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There is a magic in words which the human race seems almost always to have felt. The words for holy things and the words for intimate things, such as family relationships, have in particular enjoyed an unusually strong sentimental reverence. More than one religion has preserved its truths in a language which long ago ceased to be currently used, and in several quarters of the globe at the present day living languages are defended with fierce devotion as symbols of racial or local independence, while dead tongues are resurrected to a new life of struggle in the same compelling cause. With the growth of enquiry into human history, however, the sense of magic and the force of sentiment give place to a somewhat different feeling. It is admitted that words have changed in form, although remaining fundamentally the same in spite of it; the stable element in the word is now regarded as particularly connected with the idea which the word represents, and the changes merely show the persistence of that idea through the chances of the centuries. Hence arises an interest in the history of words which is to be found all through history from at least the classical times. Of course the somewhat uncritical use of history which was the rule until recently, and the absence of a science of philology reduced the process to something like guesswork, which was moreover employed too frequently in the maintenance of controversy, the decoration of treatises with learned ornament, or some other extraneous end. Lord Lochee long ago remarked that "one of the pre-historical ways of philosophising about law was to account for what wanted explanation by some theory about the origin of technical words. This implied some previous study of words and their history, and is an instance of the deepseated and persistent tendency of the human mind to identify names with the things they represent. The Institutes of Justinian abound in explanations founded on a supposed derivation of some leading term."[1] In the hands of an unskilful student, this method almost inevitably results in attributing the contemporary significance

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[1]Article on "Jurisprudence" 15 ENCYCLOPAEDIA BRITANNICA (11th ed. 1911) 578a.

of a word to its real or supposed historical ancestors, and assuming that this idea is immemorially old because a particular root, with which it is thus arbitrarily connected, is clearly of an ancient date. Nor were Justinian and his commissioners at all unique in their use of linguistic history as an aid to the elucidation of law; our own Coke developed a fantastic philology all his own as part of his institutional teaching.

With the nineteenth century we come to the influence of Darwin, "the greatest historian of modern times," and instead of the preoccupation of earlier ages with the persistence unchanged of ideas and institutions, we find the scholar admitting that change has been almost always an inevitable factor in history. Thus emancipated, philological enquiry was relieved of the necessity of reaching edifying results, while about the same date the study of Sanscrit revealed a new world of philological material.

To the philologists of the early and middle nineteenth century, legal history and legal science owe an immense debt. Organic connections were discovered between languages which superficially and geographically seemed widely separated. The study of comparative philology rapidly grew up, and immediately began to extend its boundaries far beyond the study of language. Investigation of certain words of primary importance had compelled the philologist to study the institutions which they represented, and so we find that the expert in linguistics discovered many things of the highest importance concerning such topics as property, contract, procedure, succession, marriage, and so forth. Finally, out of these broad territories first explored by the philologist, there has now been carved out a generous appanage for the lawyer. It is with good reason that Vinogradoff dedicated the second volume of his *Historical Jurisprudence* to Dareste, who is one of the notable band of scholars who combine philology with legal pre-history; in fact, Vinogradoff was prepared to assert that "the immediate incitement for the formation of comparative jurisprudence was given by the great discoveries of comparative philology."[2] The separation was completed when India reappeared in the story: having started the cycle with its capital contribution of Sanscrit, it completed it by furnishing Sir Henry Maine with the accumulated treasures of its tribal law and customs. Comparative jurisprudence, then, like its big brother, comparative philology, is under a peculiar debt to India.

So far, the study of language has shed most light upon matters of pre-history. There can be no doubt, however, that the services of

[2]Article on "Comparative Jurisprudence" *ibid.* 580, 581b.

philology may very well extend beyond that shadowy and contentious kingdom, and be fruitfully employed in the less speculative realm of strict history. Our own common law has an uninterrupted history of thirteen centuries for which written sources are available, and there is ample room for linguistic development in so long a period. The terminology in every day use by the Anglo-American lawyer is drawn from a variety of sources and has undergone a variety of transformations together with the legal concepts which it denotes, and in the history of these transformations there are valuable clues to the more general topic of legal history.

Within the last year there was issued the last part of the monumental *Oxford English Dictionary on Historical Principles* (1897–1928.) This immense and fascinating work provides the scholar with a summary history of every word in the language, with excerpts from the sources. Lawyers will find within these heavy folios a carefully compiled series of extracts relating to any word they choose, arranged in chronological order, with an analysis of the meanings and a summary of the ancestry of the word and the changes in its form. The amount of material there available is enormous; but it is not exhaustive. The compilers were not particularly interested in legal matters, and most unfortunately did not use the Year Books in searching for specimens. Consequently there are some gaps. But even where they have the material, it is obvious that they did not have the space for any extended discussion of the questions which interest the lawyer most—namely, the relation between changes in a particular word and changes in the law. Investigators of special subjects have therefore been at the pains of compiling for themselves the history of the technical terminology involved where this is necessary, as is generally the case. In this way quite a fair amount of work has been done, although it is scattered among countless books and articles and so is more or less inaccessible. A recent French scholar has made a plea for the systematic study of what may be called "Legal Semantic" in connection with early legal history, and there is every reason to believe that there is room for its extension to historical ages as well.[3] In Germany, where a large number of local jurisdictions existed until fairly recently, it has been possible to create a geography of legal languages.[4] In Italy, on

[3]Mauss, *Questions de Sémantique comparée de Mots concernant les Institutions et la Morale* (1928) 7 REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER 331–333.

[4]EBERHARD FRH. V. KÜNSSBERG, RECHTSSPRACHGEOGRAPHIE (Sitzungsberichte der Heidelberger Akademie der Wissenschaften, Philosophisch-historische Klasse, Jahrgang 1926–1927).

the other hand, a curious incident in the University of Rome serves as warning that the relations of philologist and jurist may sometimes be very strained.[5] In this country where academic life is less exciting there is every reason to believe that the two sciences could work together in amity if only they could be brought into contact with one another. Without making any extended searches it has proved possible to name several studies along these lines which deserve the careful attention of all who are interested in the history of law. Some of these are particularly interesting because they show the commerce in words between several different sciences. An admirable example is the recent study by Judge Dowdall, K. C., of the history of the word "Person."[6] Beginning as a mask worn by actors and serving to amplify the voice and accentuate the features, it passed into Roman law where it served at first as a word for those various types which were of constant recurrence (like the types of character on the stage). Some types were higher than others; slaves had no *persona*, as it were. But the word was still hardly a term of art. In the Byzantine empire it began to acquire some precision, however, and it may be that it came back to the west by way of Sicily, for by the thirteenth century it could be used of a corporation. Here, be it noted, Judge Dowdall finds that the history of the word *persona* is not quite in accordance with the speculations of Gierke. Not until the seventeenth and eighteenth centuries does the word assume its modern significance in law. Meanwhile there had been great play with the word *persona* and *πρόσωπον* (which was regarded conventionally as the Greek equivalent) among the theologians and philosophers from the patristic age down to the present day.

Words and phrases not infrequently serve as a veil which obscures the processes which go on behind it, and the historian must not only pierce the veil in order to discover what those processes were, but must also reckon with it as one of the factors which permitted or even facilitated the introduction of new elements. A remarkable example of the constant reading of new meanings into time honored formulas

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[5]The controversy is between Professors Carusi and Nallino both of the University of Rome, and involves numerous points of Arabic language and Mohammedan law; see Carusi's very lively book DIRITTO E FILOLOGIA: RIPOSTA DI UN GIURISTA ALLE CRITICHE DI UN FILOLOGO (1925). A learned criticism of the controversy will be found in the review of Carusi's work in (1927) 47 ZEITSCHRIFT DER SAVIGNY-STIFTUNG (ROMANISTISCHE ABTEILUNG) 446–455.

[6]Dowdall, *The Word "Person"* (1928) 106 CHURCH Q. REV. 229–264. It is still another story how *persona* became the "parson" of the parish.

is to be found in the development of the theory of the Papacy.[7] Even quite modern words, however, need historical treatment if their use is to be freed from latent misconceptions. "Capitalism," for example, comes from the year 1850 and already has provided matter for a substantial study.[8]

Political terms are all the more susceptible of curious changes since innovation is bound to come, and conservatives are easiest placated by using old words, although with new meanings. "Wonderful conjuring tricks with a crown or a basket (*fiscus*) may yet be played by deft lawyers" as Maitland has said,[9] and it will require equally deft work by the historian of words if their evolutions are to be thoroughly understood. The curious suggestion has been made that the word "public looks much like a *Respublica* which, to spare the feelings of 'a certain great personage,' has dropped its first syllable." Eighteenth century statutes do not hesitate to state that "the public stands indebted" to the East Indian Company in the sum of four millions odd.[10]

Few words are more interesting than the group "State," "status," and "estate." The early sense of status seems to have been that which we now have appropriated to the Latin form of the word, that is to say, the condition of a person in the eyes of the law. In the Middle Ages this meaning spread to include such vague notions as we now describe as social classes, whether they had precise legal attributes or not. Then by a natural specialisation, this came to mean more particularly the higher and more important classes, and hence *homo qui statum habuit* means a person of high rank, and finally a ruler, or a body of rulers. Hence we read of "Their Highnesses the States of the United Provinces" in Holland. Such potentates have their powers geographically limited, and so "state" acquires a territorial significance, especially in Italy where the ancient use

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[7]Caspar, *Primatus Petri: eine philologisch-historische Untersuchung über die Ursprünge der Primatslehre* (1927) 47 ZEITSCHRIFT DER SAVIGNY-STIFTUNG (KANONISTISCHE ABTEILUNG) 253–331.

[8]PASSOW, KAPITALISMUS: EINE BEGRIFFLICH-TERMINOLOGISCHE STUDIE (1928). The word "capital" on the other hand is quite old and has a long and complicated history which lies mainly in the field of economics rather than law. See Cannan, *Early History of the Term Capital* (1921) 35 Q. J. OF ECO. 469–481 and the supplementary note Richards, *Early History of the Term Capital* (1926) 40 *ibid.* 329–338. For some very interesting general observations see Wiener, *Economic History and Philology* (1910) 25 *ibid.* 239–278.

[9]In his Introduction to GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE (1900) xxxvii.

[10]MAITLAND, *ibid.*, at xxxvi.

of the word for a feudal residence, or even for property in general, may have helped the transition. This feudal connection is of interest for it perpetuated the medieval idea of feudal dignities within the Empire as being technically offices; "the State, at least *eo nomine*, arises within the Empire, where the theory long survived that all government, except that of the Empire itself, was however effectively sovereign, an office held from the Emperor. It is significant therefore to observe that the words *état*, state, and estate were never used, as *stato* and *staat* were and are, for a *Landschaft*; and that *status* and *stato* were applied to the position of a prince or bishop, but not to that of the Emperor or Pope." In the hands of Machiavelli the word, as well as the idea underwent a notable change: "a word was wanted for the kingdom of a king, the duchy of a duke, the county of a *unmittelbar* count, the *dominium* of an independent lord, and the government of a free city—in fact, for every form of government which exercises *imperio sopra gli uomini*. Machiavelli, by the same stroke, decisively selected, and defined, and proclaimed, the appropriate word; and by explicitly recognizing and naming a general concept suitable for scientific purposes he rendered possible, and indeed himself founded, the modern science of the State." So far, the state was the governor; the last transformation is the inclusion of the governed as well. *"L'Etat, c'est moi"* would have been a pointless truism if it had been uttered in the days of Machiavelli; by the close of the seventeenth century and the beginning of the eighteenth, however, the change begins to appear which will give point to the epigram, and confer upon the word "state" the meaning which is now its principal signification.[11]

This is by no means the whole of the story, although the rest is shorter told. "Estates of the Realm" have been the subject of learned controversy, and the English use or misuse of the words has been described by Sir Frederick Pollock.[12] Lawyers in England have appropriated the word for a peculiar conception of their own, and thereby have developed the idea of an "estate" in land (which in popular use has come to be transferred to the land itself, thus reaching the same position as the old Italian *stato* but by a different route). For the history of this aspect of the word we have the valuable discoveries of Joüon des Longrais, whose study *La Conception*

[11]This is summarised from the most interesting article of Judge Dowdall, *The Word "State"* (1923) 39 L. Q. REV. 98 where he refers to the previous literature of the subject and dissents from the theory of JELLINEK, ALLGEMEINE STAATSLEHRE (3d ed. 1921).

[12]POLLOCK, TABLE TALK OF JOHN SELDEN (1927) 150.

Anglaise de la Saisine du XIIe au XIVe Siècle (*1925*) is indispensable for a thorough understanding of the history of real property law.[13] It seems that Bracton does not use the term to mean "an estate" in land in the modern use of the word; with him *status* means chiefly the condition of freedom or serfdom. But there does appear in his treatise a phrase *statum mutare* several times repeated in connection with transactions dealing with land. It is clear from the context (as des Longrais observes) that *status* here refers to the person rather than to the land. The nearest modern equivalent is perhaps the familiar "change of position;" thus a donor who remained in seisin after the alleged gift *numquam exivit a seysina, nec statum mutavit in aliquo*—"never gave up seisin, nor changed his position in any way." This is undoubtedly the sense in Bracton's mind, but as the author acutely observes, "half a century later the word *status* in this same phrase would certainly be taken (by an easy transition) in the real or abstract sense: "he did not give up seisin nor change *the nature of* his estate."[14] In the course of time, the vague word "estate" acquires some degree of precision, and so a new term "interest" is employed to carry the vague sense which once belonged to "estate." To the foreign observer there is something significant of English legal thought in this process: "like the word 'estate,' the word 'interest' in use later, will be one of those broad, practical terms whose use seems indispensable to jurists across the Channel. As we shall see, the word 'seisin' for a moment played the same role in the past."[15] The English taste for ill-defined terms is surely reflected in the extremes of *bizarrerie* to which a common lawyer will go, if once he yields to the urge to create a really exact terminology. Recent years have seen some truly fearful and wonderful productions of this sort.

In the more special field of the common law, the references to the history of technical terms are few, and mainly to be found in a few books. The language of the real property lawyer has been carefully studied by Joüon des Longrais, and he has embodied in his work the suggestions of Pollock and Maitland. The "use" has been definitely traced by the latter to the Latin *opus* rather than to *usus*,

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[13]Pages 81 to 205 of Joüon des Longrais are an exhaustive examination of English legal terminology so far as it applies to real property; the study of both normal and Bractonian terms and the distinction between the two is of the essence of the author's thesis.

[14]JOÜON DES LONGRAIS, *op. cit. supra*, at 127 n.4.

[15]JOÜON DES LONGRAIS, *op. cit. supra*, at 129.

a fact of significance.[16] "Owe" and "own" have been disentangled;[17] and may perhaps be paralleled by the curious use of "duty" in the sense of a debt; [18] "attach" has been historically treated and cleared of a serious misconception;[19] the short career of "epike" has also been learnedly treated;[20] the present writer has raised questions about "lease" which have not yet been answered;[21] the word "parliament" has been traced back to a time when it could be used of a disorderly or unlawful assembly.[22] As late as 1267 Henry III forbade parliaments, conventicles or congregations which might lead to a breach of the peace.[23] Malice aforethought has also been referred to a curious original,[24] and so for that matter, have a number of terms in criminal law, such as "forestall."[25]

By way of concluding this list of examples, we shall refer very briefly to a word whose history seems to have escaped attention, namely "bailiff" and "bailee." The principal meaning of "bailiff" in English documents is the familiar agent of the lord of the manor who has the general management of the estate. The principal descriptions of his duties are to be found in Walter of Henley and Fleta.[26] A recent writer,[27] however, has thrown doubt upon their veracity, especially as to the bailiff, by confronting them with the evidence of the surviving rolls and accounts of many manors: "It is

[16]2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (1911) 228–229, 233–239. It is curious to note that the change from *opus* to the English "use" was a bit confusing to contemporaries; occasionally we find that the derivation is reversed and that a writer who wishes to employ the word "use" in the sense of "usage, custom," will be tempted to put into it a *p* which ought not to be there: "great-great-grandfather is made cousin in Chancery according to their usage (*par lour oeps*)" Y. B. Mich. 19 Edw. III, pl. 15, p. 333 (1345) Rolls Series.

[17]"We cannot rethink the process which lies hidden away in the history of those two words *owe* and *own*." 2 POLLOCK AND MAITLAND, *op. cit. supra*, note 16, at 178.

[18]In a text of 1461–1483 we read "the claymor shall have execucyoun to levee the dwtie;" 1 BATESON, BOROUGH CUSTOMS (1904) 195. (Cf. *ibid.*, at 208).

[19]FOX, CONTEMPT OF COURT (1927) 56, 101.

[20]See chapter on "The Transformation of Equity." POLLOCK, ESSAYS IN LEGAL HISTORY (Vinogradoff's ed. 1913) 286.

[21]4 BULLETIN OF THE INSTITUTE OF HISTORICAL RESEARCH (1927) 186–187.

[22]Richardson, *The Origins of Parliament* (1928) 4 TRANSACTIONS OF THE ROYAL HIST. SOC. (4th Series) 137.

[23]Richardson, *ibid.*, at 147.

[24]1 MAITLAND, COLLECTED PAPERS (1911) 304.

[25]2 POLLOCK AND MAITLAND, *op. cit. supra* note 16, at 469 n.1.

[26]WALTER OF HENLEY'S HUSBANDRY (Lamond's ed. 1890); FLETA SEU COMMENTARIUS JURIS ANGLICANI (Selden's ed. 1647).

[27]Bennett, *The Reeve and the Manor in the Fourteenth Century* (1926) 41 ENG. HIST. REV. 358.

the overwhelming influence exerted by Fleta and other treatises which has confused our knowledge of the actual working arrangements of the mediaeval manor, giving us a Utopian rather than a real version."[28] As against the bailiff, Mr. Bennett would set up the reeve as the more important officer for practical purposes. These are serious charges to bring against a group of writers who have hitherto enjoyed considerable esteem, and we think that they are open to several answers. In the first place, these ancient authors are interested in the scientific management of big businesses, and like modern writers of the same subject they describe the most elaborate organisations of their day; they do not pretend to give us a picture of the average small concern. Then too, there is other evidence available which confirms the statements of Walter and Fleta. A short experience of the Year Books will show that the bailiff has a definite standing in the law courts, and indeed he figures very frequently in particular forms of action, and above all in the assize of novel disseisin. It is a striking feature of the bailiff's position that he can answer such an assize by pleading the general issue without his lord. The appearance of the bailiff is a sufficient answer to a writ directed against the lord. This is derived no doubt from the age when the position of the bailiff was at its highest. Later, it seems that bailiffs *ad hoc* could be appointed; for example if an assize of novel disseisin is brought against a man and wife, it was the common procedure for the man to answer on his own behalf, and as the bailiff of the wife. On the other hand, a bailiff was subject to very stringent laws on the matter of his accountability to the lord. Account seems to be due as an outcome of the relationship of lord to bailiff, and by statute a lord could assign auditors to his bailiff or other such accountant and if he is found to be in arrears the auditors were given power to commit him immediately to prison.[29]

As the middle ages proceed more and more people are admitted into the category of bailiffs, and a case of the reign of Richard II curiously illustrates the tendency.[30] Here we read that a wine dealer deposited wines in a house which he let to the defendant who was a taverner; the dealer then brought a writ of account against the taverner as "bailiff" of the wines. Finally an issue was reached on the question whether the defendant had assented to this bailment which had been made in fact not to him but to his wife who was a merchant

[28]Bennett, *ibid.*, at 359.

[29]WESTMINSTER II (13 Edw. I) c. 11 (1285).

[30]Selby v. Palfrayman, Y. B. 13 Rich. II. 79 (1389). This Year Book is in the press and will be published shortly.

in her own right. On reading the French text of this case, it looks very much as though the word "bailiff" is on the point of turning into "bailee." Both words indeed have the same fundamental idea of one person being placed in control of another's property. More curiously still there is the parallel in the legal position of the bailiff and the bailee. The bailee who is dispossessed has the same remedy as his bailor: the bailiff, however, is not to be regarded as seised and so cannot be plaintiff in a novel disseisin, but he can answer in defence of his lord's title and plead to the assize, and this without being furnished with explicit authority such as a power of attorney. The bailiff's importance steadily declines while that of the bailee correspondingly grows. The word "bailee" seems to appear first in 1528 when it is spelt as often as not "baily"—a very frequent form of Bailiff (cf. "Old Bailey").—where it is used of the indifferent person to whom a deed was delivered in escrow pending the performance of certain conditions.[31] In later days, the bailee will most frequently be a carrier, and it is carriers who have provided the occasion for most of the law relating to bailees. This is a point to which we shall refer later. Meanwhile the growing importance of the bailee can be seen in a very significant case of uncertain date (probably Henry VII, 1485–1509) where it was held necessary to say that the defendant was bailiff, but that this was not traversable. In other words, the only way of getting an account from a bailee of goods was to charge him as a fictitious bailiff of a manor.[32]

If we look abroad we shall find that the word has had various fortunes. If in England it has had the queer chance to be applied to the release of a prisoner upon security (he being bailed to the bailees who were responsible for his appearance), in France it came to be the general word for a lease. But most curious of all, if the word is traced to its remote origins in low Latin we find that it comes from *bajulivus*, an adjective formed from *bajulus*, which means a carrier. So the story begins as it ends, with the carrier, although for a long interval the *ballivus* might carry responsibility rather than merchandise, and might be the bailiff of a liberty or the *balio* of a principality.

It would be possible with some searching to collect many more instances of the part which words have played in the history of legal ideas. All that we shall do here is to urge that the study is of great

[31]"Et aprez le bayle deliuer le obligation a cesty a q' fuit fait." PERKINS, PERUTILIS TRACTATUS (1st ed. 1528). The translation of 1642 used by the Oxford English Dictionary renders "bayle" (doubtless a dissyllable) by "baily."

[32]Keilway 114.

interest in itself, and often of value for its side-lights on legal history. Perhaps in some distant future there may be written a legal dictionary. The *Oxford English Dictionary* is a magnificent beginning, and the Institute of Historical Research in Longdon University is doing most useful work in continuing it, but the responsibility rests mainly with lawyers. Less learned professions (according to common repute) have already furnished themselves with historical dictionaries of their technical words. The drapery trade has long had an excellent dictionary of its terminology on historical and archaeological principles; gypsy-talk and tinkers' cant are the subject of a special literature; a certain *Glossarium Eroticum* is now in a well-deserved second edition; but when shall we get a real Law Dictionary on Historical Principles?