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# ON ENGLISHING THE LAW OF ENGLAND

CHARLES F. MULLETT\*

During the twelfth century Latin became the language of the English courts, maintaining a position from which, despite partial supersession, it was not dislodged until 1731. Both English and French had been used for important legal documents prior to this date, "but seemingly we may lay down some such rule as this, namely, that if a series of records goes back as far as the twelfth or the first half of the thirteenth century, it will until the reign of George II be a series of Latin records. It is only in the newer classes of authoritative records that either English or French has an opportunity of asserting its claims. . . . In particular, Latin remains the language in which judicial proceedings are formally recorded, even though they be the proceedings of petty courts."<sup>1</sup>

This practice, however, did not survive undebated, and various gestures indicated disapproval. In the reign of Edward III (1327-77), a statute, considering that great mischiefs followed from ignorance of the tongue (French) in which laws were pleaded, ordained therefore that in order to secure good government, pleas should be made and defended in the English tongue.<sup>2</sup> Notwithstanding this use of English for oral pleading, all pleas were to be entered and enrolled in Latin. Periodically the subject came up for further discussion, but not until the seventeenth century did another formal change occur, and this was but temporary. In 1650, an act provided that all legal proceedings should be in English, and written in the ordinary, not in the court, hand, and that "all the report books of the resolutions of judges and other books of the law of England" should be translated into English and written in English in the future.<sup>3</sup> The following year saw provision for certain persons to act as commissioners to superintend these translations. Moreover, this act declared that mistranslation or variation in form by reason of translation should not

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1. 1 POLLOCK AND MAITLAND, *THE HISTORY OF ENGLISH LAW* (2d ed. 1899) 82-83. See also 2 HOLDSWORTH, *A HISTORY OF ENGLISH LAW* (3d ed. 1923) 470-82.

2. 36 EDW. III, st. 1, c. 15.

3. 2 ACTS AND ORDINANCES OF THE INTERREGNUM 1642-1660 (Firth and Rait's ed., London, 1911) 455.

be error, and that no translation of certificates of cases or proceedings in the Admiralty which were to be sent beyond the sea was necessary.<sup>4</sup>

The restoration of Charles II carried with it, unbeknownst to that "merry monarch", the restoration of Latin, the use of which became almost a symbol of loyalty to the Stuart regime. To Roger North who died in 1734—not, it is to be hoped, from the shock induced by the legislative enforcement of English usage—it appeared, as it had earlier to Fortescue and Coke, that the rules of English law were "scarcely expressible properly in English", for a man might be "a wrangler but never a lawyer without a knowledge of the authentic books of the law in their genuine language." Persistently archaic in his views, North also observed that "during the English times, as they are called, when the Rump abolished Latin and French, divers books were translated, as the great work of Coke's Reports, etc.; but upon the revival of the law, those all died and are now but waste paper."<sup>5</sup> Such a view, however, was more than premature: it was erroneous, even for North's own day. The latter part of the seventeenth century witnessed not only the appearance in English of many new books but, what was of greater significance, the translation into English of numerous legal classics, a practice for that matter already of some years' standing. Moreover, as has already been noticed, within North's lifetime an even more momentous change in this connection occurred. This change emerged from a relatively obscure but a fundamentally and historically important source, a county court, that institution whence so much English legal history has sprung.

On February 11, 1731, the quarter session of North Riding, Yorkshire, petitioned the House of Commons against obliging grandjurors to make presentments in a language few of them understood and also against suffering the persons and property of Englishmen to be affected by a language not intelligible and a handwriting not legible. Such usage, said the petitioners, gave rise to abuses, frauds, and delays in the administration of justice. In particular, it made the recovery of small debts impracticable, created too many attorneys, and rendered the prosecution of the rights of subjects expensive.<sup>6</sup> This complaint, which within three months

4. *Id.* at 510.

5. A DISCOURSE ON THE STUDY OF THE LAWS (1824) 12-13. See also 6 HOLDSWORTH, HISTORY OF ENGLISH LAW (1924) 424, 481, 571-72.

6. 8 PARLIAMENTARY HISTORY (1811) 843; JOURNALS OF THE HOUSE OF COMMONS (1727-32) 622. On February 13, the West Riding sessions presented a similar petition. *Id.* at 623.

found a legislative remedy, fitted the temper of the times, since the need for the reform of English law, especially in the direction of simplification, had recently been stressed.<sup>7</sup>

The Yorkshire petition itself aroused conflicting reactions. One writer opposed the changes, insisting that the lawyers had not invented the law hand to keep the people in ignorance; rather, the latter had varied their handwriting from the original. In listing the benefits of the old hand, he particularly stressed the point that deeds of five or seven hundred years' standing remained as legible as if "new wrote".<sup>8</sup> To alter the hand would make it obsolete. Moreover, if writing continually changed, the documents of one century would lose their meaning for another. The same arguments applied to language as well as to handwriting. Likewise, the author pointed out that technical terms had a constant meaning, and to change the language would cause many disputes. Finally, English was too prolix, as could be proved by comparing the records of the Chancery courts, which were kept in English, with those of the Common Law courts, which retained Latin. Instead of benefiting the principals in a suit, the use of English would be especially hard on the plaintiff by encouraging the defendant to take advantage of the novel terms. As a binding argument the author recalled that Cromwell's introduction of English had proved inconvenient, and Latin had been restored along with Charles Stuart.

Although these arguments were to reappear in the parliamentary debates on the subject, some attention may first be given to those favoring the Yorkshire proposal. One defender in the *Gentleman's Magazine* observed that while the law of England had a marvelous tradition, it was at the same time over-complicated and permitted injustice, evasion, and bribery.<sup>9</sup> One major cause of these abuses derived from the fact that men carried on pleadings in a tongue unknown to themselves, and unintelligible both "to the vulgar and the learned." Another difficulty resulted from the use of "a strange uncouth character" which had "as little affinity to the Latin letters, as to the Arabick." Another writer in the same magazine insisted upon the necessity for clear and concise laws.<sup>10</sup> "If a man has no learning, how shall he read 'em in a language he don't know, and in a character he is not acquainted with?" To regard Latin

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7. 1 THE GENTLEMEN'S MAGAZINE (1731) 19.

8. *Id.* at 96.

9. *Id.* at 98-9.

10. *Id.* at 104.

as the only proper legal language, because its meanings were established, carried no weight. The English tongue had equal value with the Latin, and, if used for English laws, men would never mistake their meaning and intention.

In answer to the stand already mentioned against the proposal, a third contributor to the argument declared that the records of the past would not become obsolete through the introduction of English, for it would always be necessary to have recourse to them.<sup>11</sup> Statutes, once in French and Latin, had been Englished since the Reformation without difficulty. It is not compatible with a free people that their judicial process should be entered in an unknown tongue and thus influenced by chicanery and artifice. The use of English constituted, according to this author, a necessary and noble reform.

On March 4, 1731, Sir George Savile presented to the Commons a bill to enact "That all Proceedings in Courts of Justice shall be in the English Language".<sup>12</sup> Like the act of Edward III, this bill deplored the mischiefs resulting from the use of an unknown tongue and a character not legible except to those practiced in the law. The act was to commence on March 25, 1733, and provided that writs and proceedings of any court of justice in England and of the court of exchequer in Scotland should be not only in the English language but also in the same legible hand as acts of parliament and not in the "court hand." Every offense against this act called for the forfeiture of 50 pounds. Some provisions were reminiscent of the act of 1651. Mistranslation, variation in form by reason of translation, mis-spelling, and mistakes of clerkship in proceedings begun before March 25, 1733, being part in Latin and part in English, should be no error, nor make void any proceedings, but might be amended on payment of reasonable cost. The act was not to apply beyond the seas or to courts of Admiralty where Latin would still survive. All statutes for amending delays arising from Jeofails should extend to all proceedings (except in criminal cases) when the forms and proceedings were in English. All errors amended if the proceedings had been in Latin should be amended when the forms were in English. The act allowed the Lord Chancellor and the justices until 1733 for translating the law into English.

11. *Id.* at 118.

12. 4 GEO. II, c. 26; 8 PARLIAMENTARY HISTORY (1811) 858-59; 1 GENTLEMAN'S MAGAZINE (1731) 213-14.

While the bill was pending in parliament, its opponents conjured up many arguments, not dissimilar from those already referred to.<sup>13</sup> If the language and writing were altered, it was declared, no one would ever study the ancient writing and language and the use of the old records would disappear. The method of distributing justice was already established according to a concise and regular form which if changed would modify all proceedings and make for confusion. Indeed it would be many years before the new forms could be settled in a certain and orderly course. This change would therefore increase delays and frauds, render the prosecution of the rights of the subject more difficult and expensive, make the recovery of small debts more impracticable, and increase the number of attorneys.

The advocates of the reform replied that the language of the ancient records would not be lost because men would make it their business to study such records if the occasion required. In any case, a few antiquarians would suffice since lawyers depended altogether too much on ancient records, it being constantly necessary to overhaul various laws every few years. Moreover, too many set forms of law existed in England. Nothing so much perplexed the justices and retarded court proceedings as a too nice observance of established forms. For the sake of fees, lawyers had emphasized forms, and every country had found it necessary to curtail their bulk. Justice was most speedy and impartial where forms were fewest. Their destruction then was an argument for, not against the bill, because it would take considerable time before lawyers could again confuse the course of justice with a number of useless forms and ceremonies. The bill passed the Commons and went to the Lords where it was debated on May 3, 1731.

In the upper house the opponents of the bill anticipated great confusion, delay, and difficulty arising from the translation of the law into English, and they foresaw many suits occasioned by the interpretation of English words.<sup>14</sup> Lord Raymond, a prominent legal authority, in opposing the bill maintained that if it passed, the laws ought also to be trans-

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13. JENKS, *A SHORT HISTORY OF ENGLISH LAW* (1913) 348-49; 8 Foss, *THE JUDGES OF ENGLAND* (1848-64) 77-78. There was widespread conviction that change meant downfall. One argument against the proposal was "that the absence from legal documents of the quaint barbarisms of the neo-Latin of the Year Books, would injure the study of classical literature."

14. 8 *PARLIAMENTARY HISTORY* (1811) 860-61; *JOURNALS OF THE HOUSE OF COMMONS* (1727-32) 753.

lated into Welsh since many Welshmen did not understand English. For the bill, the Duke of Argyle responded by observing that inasmuch as the meaning of the law had long been known to the judges, the latter should be able to use English as well as Latin. Men prayed in English; why should not their law be in the same language? The Welsh analogy he dismissed as nothing but a joke. Another advocate of the reform recalled the law of Edward III. Concluding the debate in the Lords, one member observed that in Scotland sheriffs knew nothing of the writs which they executed because they did not know the court hand. As in the Commons the bill passed the Lords, amended but slightly and without any serious difficulty.

Whether connected with this issue or not, additional complaints appeared both in 1731 and 1732 concerning the multiplicity and confusion of English laws and the superabundance of lawyers.<sup>15</sup> In any case, in 1733, when the Englishing of the law was to go into effect, a brief related flurry did occur. A writer, pleasurably anticipating the statute, recalled that England was the only important country whose law was in a foreign tongue.<sup>16</sup> The Romans had carried their language with them on their conquests. So had the French. Even the Welsh had retained their laws in their own speech. After declaring that Cromwell's effort had really obstructed the reform because of the illiteracy of his agents, he issued some general warnings. Such terms as *nisi prius*, *quare impedit*, and *non assumpsit* he thought might trouble the translators. Moreover, when translated, these phrases might occasion great surprise at the discovery of their meanings behind such oracular words. Too close a translation might be attended with inconveniences, and "too loose and rambling a translation" might cause "strange alterations in the mouths and muscles of our best pleaders".

Parliament, however, in part took care of this in the same year by passing a statute extending the act, 4 Geo. II, c. 26, to Wales and also by permitting the retention of such phrases as this rather frivolous author had mentioned.<sup>17</sup> Otherwise, the controversy over Englishing the law largely ended with the passage of the act, and an institution of centuries' standing passed rapidly into discard.

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15. 1 GENTLEMAN'S MAGAZINE (1731) 522; 2 *id.* (1732) 899-900, 1045-47.

16. 3 *id.* (1733) 65-66.

17. 6 GEO. II, c. 14.