dinners held here in recent years have often contained some educational element such as a lecture by a judge or practitioner. I think that it would also be desirable to conduct moots and mock trials where, for example, expert witnesses are cross-examined by experienced counsel. We get a great deal of feedback, polite or otherwise, from our opponents and from judges about our legal submissions. We get hardly any reaction, except behind our backs, to our courtroom techniques. These skills are, in many cases, at least as important as our knowledge of the law.

A good counsel's reasons for putting his or her submissions in a particular way would be instructive, as might the comments of the adjudicating judge. The views of an experienced expert witness on the way he or she was cross-examined might also be illuminating.

It would be salutary and probably embarrassing to use the Bar Practice Centre's facilities to videotape the moot so others also could learn from the exercise. Those sufficiently embarrassed by their performance in replay might elect to seek professional help from public speaking and drama coaches engaged by the Association. And those who had not yet learned the art of the about-face in front of the Full Court could be taught how to pirouette by the Queensland Ballet. There must have been some point in those dancing lessons!

These days, also, I think that we should be doing something to record in a more readily accessible form the points of law which we refer to regularly. Most of us have gone

through the process of re-inventing the wheel, legally speaking, many times. We have spent hours discovering the law relating to certain issues which some other more experienced member of the Association might know off the top of his or her head. If you are lucky when commencing practice you might have ready access to an experienced counsel with a good memory who is willing to help. If you are well organised you might record what you find out in a notebook or, these days, in a database on a computer. Learning elementary points can be haphazard, however, and inefficient even for those who are willing to do their own research.

It would be desirable for the Association to attempt to amass a data bank of useful precedents of pleadings and of information touching on common areas of practice. Mr. Justice Moynihan's work on Court Forms, Precedents and Pleadings is a useful start in this area. There are, however, modern alternatives available which can be faster and more flexible than a simple book of precedents. Computer programs are available now where, for example, a new practitioner can go through a checklist of matters required for drafting a document, such as a pleading. A properly prepared program will also provide information on why the document should contain particular allegations and suggestions as to their form. The program is like a branching tree, enabling the user to choose from a series of alternatives to create the document. It can also be amended to incorporate improvements and refinements or changes in the law.

It would take one person years to create such a system. The difficulty is, of course, that most of us spend too much time chopping trees and not sharpening our axes because of the pressures of work. It would be desirable, however, for the Bar as a whole to commence work on such a project if only to protect our interests in continuing to settle pleadings. The large solicitors' firms are already beginning to form collections of precedents using these programs and it is in our interest to ensure that this work remains with the Bar. It will remain with the Bar if we can do it as speedily as a solicitor, and more efficiently. It is important that it should remain with us, also, because a proper pleading is the foundation of a successful action.

There are greater difficulties in preserving for common use the information contained in barristers' opinions. These are confidential to the client. A firm of solicitors can keep advices for use within the firm and still maintain that confidentiality. In a firm that deals with many problems of the same type, earlier opinions or letters of advice can be invaluable. Most of the problems which come to us, on the other hand, are unusual.

Counsel could, however, catchword their opinions after the style of the Australian Digest without betraying the effect of the advice. Those catchwords could then be stored in a commonly accessible database. Other counsel could then consult the database to find out who had already developed some expertise in the area of their research.

I am not suggesting that counsel ask around instead of looking up the books, but I feel that we will promote informed discussion about the law within our ranks by encouraging novices to bounce their ideas off experienced counsel. We can also try to ensure that the body of skills we possess as a group is preserved and enhanced. Those early students did that by creating the Year Books to keep a record of the law they were learning. The moots held over the centuries must also have had a great effect. The skills of advocacy

seem to be much better developed in our system than in the civil law or even in the American system. We should do our best to ensure that the standard continues to improve.

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