

COMMENT ON RECENT DECISIONS

"AND/OR"—PLEADING—LEGISLATION—[Missouri].—The petition in a recent case¹ alleged that "the Federal Automobile Association and/or the Federal Automobile Insurance Underwriters" was an association of subscribers engaged in exchanging reciprocal insurance contracts. The court stated at the outset that it did not understand the meaning of the term "and/or." It condemned its use, saying that there was no reason why a statute, contract, or legal document of any kind could not be stated in plain English.²

There is no question that it is, at times, exceedingly difficult to ascertain exactly what the term means. Mr. Justice St. Paul in *State v. Dudley*,³ said, "such an expression in a contract amounts in effect to a direction to those charged with construing the contract to give it such an interpretation as will best accord with the equity of the situation and for that purpose to use either 'and' or 'or' and to be held down to neither."⁴ (Italics supplied by court.)

The use of the symbol has been condemned by numerous courts.⁵ An Illinois court, in condemning its use on the grounds that it tended to confuse and mislead, warned that in a close case where these words are used, a situation may be presented that would warrant the court in reversing a judgment or decree.⁶

In pleading, the use of the term has not only been condemned, but it has sometimes been declared fatal as too vague and uncertain, or as an unauthorized pleading in the alternative.⁷ Pleading which states material facts ambiguously or in the alternative, so that it is difficult to determine upon which of several equally substantive averments the pleader relies for the maintenance of his action or defense was not permitted at common law. The same rule has been generally adopted under the codes, although changed by statute or judicial decision in some states.⁸

1. *State ex rel. Adler et al. v. Douglas et al.* 95 S. W. (2d) 1179, (Mo., 1936). The case was decided on a point of law entirely different from the question here under consideration. The court's discussion of the term "and/or" was dictum.

2. *Ibid.* p. 1180.

3. *State v. Dudley*, 159 La. 872, 106 So. 364 (1925).

4. *Ibid.* p. 878.

5. *Preble v. Architectural Iron Workers' Union*, 260 Ill. App. 435 (1931); *Bell v. Wayne United Gas Co.*, 181 S. E. 609 (W. Va., 1935). The court in this case described the symbol as "a disingenuous modernistic hybrid, inept and irritating"; *City National Bank and Trust Co. v. Davis Hotel Corp.*, 280 Ill. App. 247 (1935); *Irving Trust Co. v. Rose*, 67 F. (2d) 89 (C. C. A. 4, 1935); *Lamborn v. National Park Bank*, 208 N. Y. Supp. 428 (1935); *Ex Parte Iratacable*, 55 Nev. 263, 30 P. (2d) 284 (1934); *Tarjan v. National Surety Co.*, 268 Ill. App. 232 (1932).

6. *Preble v. Iron Workers' Union*, 260 Ill. App. 435 (1931).

7. *Kornbrodt v. Equitable Trust Co.* 137 Ore. 386, 2 P. (2d) 236 (1931).

8. Clark, *Code Pleading* (1928) pp. 171, 172. The common law rule has been changed by statute in England and 6 states in this country: Conn., Ky.,

In legislative action, its use has caused a court to declare an act uncertain, and therefore invalid.⁹ It was held that although its use in a contract was permissible and was equivalent to a direction that it be construed so as to best accord with the equity of the case, such usage cannot apply to statutes, since the legislature, in making its laws, must express its own will and leave nothing to the mere will or caprice of the courts, particularly in the matter of punishing offenses.¹⁰ But in *Ex Parte Iratacable* it was held that the presence of thirty-two "and/or's" in a statute did not render it uncertain.¹¹

George W. Wickersham, a noted member of the bar, said that the use of the symbol in pleadings and court proceedings and in legislative acts is utterly unjustified,¹² and the majority of the courts seem entirely in accord with this view.

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ATTORNEYS—RULES OF COURT—RETROSPECTIVE LAWS—[Missouri].—The Missouri appellate courts in two recent cases¹ have been confronted with the question whether the rules of the Supreme Court of Missouri² must operate prospectively when invoked in ex parte proceedings instituted for the purpose of disbarring attorneys. The Constitution of Missouri prohibits the enactment of both ex post facto and retrospective laws.³ In the *Noell* case, the alleged professional misconduct of the respondent had occurred approximately ten years prior to the adoption of the rules of court. Therefore, the respondent contended that those rules which provide for the investigation of conduct and which interdict certain conduct could not be invoked against him without violating the constitutional provision to which allusion has been made. The court, in dismissing this defense without discussion, relied upon the *Sparrow* case, and held that rules of court need not operate prospectively in cases of this character.

Mass., Mo., N. J., and N. Mexico. In at least 10 more states it has been changed by judicial decision.

9. *State v. Dudley*, 159 La. 872, 106 So. 364 (1925).

10. *Ibid.* p. 365.

11. *Ex parte Iratacable*, 55 Nev. 263, 30 P. (2d) 284 (1934).

12. 18 A. B. A. Journal 574 (Sept., 1932).

1. In re *Noell*, 96 S. W. (2d) 213 (Mo. App. June, 1936); in re *Sparrow*, 90 S. W. (2d) 401 (Mo. Dec., 1935).

2. The rules were adopted by the Supreme Court in November, 1934. 334 Mo. (Appendix i).

3. Mo. Const. Art. 2, sec. 15. An ex post facto law has been defined as one which makes an action done before the enactment of a statute penal or criminal which was innocent when committed or which aggravates a crime by making it greater than when committed or inflicts a greater punishment than existed when the offense was committed. *State ex rel. v. Works*, 249 Mo. 702, 156 S. W. 967, 238 U. S. 41 (1913). The phrase ex post facto relates exclusively to crimes. *Calder v. Bull*, 3 Dall. 386, 1 U. S. (L. ed.) 648 (1798). Retroactive laws relate only to civil rights and proceedings. *Gladney v. Snyder*, 172 Mo. 318, 72 S. W. 554 (1903). Thus, every ex post facto law is retrospective, but every retrospective law is not an ex post facto law. 6 R. C. L. 303.