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## LEGALESE IN MODERN LAW

A lot of lawyers are tired of hearing about legalese, and many still haven't embraced plain language in their own legal writing and speaking. With my report I won't try to convince anyone to change their mind, just a little info for everyone.

But there is another issue often lost in the plain-language wars: where did all these legalese words come from? The perception on both sides seems to be these words and phrases once served a purpose, but don't anymore. But what if we discovered that they never served any purpose?

*1. The Majesty of the Law.* No doubt about it, some things in the law should sound solemn and ancient, because as Lord Hewart noted, "Justice should not only be done, but should manifestly and undoubtedly be seen to be done." For example, most lawyers wouldn't change the opening of every Supreme Court session:

The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States. All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court.

Lawyers persist in using clumsy language even when it makes us less persuasive to our intended audience. Maybe that is because we believe or fear that words mean things when they really don't. This may be a superstition, but it is a superstition that all the arguments in the world in favor of plain language will not overcome.

In the last century, lawyers have recognized that constantly using Latin words and phrases when English ones serve just fine made legal writing and speaking unnecessarily stuffy and ambiguous.

Of course, there are some terms of art that don't have ordinary English equivalents, such as *res ipsa loquitor, prima facie, and alibi*.[1] Other words with ordinary English equivalents are nevertheless so standard as to be unabjectionable, such as *bona fide*, *amicus curiae*, and *versus*.[2] Few seek to remove this type of Latin from the law.

Today, most lawyers will recognize that writing or saying *in praesenti* ("in the present"), *contradicto in adjecto* ("contradiction in terms"), or *ex abundenti cautela* ("out of abundant caution") is to present "pompous, turgid deadwood."[3]

Perhaps many lawyers today resist cutting out non-Latin legalese because they view it with the same respect that 19th-century lawyers viewed Latin. Let's see if that respect is warranted.

2. Grammatical Grotesauerie. *"Wherever lawyers stand on legalese, they should, at least, stand on reason."*

This is a term Bryan Garner uses to describe legalese that no one intended to make a thing. He notes that when he was a young lawyer in Texas, the traditional denial in a defendant's answer went like this: "Defendant generally denies each and every, all and singular, the allegations contained in the plaintiffs original petition".

He surmised that the justification for "all and singular" was likely in the same vein as Chief Justice John Fortescue's famous statement: "We have several set forms which are held as law, and so held and used for good reason, though we cannot at present remember that reason." After doing some digging, the first use of "all and singular" he found was in a 1847 Texas Supreme Court rule, and he notes:

The anonymous drafter of that rule, perhaps a justice of the Supreme Court, perpetrated a synactic blunder that would be repeated (with minor variations) in Texas pleadings for more than a century and a half.

It's bad enough that lawyers use antiquated phrases that have little or no meaning. It's worse when we don't even use the same antiquated language. For instance, I found four different versions of the sadly common "Further your affiant" language at the end of an affidavit used in Minnesota: Further your Affiant saith not; Further your Affiant sayeth not; Further than this your affiant sayeth not.

*3. The Whys of Whereas.* "Whereas" is one of those words that pops up on all sorts of contexts. In my experience, many lawyers think the word needs to be in anything signed by the court.

This led me to ask: is there any reason to use *whereas* clauses? According to Garner, the answer is no: One significant feature of these whereas clauses are that they usually have no legal effect: they are merely preliminary statements providing introductory background information before the binding promissory language.

Let's break this example down: *Whereas* clauses have no purpose in contracts—where they were originally used; Lawyers in cases with no connection to contract law include *whereas* clauses in routine stipulations; These same lawyers fear that removing *thewhereas* clauses will invalidate the stipulation.

Until lawyers can rid themselves of this fear, they will never embrace plain language in writing and speaking.

*4. The Direction of Your Attention.* Lawyers love to direct people's attention to things. It could be an exhibit ("directing your attention to the bloody glove"), another witness's testimony ("I'd like to direct your attention to the plaintiffs direct examination"), or a legal concept ("directing your attention to the reasonable-person standard"). As many have already written, there are much better ways to transition into another topic.

I have two different concerns: what is the purpose of the phrase and where does it come from?

On the first point, I have found absolutely no evidence that the phrase has any special legal meaning. If anyone finds evidence that it does, please let me know.

On the second point, I have heard rumors that this phrase was used by lawyers in Elizabethan England, but I've only been able to track the phrase back to 1784. The fact is: Almost no one outside of the legal community has used the phrase since the early 20th Century.

And if a ScotusSearch of US Supreme Court oral arguments is any indication, even lawyers are using the phase much less often. Lawyers and the justices used the phrase a total of 86 times since 1959, but only 8 times since 2000.

*5. To Know These Presents Is to (Not) Love Them.* Yes, lawyers still write *know all men by these presents* to mean "take notice." This one goes back a long time. It first comes up in Google

Books in 1695. And no, there probably was never a reason to use this phrase, either.

Wherever lawyers stand on legalese, they should, at least, stand on reason.

**Reference list:**

1. Bryan A. Gamer, Gamer's Dictionary of Legal Usage 518; 3d ed. - Oxford University Press, 2011.

2. Bryan A. Garner, A Dictionary of Modern Legal Usage 929; 2nd ed. -Oxford University Press, 1995/