

# And in *En Banc* News . . .

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How many of you have ever wondered where certain slang expressions come from? Like “She’s the cat’s pajamas,” or to “take it on the lam.” Neither have I. And yet for those who are interested in this sort of thing I have provided a brief guide to a few of the more interesting origins.<sup>1</sup>

In that essay Woody Allen then proceeded to just make stuff up. We won’t do that. Yet. We do realize, however, that – like Woody’s audience – you, dear readers, may have never wondered where the fancy French phrase “en banc” comes from. Kind of funny looking, though, isn’t it? Why not just say “the whole court” instead of getting all Continental? If the King’s English was good enough for Jesus Christ,<sup>2</sup> why isn’t it good enough for federal circuit courts?

Well, in this brief journey through time we attempt to answer these questions you haven’t asked and explain why when federal appellate judges gather in groups of more than three they start speaking French.

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<sup>1</sup> WOODY ALLEN, *WITHOUT FEATHERS* 217 (1983) (beginning of chapter entitled “Slang Origins”).

<sup>2</sup> 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/language-log/archives/003084.html>. Like any age-old saying, it’s too good not to use, especially in a piece of such gravity.

## I. DAS BANC

Except, it's not really French. So the immediate origin of the phrase "en banc" – which literally in today's language of Paris means "on bench" or "in bench" – seems to have been "Law French." But it kind of might not have been. French was a language used in English law courts – and at times in the English royal "court," as in where courtiers gather – from the time of the Norman Conquest in 1066<sup>3</sup> all the way into the seventeenth century. William and his Viking-descended buddies brought their recently adopted Old French over from Normandy and it made its way into law and administration. However, it wasn't the only language used in official circles. Latin was, of course, the primary written language of the age, and English was by no means officially banished. Indeed, William the Conqueror himself published legal documents in English as well as Latin.<sup>4</sup> It was just that during the two centuries after 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.<sup>5</sup> Once institutionalized in the "bench and bar" (as we say today in English) this use of French became hard to shake free, even after the kings and judges evolved into people who

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<sup>3</sup> To substantiate the veracity of this date, we're going to cite to the classic source that everyone should trust. R.J. YEATMAN & W.C. SELLAR, 1066 AND ALL THAT (1930). See, we didn't need a pin cite. It's right there on the cover.

<sup>4</sup> I FREDERICK POLLACK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 60 (Cambridge Univ. Press, 1895), <https://archive.org/details/historyenglishl04maitgoog/page/60/mode/2up>.

<sup>5</sup> *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.").

spoke English in their daily lives.<sup>6</sup> It was at this time that what is properly called “Law French,” an archaic language that wasn’t used outside the law, was spoken in England (although only in the courts and law offices of England). At that point the numerous French legal words were there to stay in English legal practice, even after “Law French” finally faded away.<sup>7</sup>

This *mélange* of language takes us to the origin of “en banc.” Some modern sources trace the word “banc” to Latin, including Second Circuit Judge Newman in a piece he wrote about the federal en banc system.<sup>8</sup> And it’s understandable why they’ve done so. After all, every schoolboy knows that French is a “Romance” language, and that that word isn’t used because the French are better lovers (please) but because French’s ancestor, Latin, came from the Romans. Plus, if you look in some Latin dictionaries you might see the word “bancus,” meaning shelf, counter, or bench.<sup>9</sup>

But note we only say “some.” A typical Latin dictionary for the schools that still teach the stuff – which usually means the classical Latin of Cicero – will likely lack “bancus.”<sup>10</sup> That’s because “bancus” was *not* what a Roman would use to refer to a

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<sup>6</sup> *Id.* at 65.

<sup>7</sup> 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](http://greenbag.org/v2n4/v2n4_terms_of_art_franklin.pdf).

<sup>8</sup> Jon O. Newman, *In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 BROOK. L. REV. 365, n.1 (1984).

<sup>9</sup> Particularly a medieval Latin dictionary. See, e.g., J.F. NIERMEYER, *MEDIAE LATINITATIS LEXICON MINUS: A MEDIEVAL LATIN – FRENCH/ ENGLISH DICTIONARY* 79 (1976) (defining “bancus” as banc (French) or bench (English)).

<sup>10</sup> 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 “balteus” and “barathrum”). Apparently “banchus” or “bancus” could mean a special kind of fish, but the word was “otherwise unknown.” CHARLTON T. LEWIS AND CHARLES SHORT, *A LATIN DICTIONARY* 221 (1966).

bench. They would enunciate words like *scamnum* or *subsellium*.<sup>11</sup> Instead, the word only enters the “Latin language” in the Middle Ages, when the “Latin” spoken in the former province of Gaul (or, by then, West Francia), was well on its way to becoming “French.” “Latin” *per se* (no pun intended) was becoming less a spoken language and more a language of scholars and the clergy.<sup>12</sup> In other words, “bancus” entered Latin the same way, and during the same period, that “banc” entered French. Really, it entered both languages when they were, kind of, still the same thing.

So where did “banc” come from? It seems it is one of (comparatively) few French words to emerge from the folks who give modern France its name, the Franks. Those conquerors who set up shop in Gaul and then melded into the local population – and its Latin-based language – after they had enjoyed too much wine and cheese at first spoke a Germanic language, just as the Angles and Saxons (and don’t forget the Jutes!) who came to England. As best we can tell, “banc” and “bancus” are descended from the proto-Germanic “bankiz,” which could mean a bench and also a raised surface, like a bank of a river.<sup>13</sup> If we want to get even further back, there is a proto-Indo-European word “b<sup>h</sup>eg” meaning to bend or curve. Modern West Frisian has the word “bank”

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<sup>11</sup> WILLIAM SMITH AND THEOPHILUS D. HALL, *A COPIOUS AND CRITICAL ENGLISH-LATIN DICTIONARY* 75-76 (American Book Co., New York, 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.

<sup>12</sup> For the 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-aa1d40a74593>. TL;DR (or “L” for a podcast, right?): It can all be blamed on an English monk.

<sup>13</sup> See *Reconstruction: Proto-Germanic/bankiz*, WIKTIONARY, <https://en.wiktionary.org/wiki/Reconstruction:Proto-Germanic/bankiz>

meaning “bench,”<sup>14</sup> as does 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 long tables – is how we have the word “bank” to mean a place where you stash your cash. This is likely via the Lombards (another posse of Germanics), who invaded northern Italy in the sixth century. Also, although this meaning 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.”<sup>15</sup>

Thus, “banc” comes from a Germanic word which 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” ain’t one of them.

## II. THE FULL BANC-Y

Nevertheless, while “bench” and “banc” are Germanic siblings, in the post-1066 era both “banc” and “bancus” became associated beyond just literally sitting on a bench. And so it came to pass that placing an “in” in front of those words was used to distinguish the centralized courts in London (where the judges apparently sat on a big bench) from the local courts throughout England. There’s evidence of this phrase just after the Norman Conquest, and over the subsequent centuries it became widely used.<sup>16</sup>

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<sup>14</sup> PIETER SIPMA, *PHONOLOGY & GRAMMAR OF MODERN WEST FRISIAN* 135 (1913), <https://archive.org/details/phonologygrammar00sipmuoft/page/134/mode/2up>.

<sup>15</sup> I JOSEPH BOSWORTH & T. NORTHCOTE TOLLER, *AN ANGLO-SAXON DICTIONARY, BASED ON THE MANUSCRIPT COLLECTIONS OF THE LATE JOSEPH BOSWORTH* 83 (Oxford, Clarendon Press 1882), <https://archive.org/details/anglosaxondictio00bosw/page/n5/mode/2up>.

<sup>16</sup> JOHN BAKER, *INTRODUCTION TO ENGLISH LEGAL HISTORY* 21–22 (5th ed. 2019) (hereinafter “Baker”).

As soon as the 1190s it described the central royal court at Westminster (predecessor to the superior common law courts) to distinguish it from the judges who travelled England to hear cases.<sup>17</sup> It seems often the appeal from the jury trial to the court in London would be considered “reserving a case for the court *in banc*.”<sup>18</sup> But as Latin was often used in legal documents, “in banco” (“*bancus*” in the ablative case) was common as well.<sup>19</sup>

Thus, as both Latin and French died away in English law (outside of formulaically using them in statutes and other legal documents) but left their various legal words behind, it’s hard to say whether the “*banc*” the English were left with was from one or the other. Much of English law simply used the King’s English, after all. For example, we say “the King’s Bench” not “the King’s Banc.” But for whatever reason, “*in banc*” remained as a term distinguishing a group of judges in London from the rest of the country.

The funny thing about this, however, is that “*in banc*” is not proper French (as opposed to Law 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 what seems to

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<sup>17</sup> *Id.* at 22-24.

<sup>18</sup> IV W.F. FINLASON, REEVES’ HISTORY OF THE ENGLISH LAW 402 (M. Murphy, Philadelphia, 1880), <https://archive.org/details/reeveshistoryen01finlgoog/page/402/mode/2up>.

<sup>19</sup> See, e.g., II W.F. FINLASON, REEVES’ HISTORY OF THE ENGLISH LAW 340 (M. Murphy, Philadelphia, 1880) (distinguishing “*coram justitiariis in banco*” (before the justices on the bench) from itinerant justices), <https://archive.org/details/cu31924064829306/page/340/mode/2up>.

have been the Court of Common Pleas as “en commune banc.”<sup>20</sup> 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” simply dropped? At some point it was just all the same.

### III. A NEW WORLD FOR OLD BENCHES

The English meaning of the phrase – that is, of 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. Very early on it seems “in bank” (another variety) was popular. The earliest example of “in bank” we could find in the United States was an opinion by the Common Pleas of Philadelphia County from 1785.<sup>21</sup> Then in the 1810s the Pennsylvania Supreme Court was the first to begin regularly using “in banc.”<sup>22</sup> This usage seems to refer to a regular appeal from the trial court to the full bench of a higher court, rather than the more specific rehearing *en banc* practice today. The phrase was then used in Pennsylvania and sporadically in other state appellate courts through the first half of the nineteenth century, either referring to themselves sitting as a full court or to describe how another court was structured.<sup>23</sup>

It was not until 1858, however, that the French preposition “en” makes its way into this nomenclature. In *Harkins v. Board of Supervisors*, the brand-new Supreme Court

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<sup>20</sup> IX 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, London 1770) (statute entitled “CAP IV”), [https://www.google.com/books/edition/The\\_Statutes\\_at\\_Large/uaRFAAAAcAAJ?hl=en&gbpv=1](https://www.google.com/books/edition/The_Statutes_at_Large/uaRFAAAAcAAJ?hl=en&gbpv=1).

<sup>21</sup> *Burrows v. Heysham*, 1 U.S. (1 Dall.) 133 (Pa. Ct. Comm’n Pleas 1785). All of the findings in this section are based on searches in the “All Courts” database in LEXIS.

<sup>22</sup> *Lessee of Lazarus v. Bryson*, 3 Binn. 54, 65 (Pa. 1810); *Lessee of Jackson v. Burns*, 3 Binn. 75, 86 (Pa. 1810).

<sup>23</sup> See, e.g., *Dudley v. Bolles*, 24 Wend. 465, 469 (N.Y. 1840); *Gayle v. Ennis*, 1 Tex. 184, 187 (1846).

of Minnesota used “en banc” to refer to itself sitting as a full court.<sup>24</sup> The next we found wasn’t until 1880, when the Supreme Court of Louisiana slipped the “en” word in.<sup>25</sup> And in the 1880s decade we only found two other opinions where “en banc” entered the text of an opinion. The 1890s saw seven opinions, and then the dam seems to have burst open once we hit the twentieth century. In just the decade of the 1900’s there were literally hundreds. In contrast, there were hundreds of instances of “in banc” in opinions in each of the last few decades of the nineteenth century. There still were over a thousand uses of “in banc” in opinions the 1900s, but suddenly its “en” sibling was catching up, out of virtually nowhere. The two phrases then stayed roughly at parity in the frequency of their use for a few decades, although “en banc” began to outpace the other in the 1930s and 1940s. In the 1950s, though, “en banc” truly overpowered its rival with roughly five times as many uses across state and federal courts.

Further, the past somewhat generic meaning of “en” or “in” banc began to evolve into something more specific, at least in the U.S., by the early twentieth century. The 1914 edition of Bouvier’s American law dictionary equates a court “sitting in banc” with a “full court” and states that this phrase is reserved for “cases of great importance.”<sup>26</sup> 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.

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<sup>24</sup> 2 Minn. 342, 343 (1858).

<sup>25</sup> *De Buys v. Judges of Civil Dist. Court*, 32 La. 1256, 1259 (1880).

<sup>26</sup> II JOHN BOUVIER, *BOUVIER’S LAW DICTIONARY* 1322 (8th ed. 1914), <https://archive.org/details/cu31924022836237/page/1322/mode/2up>.



It's unclear why the shift in meaning occurred. It's possible that some state appellate courts began limiting this full-bench procedure to only important appeals and kept "en banc" or "in banc" as a label. In 1941, the Supreme Court authorized federal courts of appeals to utilize this "en banc" procedure for initial appeals (without defining the term, suggesting it was an established part of American legal lingo).<sup>27</sup> By the time Congress enacted Rule 35 of the Federal Rules of Appellate Procedure in 1967, the full-bench "in banc" procedure was further limited to reconsidering prior decisions of a panel of the same circuit.

Following the "in" to "en" trend noted above, the Supreme Court spelled the phrase "en banc" in its 1941 case. That must have turbocharged the trend even more. The Court (and federal courts of appeals) continued to use that spelling in subsequent cases. In contrast, Congress' codification of the process in 1948 used the "in banc" spelling. Congress continued to use this spelling in rules until 1994, when they changed all mentions of the phrase to "en banc" to match the federal courts. However, the statute still says "in banc."<sup>28</sup>

Almost all American jurisdictions now use "en banc." According to Bryan Garner, Arizona and Maryland are the only two jurisdictions that use the "in banc" spelling—though commentators in Maryland have openly wondered why, claiming that the only reason this form is used is because the drafters of the Maryland

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<sup>27</sup> *Textile Mills Sec. Corp. v. Comm'r*, 314 U.S. 326 (1941).

<sup>28</sup> 28 U.S.C. § 46(c).

constitution spelled it that way.<sup>29</sup> In addition, the Supreme Court of California spells it “in bank” - perhaps making it the only court in the English-speaking world that does so.

#### IV. AMERICANS TALK BON FRENCH

Thus, in the end, “en banc” as it’s used today really has only been with us since the mid-to-late nineteenth century. Before that, with just a few exceptions, it was all “in banc,” “in banco,” and even “in bank.” “En banc” *was* a thing, but for the *real* French, not so much Anglosphere judges and lawyers.

So why the change in modern times in America? Here’s our (speculative) thinking. Again, “in” isn’t a preposition in French, but it is in Latin, and perhaps may have been a bit of a thing in Old French when the two languages were more fluid. This was fine for the English after they stopped speaking French outside the law. After all, they had all kinds of other weird French and Latin words floating around their courts. But it seems that once it jumped the pond and bounced around New World benches at some point lawyers and judges (who as learned school kids of their age were also educated in (modern) French) must have thought “Um, that’s not right. It’s ‘en.’” And thus, the medieval phrase that *may* have been some kind of French, but seems to have more been some kind of Latin, was corrected to the proper French of nineteenth century gay Paris. Thus, today the phrase has been “fixed.” But what these proper students of modern French didn’t know is that the term was never broken.

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<sup>29</sup> BRYAN GARNER, GARNER’S DICTIONARY OF LEGAL USAGE 315 (3rd ed. 2011).

The Oxford English Dictionary states that the 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 a “on bonk,” with the “on” on the fancier side. But since its origin isn’t from the French of modern Paris – but something much more interesting – *en banc* is probably like “amicus” – it’s pronounced however the speaker wants to pronounce it. Like Woody Allen, you can just make stuff up.