

The French language and the common law

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THIS ESSAY HAS BEEN PROMPTED by a brief anonymous article in the Manitoba Bar Newsletter *Headnotes and Footnotes* for October, 1987,¹ entitled "Le Français et la 'Common Law'" and in particular by two passages therein.² The first of these passages consists of a single sentence as follows:

la 'common law', c'est en effet le système de droit uniforme que Guillaume le Conquérant, premier roi francophone d'Angleterre instaura dans ce pays au XIe siècle.

The second passage reads:

Malgré cette interdiction, un auteur britannique pouvait encore écrire ce qui suit au XIXe siècle:

[TRANSLATION] Il n'est guère possible de parler convenablement de droit en anglais et, lorsque l'on tente l'expérience, il faut, pour éviter d'être trop maladroit, avoir recours à une langue fortement francisée...

Bref, du point de vue historique, la véritable langue du droit anglais, c'est le français!

The statements made in the second of these quotations are entirely correct. But the first quotation is equally entirely wrong. William I did not impose a uniform system of law on England. He systematized land tenure, with the result that in time England became the best organized feudal state in Europe, but that is essentially all he did. The statements made in the first quotation are based on a misunderstanding of the nature and immediate consequences of the historical event commonly, but somewhat inaccurately, referred to as the Norman Conquest. This has led the author of the article into a further error later on where he remarks that "les termes normands qui ont engendré la terminologie juridique anglaise contemporaine ont été introduits en Angleterre au

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2 French speakers of today have apparently given up the attempt to translate "common law" into French. In fact neither part of it is, in origin, English; "common" is French (*commun*) and "law" is Norse.

XIe siècle." In fact they were not so introduced, nor are they particularly Norman. They are simply French. The French language was introduced in the eleventh century, but the legal terminology of the Common Law was not introduced into England from anywhere. It simply developed there in the twelfth and thirteenth centuries, and because the language in use was French, the terminology was naturally in French.

The purpose of this essay will be to seek to demonstrate the validity of the assertions made in the preceding paragraph. And it is useful to begin with an explanation of the state of England before the Conquest and of the events that produced it.

The Saxons arrived in Britain about the middle of the fifth century, that is about 600 years before the Norman conquest. For the first 100 years or so they were fighting the Britons to drive them out. For most of the last 200 before the Conquest they were fighting the Danes to keep what they had thus got. During the intervening 300 they fought each other, for which purpose they organized themselves in separate kingdoms which fluctuated in number between a low of five and a high of seven and, when that failed to provide enough action, there were occasional civil wars within a kingdom, usually over a disputed succession to the kingship.

The boundaries of Saxon England were not the same as those of modern England. On the one hand, Cumbria, the extreme northwest of the country, was never conquered by the Saxons; it remained in the possession of the Britons as part of the kingdom of Strathclyde. On the other hand, Northumbria, the most northerly Saxon kingdom, stretched along the east coast from Yorkshire to the Firth of Forth, straddling the modern Border between England and Scotland. Northumbria was one of the three largest of the Saxon kingdoms, the other two being Mercia, in the Midlands, and Wessex, in the southwest.

On this motley collection of feuding principalities there fell, in 865, the hammerblow of a Danish invasion. Viking raids had begun half a century before, but this was no mere raid but a powerful army intent on conquest and settlement. In the end they grabbed roughly the northeastern half of modern England. Only Wessex, Kent, southern Mercia and, rather oddly, the northern half of Northumbria eluded them. And it was only the skill and courage of the king of Wessex, Alfred, that kept them from overrunning the south and west of the country as well. Wessex now swallowed up Kent and southern Mercia and, under Alfred and his successors, set out to try to recover what the Danes had taken. In the end they succeeded, but not until the year 954 under the rule of the last of Alfred's grandsons. Furthermore it was re-

covered only on terms, which included the recognition of Danish law in the area of Danish settlement, which became known as the Danelaw as a result.

England was now, for the first time, united under Saxon rule. It did not last long, 26 years to be precise. In 975 the last of Alfred's great-grandsons, Edgar, died; he had married twice and left two sons, one by each wife. The elder, Edward, succeeded him, but three years later he was murdered by retainers of his stepmother, thus clearing the way for the succession of her son, the notorious Ethelred the Unready.³ It was a sordid beginning to a sordid and disastrous reign. In 980 Danish raids resumed. Ethelred proved quite unable to organize resistance, and resorted to trying to buy the Danes off by payments of tribute called Danegeld. The Danes took the money and came back for more. To raise the money needed, Ethelred had to impose a tax, and in time the name Danegeld came to mean not the tribute, but the tax. The tax was a direct tax on land based on its value, which required that all occupied land in England should be assessed. This gave England the most sophisticated fiscal system in Europe. All taxes, once imposed, have a tendency to remain permanent and Danegeld was no exception. Just as our own Income War Tax Act remained in force for decades after 1918, so Danegeld went on being collected; it continued to be collected by the Norman kings after the Conquest.

This time the Danes prevailed. In 1013 Sweyn, King of Denmark, was proclaimed king of England, and in 1014 Ethelred fled to Normandy and took refuge with his brother-in-law Duke Robert, whose sister he had married as his second wife. The same year Sweyn died and in 1016 Ethelred died. There ensued a struggle between Sweyn's son Cnut and Ethelred's son by his first wife, Edmund Ironside. It might be thought that in this contest all Saxon England would rally to Edmund, but it didn't; Edmund was defeated and had to agree to divide the kingdom with Cnut. Shortly afterwards Edmund died leaving infant children, who were shipped off to Sweden by their guardians to get them out of harm's way. Cnut the Dane now became King of England, Denmark and Norway and reigned until his death in 1035. He was succeeded as King of England by his son Harold, commonly known as Harold Harefoot.

By the end of Cnut's reign northern Northumbria had become permanently detached from England and incorporated into Scotland. Since it was Saxon and Cnut was Danish, this could well have been a secession rather than a conquest.

3 The meaning of this word has changed. In Anglo-Saxon "Ethelraed" meant "noble counsel"; "Unraed" meant "no counsel". The nickname was a pun designed to emphasize how totally Ethelred had failed to live up to his name.

Ethelred had taken with him to Normandy his two sons by his second wife, Alfred and Edward. Alfred now made his way to England, ostensibly to visit his mother Emma who, after Ethelred's death, had married Cnut, but obviously his real purpose was to try to claim the throne. He was seized on the orders of Godwin, Earl of Wessex, who, although a Saxon, was the leader of the pro-Danish party in England. On Godwin's orders Alfred was blinded and imprisoned in a monastery, where he died.

In 1040 Harold Harefoot died and was succeeded by his half-brother, who died two years later. At this point England had again been united under Cnut and his sons, from 1016 to 1042, that is for a further 26 years, but this time under the rule of Danish conquerors.

The throne of England was now vacant, but the *de facto* ruler of the land was Earl Godwin. There ensued some hard bargaining between Godwin and Alfred's younger brother Edward, known to us as Edward the Confessor. In the result Edward returned to England as king and married Godwin's daughter, and Godwin became, in effect, prime minister for life. It must have been an uncomfortable *ménage* for Edward knowing that his father-in-law was his brother's murderer. In 1053 Earl Godwin died and was succeeded as Earl of Wessex and *de facto* ruler of England by his eldest son, Harold. And two of his other sons were installed as Earls of Mercia and Northumbria, the existing earls being dispossessed to make way for them. That can hardly have made the Godwin family popular in the north of England.

Edward's marriage was childless. Who was to succeed him? In the absence of any known relations on his father's side, his closest relative on his mother's was his first cousin, William Duke of Normandy. William's claim had one defect, which today would be regarded as insuperable; he was illegitimate. He may be William the Conqueror in England, but he was Guillaume le Bâtard in eleventh century Normandy. However, this had not stopped him becoming Duke of Normandy, so why should it stop him becoming King of England?⁴ The only other claimant was Harold. He was the *de facto* ruler of England; if the throne became vacant, why should he not fill it?

In this situation, someone remembered the infant children of Edmund Ironside, who had been spirited off to safety in Sweden on their father's death in 1016, and set out to trace them. And an interesting

4 People certainly seem to have taken a relaxed view of this sort of thing in the eleventh century. Duke William's aunt, Emma, had married Cnut as his second wife; in this context that does not mean that Cnut had been previously married but that he was already married. Nevertheless Emma's son by Cnut succeeded Harold Harefoot as King of England in 1040. This, incidentally, made William also the first cousin of the last Danish king of England.

trail it was. Sweden was too close for comfort to Denmark, so they had moved on, first to Russia and ultimately to Hungary. There the English found Edmund's son Edward, appropriately known to history as Edward the Exile, the indisputable heir to the throne of England. And from there, in 1057, he returned, now a man in his forties with children of his own. Shortly after his return he was invited to visit Harold. He arrived in perfect health. Within a few days he was dead. Natural causes or poison? We will never know. But like father, like son. Remembering how Earl Godwin had disposed of an inconvenient member of the royal house, why should we give Harold Godwinson the benefit of the doubt?

In 1066 Edward the Confessor died. Who was now the rightful king of England? To that question there can be only one answer, Edward the Exile's only son, Edgar the Atheling, the only remaining direct male descendant of Alfred the Great. True enough he was young. Just how young he was is not clear; no history book tells us. But even if he was a child, Harold was the *de facto* ruler, and if Edgar had been crowned, Harold would have continued as ruler until Edgar came of age; thereafter he would have to take his chances. Harold chose not to take that risk. The day after Edward died, the Witan (or council) met and elected Harold king, and he was crowned by Stigand, Archbishop of Canterbury. The idea that a Witan representative of the whole country could have assembled on that short notice is absurd. And Stigand had no title to his office; there had been a schism in the Church, with two rival claimants to the Papacy, and Stigand had been appointed by the loser. This flaw in Harold's title enabled the Pope to give his blessing to William's invasion. The flaw would appear to have been readily curable, by having the coronation performed by the Archbishop of York. That would have meant a delay of at most a week or two. But perhaps the Archbishop of York was unwilling, for, after Hastings, it was he who crowned William I.

The first blow against the new king was struck by his own brother Tostig, who had been made Earl of Northumberland but had subsequently quarrelled with him. Tostig attacked and plundered the Isle of Wight; obviously he had supporters, for he cannot have done this single handed. He then joined forces with the king of Norway, who claimed to be the heir of Cnut, to launch an invasion of northeast England.

Essentially Harold had hijacked the throne, and it is difficult to say how much backing he really had in the country. As between himself and William, it was the latter who had the better claim, for he was at least related to the previous king. What subsequently happened to Edgar the Atheling? In 1066, after Hastings, he swore fealty to William,

but the next year he fled with his sisters to Scotland. But in 1074 he returned to England and was reconciled to William. He commanded the contingent of English ships in the First Crusade. Apparently he died childless. But his sister Margaret married Malcolm Canmore, King of Scots. Her daughter married Henry I, the Conqueror's youngest son, and their grandson was Henry II, the first of the Plantagenet dynasty. Thereafter the title of the Conqueror's successors is unassailable, except by the heirs of Margaret's son, who of course became King of Scots. But in 1603 James VI of Scotland succeeded to the throne of England anyway.

Under Edward the Confessor England had been united, and once again under Saxon rule, from 1042 to 1066, which is 24 years. If you add to it the previous 26 years of Saxon rule over a united country, from 954 to 980, you get a total of 50 years. But the periods are so far apart that few, if any, people can have been alive in both of them. Most of Edward's subjects had been born and brought up under Danish rule. And Edward had been a purely nominal ruler. The country had really been ruled by the Earls of Wessex, father and son, and their relatives who had been placed in positions of power all over it. That sort of thing may be accepted if it works and produces peace and order, but now the Godwin family was fighting amongst itself. Without the Norwegian invasion instigated by his brother Tostig, Harold would probably have defeated William. Essentially, Saxon England collapsed for lack of a leader whom the whole country would accept.

Thus the justification for the Norman Conquest was that Duke William was the rightful king of England. As between himself and Harold this was certainly plausible, and a *jus tertii* held by Edgar is no answer to the claim. There is no essential difference between the claim of William I vindicated at Hastings and the claim of Henry VII vindicated at Bosworth.⁵ Both could and did claim that the lands of any person who had actively opposed him were thereby forfeit and could be regranted to his own supporters. But, thereapart, each had to accept the laws of England as he found them.

Now let us look at the Norman side. William began by asking his barons to authorize his venture, so that he could use the resources and revenues of the Duchy of Normandy to conquer England. But at the Council of Lillebonne they refused, which was just as well. Had they

⁵ Indeed there is a very close parallel between them, for Henry's claim too was tainted by bastardy. His grandfather was one of the illegitimate children of John of Gaunt by Catherine Swynford. (She was his children's governess, which gives the affair a quaintly Victorian flavour.) They were later legitimated by Act of Parliament for all purposes except succession to the throne. When the House of Lancaster ran out of legitimate heirs, the exception was just ignored.

agreed, England would have been an appendage of the Duchy, which would have given the French king a claim to suzerainty over England. As they refused, William had to arrange his attempt as a private venture. This point is important. The Norman Conquest of England was an undertaking of private enterprise; it may fairly be described as the greatest achievement of private enterprise in history.

William's first requirement was to raise an army. This he did by offering to divide up among his followers the estates of the English landowners who opposed him. But he also needed a fleet to transport his army, and food with which to feed it while it was waiting for a favourable wind to cross the Channel. Medieval ships' captains were not interested in taking a chance on acquiring a piece of real estate somewhere in the interior of England; they wanted cash on the barrel head. So did the grain merchants. To pay them William had to borrow, promising to repay out of the revenues of the conquered territory, which of course is where the Danegeld would come in handy. William is condemned in the Anglo-Saxon Chronicle for the rapacity of his taxation and his love of the red gold. In truth he had little choice; he had to pay his creditors.

But it is the composition of William's army that is significant. There is no nominal roll of the army, but Domesday Book shows the names of those to whom land had been granted. They came from all over northern France, and from as far eastward as Flanders. They also came from the westward of Normandy, from Brittany. And here we do have a check on the numbers. At Hastings William divided his army into three divisions, and one division was composed entirely of Bretons. It is worth dwelling on this point for a moment. Brittany contained then, as indeed it does today, the descendants of the original Celtic inhabitants of France, the Gauls. The Breton language is still alive today; it was flourishing in the eleventh century, and to most of the Breton followers of Duke William French must have been a second language. And in the eleventh century Breton society was still essentially a Celtic tribal society on which feudalism had made little impact. Why did so many Bretons join Duke William's army? Here we have to go back five or six centuries, to the Saxon invasion of Britain. As the names imply, there was a close racial affinity between the Britons and the Bretons. As the Saxons drove inland, the Britons fled, some by land to Wales, Cornwall and Cumbria, and some by sea to Brittany. There they and their descendants dreamed of the day they would return, and in 1066 that day dawned. Thus does the whirligig of time bring in his revenges.

Thus the new landowning class which the Conqueror imposed on England was only, at most, about half Norman. For the newcomers to have imposed Norman customary law as a uniform law on the whole

country was impossible, since half of them had no knowledge of it. If William had parcelled the country out in such a way that knights from the various provinces of France were grouped together, the customs of those provinces might have taken root in different parts of England. But he took pains to avoid doing this. William had been troubled by rebellion in Normandy, and he was determined to make it difficult in England. So those who received large grants of land received it in small pieces spread out across the country, and men from the same district in France, who might be disposed to club together, were deliberately split up and placed amongst strangers so as to prevent this.

The essential feature of the new ruling class was not its Norman-ness, but its Frenchness. For a century after the Conquest, the term "Norman" is never used, always "French". In those days it was customary for a document of an official nature to begin with a greeting to those to whom it was addressed. And what we would now call a deed of land took the form of an announcement by the grantor to all who might be affected by it of the grant that he had made. Take for example this grant of about 1150.⁶

Ranulphus comes Cestrie constabulariis dapiferis vicecomitibus ministris et baillivis et omnibus hominibus Francis et Anglis salutem. Scitote me dedisse Henrico de Laceio in feodo et hereditate Ludeham et Brigeford....

[Ranulph, Earl of Chester, to the constables, stewards, sheriffs, ministers and bailiffs and all his men, French and English, greeting. Know that I have given to Henry de Lacy in fee and inheritance Ludeham and Brigeford....]

What gave the Conquest its Norman complexion was not the composition of the conquering force, but the men William chose to fill the important places in the administration in both the state and the church. He wanted men he knew and could trust. The men he knew were the Normans and he knew which of them he could trust. Justiciars, chancellors, sheriffs, bishops and abbots were all Normans. The administration of the country was Normanised, but substantive law was not. He made this clear in the first document he issued, which, in translation, reads as follows.⁷

King William greets in friendly wise William the Bishop and Gosfrith the portreeve and all the burgesses in London, both French and English. I let you wit that I will that you two be worthy of all the laws that you were worthy of in King

6 Sir F.M. Stenton, *The First Century of English Feudalism, 1066-1166* (Oxford: Clarendon Press, 1932) at 270, no 23.

7 This translation is taken from: T.F.T. Plucknett, *A Concise History of the Common Law*, 3rd ed. (London: Butterworth, 1940) at 13.

Edward's day. And I will that every child be his father's heir, after his father's day, and I will not endure that any man offer any wrong to you. God keep you.

By and large, William lived up to this promise. Indeed he was so busy imposing order that he had little time to think about law. He did however make three changes in the existing law. The first two may come as a surprise. He reduced the number of offences punishable by death and he abolished penal slavery.⁸ The third change was to prohibit the bishops from transacting ecclesiastical business in the hundred courts (one of the local customary courts) and require them to set up their own church courts for the purpose.⁹

The Conqueror's immediate successor, his second son William Rufus, enacted no legislation whatever. His third son, Henry I, who succeeded in 1100, began his reign by issuing a Charter of Liberties. This concludes with a grant of the law as it was under Edward the Confessor "together with those revisions which my father made with the advice of his barons".¹⁰ Clearly no significant change in the law has been made.

The result was to leave the laws of England in a condition that was far from uniform. The reign of Henry I saw the appearance of the first textbooks on English law. The most important of them bears the misleading title of *Leges Henrici Primi*; it begins with Henry's coronation oath, but the rest of its contents have nothing to do with him. They are an attempt to state the Anglo-Saxon law in a form suitable for the Norman age. The author recognizes the existence of three different territorial laws, those of Wessex, Mercia and the Danelaw. There is no one law common to the whole country.

Nor was there even a unified system of courts. To our way of thinking, the administration of justice is a royal monopoly. But that is a modern idea. It is not how the administration of justice began in

8 This was clearly a punishment extensively used in Saxon criminal law and accounts for the slaves who are recorded in Domesday Book. This gives the figures for two dates, 1066 and 1086, the year of the survey. They show a significant reduction in the number of slaves in 1086, presumably as a result of William's abolition.

9 This piece of William's legislation had, until recently, left its mark on Manitoba. One area of ecclesiastical jurisdiction was the probate of wills of personalty, and this lasted until the creation of the Court of Probate in 1857. Although at first each bishop exercised his jurisdiction personally it soon became necessary to appoint a trained canon lawyer to exercise it on his behalf. This person was known as a surrogate (which is only a Latin word for deputy), and his court as the Surrogate Court. When probate courts were established in Upper Canada they were given this name, then still in use in England, even though they were not church courts. From there it was imported into Manitoba.

10 Plucknett, *supra*, note 7 at 283.

England, or elsewhere in Western Europe. In England it began in the local courts, the courts of the shires and of the hundreds, which were subdivisions of shires. These were not courts as we know them with professional judges; there were no professional judges. By the eleventh century the shire court was an assembly of all the freeholders of the shire presided over by the shire reeve, a title which became contracted into sheriff. He was appointed by the king, and that was the only control the king had over the court, and it was not much. The court met not just to decide disputes, but to transact the general business of the shire, and all decisions were made, not by the sheriff, but by the general consensus of the assembled freeholders. These courts continued after the Conquest; the Anglo-Saxon shire changed to county, but that was all. Following the Conquest, and the imposition of a more organized feudalism, feudal courts held by a lord for his tenants appeared alongside the local courts. The situation existing forty years after the Conquest is described as follows by Professor Maitland.¹¹

At the beginning of the twelfth century England was covered by an intricate network of local courts. In the first place there were the ancient courts of the shires and the hundreds, courts older than feudalism, some of them older than the English kingdom. Many of the hundreds had fallen into private hands, had become the property of great men or great religious houses, and constant watchfulness was required on the king's part to prevent the sheriffs, the presidents of the county courts, from converting their official duties into patrimonial rights.¹² Then again there were the feudal courts; the principle was establishing itself that tenure implied jurisdiction, that every lord who had tenants enough to form a court might hold a court of and for his tenants. Above all these rose the king's own court. It was destined to increase, while all the others were destined to decrease; but we must not yet think of it as a court of first instance for all litigants; rather it, like every other court, had its limited sphere of jurisdiction. Happily the bounds of that sphere were never precisely formulated; it could grow and it grew.

11 Sir F. W. Maitland, *The Forms of Action at Common Law* (Cambridge: Cambridge University Press, 1941) at 12.

12 This seems to have happened in France. As is noted below, after the Conquest Latin became the written language of government in England. Sheriff was translated as *vicecomes*. The Latin word *comes* is the root of the French *comte* and the English count. *Vicecomes* is therefore vicomte or viscount. The Normans' use of *vicecomes* as the translation of sheriff thus implies that in eleventh century Normandy vicomte was not a title but the name of an office similar to that of sheriff. Confirmation of this is to be found in the Channel Islands, originally part of Normandy. English replaced French as their official language about twenty years ago, and the sheriff there is now rather improbably called the viscount, see *Viscount of the Royal Court of Jersey v. Shelton* [1986] 1 W.L.R. 985. Obviously before the change to English he was still the vicomte. The emergence of vicomte as a title in France thus seems to have originated in sheriffdoms becoming hereditary. The English title viscount was simply copied from France at a much later date.

The recognized jurisdiction of the king's court was in fact threefold. First, like any other lord, he could hold his court for his tenants, the so-called tenants-in-chief who held directly of the king, in which issues affecting their rights and obligations, and disputes between tenants, could be decided. Secondly, the court could hold the so-called pleas of the crown, matters that in one way or another especially affected the king, such as infractions of his proprietary rights, and even any violent crimes which broke the king's peace. And thirdly it was accepted that the king's court had some sort of supervisory power over other courts, not a right to hear appeals in the modern sense, but a right to ensure that all cases brought were duly heard and decided in a proper manner.

It will be seen from this that practically all civil litigation took place in non-royal courts. There were no professional judges, no professional lawyers, and no published statutes to refer to. Furthermore, in many instances not only the facts but the law fell to be decided by a body of men resembling a large and unwieldy jury. It is inevitable that, on points of law, their decisions would follow what they believed to be the local custom. In this situation it was impossible for any body of law common to the whole country to exist or even to begin to evolve.

One can only guess at what language was spoken. Before the Conquest, Anglo-Saxon had been not only the spoken but also largely the written language of government. At the Conquest it was displaced as the written language not by French, but by Latin. Latin, not French, is the original official language of the Anglo-Norman state, including the law. It is only later, when more was being written, that French appears in surviving documents. But very few people could speak Latin. Oral proceedings in court had to be conducted in either French or Anglo-Saxon. In most cases it must have been Anglo-Saxon, since the vast majority of the population, and therefore the majority of litigants, were Anglo-Saxon. But even when French was used, this would not have resulted in Anglo-Saxon legal terminology being translated into French, because there was none to translate. Legal terminology cannot evolve until the law is being administered by professionals.

The first step towards professional administration was taken by Henry I, who began sending out royal judges to examine the proceedings of the local courts, and even to preside in place of the sheriff at the trials of important cases. But this came to a halt when Henry died in 1125, leaving a disputed succession and a resulting civil war.

I have here, I submit, completed the first part of my task by demonstrating that William I did not introduce into England any uniform body of law, or any French or Norman legal terminology. A few new words, such as *in feodo et hereditate*, appear in grants of land, but they are Latin, not French. Not only at William's death, but also at the death of

his son Henry I in 1125, the law itself and the methods by which it was administered remained much as they had been in 1066.

My remaining task is to examine how the Common Law did come into existence, and why its terminology was French.

The succession to the throne on Henry's death was disputed because he left no son but only a daughter, Matilda. The issue was whether the country should be ruled by a woman. The rival claimant was Stephen, Count of Blois, the son of the Conqueror's daughter, so obviously it was not disputed that the crown could descend through the female line. To some extent the crisis was manufactured. Many barons felt that Henry had been making the crown too powerful; here was an opportunity to reassert their independence. Henry had taken one important precaution; he married Matilda to the Count of Anjou, which adjoined Normandy to the south, thereby ensuring that Normandy would be safe from attack and would be secured to her. But she was not able to secure England. Stephen won the civil war and was installed as king, and Matilda withdrew to Normandy. The result is described in a famous passage in the Anglo-Saxon Chronicle.¹³

Every rich man built his castles and defended them against the king, and they filled the land full of castles.... And when the castles were finished they filled them with devils and evil men. Then they took those whom they suspected to have any goods... seizing both men and women and they put them in prison for their gold and silver and tortured them.... I cannot and may not tell of all the wounds and all the tortures that they inflicted on the wretched men of this land, and it lasted the nineteen years that Stephen was king.

Meanwhile, in 1150, Matilda and the Count of Anjou installed their son Henry as Duke of Normandy. In 1151 the Count died, and Henry succeeded him as Count of Anjou, Touraine and Maine. In 1152 Louis VII of France divorced his wife, Eleanor of Aquitaine, the heiress of all southwest France. Within two months Henry married her, although he was 19 and she was 30. He was now master of the whole western half of France. In 1153, with this power behind him, he swept into England and defeated Stephen in two battles. By 1154 Stephen was dead and Henry Plantagenet was King of England. He was welcomed by both French and English. To the French he was the great-grandson of the Conqueror. To the English he was, through his grandmother, the great-grandnephew of Edgar the Atheling, a descendant of King Alfred and the representative of the Saxon royal house. To both he came as a deliverer from anarchy and chaos. About half the baronage had, after

13 The Chronicle was, of course, written in Anglo-Saxon, and the text following is a translation. It is to be found with minor variations in numerous histories of the period.

all, backed his mother in the civil war, and those who had genuinely backed Stephen in the belief that a man was better fitted to preserve order had been cruelly disappointed. In addition, Henry's reign proved to be a time of economic expansion. Thus, at least until the tragic murder of Archbishop Becket in 1170, he had a great deal going for him, and this enabled him to make changes which other monarchs might not have been able to accomplish.

It has to be remembered that there was at this time no such thing as Parliament. Theoretically the king was the lawgiver. The practice, however, was to summon a council of some sort to approve any new legislation, because a statute that had not got the backing of the nobility would soon prove to be unenforceable. In Henry's reign there is a veritable outburst of legislation, but the really significant development is the expansion of the jurisdiction of the royal court. Sometimes this was achieved or assisted by a statute, but in other instances it was accomplished without any statute at all. The best illustration of what happened is provided by the next legal textbook to appear, which bears the name of Glanvill. It appeared about 1187, which is two years before Henry's death. Ranulph de Glanvill was the Justiciar during the last ten years of the reign. The book does not claim to have been written by him, only to have been written during his time. It gives a specimen of the various forms of writ then in use in the King's Court, with a commentary on each of them. At this time there were not very many such writs, so the book is not very long. But subsequent medieval textbooks followed the pattern thus established, and the books get longer because the number of available writs is expanding, and with it the jurisdiction of the court.

The contrast between Glanvill and the *Leges Henrici Primi* is very marked. The author of the older book is overcome by the confusion of competing systems of law, none of which alone was adequate. Even in England he had to recognize three territorial laws, the Dane Law, the Law of Mercia and the Law of Wessex, but in order to make sense out of them he had to appeal to Roman, canon and Frankish law. When we come to Glanvill everything is beautifully simple. He is only concerned with the law of the King's Court; all the tangled masses of local custom which certainly were still in force he completely ignores; most of the surviving traces of pre-conquest law are likewise absent from his work. He is, in fact, the first exponent of the new common law which in the course of the centuries was to supersede the ancient legal institutions of the land. Already we can see the main features of that common law in Glanvill's book; it is royal, flowing from the King's Court; it is common, for local variations receive very little sympathy; it is strongly procedural, being based upon writs and expressed in the form of a commentary upon them.¹⁴

14 Plucknett, *supra*, note 7 at 229.

Be it noted that no one has enacted a new law. The King's Court has simply provided a new remedy. *Ubi remedium, ibi jus*; where there is a remedy, there is a right. That is the principle on which the Common Law was founded. And it is still with us today, for what is the essential feature of a statement of claim? It must disclose a cause of action, and thus show that the plaintiff is entitled to a remedy. If it doesn't, it will be struck out.

How did Henry get away with it? The answer undoubtedly lies in the two most important of the new writs. These are known as the Assize of Novel Disseisin and the Assize of Mort d'Ancestor. The word "assize" (Latin *assisa*) appears at this time with a bewildering variety of different meanings. In this instance it refers to the method of trial; the writ commanded the sheriff to summon twelve free and lawful men (*duodecim liberos et legales homines*). Originally they were probably intended to be men with some knowledge of what had happened, but ultimately they evolved into a jury, and this is the introduction of jury trial into civil actions in England, right at the beginnings of the Common Law. In an Assize of Novel Disseisin the plaintiff had to prove only that he had been in possession as the apparent lawful owner and that the defendant had ousted him. It was no answer for the defendant to assert that the land ought to be his. If he was claiming to be the owner, he must recover possession by bringing the appropriate action, known as a writ of right. An Assize of Mort d'Ancestor provided the same relief where the plaintiff's predecessor had died possessed of the land and the defendant was preventing the plaintiff from taking possession. Forcible seizure of other people's land by the strong had of course been one of the evils of the Anarchy of Stephen's reign. It was precisely one of the evils that men wanted Henry to put an end to, and they welcomed the means by which he did it.

Despite its apparently all-embracing name, an Assize of Mort d'Ancestor was in fact available only where the predecessor was the plaintiff's parent, brother, sister, uncle or aunt. Obviously this left some gaps, and about the year 1237 three new writs appear to fill them, the writs of Aiel, Besaiel and Cosinage. There is no legislation, just a new writ. At about the same time another new writ of great importance appeared. Leases of land for a term of years were already known, but hitherto they had been regarded as a purely contractual arrangement giving the lessee no interest in the land. But at this time there is found the first instance of a writ named *quare ejecit infra terminum* whereby a lessee ejected before his lease expired could recover possession from his lessor. This converts the lease from a mere contract into an interest in land. No new right has been proclaimed; no statute has been enacted;

just a new writ. And in this instance we know who invented it; it was the Chief Justice, William de Raleigh.

But then, about the end of the thirteenth century, this process stops. On the face of it, a reaction has set in; the King's Court, which had been so bold and innovative, has now become timid; the law has ceased to be flexible and become rigid. What in fact has happened is that Parliament has come into existence. When the king alone could make laws, there was no reason why his judges should not make new law by creating new remedies. But now it requires the King, the Lords and the Commons to make a new law, and the Commons could see very well that if the courts were left free to go on creating remedies, their control over legislation would be rendered nugatory. So they petitioned against this practice and it ceased.

Thus the period of the founding of the Common Law begins about a century after the Conquest, around 1160, and lasts for a century and a half. It is therefore during this period that the basic terminology of the law became fixed. It became fixed in French. Why?

When Henry II came to the throne in 1154, English society was still much the same as it had been immediately after the Conquest; the upper class was almost wholly French. Many of the Conqueror's followers had owned land in France, and their descendants had no difficulty in retaining their possessions on both sides of the Channel; Henry's predecessor on the throne, Stephen, was Count of Blois as well as King of England. These men would naturally speak French, and there would be no difference between the French spoken in England and that spoken in France, since many of those speaking it spent part of their time in one country and part in the other.

History has given to Henry's territorial possessions the name of the Angevin Empire. And an imposing empire it is on the map, stretching from the Cheviot Hills on the Scottish Border to the Pyrenees. The centre of gravity of the Empire clearly lay in France; that was where the bulk of its population and of its wealth were to be found. Nevertheless it was England that formed its essential part. All Henry's French possessions were feudal fiefs held of the French crown; on the basis of these possessions alone, Henry was simply an over-mighty subject of the King of France. But England was a kingdom in its own right; it was being King of England that gave Henry a status equal with Louis of France. Obviously French had to be the working language of the Empire, and it therefore also had to be the working language of the territory that made it an Empire, namely England. It is generally thought that Henry himself could not speak English.

But the Angevin Empire looks far more impressive on the map than it was in reality. It was simply a collection of Henry's personal

fiefs, which had no community of feeling or interest one with another. So long as it was controlled by a capable and energetic ruler it would hold together, but there was nothing else to keep it together. Henry died in 1189. He was succeeded first by his son Richard I. It is worth observing that he is referred to in many English books by the French version of his nickname, *Coeur de Lion*; he will not be found named the Lion-heart in any French book. As I have said, French was the working language of his empire.

In 1199 Richard died, and was succeeded by Henry's youngest son, John. Now the Angevin Empire fell apart. This was an inevitable result of John's character. In the first place he was as crooked as a corkscrew; he would doublecross anybody at any time if he thought it would give him an advantage. In the second place he thought this was perfectly normal conduct and that everybody else was as dishonest as he was. Honest men do not like being assumed to be crooks, and honest men deserted John in droves. By 1204 he had been driven from all his French possessions, except Gascony in the extreme southwest (part of the lands of Eleanor of Aquitaine) and the Channel Islands. The English kings continued to hold Gascony as a fief of the French crown for another two and a half centuries; but it was too far away from England for this to have any practical effect, except to give Englishmen a preference for the wines of Bordeaux. The Channel Islands they have to this day, and these continued to be mainly French speaking until this century, but their population is too small for this to have any impact in England.

As mentioned, a substantial number of the nobility held estates in both France and England. This was a source of potential weakness for royal power, for men so placed had opportunities to play one king off against the other. The King of France now felt strong enough to put an end to it. He decreed that all such landowners must choose whether they were going to be French or English; all those who did not dispose of their English possessions must dispose of their lands in France or they would be forfeited.

This had profound effects. "French" now ceases to refer to race and refers to nationality. Henry II, in his charters, had still been greeting "all his liegemen of the whole of England, both French and English". But in John's most famous charter, the Magna Carta of 1215, the word *Franci* is not to be found. More important, of course, is that from now on all those French speakers who have remained in England have done so because, when made to choose, they chose to be English.

Despite this, French went on being spoken and, now, written in England. In 1275 we find the first statute written in the vernacular in-

stead of in Latin; the vernacular used is French.¹⁵ Thereafter for several decades Latin and French alternate in the statutes, until both are abandoned in favour of English in the middle of the fourteenth century.

You could not in those days hop across the Channel in an hour or two. Medieval ships had great difficulty in sailing into the wind; they really needed a following wind. And the tides in the Channel are extremely strong; the whole southern half of the North Sea partially empties and refills through it every twelve hours. Even if the wind was favourable, if it was not a strong one you could easily find yourself, at the end of the day, further away from your destination than you had been at its beginning. People did not cross the Channel for pleasure, but only when important business required it. And now few people had business of that importance on the other side. Intercourse between England and France did not cease, but it was not now extensive.

It is clear enough that everyone in England could now speak English. John's son, Henry III, married a French wife, Eleanor of Provence, and thereafter his court (that is to say his household, not his law courts) began to attract Provencal and other French favourites. These aroused the ire of, among others, Bishop Grosseteste, who denounced them for numerous sins, and in particular their inability to speak English. This is in the middle of the thirteenth century; we have travelled a long way in the two hundred years since 1066.

But yet the use of French continued; indeed, according to some historians, it actually spread, downwards socially speaking, from the landowning and official classes to the merchants. The explanation for this seems to lie in the educational system. In the early middle ages the Church had a monopoly of education, to the extent that the accepted test of whether someone was a cleric or a layman was whether he could read and write. In this context the term cleric is by no means equivalent to priest. It included both those in major orders (the priesthood) and those in minor orders. Men in minor orders were not required to take the priestly vows and were thus free to marry; by admitting all educated men to minor orders, the Church was able to keep them under its umbrella, which in a rough age afforded some protection. The word clerk, which is simply a corruption of cleric, originally signified a man who could read and write. It was from these clerks in minor orders that the royal civil service was staffed.

15 The statute concerned is known as the First Statute of Westminster. It is of interest also for giving us a French word for a statute, namely *tablisement*. This word was apparently being used in the same meaning in France at the time. It is the subsequent abandonment of this usage in France, and the substitution for it of *loi*, that has had the effect of making Common Law untranslatable.

It is obvious that, following the Conquest, the language of instruction in some schools must have been French, since many of those who could afford an education were naturally French speaking. Was this the case in all schools? The answer clearly is no. In 1185 there was written the biography of a hermit by the name of Wulfric, who had achieved some fame as a worker of miracles. Wulfric of course was a Saxon, and he was a priest. It is a fair inference from his biography that he could speak French, but another Saxon parish priest figures in the story, and he could not. Obviously he must have been able to read, and he must have been taught in English.¹⁶ But in 1385 the scholar John de Trevisa (who was born in about 1326) wrote that in all the grammar schools children were ceasing to use French and construing and learning in English, whereas fifty years earlier (which would be in his own boyhood) instruction had been entirely in French. He noted that, as a result, they were now learning their grammar faster than before, but on the other hand they were not learning any French.¹⁷ What grammar were these children being taught; what language were they construing and learning? It is obviously not French. Neither can it be English; no one would learn French in order to be taught English. It is of course Latin. Latin was still, and remained for centuries more, the written language of scholarship. And the institutions in which the children are learning their Latin are referred to by Trevisa as grammar schools; it is in the grammar schools that instruction had been entirely in French, and they are called grammar schools because they teach Latin grammar. Thus the term grammar school signified, as indeed it still signifies in England, what we would call a secondary or high school, which in the fourteenth century meant one that went beyond merely teaching reading and writing and simple arithmetic.

Thus Trevisa's comments show that all secondary education in England had been conducted in French until at least about 1335, after which it had gradually been replaced by English. It is not difficult to discern how French had lasted so long. The grammar school teachers have acquired the very valuable skill of being able to teach in French; they form a French speaking educational élite. But their skill is valuable only so long as instruction continues to be in French; if that ceases it is valueless. We thus have an educational élite with a vested economic interest in the continued use of French as the language of instruction.

16 R. Arnold, *A Social History of England from 55 B.C. to A.D. 1215* (London: Constable, 1967) at 356-8.

17 R. Claiborne, *Our Marvellous Native Tongue* (New York: Times Books, 1983) at 109.

Furthermore the children they are teaching will necessarily acquire the ability to speak French. Speaking French thus becomes the mark of an educated man; it has a cachet, which gives it a definite snob value. These two forces together will give the use of French a durability which will keep it going for a long time. And by now education is spreading beyond the Church; we are entering the age of Chaucer, and he was no churchman. This accounts for the use of French spreading down into the merchant class.

Thus it is that the use of French continued in England for almost a century longer than one might have expected, and as a result it lasted throughout the formative period of the Common Law. But that is not sufficient in itself to account for the French terminology of the law. As already noted, the written language of the Common Law was Latin; not only were the records and formal documents kept in Latin, but most textbooks were written in Latin. Consequently every French term which became embedded in the law had a Latin equivalent. Why has the French term endured while the Latin has been forgotten?

The survival of the spoken French term instead of the written Latin one requires its constant and habitual use in speech in the courts. This requires, in the first place, professional French speaking judges. In the late twelfth century we begin to find these. The volume of business in the royal courts has become sufficient to require a body of men permanently employed to conduct it. These were men drawn from the royal civil service, clerks in the then accepted sense of the word. They were not men who had prior experience of the Common Law; they could not have, because they were the men who founded it. But some of them had knowledge of Roman and Canon Law, which could be studied at a university, originally Paris until Oxford was founded by a migration of English scholars from Paris in 1167. The idea of the writ of Novel Disseisin was not plucked out of thin air; it had a forerunner in the Roman interdict *Unde vi*.

The judges of the first half of the thirteen century included some men of outstanding ability. But towards the middle of the century there was apparently a decline in the quality of the men appointed; accusations of ignorance and even of corruption were made. The solution adopted was to appoint men drawn from the bar, the first being one Lawrence de Brok appointed in 1268. This practice was, at the time, unique to England, and even today it is unusual outside Common Law jurisdictions; it is typical that it was adopted, not as a matter of principle, but as an ad hoc solution of a problem that had arisen. But its importance in the present context is that it shows that a professional bar existed in the middle of the thirteenth century. Exactly when it had begun is uncertain. The function which its members fulfilled was origi-

nally seen as being to tell the litigant's story to the court on his behalf. For this reason they were called *narratores* in Latin and conteurs in French, and the story that they thus told was a conte. When English displaced French, they were referred to as counters. We no longer have counters in our system, but we still divide our indictments into counts where there is more than one story to put before the court.

Thus there was a body of professional counsel whose function was to make oral submissions to the court on behalf of litigants. Inevitably these submissions would come to include legal argument as well as straight narration. French being the language of educated men, these oral submissions would be in French. This completes the requirements necessary for the constant and habitual use of French in speech in the courts, and explains why it was the French terminology, and not the Latin, that came to be generally used, and thus to survive.

What sort of French was being spoken in England during the period (roughly 1160 to 1310) when the terminology of the Common Law was being established? Down to about 1240 the answer is simple; the same French as was being spoken in France. The effective separation of the French speakers in England from France occurred shortly after 1204, and it would have no effect on speech until a generation had passed, which brings us to about 1240. Thereafter we have a numerically small language group separated from its parent stock. That in itself is by no means unknown; Iceland is another instance of it. It was settled from Norway, but is physically separated from that country by a wide expanse of sea, and it subsequently came under the rule of Denmark, whose language, though similar, is distinct from that of Norway. The result today is that Icelandic is generally classified as a separate language, and it has apparently changed very little since the eleventh century. However it was not in competition within Iceland with another language as French was with English. What difference did that make?

In considering this question, we must be careful not to read history backwards. At the beginning French, though spoken, was rarely written, Latin being used for that purpose. In the fourteenth century it was quite extensively written, notably in the Year Books, which were the earliest law reports. But this is precisely when French was ceasing to be spoken. In those days pleadings were oral, not written. French is believed to have been retained for these oral pleadings, but not for argument. And in its written form it was being used, in the Year Books, to summarize arguments and judgments delivered orally in English. This is a very unnatural use for any language, and it is little wonder that its quality declines. But that sheds little light on the quality of French being spoken at an earlier date, when it was still a living language spoken by every educated person in England.

Also we must not assume that every legal term in use today that appears to be of French origin came into the English language in this way. Many words of French origin came into it at a much later date; camouflage for example. The word "evidence" figures in both languages. Its origin is the Latin adjective *evidens*, meaning clear or plain. It could have come into English by way of French, or it could have come direct from the Latin. But it certainly does not appear to have come into English as original Common Law legal terminology, because a different word was used for that purpose. That word was *testmoigne*, and it is worth examining it briefly. Its origin is, of course, the Latin *testimonium*, and the English equivalent is testimony, so here is an instance where the Latin won out over the French, and one can quite see why; the omission of the *i*, leaving *stm* in the middle of the word, makes it awkward to say. In the thirteenth century there was a related verb, *testmoigner*, but no other noun, so *testmoigne* had to do double duty; it was used to mean both the witness and his testimony. Modern French has three words, the verb *témoigner* and two nouns, *témoin* (witness) and *témoignage* (testimony). The awkward sound has been eliminated by eliding both the *s* and the *t*, leaving an acute accent on the *e* in their place. This process had in fact started in the French spoken in England, for *testmoigne* was sometimes written *tesmoigne*.

This illustrates several important points about the relationship between modern French and Norman-French, as it is generally, though not accurately, called. The first is that in those days spelling was not fixed; in this instance you could include or omit the middle *t* as you chose. This was equally true of English; try comparing Chaucer's spelling to your own. In fact the spelling of both languages did not become completely fixed until the eighteenth century. Thus oddities in Norman-French spelling are not indications of corruption of the language; they are just the individual variations normal in those times.

Secondly, since the starting point is the Latin *testimonium*, it is obvious that the sequence is *testimonium*, *testmoigne*, *tesmoigne*, *témoin* for the noun, and *testimonium*, *testmoigner*, *tesmoigner*, *témoigner* for the verb. The Norman-French is not a corruption; it is an archaic form. The *g* in *testmoigne* was there originally, because it is still there in *témoigner*. And the uncouth *stm* in the middle is equally an archaism because it is an essential step in the progression from Latin to modern French.

Thirdly, since medieval spelling was presumably based on the writer's conception of the best way to indicate the sound of the word, it is probable that this archaic spelling does represent the early medieval pronunciation. The fact that the result is clearly incorrect in terms of

modern French does not prove that it was incorrect in terms of the pronunciation current in twelfth and thirteenth century France.

Just as every word in use today that looks French is not necessarily of Norman-French origin, so the exact opposite is equally the case; we use words of Norman-French origin that we do not realize are French. I have already mentioned *count*; another example is *try*. Its origin is the French verb *trier*, meaning to sort. There is an instance of it being used in France around 1200 to refer to the examination of petitions, sorting out those with merit from those without. It never went any further than that in France, but in England it was extended to the function of a judge, sorting out the good cases from the bad ones, or perhaps sorting out the evidence. From there it was extended to cover anyone whose task it was to examine anything and decide its quality. Thus in Norman-French it came to mean to try (an action) or to test something. In the course of the fourteenth century *trier* became anglicized as *try* and entered the English language with this meaning. Thus *try* in its original meaning is essentially legal terminology; its other meanings developed subsequently from that.

And the evolution of *trier* illustrates a characteristic of Norman-French. Words acquired new or extended meanings by being used metaphorically. The language became racier and more colourful. Interestingly, North American English tended to do the same thing during the nineteenth century. A number of differences between Norman-French legal terminology and modern French terminology can be traced to this. This is a sign of a vigorous language, not a dead one.

Another characteristic of Norman-French was a penchant for making nouns out of participles. This is almost unknown in English. At first sight it may look as if, for example, "the living and the dead" is an instance of this, but in fact both "living" and "dead" are qualifying a noun (presumably people or something like it) which is implied. If they were nouns themselves, it would be possible to say "a living" or "a dead", and it isn't. It is however possible to say "an accused"; this is the only true instance that occurs to me of a participle being used as a noun in English, and it is perhaps significant that it is legal terminology.

But in French converting participles into nouns is fairly common. *Commandant*, *combattant*, *restant* and *restaurant* are all present participles in origin; *intimé* and *employé* are past participles. (Four of these six have also been taken into English as nouns.) But the Norman-French carried this further than it was taken in France. One of the most used examples of a present participle is of course *defendant*. This word is not, in origin, English, for the English word for a person being sued is *defender*, which is what he is called in Scotland which did not

have a French-speaking élite. Defendant is simply the present participle of *defendre*. It is not so generally known that the original word for a person suing was *demandant*. In both cases the underlying verb, *demander* and *defendre*, was the same in England as in France; but in France nouns were formed from them, *demandeur* and *defendeur*, while in England the present participles were used as nouns.

The past participles have been even more prolific. Probably the first was *feoffee*, the past participle of *feofor*. (In modern French this word has become *fieffer*; its past participle is, of course, *fieffé*, but accents do not seem to have been used in the twelfth and thirteenth centuries.) That was a straightforward use; the *feoffee* was the person *enfeoffed*, so he was the direct object of the verb. But then the idea was extended to words like *mortgagee*, or more accurately *gagee*, since there were then two types of security, a *mort gage* and a *vif gage*. Here the *gagee* is not a person who has been pledged, but a person to whom something has been pledged; he is the indirect object. The same is true of *bailliee* (spelt with a double *l* as in modern French), which meant both a *bailee* and a *lessee*. This proved so useful that the formation was carried over into English; nouns were formed from English verbs by giving them French past participles, and we get *lessee* and *grantee*, *licensee* and *invitee*; in fact we continue to make more of them all the time.

I have now, I believe, completed the second part of my task by showing how and when the Common Law was created and that, during the period of its creation, French was the language usually spoken by the professional judges and lawyers who created it. I have also tried to show that the written Norman-French texts of the thirteenth and fourteenth centuries do give us reasonably good evidence of the French that was spoken in England in the early days of the Common Law; it has obvious oddities because the French of those days is naturally as archaic as is Chaucer's English; it did develop some usages which were unknown in France, and which educated Frenchmen no doubt disapproved of, much as British schoolboys half a century ago were admonished to eschew American slang.

But the essential point is that the legal terminology which developed was produced by men who spoke French selecting French words which seemed to them best suited for expressing the concepts which they found this new system of law required to be expressed.

BIBLIOGRAPHY

THIS ESSAY is naturally based on information obtained from a wide variety of sources, and in particular from four works already mentioned in the footnotes, namely Plucknett's *Concise History of the Com-*

mon Law, Maitland's *Forms of Action at Common Law*, Stenton's *First Century of English Feudalism* and Arnold's *Social History of England from 55 B.C. to A.D. 1215*, and also from the *Manual of Law French* by J. H. Baker (London: Avebury, 1979). I have also, of course, consulted general histories of Saxon and Norman England, principally Sir Winston Churchill's *History of the English-Speaking Peoples*, supplemented as regards the circumstances of the death of Edward the Exile and John's loss of his French possessions by articles published during the last few years in the British magazine *History Today*. And finally I have consulted various dictionaries, both French and English.