Pardon My Law French

David Franklin

All right, class, it's time for your first pop quiz in law French. Please read the following marginal note from a seventeenth-century English law report and see how much of it you can understand:

> Richardson Chief Justice de Common Banc al assises de Salisbury in Summer 1631 fuit assault per prisoner la condemne pur felony, que puis son condemnation ject un brickbat a le dit justice, que narrowly mist, et pur ceo immediately fuit indictment drawn per Noy envers le prisoner et son dexter manus ampute et fix al gibbet, sur que luy mesme immediatement hange in presence de Court.

Now that wasn't too tough, was it? In fact, judging from this passage, law French turns out to be mostly English spoken by a lawyer with a very bad French accent. *Terms of Art* is reminded of the taunting Frenchman from *Monty Python and the Holy Grail* ("Fetchez la vache!").

Considering the mongrel quality of the above passage, it will not surprise you to learn that the historical development of law French was haphazard at best. For more than 600 years after establishment of a church at Canterbury in 601, the official language of lawyers in England was Latin. Then suddenly, sometime around 1250 – almost two centuries after the Norman conquest – lawyers began speaking French. Spoken French did not keep its hold at the bar for long, however; as early as 1362 Parliament tried to prohibit all use of the Gallic tongue in the courts. This legislation (which was written in French!) was largely ignored at the time of its passage, but by 1500, it seems, English attorneys were making most of their pleadings and arguments in English. (This linguistic shift must have pleased the clients, who after almost a millennium in the dark could finally understand what their lawyers were saying.)

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Some old-fashioned lawyers did continue to speak law French, and those who did apparently took pride in pronouncing French words as if they were English words. As a consequence, actual Frenchmen could barely understand them. One visitor from France during the reign of Queen Elizabeth wrote that law French "may be worthily compared to some old ruines of some faire building, where so many brambles and thornes are grown, that scarcely it appeareth that ever there had bin any house."

Long after French had lost its hold on the tongues of most English lawyers, however, a bastardized form of the language remained their preferred mode of written communication. In particular, the reporters who jotted down the not-always-reliable accounts of courtroom events continued to use a slapdash *lingua franca* composed of corrupted French combined with some macaronic Latin and everyday English words. This was "law French," and court reporters stuck with it well into the seventeenth century – even when the proceedings they were ostensibly transcribing were going on entirely in English.

Which brings us back to Chief Justice Richardson and his brick-wielding assailant. The note reproduced above was apparently written by one Sir George Treby, in the dying days of law French (hence the interpolation of so many English words). In a groundbreaking 1984 essay entitled "Le Brickbat Que Narrowly Mist," English legal historian J.H. Baker unveiled another contemporaneous account of the same event, written in highly idiosyncratic law French by Sir Richard Hutton, one of Richardson's close associates. According to Hutton, the prisoner, "un stronge fellowe,"

> suddenment throwe ove great violence un great stone al heade del dit Seignior Rychardson quel per le mercy del Dieu did come close to his hatt et missed him et auxi le Seignior George que sitt prochin a luy, et le stone hitt the wanescott behind them and gave a great rebound, quel si ceo stone had hitt le dit Seignior Rychardson il voet have killed him.

Onlookers were outraged by the defendant's life-threatening launch; Richardson later quipped that if he had been an upright judge he would have been slain. Since the prisoner had already been found guilty of highway robbery ("ad judgment pur robery per hault chimin") and was therefore a dead person in the eyes of the law ("un mort person in ley") the Chief Justice ordered the executioner to cut off the man's throwing hand for good measure before hanging him. Hutton applauded the sentence as "un bon example de justice in cest insolent age."

Law French, alas, has long since gone the way of trial by ordeal and the Interstate Commerce Commission. But its imprint on the language of the law remains unmistakable. Perhaps the most conspicuous vestiges are the many legal nouns formed from the French infinitive (demurrer, disclaimer, interpleader, joinder, merger, ouster, tender, trover) or from the French past participle (bailee, employee, grantee, lessee, trustee, vendee). A few whole phrases of law French survive ("cestui que use," "cy pres," "pur autre vie") mainly so that first-year Property professors can torment their hapless students.

Law French itself may have died out, but one original purpose for its existence is still with us. Specialized legal dialects have always served to set lawyers apart, to distinguish insiders from outsiders, to keep laypeople ignorant of the mysteries of the lawyer's craft. As Jeremy Bentham once wrote, the language of lawyers creates a "bond of union: it serves them, at every word, to remind them of that common interest, by which they are made friends to one another, enemies to the rest of mankind."

In his new book *Legal Language*, lawyer/linguist Peter M. Tiersma explores the ways in which today's lawyers continue to use language to set themselves apart. One time-

honored way to flummox the laity is to dip back beyond law French and spatter your diction with a healthy dose of Latin phrases, especially ones with ready English equivalents: *bona fides* for "good faith," *per se* for "as such," *in hæc verba* for "in so many words," and so on. A recent study reports a clear increase over the past twenty years in judicial usage of such phrases as *inter alia*, *vel non*, *sub silentio*, *sua sponte* and *ratio decidendi*. (On the other hand, *res gestae* and *mutatis mutandis* are apparently on the endangered list, and *dictum* is steadily losing its *obiter*.) And just like medieval speakers of law French, modern lawyers seem to take pride in mangling their Latin pronunciations. Thus virtually all American lawyers pronounce *prima facie* to rhyme with "I'm a geisha," and for some reason disciples of the Harvard Law School's Henry Hart seem uniformly to pronounce *res judicata* to more or less rhyme with "peace rutabaga."

Tiersma also mentions other stylistic tics, tendencies and shibboleths with which lawyers mark off their exclusive territory. For example, he asserts that lawyers disproportionately omit the so-called "serial comma" before the last item in a list, as I did in the opening sentence of this paragraph. Tiersma also notes a growing penchant among American lawyers for accenting the final syllable in the word "defendant" – "as though the attorney were defending insects."

Terms of Art would go further and argue that lawyers speak a distinctive dialect called "law English." Characteristics of law English include: use of the phrase "to make oneself whole" in contexts that have nothing to do with Deepak Chopra; choice of prepositions for maximally archaic effect ("the plaintiff's claim sounds *in* negligence *at* common law"); use of the word "practicable" to mean "feasible"; and repeated failure to precede the word "process" with either "a" or "the." Worst of all, lawyers constantly (and, it seems, uniquely) misuse the word "implicate." That is, they say "X implicates Y" when they mean "Y has implications for X," as in the following all-too-typical passage from a federal appellate decision: "The speech at issue clearly implicates the First Amendment." Lawyers, more than anyone else, should know that "implicate" is a synonym for "incriminate," not for "have something or other to do with."

Perhaps "implicate" is just a personal bugaboo for *Terms of Art*, the way "parameter" was for the late Justice Blackmun. As countless former clerks and colleagues can no doubt attest, "parameter" – as commonly used to mean, roughly, "boundary" – was Justice Blackmun's self-avowed least favorite word. In fact, the one time he had to repeat it as part of a quotation, it literally made him *"sic."* See *Costle v. Pacific Legal Foundation*, 445 U.S. 198, 201 n.2 (1980) (Blackmun, J.) ("'parameters' [*sic*]") (quoting 40 CFR §§ 125.58(r) and 133.102 (1979)). Justice Blackmun, of course, was a gentle soul who would never sic anything more dangerous than a bracketed Latin term on an unsuspecting linguistic offender. Unburdened by any similar reputation for civility, *Terms of Art* advances its own modest proposal: any lawyer who misuses "implicate" shall be immediatement hange in presence de Court.