

LAWYERS' LANGUAGE

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In a very real sense law is language and it is a trite saying that words are the lawyer's tools of trade. The functions of law can be classified as the ordering of human relations on the one hand and the restoration of order when it has been breached on the other. This paper is concerned mainly with the ordering function of New Zealand law, regulative and facilitative, and the language by means of which that is carried out; the restorative function is for the most part left aside. But the two functions cannot be entirely separated. The determination of what is the law itself, the meaning of language governing human relations, whether public legislation or private arrangements, involve linguistic discussion and the use of technical vocabulary.

It was that technical vocabulary which led G.E. Woodbine to say¹

The professional language of the present day lawyer in the English speaking countries can hardly be called English. There are English words in it, to be sure, but at its core it is medieval French of a particular type, one that was used by a never very numerous class of persons — the technical language of the French-speaking lawyers in the England of Edward I and later.

But it is more than vocabulary which stamps present day legal English with its essential character. The style of discourse between counsel and judge in court epitomises the antique aspect of the language, deeply rooted as it is in history and outdistanced by the changing language of intercourse outside the courts, although judgments themselves, particularly the judgments of English courts, are often urbane and leisurely discussions in a modern style, graced with literary or historical allusions. The dense and involved style of legislation and many private legal documents, which stems from the search for certainty and comprehensive coverage but which laymen find alien and rebarbative, makes them far removed in nature from the language of communication in other circumstances.

So marked are these characteristics that some American socio-linguists describe legal English as a distinct dialect, but that seems to be either an exaggeration or an unusual extension of the meaning of dialect.² Dialect is an uncertain word, and whether a particular speech pattern is thought to be suitably described as a dialect rather than a separate language or rather than just one variant of ordinary speech, often depends on non-linguistic factors. The term usually refers to the speech habits of geographically separated language communities but has come to be applied to language varieties associated with socio-cultural variables like social class, that is, with horizontal rather than vertical divisions.

¹ G.E. Woodbine, "The Language of English Law" (1943) 18 *Speculum* 395.

² References in B. Danet, "Language in the Legal Process" (1980) 14 *Law and Society Review*, 447, 470.

There are cases, referred to as diglossia, in which two languages fulfil different roles in society. Typically one is, for example, the language of administration, education, religion or serious literature, the other a "low variety" used in more informal contexts.³ In both Greek and Arabic for instance there are markedly distinct forms of the language, the one older, more prestigious ("classical"), the other for every day use. If legal English is to be regarded as anything more than an indistinct variant of ordinary speech the situation could perhaps be described as amounting to diglossia, though the distinction is hardly clear enough to merit that description. The notion is different from, but may coincide with, bilingualism as usually defined, as in Welsh and English, Basque and Spanish, and at least formerly, Maori and English; and of special relevance to legal language Anglo-Saxon or Norman French and Latin.

Legal English seems best considered as English set in a particular "register". Dialect looks to the speaker; register is a function of situation or use. What is appropriate to one situation is not appropriate to another and the difference extends not only to vocabulary but to syntax. Criticisms of euphemism in the utterances of counsel addressing the judge, discussed later, are not really criticisms of euphemism but of register. (Barristers, it is said, are guilty of "an obsequious 'May it please your Lordship' where 'Hello, good morning Judge' would do".) Private discussion, a spoken address (not written and read), and a research paper may all say the same thing but will say it in quite different registers; the difference is obvious when spoken lectures are reduced to writing and published in book form. It is a matter of appropriateness and the concomitant restraints.⁴ Of recent times the general trend has been towards informality of language and part of the criticism of legal English, especially the intercourse between counsel and judge, is based on the feeling that it is far out of date. But it is not always the lawyers who think that the dignity of the law needs polysyllabic and old-fashioned formality. Francis Bennion, formerly an English Parliamentary Counsel, records that he once drafted a bill referring to a landlord who "tried his best" to let office property. M.P.'s called this "amateurish" and "a headmaster's phrase" and preferred the well-worn phrase, "used his best endeavours" to let the property. Nevertheless if there is one underlying characteristic of legal language, whatever the varying degree of formality, technicality and complexity, and whatever the context, it is its archaic style and vocabulary. Familiarity with lawyers' jargon dulls appreciation of how wide is the gap between lawyers' language and laymen's. The process of dealing with the law of its very nature involves considering what has been established, what has been fixed in the past, an approach accentuated in the common law world with the hardening of the doctrine of precedent from the sixteenth century onwards. It may be going too far to say that the law advances backwards towards the future, scanning the way it has come for landmarks to keep it on the right track; but any system which is so much concerned with judicial precedents to be submitted to, or built on, or side-stepped, and with drafting precedents sanctified by habit or hallowed by judicial ruling, can hardly avoid using the language

³ Glanville Price, *The Languages of Britain* (London 1983) p.121; John Lyons, *Language and Linguistics* (Cambridge 1981) p.284. Cf. Jack Goody, *The Interface Between the Written and the Oral* (Cambridge 1987) pp.279-283.

⁴ Randolph Quirk, *Words at Work* (London 1986) chapters 7 & 8.

of the past. The danger is of course that neither the law nor its language will keep pace with the changing mores and speech habits of society.

This characteristic may be illustrated by looking at the antiquity of a single phrase which is still common, and which incidentally displays defects of drafting of a type often rightly criticised; that is the tautologous declaration with which wills even now usually begin: "This is the last will and testament of me John Doe". The formula or wording closely similar, expressed in English, is at least five centuries old, and even in the thirteenth and fourteenth centuries, when Latin was the language of record, there were wills using the expression *testamentum et ultima voluntas*.⁵ Even Glanvill, who wrote about 1188, uses the expressions *ultima voluntas* and *testamentum*, though not combined. Holdsworth quotes from a holograph will, apparently of the fifteenth century: "This my present last will and testament". In 1500 Thomas Kebell, "the kynges seriaunt at Law being hoole of mind, thankid be God" made what he called his "testament and last wyl". In 1528 and 1540 Sir John Port, a Justice of the King's Bench, drew himself wills described therein as "my last will and Testament" and "this testament and last wylle". A statute of 1540, 32 H.VIII c.l., provided that a tenant in fee simple might "give dispose will and devise" his land by his "last will and testament in writing". In 1590 Henry Swinburne wrote a textbook entitled "*A Treatise of Testaments and last wills . . .*". A satirical attack on the ecclesiastical courts was published in 1641 under the title "The Last Will and Testament of Doctors Commons". Shakespeare's will, drawn up for him by his attorney in 1616, repeatedly uses the expression "my last will and testam't".⁶ The formula was carried with the common law to America where also it still persists. It was standard practice in England long before that October afternoon of 1769 when Young Nick's Head came up over the horizon to those in the Endeavour; seventy years later it was imported into this country via New South Wales and is still in use here, as it is generally in the common law world. Standard books of precedents and most solicitors still use the expression, but it adds nothing to the phrase "This is the will of me John Doe" and indeed the "me" is unnecessary. In New Zealand, *Nevill's Will Draftsman's Handbook*⁷ has "This is the last Will [and Testament] of AB of . . .". In England D.M. Pettitt finds "the traditional opening perfectly acceptable" though as it "introduces an undesirable element of solemnity into the process of will making" he recommends the form "I . . . hereby revoke all former wills and testamentary dispositions made by me and declare this to be my last Will".⁸ But here again is tautology. A will is a testamentary disposition and it is (at least

⁵ M.M. Sheehan, *The Will in Medieval England* (Toronto 1963) p.192. Fifteenth century manor court records use the phrase *testamentum et ultima voluntas*: L. Bonfield and L.R. Post, "The Development of the Deathbed Transfer in Mediaeval Manor Courts" [1983] C.L.J. 403, 426; but in earlier times at least the two expressions did not always mean quite the same thing: N. Adams and C. Donahue, *Select Cases from the Ecclesiastical Courts of the Province of Canterbury c.1200-1301* (London 1981), pp.92, 636-637.

⁶ E.W. Ives, *The Common Lawyers of Pre-Reformation England* (Cambridge 1983) p.425. J.H. Baker ed., *The Notebook of Sir John Port* (London 1986) pp. xlvi, lviii. Holdsworth H.E.L. III p.535iv. David Thomas ed., *Shakespeare in the Public Records* (London 1985) pp.28-32. This is the will (reproduced in facsimile) containing as an interlined afterthought the gift to his wife of "my second best bed".

⁷ *Nevill's Will Draftsman's Handbook* (3rd ed. 1976).

⁸ *The Will Draftsmans Handbook* (2nd ed. 1982).

for the present) the last one. *Parker's Modern Wills Precedents*⁹ has a refreshing air of modernity in the formula "This will dated . . . is made by me", and in Australia Hutley and Inglis¹⁰ uses the same wording.

As to the will being John Doe's last will, of course it is his last will, at least until he makes another. But the word was used, perhaps sometimes still is, in a rather different sense, implying not the latest of a series, but finality. The main purpose of medieval wills was to ensure the testator's state of grace at death rather than the worldly disposition of his property, and this purpose continued in later times. David Mellinkoff of California has written of American practice¹¹

The word *last* in the formula is even worse than the doubling of will and testament. At the least, *last* is ambiguous. In its earliest use in England, this *last* was associated with the imminence of death, the last words of the dying man, and so ante-dated the clutter of our world of paper with whole processions of wills each proclaiming itself the last. Last words in the nearness of death (allied to the last illness, last breath, and last gasp) are not necessarily the last in a succession of wills, and these expressions do not necessarily express the final or last intention of the testator which judges say they are looking for.

The continued use of such expressions as "last will and testament" in the United States shows how strong are the forces of tradition and habit. The same forces could be expected to have even greater influence on New Zealand legal language; but there is another factor causing the law in New Zealand to adopt not merely the language of its historical origins but contemporary English legal language, that is, the curious fact that contemporary English common law and equity, but not statute law, are, generally speaking, part of the law of New Zealand.

The English Laws Act 1858 (in effect carried forward by the English Laws Act 1908) declared that English law as existing on the 14th January 1840 "so far as applicable to the circumstances of the said Colony of New Zealand" should apply to that colony. (The date, which of course is a few weeks earlier than that of the Treaty of Waitangi, is the date on which Governor Gipps in Sydney made a proclamation extending the boundaries of the Colony of New South Wales to include New Zealand as a dependency, a state of affairs which was intended to be temporary. On the 16th June the Legislative Council of New South Wales formally applied New South Wales law, basically English, to New Zealand. When the two colonies separated the following November, the first Ordinance passed (in 1841) by the Legislative Council of New Zealand applied to New Zealand the law of New South Wales "in the same manner as all other the laws of England". The 1858 act was passed to remove certain doubts which had arisen¹²). The 1908 act was replaced by the Imperial Laws Application Act 1988, which modified and clarified the applicable English statute law but left the common law untouched. Specified enactments were declared to be part of the "laws" of New Zealand and all other English enactments were expressly excluded, while "the common

⁹ *Parker's Modern Wills Precedents* (London 1968, 1987).

¹⁰ Hutley & Inglis, *Wills Precedents* (3rd ed. 1980).

¹¹ *The Language of the Law* (Boston 1963) p.332.

¹² The background is discussed by D.W. Williams, but the proclamation seems to have been missed. "It would be most interesting however to know quite why 14 January 1840 was selected". "The Foundation of Colonial Rule in New Zealand", (1980) 13 N.Z.U.L.R. 54, 63.

law of England (including the principles and rules of equity), so far as it was part of the laws of New Zealand immediately before the commencement of [the] Act" would continue to be part of those laws.

Taking the 1858 and 1988 Acts at their face value one would expect New Zealand to have developed a home-grown post-1840 common law and equity (which might of course profit from Australian, Canadian or English examples, as legislation does), but of course the factual position is quite different. The current common law and equity of New Zealand is for the most part the current common law and equity of England, not because the latter is a model which New Zealand has as a matter of free choice used for its own purposes, but because the Privy Council has said that, with exceptions derived from local circumstances, the current law of England is New Zealand law.¹³

The result, so far as the language of the law is concerned, is that New Zealand lawyers speak the same language in much the same style as their English counterparts, reifying or personifying the concepts of the law by reference to the same identities. If we drew the line at 1840 we would be less familiar with the snail in the bottle, the officious bystander, the man on the Clapham omnibus, Anton Piller, Mr. Bullock and Mr. Tomlin, the Qadi under the palm tree, High Trees House and other curious people and places — though we might well remember the Chancellor's foot, the unruly horse and the man who went on a frolic of his own.¹⁴

Nevertheless there is one factor which will lead to increasing divergence between the language of the law in England and New Zealand, and that is the recent increase in emphasis given to Maori institutions and Maori language. On the one hand Maori words will be absorbed into English legal language, and on the other the Maori language will in many cases become the medium of legal communication in circumstances which have no particular relevance to Maori culture. For instance, with reference to the first factor, in the course of the judgment in *Huakina Development Trust v. Waikato Valley Authority*¹⁵ the High Court used such expressions as *tangata whenua*, *kawanatanga*, *mauri*, *taonga*, *marae*, *urupa* and *pa* (these last three also appearing in the Town and Country Planning Act 1977 since the 1986 amendment). In *Environment Defence Society Inc. v. Manganui County*

¹³ The position in 1981 is summarised in the New Zealand Commentary (by the present writer) on the title Judgments and Orders in Halsbury's Laws (4th ed.) paras.C577 to C586. See further *Breuer v. Wright* [1982] 2 N.Z.L.R. 76, 83 (on statute law); *Hart v. O'Connor* [1985] 2 N.Z.L.R. 159, 165; *Tai Hing Cotton Limited v. Liu Chong Hing Bank Limited* [1985] 2 All E.R. 947, 958 and *Knapp Roberson Associates v. Roberson*, [1987] 6 N.Z.A.R. 493, 494. But divergence is increasing, see e.g. Sir R. Cooke, [1983] N.Z.L.J. 292.

¹⁴ But perhaps the reasonable man (that "anthropomorphic conception of justice": Lord Radcliffe in *Davis Contractors v. Fareham U.D.C.* [1956] 2 All E.R. 145, 161) was old enough to emigrate before 1840. In 1781 William Jones wrote an *Essay on the Law of Bailments*, "a work . . . of some prophesy, for Jones had a good claim to have invented the reasonable man." D.E.C. Yale, "Of no mean authority: Some Later Uses of Bracton" in Arnold et al eds., *On the Laws and Customs of England* (Chapel Hill, North Carolina 1981). Parke B's dictum about a "frolic of his own" is reported in *Joel v. Morrison* (1834) 6 C & P 501, 503. The unruly horse is mentioned in *Richardson v. Mellish* (1824) Bing 229, 252 though Denning M.R. refers to an unidentified origin "300 years ago" in *Enderby Town F.C. v. The F.A.* [1971] 1 All E.R. 215. Selden's quip about the Chancellor's foot (referred to below) is of course seventeenth century.

¹⁵ (1987) 12 N.Z.T.P.A. 129.

*Council*¹⁶ both Cooke P. and McMullin J. used the words *tangata whenua* (but printed as a single word), while Casey J. referred (without explanation) to “the role of the Ngati Kahu as protectors of the *waahi tapu* and *kaimoana*”, and alluded to that people’s *marae* (which by now is virtually also an English word). The expression *tangata whenua* (instead of Maori) has indeed become something of a “buzz word” in general usage, carrying as it does varying strong political overtones not attached to the word Maori.

As to the second factor, the Maori Language Act 1987 declared Maori to be an official language of New Zealand, and confers the right to speak Maori in certain court proceedings. The Maori version of the Act contains many transmogrifications of English words — *Niu Tirene* (New Zealand), *Komihana* (Commission), *taitara* (title), *kooti* (court) and so on. Like any other language, Maori will of course borrow and modify words from elsewhere, but it is questionable whether some of these words are part of the Maori language or the translator’s inventions made for the occasion. In countries where parallel texts are published in two official languages, as in Canada and South Africa for instance, the words of one will assist in construing the words of the other, but it is important that the two be drafted with equal discrimination and precision. One who does not speak Maori is in no position to assess the correspondence between the Maori and English versions of the Act, but it may be noted that “subsection” is translated as “*tekihana iti*” (“small section”) which it is not. If the section is the building the subsections are the bricks, not small buildings. It is unlikely, however, that parallel enactments will become general at least at present. The Waitangi Tribunal’s finding on the Maori language, which led to the Maori Language Act 1987 (*te Ture o te Reo Maori* 1987), did not recommend it.

We have been considering language generally over the broad field of the law, but a distinction should be made between the language of discourse and discussion such as in the courtroom and in written judgments — language about the law — and the language of legislation and private legal documents — language that is the law, often “performative” language, that by its mere utterance effects legal change — such phrases for example as “the transferor hereby transfers . . .” “I bequeath . . .” “the Court by this order dissolves the marriage . . .”. The two types share many characteristics but each also has its own distinctive aspects. A judgment, it has been said more than once, is not to be construed like an Act of Parliament. An explanatory discussion may leave something to be understood by the hearer; the dense and hard-edged language of statutes and private instruments leaves little room for the unstated, despite the officious bystander hovering near. Language of the first type in particular is affected by the influences that change language in general, and it should be viewed in the wider matrix in which it is embedded. The striving for comprehensive certainty has led the language of statutes down a different path. We may first consider discourse and discussion, especially the language of the courtroom.

The language of court proceedings has its own codes and conventions, conventions from which the general language of society has moved away. The disparity is not new, however, and has come under increasing criticism from lawyers themselves. David Pannick has written¹⁷

¹⁶ (1989) 13 N.Z.T.P.A. 197.

¹⁷ D. Pannick in D.J. Enwright ed., *Fair of Speech: the Uses of Euphemism* (Oxford 1985) p.139.

Once in court, the barrister begins to communicate with the judge in a language full of euphemism. Barristers make submissions rather than present arguments. They introduce their arguments with an obsequious "May it please your Lordship" where "Hello, good morning Judge" would do The barrister presents his arguments with respect, with great respect or, on occasions with the greatest of respect. The degree of respect voiced is, of course, in inverse proportion to the willingness indicated by the judge to agree with the arguments being advanced.

A barrister acting for the opposing party is always my learned friend; as in it may be helpful to your Lordship and to my learned friend if I . . . meaning it will certainly be helpful to me; or in all fairness to my learned friend . . . meaning that one is about to put the legal boot in.

A.P. Herbert's gentle spoofing of English judicial process is better known and no less telling; he also was a member of the bar. In "Counsel", the *Journal of the Bar Association of England and Wales*, for Hilary 1987 (and the Church apart, in England who but the Law and the two ancient universities would still count divisions of time by mediaeval Christian feast days?) Staughton J. refreshingly called for the abandonment of a number of hoary and deferential phrases which also appeared in the practice of the High Court of New Zealand until recently but have been dropped since the enactment of the High Court Rules of 1985, phrases such as "make oath and say" "this Honourable Court" "beg leave (even crave leave) to refer". But Staughton J. stopped short of urging the abolition of some of the language to which Pannick takes exception. "But let us not abolish the phrase 'with respect' in oral argument. There is high authority for the view that it means 'You are wrong' (thus serving an essential purpose) just as 'with great respect' means 'You are utterly wrong' and 'with the utmost respect' equals 'send for the men in white coats'." The expressions have a similar coded meaning also in academic writing. In the course of a tribute to A.L. Goodhart when he had been editor or editor-in-chief of the *Law Quarterly Review* for fifty years, Lord Diplock said that he read the notes on recent cases¹⁸

for my part with less complacency since I learnt from Arthur Goodhart the significance of the introductory rubrics which he avers he inherited from Sir Frederick Pollock fifty years ago. If you are doubtful whether the judicial reasoning is wholly unassailable you preface your comment: "but with respect"; if it is obviously wrong you substitute "but with great respect"; and if it is one of those judgments that have to be seen to be believed the introductory formula is: "but with the greatest of respect".

There is something to be said for the retention of the conventional "with respect" or some stereotyped equivalent, when voicing disagreement with the judge. It need not be obsequious. The disciplined, even exaggerated, stereotyped politeness of the formal interchange between counsel and judge can degenerate into an involved stilted and sycophantic jargon, but kept within bounds it performs a useful function, as any practising barrister will know. The stresses of litigation can be such that without the conventions of restrained and courteous language argument and counter-argument could on occasions lead to unseemly verbal brawls which are not likely to appeal to any but the most avid devotees of American television courtroom drama.

Nevertheless some of the stock phrases of courtroom communication are hardly to be taken at their face value. They are a set form of response, formulae whose function is in their utterance and not in their content, being mere phatic communion (in the linguists' phrase), used to convey sociability

¹⁸ (1975) 91 L.Q.R. 457, 459.

rather than to communicate specific meaning.¹⁹ The fact that they are quite often incongruously and incorrectly used suggests that the words themselves mean nothing to some counsel who speak them, that they are a Pavlovian response, a conditioned reflex, triggered by what the judge has said and not intended to convey their superficial meaning. It is useful to have some conventional phrase to introduce a formal address or application made to the court, a function often performed by the expression "May it please Your Honour" or "If Your Honour pleases". It is also useful to have some conventional phrase as a response to some decision or direction given by the judge. "As Your Honour pleases" fulfils that function, expressing acknowledgment or acquiescence. But it is quite inappropriate to say "May it please Your Honour" as is sometimes done, in reply to a ruling from the bench. Of course it "pleases" His Honour — he has just said so — and it is pointless to express the hope that it will do so.

In the passage from David Pannick's essay, which has already been quoted, the language used by counsel in court is stigmatised as euphemistic. But that is not its significance, if indeed it can properly be called euphemism, a less distasteful word or expression substituted for one more directly in point. Expressions like "with respect" are only polite softenings of the disagreement to follow, equivalent to "If you don't mind my saying so . . ." or "Excuse me, but . . ." in a non-legal context. The significance of language in court is that it is subject to unusually severe constraints of what is thought appropriate and that appropriateness is based on what was thought appropriate in comparable circumstances three or four hundred years ago. It is on the ground of being out of date, not of being euphemistic (if it is) that it is most open to criticism.

Euphemism, however, performs a useful function and is to be found within and without the law and indeed in any culture. Conforming to the convention that all women are young and svelte, while catering for those who are not, a dress shop will advertise "non-petite fashions" (seen in Christchurch) and never "cheap clothes for fat old women" (the title of an article by Marghanita Laski). We may say of a dog that it had died, but of a person many of us will soften the blow by saying he has passed away or passed on. So the Akan of West Africa will say of a dog that it has died (oewu), but of a person that he has tarried somewhere (oaka beebi). The ancient Romans would not, any more than Victorian Englishmen, in public speeches refer explicitly to sexual activity, even in trials about adulterous intrigues. They called in aid such words as "games" and "delights". English lawyers talked of crim. con. (criminal conversation), meaning adultery. It is when notions of what is inappropriate change that euphemisms come in for criticism. Since Victorian times ideas of unseemly language referring to the three standard subjects of euphemism in English speech — death, sex and excretion — have changed considerably. The sixties and seventies in particular were one of those times when "culture turns over in its sleep and adopts a new posture" and indeed it has not settled down comfortably yet. Changed notions of appropriateness are reflected in the law no less than in any other formal context, but not because the context is legal. The Vagrancy Act 1824 (U.K.)

¹⁹ The phrase has been adopted from the anthropologist Bronislaw Malinowski's discussion of preliterate language in C.K. Ogden and I.A. Richards, *The Meaning of Meaning* (London 1930) p.315.

punishes anybody "lewdly and obscenely exposing his person with intent to insult any female". In 1970 one Evans exposed part of his stomach (but no more) through the top of his open fly, and was prosecuted, but acquitted on appeal. "It seems to me" said Ashworth J., "that at any rate today, and indeed by 1824, the word 'person' in connection with sexual matters had acquired a meaning of its own, a meaning which made it a synonym for penis. It may be, as Mr. Jacob said, that it was the forerunner of Victorian gentility which prevented people calling a penis a penis. But however that may be I am satisfied in my own mind that it has now acquired an established meaning to the effect already stated."²⁰ The Police Offences Act 1927 (N.Z.) also punishes exposure of the "person" but there is no reported discussion of the meaning of the word. An earlier and more extreme case is *Ex Parte Daisy Hopkins*.²¹ The Charter of Cambridge University, issued (in Latin) in 1561 (and rivalling for obscurity tautology and verbosity any latter-day insurance policy or hire-purchase agreement), empowered the Vice-Chancellor to imprison "*publicis mulieribus pronubis vagabondis et aliis personis de malo suspectis*". Daisy, a prostitute, was apprehended while walking with a student towards her rooms. She was charged with "walking with a member of the University" and "sent to the Spinning House" (a euphemism for the University gaol). Before the High Court the Vice-Chancellor contended in vain that the charge was in standard form and was "always understood" to mean that the woman charged was in company with an undergraduate for an "immoral purpose". Although all concerned knew what was meant and intended, the euphemism was too much for the court. The university "could not use a form of words which did not give jurisdiction, and yet give themselves jurisdiction by saying 'Oh, we meant them in a sense which would have given us jurisdiction, and they are words which we understood to give us jurisdiction'."²²

The significance of the language used in court is, as we have said, that its appropriateness and framework of restraint is essentially what was appropriate long ago, from which the general practice of society has moved away. It is merely one aspect of the behaviour of lawyers in court. That behaviour, physical sartorial or linguistic, is largely the fossilised behaviour of the sixteenth and earlier centuries, not then confined to legal contexts. There are rules about when you stand and bow, and when you stand and do not bow; there are rules about the dress you may wear and may not wear; and there are rules about the forms of address and the style of your discourse. The nature of that behaviour, of which that discourse is one facet, is most easily perceived in the uniforms which lawyers wear in court. Uniforms have their functions, and there are arguments in favour of wig and gown. But there are courts which are able to conduct their business in contemporary dress without loss of decorum or effectiveness. The Judicial Committee has never worn robes (being in theory of course not a court at all); members of the Court of Appeal have dispensed with wig and gown, though they still go through the ritual of mutual obeisance, like the mating dance of some strange and sombre birds. It seems a little odd that barristers, especially women, are required to wear Tudor men's outer garments and the headgear

²⁰ *Evans v. Ewels* [1972] 1 W.L.R. 671, 674.

²¹ (1891) 61 L.J.B. 240.

²² Both cases are mentioned by Pannick; see fn.17. For Roman euphemisms, see J.N. Adams, *The Latin Sexual Vocabulary* (Baltimore 1982) p.222.

of the Caroline men's world of fashion. Wigs were introduced to the court of Charles II in 1663 and soon became general fashionable men's wear within and without the law courts, but as a substitute for the wearer's own hair, and not as an insecure adornment of a full head of natural hair. The ordinary mediaeval "long robe" gave way to the open-fronted gown about the time of Henry VII, and this was worn by lawyers and laymen alike. The Inns of Court began regulating the use of gowns a century or so later in 1573. Gowns went out of fashion for general use in Charles I's time but continued to be worn as a legal uniform. The present plain black barrister's gown is the style adopted as mourning dress on the death of Charles I in 1685. Ordinary mortals have got over that loss and their dress fashions have changed from time to time since the age of the Stuarts, but barristers have continued for three hundred years and still continue in New Zealand, wittingly or not, to mourn the death of the last but one of the Stuart kings of England.²³

There is one quirk of conventional courtroom speech which seems to have been adopted unthinkingly in this country with the common law, but fortunately without the disparagement of non-practising lawyers apparently implicit in its use in England, that is, the convention that a barrister who holds a doctorate is not shown the courtesy of being addressed as "Doctor" but is addressed as "Mister". The reason for the practice remains obscure. Perhaps it goes back to the rivalry between common law courts and ecclesiastical courts; advocates in the latter generally and in later years invariably held the degree of Doctor of Civil or Canon Law, and as late as 1768 the society of Doctors Commons, originally formed about 1494, was incorporated as The College of Doctors of Law exercent in the Ecclesiastical and Admiralty Courts. Perhaps it is a vestigial animus against Oxford and Cambridge as seats of learning rivalling the Inns of Court (which were indeed sometimes referred to in the seventeenth century as the Third University, but which conferred no degrees like those of Universities in England and on the Continent). Perhaps it is the disdain of academic lawyers exhibited by some English barristers and judges from which we are fortunately free. Professor L.C.B. Gower has said, contrasting English practice with that of the United States:

No professor as such has ever been "elevated" to the High Court bench, no judge has ever "descended" from the bench to a professorial chair, and nothing is more nauseating than the patronising air of mock humility usually affected by one of His Majesty's judges when addressing an academic gathering.

This was said in 1950, but remarks to similar effect have been made since, and as an expression of English academic sentiment it does not seem to be out of date. Writing in 1978 Dr. J.H. Baker said for instance²⁴

²³ W.N. Hargreaves-Mawdsley, *A History of Legal Dress in Europe* (Oxford 1963). J.H. Baker, "History of the Gowns worn at the English Bar" (1975) 9 *Costume* 15. (Baker describes Mawdsley's book as "full of inaccuracies and inconsistencies".) It is sometimes said, by a kind of wildly inaccurate "folk-etymology" that the mitten-shaped appendage worn over the left shoulder is a discrete pocket for the barrister's fee. It is in fact a vestigial mediaeval hood.

²⁴ L.C.B. Gower, "English Legal Training" (1950) 13 *M.L.R.* 137, 198. J.H. Baker ed., *The Reports of Sir John Spelman* (London 1978) vol.II p.29. But see Lord Diplock in (1975) 91 *L.Q.R.* 457.

The divorce between English legal education and the universities undoubtedly had some distasteful consequences. There was a school of lawyers — and they still have descendants in the Temple — for whom it was almost a point of honour to reject fine letters and what is now termed “academic thought”.

Whatever the reason, in England the practice seems to be the unattractive reverse of the coin of group support and esteem among lawyers, a coin whose obverse can in New Zealand be so heart-warming, and in New Zealand it seems to be an unconsidered following of the practice of the fountain-head of the common law.

The reasoned analysis of law and fact, and the intellectual discussion of problems which constitute the judgments of courts in the common law world differ little in linguistic nature from one country to another. New Zealand judgments are perhaps more matter of fact than those of English courts, and are not adorned with the occasional literary and historical allusions which grace the latter. Such allusions often reveal the classical education which at least until the advent of legal aid was the usual intellectual equipment of the social class from which the bar and the judges were drawn. In *Re Berkeley Securities (Property) Limited*,²⁵ Vinelott J. was faced with circumstances which a New Zealand lawyer might well have described as a “catch 22 situation” an expression generally understood since Joseph Heller’s novel *Catch-22* was published in 1961. But what Vinelott J. said was: “The question appears to present a paradox worthy of Epimenides”. In New Zealand on the other hand the standard of linguistic education, particularly the study of the classics, has always been low. It is many years since Latin was a compulsory subject for a law degree and there must be few lawyers who have any knowledge of the language beyond the technical phrases of the law. Mismanagement even of those phrases is increasingly common.

Greece is a less usual source of analogy or vocabulary than Rome, even ignoring the strong Latin element in the technical language of the law, but there are other instances of language drawn from the Greek. In *Hongkong Fir Shipping Co. Limited v. Kawasaki Kisen Kaisha Limited*,²⁶ Diplock L.J. described what is more usually called a bilateral contract as “synallagmatic”. Apart from the initial difficulty of getting one’s tongue round the word the remark earned a good deal of criticism, on the basis that Diplock L.J. was being just too clever. In *U.D.T. Commercial Limited v. Eagle Aircraft Services Limited*²⁷ however, he returned with a spirited defence.

In *Hongkong Fir Shipping Co. Limited v. Kawasaki Kisen Kaisha Limited* . . . I was careful to restrict my own observations to synallagmatic contracts. The insertion of this qualifying adjective was widely thought to be a typical example of gratuitous philological exhibitionism but the present appeal does not turn upon the difference in legal character between contracts which are synallagmatic (a term which I prefer to bilateral for there may be more than two parties), and contracts which are not synallagmatic but only unilateral, an expression which like synallagmatic, I have borrowed from French law (Code Civile Articles 1102 and 1103).

Nothing daunted, in *United Scientific Holdings Limited v. Burnley Borough Council*,²⁸ Lord Diplock used the word two or three times and did the same

²⁵ [1980] 2 All E.R. 513, 528.

²⁶ [1962] 2 Q.B. 26, 65.

²⁷ [1968] 1 All E.R. 104.

²⁸ [1977] 2 All E.R. 62.

in *Sudbrook Trading Estates Limited v. Eggleton*²⁹.

Lord Scarman showed that he was not to be outdone in familiarity with Greek language and literature. In *Bunge Corporation v. Tradax S.A.*³⁰ he said:

The contract when made, was, to use the idiom of Diplock L.J. in *Hongkong Fir . . .* and Demosthenes (Oratt, Attici, Reiske 867.11), "synallagmatic" i.e. a contract of mutual engagements to be performed in the future, or, in the more familiar English/Latin idiom, an "executory" contract.

In the same case Megaw L.J. preferred the Latin idiom, quoting "Lord Radcliffe's classical definition of frustration":

. . . a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do . . .

There are of course many Greek and Greek-based words in the general vocabulary and these occur in judgments as part of that vocabulary, not as technical legal terms, and their correct use depends on the type and standard of education of the user. The process by which "incorrect" usage becomes "correct" by general adoption is adverted to below. It cannot yet be said that the word *criteria* is correctly used as a singular (and *criterion* is ready to hand if a need for the singular is felt), but it is used as such from time to time, even by judges. In *A.H.I. Operations Limited v. Department of Labour*, Heron J. referred to absolute liability under the Machinery Act 1950 as "that criteria".³¹ The word is frequently used in the course of town planning proceedings, and not always as a plural. In the High Court judgment of *Papakura City Council v. Salutation Hotels Limited*³² a Planning Tribunal decision is quoted, and the same passage is quoted in the summary of the judgment in *Recent Law*.³³ In the latter occur the words "a site unsuitable within that criteria". The context suggests that this is an accurate quotation. (Among other things, when using his own words the reporter treats the word as a plural.) In the former report, however, the expression is "those criteria" which suggests an amendment by the editor. (Indeed the English of some High Court judgments is discreetly edited before the decision appears in print, as comparison of the typescript and the printed text demonstrates.) Such differences are a warning that unless one hears the judgment delivered there may be some doubt as to the author of a solecism — judge, stenographer, reporter, editor, typesetter, proofreader or another. A Law Society seminar paper on banking law, of 1985, points the same way. Lord Buckmaster is quoted as saying in *Lloyds Bank v. E.B. Savoy & Co.*³⁴ that certain rules "afford a very valuable criteria". This startling remark (and spelling and grammatical errors in the same paragraph) make the quotation immediately suspect. What the report in fact says is "a very valuable criterion". Equally

²⁹ [1982] 3 All E.R. 1, 5.

³⁰ [1981] 2 All E.R. 513, 543.

³¹ [1987] N.Z.L.J. 520.

³² (1982–83) 8 N.Z.T.P.A. 417, 419.

³³ *Recent Law* (1982) 371, 374.

³⁴ [1933] A.C. 201, 212.

surprising is the remark attributed in *South Tottenham Land Securities Ltd. v. Millett (Shops) Ltd.*³⁵ to O'Connor L.J. "The only dicta of relevance is to be found in the speech of Lord Diplock . . .". The Weekly Law Reports³⁶ report him as saying "the only dicta . . . are to be found . . .".

A Greek-based word which occurs more frequently in legal contexts, and which furthermore is of legal provenance is "draconian". It has been completely absorbed in English and very rarely must any thought be given to its original non-metaphorical meaning but there is still a faint trace of its origins in the capital D with which it is sometimes written. In a 1985 Delaware judgment³⁷ for instance it is written that "a corporation does not have unbridled discretion to defeat any perceived threat by any Draconian means available . . ." and in *Canterbury Club (Inc.) v. Christchurch City Council*,³⁸ Jeffries J. said: "Even if the Draconian effect of the declaration were ameliorated . . .". In *E.M.I. Limited v. Pandit*,³⁹ Templeman J. said: "The order sought by the plaintiff appears, to misuse a currently popular phrase, to be Draconian". That was a case about an Anton Piller order, though it preceded the eponymous leading authority, and the word appears somewhere in the judgments in most such cases. In *Columbia Picture Industries Inc. v. Robinson*,⁴⁰ for instance, Scott J. refers to "the draconian and essentially unfair nature of Anton Piller orders from the point of view of the respondents". What Templeman J. had in mind in referring to the "misuse" of the expression is not revealed. Perhaps he was thinking that Drakon's laws imposed criminal sanctions; perhaps he considered the consequences of an order not severe enough to merit the phrase. The word is one more example of a faded metaphor and now means little more than "having serious consequences". Originally, however, it referred to the Athenian leader who in 621 B.C. is said to have proposed laws of extreme severity, imposing the death penalty for a multitude of petty and serious crimes alike, laws which were rejected by the Athenian assembly.

Latin tags and words are more common in English judgments than Greek allusions, but again they are part of the general cultural background of those concerned, apart from the technical maxims and terms of the law. A casual reading of the reports will reveal remarks such as that of Bankes L.J. in *Marshall Shipping Co. v. Board of Trade*⁴¹ ". . . where an action is brought to recover back money extorted *colore officii* the action lies against the person who actually extorted the money . . .". Such language is absent from New Zealand judgments, modern judgments at least. That is not to say that no New Zealand judges know any Latin, though they are probably few and becoming fewer. The intellectual atmosphere and the style are different. Certainly the audience to whom judgments are addressed are unlikely to know any Latin, technical phrases apart. Latin words are treated by barristers and academic lawyers of standing and experience in a way that would make a classicist wince, as later examples will show. One calls to mind the remark made in an English context by a reviewer of "Street on Torts" which she described as "a no-nonsense teaching text designed for the training of

³⁵ [1984] 1 All E.R. 614 at 616.

³⁶ [1984] 1 W.L.R. 710, 713.

³⁷ Quoted in 102 L.Q.R. 566.

³⁸ 11 N.Z.T.P.A. 417, 420.

³⁹ [1975] 1 W.L.R. 302, 304.

⁴⁰ [1986] 3 All E.R. 338, 371.

⁴¹ [1923] 2 K.B. 343, 350.

competent but no longer cultured legal technologists".⁴² If New Zealand lawyers have, as Ben Jonson said of his "Beloved Mr. William Shakespeare" small Latin and less Greek, perhaps they have filled the void in other ways. But they still have to cope with a technical language steeped in Latin.

Lord Radcliffe's remark that *non haec in foedera veni* has already been quoted and was quoted also by Megaw L.J. in another case. At an earlier date the Privy Council considered in *Smith v. McArthur*⁴³ the predecessor of section 5(j) of the Acts Interpretation Act 1924 (N.Z.) which they said "after all, only expresses what is meant by the old legal maxim '*Qui haeret in littera haeret in cortice*,'" and in the intervening years there had been other citations of Latin authors and Latin maxims. The judges are still, like Jacques' Justice, "full of wise sawes and moderne instances" though within and without the law proverbs and maxims are used much less often today than once they were. Occasionally, however, the lawyer's habit of considering what former judges have said still brings to the surface some "wise saw" from the past. Thus in *R. v. Howe*,⁴⁴ Lord Hailsham L.C. referred in 1987 to the commentary made by Lord Coleridge C.J. in 1881 on what Lord Chancellor Bacon had to say soon after 1600 about the maxim *necessitas inducit privilegium quoad iura privata*, more familiar in its English parallel "necessity knows no law". Most such sayings are part of the common stock of knowledge and occur in judgments without any special legal significance. Expressions such as *brutum fulmen*, *terminus ad quem*, *sine qua non*, *ex abundantia cautela*, are not confined to lawyers. One word which has seeped into general use from the technical legal vocabulary however, is *ignoramus*. Literally, of course, it means "we do not know" and in Tudor and Stuart times, an age when Latin was the language of record, was the way in which a grand jury's return (spoken in English) was recorded in a case where they found insufficient evidence to go to a petty jury. In 1616, when there was so much tension between James I and Coke, a play was written and performed by students of Trinity College Cambridge (Coke's old college) for the entertainment of King James. It was a satire on common lawyers, and the principal character was a pompous old lawyer named *Ignoramus*. In fact it was meant as a caricature of the town recorder, one Brackyn, but was taken by the royalist party as an attack on Coke. Thereafter the word passed into general use with its present meaning of an ignorant person.⁴⁵

Lord Scarman's riposte about Demosthenes, quoted above, brings to mind a judgment of Eve J.:⁴⁶

Again, in one case a man was injured while trying to help in preventing a horse from bolting. The Court of Appeal held that he could not recover damages from the owner of the horse,

⁴² (1984) 47 M.L.R. 490.

⁴³ [1904] A.C. 389, 398.

⁴⁴ [1987] 1 All E.R. 771, 779.

⁴⁵ C.D. Bowen, *The Lion and the Throne* (London 1957). The O.E.D. refers to a play, "Ignoramus" by Ruggles, acted in 1615, and a book by R. Challis, Serjeant at Law, published in 1648, *The Case and Arguments against Sir Ignoramus of Cambridge in his readings at Staple's Inn*. In 1630 William Prynne, the Puritan polemicist, was referred to in a book written by his former Oxford tutor, entitled *The Lawlesse Kneesse Schismatical Puritan*, as "Mr Ignoramus, a young scholler, a stranger to metaphysical Divinitie". (C.S. Emden, *Oriel Papers*, (Oxford 1948) p.47).

⁴⁶ *Cutler v. United Dairies* [1933] 2 K.B. 297, 307; as noted by Sir R.E. Megarry, among many entertaining dicta: *Miscellany-at-Law* (1955) and *A Second Miscellany-at-Law* (1973).

and in so doing Scrutton and Slesser L.JJ. used phrases such as *volenti non fit injuria*, *post hoc propter hoc*, *causa sine qua non*, *causa causans* and *novus actus interveniens*. The judgment of the third member of the court, Eve J., was brief: "I agree, and in order not to fall behind my learned brethren in Latinity, I express my conclusion this way: that the injuries sustained by the respondent were due to a course which he adopted *ex mero motu*".

The law of negligence has moved on however since that was a leading case and one hears less costly and unenlightening discussion about *causa causans*, *causa sine qua non*, and the like. The long slow movement away from Latin as a language of learning in the law also continues. In *R. v. Miller*,⁴⁷ Lord Diplock said:

I think it would be conducive to clarity of analysis of the ingredients of a crime that is created by statute, as are the great majority of criminal offences today, if we were to avoid bad Latin and instead to think and speak . . . about the conduct of the accused and his state of mind at the time of that conduct, instead of speaking of *actus reus* and *mens rea*.

The reference to "bad" Latin seems to imply that legal Latin should be classical Latin, but that is open to question. (Lord Diplock can only have been referring to the written language. Spoken legal Latin, discussed below, would be Greek to Cicero.) Certainly in late Renaissance times (in England as late as the early sixteenth century) the study of classical Latin was revived. But it was a dead and fossilised language, markedly different from the spoken and written language of mediaeval records and writings on law and administration, a language changed and changing over the centuries.⁴⁸

The habit of embodying thought in the form of proverbs and aphorisms found expression in a legal context in the habit of encapsulating legal rules and principles in the form of maxims. This was particularly so in the case of equity, where it became common in the eighteenth century to expound doctrines in that form. Many of them were formulated at a time when Latin was still the language of learning: *qui prior est tempore potior est iure*; *vigilantibus non dormientibus iura subveniunt*; *aequitas est aequalitas*. Though the principles had been recognised a century or more earlier, for the most part their modern articulation dates from the publication of Richard Francis' *Maxims of Equity* in 1728.⁴⁹ But this form of expression was not and is not confined to equity. The common law abounds in such apophthegms as *volenti non fit iniuria* (a saying as old as Bracton, c.1258), *qui facit per alium facit per se*, *nemo dat quod non habet*, and the like. Richard Francis' *Maxims* was the counterpart of William Noy A.G.'s book *On the Grounds and Maxims of the Laws of this Kingdom*, written a century earlier.

Sometimes these sayings took the form of metaphors personifying or reifying the conception. Perhaps the best known such metaphor or simile, to the point of cliché, is Selden's comparison of equity with the Chancellor's foot. It was quoted for instance by Lord Scarman in *Dupont Steels Limited v. Sirs*⁵⁰ and has been cited by many others. John Selden — antiquary, philologist, heraldist, linguist, jurist and statesman, described by Hugo Grotius, the Dutch

⁴⁷ [1983] 1 All E.R. 978, 980.

⁴⁸ There seems to be no specific study of legal Latin, but see F.W. Maitland, *Domesday Book and Beyond*, pp.270, 316, and on Latin in England generally Dag Norberg, *Manuel Pratique de Latin Medieval* (Paris 1968), pp.43-49, 68ff, and L.R. Palmer, *The Latin Language* (London 1954).

⁴⁹ R.P. Meagher Q.C. et al, *Equity: Doctrines and Remedies*, 2 ed. (Sydney 1984) p.67.

⁵⁰ [1980] 1 W.L.R. 142, 168.

international jurist, as “the glory of the English nation” — was one of the brightest stars in the firmament of Stuart times. Richard Milward, his amanuensis, his Boswell, collected many of his sayings, but they were not published until 1689, long after his death, as *Table Talk*. Arranged in alphabetical order of headings they consist of anything from a sentence to half a dozen paragraphs. In the entry under Equity we read:

Equity is a roguish thing, for law we have a measure, know what to trust to, Equity is according to Conscience of him that is Chancellor, and as that is longer or narrower so is Equity. 'Tis all one as if they should make the standard for the measure we call a Chancellor's foot, what an uncertain measure would this be. One Chancellor has a long Foot, another a short Foot, a third an indifferent Foot. 'Tis the same thing in the Chancellor's Conscience.

There is, however, a more recent personification or reification of discretionary justice less easily traced to its origin: “palm tree justice” or “the Qadi under the palm tree” an analogy which is as much a caricature of the Shari'a as the Chancellor's foot is of modern equity. K.M. Gresson J. said in *Thomas v. Thomas*⁵¹, a case turning on the Married Women's Property Act 1952:

There is a difference between cases in which the question is one of possession and cases where there is a question of title. The former can be and are commonly determined upon what has been called “palm tree justice”. The latter apparently must be decided according to law.

This appears to have been prompted by a dictum on the English Act in *Newgrosh v. Newgrosh*⁵² where Bucknill L.J. said of palm tree justice:

I understand that to be justice which makes orders which appear to be fair and just in the special circumstances of the case.

That definition, however, does not exclude justice according to law. The expression is more usually taken to mean untrammelled discretionary justice, justice without law, and perhaps that is what the Lord Justice meant. Bucknill L.J.'s remarks were later quoted in *Rimmer v. Rimmer*⁵³ and *Gissing v. Gissing*⁵⁴. In *McPhail v. Persons Unknown*⁵⁵ Lawton L.J. said: “Were I a *cadi* dispensing justice under a palm tree . . .” The metaphor is fairly common; a random example is the article by C.B. Cato, “Mistake and Restitution: A Defence of *Conlon v. Ozolins*⁵⁶ where both the Chancellor's foot and palm tree justice are referred to.

There was a proverbial saying current for two or three centuries after the reign of Queen Elizabeth I which throws some light on linguistic folklore and also reflects the popular regard in which Plowden, the Elizabethan law reporter, was held. Edmund Plowden was an able, sanguine and attractive character, but he was a Catholic, and that was dangerous in Queen Elizabeth's time. It was then a criminal offence to take part in the celebration of Mass. The Plowden family papers record that ill-disposed persons tried to entrap

⁵¹ [1956] N.Z.L.R. 785, 786.

⁵² [1950] L.J. 525; [1953] 1 Q.B. 63, 68.

⁵³ [1952] 1 Q.B. 63, 68.

⁵⁴ [1969] 1 Ch. 85, 94.

⁵⁵ [1973] 2 W.L.R. 71, 78.

⁵⁶ [1985] N.Z.L.J. 172.

Plowden by staging a ceremony conducted by a bogus priest. Plowden was accused, but on questioning his accusers uncovered the fact that the "priest" was bogus, whereupon he said: "The case is altered; no priest, no Mass", a remark which became part of the common stock of proverbial sayings. Plowden died in 1584. The story appears in the second edition of a book of proverbs published in 1678 where it is said it "continues still in Shropshire [where Plowden lived] with this addition: 'The case is altered (quoth Ployden). No priest, no Mass'." But another version was already current and is noted in the same book:

Plowden being asked by a neighbour of his, what remedy there was in Law against his neighbour for some hogs that had trespassed his ground, answered, he might have very good remedy; but the other replying that they were his hogs, "Nay then neighbour" quoth he, "the case is altered".

In June 1857 a correspondent of *Notes and Queries* wrote⁵⁷

I saw this sign once pictorially represented in the west of England, thus: A person, with a large wig and gown, was seated at a table; another, dressed like a farmer, stood talking to him. In the distance, seen through the open door, was a bull. The story of course is that related of Plowden, the celebrated lawyer, and which now is found in most books of fables. The farmer told Plowden that his (the farmer's) bull had gored and killed the latter's cow. "Well," said the lawyer, "the case is clear, you must pay me her value." "Oh but," said the farmer, "I have made a mistake; it is your bull who has killed my cow." "Ah, the case is altered," quoth Plowden. This expression had passed into a proverb in old Fuller's time.

The law still expresses principles and doctrines in the form of maxims, usually in Latin, and although the practice is diminishing it has not done so to the extent that similar formulae — proverbs, aphorisms, apophthegms — have faded from common usage in other contexts. This prompts the question, why did and why does the law use this form of language? And why are the maxims usually in Latin? One may hazard a guess that maxims are a linguistic structure that has survived from a time when language was almost entirely oral to a time when much language is written and in consequence has developed different structures. The nature of oral-aural linguistic habits has received a good deal of attention over the last three or four decades, ranging from the study of oral epics written down in the very early days of literacy, such as the *Iliad* and *Beowulf*, to the speech habits of entirely pre-literate modern tropical African communities; and it is clear not only that those habits differ from those of written language, but that the habits persist for a very long time in written form after written language becomes common.⁵⁸ "Oral formulaic thought and expression ride deep in the consciousness and the unconscious, and they do not vanish as soon as one used to them takes pen in hand".⁵⁹ It is a marked characteristic

⁵⁷ H. Foley, *Records of the English Province of the Society of Jesus* (London 1878) Vol.IV pp.538-542; (1857) 4 *Notes and Queries*, 2nd Series, pp.299, 418. For a rather more sceptical view, see G. de C. Parmiter, *Edmund Plowden: An Elizabethan Recusant Lawyer* (Catholic Record Society 1987), p.55.

⁵⁸ Walter K. Ong, *Orality and Literacy* (London, New York 1982), bibliography; Jack Goody, *The Interface between the Written and the Oral* (Cambridge 1987); Agathe Thornton, *Maori Oral Literature as Seen By a Classicist* (Dunedin 1987). The expression "oral literature" has been rightly criticised as self-contradictory, but there is no convenient alternative.

⁵⁹ Ong, *op.cit.* p.26.

of oral cultures that they express ideas and refer to things to be remembered in set verbal formulae, which are mnemonic aids to people who cannot "make a note of it" or "look it up". Once a word is spoken, it is gone with the wind; speech is an action, not a thing existing through time, and in preliterate communities preservation of the thought it expresses depends entirely on memory assisted by one mnemonic device or another. As Mohi Tawhai put it at a meeting called to sign the Treaty of Waitangi⁶⁰

[T]he sayings of the Pakeha float light, like the wood of the whau tree, and always remain to be seen, but the sayings of the Maori sink to the bottom like a stone.

The formulaic habit and the persistence of set forms appears strongly even in preliterate groups within substantially literate communities, such as young children.⁶¹ Of wholly preliterate communities W.J. Ong has written:⁶²

The law itself in oral cultures is enshrined in formulaic sayings, proverbs, which are not mere jurisprudential decorations but themselves constitute the law. A judge in an oral culture is often called on to articulate sets of relevant proverbs out of which he can produce equitable decisions in the case under formal litigation before him.

Some knowledge of writing of course preceded anything that could be called the common law, in England or elsewhere, but the first introduction of writing should be distinguished from its general diffusion, which may be several centuries later.⁶³

As to legal maxims being still expressed in Latin, at a time when verbal intercourse was changing "from memory to written record" Latin was the language of record and of any serious discourse.⁶⁴ Later there was a great revival of classical Latin. The sixteenth century was a time when anybody who was anybody — or at least any man who was anybody — was fluent in spoken and written Latin, and Latin was the medium for any serious discourse. The accepted educational theory of the fifteenth and sixteenth centuries was that little boys should be taken away from the shelter of their mothers and over the ensuing years until manhood undergo a rigorous process of having Latin beaten into them, and of learning the conventions of formal "rhetoric". In his educational manual *The Boke Named the Governour* (1531) Sir Thomas Elyot said:

After that a childe is come to seven years of age, I hold it expedient that he be taken from the company of women, saving that he may have, one yere, or two at the most, an ancient and sad matrone attending on him in his chamber. ("Sad" then meant "serious")

In 1563 Roger Ascham — who was, however, opposed to beating children — wrote his influential *The Scholemaster*, "a plain and perfite way of teaching children to understand, write and speak the Latin tong". So rigorous was

⁶⁰ Quoted by D.F. McKenzie, "The Sociology of a Text" in P. Burke and R. Porter eds., *The Social History of Language* (Cambridge 1987) p.161, 188.

⁶¹ *The Lore and Language of Schoolchildren* (Oxford 1959) p.2. See also the same authors' *The Oxford Dictionary of Nursery Rhymes* (Oxford 1951) p.8.

⁶² Ong, op.cit. p.35.

⁶³ Jack Goody and Ian Watt, "The Consequences of Literacy" in Jack Goody ed., *Literacy in Traditional Societies* (Cambridge 1968) p.40.

⁶⁴ M.T. Clanchy, *From Memory to Written Record: England 1066 to 1307* (London 1987) ch.6.

the curriculum then advocated for the learning of Latin, coupled with the inculcation of "courage" that W.J. Ong even propounds the notion that the process was a rite of passage to manhood, a form of puberty rite.⁶⁵

The long persistence of maxims in the language of the law is consistent with the law's habit of looking backwards to seek precedents for present action. This habit is particularly noticeable in English judicial practice (and at a distance one may wonder how much it now has to do with electronic retrieval systems). Where the status and power of ancient institutions are in issue, such as those of a University Visitor, the citing of sixteenth and seventeenth precedents may well be expected; but perhaps a modern decision on "the obsolete but not dead" doctrine of contempt of a statute could be reached without the need to study Coke's commentary of 1620 on the 1275 Statute of Westminster the First; and certainly one might expect an answer to the question, can a lease be forfeited as to part only of the demised premises, not to turn, in 1981, on what in modern terms amounts to an obiter dictum of Popham C.J. reported by Coke in 1602.⁶⁶ The fall away in regard for and knowledge of classical culture, the Latin language in particular, will no doubt result in a fall away in the Latin expression of legal principles, in England and even more in New Zealand, and this in turn will tend towards the atrophy of those characteristics of orality which still persist in legal literacy, in New Zealand as elsewhere.

There is one legal maxim which is now out of fashion, but which, when applied to language, encapsulates exactly the process of change against a background of conservative resistance, and that is, *communis error facit ius*. In a legal context it has changed in meaning — or at least in application — over the centuries, from the notion that law is what is the general consensus of lawyers, not necessarily what the judge says on the bench, through a reluctance to overrule aberrant precedents, to an acceptance of conveyancing opinion and practice on which property rights depend even if they are wrong.⁶⁷ In the High Court of Australia, Menzies J., after referring to the general opinion of the validity of a covenant, which he thought was in truth void, said in *Creer v. P. & D. Lines*:⁶⁸ "In such circumstances, upon a matter of conveyancing I consider conformity to be more important than originality" and upheld the erroneous view, but without referring to the maxim. In an earlier age Willes L.C.J. had said: "Surely it is a much less evil to make a construction, even contrary to the common rules of law (though I think this not so) than to overthrow may I say 100,000 settlements; for it is a maxim in law, as well as reason, *communis error facit ius*".⁶⁹ A century

⁶⁵ W.J. Ong, *Rhetoric Romance & Technology* (Ithaca, London 1971) ch.5.

⁶⁶ *Thomas v. University of Bradford* (1987) 1 All E.R. 836 (cf. *Norrie v. Senate of the University of Auckland* [1984] 1 N.Z.L.R. 129); *R v. Horseferry Road Magistrates Court* [1986] 2 All E.R. 666; *G.M.S. Syndicate Limited v. Gary Elliot Limited* [1981] 1 All E.R. 619.

⁶⁷ Nineteenth and early twentieth century cases discussed in C.K. Allen, *Law in the Making* (Oxford 1951) pp.300 ff. On the period before the sixteenth century, see J.H. Baker, "English Law and the Renaissance" in his *The Legal Profession and the Common Law* (London 1986) p.472. "A mediaeval judge on the other hand had no more individual authority to declare the law than an individual serjeant, or a reader lecturing in the Temple. Certainly he had no authority to question what the profession in general thought the law to be; and whether he was sitting on the bench or at the dinner table would have been considered an irrelevant circumstance."

⁶⁸ (1971) 45 A.L.J.R. 697, 699.

⁶⁹ *Smith d. Dormer v. Packhurst* (1742) 3 Atkyns 135, 139.

and a half earlier again, in 1597, Popham C.J.K.B. had said: "Although it be error, yet the long use and multitude of precedents must draw it into a law, for communis error facit ius . . ."70; and a century and a half later Lord Blackburn said of the proposition that the transfer of possession of land amounts to sufficient part performance, "if it was originally an error it is now I think communis error and so makes the law".71

Applied to language the maxim presupposes that there is a right use of language and a wrong, and certainly that is a recurring view. English grammarians of the seventeenth, eighteenth and nineteenth centuries laid down what should be done, but their successors of this century are descriptive rather than prescriptive. Academies have been established in Italy, France and South American countries from the sixteenth century onwards to try to control the correct way to speak, of which the most notorious is the French academy, established by Richelieu in 1635. The French even impose criminal sanctions on incorrect usage (mostly foreign borrowings) in some circumstances. A law of 1975 applied the penalties of fraud (80 to 160 francs for a first offence, 90 to 5600 francs for later offences) to the use in the news media of borrowings for which a supposedly adequate equivalent already existed.⁷² English speaking countries have been happily free of such regimentation, though Swift and Dryden and others did try to establish a controlling body in the eighteenth century. Nevertheless, many people hold strong views on what is correct usage; you must not split infinitives, you must not begin a sentence with "and" nor end it with a preposition. Winston Churchill, that master of rotund prose, had a robust view of such rules as his reaction to a Civil Service minute makes clear: "This is the kind of English up with which I will not put."

A person who cares for language, pays attention to what he says and is conscious of established meanings (and origins), will be naturally conservative and slow to accept new meanings and new words which begin their existence in a haze of uncertainty. Those who do not know and do not care will adopt changes more readily. Of the agents of linguistic change ignorance and carelessness, operating singly or together, must be two of the most powerful — carelessness, that is, as much in the sense of not caring about as in the sense of negligence, as in "couldn't care less". Ignorance of French and the French habit of putting the adjective after the noun is presumably the cause of the reversal in meaning (at least in America) of the ancient legal term *treasure trove*. *Trove* is of course the French for "found" (cf. *trover*), but in general use is now often treated as the name of the objects found, "treasure" being used in an adjectival sense. One or both of these factors must also be responsible for the remark of the motoring correspondent of the Christchurch Press (emphasised in a headline) that the new Jaguar is more malleable than the new B.M.W.. Since malleable means you can change its shape by hitting it with a hammer one is left wondering what he had in mind. The same causes may have led a T.V.N.Z. journalist during the Fijian crisis to describe an individual as "a cohort of Dr. Bavandra's" but at least he is not alone in using that word of a single person. More

⁷⁰ *Barkley v. Foster* (1597), translated and quoted by J.H. Baker, "New Light on Slade's Case" (1971) 29 C.L.J. 51, 222.

⁷¹ *Maddison v. Alderson* (1883) 8 App. Cas. 467, 489.

⁷² Dwight Bolinger, *Language: the Loaded Weapon* (New York 1980) p.45.

conservative or discriminating speakers are likely to recall that the metaphorical meaning, like the literal meaning, is confined to a large group of people seeking a common end. Cohort, of course, literally means a standard unit of the Roman army, one-tenth of a legion, in Caesar's day 600 men; but the meaning of a companion (often with pejorative overtones) is well on its way to becoming established. The hearer unfamiliar with a word he hears must judge the meaning from the context, and the meaning taken, like the ratio of a decision, depends on selecting the correct facts as significant. The word cohort is commonly used in the plural, but the significant fact is the groups, not the individuals; the battalions, not the soldiers; but *communis error facit ius*.

Lawyers spend much of their time striving for precision of language, but it is surprising how insensitive and sloppy some of them are in their use of words. For some reason the word "dicta" is often misused, though it must be clear to any lawyer that it means something different from "dictum". The learned judge is reported in *McKenzies (N.Z.) Ltd v. C.I.R.*⁷³ as saying "There is a line of cases founded on a dicta of Rowlatt J. . . .". The author (a barrister of experience) of the Law Society's seminar paper on Individuals' Claims against Local Authorities (April 1985) persistently uses dicta as a singular. So does the Senior Lecturer in Law who wrote the seminar paper on the Family Protection Act (and who also, in writing and speech, used the nonsense phrase *functus officius*). The solecisms in these two papers cannot be blamed on the typist; both authors repeated them in discussion. These aberrations raise questions. Just what conception does the speaker have in mind? If dicta is a singular, what is the plural and what is the meaning of dictum?

Latin apart, there are some surprising uses of ordinary English to be found in legal contexts, in many cases in documents where one would expect an editor or some such person to question the correctness of the usage. In Law Talk for the 19th March 1982 a book reviewer refers to the ending being "rather more tidier" than in real life. Fighting one's way through the thickets of legislation one will often stub one's toe on some solecism or other. The Rent Limitation Regulations 1984 twice use the expression "the later of the following dates" referring to three dates. The Local Government Act 1974 falls into the common confusion of "comprising" and "being composed of" in section 643, and so does regulation 10(3)(c) of the Superannuation Schemes Regulations 1983.

But it must not be supposed that insensitivity or incorrectness, whether of Latin borrowings or other words, is confined to lawyers. Academics who use language to communicate but not as a subject of study are not far behind. Dame Joan Metge of Victoria University uses neither/nor with more than two items: "the Maori had neither courts, justices nor police". It cannot be said that this is yet accepted as good usage, though it is changing in the same way as "alternative", once confined to one of two items only. (The second edition of Fowler (1965) unlike the first (1926). says "The notion that because it is derived from Latin alter (one or other of two), alternative cannot properly be used of a choice between more than two possibilities is a fetish". Dr. Ann Salmond of the University of Auckland, in her book *Hui* uses such expressions as "between each" and "they" used for one person.

⁷³ (1986) 9 T.R.N.Z. 368, 372.

The Senior Lecturer referred to above uses *dicta* three times as a singular and three times as a plural (apparently without disturbing the equanimity of the editor of the Law Journal).⁷⁴ Dr. P. Houghton of the University of Otago, in his monograph "The First New Zealanders" uses the word *data* indiscriminately as a singular and a plural. This is the more surprising as Houghton has written fiction and an entertaining account of circumnavigating New Zealand. But at this point perhaps we should also quote what Fowler has to say, under the rubric "illogicalities" about

... that pestilent fellow the critical reader. No longer can we depend on an audience that will be satisfied with catching the general drift and obvious intention of a sentence and not troubling itself to pick holes in our wording; the words used must nowadays actually yield on scrutiny the desired sense; to plead that anyone could see what you meant, or so to write as to need that plea, is not now permissible . . .

But we must not be too hard on the academics. "They" referring to one has persisted at least in colloquial speech since Anglo-Saxon times as a sex-indefinite singular pronoun, despite the grammarians; and "data" has virtually become a singular in its own right, separated from "datum".⁷⁵ Indeed the transmigration and complicated and subtle syntax of Latin plurals is a main area of change in English.⁷⁶ There is a gradation, with complete separation of meaning between singular and plural at one end, to a still clear recognition at the other that they are two forms of the same lexeme (word): *stamen/stamina*, *agendum/agenda*, *stratum/strata*, *desideratum/desiderata*. (The Government publishes annual tide tables, and invites the user to notify the Ministry of any errors discovered. Some years ago it was pointed out to the Ministry that tables for the 31 November seemed anomalous, and at the same time it was suggested that *data* (both *datum* and *data* being used) should take "are" and not "is"; to which the disarming and perfectly reasonable reply was made, that Master Mariners don't talk that way.)

There are of course many Latin words and phrases in the technical language of the law, but most of the individual words of the technical vocabulary are directly of French origin rather than Latin. There was a time when lawyers and would be lawyers — that relatively small group comprising judges and advocates and students of the Inns, but not the Doctors of the ecclesiastical courts — had to be trilingual in Latin, French and English. In the time of Selden and Plowden and Coke, Latin was still the language of learning and of court writs and records; many of Selden's scholarly writings, including his legal writings, were in Latin. But law French was the technical language, written rather than spoken, of the common lawyers. When Coke wrote for laymen or students, he wrote in English, but the notebooks for his own use and his reports were in French — of a sort. So were the notebooks of Port whose will has been quoted earlier, and Plowden's reports, the first to be written in anything like the modern form. Roger North, who died as late as 1724, even said: "Really the law is scarcely expressible properly in English" though Coke himself had written

⁷⁴ In an article printed in [1980] N.Z.L.J. 142.

⁷⁵ Bodine, "Androcentrism in Prescriptive Grammar: Singular 'they', sex-indefinite 'he', and 'he or she'" (1975) 4(2) *Language in Society* 129.

⁷⁶ Randolph Quirk, "Grammatical and Pragmatic Aspects of Countability" in his *Style and Communication in English Language* (London 1982) p.24.

Our English is as copious and as able to express anything in as few and apt words as any other native language that is spoken at this day. And (to speak what we think) we would derive from the Conqueror as little as we could.

(Woodbine has shown that it was not following the Conquest, but following the flood of French hangers-on who came to Edward I's Court in the thirteenth century, that most French words entered the legal language). But it was a dying language, mixed with English to an extent often ludicrous, and all it has left the law is some amusing reports and a large number of technical words. There was the prisoner who in the oft-quoted words from Dyer's reports, "*ject un Brickbat a le dit Justice que narrowly missed, & pur ceo immediately fut Indictment drawn per Noy envers le prisoner, & Son dexter manus ampute & fix al Gibbet Sur que luy mesme immediatement hange in presence de Court*". At the beginning of the fifteenth century, when English was replacing French in the upper reaches of government and society, just this sort of language could still be found in those circles. Thus in 1403 the Dean of Windsor wrote an urgent report to King Henry IV from the western Marches, ending: "*And for salvation of Your Schire and Marches al aboute, treste ye nought to no Leutenant. Escript a Hereford en tresgraunte haste, a trois de la clocke apres noone*". But already in 1400 George Dunbar, the Earl of March, could excuse himself when writing to the King: "And, noble Prince, marvel ye not that I write my letters in English, for that is more clear to my understanding than Latin or French".⁷⁷ Law French lingered on for another two or three centuries in the Inns and the courts, but latterly as a written language only. (In 1362 Parliament had enacted a statute directing that because French was ill-understood, proceedings in court should be conducted in English and recorded in Latin. The enactment itself was in French.) Woodbine, in the paper already referred to, cites a sentence from a yearbook of 1292-93 which contains, in the spelling of the time, the words *purchaser* (in the technical sense), *enfeoff*, *tenement*, *eject*, *tort*, *vouch to warranty*, *prochain heir*, *de son tort*, *demesne*: all French or French-based. Other expressions also, such as *cy près* and *laches*, are pure French; the many nouns from French verbs are nearly so: *attainder*, *cesser*, *disclaimer*, *interpleader*, *joinder*, *merger*, *rejoinder*, *remainder*, *render*, *tender*, and others less familiar. Maitland has said: "It would hardly be too much to say that at the present day [1895] almost all our words that have a definite legal import are in a certain sense French words".⁷⁸

New ways need new words, or at least new meaning for old words, and the sexual revolution of the sixties and seventies resulted in changes in language. "Gay" does not have the only meaning that once it had. For many of the new practices there already existed adequate words, but they were not adopted in general use, apparently for two main reasons. Either they were not in the ordinary person's vocabulary, certainly not in the active vocabulary and perhaps not in the passive vocabulary (words understood but not used), and were felt to have the musty smell of book-learning; or they had unwanted implications and emotional overtones. "Cohabitant" and "cohabitation" are long-established and appropriate for what they could now describe, but though

⁷⁷ Quoted in A.C. Baugh and T. Cable, *A History of the English Language* (Englewood Cliffs N.J. 3rd ed. 1952) pp.150, 151.

⁷⁸ F.W. Maitland, *Year Books of Edward II*, 17 Selden Society p.xxxviii. J.H. Baker, *A Manual of Law French* (Amersham 1979) p.17.

sometimes used by writers they are not used either in common speech or in the more formal context of the law, although the Destitute Persons Act 1910 did refer to people "cohabiting as man and wife". "Paramour" and "mistress" would need some extension of their usual meaning; they have the sexual but not the domestic connotation appropriate to the state of those who are "living together" (even if they would not admit to be "living in sin"). The current informal phrase — common apparently throughout the English-speaking world — is *de facto* marriage — or husband or wife — which in New Zealand at least is also used in the more formal atmosphere of the courts though not (yet) in legislation. (New South Wales has a *De Facto Relationships Act* 1984.) The phrase makes a distinction without a difference; either you are married, in fact and in law — *de facto* and *de iure* — or you are not; but logic never stood in the way of linguistic change. It appears to have originated in America (like the new meaning of "gay"), where an alternative, open to similar criticism, is "common law marriage" or husband or wife. There are however some States in America — thirteen in 1974 — which still recognise marriage in the strict sense by common law. Americans with their marvellous capacity for verbal invention have produced many words and phrases relevant to this this general field, ranging from obscure and banal euphemisms to the wonderfully apposite. In place of "cohabitant" the Ford Foundation prefers "meaningful associate" and the National Academy of Sciences "special friend" but for what it refers to what could be more appropriate than "palimony".⁷⁹

When a couple are apparently in a "de facto relationship" - cohabiting without marriage — their exact status may be factually uncertain and difficult to determine, depending as it does on objective facts and states of mind. The legal problem is similar to those which used to arise in cases of desertion and may still arise in cases of conditional testamentary gifts. In *Lichtenstein v. Lichtenstein*⁸⁰ a widow was left an annuity "so long as she shall not enter into a *de facto* relationship". It was held this meant a *de facto* marriage relationship, but this was conceptually too uncertain and the gift was void. The linguistic problems tend, in the law, to be dealt with by unnecessarily long-winded new phrases. No longer are spouses divorced; the "parties to the marriage" must describe themselves as "marriage partners" when they seek an "order dissolving the marriage".⁸¹

When unmarried cohabitation became more common and more open there was some resentment at the taxpayer supporting the woman in circumstances where the man would have been obliged to do so if they had been married. In 1977 the benefit paid to Mrs. Furmage was stopped on the ground that she and Mr. X, whose favours she enjoyed, were (in the words of the Social Security Act 1964) "living together on a domestic basis" though not in the same house. On appeal it was held that these words required the couple to be under the same roof though otherwise living "as husband and wife".⁸² The Act was then amended to refer to the parties as having "entered into a relationship in the nature of marriage". The linguist may regret that this case did not catch the public imagination enough for Mrs. Furmage's name to be adopted as a new succinct word for the ladies (or both parties) in

⁷⁹ The first two quoted by B.J. Brown, *Shibboleths of the Law* (Auckland 1987) pp.42, 43.

⁸⁰ (1986) 4 N.Z.F.L.R. 25.

⁸¹ Family Proceedings Act 1980 and regulations.

⁸² *Furmage v. Social Security Commission* (1978) N.Z.A.R. 75.

such a relationship. There have of course been many names adopted for some thing involving the bearer of the name: sandwich, cardigan, garyowen, boycott, macintosh, biro, gerrymander, wellington, and so on. (The O.E.D. does not list furmage, but furmager is a mediaeval word for a cheese-monger, cf. modern French *fromager*, *fromage*.)

The pronunciation of "de facto" usually follows the ordinary New Zealand pronunciation of legal Latin, though some pronounce the "de" like French *de*. That ordinary pronunciation is a mixture of English legal Latin and the more or less standard academic pronunciation. As West-European languages changed, spoken Latin changed with them, until it became unintelligible to persons from another country, though remaining an international written language. There were efforts to bring pronunciation back to what it was in classical Roman times, but they were fiercely resisted. Erasmus, for instance, who visited England twice, wrote (in Latin) an influential book on Latin pronunciation in 1528, but the Chancellor of Cambridge University punished with beatings and dismissals those who adopted the new pronunciation.⁸³ The law, as might be expected, would have no truck with these new-fangled ideas. It was not until the early years of this century that the reformed pronunciation gained much following even in academic circles. A.P. Herbert has caricatured the differences in a Misleading Case in *Wigs at Work*:

Rex v. Venables & others

Extraordinary confusion prevailed this morning in the Lord Chief Justice's Court when Mr Ambrose Wick applied for a writ of certiorari to issue to the Petty Sessional Bench of Chimney Magna.

Mr Wick, a young advocate appearing in the High Court for the first time, said:

My Lord, in these proceedings I ask for a rule nessee of *kairtiorahree* . . .

The Lord Chief Justice: I beg your pardon?

Mr Wick: *Kairtiorahree*. I am going to submit, my lord, that an order of the Chimney Magna justices was *ooltrah weerayze* . . .

The Court: Are you a Welshman, Mr Wick?

Mr Wick: No, my lord.

The Court: Then why do you not make yourself more plain? What do you mean by "*ooltrah weerayze* and "*day yooray*"? Are they patent medicines or foreign potentates? So far the Court has no idea to what your application is directed.

⁸³ W.S. Allen, *Vox Latina* (Cambridge 1965), Appendix B.

- Mr Wick: My lord, *ooltrah weerayze* — “beyond the power” . . .
- The Court: Can it be said that you have in mind the Latin expression *ultra vires*? . . . Do not break into Latin again, Mr Wick. I take it that you have but recently concluded your education and that this is the first appearance in the King's Courts of what is called, the New Pronunciation of Latin . . .
- Mr Wick: My lord, I pronounce the Latin tongue as I was taught at school.
- The Lord Chief Justice: Exactly. You are not to be blamed, Mr Wick. But I am bound to make it clear to you, to the rest of your gallant generation and to the generations that come after, that His Majesty's judges will not permit the speaking of the Latin tongue after that fashion in the King's Courts . . .

31 January 1934

Despite the new teaching the old pronunciation lived on in schoolboy slang. What that whimsical New Yorker Ogden Nash wrote about English schoolboys in *Don't Sit under the Family Tree* would have found an echo even in some New Zealand schools in the thirties, if not later. Modern lawyers will be familiar with “caveat” (let him beware) if not with “cave” (look out!).

In every illicit gathering of schoolboys there is one sentinel crow,

Who, on the approach of authority, will squawk “Scram!” or “Blow!”

In my youth you exclaimed “Cheese it!” a locution no longer to be heard in even in Rahway,

While in England one hollers, in Latin, “cave!” which may be pronounced either “cavy” or “cahway”.

But as stated the New Zealand lawyer's spoken Latin is a mixture. We say “pray-sippy” (*praecipe*), not “pry-kippay” (though some younger lawyers say “pry-sippy”), “subpeener” (subpoena) not “soob poyna” “vol-lent-eye” (*volenti*) not “wo-lentee”; but we say “day youray” or “day jooyray” (*de iure*) not “dee jewry” and so on.⁸⁴ We have not brought ourselves to pronounce the Roman *v* like an English *u*; the spelling is too strong for us. After ignorance and carelessness spelling is one of the strongest agents for linguistic change, and one of the most marked differences between the oral-aural and the written-visual transmission of language. Spelling conventions were in general established before radical changes in pronunciation (the Great Vowel Shift) took place. Apart from old-established words however, we assume that the letters of the alphabet represent in foreign borrowings the sounds they do in English. When Englishmen in India first recorded the name of those secret stranglers, they wrote it down as “thug” but they meant the *t* and *h* to represent separate sounds, as in “porthole” and “masthead” and “last hug” (or more

⁸⁴ These crude approximations are unavoidable unless a phonetic alphabet, probably unfamiliar, is used.

accurately, the explosive t sound in Hindi). Most French words are also pronounced as if they were English: clientele, garage, bain-marie, masseuse. We are indeed “slaves to the written word”. But sometimes with French we try to escape from our shackles. We sound the last t in “restaurant” because it is there in writing — which no Frenchman would do — but we half-recognise the French nasal vowel by rhyming the word with “font” not with “cant” or “grant” or “immigrant”. And while a T.V. newsreader may pronounce *coup de grace* as if it was *coup de gra*, the trade pronunciation of “lingerie” is a bizarre mixture of misplaced semi-French sounds.

The conditions giving rise to “spelling pronunciation” are not new however. “Viz” like “etc” is of course an abbreviation of the Latin. Before the time of Gutenberg and Caxton mediaeval scribes made use of a great many abbreviations and symbols (over 13000 before they went out of fashion because of their supposed association with witchcraft). For instance, of Bracton’s one surviving letter, written to a brother judge in 1247, one can make out enough to see that it is in Latin, but it is incomprehensible to anyone who is not a palaeographer, by reason of such devices.⁸⁵ “Viz” is in origin *vi* (short for *videlicet*) plus a squiggle denoting abbreviation. The earliest printers had no such squiggles in their type founts, so used the nearest symbol, the longtailed z, which later became the modern tailless z. (The abbreviation of ounces, “oz” is another example.) But “viz” unlike “etc” is easily pronounced as written and has become a word in its own right, while “etc” is pronounced in full.⁸⁶

The language of legal discussion which primarily affects those in the law — language about the law — is one of the two main kinds of legal language. The other language — that is the law — which much more directly affects the layman, we may consider now. “Legal language” and “legal jargon” usually conjure up in the mind the style of drafting characteristic of legislation and private legal instruments often rightly criticised for their obscurity. But of necessity legislation has characteristics not common in other contexts. It involves above all foresight and precise language. Omniscient foresight is impossible, and language is inherently imprecise, so problems are bound to arise. Like any other form of verbal communication, legislation essentially involves a concept in the mind of the originator, its expression in symbols (words), the reception of those symbols, and their translation into a concept in the mind of the receiver — which may or may not be the same concept. There is a multitude of opportunities for breakdowns and wrong turnings. Discussions of the “intention” of the legislator — the original concept — are in terms of the “construction” and “interpretation” of the words used, which are indeed the primary evidence of what was in the mind of the originator. But the “intention” of the legislator is often a fiction. A multiple legislature will have little common intention beyond that of enacting the measure proposed. Frequently foresight has not encompassed particular circumstances, and correspondingly the words do not deal with the matter

⁸⁵ Facsimile in H.G. Richardson, *Bracton: The Problem of his Text* (London 1965) plate 5. The writer is indebted to Professor D.A. Kidd for a transcription.

⁸⁶ Some people say *excetra* (cf. excess, excel, except), which raises questions of just what conception the speaker has in mind, and what meaning he gives to the words *et* and *cetera*. Cf. questions arising from the misuse of Latin plurals, above. But “etc” is probably now an English word separate from its Latin origin. Even the writs as quoted by Glanvill (c.1188) use *etcetera* as a single word, and also the abbreviation “etc”.

one way or the other. Is developing negatives "printing a document"? Is a microfilm a "book"? Is the husband the "stepfather" of his wife's adulterine child? Does a pilot flying international routes "ordinarily work in Britain" if his base is there? The linguistic problems are easier to deal with if it is clearly recognised that in answering such questions a court is not giving meaning to language but is making law (though doubtless in harmony with the meaning of such language as has been used and with the intention deduced from it).

Judicial law-making, "interstitial legislation" (to borrow Maine's metaphor about substantive law being secreted in the interstices of procedure), is inevitable, and is not avoided by substituting legislation for the common law, despite Bentham's cutting criticism of the latter and his passion for codification (a word which indeed he invented).⁸⁷

Such law-making has indeed long been recognised though less readily in the field of statutory law than in that of the common law. James Fitzjames Stephen said in 1863 that (English) judges had "always formed one of the best subordinate legislatures in the world";⁸⁸ and in the words of a modern Australian judge, "There is no bright line between the function of the judge and the function of the legislator in lawmaking".⁸⁹ The question of how far it should go is not a linguistic question, though often discussed in linguistic terms, such as the "literal" or "purposive" interpretation of statutory texts. Lord Simonds, who favoured the former, described Lord Denning's practice of the latter as "a naked usurpation of the legislative function under the thin disguise of interpretation" while Lord Denning of course described it otherwise:⁹⁰

Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and even if it were, it is not possible to provide for them in terms free from all ambiguity . . . A judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases.

In addition to the need for foresight and precision there are two other important factors affecting legislation as a form of communication: it is in writing; and the co-operation of the person affected, in conveying its meaning, is not to be expected. Most oral communication involves some interchange between originator and receiver, but in the case of writing the two are separated in time and space and this is not possible. The writer is not there to elaborate or explain. Written words, as Socrates complained in the early days of Greek literacy, "seem to talk to you as though they were intelligent, but if you ask them anything about what they say, from a desire to be instructed, they go on telling you just the same thing forever". The need for the co-operation on the part of the receiver, the converse of Socrates' complaint, has already

⁸⁷ Jeremy Bentham on case-law: "Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait until he does it and then beat him. This is the way you make laws for your dog, and this is the way judges make laws for you and me." (*Works* V 231).

⁸⁸ *A General View of the Criminal Law of England* p.328.

⁸⁹ McHugh J. (1988) 62 A.L.J. 15, 116 at 120.

⁹⁰ *Magor & St. Mellon's R.D.C. v. Newport Corp.* [1951] 2 All E.R. 839; *Seaford Court Estates v. Asher* [1949] 2 K.B. 481.

been mentioned. A clear example of the result of faulty co-operation is the common expression "at one foul swoop". When MacDuff comes home to find that in his absence raiders have killed his wife and children, like a hawk swooping on a hen and chickens, Shakespeare has him say: "What, all my pretty chickens and their dam, at one fell swoop!". But "fell" in that sense is archaic; we do not believe what we have heard and reconstruct it is "foul". In common speech moreover, a sentence may have as many layers of meaning as an onion has skins, and the co-operation of the hearer is required to peel away those on the surface. An enquirer may ask, "What's the time?" and that basic or literal form rarely admits of misconstruction. But it may be phrased indirectly: "Can you tell me the time?" The enquirer does not expect merely the answer "Yes". It may even take the form of a statement of fact which on the face of it calls for no answer at all: "I was wondering if you could tell me the time". But the legislator cannot depend on the receiver's help, and if argument is to be avoided must employ the basic or literal form. Stephen J. (the same James Fitzjames Stephen), who as a law commissioner and later as the Law Member of the Viceroy's Council had been partly responsible for the great series of Indian Codes, said:⁹¹

I think my friend Mr [John Stuart] Mill made a mistake upon the subject probably because he was not accustomed to use language with that degree of precision which is essential to everyone who has had, as I have had on many occasions, to draft Acts of Parliament which, although they may be easy to understand, people continually try to misunderstand, and in which therefore it is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it.

Legislative drafting is a matter of skill, a skill learned through practice or precept. When the limits of permitted or obligatory action are in issue it is not enough "to plead that anyone could see what you meant" in Fowler's words. The contrast is between a general exposition, when one can "depend on an audience that will be satisfied with catching the general drift or obvious intention of a sentence and not troubling itself to pick holes in the wording" and a precise and comprehensive delimitation of legal rights and duties. The contrast is well illustrated by district planning schemes under the Town and Country Planning Act 1977, which include both "scheme statements" of general principles and objectives, and Ordinances defining what may or may not be done. It is the same contrast as that between language about the law and language that is the law. But it is alas all too easy to pick holes in the wording of the Ordinances, which are drafted by planners who do not recognise that any skill is involved. Text books on legislative drafting do not find a place among their text books on planning and they are often a long way from meeting the criteria of the (American) *Handbook of the National Commissioners on Uniform State Laws* (1968):

The essentials of good bill drafting are accuracy, clearness, brevity and simplicity. The purpose and effect of a statute should be evident from its language; the language should convey one meaning only.

⁹¹ Re Castioni [1891] 1 Q.B. 149, 167.

Some brief examples may suffice.

One scheme, which limits the height of buildings, states that height "in relation to a building means the difference between the average level of the ground along the external wall on the nearest side of the building . . .". How the average level of a continuous line on the ground is to be calculated is unclear and has caused argument. Several schemes have had difficulty with recession planes (which are imaginary surfaces sloping upwards away from the boundary, much as an ordinary house roof slopes up from the eaves). Two schemes define it as "a plane inclined at right angles from a site boundary or points above a site boundary towards the interior of a site . . .". But if "boundary" means a one-dimensional line on the ground a recession plane makes no angle at all with the boundary; and if "boundary" is used in the legal sense of a two-dimensional vertical interface, the one angle a recession plane does not subtend is a right angle. How then is the stipulated right angle to be measured? (And a recession plane, like the legal boundary, is frequently not a plane.) Many schemes require that an empty space (a "yard") be left between any building and the site boundary, but in measuring it you do not count the eaves which may project into the space. One scheme provided that the eaves "shall not be deemed to project into the yard . . .". If you are forbidden to do any deeming you are left with the true state of affairs. What the draftsman presumably meant to say was that the eaves *shall* be deemed *not* to project into the yard space.⁹²

These examples make it clear that the skill required is linguistic rather than legal skill (always assuming the proposition to be expressed has been thoroughly thought out, which may be doubted in the cases just mentioned). This is not always recognised, and the steps taken in Victoria are the more commendable. Professor Eagleson of the University of Sydney, an expert in applied linguistics, was seconded to the office of the Chief Parliamentary Counsel and appointed as a member of the Law Reform Commission when the Attorney General gave the commission a reference on plain English drafting in 1986. The following year the commission made its report (including a Drafting Manual), a document which deserves high praise.⁹³

New Zealand statutory drafting is perhaps less open to criticism than some in Australia, but it is a very long way from what is desirable. Many examples could be quoted; one random and typical provision may suffice. Section 96 of the Income Tax Act 1976 provides that in certain cases, if income is transferred for less than a specified period to someone else, the income will be treated as derived by the transferor and taxed accordingly. Subsection (2), one of five subsections, is a single sentence of 231 words reading as follows:

(2) Where —

- (a) Any person transfers (otherwise than by will) the right to any income to any other person for a period that is less than the prescribed period: and
- (b) In any case where the right so transferred is a right arising from the ownership by the transferor of property, the transferor remains the owner of that property, or, where the ownership of the property is transferred, the transfer provides —

⁹² Other examples in J.N. Matson, "The Form and Expression of District Planning Schemes" (1980) N.Z.L.J. 274.

⁹³ Law Reform Commission of Victoria, Report No. 9, *Plain English and the Law* (Melbourne 1987). (Also Discussion Paper No. 1 *Legislation, Legal Rights and Plain English* 1986). See also an article by D.St.L. Kelly, the chairperson (sic) of the Commission, "Legislative Drafting and Plain English" (1987) 10 *Adelaide L.R.* 409.

- (i) That the property shall revert to the transferor or to a relative of the transferor or to a company in which the transferor or a relative of the transferor is a shareholder, or, where the transferor is a company, shall revert to the company or to a shareholder or a relative of a shareholder in the company; or
- (ii) That the right to dispose or direct or control the disposition of the property shall be reserved to the transferor or to a relative of the transferor or to a company in which the transferor or a relative of the transferor is a shareholder, or, where the transferor is a company, shall be reserved to the company or to a shareholder or relative of a shareholder in the company, —
that income shall be deemed to be income derived by the transferor and by no other person as if the transfer had not been made.

This might be redrafted as follows:

- (2) If you transfer the right to any income to somebody else for a period that is less than the prescribed period the income will be treated as your income alone, in the following cases:
 - (a) If the right to the income arises from owning property and you remain the owner of it.
 - (b) If you transfer the ownership of the property but the transfer provides that it will revert to you or to a person connected to you. (The meaning of a "person connected to you" is given below.)
 - (c) If you reserve for yourself or a person connected to you the right to dispose of the property, or to control the disposition of it.

This subsection applies to transfers made by companies as well as those made by human beings, but it does not apply to transfers made by will.

A "person connected to you" means a relative of yours, or a company in which you or a relative are a shareholder. If the person who transfers the right to income is a company, it means a shareholder or a relative of a shareholder in the company. ("Relative" is defined in section 2.)

There are obvious differences of form, but not (it is hoped) of substance, between the two versions. The second is in quite a different register; it is shorter (190 words as against 231); it is divided into seven sentences (or similar units) instead of being one sentence; the kernel of the provision is stated in the first three lines, not the last three (which is important); and for all these reasons it is easier to understand. The first version of the subsection starts with nineteen conditional clauses or phrases, some cumulative ("and"), some alternative ("or"), before getting to the nub of the matter in the last two or three lines. It is psycholinguistic factors such as sentence length, the number of qualifying clauses and the arrangement of the text in an order which the reader expects, that determine whether or not the text is easy to understand. Visual aids to separation and classification are also important, such as marginal indentation (what R.C. Dick calls "paragraph sculpture"), and these are indeed used in the statute as printed.

It is sometimes said that statutes on technical or complicated subjects cannot be expressed in a way that the layman can understand. That is true, but the advocates of plain English do not suggest that they can. What is contended is that difficulties of language should not be added to the complexity of the subject matter. The term "plain English" does not refer to a simplified or restricted form of the language such as Basic English (C.K. Ogden's 850-word system) or the more recent forms of "nuclear English". It refers to the use of plain, straightforward language that conveys its meaning as clearly and simply as possible. The use of a style which is not only plain but informal does have its dangers however, because informal vocabulary tends to be less precise than formal or technical vocabulary, and informal phraseology tends

to be at a level of meaning removed from the unambiguous basic or literal level. ("Can you tell me the time?") The Matrimonial Property Act 1976, for instance, refers in section 15 to the contribution of one spouse being "clearly" greater than that of the other. As Somers J. pointed out in *Barron v. Barron*,⁹⁴ if one contribution is \$1 more than the other its greater size is completely clear, but the section appears to be concerned not with the clarity but with the size of the disparity.

Plain language does not necessarily involve a loss of precision; nor does it prevent the use of such detail as is necessary. Precision tends to be equated with detail but though they often coincide they are not the same thing. Thus an American critic has said that "unfortunately, with the New Deal, a style of drafting which aimed at unearthly and superhuman precision comes into vogue, on the state as well as the federal level".⁹⁵ It is the method of expression as much as the amount of detail which causes difficulty, as another American critic made plain many years earlier. The Renton Committee quoted Thomas Jefferson as complaining that British and American statutes⁹⁶

... from their verbosity, their endless tautologies, their involutions of case within case and parenthesis within parenthesis, and their multiplied efforts at certainty by *says* and *aforsays*, by *ors* and by *ands*, to make them more plain, do really render them more perplexed and incomprehensible, not only to common readers but to the lawyers themselves.

Legislative drafting which is both less detailed and less obscure in expression will result in simpler provisions which are more easily understood (though they may also result in more judicial law-making). It was partly for this reason that Sir William Dale advocated the European system of drafting, in *Legislative Drafting: A New Approach* (1977). The French Civil Code is an extreme example of the resulting product. One can hardly imagine statutory language in the common law world serving writers as a stylistic exemplar, but Dale quotes a letter written by Stendhal to Balzac on the 16 October 1840:⁹⁷

In composing *La Chartreuse*, in order to capture the style, every morning I used to read 2 or 3 pages of the Civil Code.

Most of what is said about legislation applies also to private legal documents. They are often characterised by the same obscurities of style and arrangement; but in addition they make more use of repetitive, archaic and technical vocabulary than is found in legislation: doublets and triplets such as "null and void" "give devise and bequeath"; antiquities such as "situate" "instrument" (meaning document) and "presents"; unnecessary technicalities such as "devise" and "demise"; and obfuscating clutter such as "aforesaid" "hereinafter" "hereby" and "abovementioned". The draftsman puts such words in the mouth of the layman, but they are not such words as the latter would naturally use or easily understand. "Give" and "lease" mean as much as "devise" and

⁹⁴ [1977] 1 N.Z.L.R. 454, 460.

⁹⁵ Quoted in Guido Calabresi, *A Common Law for the Age of Statutes* (Cambridge Mass. 1982) p.189.

⁹⁶ Renton Committee, *The Preparation of Legislation* (1975) Cmd. 6053, pp.6, 7.

⁹⁷ "En composant '*la Chartreuse*' pour prendre le ton, je lisais chaque jour 2 ou 3 pages du code civil". Op.cit. p.85.

“demise”. Technical words are sometimes necessary, and they usually have the advantage of precision and brevity; but there are often less forbidding alternatives. Non-technical archaisms are even harder to justify. The reader coming afresh on such expressions as “this deed witnesseth” and “doth hereby demise unto” may be forgiven a fleeting doubt as to whether the draftsman was conscious of which Queen Elizabeth is at present on the throne.

There are other words which are common both in legal and in ordinary use, but which have diverged in meaning in the two types of context. The technical legal import of “premises” is the part of the deed, lease or conveyance preceding the reference (*praemissa*, things set out before). Such documents usually begin by naming the parties and describing the land and buildings being dealt with. “Premises” referred back to that earlier part of the deed: but in ordinary usage the meaning has been transferred from the description to the object described, and the transferred meaning is sometimes also now used in leases for example. A similar transfer of meaning has occurred with the expression “right of way”, technically the legally protected freedom to do certain things on a strip of land, but now meaning the land itself. The word “lease” has acquired an extended meaning. Strictly it is not apt to describe the bailment of a chattel but is commonly so used by motor vehicle dealers in their agreements.

The language of legal documents creates, modifies or extinguishes intangible rights or duties, liberties or powers. But different intangible transactions may have the same tangible and factual result, and it is a commonplace of the history of the law that, if one route to a desired result is blocked, another route will be found. This process has been criticised as an error in relation to the function of words, “the supposition that real distinctions exist where in fact the only distinction is between two forms of words.”⁹⁸ The most familiar example is the distinction (now abolished by the Credit Contracts Act 1981) between imposing a penal rate of interest for late payment of mortgage interest, and giving a discount for prompt payment. There are other examples. For instance in the case of a gift on trust for A, “but if A marries then for B” the gift over is void as against public policy, being in restraint of marriage. But a gift for A “until he marries” and then for B, is valid. So also the rule in *Saunders v. Vautier* can be evaded by making the gift conditional on the donee reaching the stipulated age beyond his majority. At common law, if A agrees to devote his whole time to his employment with B, but goes elsewhere, an injunction will not lie. But if he agrees not to serve any other employer, it will. With respect, however, the criticism mentioned is misdirected. There are valid conceptual differences between the provisions even if they would have the same result and even if the motive may not be apparent from the words. A discount and a penalty differ, and so do a carrot and a stick. The fact that the differences are expressed (as they must be, if at all) in words, does not mean that it is the words alone which differ. The remedy of course is to direct the prohibition at the result, not at one means of achieving it, if the result is felt to be contrary to public policy. Conceptions of public policy change with the passage of time; that factor, and the strength of the doctrine of precedent, and the restraints on judicial law-making may mean that it is the legislature which must restore

⁹⁸ Glanville Williams, “Language and the Law” 61 L.Q.R. 71, 78.

consistency of results, as indeed was done in different ways by the Perpetuities Act 1964 and the Credit Contracts Act 1981.

As movements for social change will from time to time swell in a crescendo, so the last decade or two has seen an increased demand for the reform of the language, not only of legislation but of private documents affecting the public, and the multitude of forms issued by government authorities. The "plain English" movement began in about 1974 in the banking and insurance industries in the United States, and soon spread to Canada, Australia and Britain. The catalyst in New Zealand seems to have been I.L. McKay's paper, "Intelligible Drafting"⁹⁹ which was concerned with private documents, not legislation. Since then, in New Zealand, there have been marked changes in some commercial documents such as insurance policies, in some government forms, and in documents such as wills produced by a minority at least of lawyers, though the style of legislation remains unchanged. Apart from the need to make documents intelligible to those affected, plain English is a far more efficient and economical vehicle of communication. It is difficult to measure the difference in efficiency in the case of legislation, though the Victoria report quotes statistics showing that certain Australian legislation in its unreformed state took between two and three times as long to comprehend as in a revised plain English form. In Britain there has been a concerted effort since 1982 to improve the quality of government forms. In 1984-85 alone the net saving was four million pounds.¹⁰⁰ Reasons of economy in time and money alone, apart from reducing mental wear and tear and frustration, and increasing the quality of the work done, suggest that much more should be done to improve our legislative, private legal, and administrative forms of communication.

⁹⁹ Delivered to the New Zealand Law Conference 1981 (1982) R.L. 62.

¹⁰⁰ Victoria Report, paras.100-107.