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The use of English in legal matters

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As an attorney practising for some thirty years or so 'down in the engine room' of the law, as one might say, and coming from an English speaking background in Natal, one is conscious of a huge debt to the even huger storehouse of English grammar, literature, and overall folk tradition which the settlers in Natal (as in other parts of the country) were able to draw on and leave as a heritage to us. The English language became the medium in which thoughts were cast by many people in South Africa whose home language was not English. As those people lay in their respective cots and cribs in infancy, their mothers murmuring above them would have been surprised, perhaps, to learn that their children would one day use the language of the English to express themselves in a court of law. Those mothers may have been Russian, German, Indian, French, Dutch, Swedish, Zulu, Swazi, Tswana, Xhosa, Jewish, Italian, Portugese or Norwegian, and although their sons and daughters certainly brought to the use of English some new textures, in many cases their very 'foreignness' has tested and tempered the fabric of the language. (One is reminded of the author Joseph Conrad, whose Polish background lent to his novels a special flavour in their correct use of language. He knew more about English than the lazy easy-going native users of the language knew of it themselves.)

I once had to deal with a man whose mother was Russian, his father German, born in Russia during the 1917-1919 revolution, and who trekked with his parents as an infant and young boy eastwards with the civil war that followed the revolution, ending in Vladivostock.

His home language had been Russian, naturally enough, with an overlay of German. In the east he had to acquire mandarin Chinese, and moving to Macao also Portuguese. He moved to Moçambique where he also acquired English, as well as the language of the Black peoples of the region. Yet his conversational English on a commercial plain was faultless. I met his old mother who murmured words to me in German only; her son had been forced to make the translations, and had at all times protected her from the intellectual effort to acquaint herself with new languages.

So the person whose native tongue was not English often brought to his use of English a special zeal. In addition, many brilliant advocates and judges used the English language scrupulously to define their thoughts, apply the rules, and discover the lacunae in our old systems of law. The pride in culture and the need to make judgements intelligible to ignorant people (like law students struggling with the text of the law of intestate succession) produced fine judgements which can be read with appreciation.

However, one has a suspicion that many of the old judges of English tradition and native language took a little too much for granted. They wanted their judgments understood perhaps by the governor, and his legal advisers, a few colleagues at the bench and at the club, and left much unsaid. If you did not understand the full background you were an ignorant outsider; they felt the better for knowing more than you!

Even today the legal document which one is called upon to draw several times a week frequently harks back to a Dickensian type of language, employing such words as 'Whereas' and 'Now therefore'. Modern clients often pooh-pooh such 'legalese'. For example, some modern industrialists have a background of mathematical and engineering thought that employs a modern type of code to which mathematics seems to be the key. Their documents are often short and full of meaning, and take much perusal before understanding glimmers in the mind of the non-mathematical lawyer. I can remember the blank incomprehension I experienced as a student when first reading the law passed in 1934 dealing with the position of a surviving spouse in a case where a person died without leaving a will, but owning property which had to pass over into the ownership of some new person. The section read some ways once and other ways a second time, but never did one feel one had grasped the meaning. Patiently, like a locksmith picking a lock, one had to plod from word to word, phrase to phrase. clause to clause just as in the days when one was taught the analysis of a sentence in grammar classes during one's middle years at school.

Grammar, funnily enough, is only appreciated long years after leaving school. It is a key to the understanding of statutes. I am

often challenged to find the meaning of a sentence which can run for many lines without a colon, semi-colon or full stop. When it is eventually wrung out of the text, one finds time for a sneaking admission that one admires eventually the man who framed that text. For example, in the Estate Duty Act (45 of 1955) there is a proviso to the first 'schedule' (such a quaint word, mocked at in the funny journals such as 'Punch') which runs to twenty lines and which demands understanding and then translation into the world of arithmetic. What follows is an extract from that rather formidable sentence. The rates of estate duty are subject to the proviso that

> where duty becomes payable upon the value of any movable or immovable property or on a value determined by reference to the value of any movable or immovable property, and duty has, upon the death of any person (hereinafter referred to as the first-dying person), who died within ten years prior to the death of the deceased, become payable upon the value of that movable or immovable property or upon a value determined by reference to the value of that movable or immovable property (or any movable or immovable property for which the Commissioner is satisfied that that movable or immovable property has been substituted), the duty attributable to the value of that movable or immovable property or, as the case may be, the value determined by reference to the value of that movable or immovable property, but not exceeding (in either case) an amount equal to the value on which duty has become payable on the death of the first-dying person, shall be reduced by a percentage according to the following scale;· ... subject to a maximum reduction equal to so much of the duty previously payable upon the death of the first-dying person as is attributable to the value of that movable or immovable property or, as the case may be, to an amount equal to the value determined by reference to the value of that movable or immovable property, and as it proved to the satisfaction of the Commissioner to have been borne by the deceased.

The 'story sums' with which a young pupil in standard 2 or 3 of our primary school days respectfully grappled, and took pride in solving with the 'right answer', pass into gigantic horrors in taxation statutes where the client often has to be called upon to pay huge amounts of money in income tax, estate duty, sales tax, customs and excise, and penalties for late payments.

There is a trend at present away from long and complicated documents which the lay public seldom understand and frequently do not attempt to read. Instead they will ask their attorney: Is it all right for me to sign it? If he says so, they will sign. If he points out ambiguities, they will ask him to draw it up again in

a manner calculated to remove ambiguities and to be understandable. Their own attempts to set down their ideas produce documents which are often harder to understand than those difficult statutes! One client played a sort of game with me some years ago, and instructed me that her will had to be simple, and occupy not more than one page. It was a challenge I did not relish. Her pedantic old husband, who seemed to resent the confidences which his wife had reposed in me, almost enjoyed my alarm. I felt that the rules of a parlour game were being imposed on a matter of great importance. I declined the challenge in the end, and the husband thought to teach me a lesson. He drew the will up himself, on his own typewriter, and presented it to me signed and witnessed. I noticed that the document had practically no margins, started at the tip top of the paper, and ran almost off the page. The game had been won, according to the rules of the parlour game. She is still living, and I sincerely hope that one day she asks our firm to draw another more coherent will, using our own legal 'jargon' which we will be able to understand and translate into figures and accounts ultimately.

Sometimes of course the public's attitude is justified. I heard from one of our senior partners, now alas passed on, that there was an old Natal statute which appeared in the statute book with one line missing. A printer's devil had been at work. It baffled even the bureaucrats of the day. The statute has since been repealed with a large number of other old Natal statutes in one clean sweep.

However, it is no good saying that the layman wants the law to be simple. Life itself is not simple, and cannot be described in simple terms. For example, the antics of our horse racing community (often found in the law reports under the indexed titles, 'The Jockey Club of South Africa versus ...') illustrate the complexity of our sporting world. Indeed, the attempt to explain those ways of the horse racers in simple terms has made a fortune for a Damon Runyan — and the humour produced is tinged with a sense of the ridiculous.

Dipping into the law reports at random exposes one's mind to a treat like the awful dilemma one faces when having a buffet meal, or a smorgasbord. There is so much richness there, and not only from a legal student's point of view, but from that of an historian, a sociologist, and of students in diverse other specialised disciplines. The South African law reports, firstly of the old colonies and republics and later of the provincial divisions, abound in tales of adventure and heroism and villainy, of swindling, of desperate attempts to postpone the falling of the fatal trapdoor; in comments on the folly of humans, on the strange ways of

domestic animals, on the customs of the fisherfolk of our Cape coasts, and details of hunting and whaling codes of conduct. (Many judges have toiled long into many a midnight hour to produce judgements which stand as milestones in our legal system. Most in modern times are models of good prose and clarity.)

At random, I have dipped into ancient English reports and found some intriguing legal arguments put forward by the captain of a Spanish slaver in an English court in 1813. He had been captured by an English ship with his cargo of west African slaves bound for 'the Brazils', on the high seas. He pleaded he did nothing wrong according to the law of Spain by trading in slaves. The English may have abolished slavery, but his country had not; he was on the high seas and not in English territorial waters, and so why should he not be allowed to continue his voyage? One wonders what became of the cargo of slaves whilst all this was dragging on in the courts. What did the court eventually say? Aha, my friend I think you must go and dip for yourself .... (In the old-fashioned printing style of these ancient reports the 's' sounds are frequently represented by our letter 'f'. Much amusement may be caused by reading those words as spelt. We once had a play reading at a party where we read our parts in that odd way. Imagine spluttering out the word 'Sebastopol' using f's instead of s's.)

Other reports of the year 1813 contain reference in maritime matters to the impossibility of performing contracts to deliver goods to ports on the neutral mainland of Europe, owing to the interference of the Napoleonic 'Continental System'. The names of ships, their masters, the circumstances of their voyages, and their interception by French naval squadrons are read in the great tradition of the English language where its literature deals with the sea — from long before the pen of Daniel Defoe scratched out the tale of Robinson Crusoe, stretching across the ages to modern times.

The study of literature helps many a student and struggling young attorney in the practice of the law. *Tom Jones*, a truly great novel by all standards, was written by a magistrate, and helps to show that a balanced man must try to find the via media between the extremes of human conduct. The trickery which it shows being practised in society in the eighteenth century in England is still to be found (and funnily enough in almost the same manner) in society of our own time. One has in mind an incident in the novel where a simple man is lured by a gypsy woman at a farm barn dance into an indiscreet condition, only to find himself confronted by a wildly indignant husband, who hauls up the unfortunate man before the courts to obtain damages for his attempted fault. The magistrate there 'got a nose' of the case and detected the classical trap,

used for generations, where the pretty woman is used as bait and the husband or pimp is used to snap the trap shut.

However not all sins are as universal and perennial as this. For example, one of the threats posed to the older orders by the new socialist vocabulary is the changes in ethics and morality it proposes — changes implicit in new 'norms' of conduct, which are expressed in words which splutter across the pages and bewilder a slightly insulated or isolated South African reader. Their laws make new sins — ignorance of the commissar's mission; private bargaining, so much beloved of the market place of our trading traditions, becomes suspect. It is a challenge, and it can be recognized in the language which is used. Attempt to define the same problem in old conservative English words and concepts, and you give yourself away as an animal of a different political colour altogether. I believe the socialist systems try to drill their lower ranks with a new set of responses — to produce people who will react in a way that their rulers can predict. Does it come from the psychological studies of Pavlov who made his dogs slaver when the bell was rung, even though no food was produced? Try giving the incorrect responses during an ancient church ritual, see what an outsider you are made to feel.

One thinks also of the new sins created in bygone years by clerical missionaries. Somerset Maugham in *Rain* mentions the eagerness with which the wave of well-intentioned missionaries to the South Seas tried to teach those naked natives what sin really was. He took some sardonic pleasure in having his main character fall foul of his own rules.

So if there are artificial 'sins' depending on which sort of extreme one goes to, where does one find the genuine old traditional human rule? In our old codes of law, one suspects. The 'bonus paterfamilias', the 'reasonable man', the 'man on a Fulham omnibus' are all fictional types invoked by praetors, magistrates and judges of our legal systems in a yearning to know what the average man with his feet on the ground would choose to do in a given set of puzzling circumstances. There is much comfort in contemplating that such a man exists in every community. The man who in a council of war gives good advice is such a man — a Ulysses making a speech on a shore near Troy urging the Greeks to adopt some course which will benefit them, or a General de la Rey before the Battle of Magersfontein. There are times in the history of mankind, such a collection of conflicting people that we all are, when a man gets inspiration and utters ideas which should never be allowed to perish — which 'sort out' the confusion. On such an occasion a law develops; a great prophet comes forth and says in authoritative

tones, 'Thus saith the Lord ...'. And he deserves to be preserved for ever in the literature of his nation. A legal man knows that the correct meaning to be given to a single word can make a tremendous difference to a client's interests, although that is often on a lower plane of human endeavour than the one which helps to set a universal rule for all the human race, a rule such as 'Thou shalt not kill'. Indeed, the 'fons et origo' of most of what is good in our civilization is *The Bible*. Heaven knows where all the evil came from. As students we need look not only to words, but to The Word.