Volume 42
Issue 3 *Dickinson Law Review - Volume 42, 1937-1938*

4-1-1938

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Dickinson Law Review

Published October, January, April and June by Dickinson Law Students

VOLUME XLII APRIL, 1938 NUMBER 3

Subscription Price $2.00 Per Annum 75 Cents Per Number

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OUR OBSOLETE LEGAL ENGLISH*

By Dagobert D. Runes, Ph.D., Editor.

The lawyer rarely questions the language to which he has fallen heir. He accepts the mishmash of Latin, Anglo-Saxon, and other alien expressions without troubling to inquire whether they aren't bound up with dead customs, outmoded beliefs, myths and superstitions which reach back to Roman or even to primitive times. The lawyer seeks, often, to circumvent the language of the law, because instinctively—if not consciously—he knows that the legal verbiage he employs refers to customs and ideas long since dead. From this subterfuge and circumvention has arisen the popular opinion of the lawyer, which was expressed by Ben Johnson in his famous couplet for Justice Randall:

*Reprinted from the March issue of Better English Magazine.

God works wonders now and then,
Here lies a lawyer, an honest man.

Now because he does not challenge the ideas upon which law is based, the lawyer is at a grave disadvantage: for in every case he undertakes he must vindicate the law as it has come down to him; he must buttress it by argument, witness, and evidence, and defend it before the judge if he wishes to win his case. In so doing he perpetuates the legal abracadabra which befuddles and dazzles the layman, completely at the mercy of the trained legal minds of lawyer and judge.

Why all those additional clauses in bills of sale, set usually in six point type? Why is it necessary today in a deed of sale to use such a string of synonyms as "grant, bargain, sell, convey, and confirm"? Why those cagey provisions, detrimental to the tenant, in standard leases? For whom are the traps set by the legal word-mongering which leaves the normally intelligent citizen dumbfounded?

The profession of law, said Dean Swift, "forms a society of men, bred up from their youth in the art of proving by words multiplied for the purpose that white is black and black is white, according as they are paid." And Milton describes the lawyers of his day as "grounding their purposes, not on the prudent and heavenly contemplation of justice and equity, which was never taught them, but on the promising and pleasing thoughts of litigious terms, fat contentions and flowing fees."

The law wraps itself in solemn, mystical, and equivocal phrases, which can be construed any way a headachy judge pleases. The ordinary man thinks he knows the meaning of simple words, but to the legal mind such words as "and" and "or" assume undreamed-of complexities. "And" has been held to mean "or," and vice versa, and the misbegotten *and/or* only adds to the general confusion. Lawyers and judges like to think of themselves as members of a sacred caste, guarding the consecrated precedents that hark back to immemorial times. With similar ferocity they guard the complicated phraseology of the law. Concerning legal obscurity, an old law commentator wrote in 1718: ". . . . and an abundance more of such cobweb subtleties, spun so very fine by the spiders of the law, that one would think it done on purpose to let justice fall through."

Does any lawyer need to be reminded that the learned Sir William Blackstone, the mentor and patron saint of every English and American lawyer, allied himself with the witch-burners of his time in furnishing testimony to the existence of witches? The father of "Blackstone's Commentaries" wrote: "To deny the possibility, nay, actual existence of witchcraft and sorcery is at once flatly to contradict the revealed word of God in various passages of both the Old and New Testament, and the thing itself is a truth to which every nation in the world hath in in its turn borne testimony, either by example seemingly

well tested, or by prohibitory laws which at least suppose the possibility of commerce with evil spirits."

Other professions change to meet the needs of new times and new customs. But legal English and legal procedure, in which quiddity of speech plays so large a part, is the impregnable fortress that blunts all the attacks of progress. Legal English is no more sacred than other forms of speech. These show the impress of the times. Why should legal English remain sacrosanct? Why should it be encrusted with meaningless verbiage and cumbrous forms? It is because, as the philogists tell us, the word "law" is derived from the old Teutonic root *liegen,* meaning to lie? The law is something, in other words, which lies fixed and prone, it doesn't move, doesn't change. Perhaps, who knows, the body is lifeless, smothered in its impressive wrappings.

However, if we accept the less favorable meaning of "lie" and of "liegen" we strike the most vulnerable spot in the lawyer's armor. Sophistry is the essence of legal speech and writing. Legal language is not functional, as some lawyers claim. The most functional will ever written is that of Chief Justice Holmes—one brief sentence. Of another famous American jurist it was written: "As light and spongy fabrics are reduced to a portable size by hydraulic pressure, so the verbose readings of the law were, by the force of his great mind, reduced to clear, practical rules."

Toward the end of his life a British judge apologized for having turned out so many heavy volumes of reports. Seeing them piling up around him, he suggested a decennial *auto-da-fe* of all law reports—just set fire to the whole mass and start over again.

Legal Latin may be termed the lawyer's sleight-of-hand by which he hypnotizes the client. What is the fount of this sacerdotal speech? What is the clue to its stubborn persistence? At one time the priest interceded with the god—in mumbo-jumbo; at one time the lawyer was hired by the manor lord to hornswoggle the husbandman who owned a valuable piece of property or a buxom wife or comely daughter. Hence the *lex primis noctis* and the *jus in rem.*

A good deal of the prolixity in the English law goes back to the time when Anglo-Saxon speech was in its infancy and meanings were not yet crystallized. Today the language has been sharpened and refined. It is a masterful instrument. If it was good enough for Shakespeare, Addison, Swift, Macaulay, Arnold, and Mill, it should be good enough for our lawyers and judges. It was good enough for Justice Oliver Wendell Holmes, whose opinions are models of lucidness and brevity.

What, then, can be done to streamline legal English? The plague of legal locution leads to such excesses as the recent Senate and House Farm Bill which covers 179 printed pages and which practically nobody has had time to read. Verbal debauches like this, suggest that the whole lawyer-made set-up is in its dotage, ready for a pyre.

Veblen attributed this hangover to the respectable status of archaism and waste. "Where a conventional usage rests on the canons of archaism and waste," he said, "the spokesmen for the usage instinctively take an apologetic attitude. It is contended in substance that a punctilious use of ancient and accredited locutions will serve to convey thought more adequately than would a straightforward use of the latest form of spoken English. . . . They are reputable because they are cumbrous and out-of-date."

Is it not time that we exploded the theory that anything which is gnarled and ancient is of necessity right? The horrors of legal verbiage, *Better English* suggests, must go!

ALLOCATION OF RECEIPTS FROM WASTING TRUST PROPERTY: MINING STOCK TRUSTS

Since the adoption of the Restatement of Trusts by the American Law Institute in 1935 its appearance in the Supreme Court of Pennsylvania has been frequent, and on each occasion the Supreme Court has hastened to approve the particular section under consideration. This unanimity and consistency of decision was broken on November 12, 1937, when, for the first time, the court of last resort of this Commonwealth refused to follow a doctrine of the Restatement of Trusts. The case was *Knox's Estate,*[1] and the relevant section of the Restatement was section 239. Mr. Chief Justice Kephart wrote the opinion of the court.

The applicable section of the Restatement reads:

> "Unless it is otherwise provided by the terms of the trust, if property held in trust to pay the income to a beneficiary for a designated period and thereafter to pay the principal to another beneficiary is wasting property, the trustee is under a duty to the beneficiary who is entitled to the principal, either
>
> (a) to make provision for amortization, or
> (b) to sell such property."[2]

Comment(g) of the section states that the rule applies where the subject matter of the trust is mines, and further reads:

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[1]328 Pa. 177, 195 A. 28 (1937).

[2]Sec. 239. See also Tentative Draft No. 4, sec. 231, comment (g) and explanatory notes on pages 213-220.