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Peter Butt and Richard Castle
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Introduction

Traditional legal language

The English language of today is still recognisably the language of Chaucer and Shakespeare, of Abraham Lincoln and Winston Churchill, of the Book of Common Prayer and the Authorised Version of the Bible. It is also the language of lawyers in many countries: the United Kingdom, the United States, Canada, Australia, New Zealand and India, to name but a few. In English, lawyers draft documents and compose letters; in English, lawyers formulate statutes and propagate regulations; in English, lawyers prepare pleadings and argue their cases.

Legal English, however, has traditionally been a special variety of English. Mysterious in form and expression, it is larded with law-Latin and Norman-French, heavily dependent on the past, and unashamedly archaic. Antiquated words flourish, such as *herein, therein, whereas* – words long lost to everyday language. A spurious sense of precision is conjured through liberal use of jargon and stilted formalism: *the said, aforesaid, the same*. Oddities abound: oath swearers do not believe something, they *verily* believe it; parties do not wish something, they are *desirous* of it; the clearest photocopy only *purports* to be a copy; and so on. All this – and much more – from a profession which regards itself as learned.

Some infelicities of expression, some overlooked nuances, some grammatical slips, can be forgiven. Lawyers are only human, and in the day-to-day practice of law they face an overwhelming weight of words. But what cannot be forgiven is the legal profession's systematic mangling of the English language, perpetrated in the name of tradition and precision. This abuse of language cannot be justified, legally or professionally. Nor, increasingly, do clients accept it, showing a mounting dissatisfaction with vague excuses such as 'That's the way we always put it' or 'That's how we say it in legal jargon'.

Speaking generally, today's legal English evolved over the 300-year period that spanned the setting up of the first printing press in England

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(1476) and the American Declaration of Independence. Its terminology and style remain largely frozen in the form they had reached by the early years of the nineteenth century. Nothing much has changed since then, despite sporadic efforts at reform. The lack of change is evident in Panel 1, taken from the charges register of an English land title: notice the similarity of language in documents over 200 years apart.

In more recent times, typewriters, word processors and computers have brought changes in the format, layout and length of legal documents. The language, however, has remained largely unchanged. How odd it must seem to non-lawyers that the law's antique language lingers on, harking back to another age, so numbing and relentless that even lawyers themselves sometimes fail to read it (or fail to understand it if they do). How odd that legal gobbledegook lies dormant in office files,

Title Number : DN37753

Schedule of Restrictive Covenants

1. The following are details of the covenants contained in the Conveyance dated 25 January 1750 referred to in the Charges Register:-

   AND the said John Jeffery doth for himself his heirs and assigns and every of them further covenant promise and agree to and with the said Duke his heirs and assigns and every of them by these presents THAT he the said John Jeffery his heirs or assigns shall not nor will open or work any Quarry or quarries of stone or any mines or minerals in or upon the said premises or any part thereof (other than for building or repairing the said premises) without the Licence and consent of the said Duke his heirs or assigns for the purpose first had and obtained.

2. The following are details of the covenants contained in the Conveyance dated 5 August 1958 referred to in the Charges Register:-

   "The Purchasers to the intent that this covenant shall bind so far as may be the property hereby assured into whosesoever hands the same may come and to the intent likewise that this covenant may enure for the benefit of and be annexed to the land in the said Parish of Plymstock which immediately after the execution of this Deed may remain vested in the Vendor and the Company or either of them and to each and every part of such land taken separately HEREBY COVENANT jointly and severally with the Vendor and as a separate covenant with the Company that the Purchasers and their successors in title will at all times hereafter observe and perform the covenants and conditions on the part of the Purchasers contained and set forth in the Second Schedule hereunder written

   The Vendor and the Company reserve the right to release alter or vary any of the covenants to which any other part or parts of the Thornyville Estate is shall or may be subject and to alter or vary the lay-out of The Thornyville Estate or any part thereof and to sell any part or parts of the Thornyville Estate free from the said covenants or subject to such other covenants stipulations and conditions as the Vendor or the Company may think fit.

Panel 1 Charges register extract

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precedent books and computers, ready to be recycled at a moment's notice in documents produced in the early twenty-first century.

Pressures for reform

All areas of human endeavour have their advocates for reform. But reformers, including legal reformers, are often disappointed.[1] Radical thinkers like Jeremy Bentham, Lord Brougham and Lord Denning, who urged reforms not only in the substance of the law but also in its language, in the end have had relatively little impact. Lawyers have a vested interest in preserving their mystique, and part of that mystique is wrapped up in traditional legal language. But today there are clear signs that the need for traditional legal language is being questioned.

This questioning has been fuelled largely by the consumer movement of the second half of the twentieth century. Non-lawyers now expect to be able to understand what they are asked to sign. Consumer groups urge customers to seek answers and explanations. Some lawyers see this as a threat, but others see it as a challenge. They recognise that a clearer, crisper style relieves them from the drudgery of acting as interpreter, of having to translate the antique into the contemporary. They also perceive the advertising advantage their documents provide in marketing their expertise. Even those lawyers whose prime concern is to avoid negligence claims can see that 'plainness' might prove an advantage over gobbledegook: for when a document is drawn in straightforward, up-to-date, no-nonsense English, clients are hard-pressed to assert afterwards that they did not understand it.

Yet the advocates of standard, modern English – or, to use the term now becoming widespread, plain English – should not be complacent. Among lawyers, proponents of plain English are in a minority. Many lawyers have difficulty in accepting anything other than traditional legal terminology; the ancient sonorous language of the law embodies all they stand for. But improvements are appearing, notably in commercial documents. Commercial lawyers appear more likely than their conveyancing colleagues to use standard, modern English. Perhaps this is because commercial work often involves putting new ideas and new methods into a legal setting; in contrast, conveyancing often harks back to the Middle Ages.

Change will come, but it will be slow. There will be no storming of the citadel, no victory parade, no triumphal march through the streets. Traditional legal language will be a long time dying. But die it will, under

1 See, for example, the hopelessly optimistic predictions following the 1845 English land law reforms, in 'Conveyancing Reform' (1845) 2 *Law Review*, p. 405.

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the weight of the reality that change is inevitable. Wittgenstein once wrote of language, 'Everything that can be put into words can be put clearly.'[2] Legal language is no different.

What this book does

Our purpose in this book is to encourage legal drafters to write in modern, standard English by illustrating why it is preferable to traditional legal English. We start in Chapter 1 by considering the influences that affect today's legal drafter. We also examine the factors that help perpetuate traditional styles of legal drafting, factors such as the fear of negligence claims and the familiarity that comes from using a conventional style. Chapter 2 deals with the interpretation of legal documents, and explains why drafters in the modern style can be assured that their efforts will not fall foul of the so-called rules of interpretation. Chapter 3 traces the move towards modern English in legal drafting in various countries. In Chapter 4 we consider some of the benefits of drafting in plain language, showing how it can improve the image of lawyers and help avoid negligence claims. This leads us, in Chapter 5, to discuss what to avoid when drafting modern documents. Chapter 6 explains how to draft modern documents, covering not only obvious points such as language and punctuation but other important factors such as structure and layout. Lastly, Chapter 7 puts the principles to the test by analysing some traditional legal clauses and rewriting them in modern, standard English.

2 Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*, trans. D. F. Pears and B. F. McGuinness (London: Routledge & Kegan Paul, 1961), p. 51.

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1 What Influences the Legal Drafter

The traditional style of legal writing is the product of many influences. Some influences are constant, some are sporadic. They rarely exist in isolation; usually, many operate together. This chapter reviews the main influences on traditional legal drafting:

- familiarity and habit – the security that comes from adopting forms and words that have been used before and seen to be effective
- conservatism in the legal profession, allied to the common law tradition of precedent
- fear of negligence claims
- the means of production
- pressures to conform to professional norms
- the desire to avoid ambiguity
- the mixture of languages from which the law derives its vocabulary
- payment by length of document
- payment by time
- the litigious environment of legal practice.

Some of these influences are largely historical, with little direct effect today, such as the mixture of languages and payment by length of document. Others, however, remain relevant.

The stylistic hallmarks of traditional legal drafting are apparent in many types of documents. Some of the best (or worst) examples are leases, their dense prose and 'torrential' style intimidating even the hardiest reader.[1] But other documents exhibit a similar style: conveyances, wills, trust deeds, insurance policies, mortgages, and shipping documents, to name a few. The common thread pervading them all is

1 Law Com No 162, *Landlord and Tenant: Reform of the Law* (1987), paras 3.6, 3.7. Hoffmann J., in *Norwich Union Life Insurance Society v British Railways Board* [1987] 2 EGLR 137 at 138, found the flood of words in a lease so 'torrential' that he thought there might be 'some justification' in counsel's argument that he should depart from the normal principle of construction that requires effect to be given to every word in a clause.

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tradition, going back hundreds of years. This tradition is so powerful that it has been impervious to reform through the centuries and continues to resist reform even today, when change might be thought an easy option. A tradition so persistent merits detailed scrutiny.

Familiarity and habit

Lawyers prefer to use documents that have been tested in operation. They prefer the familiar to the new. In a sense, this should not be surprising: all human beings share this trait. For lawyers, however, the trait creates particular problems, because eventually they come to write legal documents in a style that is peculiarly time-warped. It is traditional; it is inculcated in law schools; it is used by judges and legislators; it is how they always write. Knowing no other style, they never pause to question it. After all, what incentive is there to do so? All the pressures are the other way.

To illustrate, consider the following extract from a contemporary conveyance. The document comes from England, but it could have come from any country where English is the language of the law:

> AND excepting and reserving also in fee simple unto the Company their successors in title owners or owner for the time being of the parts not herein comprised of the said Building Estate the right to connect with any drain or drains made or to be made in through or under the said pieces or parcels of land thereby conveyed any drain or drains belonging to any adjoining or adjacent site or sites on the said Building Estate for the purpose of forming one or more general drain or drains or otherwise.

This drafting is the product of habit, not design. Written from scratch, it could have looked more like this:

> Reserving in fee simple the right to connect any drain in any part of the rest of the estate with any drain in the conveyed land.

Compared to the earlier version, this reduced version seems disarmingly simple. In fact, though, it assumes a high degree of expertise – so high that few lawyers would be bold enough to attempt it. Let us explore some of the technical knowledge required for the reduced version.

First, since new rights are created (whether to use existing drains or drains to be built), it is sufficient to use 'reserving' in place of 'excepting and reserving'. Most drafters, however, would instinctively play safe with the arcane distinctions between exceptions and reservations (see p. 24), and would retain the conventional 'excepting and reserving'.

Second, what of the phrase 'in fee simple'? This term has come down from medieval times. In many jurisdictions which have inherited the

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English common law, landowners do not 'own' their land in any absolute sense. Rather, they 'hold' the land 'of [from] the Crown' under what is essentially a feudal concept. The Crown grants interests in land, to be held of the Crown. In the theory of the common law, the largest possible interest is the 'fee simple'. But despite the medieval theory, for practical purposes a person who holds the fee simple is the owner of the land, and no misunderstanding or ambiguity arises from calling that person the 'owner' of the land or the owner of the 'freehold'. So 'fee simple' can be discarded in favour of a more modern term. Indeed, this change has statutory blessing. For example, in England and Wales, s 1(2) of the *Law of Property Act* 1925 provides:

> The only interests or charges in or over land which are capable of subsisting or of being conveyed or created at law are –
> (a) an easement, right, or privilege in or over land for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute ...

In the light of this provision, it would be possible to say 'Reserving for the equivalent of a freehold the right to connect ...'. Indeed, it would be possible to go further and simply say: 'Reserving the right to connect ...'. Given its context in the conveyance, the parties must have intended this easement to be a perpetual right (as distinct from an easement intended to last for a specified number of years). This intention is implemented without the need for formalistic phrases, under s 60 of the English *Law of Property Act* 1925, which provides that a 'conveyance' of land passes the fee simple, read with s 205 of the same Act, which defines 'conveyance' to include every assurance of property 'or of an interest therein'. In practice, however, simplified usage of this kind is not seen. The technical 'in fee simple' is retained, on the illusory justification that it is legally essential. The mystification it causes to non-lawyers is considered irrelevant.

The point of this example is that drafting a reservation requires expertise. So, too, does drafting many other legal documents. Few lawyers risk changes in terminology, for it puts their expertise on the line. It is easier and safer to stick with the familiar.

Conservatism

The common law traditionally looks backwards, seeking authority from things past. A clear example is the principle of *stare decisis* (to stand by things decided): lawyers defer to past judicial decisions, moving from them only reluctantly.

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However, reliance on past judicial decisions – 'precedents', as lawyers call them – can curb innovation. The pattern of the present is fixed by reference to the past, and there is a reluctance to alter the law in general to deal with a problem in particular. This reluctance is reflected in the well-known saying 'Hard cases make bad law'. When confronted by a manifest injustice, it is easy to lose sight of principle; there is a fear of setting a precedent for the future.

Of course, some lawyers do not allow themselves to be fettered by precedent. For them, rigid adherence to principle can inhibit justice. Among judges, perhaps the best-known example in modern times is Lord Denning. His 1979 book, *The Discipline of Law*, contains a chapter called 'The doctrine of precedent', which he concludes in his customary clear and forthright style:

> Let it not be thought from this discourse that I am against the doctrine of precedent. I am not. It is the foundation of our system of case law. This has evolved by broadening down from precedent to precedent. By standing by previous decisions, we have kept the common law on a good course. All that I am against is its too rigid application – a rigidity which insists that a bad precedent must necessarily be followed. I would treat it as you would a path through the woods. You must follow it certainly so as to reach your end. But you must not let the path become too overgrown. You must cut out the dead wood and trim off the side branches, else you will find yourself lost in thickets and brambles. My plea is simply to keep the path to justice clear of obstructions which would impede it.[2]

Lord Denning had earlier dealt with a similar theme, but with particular emphasis on lawyers' language. In his Romanes Lecture at Oxford in 1959, entitled *From Precedent to Precedent*, he said:

> You will have noticed how progressive the House of Lords has been when the lay peers have had their say, or at any rate, their vote on the decisions. They have insisted on the true principles and have not allowed the conservatism of lawyers to be carried too far. Even more so when we come to the meaning of words. Lawyers are here the most offending souls alive. They will so often stick to the letter and miss the substance. The reason is plain enough. Most of them spend their working lives drafting some kind of document or another – trying to see whether it covers this contingency or that. They dwell upon words until they become mere precisians in the use of them. They would rather be accurate than be clear. They would sooner be long than short. They seek to avoid two meanings, and end – on occasions – by having no meaning. And the worst of it all is that they claim to be the masters of the subject. The meaning of words, they say, is a matter of law for them and not a matter for the ordinary man.[3]

2 Lord Denning, *The Discipline of Law* (London: Butterworths, 1979), p. 314.
3 Quoted in ibid., p. 293.

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These criticisms are hardly new. Getting on for 300 years ago Jonathan Swift had expressed similar views. In *Gulliver's Travels* (1726) his hero describes a society of men in England bred from youth to prove 'by words multiplied for the purpose' that black is white and white is black 'according as they are paid':

> It is a Maxim among these Lawyers, that whatever hath been done before, may legally be done again: And therefore they take special Care to record all the Decisions formerly made against common Justice and the general Reason of Mankind. These, under the name of Precedents, they produce as Authorities to justify the most iniquitous Opinions; and the Judges never fail of decreeing accordingly …
>
> It is likewise to be observed, that this Society hath a peculiar Cant and Jargon of their own, that no other Mortal can understand, and wherein all their Laws are written, which they take special Care to multiply; whereby they have wholly confounded the very Essence of Truth and Falshood, of Right and Wrong; so that it will take Thirty Years to decide whether the Field, left me by my Ancestors for six Generations, belong to me, or to a Stranger three Hundred Miles off.[4]

So far, we have used the word 'precedents' to mean court decisions of the past. However, English and Commonwealth lawyers also use the term to describe model legal forms. These model forms, published specifically for use by the legal profession, are employed by lawyers in every facet of legal practice. They influence not only the language of legal documents but also their style and layout. They are found in precedent books, which are generally derived from earlier precedent books, which in turn were derived from yet earlier precedent books, and so on backwards to the origins of the first precedent books.

Books of model forms were first published in England in the sixteenth century.[5] Their number proliferated in succeeding centuries.[6] Also published were books of simplified legal principles, like *Every Man His Own Lawyer* and *The Justice of the Peace and Parish Officer*. Of these, David Mellinkoff of the University of California at Los Angeles, said:

4 *Gulliver's Travels* (Oxford: Basil Blackwell, 1959), pp. 249, 250. This is part of a general diatribe against lawyers.

5 The history of conveyancing precedent books is traced in *Martin's Practice of Conveyancing* (London: Maxwell & Son, 1844), vol. 2, pp. 24 ff.

6 Sir William Holdsworth, *A History of English Law* (London: Methuen and Sweet & Maxwell), vol. 12 (1938), p. 375. Examples from the 18th century are: Nicholas Covert, *The Scrivener's Guide*, 3rd edn (London: Elizabeth Nutt, 1716); *The Attorney's Compleat Pocket-Book*, 5th edn (London: J. Worrall, 1764); *The Attorney and Solicitor's Complete Assistant* (London: J. Worrall, 1767); Anthony Macmillan, *A Complete System of Conveyances of, and Securities upon, Lands* (Edinburgh: Elphingston Balfour, 1787).

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> Such books preserved in detail a continuity of archaic English, bad grammar, and deficient punctuation, in form available to every scrivener and dabbler in the law, with or without the slightest knowledge of what he was writing. They gave greater currency to the similar language of the more learned formbooks and of the few archaic forms enshrined for the literate by Blackstone. Where English letters blossomed with originality and sparkle in the eighteenth century, the law was encased in a hard shell of fixed pattern, its language determined by forms and the deadweight of precedent. The mass of misplaced precedent, attached to the forms by coincidence rather than art, dropped into the hands of a legal profession unprepared to cope with the bulk of its expanding business. The time had not yet come for any mass re-examination; there was too much movement in the law itself to look for more than the show of security. That appearance at least the forms gave, and lawyers embraced the illusion.[7]

Given their derivative nature, it is hardly surprising that even current precedent books are couched in a traditional style.

Mellinkoff has shown that many of the early drafters of precedents were uneducated laymen.[8] Others, though, were able barristers.[9] Of the latter, perhaps the most famous was Sir Orlando Bridgman, later Chief Justice of Common Pleas and styled 'the father of conveyancers'.[10] His forms of conveyance, first published in 1682 (though compiled earlier), continue to influence current practice, as witness the traditional 'covenants for title' still used in many countries.[11]

The tyranny of the precedent books is still with us. They continue to be published, hundreds of thousands of words pouring off the printing presses each year, swamping the legal profession with sentence upon sentence for pleadings, affidavits, declarations, wills, leases, conveyances, notices, bills of lading, mortgages, trust deeds, hire-purchase agreements, assignments, bonds, highway agreements, covenants – and any other documents that one lawyer imagines another might need. Two of the better-known collections in England are *Atkin's Court Forms* and *Butterworths' Encyclopaedia of Forms and Precedents*. Each runs to more than forty volumes. *Atkin* lines the shelves of most barristers' chambers; and most solicitors' firms of any size have the *Encyclopaedia*.

7 David Mellinkoff, *The Language of the Law* (Boston and Toronto: Little, Brown and Co., 1963), p. 199.
8 Ibid., p. 194.
9 Holdsworth, *History of English Law*, 3rd edn, vol. 3 (1923), p. 653; vol. 6 (1924), p. 446.
10 A title bestowed by Mr Serjeant Hill, in *Goodtitle v Funcan* (1781) Dougl 565 at 568; 99 ER 357 at 359.
11 They were compiled in 1649–60. M. J. Russell, 'Brevity v Verbosity' (1962) 26 Conv (NS) 59 reproduces some of Bridgman's material. For an example of current practice in Australia, see *Conveyancing Act* 1919 (NSW), s 78. In England and Wales, the language of these covenants has been updated: *Law of Property (Miscellaneous Provisions) Act* 1994.

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