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The Literary Fraction And/or

Worth Allen

The Literary Fraction "And/or"

By WORTH ALLEN

Of the Denver bar. Shortly after this article came to our attention we observed being published in one of the local newspapers a "summons in action for annulment of marriage and/or divorce." The relief prayed for was a "decree of annulment of the marriage of the plaintiff and defendant, and/or a decree of divorce." In the interests of bringing to the members of the Colorado bar items which will be helpful to them in the practice of the law, the columns of DICTA *will be made available to anyone who wishes to explain a decree of annulment and divorce.*

I present to the readers of DICTA some of the many criticisms of the term or phrase "and/or".

In *Employers' Mutual Liability Ins. Co. v. Tollefsen,* 219 Wis. 434, 263 N. W. 376, 377, we find the Supreme Court of Wisconsin using this language:

> "We are confronted with the task of first construing 'and/or,' that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of some one too lazy or too dull to express his precise meaning, or too dull to know what he did mean, now commonly used by lawyers in drafting legal documents, through carelessness or ignorance or as a cunning device to conceal rather than express meaning with view to furthering the interest of their clients."

After quoting the foregoing statement by the Wisconsin court, the Supreme Court of Georgia said, in *Davison, et al. v. Woolworth Company,* 186 Ga. 663, 198 S. E. 738:

> "While disavowing the expressions used by the learned judge in his classification of those who are responsible for its choice, we deplore the use in contracts and statutes of that hybrid, contradictory combination, frequently as bewildering, mystifying, and perplexing as Poe's raven—or was it fiend? on the 'night's Plutonian shore'."

The following is taken from the note in 118 American Law Reports, 1368:

> "The phrase 'and/or' has been characterized as 'gibberish' and a 'confusing hybrid' which 'means nothing.' 40 Commercial Law Journal, p. 372 (August, 1935). And it is stated in an editorial in the American Bar Association Journal (vol. 18, p. 456, July, 1932) that the symbol is 'a device for the encouragement of mental laziness,' even as used in private instruments, and that it should not be used in pleadings or legislative acts. And in the same periodical (vol. 18, p. 574, September, 1932) there is a 'symposium' of letters, some expressing approval and

others violent disapproval of the symbol. Among the latter are found the following epithets: 'A bastard sired by indolence (he by ignorance) out of dubiety;' 'barbarism;' 'journalese;' 'unsightly heiroglyphics.'

"Epithets applied to the term by various courts are the following: 'Linguistic abomination;' 'interloper;' 'interloping disjunctive-conjunctive-conjunctive-disjunctive conjunction;' 'one of those inexcusable barbarisms which was sired by indolence and dammed by indifference;' 'freakish fad;' 'not in the English language;' 'confusing;' 'accuracy-destroying;' 'certainty-destroying;' 'freakish symbol;' 'baffling symbol;' 'a disingenuous, modernistic hybrid inept and irritating;'."

In *Drummond v. City of Columbus, et al.*, 285 N. W. (Nebraska) 109, the court stated:

"The American Bar Association Journal for July, 1932, published an editorial against the use of this expression, and received so many letters that in its September, 1932, issue a symposium was published, giving opinions from many lawyers, judges, decisions of courts, and references to law magazine articles, and the majority view was against its use."

Mr. Justice Burke, in his usual trenchant style, made the following contribution to the subject in *Equitable Life Assurance Society of the U. S. v. Hemenover, et al.*, 100 Colo. 231, 237:

"One further matter, not vital to a determination of any question presented, but constituting a blot on this record, forces itself upon our attention.

"Next to the prescriptions of physicians, accuracy is nowhere so imperative as in contracts, statutes and legal proceedings. It is correspondingly discouraging to find dragged into these the ingenious inventions of scriveners to confuse and befuddle. The latest and lustiest of these pests is the literary fraction 'and/or,' which appears at least fifty times in the record before us. The resulting confusion is emphasized by the fact that three of these are in demurrers, three in assignments, and one in a tendered instruction. We have not found one attributable to counsel for defendants in error. Whatever defense might be made for it elsewhere it becomes, in demurrer or assignment, a mere 'weasel' phrase, and certainly jurors could not be expected to interpret it. Mr. John W. Davis calls this a 'pollution of the English language.' Mr. George W. Wickersham refers to it as a 'barbarism,' 'one of the worst examples of "journalese",' and says, 'Its use in pleadings and court proceedings and in legislative acts is utterly unjustified.' Numerous appellate courts have been called upon to deal with it and have generally spoken of it with disrespect. * * *

". . . We wish simply to suggest the uselessness and absurdity of 'and/or' and express the hope that this is its last appearance in this tribunal."

However, the annotator in the note referred to defends the proper use of the term in private contractual instruments as follows:

> "The term 'and/or', has been used for nearly a century in English mercantile and marine insurance contracts. See, for example, *Cuthbert v. Cumming* (1855) 10 Exch. 809, 156 Eng. Reprint, 668 (affirmed in 1855) 11 Exch. 405, 156 Eng. Reprint, 899. Its great vogue in recent times, however, has extended its use to statutes, ordinances, pleadings, and judicial records. And the neologism has even attained the respectability of a place in the general lexicons, being defined as 'either "and" or "or."' Webster's New Int. Dict. (2d ed.).
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> "This term is used to avoid a construction which, by the use of the disjunctive 'or' alone, would exclude the combination of several of the alternatives, or, by the use of the conjunctive 'and' alone, would exclude the efficiency of any one of the alternatives standing alone. It takes the place of the addition, after several alternatives connected simply by 'and,' of a qualifying phrase such as 'or either' or 'or any combination thereof,' and, after several alternatives connected by 'or,' it takes the place of such phrases as 'or both,' 'or any combination thereof.'
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> "As thus used, this phrase, term, symbol, or character is a deliberate amphibology; it is purposefully ambiguous, its sole usefulness lies in its self-evident equivocality. When the term is properly used, however, its meaning is not indefinite or uncertain. It is broad, but not indefinite; it is elastic, but within definite bounds and for a definite purpose. If the term were used in its proper place and sense, and were restricted to private contractual instruments, instead of being interpolated, with parrot-like indiscrimination, into pleadings, instructions to juries, and the like, it is probable that the courts would have accepted it without question as a useful addition to scrivener's English.
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> "There has recently been, however, a very vigorous reaction against this term on the part of judges and contributors to law journals. The phrase, probably because of its ungainly appearance and its indiscriminate misuse, seems to irritate the judicial temperament, and has provoked outbursts of invective which are somewhat disproportionate to the amount of harm caused by the term in question. . . ."

Personals

ARTHUR CASSIDY and WILBUR ROCCHIO have announced their association in the law practice with offices at 228 Equitable Bldg., Denver.

ALBERT ELLIS RADINSKY has removed his offices to the Lawyers Bldg., 1527 Champa St., Denver. A. B. CROSSWHITE and HELEN C. MYERS are associated with him.