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Legal English: Background and Perspectives

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Abstract

The English language can be said to have begun around 450 A.D., when boatloads of Angles, Jutes, Saxons and Frisians arrived from the Continent. These Germanic invaders spoke closely related languages, which came to form what we call Anglo-Saxon or Old English. Although the Anglo-Saxons seem to have had no distinct legal profession, they did develop a type of legal language, remnants of which have survived until today. Examples include words like *bequeath, goods, guilt, manslaughter, murder, oath, right, sheriff, steal, swear, theft, thief, ward, witness* and *writ.* Besides vocabulary, an Anglo-Saxon characteristic that left traces in legal English is alliteration. As opposed to rhyme, where the ends of words are phonetically the same, alliteration requires that words begin with the same sound. Anglo-Saxon poetry strove to have two or three words in each line alliterate. Alliteration is not only poetic, but makes phrases easier to remember, an important feature in a largely preliterate society.

Keywords: language origin, language distinction, legalese, legalisticness, alliteration, vocabulary, documents, pleadings, global phenomenon

Anglo-Saxon and Legal Terms

Most Anglo-Saxon alliterative phrases have disappeared from our language. One that has survived is *to have and to hold*, which is still part of many marriage vows. An Old English poet could almost have coined the phrase rest, residue and remainder, a ponderous but poetic expression still found in many wills, as is hold harmless in contracts. Other illustrations are any and all and each and every, both beloved by lawyers. To some extent, this tradition may explain the penchant of the profession to concatenate long lists of words joined by and/or or, with or without alliteration.

The Anglo Saxons used not only Old English as a legal language, but also Latin. Although Latin was introduced to England during the Roman occupation around the time of Christ, it became a major force only after the arrival of Christian missionaries in 597. Before long, Latin was the language not only of the church, but of education and learning. The association between literacy and the church became so strong that the two were almost synonymous. The terms clerk (someone who can write) and cleric or Clergy (priest) derive from the same Latin term.

For centuries, English courts recognized a type of immunity for the clergy; to avoid the gallows, you simply had to read a verse from the Bible (sometimes called the "neck verse"). Latin was important for English law mainly as the language of court records.

versus

The practice of using Latin *versus* in case names (for "against") harks back to these times. English lawyers and judges were also prone to express sayings or maxims about the law in Latin. An example that has survived is *caveat emptor*. A later influence on the language of the law was Scandinavian in origin. During the eighth century, Vikings began raiding the English coast and eventually settled down. The English borrowed from these Scandinavians the most important legal word in the English language: the word law itself. Law derives from the Norse word for "lay" and thus means "that which is laid down."

Scandinavian Influence

A couple of centuries later another group of Scandinavians had a far more profound and lasting impact on the language of English lawyers. These were the Normans, whose name ultimately comes from Northman. The Normans were originally Vikings who conquered the region of Normandy during the ninth and tenth centuries. In the course of a few generations, the Viking invaders of Normandy became French both culturally and linguistically; the Northmen had become Normans. William, Duke of Normandy, claimed the English throne and conquered England in 1066. Before long, the English speaking ruling class was largely supplanted by one that spoke Norman French. As (over)stated much later by Sir Walter Scott in his novel Ivanhoe:

after the Norman Conquest, "French was the language of honour, of chivalry, and even of justice, while the far more manly and expressive Anglo-Saxon was abandoned to the use of rustics and hinds, who knew no other."

Normans and Norman French

In the beginning, the Normans wrote legal documents in Latin, not French. Around 1275, however, statutes in French began to appear. By 1310 almost all acts of Parliament were in that language. A similar evolution took place with the idiom of the courts. At least by the reign of Edward I, towards the end of the thirteenth century, French had become the language of the royal courts. Oddly, the use of French in the English legal system grew at the very time that its survival as a living language was in serious question. The English historian J.H. Baker has observed that outside the legal sphere, Anglo-French was in steady decline after 1300. Even the royal household, the last bastion of French, switched to English by the early 1400s.
Acts of Parliament did finally switch to English around 1480, but legal treatises and reports of courts cases remained mostly in French throughout the sixteenth century and the first half of the seventeenth.

Emergence of English

Six hundred years after the Norman Conquest, and around three hundred years after French was virtually a dead letter in England, it was still being used as a professional language by English lawyers! Complaints continued to mount. In 1549, Thomas Cranmer, first Protestant archbishop of Canterbury, recounted that "I have heard suitors murmur at the bar because their attorneys pleaded their cause in the French tongue which they understood not." Roughly a century later, the Puritans took power, beheaded the king, and passed a law in 1650 that required all case reports and books of law to be "in the English Tongue only." The Puritans evidently had a zest not only for plain living, but also for plain language. But in 1660, after the monarchy had been restored, this "pretended act" was repealed and the old state of affairs returned.

Lawyers rejoiced and resumed writing in Law French, at least for the next few decades. Because it was the main language of the profession for so many centuries, French has had a

tremendous influence on legal language. A vast amount of legal vocabulary is French in origin, including such basic words as *appeal, attorney, bailiff, bar, claim, complaint, counsel, court, defendant, demurrer, evidence, indictment, judge, judgment, jury, justice, party, plaintiff, plea, plead, sentence, sue, suit, summon, verdict* and *voir dire*.

Another example of French influence is that in that language adjectives normally follow the noun that they modify. Several such combinations are still common in legal English, including *attorney general, court martial, fee simple absolute, letters testamentary, malice aforethought,* and *solicitor general*. Also, Law French allowed the creation of worlds ending in *ee*to indicate the person who was the recipient or object of an action (*lessee*: "the person leased to"). Lawyers, even today, are coining new words on this pattern, including *asylee, condemnee, detainee, expellee* and *tippee.* The French of lawyers became increasingly corrupt, and its vocabulary more and more limited.

By the seventeenth century lawyers were tossing in English words with abandon. Consider a famous case from 1631, in which a condemned prisoner threw a brickbat at the judge. The report noted that *he ject un brickbat a le dit justice, que narrowly mist*. The judge was not amused. He ordered that the defendant's right arm be amputated and that he be *immediatementhange in presence de Court.* Parliament finally ended the use of Latin and French in legal proceedings in 1731. By then, however, it was delivering merely a coup de grace. Things were similar in the United States. Despite initial antipathy in the colonies towards the legal profession, the Americans soon realized that they needed to develop a system of justice. The only real model at their disposal was the English one. The fledgling American states adopted not only England's common law, but its language as well. Nonetheless, criticism of legal language continued. Thomas Jefferson complained about the verbosity of statutes, their endless tautologies, and "their multiplied efforts at certainty by saids and aforesaids." Yet American legal language ended up being very similar to its English parent.

Legalese

Historically, legalese is language a lawyer might use in drafting a contract or a pleading but would not use in ordinary conversation. For this reason, the traditional style of legal writing has been labeled unfriendly to readers. Proponents of plain language argue that legal writing style should not vary from task to task or audience to audience. Whatever lawyers write must be Clear, Correct, Concise, and Complete". These 4 Cs describe characteristics of good legal writing style. There are different kinds (genres) of legal writing: for example, (a) academic legal writing as in law journals, (b) judicial legal writing as in court judgments, and (c) legislative legal writing as in laws, regulations, contracts, and treaties. Another variety is the language used by lawyers to communicate with clients requiring a more reader friendly style of written communication than that used with law professionals. For lawyers operating internationally, communicating with clients and other professionals across cultures requires a need for transnational legal awareness and transcultural linguistic awareness. The form of legal writing, legal skills and language skills form a vital part of higher education and professional training.

Legal English has particular relevance when applied to legal writing and the drafting of written material, including:

1. Legal documents: contracts, licences, etc.

2. Court pleadings: summonses, briefs, judgments, etc.

3. laws: Acts of Parliament and subordinate legislation, case reports, legal correspondence However, due to the spread of Legal English as the predominant language of international business, as well as its role as a legal language within the European Union, legal English is now a global phenomenon.

Key Features of Legal English

As noted above, legal English differs greatly from Standard English in a number of ways. The most important of these differences are as follows:

1. Use of terms of art. Legal English, in common with the language used by other trades and professions, employs a great deal of technical terminology which is unfamiliar to the layman (e.g. *waiver, restraint of trade, restrictive covenant, promissory estoppel*). Much of this vocabulary is derived from French and Latin.

2. These terms of art include ordinary words used with special meanings. For example, the familiar term *consideration* refers, in legal English, to contracts, and means, *an act, forbearance or promise by one party to a contract that constitutes the price for which the promise of the other party is bought* (Oxford Dictionary of Law). Other examples are *construction, prefer, redemption, furnish, hold,* and *find*.

3. Lack of punctuation. One aspect of archaic legal drafting – particularly in conveyances and deeds – is the absence of punctuation. This arose from a widespread idea among lawyers that punctuation was ambiguous and unimportant, and that the meaning of legal documents was contained only in the words used and their context. In modern legal drafting, punctuation is used, and helps to clarify their meaning.

4. Use of doublets and triplets. As noted above, the mix of languages used in early legalese led to the tendency in legal English to string together two or three words to convey what is usually a single legal concept. Examples of this are *null and void, fit and proper, (due) care and attention, perform and discharge, terms and conditions, dispute, controversy or claim,* and *promise, agree and covenant*. While originally being done to help all lawyers no matter which vocabulary they might use (English, French, or Latin) it now sometimes repeats words used mean exactly the same thing, and has become a stylistic standard for other legal concepts (*dispute, controversy or claim, search and seizure*).

5. Unusual word order. At times, the word order used in legal documents appears distinctly strange. For example, *the provisions for termination hereinafter appearing* or *will at the cost of the borrower forthwith comply with the same*. There is no single clear reason for this, although the influence of French grammatical structures is certainly a contributory factor.

6. Use of unfamiliar proforms. For example, *the same, the said, the aforementioned* etc. The use of such terms in legal texts is interesting since very frequently they do not replace the noun – which is the whole purpose of proforms – but are used as adjectives to modify the noun. For example, *the said John Smith*.

7. Use of pronominal adverbs. Words like *hereof, thereof,* and *whereof* (and further derivatives, including *at, in, after, before, with, by, above, on, upon*) are not often used in ordinary modern English. They are used in legal English primarily to avoid repeating names or phrases. For example, *the parties hereto* instead of *the parties to this contract*.

8. *er,or*and *ee*name endings. Legal English contains some words and titles, such as employer and employee; lessor and lessee, in which the reciprocal and opposite nature of the relationship is indicated by the use of alternative endings.

9. Use of phrasal verbs. Phrasal verbs play a large role in legal English, as they do in Standard English, and are often used in a quasitechnical sense. For example, *parties enter into contracts, put down deposits, serve* [documents] *upon other parties, write off debts*, and so on.

Lawyers Persist in Using Archaic Jargon

Clearly, the legal profession has tended to be quite conservative, especially in the past. But old habits and tradition cannot fully explain why modern lawyers persist in using archaic jargon passed down over the centuries. Actually, lawyers can be quite creative and innovative when it suits their purposes. They have readily coined neologisms like *palimony* (alimony paid to a "pal" or unmarried partner) and *hedonic damages* (money damages for loss of the pleasure of life). And, as we have seen, lawyers can speak eloquently and very understandably to jurors during trial. If legal documents are inscrutable-as many are-it is more than a matter of tradition. The lawyers actually created legal English. Still, lawyers seem to trot out their most ancient, redundant, and convoluted phrases when writing documents directly for clients, particularly wills. The average will (for an estate without potential tax liability) is not conceptually all that complex, and most of the language is pure boilerplate. Yet lawyers are able to charge hundreds of dollars for drafting one. All too often, complexity of language masks simplicity of content. Justifying fees is not the only reason for the persistence of legalese. Their distinctive language allows lawyers to mark themselves as members of the profession. Law students soon learn how to "talk like a lawyer." Use archaic words like *aforesaid*, *herein* and *to wit*. Embed them in convoluted syntax and never use one word where a longer phrase is available. Perhaps the best way to sound like a lawyer is to throw in as much legal vocabulary as possible. There are literally thousands of technical terms from which to choose. Words of Latin and French origin are particularly impressive. No one will doubt that you are a real member of the bar if you can convincingly use the foreign terms. Lawyers may also have strategic reasons for favoring legalese and the obscurity it engenders. For instance, an outfit that rents hang gliders to the public may be legally obligated to warn of the dangers of the sport, but at the same time would

not want to discourage potential customers. Or a department store might wish to give out credit on one sided or even oppressive terms, but might fear that consumers would balk if they realized the truth. Convoluted and incomprehensible legalese is the obvious solution. Perhaps a more legitimate justification for the long windedness of the profession derives from its adversarial nature. Virtually any legal document is liable, at some point in its existence, to be picked apart by an opponent eager to exploit a loophole or ambiguity in hopes of wiggling out of an agreement or contesting a will. Legislation is no exception; almost any statute will be subjected to intense scrutiny by lawyers trying to poke holes in it on behalf of their clients. Those who draft such documents must anticipate these attacks. Therefore, they obsessively try to cover every base, plug every loophole, and deal with every remotely possible contingency. The result is ever longer, denser and more complicated prose.

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