

Law Words

30 essays on legal words & phrases

All the words in this book are legal words and phrases. They are words and phrases that you will find in legal documents, court proceedings, and legal cases. Some of the words and phrases are familiar to you, but some are not. This book explains the meaning of these words and phrases, and how they are used in the law.



Centre for
Plain Legal
Language

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Contents

Introduction.....	1
Versus Latinum	4
The French connection.....	7
Aid and abet	10
Deemed	13
Escrow.....	16
Estate or interest	19
Execute	21
Fit and proper	24
Force majeure	27
Give, devise and bequeath	31
Goods and chattels	34
Heirs, executors, administrators, successors, and assigns	38
Instrument	41
Joint and several	44
Last will and testament.....	47
Malice	50
Notwithstanding	53
Null and void.....	56
Per stirpes	59
Pro bono	63
Provided that	66
Recognizance.....	69
Rest, residue and remainder	73
Right, title and interest.....	77
Said	80
Signed, sealed and delivered	83
Time is of the essence	86
Transfer and assign	89
Whereas	92
Without prejudice.....	95

About this collection

These essays have been researched, written, edited and commented on by a wide range of people. While many of them were originally written by one person, they are all the result of a collective effort. Those involved in this effort over the years are: Judith Bennett, Peter Butt, Amanda Chambers, Mark Duckworth, Harry Dunstall, Malcolm Harrison, Felicity Kiernan, David Kistle, Jeremy Low, Bron McKillop, Anne-Marie Maplesden, Kate Morgan, Chris Norton, Julian O'Sullivan, and Arthur Spyrou. Patrick Macalister, Deputy Editor of the *Law Society Journal* received each article each month and has always been very patient as we re-edited them to fit into our allotted space.

Because of the limits on space, the articles were always printed in the *LSJ* without footnotes. Sometimes we also had to shorten them. The Centre has previously published the full versions of the articles published in 1992 and 1993. Rather than bring out another year's compilation, we decided to collect all the ones written on words and phrases and to re-edit them. In this process, some of them have been extensively revised.

The collections published as *Words and Phrases* in 1992 and 1993 were edited by Judith Bennett. This compilation was edited by Mark Duckworth and Arthur Spyrou.

Introduction

[B]oth those who seek and those who provide securities for the performance of commercial obligations ... would save much time and money if in future they...set out their bargain in plain modern English without resorting to ancient forms which were doubtless designed for legal reasons which no longer exist.

Trafalgar House Construction (Regions) Ltd v General Surety and Guarantee Co Ltd (Unreported, Court of Appeal, England, 22 July 1994, Saville LJ at p10)

These essays are about the language of the law. They explore words and phrases often found in legal documents. Some of the words and phrases covered are technical terms to which the law gives specific meanings. Some of them are used by lawyers out of habit, more as an incantation than for any legal reason.

The language of the law has certain features that make it different from everyday English. You cannot replace a technical legal term by another without being aware of the consequences. But one of the most important features of language is that it changes over time. It cannot be frozen to reflect one age. Lawyers, in their search for certainty, often try to fix a meaning. But the evolution of language resists this. In these essays one constant theme is that the meaning of legal words and phrases changes as language does. As we trace the history of particular words we see that the meaning given them by courts in one era may be very different from the meaning they have today. Because a word has been frequently litigated does not mean that the courts are certain about what it means. In fact it is often the reverse. A word that has a settled meaning is less likely to be the subject of litigation.

In most essays we have tried to propose a plain language alternative. Sometimes this is not possible, or even necessary. The suggestions we make are not necessarily “right”. We are quite happy for people to challenge our views. These essays are not designed to give easy answers. They are written to challenge lawyers about the language they use. We would be as concerned if a reader uncritically adopted one of our suggestions as we are by those who use ‘time-honoured’ terms out of habit.

One of the things some lawyers believe is that the language of the law is more precise than other types of language. It is not. This causes concern to lawyers who live in fear that the documents they produce may have meanings they do not intend. One of the criticisms made against plain language is that by replacing ‘time-honoured’ terms whole areas of the law will be made less certain and may have to be relitigated. Certainly there are some technical words and phrases that must be retained. We do not suggest that “Certificate of Title”



or “affidavit” be abandoned for some other term. However, as we sometimes suggest, lawyers should at least explain what they mean if they have to use technical terms.

Plain language is more than just words

Plain language is a user-driven approach to writing and designing documents. It is used in a range of legal documents or documents with legal effect. It avoids archaic words, jargon, unnecessary technical expressions, and complex language. But it is not simplistic English. It aims to communicate information in the most efficient and effective way possible while remaining technically correct. It achieves this by considering the needs of the intended users of the document.

Plain language is about more than just words. It is also concerned with organising ideas so that they make sense to the reader, and designing documents to make them easy to use. It involves knowing the function of a document from talking to the people who will use it to find out their needs. The plain language process includes testing to assess the effectiveness of the new document.

Testing also shows up any problems with the document before it is introduced.

So while the words and phrases used in legal documents are important for making them easier to read, writers must consider all these other factors as well.

Mark Duckworth
Director
Centre for Plain Legal Language



The Centre for Plain Legal Language

The Centre for Plain Legal Language is part of the Faculty of Law at the University of Sydney. It was set up in 1990 as a joint project of the Law Foundation of New South Wales and the University of Sydney. The Centre promotes the use of plain language in all legal and administrative documents. We also carry out research into the use of plain language, and run training courses in applying the principles of plain language.

The Centre is a consultant to business, courts, government and community organisations. We write a range of legal and administrative documents including major commercial documents, user guides and forms. The Centre is a non-profit organisation.

A Management Committee oversees the running of the Centre. The members of the Committee are:

Professor David Weisbrot (Chair)	Dean, Faculty of Law University of Sydney
Professor Terry Carney	Head of Department of Law University of Sydney
Mr Dennis Murphy QC	Chief Parliamentary Counsel for New South Wales
Mr Simon Rice	Director Law Foundation of New South Wales
Mr Mark Duckworth	Director Centre for Plain Legal Language

The Centre aims to:

- encourage the use of plain language by government officers, lawyers, legislators, providers of financial services, and people preparing standard documents
- develop training programs in the use of plain language
- provide consultancy services in the use of plain language
- research the use of plain language, and publish the results of that research
- prepare precedent and sample documents using plain language
- co-operate with people and institutions in drafting and using documents and forms in plain language.



Versus Latinum

Lawyers use many Latin terms. Some have become part of everyday English like *de facto*, *versus* and *per cent*. It is legitimate to use these terms because they are understood by most readers.

However, non-lawyers rarely understand terms like *habeus corpus*, *inter alia* or *ab initio*. Clients are more likely to be baffled than impressed by these terms.¹ You block communication unnecessarily if you use *sub suo periculo* when “at his or her own risk” has the same meaning. Garner compares this to a mathematician who tries to appear more learned by saying 386/1544 instead of 1/4.²

Why do lawyers use Latin?

Lawyers use Latin terms because they are a convenient shorthand. Some Latin terms have been given judicial or statutory meanings and have become “terms of art”. Some lawyers argue that Latin is more precise than English. Blackstone said that:

“Law Latin” was a technical language calculated for eternal duration, and easy to be apprehended both in present and future times; and on those accounts best suited to preserve those memorials which are intended for perpetual rules of action.³

Lawyers also use Latin out of habit. Their use of Latin shows how the language of the law has remained static, while the English language has moved on. The invading Anglo-Saxons brought Latin words with them.⁴ Latin was used in English law perhaps as early as the reign of King Canute.⁵ After the Norman Conquest, Latin became the main language of English law.⁶ Latin was the universal language of the church and scholarship throughout medieval Europe.⁷ English and French were considered to be unfit, “vulgar” tongues.⁸

What is wrong with Latin?

Hudson writes that:

the survival of Latin tags in our legal system is primarily designed to give mystery and majesty to otherwise ordinary mortals and their fallible proceedings, as is the case with wigs and robes.⁹

Using Latin was justifiable when most literate people understood it. However, English governments have recognised that this has not been the case for a long time. Edward III tried (unsuccessfully) to force all proceedings in common law courts to be conducted in English.¹⁰ Cromwell’s parliament passed an act in 1650 to convert all statutes and court proceedings into English. This was repealed in 1660.¹¹ In 1731 the English Parliament forbade the use of Latin or



French in legal documents because it thought that “many and great mischiefs do frequently happen to the subjects of this kingdom from the proceedings in courts of justice being in an unknown language”.¹²

The lawyers revolted. Lord Raymond warned that if the traditional language of the law were abandoned, all precision would be lost.¹³ If he had his way, lawyers would still be writing everything in Latin. Unfortunately, Parliament partly gave in to the lawyers demands and excepted “technical words in the same language as hath been commonly used” from the requirement that they be in English.¹⁴ Blackstone believed that this exception “almost defeated every beneficial purpose of the former statute”.¹⁵

With respect, Blackstone was wrong to say that Latin is of “eternal duration”. Like all languages, Latin is mutable. The churchmen fitted the terms of Norman feudalism into a Latin mould and “Law Latin” was born. “Law Latin” is not pure Latin. It has been called “barbarous”¹⁶ “corrupt”¹⁷ “mutilated”¹⁸ “dog Latin” or the Irish “bog Latin”.¹⁹ However, it is only one variety of non-Classical Latin amongst Late Latin, Medieval Latin (or Middle Latin), Low Latin, Vulgar Latin and Modern Latin.²⁰

“Law Latin” is not precise because words are added changed or dropped. For example, in the early 1800’s *res gestae* (“things done”) statements were ones that could be used as evidence because they formed part of a disputed transaction, despite the hearsay rule. Lawyers then began to use *res gestae* carelessly to label any statements that they thought should be used as evidence despite a hearsay objection.²¹ Wigmore said, “[t]he phrase ‘res gestae’ has long been not only entirely useless, but even positively harmful. It is harmful, because by its ambiguity it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both”.²²

Some Latin words have wandered even further from their original meanings. *Posse* meant “to be able” in Classical Latin. In Medieval English it meant “power” or “force”. In modern English, the word refers to a group of local men who help a sheriff maintain the law.²³ Similarly, *baro* meant “blockhead” in Classical Latin but by the time of the Norman Conquest, it meant a “tenant in chief”.²⁴

Latin is not always logical. The prefix *in* means “not” in most, but not all, cases. Modern English words based on Latin ones demonstrate this confusion.

“Incorporeal” means “without a body”. However, when a company is “incorporated” it is given a body.



Plain Language

You should avoid using Latin. It is an obstacle to effective communication and is often imprecise. Occasionally, you can justify using it when writing to other lawyers, but generally, as Michèle Asprey said “[s]ave Latin for your clients who are Ancient Romans”.²⁵

Endnotes

- 1 R Wydick *Plain English for Lawyers* 2nd ed Carolina Academic Press, Durham 1985 p53
- 2 BA Garner *A Dictionary of Modern Legal Usage* Oxford University Press, New York 1987 p329
- 3 Jones (ed) 3 *Blackstone Commentaries* 321, 1916
- 4 D Mellinkoff *The Language of the Law* Little Brown & Co, Boston 1963 p39
- 5 see note 4 Mellinkoff p72
- 6 see note 4 Mellinkoff p71
- 7 GE Woodbine *The Language of English Law* 18 *Speculum* 1943 p395
- 8 PVD Shelley *English and French in England: 1066-1100* University of Pennsylvania Press, Philadelphia 1921 p90
- 9 N Hudson *Modern Australian Usage* Oxford University Press, Melbourne 1993 p226
- 10 36 Edward III, Stat 1 c15
- 11 S Robinson *Drafting* Butterworths, Sydney 1973 p10
- 12 *Records in English* 1731, 4 *Geo II* c 26
- 13 see note 4 Mellinkoff p133
- 14 *Courts in Wales and Chester* 1733, 6 *Geo II* c 14
- 15 see note 3 Blackstone 324
- 16 *Oxford English Dictionary* under *law* Clarendon Press, Oxford 1969
- 17 HC Black *Black's Law Dictionary* 6th ed 1990 West Publishing Co, Minnesota p886
- 18 JA Ballentine *Law Dictionary with Pronunciations* 2nd ed NY Lawyers Co-operative Publishing Company, New York 1948
- 19 E Partridge *Slang: Today and Yesterday* 3rd ed Routledge, London 1950 p188
- 20 *Webster's New International Dictionary of the English Language: Unabridged* 2nd ed G&C Merriam Company, Springfield 1961 under *Latin*
- 21 see note 1 Wydick p54
- 22 J Wigmore *Evidence* Chadbourne rev ed 1976 para 1767 p255
- 23 JH Baxter and C Johnson *Medieval Latin Word-List* Oxford University Press, London 1934
- 24 see note 4 Mellinkoff p71
- 25 M Asprey *Save Latin for your clients who are Ancient Romans* Centre for Plain Legal Language, Sydney 1992



The French connection

Legal language is peppered with French terms and words derived from French. It is best to avoid them, if possible, because they are difficult for most readers to understand. French terms are entrenched in legal language because of history, not because they are more precise than their English equivalents.

History

After the Norman conquest, English and French coexisted.¹ The marriage of Henry II to Eleanor of Aquitaine in 1236 helped introduce more French words into the English language.² A language, called “Anglo-Norman” evolved that was distinct from the dominant Parisian French of the continent. This was the language of the aristocracy until the mid 13th Century,³ although bilingualism was common.⁴ Anglo-Norman died out by the end of the 15th century, except in the law.⁵ The English language evolved, but legal language fossilised a form of Anglo-Norman called “Law French”.

Year books which contained case reports and legal commentary were all in Law French from 1260 to 1535.⁶ Law French was spoken in court, and competed with Latin as the written language of the statutes.⁷

Law French was used because most judges came from the Norman aristocracy. It was perpetuated because only the noble and wealthy could afford to have their sons trained as lawyers, and fluency in French was a mark of nobility.⁸ Medieval professions and guilds generally masked their practices in mystery to exclude the uninitiated. Lawyers did this by using a foreign language.⁹

What is wrong with using French?

Many words of French origin have become part of English. For example, court, judge, marriage, payment, possession, and property were all originally Law French, but have been subsumed by English.¹⁰

Other Law French terms remain incomprehensible to most people like *voir dire*, *seisin*, *pur autre vie*, and *cestui que trust*. Some Law French words also have ordinary English meanings which readers can confuse with their legal meanings, like *action*, *alien*, and *save*.¹¹

Law French is responsible for many tautologies. For example “goods” (English) and *chattels* (French); “sell” (English) and *assign* (French); “break” (English) and *enter* (French).¹² These tautologies arose as lawyers translated documents from French to English. Lawyers added English words with the same meanings as the French if they wanted to preserve French words or help the reader



understand them. Today, this confuses readers who assume that two words would not be used if one would suffice.¹³

Law French is not always precise or immutable. Law French was never pure French. Blackstone branded it as a “barbarous dialect”.¹⁴ Meanings change. *Seisin* originally meant possession generally, before it acquired its technical land law sense.¹⁵ Readers have to choose between meanings. In Law French *voir dire* is a corruption of *vrai dire*, “to speak the truth”. *Voir dire* is almost meaningless — in modern French it means “to see speak”.¹⁶

Plain language

Attempts to eradicate French from legal language have been made since the unsuccessful Statute of Pleadings specified that all pleadings were to be spoken in English (although written in Latin), except for “ancient terms and forms”.¹⁷ In 1650 the Roundheads rewrote the Books of Law and all Process and Pleadings in Courts of Justice into English.¹⁸ Unfortunately, this was repealed with the Restoration of Charles II, and the reports returned to French.

French reports had to quote English statutes and legal documents verbatim. This highlighted the absurdity of using both languages. Within two decades of the Restoration, some reports, dictionaries, and treatises were being published in English without any statutory compulsion to do so.¹⁹

In 1704 statute required that all law reports be in English, but technical words were excepted.²⁰ Law French was dealt its death blow (or *coup de grâce*) when it was outlawed altogether in 1731.²¹

We recommend that you avoid using Law French terms wherever possible. If you must use them, be sure to explain their meanings to your clients. Even the Anglo Norman derived “beneficiary” is more comprehensible than *cestui que trust*.²² Avoid words with special meanings that may be confused with the everyday meaning. Don’t use tautologies that arise because of historical accident. Aim to be precise.

Endnotes

- 1 D Mellinkoff *The Language of the Law* Little Brown & Co, Boston 1963 p95
- 2 see note 1 Mellinkoff p99
- 3 see note 1 Mellinkoff p95
- 4 see note 1 Mellinkoff p96
- 5 see note 1 Mellinkoff p96
- 6 see note 1 Mellinkoff p98
- 7 see note 1 Mellinkoff p99
- 8 see note 1 Mellinkoff p101
- 9 see note 1 Mellinkoff p101



- 10 see note 1 Mellinkoff p109
- 11 B Garner *The Elements of Legal Style* Oxford University Press, New York 1991 p13
- 12 S Robinson *Drafting — its application to conveyancing and commercial documents* Butterworths, Sydney 1973 p11
- 13 see note 12 Robinson p39
- 14 HC Black *Black's Law Dictionary* 6th ed West Publishing Co, St Paul Minnesota 1990 p885 see "Law French"
- 15 see note 1 Mellinkoff p107
- 16 see note 1 Mellinkoff p106
- 17 36 Edward Stat 1 c15
- 18 see note 11 Garner p10
- 19 see note 1 Mellinkoff p131
- 20 see note 1 Mellinkoff p130
- 21 see note 1 Mellinkoff p134
- 22 see note 11 Garner p185



Aid and abet

Doublets often occur in the language of the law. The phrase *aid and abet* is one of the best known.¹ *Aid and abet* are the verbs most often used to define secondary participation in crime. Brett and Waller write that:

the expression *aiding and abetting* is apt to cover any conduct on the part of the principal in the second degree which encourages or renders more likely the commission of the crime by the principal in the first degree.²

Origin and use

The word “aid” derives from Old French *aider* and Latin *adjutare* meaning to help or assist.³ “Abet” comes originally from Old French *abeter* meaning “to lure on, entice”,⁴ and *bouter* meaning “to encourage or set on”;⁵ and the Saxon *bedan* and *beteren* “to stir up or excite an animal”.⁶

The phrase *aid and abet* is often linked with “counsel and procure”. These four verbs are found together as early as a statute of 1547. However, over the centuries other words have been used to define secondary participation in crime such as “help”, “assist”, and “command”.⁷ In England, section 8 of the *Accessories and Abettors Act 1861* uses the phrase “aids, abets, counsels or procures”.⁸ This Act declared the common law on the subject.⁹ It also simplified criminal procedure by stating that an aider and abettor could be charged and punished as a principal offender. Australian legislation generally copied this wording.¹⁰ However the Queensland Criminal Code does not use the word “abet”.¹¹

The phrase “aid, abet, counsel, or procure” now appears in non-criminal statutes such as in section 75 *Trade Practices Act 1974 (Cth)*.¹² Yet the meaning given to *aid and abet* in the language of business and commerce has not changed, though the context may not involve criminal actions.¹³

What do the words mean?

Judicial consideration of the meaning of the phrase has focused on:

- “active steps taken ... by word or action”¹⁴
- presence at the time of planning or commission of the offence,¹⁵ and
- issues of knowledge and intention.¹⁶

Judges have spent considerable time working out what the four words mean. “Aid” has rarely been considered on its own, but is seen to have the general meaning of help or assist. “Abet” has an overlapping meaning of “to assist or



encourage as an accomplice in the commission of an offence".¹⁷ The distinction between *aid and abet* and "counsel and procure" is whether the defendant was present but not participating, or absent. "Any act which would amount to *aiding and abetting* if done while present at the crime would amount to 'counselling and procuring' if done while absent."¹⁸

Lord Widgery tried to find a difference between the words "aid, abet, counsel or procure" on the basis that "if there were no such differences, then Parliament would be wasting time in using four words where two or three would do".¹⁹ But Lord Widgery's approach misunderstands the language of the law. Common legal phrases often contain words that are synonyms or have overlapping meanings. In the Australian High Court, Gibbs CJ took this view and decided that the phrase had to be considered as a whole.²⁰ In the same case, Mason J commented that since the phrase was "merely declaratory of the common law" it was more important to consider the "common law concept of secondary participation" than the "ordinary meaning of the words themselves".²¹

Alternatives

In 1861 the *Accessories & Abettors Act* froze a term that had altered over the centuries. The 1992 Australian "Model Criminal Code" keeps the formula from 1861 because, it says, "[d]espite some difficulties, the meaning of the words is well understood".²² But the history of the phrase shows that while the law behind the phrase is understood by lawyers, the words themselves are not and have not always meant the same thing. An authoritative view is that "the actual words used are of no significance once it is clear that they [are] intended to incorporate the common law doctrine of secondary participation."²³ It is also clear that omitting the word *abet* does not make the Queensland Code any less effective.

While *aid and abet* remains in statutes, it must be used. Several alternatives have been suggested and may soon replace it. The Committee chaired by Sir Harry Gibbs into Commonwealth Criminal Law called the phrase "archaic"²⁴ and stated that "there appears to be general agreement as to the need to modernise the language".²⁵ That Committee recommended a formula using the words "knowingly involved in the commission of an offence". The Law Commission for England and Wales recommended replacing the old phrase by "assist or encourage or procure".²⁶ It is therefore disappointing that in 1992 the committee drafting an Australian Criminal Code kept the archaic term.

Endnote

- 1 D Mellinkoff *The language of the Law* Little Brown & Co, Boston 1963 p121
- 2 Brett, Walker & Williams *Criminal Law* 7th ed Butterworths, Sydney 1993 p536
- 3 *Oxford English Dictionary* Clarendon, Oxford 1970 vol 1 p194
- 4 *Collins English Dictionary* 3rd ed Harper Collins, Sydney 1991 p4
- 5 ER Hardy Ivamy *Mozley & Whiteley's Law Dictionary* 10th ed Butterworths, Sydney 1988 p2
- 6 *Jowitt's Dictionary of English Law* 2nd ed Sweet & Maxwell, London 1977 vol 1 p7
- 7 JC Smith "aid, abet, counsel or procure" in Glazebrook (ed) *Reshaping the Criminal Law: Essays in honour of Glamville Williams* Stevens & Sons, London 1978 120 at 123
- 8 *Accessories and Abettors Act 1861* s8 aimed to reform the prosecution of "accessories and abettors of indictable offences". The *Criminal Law Act 1967* which abolished the distinction between felony and misdemeanour, retained the phrase
- 9 the drafter of the 1861 legislation (CS Greaves) said so; see note 5 Hardy Ivamy p125
- 10 see pt9 *Crimes Act 1900 (NSW)* and s5 *Crimes Act 1914(Cth)*
- 11 s7 *Criminal Code Act 1899 (Qld)*. The word "aids" appears in para(c) and "counsels or procures" in para(d)
- 12 the use of "aided, abetted, counselled or procured" was considered in *Yorke v Lucas* (1983) 68 FLR 268 at 272, where the TPC said that "in order to be held to have aided or abetted a contravention [of pts IV or V of the Act] it must be proven that the person accused was aware or should have been aware of the facts that give rise to the contravention. Proof of intent is not required. The key penalty provisions relate to breaches of the restrictive trade practices provisions of the Act and are mirrored in the various *Fair Trading Acts* of the states eg s61 of the NSW Act. See also s233B(1)(d) *Customs Act*
- 13 *Yorke v Lucas* (1985) 158 CLR 661
- 14 *R v Coney* 1882 51 LJMC 66 at 78, Hawkins J
- 15 *Ferguson v Weaving* [1951] 1 All ER 412 at 413; and Attorney-General's Reference (no 1 of 1975) [1975] 2 All ER 684 at 686; JB Saunders (ed) *Words and Phrases legally defined* 3rd ed Butterworths, London 1988 at p64
- 16 *National Coal Board v Gamble* [1958] 3 All ER 203 at 207; *Attorney-General v Able* [1983] 3 WLR 845
- 17 *The CCH Macquarie Concise Dictionary of Modern Law* CCH, Sydney 1988 p1
- 18 see note 7 Smith p127
- 19 *Attorney-General's Reference (no 1 of 1975)* (1975) 2 All ER 684 p686
- 20 *Giogianni v R* (1984-85) 156 CLR 473 p480
- 21 see note 20 p492
- 22 Criminal Law Officers Committee of the Standing Committee of Attorneys-General *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility* Final Report December 1992 AGPS, Canberra 1993 clause 402 p86-7
- 23 see note 7 Smith p125 — this is based on a passage by the 18th Century jurist Foster
- 24 *Review of Commonwealth Criminal Law* 3rd Interim Report on *Principles of Criminal Responsibility and Other Matters* AGPS, Canberra July 1990 para 16.13 p200
- 25 see note 24 Review para 16.53 p213
- 26 Law Commission for England and Wales (Law Comm no 177) 1989 *Criminal Law: A Criminal Code for England and Wales* HMSO, London 1989 vol 1 clause 27(1)



Deemed

Deemed is an Old English word that originally meant “pronounced judgment”.¹ A judge is still known as a “deemster” in the Isle of Man.² We tend to see this archaic word in legislation, but lawyers have extended its use to many areas of legal drafting.

The meaning of “deemed”

As Windeyer J said in *Hunter Douglas Australia Pty Ltd v Perma Blinds*:

to deem means simply to judge or reach a conclusion about something ... The words *deem* and *deemed* ... thus simply state the effect or meaning which some matter or thing has — the way in which it is to be adjudged.³

Yet lawyers use *deemed* to mean different things in different contexts.⁴ Indeed one commentator believes that “few drafting expressions are more overworked”.⁵

Legal fiction

In legal drafting, *deemed* is commonly used to create a legal or statutory fiction.⁶ It is used to extend the meaning of a word or concept to include a subject not otherwise within its normal or ordinary meaning.⁷ As one judge described it:

generally speaking, when you talk of a thing being *deemed* to be something, you do not mean that it is that which it is *deemed* to be. It is rather an admission that it is not what it is *deemed* to be, and that, notwithstanding it is not that particular thing, nevertheless ... it is to be *deemed* to be that thing.⁸

Legal commentators argue that *deemed* is correctly used only when creating a legal or statutory fiction.⁹ Even then Thornton recommends caution: “[d]eem is useful but it is dangerous. It can lead to ambiguity ... ‘Deeming’ creates an artificiality and artificiality should not be resorted to if it can be avoided”.¹⁰

But, as Windeyer J said:

There is no presumption, still less any rule, that wherever the word *deemed* appears in a statute it demonstrates a “fiction” or some abnormality of terminology. Sometimes it does. Often it does not. Much depends upon the context in which the word appears.¹¹

Legal presumption

Lawyers also use *deemed* to create a legal or statutory presumption of “the existence of a fact irrespective of that fact in reality”.¹² Yet the courts have decided that whether a fiction is or is not created, or the presumption is



conclusive or rebuttable, depends not on the word, but on the context in which *deemed* appears.¹³

Other words to use instead include “considered as”,¹⁴ “regarded as”,¹⁵ “understood as”,¹⁶ or “is sufficient proof that”.¹⁷ Or even, within a document, “for the purposes of this document, X is Y”.

Comprehensive definition

Lawyers also use *deemed* in definitions to try to remove any lingering doubt about whether a definition is comprehensive.¹⁸ Often this is too cautious or unnecessary. It is also risky.¹⁹ If a comprehensive definition is needed, a clearer way is to use “means” or “includes”.

Considered to be

Drafters also use *deemed* when they actually mean “judged to be” or “considered to be” or just that it is.²⁰ An example is in the case of *Barclays Bank Ltd v Inland Revenue Commissioner*²¹ concerning section 55(3) of the *Finance Act 1940 (UK)* which states:

For the purposes of this section a person shall be deemed to have had control of a company at any time if ...

About this section, Denning LJ said:

Deemed is not used in the technical sense which a lawyer uses when he “deems” black to be white. It is used in the sense which an ordinary man uses when he “deems” a spade to be a spade.²²

In these situations *deemed* can simply be omitted. So section 55(3) could be redrafted:

[In] this section a person has control of a company at any time if ...

General legal drafting

Using *deemed* also flows into lawyers’ everyday writing in phrases like “if you deem fit” and “we deem it necessary”. This is an unnecessary deviation from clear writing; “deem” could be replaced by “think” or “consider”. Similarly in “nothing in this document shall be deemed to be ...”, *deemed* could be replaced with “means” or “interpreted”.²³

Is “deemed” necessary?

These cases show that legal drafters use *deemed* to mean different things in different contexts. Often these meanings are imprecise. *Deemed* is not a legal term of art. The Law Reform Commission of Victoria says that *deemed* is obsolete, and recommends that drafters do not use it “even in the technical case of expressing a ... legal fiction”.²⁴



If drafters must use it, *deemed* should only be used to create a legal fiction. But they must ask:

- are they actually creating a legal fiction?
- is the artificiality really necessary or appropriate?

Endnotes

- 1 D Mellinkoff *The Language of the Law* Little Brown & Co, Boston 1963 p47
- 2 *Hunter Douglas Australia Pty Ltd v Perma Blinds* (1969) 122 CLR 49 p65; J Burke *Jowitt's Dictionary of English Law* 2nd ed Sweet & Maxwell, London 1977 vol 1 A-K p577
- 3 (1969) 122 CLR 49 p65
- 4 *R v Bilick & Starke* (1984) 36 SASR 321 p328, King CJ; *St Aubyn v Attorney-General* [1952] AC 15 p53, Lord Radcliffe. See also *Note* "Deemed — an overworked drafting expression?" (1977) 51 ALJ 607
- 5 *Note* note 4
- 6 *Muller v Dalgety & Co Ltd* (1909) 9 CLR 693 p696, Griffith CJ
- 7 *St Aubyn* note 3
- 8 *R v Norfolk County Council* (1891) 60 LJQB 379 p380, Cave J
- 9 GC Thornton *Legislative Drafting* 3rd ed Butterworths, London 1987 p87. See also *Note* note 4
- 10 *Thornton* note 8
- 11 *Hunter Douglas* note 2
- 12 *R v Bilick & Starke* note 3
- 13 *Hunter Douglas* note 2 and *Note* note 4
- 14 *Barclays Bank Ltd v Inland Revenue Commissioner* [1961] AC 509 p541, Denning LJ
- 15 *Note* note 4; See also Law Reform Commission of Victoria *Plain English and the Law Report* No 9, Appendix 1 *Drafting manual; Guidelines for drafting in plain English* 1987 p58
- 16 *Barclays Bank Ltd* note 13
- 17 *Re Pardoo Nominees Pty Ltd* (1987) 11 ACLR 573 p575, Cosgrove J
- 18 *Re Daly & Director-General of Health* (1984) 2 AAR 72; *R v Norfolk County Council* (1891) 60 LJQB 379
- 19 *Re Daly* note 17. See also "Humpty-Dumpty" definitions in RC Dick *Legal Drafting* 2nd ed Carswell, Toronto 1985 p77
- 20 *Note* note 4
- 21 [1961] AC 509
- 22 *Barclays Bank Ltd* note 13
- 23 *Thornton* note 8
- 24 Law Reform Commission of Victoria note 15



Escrow

Escrow is a medieval legal term which this article considers in its modern setting.¹ What does it mean? Do we need it?

Origin

Escrow comes from the Anglo-French *escrowe*, which in turn comes from the Old French *escro* meaning a piece of cloth or parchment.² Other sources are the Norman French *escrit* and the Latin *scriptum*.³ Blackstone says that *escrow* means “a scrawl [scroll] or writing”.⁴

Legal meaning

Escrow traditionally, and to most lawyers, means a deed that is made and “delivered” conditionally.⁵

“Delivery”, or the intention to be bound, can be express or implied from the circumstances, and no special words or conduct are now required. There is no requirement that the deed be physically delivered to a third party. An *escrow* can exist even if the party giving it keeps the deed.⁶

Although the party executing the deed is bound and cannot resile from the deed,⁷ the deed in *escrow* does not operate until the condition is fulfilled. When the condition is fulfilled, the deed operates retrospectively from the date of its delivery.⁸ If the condition does not occur, the deed does not come into operation. It is as if it never existed.⁹

Garner notes that *escrow* has now developed a second meaning, or at least a different emphasis, in the United States and Britain to mean, “a deposit held in trust or as a security”. Although *Black’s Law Dictionary* labels this meaning a “perversion”, it is now also used in Australian law.¹⁰

In its new sense, the delivery aspect is emphasised, with *escrow* as a synonym for depositing something with a third party as security for performance of a condition. The new meaning seems to originate from the fact that a deed “delivered” in *escrow* is often delivered to a third party.¹¹ Here, although the contract is labelled an *escrow*, if a condition is not fulfilled, the contract remains in operation and may be relied on to seek a remedy such as damages.

Traditional use

Escrow is traditionally used for deeds. It is often used in conveyancing, such as handing over a lease conditional on the building being completed, or handing over a conveyance conditional on the purchase price being paid.



In Torrens title conveyancing, dealings are sometimes executed conditionally, but do not take effect as deeds until registered. So to describe an unregistered Torrens title dealing as an *escrow* is not strictly accurate, though it has become a common practice.¹²

Escrow is also used in legislation. The *Aboriginal Land Rights (NT) Act 1976 (Cth)* uses *escrow* nine times, but does not define it. For example section 10(2B) says “a deed of grant that is held in escrow by a Land Council”.

New use

In Australia, the new meaning of *escrow* is appearing in computer agreements about software programs. The agreement operates immediately, but has a condition that the “source code” (used to write the program and understand its logic), is kept by an independent third party.¹³ This aims to protect the user of a software program as the third party only releases the source code if, for example, the supplier is bankrupted or liquidated.¹⁴

Escrow also appears in this sense in the Listing Rules of the Australian Stock Exchange.¹⁵ For example, if a company sells a mining interest or intellectual property in exchange for shares,¹⁶ the company must enter an *escrow* agreement and deposit the shares with a bank or trustee company for an “escrow period” while their value is ascertained.¹⁷ Here the term is used to mean “holding on trust”.

Plain language alternatives

The word *escrow* is not understood by most people, and should be avoided, whether in conveyancing deeds or software programs. Even among lawyers, the two uses of *escrow* are potentially confusing. We recommend that you use separate phrases for each.

For the sense of a conditional deed: “this deed only comes into operation when X [condition] is done”. For the sense of a third party holding the deed on trust: “Z holds this deed on trust until Y [condition] is fulfilled”.

Endnotes

- 1 Lord Denning MR in *Alan Estates Ltd v WG Stores Ltd* [1982] 1 Ch 511 p516
- 2 *The Macquarie Dictionary* 2nd rev ed The Macquarie Library, Sydney 1987 p602
- 3 J Burke *Jowitt's Dictionary of English Law* 2nd ed Sweet & Maxwell, London 1977 vol 1 A-K p720; for *scriptum* see also ER Hardy Ivamy *Mozley and Whiteley's Law Dictionary* 10th ed Butterworths, London 1988 p164; RE Latham & British Academy Committee (eds) *Revised Medieval Latin Word List from British and Irish Sources* Oxford University Press, Oxford 1965 p426 traces *scriptum* to 1187 and 1461
- 4 Sir W Blackstone *Commentaries on the Laws of England* Book II ch 20 p307 cited in RA Woodman *The Law of Real Property in NSW* Law Book Co, Sydney 1980 vol 1 p173
- 5 see "Signed, sealed and delivered" on p73 of this book
- 6 *Xenos v Wickham* (1866) LR 2 HL 296 at 323
- 7 *Vincent v Premo Enterprises Ltd* [1969] 2 All ER 94; and see *Monarch Petroleum NL v Citco Australia Petroleum Ltd* [1986] WAR 310
- 8 see P Butt *Land Law* 2nd ed Law Book Co, Sydney 1988 p486
- 9 *Alan Estates v WG Stores Ltd* [1982] 1 Ch 511 at 520, 524, 528; see also *Halsbury's Laws of England* 4th ed Butterworths, London 1975 vol 12 [1334] p527
- 10 BA Garner *A Dictionary of Modern Legal Usage* Oxford University Press, New York 1987 p222 referring to *Black's Law Dictionary* 4th ed
- 11 eg R Bird *Osborn's Concise Law Dictionary* 7th ed Sweet & Maxwell, London 1983 p135 — third parties receive the deed or "writing" in *escrow*
- 12 *Manton v Parabolic Pty Ltd* (1985) 2 NSWLR 361 p374 (Young J)
- 13 JWK Burnside "The fundamentals of computer technology" p29-30 in G Hughes (ed) *Essays on Computer Law* Longman Cheshire, Melbourne 1990; see also other essays in Hughes eg P Knight "Copyright in computer software and data in Australia" p38; S Corones "Computer protection laws affecting software licences" p294
- 14 A Sharpe "An introduction to computer contracts" p289-90 in Hughes note 13; see also note 13 Burnside p30; and note 13 Corones p294-5
- 15 s 3T referred to in *In Spargos Mining NL v Enterprise Gold Mining NL* (unreported) WA Sup Ct, Murray J Co No 72/1990 delivered 6 July 1990 p14. The ASX Listing Rules are made under s761 *Corporations Law*
- 16 see definition of "vendor securities" in the ASX Listing Rules
- 17 see *Australian Corporation Law: Principles and Practice* Butterworths, Sydney vol 3 1991 [10.1.0935-50-60-65] p101, 385-7



Estate or interest

Estate or interest is often found in conveyancing documents. It is also found in real property legislation, for example, the caveat provisions of the *Real Property Act 1900 (NSW)*.¹ Another example is section 51 of that Act: “[u]pon the registration of any transfer, the estate or interest of the transferor ... shall pass to the transferee”.

However, is the compound structure *estate or interest* legally necessary? We suggest that it is not, and that *interest* alone is just as precise.

What are “estates”?

The doctrine of estates grew out of the concept of tenure under the feudal system. Tenure was based on the principle that land was originally granted as a feud by the Sovereign to the immediate tenant on the condition of certain services.² In Australia, the only estates that can be created now are the estate in fee simple and the life estate.

In the *Interpretation Act 1987 (NSW)*, *estate* where it appears in any Act or instrument includes “interest, charge, right, title, claim, demand, lien and encumbrance, whether at law or in equity”.³

Can “interest” cover “estate”?

Jowitt’s *Dictionary of English Law* says:

“‘interest’ was used in conveyances etc to denote every beneficial right in the property conveyed ... In [a] narrower sense, interest was used as opposed to estate, and therefore denoted rights in property not being estates.”⁴

However, Sweet’s *Dictionary of English Law* says, “interest as applied to property is used in a wide sense to include estates (legal and equitable)”.⁵

This was also the view of Lord Coke (1552-1634): “[i]nteresse ... extendeth to estates, rights and titles, that a man hath of, in, to, or out of lands”.⁶

And Sir William Blackstone (1723-1780) said that to ascertain an estate required an examination of, among other things, the “quantity of interest” a person had in the land. He said: “[a]n estate in lands ... signifies such interest as the tenant hath therein”.⁷ As for a tenant in fee simple, he said: “[a] fee therefore, in general, signifies an estate of inheritance; being the highest and most extensive interest a man can have in a feud”.⁸

We suggest therefore, when referring to property, *interest* is not a technical term. It is a word capable of having a wide meaning, and indeed different meanings according to the context or the subject matter.⁹ The word is capable of



including “estate”.

Use “interest”

Estate is a technical word, with feudal overtones. *Interest* is a non-technical word. A person with an *estate* necessarily has an interest. Even in the definition in the *Interpretation Act 1987 (NSW)*, we suggest that the words *estate* and *interest* could be transposed without loss of meaning.

The phrase *estate or interest* is unnecessary. Drafters can simply use the word *interest* instead. This is as legally effective, and conveys much more meaning to the people who read or are bound by the documents in which *interest* appears.

Endnotes

- 1 see eg s74f(1)
- 2 *Halsbury's Laws of England* 4th ed Butterworths, London 1982 vol 39 para 305
- 3 s21(1)
- 4 J Burke *Jowitt's Dictionary of English Law* 2nd ed Sweet & Maxwell, London 1977 vol 1 A-K p995
- 5 CA Sweet *A Dictionary of English Law* H Sweet, London 1882 p442
- 6 Sir E Coke *Institutes of the Law of England* (or *A Commentary Upon Littleton*) 1st ed 1628 19th ed 1832 Garland Publishing, New York repr 1979 vol 1 f345a
- 7 Sir W Blackstone *Commentaries on the Laws of England* 9th ed 1783 Garland Publishing, New York repr 1978 Book 2 p103
- 8 Blackstone note 7 p106
- 9 see *Bailey v The Uniting Church in Australia Property Trust* (Qld) 1984 1 Qd R 42 p58, McPherson J; *Ex parte Coote* (1949) 49 SR (NSW) 179 p182; Jordan J; *Attorney-General v Heywood* (1887) 19 QBD 326 p331, Wills J



Execute

Execute is a very common legal term.¹ Lawyers talk of executing documents in a wide range of circumstances — wills, deeds, transfers are all *executed*. The word appears in many laws² and on many legal forms signed by the public.³

Meaning

Originally a French word, *execute* has been adapted and adopted by the vocabulary of law.⁴ The ordinary meanings of *execute* include “to follow out or to carry into effect”; “to fulfil or discharge an obligation”; and, as commonly understood, “to put to death according to a sentence”.⁵

The law gives *execute* specialised meanings in certain contexts. These are understood by lawyers, but are likely to be misunderstood by clients not trained in the law.⁶

The most commonly used legal meaning of *execute* (and the third meaning in the *Oxford English Dictionary*) is a narrow sense of:

to go through the formalities necessary to the validity of a legal act ... Hence, to complete and give validity to [the instrument by which the act is effected] by performing what the law requires to be done as by signing, sealing etc.⁷

For Mellinkoff:

[e]xecution of the contract means doing what is necessary, not to kill it, but to bring the contract to life. Sometimes, this is just signing. At others, it means signing and delivery etc.⁸

Often only a signature is needed, to *execute* a document. In *Mostyn v Mostyn* a witness is described as “overseeing the execution of a deed”.⁹ *Blackstone’s* refers to the act of signing a document or deed in the presence of witnesses.¹⁰

However, this may be misleading as a signature may be only one of the necessary formalities required.¹¹ What the formalities are depends on the type of document. For example, section 38(1) of the *Conveyancing Act 1919* requires that a deed be signed and witnessed. Once these necessary formalities are complied with, the deed is executed.¹² A will is *executed* only when signed and sworn by the testator before two witnesses.

In Torrens title conveyancing, a transfer is not executed until the day of settlement. The transferors may have signed the document at an earlier time, but their signature is only one part of the transaction.¹³ There are also special requirements for executing a memorandum of association to form a company.¹⁴ A deed delivered in escrow is not executed until the conditions of the escrow

are fulfilled.¹⁵ Executing may be a process rather than a single instance in time.¹⁶ The meaning of *execute* therefore depends on the type of document.

Coke stated that “a deed speaks from its date of *execution*”.¹⁷ Kelly J in *J & S Holdings v NRMA Insurance* emphasised the finality of executing a document: “[a]n executed document lacks nothing; it has all its blanks filled in, making it physically complete”.¹⁸ Likewise Rotherburg defines *execution* as the completion of an act or course of action.

There are other specialised legal meanings for *execute*, such as “completing or carrying into effect, particularly of a judgment, effected by writs of execution, orders and notices that compel the defendant to do or pay what has been adjudged”.¹⁹ Garner and the *Oxford English Dictionary* add these meanings: “to carry into effect ministerially (a law, judicial sentence)”; “to perform or carry out the provisions of a will as an executor”, a rare meaning; as well as “to perform acts or give effect to a court’s judgment”.

Plain language

Garner describes *execute* as “argot”, or jargon. This is specialised vocabulary which saves time and space when members of a particular community communicate with each other. But this vocabulary is not essential. For lawyers, *execute* is a useful shorthand term.²⁰ It avoids the need to spell out the necessary formalities or action required when communicating with each other. However, lawyers need to be aware of their likely readers. When lawyers aim to communicate with non-lawyers, words that are more meaningful to those readers should be used.

It is clearer to replace *execute* with a plain, accurate expression that conveys the exact meaning you want. If a signature is all that is needed, it is clearer to ask your client to come in to sign the document. Mellinkoff suggests “making” would do as well for completion of formalities.²¹ As *execute* often shows the end of a transaction, an appropriate replacement may be “complete”.

Endnotes

- 1 Thanks to M Cousins for allowing us to read her essay
- 2 eg *Conveyancing Act 1919* s38(4) 41; *Real Property Act 1900* s46, 53, 54, 56, 58, 65
- 3 eg Torrens system memorandum of transfer, memorandum of mortgage, standard form will
- 4 *Oxford English Dictionary*, Clarendon Press, Oxford 1969 vol III p393; also D Mellinkoff *The Language of the Law* Little Brown & Co, Boston 1963 quoting Pollock & Maitland 1895
- 5 *Oxford English Dictionary* p393
- 6 eg M Asprey *Plain language for lawyers* The Federation Press, Sydney 1993 p83
- 7 eg *Oxford English Dictionary* p393; B Garner *A Dictionary of Modern Legal Usage*



- Oxford University Press, New York p229; R Bird *Osborn's Concise Law Dictionary* 7th ed Sweet & Maxwell, London 1987 p140; A English *A Dictionary of Words and Phrases used in Ancient and Modern Law* FB Rothman, Littleton, Colorado 1987
- 8 D Mellinkoff *Legal Writing: Sense & Nonsense* West Publishing Co, Minnesota 1982 p177
- 9 (1989) 16 NSWLR 635, Young J; also *Wickham v Marquis of Bath* (1865) LR 1 Eq 17
- 10 eg JM Bishop *Australian Legal Words and Phrases Simplified* Blackstone Press, Sydney 1993
- 11 *Estate of Williams* (1984) 36 SASR 423, 425
- 12 see *Edwards v Skilled Engineering* 14 March 1989 unreported
- 13 *Rose v Rose* (1986) 7 NSWLR 679
- 14 eg *Australian Company Secretary's Practice Manual* CCH Australia, Sydney 1978
- 15 *Terrapin International v IRC* [1976] 1 WLR 665
- 16 see note 15 Walton J p665
- 17 quoted in JS James *Stroud's Judicial Dictionary of Words and Phrases* 5th ed Sweet & Maxwell, London 1986 p654
- 18 (1981) 57 FLR 385
- 19 R Bird *Osborn's Concise Law Dictionary* 7th ed Sweet & Maxwell, London 1983 p140
- 20 see note 6 Asprey
- 21 see note 8 Mellinkoff



Fit and proper

Fit and proper is an example of a doublet. As with most doublets, you must be careful of unforeseen meanings that clever interpreters may give it. This is because of the fundamental rule of construction that every word is given a meaning and nothing is read as being merely redundant.¹ The phrase *fit and proper* occurs frequently in both in State and Federal legislation.² The High Court in *Hughes and Vale Pty Ltd v State of NSW (No 2)* noted that *fit and proper* is “traditionally used in relation to persons holding offices or vocations”.³ So in its traditional context, does *fit and proper* simply say the same thing twice or does *proper* actually add to the meaning of *fit*?

Origin and meaning

Fit is possibly derived from the Old English *fitta* meaning an “adversary of equal power”.⁴ Its origins are obscure with its earliest recorded use as an adjective meaning “suitable” in 1440. *Proper*, on the other hand, has its origins in the Latin *proprius* meaning “belonging to oneself”.⁵ This original sense of ownership survives in *property* and *proprietary*. It was adopted into French as *propre* in the 11th century. Hudson believes that it was phrases like “keep us in our *proper* places” that led to *proper* being used in the sense of ‘suitable’.⁶ The *proper* place for something was the *appropriate* place for it. So both *fit* and *proper* became synonyms for suitable.

This combination of Old English and French synonyms is a classic example of a doublet. As Mellinkoff explains, doublets originally came about when French declined and English took over as the language of law.⁷ Lawyers were reluctant to choose between the French and English word and sometimes kept both. Other commentators have argued that purpose of doublets is “rhetorical or oratorical rather than etymological”.⁸

It is difficult to work out exactly what *fit and proper* means. Many law dictionaries do not define *fit and proper*, so it is not a “term of art”. Others that do call it a “worthless redundancy”.⁹ Hudson labels the use of *proper* as “profoundly ambiguous”. He notes that *proper* also has a moral sense, rarely used, that has developed from the sense of ‘suitable’ or ‘correct’.¹⁰ Other commentators have implied that *proper* could add to the meaning of *fit* by including the condition of legal eligibility.¹¹ *Stroud’s Judicial Dictionary*, on the other hand, states that both suitability and legal eligibility are included in the meaning of *fit*.¹²



What the courts say

The phrase *fit and proper* has been judicially considered in a variety of contexts, especially in legislation. The courts have never considered the phrase a “term of art”. In *ABT v Bond*, Toohey and Gaudron JJ stated:

[t]he expression *fit and proper* person standing alone, carries no precise meaning. It takes its meaning from its context”. In the *Commissioner for the ACT Revenue v Alphaone*¹⁴, the Federal Court considered the purpose of the words to be “to give wide scope for judgment and allow broad bases for rejection.”¹³

Judges have neither distinguished between the shades of meaning nor drawn lines between personal qualification and legal competency. The Tribunal in *Re Brooke and Professional Boxing Control Board* noted that:

fit and proper is a relational term which measures personal qualifications against a certain task”. In *Stasos v Tax Agent’s Board (NSW)*,¹⁶ Hill J stated that “the content of what is necessary to constitute a person a fit and proper person to occupy a particular office or pursue a particular office may vary having regard to the office or vocation under consideration.”¹⁵

Judges often use *fit and proper* and *fit* interchangeably. So depending on the context, judges have comfortably switched from *fit and proper* to *physical fitness*,¹⁷ *fitness to practice*¹⁸ or *fitness of the applicant* without any change in meaning.¹⁹ The High Court has used *fit* broadly to include the moral sense. In quoting Coke, it stated that:

Fit (or idoneus) with respect to an office is said to involve three things, honesty, knowledge and ability: honesty to execute it truly, without malice, affection, or partiality; knowledge to know what he ought duly to do; and ability, as well in estate as in body, that he may intend and execute his office, when need is, diligently, and not for impotency or poverty neglect it.²⁰

So the courts generally agree that *fit and proper* has no settled meaning and that *fit* on its own has the same meaning as *fit and proper*.

Plain Language

One of the causes of prolixity in legal documents is that lawyers often use two words when one suffices. Additional words should only be used if they add meaning, otherwise they serve no purpose except to cast doubt in the minds of cautious lawyers. This is especially so when using *fit and proper* because *proper* has various shades of meaning. So where *fit and proper* is used, *fit* on its own is an adequate alternative. This approach appears to be consistent with case authorities. Regrettably, as long as legislative drafters continue to use *fit and proper*, so must practitioners.



Endnotes

- 1 Garner B *Dictionary of Modern Legal Usage* OUP, New York 1987 at 199
- 2 eg *Broadcasting Act 1942* (Cth) s 88(2)(b)(i); *Corporations Law* s 1280(2); *Liquor Act 1982* (NSW) s 45(1)(a); *Children (Care and Protection) Act 1987* (NSW) s 9(1)
- 3 (1955) 93 CLR 127 at 156
- 4 *The Oxford English Dictionary* Clarendon Press, Oxford 1969 under *fit* at 268
- 5 *The Oxford English Dictionary* under *proper* at 1469
- 6 Hudson N *Modern Australian Usage* Oxford University Press, Melbourne 1993 at 327
- 7 Mellinkoff D *The Language of Law* 7th ed Little Brown & Co, Boston 1990 at 121-125
- 8 Krapp G P *Modern English: Its Growth and Present Use* 1909 at 251 quoted in Garner see note 1 at 197
- 9 Mellinkoff D *Mellinkoff's Dictionary of American Legal Usage* West Publishing Co, St Paul 1992 at 247
- 10 see note 6
- 11 Mellinkoff D see note 5 at 350; Mellinkoff argues that *fit* and *proper* does not achieve this distinction
- 12 JS James, *Stroud's Judicial Dictionary* 5th ed Sweet & Maxwell, London 1986 under *fit* at 990
- 13 (1990) 94 ALR 11 at 56
- 14 (11 May 1994) (unreported)
- 15 (1988) 2 VAR 464 at p 477
- 16 (1990) 21 ATR 974 at 984
- 17 *Re Brooke and Professional Boxing Control Board* see note 13
- 18 *Re B (A Solicitor)* [1986] VR 695 at 699
- 19 *Boyd v Carah Coaches Pty Ltd* (1979) 145 CLR 78 per Gibbs J at 85
- 20 *Hughes and Vale Pty Ltd v State of NSW (No 2)* (1955) 93 CLR 127 at 156



Force majeure

It is curious that modern English-speaking lawyers should adopt French legal terms, especially when most readers find them incomprehensible, and when many judges “regret the introduction of foreign words into English Statutes and Orders without any definition”.¹

Force majeure literally means a “superior force”.² *Force majeure* clauses aim to protect one or both parties from being sued for not performing a contract because of circumstances beyond their control.³ They differ from exclusion clauses which aim to protect a party even when the circumstances may be within their control.⁴

Force majeure clauses are often found in contracts for construction, transport, insurance, or the regular supply of goods or services.⁵ They usually list “various catastrophes”,⁶ then follow with a catch-all provision to cover any other circumstances beyond the control of both parties. They may also extend the time for performing or terminating the contract if a *force majeure* event arises.⁷

Origin

The phrase *force majeure* was used (but not defined) in article 1148 of the French Code Napoleon. It is the Law French equivalent of the Latin *vis major*⁸ (irresistible violence),⁹ and can be traced back to Roman contract law. The phrase only became common in English contracts in the 1900s,¹⁰ with the first case discussing it in 1904.¹¹

Meaning

Force majeure is an established technical term in French law.¹² In common law it is not, and has undergone much judicial construction.¹³ It is difficult to define the elements of a *force majeure* event. Some essential elements are that:

- it may occur with or without human intervention
- it cannot reasonably be foreseen by the parties
- it is completely beyond the parties’ control and they cannot prevent its consequences.

Parties cannot invoke a *force majeure* clause if they rely on their own acts or omissions.¹⁴ *Force majeure* must be a legal or physical restraint, not merely an economic one.¹⁵

In *Lebeaupin v Crispin Macardie* J said that *force majeure* clauses should be “construed in each case with a close attention to the words which precede or follow it, and with a due regard to the nature and general terms of the contract.



The effect of the clause may vary with each instrument”.¹⁶ However, three years later the House of Lords in *Ambatielos v Anton Jurgens Margarine Works* said a list of catastrophic events preceding a *force majeure* clause do not limit its meaning and *ejusdem generis* rules do not apply.¹⁷ As Donaldson J comments, “the precise meaning of [*force majeure*] if it has one, has eluded lawyers for years”.¹⁸

Most commentators agree. Healey writes:

No exhaustive definition can be given to the concept of *force majeure* as it differs depending on the facts of individual cases. It is easier to identify a circumstance falling within the meaning of *force majeure* than to define it.¹⁹

Some circumstances that have been identified as *force majeure* include:

- legislative or administrative interference like changes of laws or government policies²⁰
- refusals to grant licences²¹
- or embargoes²²
- natural events like abnormally bad weather²³
- earthquakes and hurricanes²⁴
- delays in shipping due to administrative decisions or war²⁵
- machinery breakdowns²⁶
- strikes,²⁷ and
- death, or insanity.²⁸

But *force majeure* does not include:

- economic problems like insufficient funds²⁹
- substantial price rises³⁰
- ordinarily foreseeable events like bad weather
- disruptions to business caused by staff attending funerals or football matches,³¹ or
- accidents due merely to miscalculations.³²

Other doctrines

Common law courts have said that *force majeure* is wider than either “act of God” or *vis major* but have not said how.³³ Bailhache J said in *Matsoukis v Priestman & Co* that these expressions were not interchangeable with *force majeure*,³⁴ and McCardie J agreed in *Lebeauvin v Crispin*.³⁵



“Acts of God” are limited to events that occur without human intervention and cannot be prevented.³⁶ Little judicial clarification of *vis major* exists. The phrase covers all events encompassed by “act of God” as well as some events which involve human intervention such as acts of “the Queen’s enemies”.³⁷ Ultimately it is difficult to distinguish *vis major* “irresistible violence” from *force majeure* “superior force”.

Parties may use a *force majeure* clause to avoid relying on the imprecise common law doctrine of frustration.³⁸ If the clause covers the situation, then the court will rely on the express terms to decide whether the contract should be suspended, renegotiated, or ended.³⁹ However, if the clause does not fully cover the situation, the court may find that the contract has been frustrated,⁴⁰ which generally ends the entire contract.⁴¹

Plain language

The meaning of *force majeure* is too vague for lawyers to argue that it is a technical term. We recommend using a broad clause like “I am not bound to perform this contract if it is impossible to perform because of events beyond my control, and that I could not have reasonably foreseen”. If you use the phrase, explain what it means. Perhaps attach a list of examples of situations that the parties agree would excuse immediate performance but, remembering *Ambatielos*, add “without limiting the generality of these”.⁴²

Endnotes

- 1 *Hackney Borough Council v Core* [1922] 1 KB 431 Sankey J p437; also see *Matsoukis v Priestman Co* [1915] 1 KB 681 Bailhache J p686
- 2 BA Garner *A Dictionary of Modern Legal Usage* Oxford University Press, New York 1990 p247; also see ERH Ivamy *Mozley and Whitley’s Law Dictionary* 10th ed Butterworths, Sydney 1988 p190 where it is defined as “irresistible compulsion or coercion”
- 3 JR Nolan & JM Nolan-Haley (eds) *Black’s Law Dictionary* 6th ed West Publishing Co, St Paul Minnesota 1990 p645
- 4 D Yates “Drafting force majeure and related clauses” 1991 3 *JCL* 186 at 196; also see the inconclusive discussion in *Fairclough Dodd & Jones Ltd v JH Vantol Ltd* [1957] 1 WLR 136 where the House of Lords said a *force majeure* clause should be interpreted against the party seeking to rely on it; also see *Koninklijke Bunge v Cie Continentale d’Importation* [1973] 2 Lloyd’s Rep 44
- 5 see note 4 Yates p187
- 6 Purchas LJ in *Sonat Offshore AS v Amerada Hess Development Ltd & Texaco (Britain) Ltd* [1988] 1 Lloyd’s Rep 145 p185
- 7 see note 4 Yates p202
- 8 see note 2 Garner p247
- 9 this was the translation the court used in *Walker v British Guarantee Ass* (1852) 18 QB 277 p286
- 10 in *Lebeaupin v Crispin* [1920] 2KB 714 McCardie J said that *force majeure* had only recently appeared in English contracts p719



- 11 *Yrazu v Astral Shipping Co* (1904) 20 TLR 153
- 12 M Kershaw "Force majeure and frustration of contract" (book review) *The Law Quarterly Review* vol 108 April 1992 344 p345
- 13 see note 12 Kershaw
- 14 see note 10 *Lebeaupin* McCardie J p721
- 15 see eg note 11 *Yrazu* Walton J p154, 155
- 16 see note 10 *Lebeaupin* p720
- 17 [1923] AC 175
- 18 *Thomas Borthwick (Glasgow) v Faure Fairclough* [1968]1 Lloyd's Rep 16 p28
- 19 *Force majeure Institute of Building Occasional Papers* no 21 1979 p17, also see Furnston in McKendrick *Force Majeure and Frustration of Contract* Lloyd's of London, London 1991 p23
- 20 see note 10 *Lebeaupin* McCardie J p719
- 21 *Coloniale Import - Export v Loumidis Sons* [1972] 2 Lloyd's Rep 560
- 22 see note 10 *Lebeaupin* McCardie J p719
- 23 see note 10 *Lebeaupin* McCardie p720, also see *Toepfer v Cremer* [1975] 2 Lloyd's Rep 118; *Animex SA v Dewulf et Cie* [1979] 2 Lloyd's Rep 57; *Bunge SA v Fuga SA* [1980] 2 Lloyd's rep 513
- 24 see note 10 *Lebeaupin* McCardie p718-721
- 25 *Zinc Corporation v Hirsch* [1916] 1 KB 541 Swinfen Eady LJ p554; *Halsbury's Laws of England* 4th ed Butterworths, Sydney 1974 vol 9 p323
- 26 see note 1 *Matsoukis*
- 27 see note 1 *Matsoukis*
- 28 *Pell v Linell* (1868) LR 3 CP 441
- 29 *The Concadoro* [1916] 2 AC 199
- 30 *Brauer & Co v James Clark & Co* [1952] 2 Lloyd's Rep 147
- 31 see note 1 *Matsoukis* Bailhache J p681
- 32 see note 11 *Yrazu*
- 33 see note 1 *Matsoukis* Bailhache J and also see note 10 *Lebeaupin* McCardie J p719
- 34 see note 1 *Matsoukis* p686
- 35 see note 10 *Lebeaupin* p719
- 36 see note 25 *Halsbury's Laws of England* para 458
- 37 *Simmons v Norton* (1831) 7 Bing 640 Tindall CJ p648
- 38 see note 4 *Yates* p189
- 39 *Bank Line Ltd v Capel & Co* [1919] AC 435; *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 p163; *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA* [1983] 2 Lloyd's Rep 171 pp188-9. Mocatta J suggested in *Bremer Handelsgesellschaft mbH v Vanden Avenue-Izegem PVBA* [1977] 1 Lloyd's Rep 133 p163 that if two companies draw up comprehensive contracts with *force majeure* clauses, then the courts should take them literally and refuse to apply the doctrine of frustration at all
- 40 *Metropolitan Water Board v Dick; Kerr & Co Ltd* [1918] AC 119
- 41 *Consolidated Neon (Phillips System) Pty Ltd v Tooheys Ltd* (1942) 42 SR (NSW) 152 Jordan CJ; also *Aurel Foras Pty Ltd v Graham Karp Developments P/L* [1975] VR 202 held that the entire contract, never just parts of it, are voided by frustration
- 42 see note 17 *Ambatielos*



Give, devise and bequeath

The phrase *give, devise and bequeath*, is loved by drafters of wills. Its origin is obscure.

“Give” and “bequeath” are Old English words. “Devise” comes to us from the latin “dividere”, to separate, through the Old French, “divisor”, meaning the same thing.¹ In contrast, “[t]he convention which sets apart ‘devise’ for realty and ‘bequeath’ for personal is modern”.²

This group of synonyms provides a good example of “the law’s habit of doubling words” or tripling them as the case may be.³ *Give, devise and bequeath* also has a good rhythm, which may have made the phrase easy to remember.⁴

Devise and bequeath

Exactly when, and why, the words *devise* and *bequeath* acquired different meanings is unclear. In 1590, there was no distinction between “bequeathing or devising landes, tenementes, and hereditaments” and the “bequeathing or devising of goods and cattelles”.⁵

Coke (1628) used *devise* for both: “[n]ow, if a [person] deviseth, ... goods or chattels reall or personall ...”.⁶ And Blackstone (1753) wrote, “a [person] may devise the whole or his chattels”.⁷

Even writers who distinguish between *devise* and *bequeath* note that the words are commonly applied interchangeably.⁸ Law dictionaries note that *devise* is “properly” applied to gifts of real property and *bequeath* is “properly” applied to gifts of personal property. Yet they point out that in a will, the words may transfer the other type of property too, according to the construction.

Case law shows that “indiscriminate usage of these two terms is rather common”.⁹ In 1851, the court in *Wicker v Hume* said that:

[the word] *bequeath* is large enough to carry real estate if distinctly applied to it ... The only thing to look at is the intention of the testator ... and if the words are large enough to carry that intention into effect.¹⁰

A NSW case, *Re Galligan* (1913), held that *bequeathed* referred to both real and personal property because the testator had used the word as synonymous with *devised*.¹¹

Canadian and US cases follow similar reasoning. The courts look to the testator’s intention, and not merely at the words used. For example, in 1948 a court decided that a testator intended the words *devise and bequeath* in one clause of her will to refer to personal property only.¹²



Real and personal property

Centuries ago, the royal courts of common law dealt with real property, while the ecclesiastical courts dealt with personal property. By the 14th century, an owner could dispose of almost all personal property by will. In 1540 the *Statute of Wills (UK)* allowed a free-holder to dispose of almost all land by will. The different courts exercised jurisdiction, even though the testator often dealt with all of his or her property in one document.

Yet in 1677 the *Statute of Frauds (UK)* substantially unified the formal requirements for both real and personal property. The reforms in the *Wills Act 1837 (UK)* established uniform formalities for executing wills of real and personal property. These form the basis of Australian law today. These formalities did not require using the words *devise* and *bequeath*.¹³

A plain language equivalent

The distinction between *devise* and *bequeath*, if it still exists, is “quaint, but not useful”.¹⁴ Modern commentators agree that the words are used interchangeably to describe the disposition of any type of property, real or personal.¹⁵ The Law Reform Commission of Victoria also recommends omitting *devise and bequeath* because readers “strain to find a difference, believing that the writer would not use two or three terms where one would do”.¹⁶ The validity of a will should depend on adequate proof of the testator’s intention, free of extraneous formalities.¹⁷

We recommend using the word *give* alone instead of *give, devise and bequeath*. The various editions of *Hutley’s Wills Precedents* continue to use “give”. “Give” is clear, well understood, and avoids confusion. It is precise and just as legally effective for real and personal property.

Endnotes

- 1 *The Oxford English Dictionary* 1st ed Clarendon Press, Oxford 1933 vol 4 1970 reprint pp182,184; vol 1 1970 repr p809; vol 3 1969 repr p290
- 2 Sir F Pollock & FW Maitland *The History of English Law Before the Time of Edward I* vol 2 University Press, Cambridge 1895 p336
- 3 D Mellinkoff *The Language of Law* Little Brown & Co, Boston 1963 p121
- 4 Mellinkoff note 3 p42-5
- 5 H Swinburne *A Brief Treatise on Testaments and Last Wills* 1590 Garland Publishing, New York 1978 repr p69
- 6 Sir E Coke *Institutes of the Laws of England* 1st ed 1628 19th ed rev & corrected by F Hargreave & C Butler 1832 Garland Publishing, New York repr 1979 filla
- 7 Sir W Blackstone *Commentaries on the Laws of England* 9th ed Burn, London 1783 Garland Publishing, New York 1978 repr vol 2 p493
- 8 Sheppard’s *Touchstone of Common Assurances* 7th ed R Preston ed J & WT Clarke, London 1820-1 vol 2 p400-1; yet Sheppard uses “legacy” not “bequeath”



- 9 *Householter v Householter* 160 Kan 614 p618 (1945), in Mellinkoff note 3 p356-7
- 10 *Whicker v Hume* (1851) 14 Beav 509 p518; 50 ER 381; See also *Gyett v Williams* (1862) 2 John & H 429 p436
- 11 (1913) 13 SR (NSW) 291 p293-4
- 12 M Adler *Clarity for Lawyers* The Law Society, London 1990 p62
- 13 IJ Hardingham, MA Neave & HAJ Ford *Wills and Intestacy in Australia and New Zealand* 2nd ed Law Book Company 1989 p33 para 207
- 14 Adler note 13
- 15 K Mason & LG Handler *Wills, Probate and Administration Service* Butterworths, Sydney 1985 para 1017.6
- 16 Law Reform Commission of Victoria *Plain English and the Law* 1987 Appendix 1: *Drafting Manual: Guidelines for drafting in Plain English* para 99
- 17 A Lang *Formality v intention — Wills in an Australian supermarket* (1985) 15 MULR 82 p83



Goods and chattels

In *The Taming of the Shrew*, Petruchio cries, “I will be master of what is mine own. She is my goods, my chattels, she is my house”.¹ Shakespeare creates a dramatic conceit by using *goods* and *chattels*, but lawyers must use language for functional purposes, not artistic ones. Do lawyers use phrases like *goods and chattels* because they have precise meanings, or because of a reflex action?

Origin

The word *chattel* derives from the Latin *catalla* that meant cattle. Old French preserved it as *chatel* or *chaptel*. It referred to cattle but also meant any moveable goods.² It found its way into English after the Norman conquest. Originally its use was confined to Anglo-Norman, but it was used in vernacular English by the 13th Century.³ Towards the end of the 16th Century, the meaning of *chatel* split into “cattle” (meaning only livestock) and *chattel* (meaning possessions generally).⁴

Goods is derived from the Old English *god* that is in turn related to the Old Norse *gothr* and the Old High German *guot*.⁵

The phrase *goods and chattels* occurs as early as the reign of Henry VI (1422-1461).⁶ Mellinkoff suggests that the phrase arose because around that time both Anglo-Norman and English were spoken. Lawyers habitually used synonymous words from both languages to help readers. The practice of doubling words became entrenched, even after Anglo-Norman had died out.⁷

Meaning

Goods has a very broad legal meaning.⁸ The Privy Council has said that:

the word is of very general and quite indefinite import...the content of the word *goods* differs greatly according to the context in which it is found and the instrument in which it occurs.⁹

Most law dictionaries define *goods* broadly. For example *goods*, “is a term of variable meaning. It may include every species of personal property or it may be given a very restricted meaning”.¹⁰

Chattels also has a broad definition. In *Robinson v Jenkins Fry* LJ said,¹¹ “*chattels* is one of the widest words known to the law in relation to personal property. It includes choses in action”.¹²

Chattels generally means any possessions except freehold land.¹³ *Chattels* can be divided into different categories. The most important distinction is between *chattels real* and *chattels personal*.¹⁴ *Chattels real* are interests in land less than



freehold, for example leases.¹⁵ *Chattels personal* are moveable property and can be sub-divided into *corporeal chattels* (choses in possession) or *incorporeal chattels* (choses in action).¹⁶ There are even *chattels vegetable*. These are timber and crops that form part of realty before severance.¹⁷

The meaning of the phrase *goods and chattels* is very broad. Turner LJ said, “[t]he words *goods and chattels* are words of most extensive import. Unless controlled by the context, they comprise all the personal estate of whatsoever nature or description.”¹⁸ In a later case he also said, “[t]hese words *goods and chattels* are words of very extensive signification and undoubtedly comprise both tangible property and property which is not tangible”.¹⁹ *Black’s Law Dictionary* states that in the law of wills, the phrase *goods and chattels* passes all the personal estate, unless restrained by context.²⁰ *Jowitt’s Legal Dictionary* defines *goods and chattels* as all personal property rather than real property.²¹

Are the words synonyms?

Historically, the words were synonyms and several writers still claim that they are.²² One old view is that transfers of property can use *goods* or *chattels* because, “by either of these is devised as much as by both of them”.²³

Chattels includes everything meant by *goods*. The *Sale of Goods Act 1923* (NSW) section 5(1) defines *goods* as including, “all *chattels personal* other than things in action and money”. *Stadium Finance Ltd v Robbins* held that *goods*, “must include all *chattels* of which physical possession is possible, notwithstanding that they are not easily moveable”.²⁴ Crops can be *goods* as well as *personal chattels*.²⁵ In Canada, “*goods* or *chattels* in their ordinary usage are both equally apt to describe *corporeal chattels*”.²⁶

Chattels can also include interests in land less than freehold and in some contexts, choses in action, but *goods* cannot.²⁷

Plain Language

Most “doublets” consist of synonyms but *goods and chattels* must be simplified with caution. You can use *chattels* alone since it includes everything meant by *goods*, but remember that it also includes some interests in land. However, *chattels* is an obscure lawyer’s word. If you must use it, explain what you mean to your readers. *Goods* is an adequate substitute for the usual meaning intended by the phrase *goods and chattels*.²⁸ If practical, the best solution is to list the items that you are referring to.



Endnotes

- 1 W Shakespeare "The Taming of the Shrew" III ii 225 in *William Shakespeare, The Complete Works* ed P Alexander, Collins, London 1987 p302
- 2 *Jowitt's Dictionary of English Law* 2nd ed Sweet & Maxwell, London 1977 vol 1 A-K p328
- 3 *Oxford English Dictionary*, Clarendon Press, Oxford 1969 vol 2 p302
- 4 see note 3 *Oxford Dictionary* p302
- 5 *Collins English Dictionary* 3rd ed Harper Collins, Sydney 1991 p666
- 6 D Mellinkoff *The language of the Law* Little Brown & Co, Boston 1963 p117
- 7 see note 6 Mellinkoff p122
- 8 English courts must apply *ejusdem generis* rules when interpreting *goods* *AG v Brown* [1920] 1 KB 773 at 795 per Sankey J. Also see *Manton v Tabois* 30 Chd 92 and *Stuart v Bute* 11 Ves 666
- 9 *The Noordam (No 2)* [1920] AC 904 at 908-10 per cur
- 10 HC Black *Black's Law Dictionary* 6th ed West Publishing Co, Minnesota 1990 p694 Also see BA Garner *A Dictionary of Modern Legal Usage* Oxford University Press, New York 1987 p258: *Goods* has a variety of senses — "in the legal sense *goods* refers to chattels or personalty". HAJ Ford GW Hinde MS Hinde *Australian Business Dictionary* Butterworth's, Sydney 1985 p87: *Goods* is defined as moveable property. The Sale of Goods Acts define *goods* as all *chattels* personal other than money or things in action
- 11 1890 24 QBD 275 CA
- 12 *Smith and Wheller* (1835) q1 Gale 163, *Walker v Kerr* (1843) 12 LJ Ex 204, *Ronerts v Bell* (1857) 7 E & B 323 held that *chattels* includes deeds and other papers
- 13 see note 2 *Jowitt's*, p328 see also note 10 HAJ Ford GW Hinde MS Hinde p34 *Chattels* are things deemed personalty in law or property other than freehold land. They can be real or personal. *Chattels real* are interests in land other than freehold eg. leasehold. *Chattels personal* are moveable and tangible eg animals. For similar definitions see R Bird *Osborn's Concise Law Dictionary* 7th ed Sweet and Maxwell, London 1983 p71, ER Hardy Ivamy *Mozley and Whitely's Law Dictionary* 11th ed Butterworths, London 1993 p44 *Chattels* means personal property. *Chattels real* are interests in land less than freehold and *chattels personal* are moveable, see also note 10 HC Black p236
- 14 see note 2 *Jowitt's* p328. See also note 10 Garner p111 He notes that these distinction are falling into disuse
- 15 see note 2 *Jowitt's* p328
- 16 see note 2 *Jowitt's* p328
- 17 see note 2 *Jowitt's* p329
- 18 *Bartlett v Bartlett* (1857) 1 De G & J 127 at 139
- 19 *Re Baldwin, Ex p Foss, Ex p Baldwin* (1858) 2 De G & J 230 at 238, 239
- 20 see note 10 Black p694
- 21 see note 2 *Jowitt's* p865
- 22 *The CCH Macquarie Concise Dictionary of Modern Law* CCH, Sydney, 1988 p58 *Goods* is defined as "formerly *chattels* both real and personal, now generally limited to corporeal items of personal property, particularly articles of trade". WC Burton *Legal Thesaurus* 2nd ed Macmillan Publishing Company, New York, 1992 p242 lists *goods* as a synonym for *chattels*
- 23 JS James (ed) *Stroud's Judicial Dictionary* 5th ed Sweet and Maxwell, London 1988 vol 2 D-H p1109 quoting *The Touch-Stone* 447
- 24 [1962] 2 QB 644



- 25 within the meaning of the Bills of Sale Act 1878 c31 *Stephenson v Thompson* [1924] 2 KB 240
- 26 *Re Govered* (1972) 26 DLR (3d) 71 at 72 Ont SC per Houlden J
- 27 The dictionaries do not agree that *chattels* includes choses in action eg see note 10 HAJ Ford GW Hinde MS Hinde, p34 *Chattels* does not exhaust the category of personal property because *chattels* does not include intangible choses in action
- 28 see note 2 *Jowitt's* p865 "*Goods* includes all *chattels*, as well real as personal" [quoting Coke upon Littleton, 118b 18th ed by Hargrave and Butler]. In practice however, the term *goods* is confined to those *chattels* which are capable of manual delivery (see Sale of Goods Act 1893 s62 328)



Heirs, executors, administrators, successors, and assigns

In modern contracts, the definition or interpretation clause often states “a reference to a party includes the party’s *heirs, executors, administrators, successors, and assigns*”. This describes what *may* happen under statute or general law if a party dies, but it rarely has much to do with the contents of the contract. For lay readers, it is misleading. Is it necessary?

Historical use

In the past, if the word “heirs” was not used in conveyances of land, only a life estate would be transferred, regardless of the intention of the grantor. For corporations the word “successors” was required. Today however, section 47(1) of the *Conveyancing Act 1919 (NSW)* provides that the entire legal estate will pass without using the words “heirs” or “successors”.

Privity of contract

A definition or interpretation clause will not make any of the *heirs, executors, administrators, successors, and assigns* parties to the contract. This is due to the doctrine of privity of contract, that is, only the parties to a contract are legally bound by the contract, and entitled to enforce it.¹

There are exceptions to this privity of contract where an *heir, executor, administrator, successor, or assign* may become a party. Yet these exceptions do not operate merely because of the expanded definition of “party” in the contract.

Exceptions

Agency: If the principal party contracts as an agent for an *heir, executor, administrator, successor, or assign*, then that person is bound by the contract according to the law of agency. However the agent must authorise the principal to enter the contract on the agent’s behalf. There is nothing to suggest that the principal is authorised by using an expanded definition, especially as those people who fall within the definition may not even know of the contract’s existence.

Operation of law: At times, one or more of an *heir, executor, administrator, successor, or assign* may be placed in the position of the principal party by operation of law.

An illustration is the *Wills, Probate & Administration Act 1898 (NSW)* which



vests some contractual rights in the “executor” (or “administrator”) on the death of the principal party.² Nevertheless, other contracts, such as those of a purely personal nature, are not enforceable against that executor or administrator. Using “executors or administrators” in the definition or interpretation of “party” does not overcome this unenforceability.

Similarly on bankruptcy, the principal party’s contractual rights vest in the trustee for bankruptcy.³ The trustee must perform or obtain performance of the principal’s obligations under the contract if the other party is to remain bound.⁴

But these examples do not justify defining “party” as including “executors, or administrators”, or even “trustees in bankruptcy”, as these and similar laws operate independently of the contract. These people will be bound whether or not the expanded definition is used.

Novation: Novation extinguishes the original contract and replaces it with a new contract. Consideration for the second contract is the discharge of the original. But just using a definition of this kind does not “novate” the original contract. The need for offer and acceptance and all other contractual requirements remain.⁵ Without these, the *heirs, executors, administrators, successors, and assigns* have done nothing to become parties to a novated contract.

Privity of estate: Covenants or easements concerning land, once validly created by a principal party, automatically bind the land in the hands of successors, or assigns.⁶ This occurs irrespective of, and without the need for, any expanded definition of “party” in the contract creating the covenants or easements.

Assignment: The principal party may assign the benefit of the contract to another party (known as the “assign”).⁷ The validity of the assignment does not depend on defining “party” to include “assign”. Indeed this may have unintended results as in *Tolhurst v Associated Portland Cement Manufacturers P/L* where the court held that a provision referring to a “party” as including “assigns” implied that the contract was assignable.⁸ It is better to include an express clause in the contract dealing with whether assignment is permitted.

A bad habit

Expanding the definition of “party” to *heirs, executors, administrators, successors, and assigns* has little legal effect on its own. It is mostly descriptive. For lay readers, it is confusing and misleading, especially if it describes legal issues that are not covered in the contract. You should not use the expanded definition just as a matter of habit.



Endnotes

- 1 *Price v Easton* (1833) 110 ER 578; *Concrete Constructions P/L v GIO of NSW* [1966] 2 NSWLR 609; *Beswick v Beswick* [1968] AC 58. The doctrine may be being relaxed: *Trident General Insurance Co Ltd v McNiece Bros P/L* (1988) 165 CLR 107
- 2 *Ahmed Angullia Bin Hadjee Mohamed Salleh Angullia v Estate & Trust Agencies* (1927) Ltd [1938] AC 624
- 3 section 58(1) *Bankruptcy Act 1966 (Cth)*
- 4 Carter & Harland *Contract Law in Australia* 2nd ed Butterworths, Sydney 1991 p300
- 5 *Scruples Imports P/L v Crabtree & Evelyn P/L* (1983) 1 IPR 315; *Olsson v Dyson* (1969) 120 CLR 365
- 6 s70 *Conveyancing Act 1919 (NSW)* supplies the necessary intention to bind the land in the hands of all future owners
- 7 see note 4 Carter & Harland — it is not possible to assign the obligations without the consent of the original parties to the contract
- 8 *Tolhurst v Associated Portland Cement Manufacturers Pty Ltd* [1903] AC 414



Instrument

Musicians use *instruments* to play on. Surgeons use *instruments* in the operating theatre. Scientists use *instruments* like a pressure gauge or an ammeter. Pilots fly by using *instruments*. The rack is an *instrument* of torture. And lawyers use *instruments* to create rights and liabilities.

All of these meanings have the same origin. In its broadest sense an *instrument* is “a thing with or through which something is done or effected; anything that serves or contributes to the accomplishment of a purpose or end; a means”.¹

The word comes from the Latin *instrumentum* meaning an “implement of any kind”. By the first century AD it was occasionally used figuratively to mean a “document”, but without any specific legal connotations.² It started to get a legal flavour in medieval Latin in 1301, where the term *instrumentum obligatorum* was used to mean “a bond”.³

But it is first found in English in its legal sense in 1483, when Caxton used the phrase “an instrument publyque”.⁴ For many centuries, the word kept a narrow technical sense. This is still so in Scots law where *instrument* means a formal, authenticated record of any transaction drawn up by a notary-public.⁵

Legal uses

In its legal uses, the meaning of *instrument* depends on its context. It is both a general and a technical word. Some of its uses are defined by common law, some by statute.

In its general legal meaning, *instrument* is used to refer to any formal legal document.⁶ It usually applies to a document under which “some right or liability, whether legal or equitable, exists”.⁷ But its scope may be wider, including “documents that affect the pecuniary position of parties although they do not create rights or liabilities recognised in law”.⁸

Some statutes define *instrument*. Sometimes the definition is wider than the general meaning, sometimes narrower. Examples in NSW are:

- in the *Interpretation Act 1987* section 3(1) it means “an instrument (including a statutory rule) made under an Act”. These statutory *instruments* include documents as varied as principal regulations and local environmental plans. But *instrument* is not defined in section 21 which covers the “meaning of commonly used words and expressions”
- in the *Stamp Duties Act 1920* section 3(1) it includes “every written document”



- in the *Crimes Act 1900* part 5 chapter 2 dealing with “false instruments”, it means “any documents, whether of a formal or informal character”. In section 299(1) it includes credit cards, computer discs and tapes
- in the *Real Property Act 1900* section 3(1) it means “any grant, certificate or title, assurance, deed, map, will, probate, or any other document in writing relating to the disposition, devolution or acquisition of land or evidencing title thereto”.

Statutes can also prescribe the way certain *instruments* are created, such as cheques⁹ or promissory notes.¹⁰

Courts have also considered the word and decided that some formal legal documents are not *instruments*. For example, the word cannot generally be used to describe an order of the court.¹¹

There is also a technical term “instrument under hand only”. In common law this means a “document in writing which either creates or affects legal or equitable rights or liabilities, and which is authenticated by the signature of the author, but is not sealed”.¹²

Instrument in writing?

Many lawyers use “written instrument” or “instrument in writing”. These are not technical terms. Adding the words “written” or “in writing” is never necessary. All *instruments* are in writing, and there is no such thing as an “oral” instrument. So why do some lawyers persist in using “written instrument”? Maybe, as Mellinkoff suggests, it is “to avoid confusion with a musical instrument, so that no one will think you are talking about a French horn when you mean a lease”.¹³

An alternative?

For non-lawyers, *instrument* used in its legal sense can be confusing. However, since *instrument* has both general and technical meanings, can an alternative word be used?

Garner suggests that *instrument* can frequently be replaced by “document” or “writing”.¹⁴ Of course, while all *instruments* are documents, not all documents are *instruments*. However, when a lawyer is writing or talking to a lay person about a formal legal document with no defined technical meaning, we recommend using the word “document” or, perhaps, “legal document”. For lay people, these meanings will be far clearer and better understood.

When *instrument* is used with a technical meaning, we recommend giving an explanation of the meaning in its context.



Endnotes

- 1 These definitions are from the *Oxford English Dictionary* Clarendon Press, Oxford 1933 vol V p356
- 2 Lewis & Short *A Latin Dictionary* Clarendon Press, Oxford 1890
- 3 RE Latham & British Academy Committee (eds) *Revised Medieval Latin Word List from British and Irish Sources* Oxford University Press, Oxford 1965 p254
- 4 used in the "Golden Legend" see *Oxford English Dictionary* note 1
- 5 see note 1 *Oxford English Dictionary*
- 6 P Butt *Land Law* 2nd ed Law Book Co, Sydney 1988 p7
- 7 *Halsbury's Laws of England* Butterworths, Sydney 1975 4th ed vol 12 para 1437
- 8 see note 7 Halbury's
- 9 *Cheques & Payment Orders Act 1986 (Cth)* s10
- 10 *Bills of Exchange Act 1909 (Cth)* s89
- 11 *Jodrell v Jodrell* (1869) LR 7 Eq 461
- 12 see note 7 *Halsbury's* para 1436
- 13 D Mellinkoff *The Language of the Law* Little Brown & Co, Boston 1963 p365
- 14 B Garner *A Dictionary of Modern Legal Usage* Oxford University Press, New York 1987 p304



Joint and several

A term of art?

Joint and several or *jointly and severally* are not phrases used in ordinary language. But lawyers use them in many areas of law to embody a range of technical concepts, including liability, the exercise of power, and legal rights.

As a result, some lawyers may argue that *joint and several* or *jointly and severally* are technical legal terms which cannot be recast into plain language. But we do not believe this is so. Legal technicalities exist in the concepts behind the words, not in the words. And the words themselves may be misleading.

The meaning

Using liability as an example, “joint” liability is an obligation on two or more people together. “Several” liability is liability on each person as an individual. So *joint and several* liability occurs where two or more people are liable together as well as separately. The person to whom they are liable may choose to sue all (or some) of them jointly, that is, together, or each of them severally, that is, separately.¹

According to case law, whether a person’s liability is joint, several, or *joint and several*, can depend on the words of the agreement:

Where the words of a covenant ... are clear and unambiguous, the question ... is to be determined solely by the words; but where the words are ambiguous, the liability will depend on the interests of the covenantors and other circumstances.²

For example, in *Keightley v Watson* (1849), the court held that a “separate” covenant clearly meant a “several” obligation, as the words “separate” and “several” are in reality the same.³ They both derive from the same word, *separo*, the only difference being the change in the manner of articulation.⁴

Joint

The *Oxford English Dictionary* traces “jointly” back to the Old French verb *joindre*, to join.⁵ The *Macquarie Dictionary* states the common meaning as “together, in common” and “shared by, or common to, two or more”.⁶ In everyday language, “jointly” is generally understood. However, a word like “together” may more clearly express the legal meaning.



Several

The word “several” is more problematic. It derives from the French *several*. This, in turn, comes from the mediaeval Latin *severalis*, itself an adaptation of *separalis*, which again derives from *separ*, meaning “separate, distinct”.⁷ But the *Oxford English Dictionary* states this use of “several” is obsolete.

According to one legal writer, “... using ‘several’ for ‘separate’ is an archaism of Shakespearian vintage that has survived only in legal language”.⁸

Indeed, in everyday language, “several” now means “a moderate number — more than two, but not many”⁹ or “being more than two or three, but not many”.¹⁰ This commonly understood meaning is at odds with the legal meaning of distinct or separate. Clearly, “severally” is not only archaic, it can also be misleading.

Is “joint and several” necessary?

As far back as 1677, a court decided that the words “for themselves and every of them” were sufficient to give the legal effect of *joint and several*.¹¹

In *Kidson v McDonald*, Foster J decided that “jointly” did not have a technical meaning in English law and was not a legal term of art (except when using the words “joint tenants”).¹² Using the definition in the *Shorter Oxford English Dictionary*, he stated that “jointly” in its ordinary sense meant “common to two or more”.

Similarly, other cases show that “severally” means “separately”,¹³ “for every of them” and “for each of them”,¹⁴ and “several” means “respectively”.¹⁵

The “combination problem”

But is *jointly and severally* enough if more than two people are liable, say X, Y and Z? It is clear that X, Y and Z are each liable, and liable all together. But what about X and Y together, or Y and Z, or Z and X? While it is probable that a court would hold any of these combinations liable, the words *jointly and severally* do not make this clear.¹⁶

Together and separately

There are clear and precise alternatives to the words *jointly and severally*. For example, you can use “together” or “collectively” rather than “jointly”. For “severally”, you can use “separately”, “individually”, “alone”, or “each of them”.

If you are cautious about changing a venerable legal phrase, but you realise that your client may not understand its effect, you could use the modern phrase with the traditional legal phrase in brackets: “together and separately (this is known as *jointly and severally*)”. To make your intention clear as to combinations, you can add “or in any combination”.



Endnotes

- 1 S Marantelli & C Tikotin *The Australian Legal Dictionary* 2nd ed Edward Arnold Australia, Melbourne 1985 p136
- 2 RF Norton *A Treatise on Deeds* 2nd ed by RJA Morrison & HJ Goolden 1928 Gaunt Florida 1981 repr p566. See also *Sorsbie v Park* (1843) 13 LJ Ex 9 p10-12, citing *James v Emery* (1818) 5 Price 529 p533; 146 ER 685 p686, Gibbs CJ
- 3 *Keightley v Watson* (1849) 3 Ex 716 p722, 154 ER 1034
- 4 *Keightley* note 3 p1036
- 5 BA Garner *A Dictionary of Modern Legal Usage* OUP New York 1987 p499
- 6 *Macquarie Dictionary* 2nd rev ed Macquarie Library, Sydney 1987 p942
- 7 *Oxford English Dictionary* 1st ed Clarendon Press, Oxford 1933 repr 1961 vol 9 p568
- 8 see Garner note 5 p499
- 9 *The Concise Oxford Dictionary* 6th ed Clarendon Press, Oxford 1933 repr 1961 vol 9 p568
- 10 see note 6 p1553
- 11 *May v Woodward* (1677) Freem KB 248; 89 ER 177. See also *National Society for the Distribution of Electricity by Secondary Generators v Gibb* [1900] 2 Ch 280
- 12 *Kidson v McDonald* [1974] 1 All ER 849
- 13 *Keightley* note 3
- 14 *May* see note 11
- 15 *Woodstock v Shillito* (1835) 6 Sim 416; 58 ER 650
- 16 This is the “combination problem” as R Castle calls it in his unpublished thesis 1989 p950



Last will and testament

In this essay, we examine the phrase *last will and testament* to see if there is a plain language equivalent which will convey meaning to the lay reader, while retaining legal efficacy. We suggest that the phrase is used by lawyers solely out of habit. The word “will” is sufficient in law.

Why “last will and testament”?

Last will and testament has been used for over 500 years. For example, section 1 of the *Statute of Wills 1540 (UK)* refers to “a last will and testament in writing”. This Statute first allowed a testator to dispose of land by will.

The survival of the phrase probably owes much to Lord Coke (1552-1634) who said: “[b]ut in law most commonly, *ultima voluntas in scriptis* [last will in writing] is used where land or tenements are devised and *testamentum* when it concerneth chattels”.¹ He added:

[b]ut now ... by the Statute of [Wills] ... lands and tenements are generally devisable by the last will in writing²

However, as well as using the phrase “last will in writing”, the *Statute of Wills* also speaks of a “last will and testament”, “wills or testaments”, and a “last will or testament”. As Halbury’s *Laws of England* states, “the terms appear to be used interchangeably” in that Statute.³ There seems no basis for Coke’s distinction between “will” and “testament”.

Is it justified historically?

The word “testament” comes from the Latin *testamentum*. *Testamentum* meant an expression of a person’s will, like the Old English word “will” (originally *wille* or *wile*). However, the Latin *voluntas* also meant an expression of the will. The difference between the two Latin words was the civil law rule that the true essence of a *testamentum* was the appointment of an executor. In other words, although there may be an expression of *ultima voluntas* (last will), there could be no true *testamentum* without the appointment of an executor.

According to the English legal historian, Holdsworth, this civil law rule was adopted by the English ecclesiastical courts when, in the 13th century, they appropriated jurisdiction over testamentary matters relating to personal property. However, Holdsworth adds that although this rule existed, it soon became meaningless because, if there was no executor, the ecclesiastical courts would appoint an administrator (within the jurisdiction) to give effect to the *ultima voluntas*.⁴



Another reason for “last will and testament”?

During the Middle Ages, the English language adopted many words from Latin and French. Legal language was no different, often stringing together English and Latin (or French) words, when one English word would do. Mellinkoff writes that although this “may have once been rationalised as necessary translation, [it] soon became a fixed style”.⁵

Lawyers revelled in this habit. The evidence suggests that *last will and testament* is an English/Latin example of this “bilingual fashion of the day”.⁶

Should “will and testament” be used today?

Section 3 of the *Wills, Probate and Administration Act 1898 (NSW)* states that: “ ‘will’ extends to a testament and to a codicil ... and to any other testamentary disposition”. Clearly, there is no longer any need to use *last will and testament*.

Is there a need for “last”?

When deciding the validity of a will, a court must find the last intention of the testator as to disposing of his or her property. This is a question of fact.

Whether or not a will is called a person’s “last” does not bind the court. As Grose J said in *Walpole v Cholmondeley*, “the term ‘last will’ ... is a general term, signifying only ‘a will’”.⁷

Further, the words “last will” are not a substitute for a general revocation clause. While no particular form of words is necessary to revoke a previous will, the intention to revoke must be clearly expressed. In *Cutto v Gilbert* the court said that merely stating in a document “this is my will and testament” could not possibly render it a revocatory instrument.⁸

Use “will”

The use of *last will and testament* is unnecessary. The word “last” serves no legal purpose, and the term “will” includes “testament”. The single word “will” is enough.

Endnotes

- 1 Sir E Coke *Institutes of the Law of England* (or *A Commentary Upon Littleton*) 1st ed 1628; 19th ed rev & corrected by F Hargreave & C Butler 1832 Garland Publishing, New York repr 1979 vol 1 filla
- 2 Coke note 1 fillb
- 3 *Halsbury’s Laws of England* 1st ed 1914 vol 28 p505; 4th ed Butterworths, London 1984 vol 50 para 201
- 4 Sir WS Holdsworth *A History of English Law* 3rd ed Methuen & Co; Sweet & Maxwell, London 1923 repr 1966 vol 3 p536-7
- 5 D Mellinkoff *The Language of the Law* Little Brown & Co, Boston 1963 p120



- 6 Mellinkoff note 5 p121
- 7 (1979) 7 Term Rep 138 p150; 101 ER 897 p904
- 8 (1854) 9 Moo PCC 131 p147; ER 247 p254



Malice

The word *malice* and its derivatives “malicious” and “maliciously” are good examples of ordinary words taken into legal language that have acquired new meanings in the process. One problem with words like these lies in clearly distinguishing the new legal meaning from the original, ordinary one. Another problem lies in recognising that a new meaning can become so remote from the original that the word loses its legal usefulness. This happens if it has to be understood by non-lawyers, including jurors.

The word *malice* comes from the Latin *malitia* meaning “badness” or “spite”. Its English meanings, according to the *Oxford Dictionary*, also include “wickedness”, “ill-will” and “hatred”.

Malice aforethought

The best known use of *malice* in the law is the expression “malice aforethought”. It describes the mental element required for murder. This expression dates from the Middle Ages in England.¹

Until at least the 18th century, *malice* generally had its ordinary meaning of “wicked, depraved, malignant”.² By the end of the 19th century, however, neither *malice* nor “aforethought” was required for murder and the expression was “never used except to mislead or to be explained away”.³

Extended meanings of *malice* had by then developed, as in “implied malice” (intention to cause grievous bodily harm rather than death) and “constructive malice” (for example: felony, murder). *Malice* was also used to include reckless indifference to death or grievous bodily harm.

Although the expression “malice aforethought” is still sometimes used to indicate the mental element for murder, it is a way of referring to the various states of mind necessary for murder.⁴ None of these states of mind involve *malice* in the original meaning of the word.

Act done of malice

There is still one provision in the *Crimes Act 1900 (NSW)* that uses *malice* in its original meaning. That is section 5 which defines “maliciously” as including “[e]very act done of malice ...”, or done without malice but “with indifference to human life or suffering, or with intent to injure, or recklessly, or wantonly”. This definition is sometimes said to be circular,⁵ but if “maliciously” is understood in the extended legal sense indicated, and *malice* in its ordinary sense, there is no circularity.⁶



Malice and torts

Professor Fleming has described the word *malice* in the law of torts as a “weasel word”, and a source of uncertainty and confusion.⁷

The main torts involving *malice* are malicious prosecution, injurious falsehood and defamation. In the first two the plaintiff must establish *malice* in the defendant. In the third the plaintiff can defeat a defence of qualified privilege by showing that the publication was “malicious”.⁸

The meaning of *malice* in these torts ranges over the ordinary meaning and different technical legal meanings. Spite, ill will or a spirit of vengeance satisfy the “malicious” requirement in malicious prosecution. However, so do improper purposes behind a prosecution such as trying to silence the plaintiff in another legal proceeding or trying to block a meeting of shareholders.⁹

In injurious falsehood, *malice* now means a dishonest or improper motive or, more technically, intent to injure without just cause or excuse.¹⁰ In defamation, qualified privilege is defeated by spite or a desire to inflict harm for its own sake. It is also defeated by the misuse of the privileged occasion for an improper purpose.¹¹

Recommendation

Malice is one of those ordinary words that, once taken up by the law, tends over time to lose its original meaning. When the legal sense replaces the original sense, as in the mental element for murder, a word like *malice* should be dropped from legal language. When the original sense continues to exist in the law beside new legal senses, as in the law of torts, special care should be taken to distinguish exactly what is meant.

Endnotes

- 1 Sir J F Stephen *A History of the Criminal Law of England* MacMillan, London 1883 vol 3 pp41-6
- 2 Sir M Foster *Crown Law* Oxford 1762 Professional Books, Abingdon Oxfordshire 1982 repr p256
- 3 see Stephen note 1 p83
- 4 B Fisse *Howard's Criminal Law* 5th ed Law Book Company, Sydney 1990 p43
- 5 eg *Mraz v R* (1955) 93 CLR 493 p510, Fullagar J
- 6 As made clear in the notes to the original provision (s7) in Sir A Stephen & A Oliver *Criminal Law Manual Comprising the Criminal Law Amendment Act of 1883* Government Printer, Sydney
- 7 JG Fleming *The Law of Torts* 7th ed Law Book Company, Sydney 1987 p672. A “weasel word” is a word which destroys the force of a statement as a weasel ruins an egg by sucking out its contents
- 8 In some jurisdictions other than NSW, *malice* will also defeat a defense of fair comment



The Australian Law Reform Commission has recommended discarding *malice* as defeating qualified privilege and renaming the defense “limited privilege”. See *Unfair Publication: Defamation and Privacy* Report No 11 1979 para 149

- 9 see cases in note 7 p590
- 10 see cases in note 7 p672-3
- 11 see cases in note 7 p549-50



Notwithstanding

In 1990 the London *Times* published an editorial attacking the traditional language found in many legal documents. The editorial was headed “Notwithstanding”.¹ Even though it is not a technical legal word, for the *Times*, as for many others, it is emblematic of a style of writing that puts the reader second and obscures meaning.

Origin

Notwithstanding was created as a direct translation of the Latin *non obstante*. The Latin verb *obsto* means to stand against or in the way of. *Notwithstanding* is made up of “not” and the old English verb “withstand” which means to oppose or resist. “Withstand” also means to refuse a person the possession of something.

Non obstante is not a Classical Latin expression. It is first recorded in 1226 and made a regular appearance in English law after around 1250.² At that time the Crown began to grant licences and letters patent *non obstante* any statute to the contrary.

The phrase *non obstante* was so often used with this dispensing power that it came to have a semi-technical meaning. A number of cases in the 17th century attempted to define the limits of the royal power of dispensation, including one called the *Case of Non Obstante* with a judgment by Coke.³ Bacon used the term in its technical way when he wrote:

[i]f there be a statute made that no sheriff shall continue in office above a year ... yet nevertheless a patent of a sheriff's office made by the king for term of life, with a *non obstante*, will be good in law.⁴

The term has a place in English constitutional history. The power of the King to grant a dispensation that defeated the spirit and intent of an Act of Parliament was one cause of friction between the King and Parliament over the extent of the royal prerogative.⁵ The abuse of this power by James II was one of the causes of the revolution of 1688.⁶ The Bill of Rights enacted that year, after James II was overthrown, specifically stated that any dispensation *non obstante* was void. Since then *non obstante* has had no technical meaning.

Notwithstanding is first found in English in about 1380, in a theological work.⁷ This period was one of great experimentation with the English language. It was also one in which words had many different spellings and meanings. The “mouthfilling notwithstanding”, as Mellinkoff calls it, was a typical creation of that time “with customary multiple meanings: in spite of, nevertheless, still, yet, although”.⁸



As Mellinkoff also said, “[i]t was not a law word to start with, but the law later picked it up and kept it”.⁹ Its use in documents connected with Crown grants popularised *non obstante* and its English translation, *notwithstanding*, among lawyers. Like many other words and phrases originally found in public documents, it was adopted into private documents as well.

Current use

Notwithstanding is used grammatically in different ways. It can be a preposition to override a conflicting provision such as in “notwithstanding section 10”. It is often used to preclude in advance any interpretation contrary to certain declared objects or purposes. For this reason, clauses often began with the word *notwithstanding*. It can be used as a conjunction to introduce a subordinate adverbial clause as in “he may, notwithstanding that he has failed to comply with this section, ...”. It can even be used as an adverb, but this is rare in legal writing.¹⁰

Problems

There are several problems with using the word *notwithstanding*. The first is that it is a long, legal sounding word that non-lawyers find offputting. It is one of those words the Plain English Campaign calls “legal flavouring”. A word that “either [adds] no meaning or [has] a perfectly acceptable plain English alternative”.¹¹

It should also be avoided as its use can lead to a complicated document structure that is likely to obscure the meaning for the reader. For example, it is often used to set out a significant exception. This is part of what Mellinkoff calls “the vice of excessive qualification” or “wheels within wheels”.¹² A document sets out what appears to be its most important points in one part and then it qualifies them, even to the extent of negating them.

At the most extreme is the phrase “notwithstanding anything to the contrary contained herein...”. This is really saying “disregard the rest of the document, this is the important bit”.¹³ The need to write like this indicates a poorly planned document.

Alternatives

It is always possible to find an alternative to *notwithstanding*. Today most legislative drafters avoid it. To override a conflicting provision, use “despite”. It is better to write “although she failed to comply with this section, she may ...”, than “notwithstanding her failure ...”. Other alternative words are “however”, “even though”, “yet”, or “but”.

But changing the words may not be enough. If the clause includes an exception,



use the heading “Exceptions”. This makes it clear to the reader what is going on.

Notwithstanding is an unfriendly word. As Martin Cutts has written, “its only essential use is as the answer to the crossword clue *shiny trousers*”.¹⁴

Endnotes

- 1 London *Times* 30 November 1990
- 2 see RA Latham & British Academy Committee (eds) *Revised Medieval Wordlist from British and Irish Sources* Oxford University Press, Oxford 1965
- 3 These included the *Case of Monopolies* (1602), the *Case of Penal Statutes* (1605), and the *Case of Non Obstante* 12 Co Rep 18 77 ER 1300, where Coke summed up the learning on the meaning of the term; see WS Holdsworth *History of English Law* Methuen, London 1956 vol iv p205 & vol vi p221
- 4 “Maxims of the Law” cited in WS Holdsworth *History of English Law* 7th ed Methuen, London 1956 vol iv p205, note 2. Coke in the *Case of Non Obstante* stated that “No Act can bind the King from any prerogative which is sole and inseparable to his person that he may dispense with it by a non obstante”
- 5 The Crown most frequently used this power to give licences so that corporations could hold lands in contravention of the mortmain statutes. Land that passed into the “deadhand” (mortmain) of corporations was inalienable. The mortmain statutes were enacted to prevent this
- 6 To dispense with the provisions of the *Test Act 1672* 25 Car 2 c2 that excluded Catholics for public office
- 7 used by John Wyclif — see entry on *notwithstanding* in the *Oxford English Dictionary*, Clarendon Press, Oxford 1933
- 8 D Mellinkoff *The Language of the Law* Little Brown & Co, Boston 1963 p85
- 9 see note 8 Mellinkoff
- 10 EA Driedger *The Composition of Legislation* 2nd ed Dept of Justice, Ottawa 1976 p137
- 11 *The Plain English Story* 2nd ed Plain English Campaign, Stockport, UK 1991 p46
- 12 D Mellinkoff *Legal Writing: Sense and Nonsense* West Publishing Co, St Paul Minnesota 1982 p178
- 13 M Cutts *Making Sense of English in the Law* Chambers Publishers, Edinburgh 1992 p158
- 14 see note 13 Cutts



Null and void

Lawyers like to use the phrase *null and void*. Is this simply habit or are there good legal reasons for it?

Mellinkoff recognises the temptation for lawyers to use the phrase. He asks:

[h]ow is it possible to stop at “void” when so many lawyers have for so long plunged on into *null and void*? ... And in this prideful vain, even more lawyerly, more precise, more emphatic, is “null and void and of no further force or effect!”¹

Similarly Dick asks, “[i]f a contract is ‘void’ is it made any more so by saying it is *null and void*?”²

Meaning

The word “null” appeared in the 16th century and derives from the Latin *nullus* meaning “none”. The word “void” appeared in the 13th century and derives from Old French *vuide* which in turn came from Latin *vocitus* (unattested) and *vacuus* (empty).³

In everyday language the words “null” and “void” are synonymous, both meaning “of no effect”. Dictionaries give meanings for “null” as “without legal force, invalid” and for void as “not legally binding”.⁴

Similarly in legal dictionaries, “null” is defined as “void, of no legal effect or consequence”⁵ and “without legal validity”.⁶ “Void” is defined as “absolutely null”,⁷ “without legal effect; legally null”,⁸ “without legal force or effect; not legally binding or enforceable”,⁹ “no legal effect; a nullity”.¹⁰ A void transaction is “a mere nullity and incapable of confirmation”.¹¹ *Stroud’s* spends over two pages defining “void” as “not legally binding”.¹²

The phrase *null and void* has been defined as “nought, of no legal validity or effect”¹³ and “having no legal force or effect”.¹⁴ Yet *Stroud’s Judicial Dictionary* does not refer to *null and void*.¹⁵

Case law

Little judicial comment has been made on the meaning of *null and void* and virtually none on the word “null”. In *Egan v Maher*, Northrop laments the “lack of uniform and precise terminology by higher courts” in the use of the two words.¹⁶

In contrast, the word “void” has been widely considered judicially.¹⁷ According to Windeyer, a void transaction is one which is always devoid of legal consequences. Yet he goes on to say “void has never been an easy word”.¹⁸ Many of the cases deal with the uncertainty of its meaning. And these meanings



vary according to whether it is contract law, marriage law, legislation or other areas of the law.

Some of this uncertainty is because “void” has been held in the circumstances to mean “voidable”, that is, capable of being voided. Another source of uncertainty is its scope. Does it cover all or only some of the parties to the document? Yet these uncertainties are not due to “void” itself. It is the courts that tend to interpret the word according to the circumstances of each case.¹⁹

In some of these cases “void” was included in the phrase *null and void*. Does this mean that “null” adds nothing to the meaning? Does the phrase itself mean “voidable”?

In *National Acceptance Corporation v Benson*, the court said that “void” should receive the meaning which attaches to it in everyday life, that is, having no legal effect for any purpose. It is as if the transaction which is “void” had never occurred.²⁰

Plain alternative

The phrase *null and void* is not necessary. The two words are interchangeable. So why do we continue to use *null and void* in modern times?

Garner suggests that “void” itself is sufficient. However, he notes “void” alone is susceptible to the weakness of being interpreted to mean voidable, and, therefore, is uncertain.²¹ Also it is not a word that ordinary people use. We recommend that you replace *null and void* or “null” or “void” with a plain language equivalent that people can readily understand, such as “without legal effect”.

The person may understand that the obligation has no effect, but may not realise that legally it is as if the obligation never existed. It is clearer to spell this out, such as “of no legal effect from the beginning of this event”. Indeed many of the issues discussed in the cases may need more thought. The drafter may need to carefully consider the context and consequences of an event being of no legal effect. For example, does the drafter mean “of no effect” from the beginning of an event, and against which parties does this apply?

We recommend that you replace the words *null and void* with the words “of no legal effect” or with words that clearly explain when the obligation becomes of no effect, and the consequences of that.



Endnotes

- 1 D Mellinkoff *The Language of Law* Little Brown & Co, Boston 1963 p360
- 2 RC Dick *Legal Drafting* 2nd ed Carswell, Toronto 1985 p126
- 3 GA Wilkes & WA Krebs (eds) *Collins English Dictionary* 3rd Aust ed Harper Collins, Sydney 1991 p1072 & 1719
- 4 *Collins* note 3
- 5 R E Rothenberg (ed) *The Plain Language Law Dictionary* Penguin, New York 1981 p226
- 6 *CCH Macquarie Concise Dictionary of Modern Law* CCH, Sydney 1988 p91
- 7 BA Garner *Dictionary of Modern Legal Usage* OUP, New York 1987 p570
- 8 *CCH* note 6 p137
- 9 *The Macquarie Dictionary* 2nd rev ed The Macquarie Library, Sydney 1987 p1908
- 10 R Bird *Osborn's Concise Legal Dictionary* 7th ed Sweet & Maxwell, London 1983 p340
- 11 ER Hardy Ivamy *Mozley and Whiteley's Law Dictionary* 10th ed Butterworths, London 1988 p496
- 12 JS James *Stroud's Judicial Dictionary* 5th ed Sweet & Maxwell, London 1986 p2802-3
- 13 JR Nolan & JM Nolan-Haley *Black's Law Dictionary* 6th ed West Publishing Co, St Paul Minnesota 1990 p1067
- 14 *The Macquarie Dictionary* note 9 p1171. See also *Collins* note 3 p1072
- 15 *Stroud's* note 12
- 16 (1978) 35 FLR 197 p245
- 17 *Stroud's* see note 12. See also *Brooks v Burns Philip Trustees Co Ltd* (1969) 121 CLR 432
- 18 (1969) 121 CLR 432 p459 citing JG Starke & PFP Higgins *Cheshire & Fifoot's Law of Contract* 2nd ed Butterworths, Sydney 1969 p440
- 19 *Brooks* note 18; *Buckley v Tutty* (1971) 125 CLR 353; *Egan v Maher* (1978) 35 FLR 197
- 20 (1988) 12 NSWLR 213
- 21 *Garner* note 7 p570 citing (1955) 92 *Corpus Juris Secundum* p1020-23



Per stirpes

Per stirpes is a Latin term which is a convenient shorthand for lawyers¹. Is it a technical term? Can it be replaced by a precise, plain term?

Derivation

Per stirpes comes from the civil law, and is used mainly in succession.² It literally means “according to stocks”,³ that is, going from the dead beneficiary to the descendants.⁴ *Webster’s Dictionary* traces it to *stipes*,⁵ which describes the stem of a candle stick (1180), stocks of descent and ancestry (1198), and an heir (1350).⁶

Stipes means root-stem⁷ or branch.⁸ Why the botany? Well, if you draw a diagram of a *per stirpes* distribution in a will, it looks like a “tree”, with the beneficiaries as branches.⁹

Legal meaning

In law, *per stirpes* is used to describe a means of distributing property on death. This type of distribution applies if the will maker specifies it, or on intestacy as a result of the *Wills, Probate and Administration Act 1898 (NSW)*.¹⁰

Dictionaries link *per stirpes* with *per capita*.¹¹ *Per capita* describes another means of distributing property that is based on people as the units, not classes of generations.¹² In a *per capita* distribution, each beneficiary receives an equal share of the particular gift in his or her own right.¹³

This contrasts with *per stirpes*.¹⁴ In a *per stirpes* distribution, if a beneficiary named in the will dies before the will maker, the next generation, the beneficiary’s children share the gift that the beneficiary would have received equally. The children inherit as representatives of the beneficiary.¹⁵ If a beneficiary from an earlier generation is alive, that beneficiary takes precedence.¹⁶

For example, a will maker left \$100 000 to children A and B *per stirpes*. A had two children, M and N, and A died before the will maker did. On the willmaker’s death B’s share is still \$50 000. B’s children do not receive anything because their parent is still alive.¹⁷ However, A’s share is split equally between A’s two children, so M and N get \$25 000 each.¹⁸

Why use Latin?

Fowler says it is “affected to use Latin when English will serve as well”. Although *per stirpes* is an “established”¹⁹ legal phrase, it is not used or understood by the ordinary person. Indeed, it is not in all dictionaries.



Why use *per stirpes*?

The literal meaning of *per stirpes* does not fully correspond to the legal meaning. It is not a precise term.²⁰ The original Latin word has taken on new life in the legal context.

Per stirpes is often used as shorthand.²¹ It is a term of art,²² a technical term.²³ It cannot easily be recast in precise, plain language.²⁴ Yet this does not mean that lawyers should continue to use the term. It may have consequences that the will maker does not want. Since a will is a document that needs to be understood by the client, it may be useful to include a plain language version of the term, even if the will becomes longer.²⁵ You can add “known as *per stirpes*” after that plain language version.

Explanations or alternatives

One alternative is: “A gift to a donee who dies before me is shared equally between the donee’s children”.²⁶ The drafter of this alternative suggests “donee” is flexible enough to allow the gift to go to the appropriate grandchildren and to their descendants as necessary.²⁷ However this sacrifices clarity for brevity, and “donee” is normally used for gifts made while the giver is alive.²⁸

Another alternative is: “divided equally among the descendants”.²⁹ Yet “descendants” also covers all relatives,³⁰ as does the word “issue”.³¹ Using only a phrase like this risks the distribution being among all descendents irrespective of their generation. This contrasts with a *per stirpes* distribution where each new generation is treated as a separate class. Adding a context also helps clarify the legal meaning of *per stirpes*.

A third alternative is: “I leave \$100 000 to be shared equally between A and B. If A dies before I do, A’s share is to be divided equally among A’s children. The same applies to B.”

To cover the next generation, the willmaker could add in the same clause: “however, if any of A or B’s children who would have received a share of the gift under this clause die before I do, then their share is to be divided equally among that child’s children (my great grandchildren)”. Specifying much further may create more problems than it solves, as it is difficult to cover every possibility.³² We suggest including a diagram to explain the concept to the will maker and those who may administer the will.

Endnotes

- 1 RC Dick *Legal Drafting* 2nd ed Carswell Toronto 1985 p13
- 2 JR Nolan & JM Nolan-Haley *Black’s Law Dictionary* 6th ed West Publishing Co, St Paul Minnesota 1990 p1136. Also see AM Prichard *Leage’s Roman Private Law* 3rd ed Macmillan, London 1961 p291; *Ralph v Carrick* (1879) 11 Ch D 873 cited in JS James



- Stroud's *Judicial Dictionary* 5th ed Sweet & Maxwell London 1986 Vol 4 P-R p1895; R Hastings & G Weir 1939 *Probate Law and Practice* 1st ed Law Book Company, Sydney 1948 p664. The concept was "adopted" in the *Statute of Distributions 1670 (Imp)*
- 3 HAJ, Ford GW Hinde & MS Hinde *Australian Business Dictionary* Butterworths, Sydney 1985 p140
- 4 eg *Black's* note 2 p1417; R Bird Osborne's *Concise Law Dictionary* 7th ed Sweet & Maxwell, London 1983 p250; *The Macquarie Dictionary* 2nd rev ed 1987 Macquarie Library, Sydney p1667
- 5 BA Garner *A Dictionary of Modern Legal Usage* OUP New York 1987 p518, quoting PB Gove (chief ed) *Webster's Third New International Dictionary* 3rd ed G & C Merriam Co, Springfield Massachusetts 1961
- 6 RE Latham & British Academy Committee *Revised Medieval Latin Word List from British and Irish Sources* OUP London 1965 p453; see Hastings & Weir note 2, 2nd ed 1948 p743. They distinguish the "stipes" or "stem" and the "stirpes" or "root"
- 7 *Black's* note 2 p1415
- 8 Garner note 5 as in "branch of a family"
- 9 *Black's* note 2 p1417 when discussing "stock" cites *Matter of Samson's Estate* 139 Misc 490, 249 NYS 79 p83 - "metaphorically", descendants are "branches"
- 10 see ss61F, 61B(4), 61C. The Act does not use the term *per stirpes* but the concept exists in s61C
- 11 eg Garner note 5 p411
- 12 HW Fowler *A Dictionary of Modern English Usage* 2nd ed rev by Sir E Gowers OUP 1965 p443
- 13 IJ Hardingham, MA Neave & HAJ Ford *Wills and Intestacy in Australia and New Zealand* 2nd ed Law Book Co, Sydney 1989 para 1504 p360-1
- 14 *Black's* note 2 pp1145,1415
- 15 Hardingham note 13 p359; also *Australian Encyclopaedia of Forms and Precedents* 3rd ed Butterworths, Sydney 1990 vol 15 para 2895 p13230
- 16 FC Hutley with MW Inglis *Australian Wills Precedents* 3rd ed Butterworths, Sydney 1980 p86
- 17 *Ralph v Carrick* (1879) 11 ChD 873 cited in Stroud's note 2; see also Hutley note 16
- 18 for an example see Hardingham note 13 p360
- 19 Garner note 5 p411
- 20 D Mellinkoff *Legal Writing: Sense and Nonsense* West Publishing Co, St Paul Minnesota 1983 p193-4
- 21 see Dick note 1
- 22 L Cusack "The plain English will revisited" (1980) vol 119 no7 *Trusts & Est* 42 p44, quoted in B Child *Drafting Legal Documents: Materials and Problems* West Publishing Co, St Paul Minnesota 1988 p86
- 23 K Mason & LG Handler *Wills Probate and Administration NSW* Butterworths, Sydney (1985) [1053.15.4] p14049
- 24 *Australian Encyclopaedia of Forms & Precedents* note 18 para 2845 p13206 : "An exact definition of *per stirpes* is cumbersome"
- 25 see Mason & Handler note 24
- 26 adapted from *Clarity* Issue 9, June 1988 p7
- 27 see *Clarity* note 27 & *Clarity* Issue 8, January 1988 p5
- 28 Comment by Assoc. Prof. Ros Atherton, Law School, University of Sydney, 4.11.92
- 29 M Asprey *Plain Legal Language for Lawyers* Federation Press, Sydney 1991 p160
- 30 see Atherton note 29

- 31 eg *Estate of Auerbach* [1974] 1 NSWLR 57 p63-4, Mahoney J: “ ... ‘descendants’ means, in its ordinary sense, issue of every degree”: *Ralph v Carrick* (1879) 11 ChD 873. *In the Will of Moore* [1963] VLR 168 p171, Adams J “There is abundant authority ... that the *prima facie* meaning of issue is descendant of every degree ... not children only”. citing eg JHC Morris *Theobald on Wills* 11th ed Stevens & Sons London 1954 p303-4; *Ross v Ross* [1855] 20 Beav 145; 52 ER 753. See also *Black’s* note 2 p445 & 831
- 32 Hutley note 16 p86



Pro bono

The term *pro bono publico* derives from Roman law and is usually translated as “for the public [or common] good”.¹ Contemporary American law dictionaries indicate that the term also refers to “free” professional work. *Black’s Law Dictionary* refers to “the welfare of the whole, done free of charge”.² Rothenberg defines it as “an expression, derived from *pro bono publico*, meaning ... free legal work ... done for some charitable or non-profit organisation”.³

Pro bono entered the English language in Roman times when its meaning was linked to the Roman socio-legal system. The Romans relied heavily on patronage in their society, and the law was an integral part:

The wheels of Roman society were oiled ... by two notions: mutual services of status-equals (I help you in your affairs: I then have a moral claim to your help in mine) and patronage of higher status to lower.⁴

The concept of *pro bono* can also be seen in the Church’s legal functions in the Middle Ages, in catering for the poor and *in forma pauperis* proceedings. Brand⁵ and Holdsworth⁶ both deal with the special role of officers of the Crown in dealing with the poor on its behalf. This led to our current concept of legal aid.

Meaning

The term *pro bono* has been used again in contemporary times. But the meaning varies depending on whether you are a lawyer, a group concerned with providing legal services, or a member of the public.

Many lawyers use *pro bono* loosely to refer to work done for community groups for free or for a reduced fee. It is seen as part of the firm’s day to day practice and separate from “legal aid” work. They also use it to refer to free work such as secondments to legal centres or work for major public events.

The current focus on reform of the legal profession and the efforts to use the diminishing “legal aid” dollar as effectively as possible, have led to a closer link between *pro bono* and the idea of legal aid work.

Law Society and Public Interest Law Clearing House views

The Law Society’s brochure to the public explaining *pro bono* work, states that a member of the public may be eligible for *pro bono* assistance (that is, reduced fee or free legal service) if that person cannot afford a solicitor, and cannot get legal aid.⁷



The brochure describes *pro bono* as “a shortening of the Latin *pro bono publico* — for the public good”. It then switches between the financial and public interest meanings as it continues:

[p]ro bono work by solicitors ... is work done in the interest of the public. Lawyers use the term to refer to work which they do either free of charge or at a substantially reduced cost. They do this work for those who would otherwise be unable to defend or assert their lawful rights or interests.⁸

This view is also expressed in the Law Society’s most recent report “Pro Bono”, published in 1994.

The four eligibility categories add to the uncertainty. The public may be eligible if they do not qualify for legal aid and cannot afford a private lawyer; if their case may be of public interest; if they are a non-profit organisation representing the interests of disadvantaged groups or which serve the public good; or if the case is “worthy of support”.

The Society’s second brochure to solicitors⁹ lists seven “professional advantages” of *pro bono* work. It also lists three eligibility guidelines: people who fall outside the legal aid eligibility guidelines but who are unable to afford a private lawyer; people who require legal services to advance a public, rather than a private, interest; and non-profit organisations that represent disadvantaged groups or serve the general public good.

By contrast, the Public Interest Law Clearing House’s brochure emphasises the “public interest” meaning of *pro bono*. It defines *pro bono* as public interest cases and projects which address issues of broad community concern or have significant impact on disadvantaged groups. It then defines “public interest matters” as “those which affect a significant number of people, raise issues of broad public concern or particularly impact on disadvantaged and marginalised groups”.¹⁰

The public’s view

A recent survey by the Centre for Plain Legal Language and law students suggests that the public do not understand the Latin term. Half of those surveyed did not know what the words *pro bono* meant. Only 28% said that it meant lawyers providing their services for free, and 15% said it meant legal services provided for the public good.

When asked “should the term be used?”, 70% of the survey group answered “No”. The main reason was “people do not understand what it means”. When asked to suggest an alternative phrase, there was considerable uncertainty. Most suggested terms using the word “free”, others suggested “social service”, “gratis or goodwill”, “legal aid” and “public welfare”.



Recommendation

The term needs to be replaced with a clearer, more meaningful alternative in English. But the profession must decide between the “financial” or “public interest” meanings. While the confused public lean towards a concept of free legal advice, others use a formal “public interest” definition, embracing access to justice.

Endnotes

- 1 *Oxford English Dictionary* Clarendon Press, Oxford vol VIII p1397
- 2 JR Nolan & JM Nolan-Haley (eds) *Black's Law Dictionary* 6th ed West Publishing Co, St Paul Minnesota 1990 p1203
- 3 RE Rothenberg *Plain Language Law Dictionary* Penguin, New York 1981 p271
- 4 JA Crook *Law and Life of Rome* Cornell University Press, 1967 p93
- 5 P Brand *The Origins of the English Legal Profession* Blackwell Publishers, Oxford 1992 p104
- 6 W Holdsworth *A History of English Law* 4th ed Methuen, London 1936 p485-93
- 7 “The *pro bono* scheme: To help bring justice to all” Law Society of NSW brochure October 1992
- 8 see note 7 p2
- 9 “*Pro bono*: Information for practitioners” Law Society of NSW brochure October 1992 p3. The 1994 Law Society of NSW brochure of *pro bono* work has stressed as its major aim, continuing efforts “to make the legal system more equitable and accessible”. The brochure was titled “*Pro bono* for the public good”
- 10 Public Interest Law Clearing House brochure November 1992 p3



Provided that

The phrase *provided that* is used in both statutes and private legal documents. Today, the phrase is mostly used to introduce a subordinate clause that qualifies its main clause. But *provided that* is also used to introduce new material or even to widen the scope of a clause. Most writers on drafting use the word “proviso” and the phrase *provided that* interchangeably, although a proviso is usually thought of as limiting, rather than expanding, a clause. The history of *provided that* helps explain why the phrase has these different uses.

Meaning

The phrase *provided that* comes from the Latin *provisum est* which means “it is provided that”.¹ This was one of the enacting formulas used to introduce each section of a statute. This was necessary before 1850 when every section of a statute had to be independently enacted, and there were no paragraphs and no punctuation marks.² To connect separately enacted sections, drafters used “It is provided that ABC and further it is provided that XYZ”.

The words “it is” vanished over the centuries and drafters increasingly used the remaining fragment both, in statutes and in private legal documents as if it was a subordinating conjunction. *Provided that* became, as Driedger says,

hardly more than a legal incantation. The best that can be said for it is that it is an all-purpose conjunction, invented by lawyers but not known to or understood by grammarians.³

In statutes, *provided that* is also commonly understood to be used to except from, modify, or limit the main clause of the section to which it is attached. This use as an “incantation” is also reflected in private legal documents.⁴

However Latham CJ recognised that *provided that* has more functions when he wrote:

generally, a proviso is a provision which is ‘dependent on the main enactment’ and not an ‘independent enacting clause’ ... [But] a consideration of both the main and the subsidiary provisions of an enactment may show that the proviso contains matter which is really ‘adding to not merely qualifying that which goes before’.⁵

The variety of functions of *provided that* is illustrated by Driedger:

Sometimes it is subordinating, joining a dependent clause. Sometimes it is coordinating, joining two independent clauses; if the clauses are completely separate rules, it is supposed to mean *and*; if they are alternative, it is supposed to mean *or*; if one is a qualification of the other it is supposed to mean *but*; and if one is an exception to the other it is supposed to mean *except that*; and sometimes *provided*



that is used as a conjunctive adverb, the equivalent of *nevertheless*, *moreover*, or *furthermore* ... All too frequently, provisos are used to tack on additional words that are not grammatically capable of being joined.⁶

Is the phrase necessary?

Syntactically *provided that* is meaningless except when forming a conditional sentence such as, "I will come provided that you go". Although Fowler indicates that in these cases "it can never be wrong to write *if*".⁷

The way lawyers use the phrase is almost always syntactically incorrect. It is also usually confusing and ambiguous. The meaning is often hard to extract. First the reader must work out if the proviso limits or enlarges the main provision. Then the reader must see if it is a condition, a limitation, an exception, or just a longwinded way of saying "and".

Lazy drafters often use *provided that* to avoid working out exactly what they mean. Even in 1843 George Coode wrote:

wherever a matter is seen by the writer to be incapable of being directly expressed in connection with the rest of any clause, [the writer] thrusts it in with a proviso.⁸

Provided that also imposes a sentence structure that obscures the meaning of the clause. As Garner points out, a sentence that says "such and such is true provided that it is not true in these instances" surprises the reader, because important facts are held back until after the main clause is concluded".⁹ The reader is asked to study and decode the sentence, not to read it.

Many writers on legal drafting condemn its use. Coode called it "that bane of all correct composition".¹⁰ Thornton states "the case against the proviso is established ... by the ambiguity and uncertainty of the phrase".¹¹ But despite a century and a half of attack, *provided that* still appears in many legal documents.

In 1843 Coode said, "[a]t present the abuse of the formula is universal".¹² What was true then is still true. *Provided that* can always be replaced by other clearer, more precise words. As Garner writes, "[b]anning the phrase from legal writing would benefit us all, provided that we all knew how to fashion good conditional sentences".¹³

What are the alternatives?

Because *provided that* can mean so many different things, a plain language alternative depends on the context.

Where new material is being added, begin a new clause. If two independent clauses must be joined, use *and*. For a condition use *if*. Show alternatives by using subclauses joined by *or*. For an exception, use the words *except for*. The



word *however* also clearly signals that the main clause is about to be limited. The best rule for what to use instead of *provided that* is “say what you mean”.

Endnotes

- 1 EA Driedger *The Composition of Legislation* 2nd ed Dept of Justice, Ottawa Canada 1976 p93
- 2 this “rule” was abolished by Lord Brougham’s Act 13 & 14 Vic Ch XXI sII titled *An Act for shortening the language used in Acts of Parliament*
- 3 see note 1 Driedger p96
- 4 paraphrasing JR Nolan & JM Nolan-Haley (eds) *Black’s Law Dictionary* 6th ed West Publishing Co, St Paul Minnesota 1990 p1225
- 5 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 274-5 citing *R v Dibdin* (1910) P 57 p125; and *Rhondda UDC v Taff Vale Railway Co* (1909) AC 253 at 258. For an analysis of interpretation of provisos, see DC Pearce & RS Geddes *Statutory Interpretation in Australia* 3rd ed Butterworths, Sydney 1988 p95
- 6 see note 1 Driedger p96
- 7 HW Fowler *The King’s English* Oxford University Press, Oxford 1906 p23. Fowler also writes that “*provided* is a small district in the kingdom of *if*”
- 8 *On Legislative Expression* (1843) reprinted as Appendix 1 to Driedger, see note 1 Driedger p362
- 9 BA Garner *The Elements of Legal Style* Oxford University Press, New York 1991 p53
- 10 see note 8 *On Legislative Expression* p334
- 11 GC Thornton *Legislative Drafting* 3rd ed Butterworths, London 1987 p70. Reed Dickerson agrees: “Provisos should not be used, because, having been used indiscriminately to introduce conditions, exceptions, or merely additional material, they tend to be ambiguous” — from *Materials on Legal Drafting* West Publishing Co, St Paul Minnesota 1981 p194
- 12 see note 8 *On Legislative Expression* p360
- 13 BA Garner *The Elements of Legal Style* Oxford University Press, New York 1991 p54



Recognizance

Recognizance (sometimes spelled “recognisance”)¹ is often used in criminal law, mainly in setting bail and sentencing.² It therefore affects many people. But do they understand what it means?

Meaning and origin

In criminal law procedure *recognizance* has interlocking meanings. It means the agreement that an accused person enters into *and* the conditions of the agreement. For instance, the accused may agree to appear in court on a set date, or to keep the peace, or to pledge a sum of money as security for observing the conditions.

In a narrow sense *recognizance* is also used to refer only to the security (that is, it is “an acknowledgment of a debt owing to the Crown”) that becomes void if the “recognizor” obeys the condition.³ The idea of a *recognizance* as essentially a debt to the Crown is found in some English and Canadian cases.⁴ English and Australian cases also note the bond-like nature of a *recognizance*.⁵ However, a *recognizance* and a bond are not the same thing. A *recognizance* does not always involve money, whereas a bond does.⁶

Confusingly, the word is also used interchangeably to refer to the conditions and the money used to secure the performance of those conditions.

Origin

Recognizance has its origins in the Old French *requenoysance* from the Latin noun *recognitio*, which meant in classical times “an investigation, an examination or a review”, and its verb *recognosco*.⁷ By 1086 *recognosco* had come to mean “to acknowledge”, and by 1268 *recognitio* is found meaning “acknowledgment of debt”.⁸ The *Oxford English Dictionary* records the use of its modern meaning in Chaucer around 1386 with “[h]e was bounden in a reconyssaunce”.⁹

The word is used in NSW Acts such as the *Justices Act 1902*, *Fines & Forfeited Recognizances Act 1954*, and *Crimes Act 1900*, but is not defined.¹⁰ Nor is it defined in the *Interpretation Act 1987 (NSW)*.

Use in bail

It used to be that a person accused of a crime who was granted bail was asked to enter a *recognizance*. This *recognizance* was that he or she would agree to turn up to court and obey certain conditions in exchange for being released until the next court date. These conditions might include that the accused person or another person would pay money if the *recognizance* was breached.¹¹



When the NSW and Victorian *Bail Acts* were rewritten in the late 1970s, the term *recognizance* was replaced with the terms “bail undertaking” and “bail condition”.¹² One reason the NSW Act was rewritten was to “clearly and precisely [set] out these principles in simple language which can be readily understood by the lay [person]”.¹³ However in the *Justices Act 1902 (NSW)* the word *recognizance* still appears in the section dealing with people who break their bail conditions.¹⁴ In one section the word appears side by side with “bail undertaking”.¹⁵

Sentencing

A second use is that still found in sentencing according to sections 556A and 558 of the *Crimes Act 1900 (NSW)*. In section 556A, a person may be found to have committed the crime, but no conviction will be entered by the court as long as that person enters a *recognizance* agreeing, for example, to “be of good behaviour” or to forfeit money if the *recognizance* is breached. Section 558 allows the court to defer a sentence if the person enters a *recognizance*.

However, the word is found in both the section 556A and the section 558 forms that the offender has to sign: “and was thereafter duly ordered to be released upon entering into a recognizance with/without sureties in the sum abovementioned”.

The Commonwealth *Crimes Act 1914* in section 16F(2) requires the court to explain to the accused person the purpose and consequence of a “recognizance release order”. Section 20(2) defines a “conditional release” as one where the convicted person gives “security, with or without sureties, by recognizance or otherwise.”¹⁶ However, that Act, other Commonwealth Acts which use *recognizance*, and the *Acts Interpretation Act 1901 (Cth)* do not define it.¹⁷

Other uses

There are a number of other similar uses in statutes. Under section 102(1) *Justices Act 1902 (NSW)*, a person who appeals to the Supreme Court must “enter into a recognizance” to prosecute the appeal without delay, submit to the judgment of the court and pay any costs awarded by the court. The same Act gives justices power to “bind by recognizance” the prosecutor and witnesses for the prosecution and the defence to appear on a given day.¹⁸

In addition the NSW Supreme Court stated in *Carr v Werry* that a magistrate has a general power to require under *recognizance* any person, including a complainant or a witness, to keep the peace.¹⁹



Plain language alternative

Although the word has been replaced in the *Bail Act*, it is still used in much other legislation. It is a word that is not understood by the general public although it affects many of them, especially section 556A of the *Crimes Act*.

We support using words such as “agreement”,²⁰ “promise”,²¹ or “undertaking”. As a *recognizance* does not always involve money, it is not strictly a “bond”,²² so we do not recommend the word “bond”.

For bail, we recommend using the words “bail undertaking” and “bail condition”, as used by the *Bail Act*.²³

For a conditional release or a suspended sentence, the ideas should be clearly explained such as the offender’s agreement and any conditions of their release. It is also clear that the section 556A and section 558 forms need to be reworded and redesigned.

Endnotes

- 1 eg “recognisance” is used in *Crimes Regulations 1990 (Cth)* sch 3 forms 10-12; *Rules of the ACT Supreme Court* O80 r15.01; the *NSW Criminal Appeal Rules* use “s” in r43 and r45, but “z” in r47
- 2 ER Hardy Ivamy *Mozley & Whiteley’s Law Dictionary* 10th ed Butterworth, London 1988 p383; R Bird *Osborn’s Law Dictionary* 7th ed Sweet & Maxwell, London 1987 p279; EA Martin (ed) *A Concise Dictionary of Law* 2nd ed Oxford University Press, Oxford 1990 p43
- 3 AS Oppe *Wharton’s Law Lexicon* 14th ed Stevens & Sons, London 1939 p845-6
- 4 *Re Nottingham Corporation* [1897] 2 QB 502, Ridley J; *R v Dover* 1 Cr M & R 733 (1835) 149 ER 1273;
JS James *Stroud’s Judicial Dictionary of Words & Phrases* 5th ed Sweet & Maxwell, London 1986 vol 4 p2187-8; *R v Barnes* (1978) 20 SASR 1 p11; see also *Rex v Giles* [1930] 3 DLR 273 cited in G Sanagan (ed) see *The Encyclopedia of Words and Phrases: Legal Maxims* Canada 3rd ed Richard de Boos Ltd, Toronto 1825-1978 vol 2 p23-4
- 5 *R v Southampton JJ ex p Green* [1976] 1 QB 11 (Ct of App) *recognizance* is in the nature of a bond; *R v Barnes* (1978) 20 SASR 1 p7 “recognizance is closely akin to a bond”
- 6 see *Halsbury’s Laws of England* Butterworths, London 1975 vol 12 para 1385-87 requiring money for a bond
- 7 Lewis & Short *A Latin Dictionary* Clarendon Press, Oxford 1890 p1534-5
- 8 RE Latham & British Academy Committee (eds) *Revised Medieval Latin Word List from British and Irish Sources* Oxford University Press, Oxford 1965 p394
- 9 *Oxford English Dictionary* 1st ed 1933 Clarendon Press, Oxford vol 8 note 1 p252
- 10 see *Crimes Act 1900* note 18
- 11 see note 6 *Halsbury’s* vol 29 para 349; *Lansbury v Riley* [1914] 3 KB 229
- 12 *Bail Act 1978 (NSW)* s34, 36; *Victoria Bail Act 1977*, s3; see RG Fox *Victorian Criminal Procedure* 5th ed Monash Law Book Co-op, Monash University, Victoria 1988 p58
- 13 F Walker, Attorney-General & Minister for Justice, 1st Reading Speech, Parliamentary Debates (Hansard) NSW Legislative Assembly, 13 December 1978 AGPS, Sydney p1843-8



- 14 s96, 96A, 97
- 15 s97
- 16 the *Family Law Act 1975 (Cth)* also requires an explanation of the term in s112AF(5), as does the *Bankruptcy Act 1966 (Cth)* s153(2)(a)(iii)
- 17 *Bankruptcy Act 1966 (Cth)* s153(2)(a)(ii) refers to a “bail bond”; *Crimes Act 1914 (Cth)* s16 defines “recognizance release order” as an order under para s20(1)(b); *Transfer of Prisoners Act 1983 (Cth)* s3 defines a “relevant security” as “a security given by... recognizance or otherwise that the person will comply with conditions relating to his or her behaviour”
- 18 s38; for other uses in NSW statutes, see *Justices Act* s50(1), (1A), cf s50(2); s96-7, 102(3), (4), 125A(2)-(2B); *Fines & Forfeited Recognizances Act* eg s4, 4A, s6(1), (1A); *Crimes Act* s547, s432(2), s554(2), s556B
- 19 *Carr v Werry* [1979] 1 NSWLR 144; *Sheldon v Bromfield JJ* [1964] 2 QB 573. Magistrates in England have a power to require *recognizances* for defendants in non-criminal licencing and family proceedings; see note 6 Halsbury’s vol 29 para 350
- 20 M Cutts *Making Sense of English in the Law* Chambers Publishers, Edinburgh 1992 p91
- 21 J Bowen *The Macquarie Easy Guide to Australian Law* The Macquarie Library, NSW 1987 p846
- 22 see note 6 Halsbury’s vol 12 para 1385-87 — bonds must be for “payment of a certain sum of money”; eg JR Nolan & JM Nolan-Haley (eds) *Black’s Law Dictionary* 6th ed West Publishing, St Paul Minnesota 1990 p1271
- 23 Law Reform Commission of Victoria *Review of the Bail Act 1977*, Report no 50 LRCV, Melbourne October 1992



Rest, residue and remainder

In wills, the triplet *rest, residue and remainder* forms a ritual utterance.¹ Using three words invites ordinary readers to think there are three meanings, but, as Mellinkoff says, “each of these words is a French way of referring to a leftover”.²

The phrase has its origins in the common law fashion of joining synonyms, a relic of the translation from Law French into English.³ It endures through its “appealing rhythm”.⁴ Other reasons include “its rhetorical weight and its alliteration”⁵ as well as a lawyer’s tendency to seek safety in verbosity.

Even some of the formbooks which keep it alive say that it is not necessary,⁶ and it has never been a standard of technical precision.⁷

Legal meaning

If you are left the *rest, residue and remainder* of a testator’s property in a will, you receive what remains after giving gifts and paying debts. This includes property the testator did not give away, or was not successful in trying to give away.

Of the legal dictionaries, only *Strouds* refers to “rest” on its own.⁸ It has no technical meaning.

“Residue” appears in legal dictionaries in forms such as “residuary estate”, “residuary legatee”, and “residuary devisee”.⁹ *Black’s Law Dictionary* defines the “residuary estate” as “the gross estate less all charges, debts, costs and all other legacies”.¹⁰

Generally, “remainder” is used in a non-technical sense as in “left over” or “remaining”. It is also used in law to describe another, particular, type of leftover, a future estate. In this sense it refers to a future interest in land, as in “I give Blackacre to A for life, remainder to B in fee simple”.¹¹

But as *Black’s* sums up, “in wills, the phrase *rest, residue and remainder* is usually and ordinarily understood as meaning all that part of the estate which is left after all of the other provisions of the will have been satisfied”.¹²

Older cases suggest the words may have had distinct meanings. In 1775, *Hogan v Jackson*¹³ held that “remainder” referred to real estate, and “residue” to personal estate. However, more recent cases overwhelmingly treat the words as synonymous.¹⁴

“Residuary estate” is used to cover all types of property, real and personal.¹⁵ In *Re Mason, Rigby J* said “since s28 of the *Wills Act 1837 (UK)* [enacted in NSW



as section 24 *WPAA 1898*], “residue” refers to all gifts, whether interests in land or personal property”. He continued:

and it was not by virtue of any special merit in the word ‘residue’ ... Other words of the same purport and effect would have had the same result ... the word ‘rest’ for instance, or the word ‘remainder’, and also the word ‘other’.¹⁶

Further cases have held that “all the rest”¹⁷ and “the rest and residue”¹⁸ include land even if used with words associated with personal property.

Ordinary meaning

In ordinary English, the three words mean the same thing.

The ordinary meaning of “rest” can be something left or remaining.¹⁹ Its use in this phrase derives from late Middle English *reste*, which comes from the French *restere*.²⁰ This clashes with the English “rest” as in “take a rest”.

“Residue” means “that which remains after a part is taken ... remainder; rest”.²¹ “Residue” came into Middle English from the French *residu*, which came from the Latin *residuum* (defined as “the residue, remainder, or rest of something”).²² It also has a specific meaning in chemistry.²³

“Remainder” means “that which is left”, and derives from the late Middle English word *remaindre*, taken from Anglo French, which comes from the Latin *remanere*.²⁴

Use an alternative

As used in the triplet, the words are synonymous in their legal and ordinary meaning. The words have no technical meaning. Yet the repetition means that ordinary readers “strain to find the difference”²⁵ and offers lawyers the opportunity to argue that special senses were intended.²⁶ We recommend that you do not use this synonym chain.²⁷

Alternatives are to choose one of the three, or to use another phrase.

Any one of the three words would be suitable as a plain language alternative. However, as we have seen, “remainder” has a technical meaning in the context of future interests, and there is a risk that “remainder” may be used in its technical sense in another part of the will. “Residue” may not be as readily understood by the ordinary reader.²⁸ Of the three, “rest” is simpler and more easily understood.²⁹

We suggest using a plain, clear alternative such as “all other property”,³⁰ or “all remaining property”, or “the balance of my property”,³¹ or “all the rest of my property”, or even “all property left over”.



Endnotes

- 1 see BA Garner *A Dictionary of Modern Legal Usage* Oxford University Press, New York 1987 p199 for other examples of ritual language
- 2 D Mellinkoff *The Language of the Law* Little Brown & Co, Boston 1963 p360
- 3 Law Reform Commission of Victoria *Report No 9: Plain English and the Law* Government Printer, Melbourne 1987 p13-5
- 4 see note 2 Mellinkoff p360
- 5 see note 1 Garner p198
- 6 see note 2 Mellinkoff p361 quoting formbooks in footnote 626 (eg *Am Jur Legal Forms* 1955 p383,389 Nichols *Encyclopedia of Legal Forms* 1936 p549). In Australia, see F Hutley & MW Inglis *Australian Wills Precedents* 3rd ed 1980 Butterworths, Sydney p79-83
- 7 see note 2 Mellinkoff p361
- 8 JS James *Stroud's Judicial Dictionary* 5th ed 1986 Sweet & Maxwell, London 1986 vol 4 P-R p2271
- 9 see R Bird *Osborn's Concise Law Dictionary* 7th ed Sweet & Maxwell, London 1983 p289
- 10 JR Nolan & JM Nolan-Haley (eds) *Black's Law Dictionary* 6th ed 1990 West Publishing Co, St Paul Minnesota 1990 p1310
- 11 see *The CCH Macquarie Concise Dictionary of Modern Law* Business ed CCH Australia 1988 p114
- 12 see note 10 *Black's* p1292
- 13 *Hogan v Jackson* (1775) 1 Cowp 308 98 ER 1096
- 14 eg *Guthrie's Executor v Guthrie* [1945] SC 138 p142-3 where remainder was not limited to land
- 15 *Re Beverly: Watson v Watson* [1901] 1 Ch 681 at 687, Buckley J: "residuary estate" in s4(1) *Land Transfer Act 1897 (UK)* referred to both personalty and realty
- 16 *Re Mason* [1901] 1 Ch 619 at 625; *Murray v Wife & AI* (1706) 24 Pr Ch 264; 24 ER 127 supports the argument that a devise of "residue" could pass the fee simple even before then
- 17 *Attree v Attree* (1871) LR 11 Eq 280; *Dobson v Bowness* (1868) LR 6 Eq 404
- 18 *Smyth v Smyth* (1878) 8 ChD 561. The judgment refers to "rest and residue" but the will reads "rest, residue ..."
- 19 GA Wilkes & WA Krebs *Collins English Dictionary* 3rd Aust ed Harper Collins Publishers, Sydney 1991 p1320
- 20 *The Macquarie Dictionary* 2nd rev ed The Macquarie Library, Sydney 1981 p1450
- 21 see note 20 *Macquarie Dictionary*
- 22 see note 20 *Macquarie Dictionary*
- 23 see note 20 *Macquarie Dictionary* p1447; see also note 1 Garner p479
- 24 see note 20 *Macquarie Dictionary* p1437
- 25 see note 1 Garner p197-9
- 26 D Mellinkoff *Legal Writing: Sense and Nonsense* West Publishing Co, St Paul Minnesota 1982 p4-5
- 27 see note 26 Mellinkoff
- 28 *Hutley's Wills Precedents* 4th ed Butterworths, London 1989 p199
- 29 see *Re Mason* [1901] 1 Ch 619 at 625; *Dobson v Bowness* (1868) LR 6 Eq 404
- 30 see note 2 Mellinkoff p362; note 29 Mellinkoff p4-5; *Ferguson v Ferguson* (1913) 13 SR 241



31 M Asprey suggests “balance” in *Plain Language for Lawyers* The Federation Press, Sydney 1991 p161; also *Re will of Donaldson* (1921) 24 WALR 67



Right, title and interest

Introduction

The phrase *right, title and interest*, is loved by conveyancers. But is there any legal reason it should be used? At least one leading legal writer, Dick, believes that the phrase is “useless prolixity” and “should be scrapped”.¹ This article argues that the word “interest” alone is less legalistic, and just as accurate as all three.

Use in legal language

The use of *right, title and interest* is found as early as 1450 in the Rolls of Parliament (UK): “noon of your Liege peple hafuyng interest, right or title, of or in ony of the premises”.

Until the *Conveyancing Act 1881 (UK)*, the phrase was commonly used in “all estate” clauses to ensure a full conveyance despite deficiencies which might be found in the words of the conveyance itself. The phrase can still be found today in conveyances, mortgages, agreements for sale, and in some legislation.²

The use of these words as a composite phrase may be explained from the way the English language developed. After the Norman Conquest in 1066, English was exposed to other linguistic influences, notably Latin and French. In fact, Latin and French, in that order, were used as the languages of English law. By the time Parliament passed an Act in 1731 banning lawyers from using these two languages, many foreign words had already been adopted into legal English.³

According to Mellinkoff, this was the reason for the English habit of using synonyms to form phrases. This “may have once been rationalised as necessary translation [but it] soon became a fixed style”.⁴

Mellinkoff also believes that the English tradition of rhythm, synonym, (and alliteration) helped preserve many legal phrases. Unless *right, title and interest* has a specific legal meaning, it is an irresistible conclusion that the phrase exists because of the English tradition of synonym and rhyme.

Does “right, title and interest” have a precise legal meaning?

Right

Holland’s *Jurisprudence* says that a “right” is “a capacity residing in one man of controlling with the assent and assistance of the State, the actions of others”.⁵ However, in “narrower signification”, right means “an interest or title in property”.⁶



Title

The modern concept of “title” is best known in the context of the Torrens system of title by registration.⁷ However, the use of the word “title” in the phrase *right, title and interest* is redundant. A person cannot have title to property without first having an interest in it.⁸

Interest

Lord Coke (1552-1634) discussed the legal meaning of all three words in the *Institutes of the Law of England*.⁹ About “interest” Coke said, “interesse ... in legall understanding ... extendeth to estates, rights and titles, that a man hath of, in, to, or out of lands; for he is truly said to have an interest in them”.

Sweet’s Dictionary of English Law (1882) says “[i]nterest as applied to property is used in a wide sense to include estates (legal and equitable) ... and generally every right in respect of property”.¹⁰

Use “interest”

These passages indicate that the phrase *right, title and interest* is tautologous. Either “right” or “interest” can be used in place of the composite phrase without loss of legal precision or effect. This view is supported by case law: the two words are of “equally extensive import”;¹¹ “interest” is a word of “wide import”¹² and is “capable of different meanings according to the context ... or the subject-matter”.¹³

The preferable word is “interest”, because “right” is often used in the context of a person’s “legal rights” (for example, a “right” of privacy or a “right” to a fair trial). In contrast, apart from the distinct concept of interest on a loan, “interest” is a term that generally connotes having right or title to property.¹⁴

Endnotes

- 1 RC Dick *Legal Drafting* 2nd ed Carswell, Toronto 1985 p127
- 2 eg s26 *Conveyancing and Law of Property Act 1898 (NSW)*; s63 *Conveyancing Act 1919 (NSW)*; s63 *Law of Property Act 1925 (UK)*; sch 1, cl 15.2.2 *Defence Service Homes Amendment Act 1988 (Cth)*
- 3 4 Geo II Ch26
- 4 D Mellinkoff *The Language of the Law* Little Brown & Co, Boston 1963 p120
- 5 T E Holland *Elements of Jurisprudence* 1st ed 1880; 12th ed Clarendon Press, Oxford 1916 p83; cited in *Bailey v Uniting Church in Australia Property Trust (Qld)* [1984] 1 Qd R 42 p58, McPherson J. See also CA Sweet *A Dictionary of English Law* H Sweet, London 1882; J Burke *Jowitt’s Dictionary of English Law* 2nd ed Sweet & Maxwell 1977 vol 2 L-Z p1581; JR Nolan & JM Nolan-Haley *Black’s Law Dictionary* 6th ed West Publishing Co, St Paul Minnesota 1990 p1324
- 6 *Black’s* note 5
- 7 *Breskvar v Wall* (1971) 126 CLR 376 p385-6



- 8 see example *Minister for National Revenue v W T Shaw Estate* [1971] Can Tax Cas 15 p22, Jackett P
- 9 otherwise known as *A Commentary Upon Littleton* 1st ed 1628; 19th ed 1832 Garland Publishing, New York repr 1979 vol 2
- 10 quoted in *Craig v Federal Commissioner of Taxation* (1945) 70 CLR 441 p454, McTiernan J
- 11 *Bailey* note 5 p58
- 12 *Craig* note 9 p457
- 13 *Attorney-General v Heywood* (1887) 19 QBD 326 p331, Wills J
- 14 *Oxford English Dictionary* 1st ed 1933 Clarendon Press, Oxford repr 1970 vol 5 H-K p393



Said

Lawyers often use archaic words that they think make their prose read like the King James Bible. They persist in using words from Old and Middle English long after other writers have abandoned them. Amongst these redundant words are *said*, *aforesaid*, *aforementioned* and *abovementioned*. English speakers have used *said* to refer to previously mentioned things since at least 1300,¹ and the use of *aforesaid* dates back to at least 1418². These words are now either unnecessary or imprecise and burden the reader with verbiage. Lawyers should resist the temptation to use them because such words sacrifice clarity for gravity.

The basic problem

Said is either unnecessary or imprecise. In America, judges have labelled *aforesaid* a “sheer redundance”.³ If *said* can refer to only one thing, then it is unnecessary.⁴ The unnecessary use of *said* annoys readers and makes the writer look pompous, without increasing precision.

A more serious problem occurs when *said* can refer to more than one thing. The resulting ambiguity invites litigation. Coke warned writers that it was not always clear what *aforesaid* referred to⁵ and many later commentators have agreed with him.⁶ Judges have no clear rule to help them interpret the meaning of *said*. Although judges may wisely resolve an ambiguity created by the use of *said*, litigants may find it hard to predict how judges will exercise their discretion.

Lawyers risk falling into the habit of writing *said* as a reflex action. This is a dangerous habit because they may use *said* to refer to something that is not mentioned earlier in the document. In early times, this led to catastrophe.⁷ In *Campbell v Bouskell* a testator referred to his “aforesaid nephews and nieces” but did not previously mention any of them.⁸ The judge was forced to guess at the testator’s intentions and decided that all nephews and nieces should be included in the will.

The “rule”

Some judges and law dictionaries have claimed that *said* or *aforesaid* always refer to their “immediate” or “last antecedent”.⁹ However, judges all over the common law world disregard this “rule” when they think that they can divine the writer’s “true” intentions.

In Australia in *Inglis Electrix Pty Ltd v Healing Pty Ltd*¹⁰ Asprey J thought that a literal interpretation of *aforesaid* would produce an absurdity.¹¹ He rejected a



literal interpretation and drew his own conclusions based on “the intention of the parties...collected from the whole instrument”.¹² Asprey J relied on the High Court’s decision in *Metropolitan Gas Co v Federated Gas Employees’ Union*.¹³ In that case, Isaacs and Rich JJ emphasised that there were no hard “rules” for interpreting specific words — “it is a received canon of interpretation that every passage in a document must be read, not as if it were entirely divorced from its context, but as part of the whole instrument”.¹⁴

English judges have also abandoned the “rule” whenever they felt that applying it would violate the true intentions of the drafter.¹⁵ For example in *Shepherd’s Trustees v Shepherd*¹⁶ the judge acknowledged that the “rule” was a general principle but “[w]hat matters is that we should follow, in construing the document, the ordinary natural sequence of thought which the testatrix followed in writing it and which the reader follows automatically as he reads it currently”.¹⁷ The “ordinary natural sequence of thought” is a very nebulous guideline.

In the American case of *Ferguson v Morgan*¹⁸ one judge insisted on obeying the “rule” that *said* referred strictly to the immediate antecedent. However, the other four judges thought that applying this “rule” would violate the testatrix’s intentions. They concluded that *said* referred to a different word.

Alternatives

In most cases, a definite article like “the” can replace *said* with no loss of precision. If you must refer definitely to something, you have several options. If the antecedent is short, you can simply repeat it. If the antecedent is long and occurs frequently, you can define an abbreviated substitute for it at the start of the document. For example, “the defendant’s 1984 Toyota Corolla sedan, license number DYH 362 (called ‘the Toyota’ in this document)”.¹⁹

Endnotes

- 1 *Vol X The Oxford English Dictionary* Clarendon, Oxford University Press, 1970 p36
- 2 *Vol 1 A-B The Oxford English Dictionary* Clarendon, Oxford University Press, 1970 p165
Oxford English Dictionary
- 3 *Estate of Dubois* 94 Cal App 2d 838, 842 (1949)
- 4 see JK Aitken *Piesse The Elements of Drafting* 8th ed London, The Law Book Company Ltd 1991 p56
- 5 Coke, Sir Edward *The First Part of the Institutes of the Laws of England, or a Commentary upon Littleton* 10th ed. London: William Rawlins and Samuel Roycroft, 1703, f. 20b and f. 46b
- 6 eg D Mellinkoff *The Language of the Law* Boston, Little Brown and Company, 1990 p318, GC Thornton *Legislative Drafting* London, Butterworths 1987 p80
- 7 eg *King v Fearnley* 99 Eng Rep. 1115, at 1117 (KB 1786)
- 8 54 Eng Rep 127,128,129 (Rolls Ct 1859)



- 9 eg *Black's Law Dictionary* 6th ed St Paul, Minnesota, West Publishing Co. 1990 pp 61,
1336 *Peake v Screech* 7 QB 610 per Denman CJ, *Esdaille v Maclean* 16 LJ Ex 71,
10 *Wigmore v Wigmore* [1872] WN 93, *Hall v Warren* 9 HL Ca 420, *R v Albert* 5 QB 37
11 [1965] NSW 1652
12 at 1655
13 (1925) 35 CLR 449
14 at p455
15 eg in *Giles v Giles* (1837) 8 Sim 360 at 364 Shadwell V-C was construing a will that
referred to "said" children, but only one child of several was referred to by name. He set
aside a literal reading of "said" because it would conflict with the testator's intentions. In
Dickason v Foster (1861) 4 LT 628 CA, per Lord Westbury LC at 630 was construing a
will and thought that it was not clear whether "said children" referred to three or four
children previously mentioned. He concluded that "I think that the words are sufficiently
clear and have reference to the four children". See also *R v Countesthorpe* 2 B & Ad 487,
and *Healy v Healy* Ir Rep 9 Ez 418
16 1945 SC 60
17 per Lord President (Normand) at 65
18 220 Miss. 266, 269 (1954)



Signed, sealed and delivered

Signed, sealed and delivered is a phrase with a good ring to it, but is it really necessary?

The meaning?

For most documents, *signed, sealed and delivered* means no more than “signed”. When used for deeds it has a more precise meaning. In New South Wales the formal requirements of a deed include being signed, sealed, delivered and attested.¹ But the words *signed, sealed and delivered* do not necessarily mean what they seem.

Signed

Oddly enough, under common law the phrase *signed, sealed and delivered* did not necessarily mean a deed was signed, but it did have to be sealed and delivered (and in writing).

A deed may be good, albeit the party that doth seal it doth never set his name or his mark to it, so as it be duly sealed and delivered.²

Generally a signature is the handwritten name of the person executing the document, given with the intention of authenticating the document as that of, or binding on, the person signing it.

However, when common law was developing, because so many people could not write or sign their names, any individual mark could be used as a signature. Initials, a rubber stamp, even a printed name on a piece of paper, could be used.³ A person could sign a document by proxy — that is, authorising another person to sign his or her name.⁴ Whatever the format, the signature gave authenticity to the document.

Today, legislation such as section 38 *Conveyancing Act 1919 (NSW)* makes signing a requirement. But section 38(1B) also allows a person to “sign” by affixing his or her mark, or by authorising another person to do so. The maker’s rubber stamp may also be used.⁵

Sealed

Though early courts did not insist on a person’s signature on a document, they did insist on sealing for authentication. Melted wax or red wafers (thin disks of flour mixed with gum or gelatine) were used to seal the document so that no one could read it without breaking the seal. To make tampering more difficult, the person could impress the wax or wafer with a metal die or perhaps a fingerprint.⁶ However, even in 1871 actual sealing was not vital if other



evidence existed as to the intention of the parties.⁷

Today a deed must still be “sealed” but the term is interpreted liberally. Section 38(3) of the *Conveyancing Act* says that as long as a document is called a deed, or is expressed to be sealed, and is signed and attested according to the legislation, it is “deemed” to be sealed whether it actually is or not. It may be sufficient that the document is plainly a deed on its face, even without using the word “deed”.⁸

Delivered

The law concerning delivery also dates from early times. “As a deed may be delivered to the partie without words, so may a deed be delivered by words without any act of deliverie.”⁹

Unlike contracts for sale of land which need to be exchanged, “delivery” in this sense does not mean “handed over” to the other side. It means delivery in the legal sense of “an act done so as to evince an intention to be bound”.¹⁰ That is, the maker only needs to show an intention to be bound by the document. “It is also not necessary that the other side formally accept or take away the document to make delivery complete.”¹¹

Today a deed needs to be “delivered”¹² and without other evidence, takes effect from the time of delivery.¹³ But, as held in *Xenos v Wickham* [1886], no technical form of words or particular acts are necessary for delivery. What matters is that the person executing it intends that it be executed as a document binding him or her. This is a question of fact.¹⁴

Using the word “delivery” today is unclear because it suggests the need to deliver or physically transfer the document from one person to another. Instead the document only needs to show the intention to be bound.

A plainer alternative

While *signed, sealed and delivered* technically describes three of the four requirements of a deed, the phrase is unclear and misleading to people who do not know the technicalities of satisfying those requirements.

We suggest a more useful alternative is one clearly conveying that the person signing the deed intends to be bound by it. A signature (or mark) authenticates the document, and the word “signed” at the end of a document can show who must sign and where. If a company is making the deed, then use the word “made”, followed by the normal formal requirements of the company seal and so on. Stating it is a deed can show the necessary intention. Specifying the date on the document can show when the deed becomes binding.

We suggest using “signed (or made) by [name] as a deed and taking effect on [date]”.



Endnotes

- 1 *Conveyancing Act 1919 (NSW)* s38. See also *Manton & Parabolic Pty Ltd* [1985] 2 NSWLR 361 p368-9
- 2 JS James *Stroud's Judicial Dictionary of Words and Phrases* 5th ed Sweet & Maxwell, London 1986 vol 5 S-Z p2432 citing *Sheppard's Touchstone of Common Assurances* R Preston ed 7th ed 1820 J & WT Clarke, London p60-1
- 3 DM Walker *The Oxford Companion to Law* Clarendon Press, Oxford 1980 p1143
- 4 eg *London County Council v Vitamins Ltd* [1955] 2 All ER 229 p231
- 5 *Goodman v Eban Ltd* [1954] 1 QB 550
- 6 eg *Stromdale & Ball Ltd v Burden* [1952] Ch 223
- 7 *Re Sandilands* (1871) LR 6CP 411
- 8 *Manton & Parabolic Pty Ltd* [1985] 2 NSWLR 361 p368-9
- 9 quoted in *Stroud's* note 2
- 10 *Vincent v Premo Enterprises* [1969] 2 All ER 941 p944
- 11 *Xenos v Wickham* [1866] LR 2 HL 296 p312
- 12 *Manton* note 8. See also *Beesley v Hallwood Estates Ltd* [1960] 2 All ER 314
- 13 *Federal Commissioner of Taxation v Taylor* (1929) 42 CLR 80 p85
- 14 *Xenos* note 11



Time is of the essence

The formula *time is of the essence* is legalese. It confuses and alienates the non-lawyer. Yet lawyers persist in using this formula like a mystical incantation, expecting that it will make their contracts go like clockwork. But is this formula legally necessary or is there a plain language alternative that clients might actually understand?

Meaning

A provision in a contract is said to be *of the essence*:

when compliance with it was known at the time of entering into the contract to be of such importance that performance of the contract without strict compliance with it may be of no avail.¹

Therefore when *time is of the essence*, it means that time is critical.²

The effect of making time critical is that if one party fails to comply strictly with the time clause, the other has the right to sue for damages (as it normally does) *and* the right to terminate the contract.³ That is, provisions about time are conditions rather than warranties. Curiously, as Robinson points out, if terms in contracts are normally classified as conditions or warranties, why do we create a third class and call it an essence?⁴

Is it necessary?

Some lawyers believe that you must include *time is of the essence* in a contract so that a party is automatically entitled to terminate when the other has breached the time condition. It is almost as if the phrase alone had some legal magic. This may have been true in the past when the courts interpreted the presence of the provision as “compelling and leav[ing] the court of equity with no option but to give effect to it”.⁵ In one New Zealand case, the Court even allowed a party to terminate the contract when the time clause was breached by only six minutes!⁶

However, as Dillon LJ stated, “[t]here is no magic formula which alone achieves the result of making time of the essence of a contract...[W]hat is necessary is something which shows that the time limit is obligatory and means what it says.”⁷ Many cases have made time an essential term without using the formula. For example, the courts have held that a clause stating “within” a certain time “but not otherwise” is sufficient to make time critical to a contract.⁸



Is it sufficient?

Today the mere presence of the formula *time is of the essence* may not even be sufficient to make a time an essential term. This is because the Courts now tend to look at clauses in the context of other contractual terms and surrounding circumstances. For example, in *Citicorp Australia Ltd v Hendry* the Court held that a blanket *time is of the essence* clause did not make all the time obligations critical, as some conditions were to be performed within a specific time and others a reasonable time.⁹ Even if the Court finds that a *time is of the essence* clause has made time critical, the Court can still grant specific performance in special circumstances. This is known as “relief against forfeiture”.¹⁰

To make sure that the contract is legally effective, it would be safer to state the consequence of breaching a time clause. For example, the Courts have held that a notice to perform is not valid if it merely states that *time is of the essence*.¹¹ The notice must tell the other party that if they do not perform by a certain date, the giver may terminate the contract.¹²

Plain language alternative

Since the formula is not necessary (or even sufficient at times) why not try explaining the consequences of breaching the time clause in plain language instead? For example: “We agree to complete the contract on 1 December 1995. If either of us cannot complete on that date, then the other may end the contract immediately”. If the contract has a clause (clause x) dealing with default, the drafter may add “clause x will then apply”.

Although slightly longer, this approach ensures no misunderstanding about the consequences of a breach and it clearly tells the parties what their rights are.

Endnotes

- 1 *Jowitt's Dictionary of English Law* 2nd ed Sweet & Maxwell, London 1977 vol 1 A-K p 722. *The Oxford English Dictionary* Clarendon Press, Oxford 1969 vol III at p 295 defines essence as “the most important indispensable quality or constituent element of anything”
- 2 S Berwin *Pocket Lawyer* Blackwell Economist, Oxford 1987 p216
- 3 JC Starke, MP Ellinghaus & NC Seddon *Cheshire and Fifoot's Law of Contract* Butterworths, Australia 1992 p 741. Although at common law this was always the rule, in equity *time is of the essence* only when it is unequivocally agreed upon or may reasonably be implied in the circumstances. The equitable rule now prevails. See NSW: Conveyancing Act 1919 s 13; ACT: Law of Property (Miscellaneous Provisions) Act 1958 s 4; Qld: Property Law Act 1974-78 s 62; SA: Law of Property Act 1936-75 s 16; Tas: Supreme Court Civil Procedure Act 1932 s 11(7); WA: Property Law Act 1969 s 21; NT: Supreme Court Act 1878 (SA) s 6 VII
- 4 SR Robinson *Drafting: Its Application to Conveyancing and Commercial Contracts* Butterworths, Australia 1973 at 4



- 5 *Mehmet v Benson* (1965) 113 CLR 295 at 303 per Barwick CJ; *Hoad v Swan* (1920) 28 CLR 258 at 263; *Tasker v Dodd* [1922] NZLR 994 at 997-8
- 6 *Karangahape Road International Village Ltd v Holloway* (1989) 1 NZLR 83
- 7 *Touche Ross & Co v Secretary of State for Environment* (1983) 46 P & CR 187 at 190 per Dillon LJ (Griffiths and Lawton LJJ concurring); also see *Solomons v Halloran* (1906) 7 SR(NSW) 32 at 42 per Street J
- 8 e.g. *Drebbond v Horsham District Council* (1978) 37 P & CR 237; also *Harold Wood Brick Co Ltd v Ferris* [1935] 2 KB 198: “shall actually be completed not later than” a certain date; *Perry v Sherlock* (1888) 14 VLR 492 — “on or before” a certain date
- 9 (1985) 4 NSWLR 1 at 28 per Mahoney J
- 10 *Legione v Hately* (1983) 152 CLR 406; *Stern v McArthur* (1988) 165 CLR 489
- 11 Where time was not originally critical, it may become critical if one party is guilty of delay and the other gives notice requiring performance (a notice to perform) within a specified reasonable time
- 12 *O’Brien v Dawson* (1941) SR (NSW) 295; 21 June 1972); *Howard Developers Pty Ltd v M Makers & Co Pty Ltd*(1972) 4 BPR 9460



Transfer and assign

The phrase *transfer and assign* is found in legislation¹ and private legal documents. Can lawyers justify using two words when one is enough? As Martineau puts it, using expressions like *transfer and assign* force a court “to choose between ignoring a word in the legislation or rule, or giving different meanings to two or more words that were intended to be synonyms or which were used without thought”.² To say *transfer and assign* is to tautologise and “although history explains how these redundant phrases crept into legal documents, it does not justify their continued use in legislation and rules”.³

History

The verb “assign” derives from the Old French *assigner*.⁴ It first appeared in English in the 13th century.⁵ “Transfer” derives from the Latin *transferre*.⁶ Using both words together occurred at least as early as 1693⁷ and may have begun in mediaeval times when both Latin and “Law French” terms were used by English lawyers. This was done more to help readers than because of any difference in meaning.⁸

Meaning

Most legal dictionaries give “assign” a broad meaning, although some suggest “assign” refers to transfers of personal property only.⁹ However the *Conveyancing Act 1919* NSW implies that real property can be assigned. Section 6(b) refers to covenants against “*assigning*, under-letting, parting with possession or disposing of the *land* leased”. “Assign” may also be limited to transfers of the whole of an interest. “In strict legal phraseology, an instrument does not operate as an assignment unless the grantor parts with the whole of his (sic) interest, but in common parlance it is otherwise.”¹⁰

Legal dictionaries define “transfer” broadly,¹¹ and so do the courts. In *Gathercole v Smith*¹² one judge said “[t]he word ‘transferable’ ... is of the widest possible import, and includes every means by which property may be passed from one person to another”.¹³ Another said that “*transfer* is one of the widest terms that can be used”.¹⁴ The Canadian view was stated in *Fasken v Minister of National Revenue*: “[t]he word *transfer* is not a term of art and has not a technical meaning”.¹⁵ In the US: “[t]he word [transfer] is one of general meaning and may include the act of giving property by will”.¹⁶

Legal dictionaries regard the words as synonyms. For example *Osborne’s Concise Legal Dictionary* defines “assign” as “to *transfer* property”.¹⁷ Blackstone defined “assign” as “to make or set over to another, to *transfer*, or to

assign some interest therein”.¹⁸ Garner believes “assign” is “frequently merely an inflated synonym for transfer”¹⁹ and Mellinkoff regards it as being a technical word but not a term of art.²⁰ According to *Halsbury’s Laws of England* an assignment occurs when liabilities or rights are *transferred* to another”.²¹

Most case law also suggests that “assign” and “transfer” are synonyms. In *Crusoe d Blecove v Bugby* the court said “assign, transfer, and set over are mere words of assignment”.²² In *William Brandt’s Sons & Co v Dunlop Rubber Co*²³ Lord Macnaghten said: “[a]n equitable assignment does not always take the form of an assignment, the language is immaterial if the meaning is plain”.²⁴ In Australia in *ex parte Healey re Greene Street J* acknowledged that “assign” and “transfer” can be synonyms.²⁵ He observed: “[t]he word ‘transfer’ is not inapt in its association with ‘assignment’ and is the word used in the *Real Property Act* when dealing with assignment of leases under that Act”.²⁶

Plain language

Using *transfer* and *assign* is unnecessary. When clients aim to part with their entire interest, “assign” is enough. Yet though Mellinkoff believes using the word “assign” is “fairly common and probably not misleading”, most ordinary people would probably not agree.²⁷ We recommend using “transfer” as a plain language alternative. “Transfer” has been given a wide interpretation by the courts. Or else be more precise. If your clients want to give something, use “give”, and if they want to sell it, use “sell”.

Endnotes

- 1 eg *Landlord and Tenant (Amendment Act) 1948-1958* NSW s62(g); *The Stamp Act 1894* s49C(2)
- 2 RJ Martineau *Drafting Legislation and Rules in Plain English* West Publishing, Minnesota 1991 p89
- 3 see note 2 RJ Martineau
- 4 *The Oxford English Dictionary Vol I* Clarendon Press, Oxford 1969 p509
- 5 see note 4 *Oxford Dictionary* p509
- 6 *The Oxford English Dictionary Vol XI* Clarendon Press, Oxford 1969 p257
- 7 see note 4 *Oxford Dictionary* p509
- 8 Law Reform Commission of Victoria *Plain English and the Law* Report No 9 1987 p19-20
- 9 eg see note 4 *Oxford Dictionary* p508; O’Hare C & Sonneman JA *Longman’s Australian Legal Terms* Longman Cheshire, Melbourne 1980 p8
- 10 *Butler v Capel* (1823) 2 B & C 251 p253 by the court. For a similar view see also *South of England Dairies Ltd v Baker* [1906] 2 Ch 631 Joyce J p638
- 11 eg “An intentional act by one person (owner) to sell or give possession, control or ownership to another person”, in Bishop JM *Blackstone’s Australian Legal Words and Phrases* Blackstone Press, Sydney 1993 p225; “to hand over from one to another...to sell or give”, HC Black *Black’s Law Dictionary* 6th ed West Publishing, Minnesota 1990



p1479; “the passage of a right from one person to another (i) by the transferor’s act with intention eg conveyance, *assignment*, by sale or gift (ii) operation of law eg forfeiture, bankruptcy, descent or intestacy”, R Bird *Osborne’s Concise Law Dictionary* Sweet and Maxwell, London 1983 p326, “the passing of title to property or other right from one person to another by act of the parties or by operation of law; conveyance”, *Collins English Dictionary* 3rd ed Harper Collins, Sydney 1991 p1634; “the making over of a right in property to another”, *CCH Macquarie Concise Dictionary of Modern Law* Macquarie Library, Sydney 1988 p131; “to convey; to make over to another’ E Jowitt and C Walsh *Jowitt’s Dictionary of English Law* 2nd ed, Vol 2 Sweet and Maxwell, London 1977 p1796; “assign” is suggested as a synonym for “transfer” in WC Burton *Burton’s Legal Thesaurus* 2nd ed Macmillan, New York 1992 p496

- 12 17 Ch D 1 Lush LJ
- 13 p9
- 14 James LJ p7
- 15 *Fasken* [1949] 11 DLR 810 Thorston P p822
- 16 *Hayter v Fern Lake Fishing Club* Tex Civ App. 318 S.W. 2d 912 p915
- 17 see note 11 Bird p35, See also “to transfer, make over, or set over to another” Black p118; “to transfer to another” Burton p36; “to transfer property” *Collins Dictionary* p91. Similarly “assignment” has been defined as “the transfer of some legal right to another person” M Cutts *Making Sense of English in the Law* Chambers, New York 1992 p14; “the transfer of a right or interest to another” Ford HAJ, Hinde GW, Hinde MS *Australian Business Dictionary* Butterworths, Sydney (1985) p12; “to transfer an interest in property” *CCH Macquarie Concise Dictionary of Modern Law* Macquarie Library, Sydney 1988 p10; or “a transfer of right which has legal effect” G McFarlane *A Layman’s Dictionary of English Law* Waterlow, London 1984 p19
- 18 from *Words and Phrases Legally Defined* 3rd ed Butterworths, London 1989 vol 1 p126
- 19 BA Garner *A Dictionary of Modern Legal Usage* Oxford University Press, New York 1987 p67
- 20 D Mellinkoff *Legal Writing, Sense and Nonsense* West Publishing, Minnesota 1982 p178
- 21 *Halsbury’s Laws of England* 4th ed Butterworths, Sydney 1974 vol 9 para 336
- 22 2 BI Wl 766
- 23 [1905] AC 454
- 24 p461
- 25 48 NSW SR 449
- 26 p453
- 27 see note 20 Mellinkoff p178



Whereas

When lawyers begin their recitals with *whereas*, they might as well be writing — “Beware! Document in legalese!” If there is more than one recital, lawyers often introduce each of them with the words “*and whereas*”, making the document monotonous to read.¹ Using *whereas* in this way also makes the document difficult to read because it breaks grammatical convention. It makes the sentences appear to be incomplete. If you examine the origins of the use of *whereas* in legal documents you will find that it is not a legal term of art. There are alternatives to using *whereas* to introduce recitals, one of which is to drop recitals altogether.

Should we banish *whereas* from all legal documents?

Some uses of *whereas* are acceptable. *Whereas* can be used in two senses. Firstly, it can mean “*but on the contrary*”, for example, “I like to jog *whereas* Sam likes to swim”. Using *whereas* in this sense is acceptable because it is still in general use.² In fact, in formal writing Garner considers using *whereas* in this sense to be ordinarily better than using *while*, because the “latter is sometimes thought to have inherent temporal associations”.³

However, *whereas* becomes the archetypical legalism when it is used to mean “*given the fact that*”.⁴ It is in this sense that *whereas* is often used to introduce recitals in a contract. In recent times, it has found a home in the preambles to the European Community directives, where it prefaces every fact the law-makers have taken into account in framing the directives. Sometimes as many as 50 statements are *whereased*!

Origin

Whereas has never been a lawyers’ term of art. It was borrowed from the loose usage of the common speech in the Middle English period.⁵ From the fifteenth and eighteenth centuries, legal writings began to adopt an equally loose meaning of *whereas*.⁶ It could mean where as,⁷ where,⁸ for as much,⁹ and,¹⁰ because.¹¹

With the hardening of law forms in the eighteenth century, the vague *whereas* became the usual translation for equally vague Latin terms such as the introducer *cum* of the thirteenth century statutes,¹² as well as for Latin *quum*, *quandoquidem*, and *quoniam*.¹³ So *whereas* was used to mean all things and yet nothing. This made it the perfect harrumph, a kind of ritual throat-clearing to get a document underway.¹⁴

Because *whereas* often introduces recitals, its effect is often confused with that



of the recital itself.¹⁵ However, commentators have described this use of *whereas* as “not necessary”¹⁶ and “worthless”.¹⁷ Introducing the recitals with headings such as “Background”, “Recitals” or “Agreed facts” is equally as effective. It would mean much more to the non-lawyer and be a more effective means of presentation. As Robinson states, “[i]t is surely easier for the parties to find the fifth recital rather than to the fifth *whereas*”.¹⁸

Do we even need recitals?

But why have recitals at all? Some lawyers pack their documents full of facts in case they might be useful if they have to be used defensively. In some cases, for example, where documents have a page and a half of *whereases* and then two short sections in the body of the contract, the results can be quite ludicrous.

Sometimes recitals bind and sometimes they do not. Recitals may create a covenant if it appears that this was the parties’ intention.¹⁹ Recitals may also be used as evidence of the existence of a fact. So one party may invoke the doctrine of estoppel and stop the other from denying those facts.²⁰ However, as Asprey asserts,²¹ if the facts are so important, why not put them in the operative part of the contract so that they are warranties and can therefore found a cause of action? Important material should be in the body of the agreement so that its status is unambiguous and is not skipped over by the reader.

Plain Language

First consider if you need to use recitals at all. You may find that the substance of the recitals can be more plainly and accurately presented as part of the main body of the document. If you feel you need to use recitals, introduce them with “Recitals”, “Background” or “Agreed facts”. Then list the facts using straightforward and complete sentences. Alternatively, you could do as Piesse suggests, and put all the recitals into a schedule where they can be set out less formally without using *whereas*.²²

Endnotes

- 1 Contrast the statement by Evans, *The Spoor of Spooks* 265 (1954) quoted in Mellinkoff, D *The Language of Law* (7th ed) Little Brown & Co, Boston (1990) at 292, “The wording of legal documents may be tedious, polysyllabic, repetitious, cacophonous, and humorless, but to anyone not panic-stricken at the sound of *whereas*, it usually makes the meaning clearer than it otherwise would be”
- 2 Fowler, H.W. *A Dictionary of Modern English Usage* (2nd ed) Oxford University Press, Oxford (1983) at p 695
- 3 Garner, B. *Dictionary of Modern Legal Usage* OUP, New York (1987) at 2845
- 4 *The Oxford English Dictionary* Clarendon Press, Oxford (1969) under *whereas*. On this usage of *whereas* it states “[c]hiefly, now only, introducing a preamble or recital in a legal or other formal document”



- 5 Middle English is the form of English language used in England in the period 1100- 1500
- 6 Decree, Star Chamber, 13 Car. (July 11, 1637)
- 7 *Oxford English Dictionary*, under *whereas*; 2 The Paston Letters 15-16 (Gairdner ed. 1904)
- 8 Stat. (1533) 24 Hen. VIII, cc. 7, 13; 2 The Paston Letters 15-16 (Gairdner ed. 1904)
- 9 Stat. (1533) 24 Hen. VIII, c 1
- 10 Decree, Star Chamber, 13 Car. (July 11, 1637)
- 11 Stat. (1533) 24 Hen. VIII, c. 8
- 12 Stat. (1285) 13 Edw. I, Stat. 1; Statute of Marlborough, 1267, 52 Hen. III
- 13 *Dr Adam Littleton's Latin Dictionary* (6th ed. 1735), under *cum* and *quoniam*
- 14 Cutts, M *Making Sense of English in the Law* Chambers, New York (1992) at 241
- 15 Mellinkoff, D. *The Language of Law*, at p 324
- 16 Aitken J, *Piesse - The Elements of Drafting* (8th ed) Sweet & Maxwell, London (1991) at 56
- 17 Mellinkoff, D, *Legal Writing: Sense and Nonsense*, West Publishing Co, Minnesota (1982) at 134
- 18 Robinson, S *Drafting: Its Application to Conveyancing and Commercial Contracts* Butterworths, Australia (1973) at 114
- 19 *Aspdin v Austin* (1844) 5 QB 671 at 683; *Buckland v Buckland* [1900] 2 Ch 534 at 540; *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54; 17 ALR 513 at 528 per Mason J
- 20 *Young v Raincock* (1849) 137 ER 124 at 135; *Stroughill v Buck* (1850) 14 QB 781; *Greer v Kettle* [1938] AC 156
- 21 Asprey, M *Plain Language for Lawyers* The Federation Press, Sydney (1991) at p 125
- 22 *Piesse - Elements of Drafting*, see note 16



Without prejudice

Without prejudice can mean several different things.¹ The phrase is commonly used to claim a form of privilege in negotiations before and during litigation.² It is also used in legislation to isolate an idea from the rest of the legislation.³ In the United States, it means that a case has not been finally decided.⁴

This article looks at the use of the phrase in negotiations. It is a “magic” phrase lawyers use to try to give protection. Does the incantation work? Is a plain language alternative preferable?

Meaning

“Prejudice” is the French form of the Latin *praejudicium*,⁵ deriving from *prae* (before) and *judicium* (judgment).⁶ Latham records the use of *prejudicium* meaning “injustice” in 1125.⁷

Ordinary meanings of “prejudice” include “disadvantage or injury”;⁸ “detriment, unfairness”;⁹ or “bias”.¹⁰ *Without prejudice* implies there will be no disadvantage or detriment. But this can be misleading to a non-lawyer.¹¹

In contrast, in legal writing the phrase *without prejudice* is used as an incantation to try to ensure that if the negotiations fail, the contents of the document using the phrase are not admitted as evidence.¹² A form of argot,¹³ the phrase is shorthand for “without prejudice to the position of the writer of the letter if the negotiations ... propose[d] are not accepted”.¹⁴ In other words, *without prejudice* claims a form of privilege.¹⁵

Are the words necessary?

Yet claiming this privilege does not necessarily give it. Cases show that courts look at the substance of the document using the phrase, and not whether the phrase has been used. The incantation has no “magic”.¹⁶

Some documents labelled *without prejudice* may not be protected, while documents which do not use the phrase may be protected. It depends on the rules of evidence. For example, the contents of a document may be privileged if negotiations had begun and there was a genuine attempt at settlement.¹⁷ Or if the document was reasonably incidental to negotiations.¹⁸ The privilege is based on the public interest “that disputes should be settled and litigation reduced to a minimum, so the ... law is in favour of enlarging the cloak under which negotiations may be conducted without prejudice”.¹⁹



But the contents may not be privileged in a number of circumstances, whether or not the document was labelled *without prejudice*. For example, the document could be admitted into evidence if:

- the contents of the document are an objective fact²⁰
- the document shows the terms and conditions of a contract which were later broken²¹
- it is needed to prove that the document was made²²
- the court would be misled without the information²³
- the contents are criminal or tortious.²⁴

Need for an alternative?

Despite case law showing that using *without prejudice* does not give protection,²⁵ lawyers continue to use it. As argot²⁶ it is “a useful bit of shorthand for [lawyers in] presenting ideas that would ordinarily need explaining”.²⁷ However it is not a term of art, and the amount of case law shows that even lawyers do not necessarily understand it. Also, many lay people do not understand it.

In 1991, Adler asked people who had had some experience with lawyers what they understood by the phrase. He found that only 10 out of 77 “clearly understood” the meaning. Of those who did not understand, “33 (or 43%) were under a misapprehension which seriously threatened their rights”.²⁸

A plain language alternative?

Lord Griffiths has said that:

A competent solicitor will always head any negotiating correspondence ‘without prejudice’ to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase ‘without prejudice’ and *if it is clear from the surrounding circumstances* that the parties were seeking to compromise the action, evidence of the content of those negotiations as a general rule, may not be admissible at the trial...²⁹

Clearly, the phrase *without prejudice* is not necessary to claim the privilege associated with it. This doesn’t mean you cannot use it. If for example, you are certain that the expression *without prejudice* covers your requirements exactly, and you are writing to another lawyer who is perfectly capable of understanding the phrase, there is no real need to do more than head your document with the phrase.

However, if you are writing to a lay person, then it is in your own best interests



to explain exactly what you mean. This doesn't mean that you have to omit the phrase if you feel it is necessary. It simply means that a clear explanation of what you mean by *without prejudice* will carry more weight with the court, with your client and with your opposing party, than the phrase on its own. Surely it will make a greater impact on the reader if you start your document with your version of one of the following phrases, than if you merely headed it "without prejudice":

In this letter, we make you an offer 'without prejudice'. This means that if you do not accept the offer, this letter cannot be used as evidence against me in court. But if you do accept it, this privilege is removed.³⁰

All admissions or offers made in these negotiations are 'without prejudice'. This means you cannot use them in court as evidence against me if this case does not settle.

This document is part of settlement negotiations, and is 'without prejudice'. It is not intended to be used as evidence in court, or to be the subject of discovery or production.

Endnotes

- 1 *Alley v Thurect* [1983] 2 QdR 706 p718, Thomas J
- 2 eg M Aronson, J Hunter & M Weinberg *Litigation, Evidence & Procedure* 4th ed Butterworths 1988 [11.02] p313
- 3 paraphrasing J Burke *Jowitt's Dictionary of English Law* 2nd ed Sweet & Maxwell, London 1977 vol 2
L-Z p1408. See JS James *Stroud's Judicial Dictionary of Words and Phrases* 5th ed Sweet & Maxwell, London 1986 vol 5 S-Z p2881 for UK legislation. For Australian legislation see *Green v Australian Hydrocarbons NL* [1988] 13 NSWLR 459 at 461
- 4 JR Nolan & JM Nolan-Haley (eds) *Black's Law Dictionary* 6th ed West Publishing Co, St Paul Minnesota 1990 p1603. US cases include *Fiumara American Surety Co* 31A at 283; *Newberry v Ruffin* 102 Va 73; *Cochran v Couper* 2 Del Ch 27; *McIntyre v McIntyre* (1919) 171 NW 393. NSW cases on this include *Newmont Pty Ltd v Laverton Nickel NL* (no 2) [1981] 1 NSWLR 221 at 221; *McM v C* (no 1) [1980] 1 NSWLR 1 at 15
- 5 *The Macquarie Dictionary* 2nd rev ed The Macquarie Library, Sydney 1981 p1340-1
- 6 W & M Morris *Dictionary of Word & Phrase Origins* Harper & Row, New York 1962 p281
- 7 RE Latham & British Academy Committee (eds) *Revised Medieval Latin Word List from British and Irish Sources* Oxford University Press, Oxford 1965 p367
- 8 eg G Wilkes & W Krebs *Collins English Dictionary*
3rd Aust ed Harper Collins, Sydney 1991 p1226
- 9 WC Burton *Legal Thesaurus* Macmillan Publishing, New York 1980 p397
- 10 D Oran *Oran's Dictionary of the Law* 2nd ed West Publishing Co, St Paul Minnesota 1991 p326



- 11 eg M Adler "Bamboozling the public" (1991) *New Law Journal* 26 July 1991 p1032-34
- 12 R Bird *Osborne's Concise Law Dictionary* 7th ed Sweet & Maxwell, London 1983 p347
- 13 D Mellinkoff *The Language of the Law* Little Brown & Co, Boston 1963 p19; BA Garner *A Dictionary of Modern Legal Usage* Oxford University Press, New York 1987 p581
- 14 *Walker v Wilsher* (1889) 23 QBD 335 at 337 by Lindley LJ; JB Saunders *Words and Phrases Legally Defined* 3rd ed Butterworths London 1990 vol 4 R-Z p449
- 15 GC Lindsay "Aspects of the law of evidence: Privilege, when available and how lost" (1989) 5 *Australian Bar Review* 243
- 16 P Gillies *The Law of Evidence in Australia* 2nd ed Legal Books, Sydney 1987 p428
- 17 *TPC v Arnotts* (1989) 88 ALR 69; *In Re Daintry ex p Holt* [1893] 2 QB 116; *Kurtz & Co v Spence & Sons* (1887) 57 LJ Ch 238
- 18 *Field v Commissioner for Railways* (1955) 99 CLR 285
- 19 D Byrne & JD Heydon *Cross on Evidence* 4th Aust ed Butterworths, Sydney 1991 [25350] p720
- 20 see note 18; see *Halsbury's Laws of England* Aust Commentary Butterworths, Sydney 1990 vol F C212
- 21 *Walker v Wilsher* (1889) 23 QBD 335
- 22 see note 21
- 23 *McFadden v Snow* (1952) 69 WN (NSW) 8; *Pitts v Adney* [1961] NSW 535 in ALC Ligertwood *Australian Evidence* Butterworths, Sydney 1988 [5.46] p178-9
- 24 see G Lewis & E Kyrou "Without prejudice" (1986) 60 *Law Institute Journal* 1376; *Davies v Nyland* (1975) 10 SASR 76, Wells J
- 25 see note 19 Byrne & Heydon p721 citing *Davies v Nyland* (1974) 10 SASR 76 at 89-90; *Bentley v Nelson* [1963] WAR 89; *Re Brisbane CC and White* (1972) 50 LGRA 275 (Qld). To obtain the privilege, letters do not need to be headed "without prejudice": *Cory v Bretton* (1830) 4 Car & P4 Car & P462; 172 ER 783; *Rodgers v Rodgers* (1964) 114 CLR 608 at 614
- 26 Argot - "cant, jargon, and slang ... a specialized vocabulary that is common to any group" Mellinkoff *A Dictionary of Modern Legal Usage* (see note 13) p17
- 27 see note 13 esp Garner p60
- 28 see note 11 Adler. Of those 33 people, 23 thought it meant that accepting the offer would not create a binding agreement; and 10 thought it meant that the solicitor writing the letter was acting impartially
- 29 *Rush & Tompkins Ltd v Greater London Council* [1988] 3 WLR 939 at 942, emphasis added
- 30 derived from *Omnium Securities Co v Richardson* [1884] 7 OR 182

