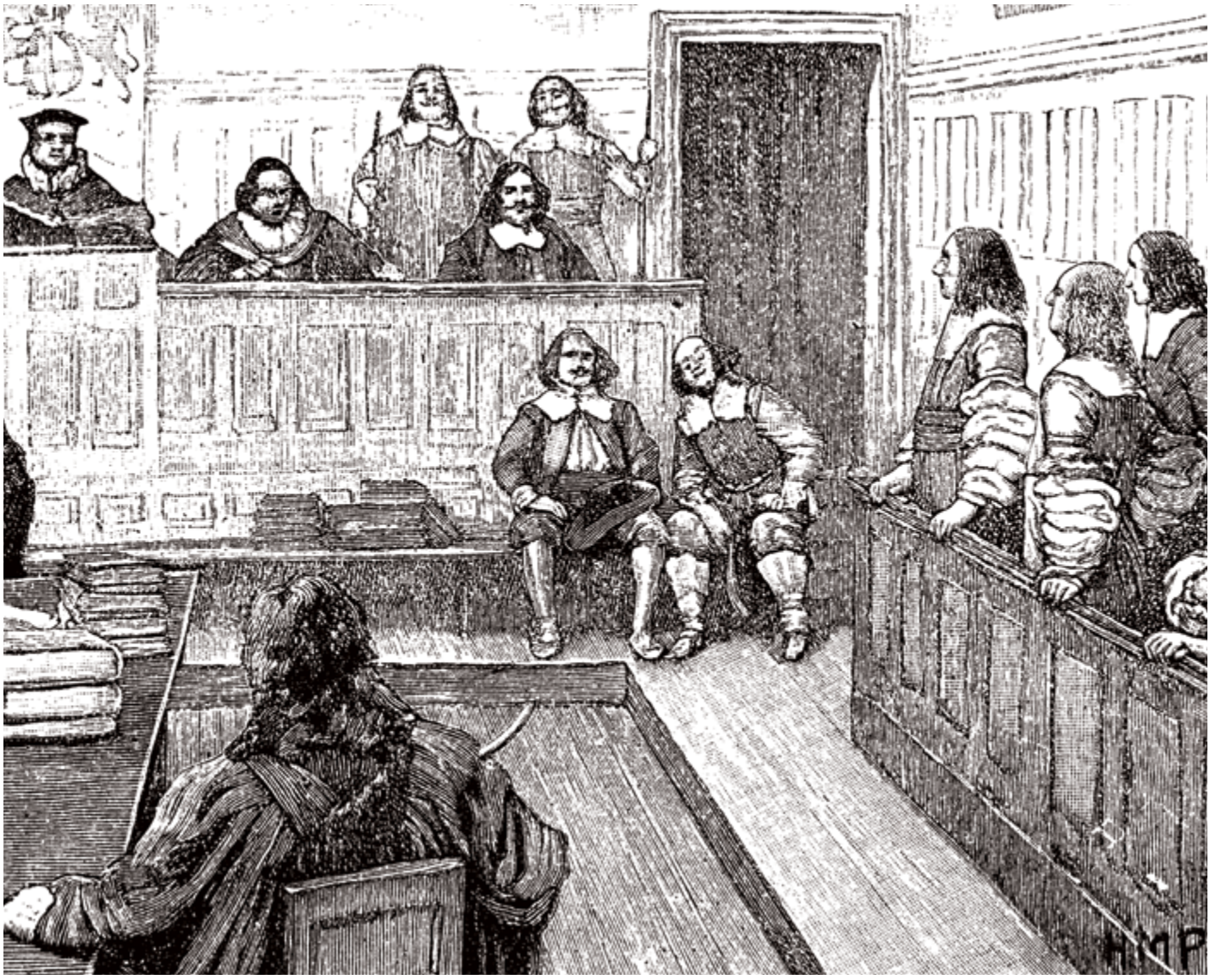
Solicitors as advocates

Our heritage and our future



"If we are marked to die,
we are enough

To do our country loss;
and if to live,

The fewer men, the greater
share of honour.

God's will, I pray thee wish
not one man more…

"…and gentlemen in England now a-bed

Shall think themselves accursed
they were not here,

And hold their manhood's cheap
whiles any speaks

That fought with us upon Saint Crispin's day."[1]

No doubt Shakespeare was fanciful in his prose regarding Henry V, but it is a fair bet that the King said something to his troops to fire them to victory over the much larger French army. In doing this, in persuading people to accept his belief, Henry was being an advocate – and an effective one given his victory.

Advocacy has been around a lot longer than that, however, and in fact we will never know the name of the first advocate. Perhaps it was a particularly articulate Cro-Magnon in Upper Palaeolithic Europe arguing that the spoils of the hunt should be more evenly divided amongst the tribe, or maybe the development was more recent.

back to contents

by Christine Smyth, Stafford Shepherd and Shane Budden



Whatever the motivations of the first advocates, we know that those whose efforts took place in recorded history were driven by the mantra of assisting those in need. From the earliest times, the role of the advocate was to help.

In Latin, *Advocatus* meant 'one called to aid another'; in Middle English it denoted "one who intercedes for another," and "protector, champion, patron." There can be no doubt that the traditional role of the advocate underpins the fundamental duties which now drive the growing ranks of the solicitor-advocate; that is to serve the public. It is a tradition with deep roots and archaic origins.

In ancient Greece, Athenian orators began the tradition of assisting a friend, albeit hindered by the rule that fees for oratory services were banned. Although that is far from the norm today, echoes of this tradition remain in the countless hours of pro bono work performed by solicitors every year; a resource on which the state has come to (rather dangerously) rely. That is perhaps a topic for its own column.

The first professional orators appeared in ancient Rome, when the Emperor Claudius legalised advocacy as a profession – bear that in mind the next time someone asks what have the Romans ever done for us!

By the fourth century, advocates had to be enrolled on the bar of a court to argue before it, and they could only be attached to one court at a time. By the 380s, advocates were studying law, and in 460, Emperor Leo imposed a requirement that new advocates seeking admission had to produce testimonials from their teachers. How many of us would have been admitted when endorsement from lecturers was required is thankfully a moot point in these more enlightened times.

The fall of the western Roman Empire and the onset of the Dark Ages saw the virtual elimination of the profession, which in hindsight illuminates the strong connection between civilised society and the ability to have – and enforce – legal rights. No doubt many a downtrodden peasant would have given much for a valiant 21st century solicitor and a court system to match.

The profession survived in the practice of canon law and the courtesy title of Esquire (still occasionally used today) evolved to identify substantial lawyers and jurists. A forerunner, perhaps, of our modern day specialist accredited solicitors and Queen's Counsel.

The coalescence of the legal profession from the sea of ecclesiastical experts almost immediately prompted the attempt to regulate the practice of law, and the emergence of a true profession soon followed. Of course, to truly organise something you need, the English (true to their nature – and that is as true of the law as anything else) statutes were quickly enacted that promulgated regulations concerning conduct and admission.

Almost immediately the profession split, with the modern barrister and what was seen as a 'second class' (I use the term advisedly) of legal agent appearing, meaning us: solicitors. The English, as noted, are good at organising, and the profession was subject to this – barristers from the upper class, solicitors not so much. From the very beginning, it was solicitors who were the advocates of the masses.

Perhaps it was this class-based distinction that led to the long tradition of solicitors acting for clients, and barristers acting for solicitors. Whatever the reason, for many years the tradition remained largely that a barrister, instructed by a solicitor, did the court work; the solicitor did everything else. Just as a barrister would never sully himself (there were few if any hers on that side of the profession, then as now) with a conveyance, solicitors were unwelcome in speaking roles on the stage of the court.

It was a system that may well have survived a less egalitarian society than ours, but Australians are perhaps a little less enamoured of the class system than most, and solicitors have long had a right of appearance – enshrined in law – across all jurisdictions (predating federation in fact). That even playing field has given rise to a long line of solicitor-advocates who feel no need to don wig and robes to ply their trade from the bar table, and who sometimes chafe at the distinctly un-Australian tradition of barristers being regarded as more senior by dint of title, rather than merit.

More so than a reaction to the class system, the Australian solicitor-advocate is – so aptly in our secular, largely pomp-free nation – a product of pure practicality. There are too many litigants and not enough barristers, and the same spirit that developed the stump-jump plough and the Hills Hoist drove solicitors to take on court matters themselves, and discover that they were actually very good at them. Australian clients are also very practical and have worked out that they need not pay for two orators when one will do.

Although solicitor-advocates have for the most part avoided the appellate jurisdictions, this is simply a tradition – and it has passed its use-by date. There is no difference, legal or otherwise, between our right of appearance and that of the Bar. The natural evolution of solicitor-advocates is now taking them into the higher courts; the world, as Tolkien might have said, has changed.

So often debates and discussions about the future of law revolve around AI and the challenges it brings, without any examination of what it is that lawyers actually do. All the purple prose of submissions drafted by robot lawyers will be useless without someone to deliver them, and laypeople remain understandably reluctant to stand up in court and deliver the submissions themselves.

The solicitors of the future will need the skills, ability and passion to conduct advocacy work, and our role as the voice of the people is neither new nor a bad fit. This has ever been our mantle and it must be embraced if we are to thrive. The Society has taken this on board and launched initiatives such as the Modern Advocate Lecture Series and the Solicitor Advocate Course to embrace this future so deeply rooted in our profession's past. It is time for young dogs to learn old tricks to prepare our profession for this brave, new (but very familiar) world.

Christine Smyth is president of Queensland Law Society, an accredited specialist in succession law and partner at Robbins Watson. Stafford Shepherd is director of QLS Ethics Centre. Shane Budden is ethics solicitor at Queensland Law Society.

Notes

[1] Shakespeare, W. "The Life of King Henry the Fifth", Act 4, Scene 3, circa 1599.