



"THE SHERIFF'S APPEARING IN THE CUSTODY OF THE SERJEANT AT ARMS BEFORE THE COURT OF THE QUEEN'S BENCH." 19TH CENTURY ILLUSTRATION.

En Banc or In Bank? Take a Seat . . .

BY MATT LILES* & ANTHONY B. SANDERS†

Why do judges and lawyers use the phrase “en banc”? Why not just say “the whole court” instead of getting all Continental? If the King’s English was good enough for Jesus Christ,¹ as was supposedly said by a Texas governor, why isn’t it good enough for federal circuit courts?

In this brief journey through time, we attempt to answer these important questions — and explain why, when federal appellate judges gather in groups of more than three, they start speaking another language.

“EN BANC” SOUNDS FRENCH — AND IT IS (KIND OF)

“En banc,” in modern French, literally means “on bench” or “in bench.” But *modern* French isn’t the whole story. After the Norman Conquest in 1066,² William the Conqueror and his Viking-descended buddies brought their recently adopted Old French over from Normandy to England. There, Old French made its way into English law courts — and into the English royal “court,” as in where King’s courtiers gathered. Thanks to the Normans, French became the most spoken language in England’s central law and administration.³

However, French wasn’t the only language used in official circles. Latin

“BANC/BANCUS” IS FROM GERMANIC ROOTS AFTER THE FALL OF THE WESTERN ROMAN EMPIRE, BUT WHETHER THE WORD WENT TO LATIN AND THEN TO FRENCH FROM LATIN — OR STRAIGHT TO LATIN AND AT THE SAME TIME STRAIGHT TO FRENCH — IS A MYSTERIOUS AND (GIVEN THE SOURCES) PROBABLY UNANSWERABLE QUESTION.

was, of course, the primary written language of the age, and English was by no means officially banished either. Indeed, William the Conqueror himself published legal documents in English as well as Latin.⁴ But for the two centuries immediately following the Conquest, the language of the King’s entourage (including his judges) was French, and when lawyers orally addressed the King’s courts, they

endeavored to use that French.⁵ Once institutionalized, this use of French became hard to shake, even after the kings and judges began speaking English in their daily lives.⁶ Thus, in English courts, the Normans’ Old French evolved into “Law French.” Even after its eventual demise by the 17th century, numerous Law French words remained in English legal practice.⁷

VULGAR TONGUES

Having set the stage with this mélange of language in England, we can move on to the origin of the phrase “en banc.” But for this we need to travel a bit further back than 1066. Some modern sources state that the word “banc” comes from Latin, including Second Circuit Judge Jon. O. Newman in a piece he wrote about the federal en banc system.⁸ While that might be kind of true, it is not the whole story. “Banc” stemming from Latin makes intuitive sense. After all, French is a “Romance” language, so called because the language came from the Latin-speaking Romans (*not* because the French are better lovers). Indeed, some Latin dictionaries contain the word “bancus,” meaning bench,⁹ similar to the modern French word. So it’s a safe assumption that “banc” comes from the Latin “bancus.”

However, those Latin dictionaries are referencing *medieval* Latin. *Classical* Latin dictionaries usually lack the

word “bancus.”¹⁰ That’s because “bancus” was not what a Roman from the age of Julius Caesar would say to refer to a bench (instead using words like *scamnum* or *subsellium*).¹¹ The word “bancus” only entered the Latin language in the Middle Ages, when the language spoken by common people in the former province of Gaul (which now includes, among other countries, modern-day France) was well on its way to evolving from the local “vulgar” Latin (that is, the words normal people actually said to each other) into “French.”¹² This is the same process that occurred in Spain (Spanish), Italy (Italian), and various other once Latin-speaking regions. Meanwhile Latin *per se* (no pun intended) had become less a language spoken among normal people and more a language of scholars and the clergy.¹³ In other words, “banc/bancus” is from Germanic roots after the fall of the Western Roman Empire, but whether the word went to Latin and then to French from Latin — or straight to Latin and at the same time straight to French — is a mysterious and (given the sources) probably unanswerable question.

The truth is, rather than dating back to the days of Caesar, “banc” is one of comparatively few French words to descend from the folks who give modern France its name: the Franks. The Franks, those conquerors who set up shop in Gaul and then melded into the local population (and its Latin-based language), at first spoke a *Germanic* language, just like the Angles and Saxons who came to England. “Banc” and “bancus” descend from a word that is common in the Germanic language family. And all of these versions of the word seem to go back to the proto-Germanic “bankiz,” which could mean a bench but also a raised surface, like a bank of a river.¹⁴ And if we want to go

WHILE “BENCH” AND “BANC” ARE GERMANIC OR GERMANIC-DESCENDED SIBLINGS, IN THE POST-1066 ERA BOTH “BANC” AND “BANCUS” BECAME ASSOCIATED WITH MORE THAN SITTING ON A LONG FOUR-LEGGED STOOL. AN “IN” WAS PLACED IN FRONT OF THOSE WORDS TO DISTINGUISH THE CENTRALIZED COURTS OF LONDON (WHERE THE JUDGES APPARENTLY SAT ON A BIG BENCH) FROM THE LOCAL COURTS THROUGHOUT ENGLAND.

even further back, that word descends from a proto-Indo-European word, “b^heg,” meaning to bend or curve.¹⁵

Modern West Frisian includes the word “bank,” meaning “bench,”¹⁶ as does modern German. Further, among Latin-descended tongues, “banc” isn’t only a word in French. Italian has a similar word, “banco,” which — through medieval money-changing habits over tables with long benches — is how we have the word “bank” (a place where you stash your cash).¹⁷ But it likely entered Italian via another posse of Germanic people, the Lombards, who invaded northern Italy in the sixth century. Also, although this mean-

ing of “bank” comes into English via Italian, “bank,” as in a bank of clouds or cliffs, comes from Old English. And while we’re looking at Old, pre-1066, English, note the word “benc” as well, leading to the modern word “bench.”¹⁸

Thus, “banc” originates from a Germanic word that itself is the ancestor of both “bank” (in two different ways) and “bench.” While the Romans may have done quite a few things for us, “en banc” isn’t one of them. The Roman Empire (the western version, that is) was done and buried by the time bancus sat on its remains.

Now, here’s the tricky part for the present story: Until only a couple of centuries before the Norman Conquest, there is very little written evidence of “French.”¹⁹ The small amount of writing to survive from this period in France is overwhelmingly in Latin, which for the most part continued being written the same way as the Romans had, even though the language spoken by the common people had changed significantly. So it’s hard to tell precisely where “Latin” ended as a common spoken language and “French” began. No one seems to have distinguished between French and Latin as separate languages until around the year 800.²⁰ But “bancus” must have entered whatever we call the language well before that, as the Franks gained control of the region in the early sixth century. So did the Old French “banc” come from “bancus,” which in turn came from the Frankish version of “bankiz?” Or did whatever the original Franks said flow separately into the two “languages”? It probably depends on whether we want to call the vulgar tongue of Gaul of around 600 A.D. “Old French,” “late vulgar Latin,” “Romance” (as some scholars have called it²¹), or whatever else. With hardly any written record of anything other than ecclesiastical Latin from this

period, it's hard to say. But the important takeaway is this: By 1066, French and Latin were understood to be distinct languages, and both had a word meaning "bench" — *banc* or *bancus*, respectively — that traced back to Gaul's Germanic conquerors.

THE EVOLUTION CONTINUES

While "bench" and "banc" are Germanic or Germanic-descended siblings, in the post-1066 era both "banc" and "bancus" became associated with more than sitting on a long four-legged stool. An "in" was placed in front of those words to distinguish the centralized courts of London (where the judges apparently sat on a big bench) from the local courts throughout England. There is evidence of the phrase "in banc" just after the Norman Conquest, and over the subsequent centuries it became widely used.²² By the 1190s, the phrase described the central royal court at Westminster (predecessor to the English superior common law courts) to distinguish it from the judges who traveled England to hear cases.²³ Most often, an appeal from a local jury trial to the central court in London would be described as "reserving a case for the court *in banc*."²⁴ But as Latin was often used in legal documents, "in banco" ("bancus" in the ablative case) was common as well.²⁵ That is, "in banco" was used when documents were in Latin and "in banc" when in French.

As both Latin and French mostly faded away in English law (outside of formulaic uses in statutes and other legal documents), it's hard to say whether the "banc" the English continued using was from one or the other. Much of English law simply used the King's English, after all. For example, today we say "the King's Bench," not "the King's Banc." But for whatever reason, "in banc" remained as a term

in English distinguishing a group of judges in London from the rest of the country's courts.

Nonetheless, "in banc" is not proper French, although "in banco" is proper (medieval) Latin. And at times, when using French, the medieval English seem to have used the proper "en banc" when speaking of "the bench." For example, a statute from the time of Edward III (in the Parliament of 1341) referred to the King's Bench as "en banc le Roi," and to what seems to have been the Court of Common Pleas as "en commune banc."²⁶ But the "in banc" was used in subsequent centuries in referring to a court in full. So was that bad French, or was it Latin with the "o" dropped? At some point, the distinction became irrelevant and those phrases meant the same thing.

OLD BENCHES ENTER THE NEW WORLD

The modern English meaning of the phrase — that is, a full court hearing a case, especially on appeal — was imported into American legal terminology before the founding, as with most other English legal heritage. Early on, it seems "in bank" (another variety) was most popular in the United States, with the earliest example in an opinion by the Common Pleas of Philadelphia County from 1785.²⁷ The Pennsylvania Supreme Court in particular was a frequent user of "in bank" in the early 19th century.²⁸ "In banc" then slowly appeared in state appellate courts toward the middle of the 19th century, either referring to themselves sitting as a full court to decide cases or to describe how another court was structured.²⁹ Whether used with "bank" or "banc," the phrase seemed to refer to an appeal from a trial court to the full bench of a higher court, rather than the more specific rehearing *en banc* practice today.

From what we can tell, it was not until 1880 that the French preposition "en" made its way into this nomenclature, first at the Supreme Court of Louisiana.³⁰ Perhaps it isn't surprising that this occurred in the home of French-American culture. American appellate courts took time to adopt the new preposition, with the rest of the 19th century seeing only a handful of "en banc" opinions. At the turn of the 20th century, however, the dam burst wide open. From 1900 to 1910, there were hundreds of uses of "en banc," just as there had been hundreds of uses of "in banc" in the few decades prior. To be sure, many courts still used "in banc" in opinions in the 1900s — but suddenly its "en" sibling was catching up, virtually out of nowhere. The two phrases stayed at a rough parity for a few decades, although "en banc" began to outpace the other in the 1930s and 1940s. By the 1950s, "en banc" finally overpowered its rival, with roughly five times as many uses across state and federal courts.³¹

The phrase's meaning also grew more specialized at the same time its spelling was changing. The 1843 edition of Bouvier's American law dictionary didn't include any version of the full phrase, but defined "BANC or BANK" as either "[t]he seat of judgment as *banc le roy*, the king's bench" or "[t]he meeting of all the judges or such as may form a quorum, as, the court sit in *banc*."³² By 1914, Bouvier's dictionary equated a court "sitting in banc" with a "full court" and stated that the phrase was reserved for "cases of great importance."³³ (The phrase had fallen out of use in England by this point due to the reform of their judicial system, which could have made it easier for the meaning, or spelling, in the United States to change.) And later in the 20th century the phrase became

even more technical and specific to its modern-day meaning.

It is unclear why this shift in meaning occurred. It's possible that some state appellate courts began limiting their full-bench approach to only important appeals and more clinically deployed "en banc" or "in banc" as a label to distinguish those appeals from cases using a subset of judges. In 1941, the United States Supreme Court authorized federal courts of appeals to hear particularly important cases "en banc" without specifying whether those cases had to come from a trial or appellate court. When it did so, it did not define the term — a move that confirms it was already an established part of American legal lingo.³⁴ By the time Congress enacted Rule 35 of the Federal Rules of Appellate Procedure in 1967, however, the full-bench "in banc" procedure was further limited to reconsidering prior appellate decisions of a panel of the same court.

The Supreme Court in 1941 also spelled the phrase "en banc" — a decision that may have turbocharged the general spelling change from "in" to "en." The Court (and federal courts of appeals) continued to use that spelling in subsequent cases. By contrast, when Congress codified the process in 1948, it continued to use the "in banc" spelling, and persisted in doing so until 1994, when it changed all mentions of the phrase to "en banc" in the rules of appellate procedure to match the federal courts. However, the 1948 statute still says "in banc."³⁵

Almost all American jurisdictions now use "en banc." According to Bryan Garner, Arizona and Maryland are the only two jurisdictions that still use the "in banc" spelling — though commentators in Maryland have openly wondered why (with some believing the spelling persists in allegiance to the spelling in

ONCE THE PHRASE JUMPED THE POND, JUDGES AND LAWYERS IN THE NEW WORLD — EITHER THOSE IN LOUISIANA WHO ACTUALLY SPOKE FRENCH AT HOME OR THOSE ELSEWHERE WHO WERE EDUCATED IN MODERN FRENCH — ASSUMED "IN" WAS AN ERROR, AND THAT THE RIGHT WORD WAS "EN."

the state's constitution).³⁶ In addition, the Supreme Court of California spells it "in bank" with a "k" — perhaps making it the only court in the English-speaking world that still does so.

AMERICANS TALK BON FRENCH

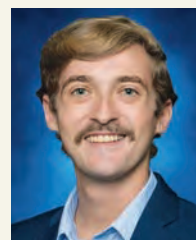
In the end, "en banc" as it is used today has only been with us since the mid-to-late 19th century. Before that, with just a few exceptions, it was all "in banc," "in banco," and even "in bank."

So why the change in modern times in America? Here's our (admittedly speculative) thinking: Perhaps "in," though not a preposition in French, was nonetheless used in Law French due to the influence of Latin — where "in" is a preposition. This use of "in" worked just fine for the English, even after they stopped speaking French outside of the legal world; after all, they were accustomed to all other kinds of weird French and Latin words floating around their courts.

But it seems that once the phrase jumped the pond, judges and lawyers in the New World — either those in Louisiana who actually spoke French at home or those elsewhere who were educated in modern French — assumed "in" was an error, and that the right word was "en." Americans therefore endeavored to "fix" the phrase, without realizing that the phrase was never broken in the first place.

The Oxford English Dictionary states that the current-day British pronunciation of en banc is "in bonk," while the American pronunciation is either "on bonk" or "en bank." Garner's dictionary considers both American pronunciations to be common and acceptable. In Paris, you would ensure that you said "on bonk," with the "on" on the fancier side. The phrase, however, does not originate from modern French — but from something much more interesting — meaning that modern French pronunciation need not apply.

All in all, this is only to say that "en banc" is probably like "amicus": pronounced however the speaker wants to pronounce it.



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- * Mr. Liles thanks Mr. Sanders for his partnership, historical knowledge, and sense of humor.
- † Mr. Sanders thanks Mr. Liles for his partnership, research, and writing on this topic while a summer fellow at the Institute for Justice (IJ). He also thanks fellow IJ employees Bob Beldon and Sam Gedge for their deep disagreement with him on how to pronounce “en banc” that inspired this project. Mr. Sanders contributes to the center’s weekly newsletter “Short Circuit” (edited by John Ross), which, among numerous summaries of opinions from the federal courts of appeals, often reports on grants or denials of en banc review.
- 1 This completely apocryphal quotation has long been wrongly attributed to Governor Miriam Amanda “Ma” Ferguson. See Benjamin Zimmer, *Ma Ferguson, the Apocryphal Know-Nothing*, LANGUAGE LOG (Apr. 29, 2006, 4:30 PM), <http://itre.cis.upenn.edu/~myl/languagelog/archives/003084.html>. Like any age-old saying, it’s too good not to use, especially in a piece of such gravity.
- 2 To substantiate the veracity of this date, we’re going to cite to the classic source that everyone should trust. W.C. SELLAR & R.J. YEATMAN, 1066 AND ALL THAT (1930).
- 3 1 SIR FREDERICK POLLACK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 61–62 (Cambridge Univ. Press 1895), <https://archive.org/details/historyenglishl-04maitgoog/page/60/mode/2up>.
- 4 E.g., *id.* at 60.
- 5 *Id.* at 62 (“If we must choose one moment of time as the fatal moment, we ought to choose the year 1166 rather than the year 1066, the year of the assize of novel disseisin rather than the year of the battle of Hastings. Then it was that the decree went forth which gave to every man dispossessed of his freehold, a remedy to be sought in a royal court, a French-speaking court.”).
- 6 *Id.* at 65.
- 7 For the long death march of Law French, see generally Ian Williams, *Law, Language and the Printing Press in the Reign of Charles I: Explaining the Printing of the Common Law in English*, 38 L. HIST. REV. 339 (2020); David Franklin, *Pardon My Law French*, 2 GREEN BAG 2D 421 (1999), http://greenbag.org/v2n4/v2n4_terms_of_art_franklin.pdf. For a study of how by the 13th century French was apparently moving out of being a widely spoken language in England, yet was dominant in court as a spoken language — even over Latin — see generally Thomas J. McSweeney, *Those Things Which Are Written in Romance: Language and Law Teaching in Thirteenth-Century England*, at 62 Am. J. Legal Hist. 285 (2022).
- 8 Jon O. Newman, *In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 BROOK. L. REV. 365, n.1 (1984).
- 9 See, e.g., JAN FREDERIK NIERMEYER, MEDIAE LATINITATIS LEXICON MINUS: A MEDIEVAL LATIN-FRENCH/ENGLISH DICTIONARY 79 (1976) (defining “bancus” as banc (French) or bench (English)).
- 10 See, e.g., OXFORD LATIN DICTIONARY 225 (1968) (no word between “balux” and “bannanicus”); D.P. SIMPSON, CASSELL’S LATIN AND ENGLISH DICTIONARY 26 (1987) (no word between “baltus” and “barathrum”). Apparently “banchus” or “bancus” could mean a special kind of fish, but the word was “otherwise unknown.” CHARLTON T. LEWIS & CHARLES SHORT, A LATIN DICTIONARY 221 (1966).
- 11 WILLIAM SMITH & THEOPHILUS D. HALL, A COPIOUS AND CRITICAL ENGLISH-LATIN DICTIONARY 75–76 (American Book Co. 1871), <https://archive.org/details/copiouscriticale00smit/page/74/mode/2up>. Even when used in the sense of a seat for judges, this dictionary notes the first translation of “bench” as “subsellia,” and notes “bancus” as the last, and only as medieval Latin. *Id.* at 76.
- 12 GERHARD ROHLFS, FROM VULGAR LATIN TO OLD FRENCH 68 (Vincent Almazan & Lillian McCarthy trans., 1970).
- 13 *Id.* For an easily accessible history of the mysterious transformation of Latin into modern Romantic languages, listen to Patrick Wyman’s excellent podcast *Tides of History: How Latin Became the Romance Languages* (2017), <https://art19.com/shows/the-fall-of-rome-podcast/episodes/c21415e9-8166-4179-9c0d-aald40a74593>. TL;DR (or “L” for a podcast, right?): It can all be blamed on an English monk.
- 14 See MORE WORD HISTORIES AND MYSTERIES 25 (Houghton Mifflin Co. 2006).
- 15 *Id.*
- 16 PIETER SIPMA, PHONOLOGY & GRAMMAR OF MODERN WEST FRISIAN 135 (1913), <https://archive.org/details/phonologygrammar00sipmuoft/page/134/mode/2up>.
- 17 THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 117 (1966).
- 18 1 JOSEPH BOSWORTH & T. NORTHCOTE TOLLER, AN ANGLO-SAXON DICTIONARY, BASED ON THE MANUSCRIPT COLLECTIONS OF THE LATE JOSEPH BOSWORTH 83 (1882), <https://archive.org/details/anglosaxondictio-00bosw/page/82/mode/2up>.
- 19 See ROHLFS, *supra* note 12, at 69 (reviewing progress of French language via poetry).
- 20 See *id.* at 68–69.
- 21 See, e.g., *id.* at 68.
- 22 JOHN BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 21–22 (5th ed. 2019).
- 23 *Id.* at 22–24.
- 24 WILLIAM FRANCIS FINLASON, REEVES’ HISTORY OF THE ENGLISH LAW: FROM THE TIME OF THE ROMANS TO THE END OF THE REIGN OF ELIZABETH Vol. IV 402 (1880), <https://archive.org/details/reeveshistoryen01finlgoog/page/402/mode/2up>.
- 25 See, e.g., *id.* at Vol. II 340 (1880) <https://archive.org/details/cu31924064829306/page/340/mode/2up> (distinguishing “*coram justitiariis in banco*” (before the justices on the bench) from itinerant justices).
- 26 9 STATUTES AT LARGE FROM THE SECOND YEAR OF THE REIGN OF KING GEORGE THE THIRD TO THE FIFTH YEAR OF THE REIGN OF KING GEORGE THE THIRD Appendix, 36 (Basket ed., Gale 2003) (1770) https://www.google.com/books/edition/The_Statutes_at_Large/uaRFAAAAcAAJ (statute titled “CAP IV”).
- 27 *Burrows v. Heysham*, 1 Dall. 133, 134 (Pa. Ct. Com. Pl. 1785). All of the findings in this section are based on searches in the “All Courts” database in LEXIS. However, some of the earlier cases were also double-checked against the earlier available published case reports, as “in bank,” “in banc,” and “en banc” seem to often mysteriously transform into one another when jumping between various editions and electronic databases. A number of cases say “in banc” in LEXIS but “in bank” in the original reporter.
- 28 *Lessee of Lazarus v. Bryson*, 3 Binn. 54, 65 (Pa. 1810); *Lessee of Jackson v. Burns*, 3 Binn. 75, 86 (Pa. 1810).
- 29 See, e.g., *Dudley v. Bolles*, 24 Wend. 465, 469 (N.Y. Sup. Ct. 1840); *Gayle v. Ennis*, 1 Tex. 184, 187 (1846).
- 30 *Louisiana ex rel De Buys v. Judges of Civil Dist. Court*, 32 La. Ann. 1256, 1259 (1880).
- 31 The numbers in this paragraph were obtained by the authors through searches of the phrases “en banc” and “in banc” within the body of opinions (that is, excluding headnotes and summaries) in the LEXIS database for all U.S. cases within the indicated time frames.
- 32 1 JOHN BOUVIER, A LAW DICTIONARY 166 (2d ed. 1843), <https://archive.org/details/alawdictionary-a02bouvgooog/page/166/mode/2up>.
- 33 2 JOHN BOUVIER, BOUVIER’S LAW DICTIONARY 1322 (8th ed. 1914), <https://archive.org/details/cu31924022836237/page/1322/mode/2up>.
- 34 *Textile Mills Sec. Corp. v. Comm’r*, 314 U.S. 326 (1941).
- 35 28 U.S.C. § 46(c).
- 36 BRYAN GARNER, GARNER’S DICTIONARY OF LEGAL USAGE 315 (3rd ed. 2011).