

The Scrivener: Modern Legal Writing



Further Saith Naught¹

by K.K. DuVivier

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Among professions, the law is one most bound by tradition. Not only does the law look back in time for substantive precedents, it also borrows heavily from the language of the past. Do words like “notwithstanding” and “herein” creep their way unnoticed into your legal documents? Do your affidavits contain an “ss” at the top and use alliterative wording such as “subscribed, sworn, and sealed”? These antiquated expressions are not used in standard Modern English, and before you entered law school, they probably were familiar only if you read Old or Middle English literature. To help determine which are expendable, this article explores the origin of a few legal expressions transported in a time machine from bonnie old England before 1500 A.D.

Although the evolution was gradual, there are three commonly recognized stages of the English language approximately bounded by historic events. First, Old English was the language used in England before the Norman Conquest. Second, the Middle English stage spanned the period between 1086 and approximately 1477 A.D. when the first English-language book was printed in England. Finally, the Modern English period began around the time of the Renaissance in Europe and Columbus’s discovery of America. From its origins with early authors such as Shakespeare, Modern English continues as the form of English used today.²

The Old English Period

Because of widespread illiteracy, Old English was an oral tradition. The epic poem *Beowulf* marked the literature of this period. As with the literature, the language of the law during the Old English period was rhythmic and repetitive. This characteristic persists in the law today in repetitive phrasings such as the oath still used for witnesses in court: “Do you solemnly

swear to tell the truth, the whole truth, and nothing but the truth. . . .”³

Alliteration is another language trait we inherited from Old English. We see it preserved in the “solemnly swear” portion of the truth oath and in the phrasing “to have and to hold” that is commonly used in land transfers.⁴ Although this ritualistic wording may add nothing to the meaning, it often is retained, sometimes by statute.⁵ The poetry of the wording may help instill into the parties a sense of solemnity to emphasize the significance of their legal acts.

The Middle English Period

After the Norman Conquest, English became the language of the common folk.⁶ Although Chaucer is representative of the writing of this period, English generally was neglected as a language of literature and education. The first English language dictionary did not appear until the era of Modern English. Without rules, dialect was the norm, and spellings varied widely. For example, during the Middle English period, at least nine different spellings have been recorded for the word “law”: *i.e.*, “lach, laewe, lagh, laghe, laha, lau, lauh, law” and even “laugh.”⁷ In addition to different spellings, “law” had at least seven different meanings.⁸

During the Middle English period, some verb forms ended with “th,” such as “hath” or “saith.”⁹ Also during this period of experimentation, new forms were created by combining words and expressions. Middle English formed dozens of compounds with the words “where,” “here,” and “there”—for example, “wherein, herein, therein, whereof, hereof, thereof, whereas, hereas.”¹⁰ These Middle English traits are some of the archaic phrasings that have become a trademark of legalese. Although these words sound lawyer-like, they are easily replaced with standard Modern English.

Example: “The parties witnessth the documents herein. . . .”

Revised: “The parties witness the documents here. . . .”

Example: “Further affiant saith naught.”

Revised: “The affiant has nothing more to say.”

DO YOU HAVE QUESTIONS ABOUT LEGAL WRITING?

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"Notwithstanding" is another word whose heritage can be traced to the Middle English period. The Medieval Latin expression *non obstante* was combined with the Old English word "withstand," which meant "oppose." The combination "notwithstanding" is now used almost exclusively by lawyers and is a "law word" that usually can be eliminated.¹¹

Have you ever pondered the letters "ss" at the top of affidavits? This notation and the ampersand symbol (&) are survivors from the Middle English period. Documents during this period often were penned by the clergy. Stylized Latin script was used and abbreviations were a frequent hand-saving device. The ampersand is a script substitute for the Latin *et*.¹² Although the meaning and origin of *ss* is debated, it is widely held to abbreviate the Latin *scilicet*. *Scilicet* means "to wit" and seemed to be used to designate a particular locality.¹³ A British court found it "customary and more lawyer-like" to use *ss*, but this decision was made in 1875.¹⁴ The modern conclusion is that "ss adds nothing to precision; its omission is not missed."¹⁵

The Modern English Period

When the printing press introduced the era of Modern English, written legal forms became the general rule. However, these forms still reflected their oral beginnings.¹⁶ In a precedent-based system, written forms focus on exact wording. In such a system, there is much incentive to repeat the exact words that have been tried and tested in the past. Plain English is a lofty goal, but attorneys must use caution when dust-

ing off their forms and converting them into standard, yet formal, 21st century English.

Once we know the origins of our lawyer-like expressions, we can safely determine which may be eliminated and which may be worth preserving. Poetic phrasing with its origins in Old English may play a role in re-enforcing a legal ritual. However, many of the traditions from the Middle English period—compounds such as "herein" and "notwithstanding," the abbreviation "ss," and verb forms such as "hath"—are anachronistic. These are expressions we can eliminate and need further saith naught.

NOTES

1. "Further affiant saith naught" is an expression commonly used to conclude affidavits.

2. Finnie, *The Stages of English* 9-33 (Boston, MA: Houghton Mifflin Co., 1972).

3. Mellinkoff, *The Language of the Law* 42-43 (Boston, MA: Little, Brown & Co., 1963, 7th printing, 1990).

4. *Id.* at 93-94.

5. The notary public statute includes the following tautological or poetry-like recitations: "subscribed and affirmed, or sworn to before me . . ." (CRS § 12-55-119) and "complete, full, true, and exact facsimiles . . ." (CRS § 12-55-120).

6. "Do you suppose I would do anything to help these foreigners who speak through their noses in that outlandish Norman-French? Do you know what they call these animals of ours? Instead of the good Saxon name *swine*, they speak of them as *pork*." Sir Walter Scott, *Ivanhoe* 3 (Laidlaw Bros., 1958) (a quote from a serf named Wamba).

7. Mellinkoff, *supra*, note 3 at 84.

8. *Id.* at 84-85.

9. *E.g.*, "Yow made, and thynketh al nys but a faire

This world, that passeth soone as floures faire."

Chaucer, *Troilus and Criseyde V*, cited in Finnie, *supra* note 2 at 74 (*emphasis added*).

10. Mellinkoff, *supra*, note 3 at 85-86.

11. *Id.* at 85.

12. *Id.* at 87.

13. *Id.* at 319-21.

14. *Smith v. Richardson*, 1 Utah 194, 195 (1875), cited in Mellinkoff, *supra*, note 3 at 321.

15. Mellinkoff, *supra*, note 3 at 321.

16. *Id.* at 137-140.

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The CBA Interprofessional Committee and the Denver Medical Society will present a dinner program and panel discussion entitled "Physician Accountability and the Patient from Hell" on June 23 at the University Club in Denver. A light buffet and cash bar will begin at 5:30 P.M., with the program following at 6:30.

The cost is \$25 per person. CLE credit approval is pending. For more information, call Barbara Kammerling in Denver at (303) 377-1850; to make reservations, send a check payable to the Denver Medical Society, 1850 Williams St., Denver, CO 80218.