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## And/Or–Its Use and Abuse

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## STUDENT NOTES

## AND/OR — ITS USE AND ABUSE

Verboseness of the law is said to result partly from the fact that early draftsmen's fees depended on the number of words in their instruments. Some such idea of making two words grow where only one was found before may account for the creation of "and/or". More likely it was sired by the typewriter and nurtured by the business college. A product of unknown parentage, it has not been generally welcomed into the legal world.<sup>1</sup>

The Supreme Court of West Virginia recently referred to it as a "baffling symbol . . . a disingenuous modernistic hybrid, inept and irritating."<sup>2</sup> Others have called it "one of those inexcusable barbarisms which was sired by indolence and damned by indifference,"<sup>3</sup> an "interloper"<sup>4</sup> and "freakish fad."<sup>5</sup> The Wisconsin court speaks of it as "that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word or phrase, the child of a brain of someone too lazy or too dull to express his precise meaning, or too dull to know what he did mean."<sup>6</sup> It has even been held to be no part of the English language.<sup>7</sup> Such opinions from naturally conservative courts are unusual at any time and are quite amazing when applied to a single phrase.<sup>8</sup>

The great objection to its use is that it joins three unrelated words to form a single phrase. In effect, (/) is merely a symbol for the word (or) and the expression is read as if written "and (or) or". The result is to join the conjunctive and, meaning an

<sup>1</sup> See generally, Sandwell, "The Which of And/Or" (1932) 165 HARPERS 245; "An And/Or Symposium" (1932) 18 A. B. A. J. 574. In favor of its use see, Note (1935) 10 S. B. J. OF CALIF. 92; Note (1935) 10 S. B. J. OF CALIF. 187; Note (1936) 45 YALE L. J. 918. Opposing its use see, Editorial (1932) 18 A. B. A. J. 456; Editorial (1932) 18 A. B. A. J. 524; Note (1935) 10 LOS ANGELES BAR ASS'N BULL. 113; Note (1935) 10 S. B. J. OF CALIF. 77, reprinted in (1935) 40 COMM. L. J. 372; 79 CONG. REC. 2007 *et seq.* (1935).

<sup>2</sup> Bell v. Wayne United Gas Co., 181 S. E. 609 (W. Va. 1935).

<sup>3</sup> Cochrane v. Florida East Coast Ry. Co., 107 Fla. 431, 145 So. 217 (1932).

<sup>4</sup> Clay County Abstract Co. v. McKay, 226 Ala. 394, 147 So. 407 (1933).

<sup>5</sup> Tarjan v. National Surety Co., 268 Ill. App. 232 (1932).

<sup>6</sup> Employers' Mut. Liability Ins. Co. v. Tollefsen, 263 N. W. 376 (Wisc. (1935)).

<sup>7</sup> Carlin v. Millers Motor Corp., 265 Ill. App. 353 (1932); Tarjan v. National Surety Co., *supra* n. 5.

<sup>8</sup> Consider also the opinion of noted lawyers. John W. Davis thinks it is a "bastard sired by Indolence (he by Ignorance) out of Dubiety. Against such let all honest men protest." George W. Wickersham feels it "has no place in any composition written by one who has a knowledge of the English language." 18 A. B. A. J. 574. Senator Carter Glass thinks we should "make it a penal offense for a lawyer to write an and/or." CONG. REC. *supra* n. 1.

addition, with the disjunctive, or, mean an alternative, and then let the courts guess which word should have been used. So the expression "A and/or B" always means at least (1) A, (2) B or (3) A and B.<sup>9</sup> If these three alternatives are not clear, we have only "confusion worse confounded". And it is absurd to argue that courts have frequently construed "and" to mean "or" and "or" to mean "and". These words are not interchangeable.<sup>10</sup> They are used for entirely different purposes and are so construed only when necessary to carry out the intent of the parties. The fault lies not with the words but with their improper use.

It is equally absurd to argue again in precision. Instead of one sense which may or may not be correct we have substituted several senses, some of which are almost certainly wrong. If the one word is used improperly the courts will look to the context and substitute the correct one. This becomes only more difficult when there are alternative meanings. It might be simpler to leave a proper space and let the court insert the correct word. When the parties are not certain which is appropriate, does it help to insert a word indicating their uncertainty? Yet for these advantages, we have created a new term, unlike any other word — one difficult to read and of unusual appearance on a printed page.

The expression is condemned, however, not because it is new and unusual but because the law seeks certainty while this creates uncertainty. It is no wonder that courts have almost universally condemned its use in pleadings.<sup>11</sup> More important, they have decided in several cases that its use created an ambiguity and then have applied the general rule of construing an ambiguity most

<sup>9</sup> For examples of definitions, see: *Cuthbert v. Cumming*, 10 Ex. 809, 156 Eng. Rep. 668 (1855); *Lamborn v. National Park Bank*, 212 App. Div. 225, 208 N. Y. S. 428 (1925); *Bobrow v. United States Casualty Co.*, 231 App. Div. 91, 246 N. Y. S. 363 (1930); *Schaffer v. City Bank Farmers' Trust Co.*, 239 App. Div. 531, 267 N. Y. S. 551 (1933); *State v. Dudley*, 159 La. 872, 106 So. 364 (1925); *Kornbrodt v. Equitable Trust Co.*, 137 Ore. 386, 2 P. (2d) 236 (1931); *Business Men's Bldg. & Loan Ass'n v. Tumulty*, 13 N. J. 638, 180 Atl. 772 (1935).

<sup>10</sup> *Reynolds v. Wingate*, 164 Ga. 317, 138 S. E. 666 (1927); *Kornbrodt v. Equitable Trust Co.*, *supra* n. 9.

<sup>11</sup> *Preble v. Architectural etc. Union*, 260 Ill. App. 435 (1931); *Snow v. Allen*, 227 Ala. 615, 151 So. 468 (1933); *Russell v. Empire Storage and Ice Co.*, 332 Mo. 707, 59 S. W. (2d) 1061 (1933); *Woco Pep Co. of Montgomery v. Montgomery*, 227 Ala. 261, 149 So. 692 (1933): But it occasionally has crept in opinions without notice. *United States v. Abilene & So. Ry.*, 265 U. S. 274, 44 S. Ct. 565 (1924); *Bankers' Pocahontas Coal Co. v. Cent. Pocahontas Coal Co.*, 113 W. Va. 1, 166 S. E. 491 (1932).

strongly against its author.<sup>12</sup> Its use alone has led to reversals.<sup>13</sup> Thus, the user of this "thing" faces not only the frowns of the courts but also the distinct possibility of creating a two-edged sword which may be turned against himself.

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#### FORM OF THE ORIGINAL WRIT IN WEST VIRGINIA

A recent survey discloses that in thirty-three counties in West Virginia the original writ returnable to rules cites the defendant "to appear *before the Judge* [italics ours] of our Circuit Court . . . . at Rules to be held in the Clerk's Office of the said Court on the first Monday in . . . . to answer . . . ."<sup>1</sup> The citation to appear "before the judge" in writs returnable to rules and in writs returnable to the court during term has long been in use in both Virginia and West Virginia, but the propriety of the phrase has apparently never been questioned. Judge Green in *Kyles v. Ford*, an early Virginia case, noticed the phrase and, in passing, said, "The requisition to appear before the Judge is, I presume, common to writs returnable to the first day of the Court, and to the rule-day. In the latter case, there is no occasion to drop this mandate . . . ."<sup>2</sup> The last sentence of this quotation may well be questioned. Though such writs are probably not assailable under our statute<sup>3</sup> providing that the forms of writs "may be as heretofore used", the phrase when used in writs returnable to rules has not enjoyed such immunity in at least one jurisdiction. In North Carolina the court held voidable, but capable of amendment, a writ citing the defendants "to be and appear before the judge of our Superior Court . . . . and

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<sup>12</sup> *Bobrow v. United States Casualty Co.*, *supra* n. 9; *Employers' Mut. Liability Ins. Co. v. Tollefsen*, *supra* n. 6.

<sup>13</sup> *Cronin v. Crooks*, 143 N. Y. 352, 38 N. E. 268 (1894); *Putnam v. Industrial Comm.*, 80 Utah 187, 14 P. (2d) 973 (1932).

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<sup>1</sup> Taken from the form used in Logan County. Substantially the same form is also used in the following counties: Barbour, Boone, Cabell, Calhoun, Clay, Doddridge, Fayette, Greenbrier, Harrison, Jackson, Kanawha, Lincoln, Mason, Mingo, Monongalia, Monroe, Nicholas, Pendleton, Pleasants, Pocahontas, Putnam, Randolph, Ritchie, Roane, Summers, Taylor, Tyler, Upshur, Wayne, Wetzel, Wood and Wyoming. In Marion and Webster counties the defendant is cited to appear before the Circuit Court at rules. This is as misleading, if not more so, as the writs under scrutiny.

<sup>2</sup> 2 Rand. 1 (Va. 1823).

<sup>3</sup> W. VA. REV. CODE (1931) c. 56, art. 3, § 3;