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Obiter Dicta

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"An *obiter dictum,* in the language of the law, is a gratuitous opinion, an individual impertinence, which, whether it be wise or foolish, right or wrong, bindeth none—not even the lips that utter it."*

An Ancient Maxim

"I need hardly repeat that I detest the attempt to filter the law by maxims. They are almost invariably misleading," warns Lord Esher M. R., in *Yarmouth v. France,* 19 Q. B. D. 647, 653 (1887). The venerable maxim *de minimis non curat lex* like its brother maxims is not invulnerable to this caustic observation. But the learned Lord's sweeping indictment against the utility of maxims is itself a generalization which does not always fit the facts. Enunciated early in the common law [*Taverner v. Dominum Cromwell,* Cro. Eliz. 353, 78 Eng. Reprints 601 (1594)], the *de minimis* standard has served and continues to serve the commendable purpose of combing the legal world of distracting picayunes, of zeroes heaped upon the scales of justice, of minute discrepancies and superfluities.

De Minimis non Curat Lex

Armed with this principle, courts have summarily ignored sundry trivialities ranging from "drippings of mortar" attached to a building (alleged to be an encroachment making title to an adjacent unimproved lot unmarketable), *Ungrich v. Shaff,* 119 App. Div. 843, 105 N. Y. Supp. 1013 (1907), to a refusal by a court to interfere and to set aside a verdict contended to have been miscalculated by the jury to the extent of $.78. *Brewer v. Tyringham,* 29 Mass. 547 (1832).

But this maxim, inherently helpful, has its manifold exceptions. Its limitations reside not only in particular instances but also in deep seated categories of the law. "The maxim '*de minimis non curat lex*' is never applied to the positive and wrongful invasion of one's property," cautions Cowen J. in *Seneca Road Co. v. Auburn & Rochester R. R.,* 5 Hill 170, 175 (N. Y. 1843). Nor has the *de minimis* principle any uniform force in the field of contract law: where a contract right is violated at least nominal damages will be given. See 3 Williston, Contracts (1920) § 1340.

Specifically, among the so-called negligibles which harass the legal order and ostensibly work high corruption of *de minimis non curat lex,* one of the most diverting is the disarmingly humble indefinite article "*a*". How this Lilliputian of literature became a Brobdingnagian at law is an interesting story. 1 Words and Phrases Judicially Defined (1st ser.) 2, 3. The therein-contained attempt to define the indefinite is a tribute to *a's* versatility and legal agility. Accordingly, *a* has been defined as susceptible of meaning "one", "any", "some", or "my", depending upon the context in which it is used. To illustrate: Sec. 177 of the English Property Act of 1925 providing that "a will expressed to be made in contemplation of *a* marriage shall not be revoked by the solemnization of the marriage contemplated" was strictly construed to mean in contemplation of a *particular* intended marriage and not *any* marriage in the future. *Sallis v. Jones,* [1936] P. 43. Conversely, where a person contracted to lease for a certain purpose "*a*" room that is improved and suitable" he does not bind himself to furnish a particular room but fulfills his contract if he provides *any* room, improved and suitable. *Thomas v. Stewart,* 60 Iowa 225, 14 N. W. 247 (1887). A promise to convey

Multum in Parvo

* Birrell, Obiter Dicta (1885) title page.

"*a* house and lot of land on Amity St." was interpreted as a promise of the contracting party to convey '*my* house and lot'. *Hurley v. Brown*, 98 Mass. 545 (1868).

Thus, it is seen that the maze of ambiguity surrounding this mighty atom compels a thorough judicial search through the legal labyrinths for the intended meaning in all cases where its construction is involved. Faced with the importance of the supposedly insignificant "*a*" and similar legal "minims", what is the remedy? Certainly it is not to be found in the ouster of the classic maxim *de minimis non curat lex*, which stresses the value of solid substance over empty form. Despite the complaint of Lord Esher such maxims have a place in the legal lexicon. To provide for emergencies wherein the old maxim does not fit, why not frame a new formula designed to rationalize the exceptions to the old principle, to wit—*De minimis curat lex?*

De Minimis Curat Lex

The New Silicosis Statute

Recently the newspapers carried lengthy accounts of the grievous condition of many workers who had contracted an insidious occupational disease known as silicosis (more popularly called dust pneumonia) for which there was no effective legal redress. Because of the peculiar nature of the disease, its deleterious effects are often not manifested until several years after the worker has last been employed in the disease producing industry. See *Michna v. Collins Co.*, 116 Conn. 193, 195, 164 Atl. 502, 503 (1933); *Madison v. Wedron Silica Co.*, 352 Ill. 60, 63, 184 N. E. 901, 902 (1933). Since silicosis was not one of the enumerated occupational diseases covered by the Workmen's Compensation Act [N. Y. Workmen's Compensation Law (1922) § 3] the stricken worker was forced to bring his action in negligence, a cause which is governed by a three year statute of limitations. N. Y. Civ. Prac. Act (1921) § 49.

Why A Statute?

The court was then faced with the perplexing dilemma—when does the cause of action accrue? In the numerous suits which arose counsel for the plaintiff contended that damage being the gist of an action for negligence, the cause did not arise until the disease itself was manifest, and that to hold otherwise would place the entire law of torts in the anomalous position of holding that a man must bring a law suit to recover damages for injuries before the injuries exist. *Schmidt v. Merchant's Despatch Transp. Co.*, 76 F. (2d) 115 (C. C. A. 2d, 1935); *Schmidt v. Merchant's Despatch Transp. Co.*, 244 App. Div. 606, 280 N. Y. Supp. 836 (1935). Unfortunately for the worker, the court rejected this contention and held that the cause of action accrued not later than the immediate moment when the worker left this employment.

Undoubtedly the injustice of such a result, which seemingly deprived the worker of his day in court, was suggested to the legislature. To prevent the future recurrence of such an undesirable situation (the act is not applicable to cases in which the last injurious exposure occurred prior to September 1, 1935) legislation was passed. N. Y. Workmen's Compensation Law (1936) §§ 65-72. An examination of this statute, indubitably enacted for the increased protection of the worker, reveals that the silicosis victim will in many instances be in a more dangerous position than before its passage. The statute provides that the employer shall be liable only when the disability results within one year after the last injurious exposure in such employment. N. Y. Workmen's Compensation Law (1936) § 67.

The Statute

It is submitted that in practical effect this is similar to having a one-year statute

of limitations for the bringing of such actions. This stipulation has been included despite the fact that it is known that the disease is unusually slow in making itself manifest. See U. S. Public Health Bull. 187 (1929) at 89. But this is not all—the statute further provides that compensation shall not be payable for *partial* disability but that there must be temporary or permanent *total* disability. N. Y. WORKMEN'S COMPENSATION LAW (1936) § 66. Medical authorities find that total disability often does not appear until much longer than one year has elapsed. See Riddell and Rothwell, *Some Clinical and Pathologic Observations on Silicosis in Ontario* (1928) 9 J. IND. HYGIENE 147. Assuming that total disability results within two years after the last exposure, the worker has no relief under this statute. Nor can he any longer maintain his action in negligence because the statute expressly provides that the "liability of an employer . . . shall be exclusive and in place of any other liability whatsoever. . . ." N. Y. WORKMEN'S COMPENSATION LAW (1936) § 72.

Defects in Statute

"BANK-NITE" LOTTERIES

Every now and again, the commercial mind devises some little attraction to ensnare the public attention. Such enticements to bashful buyers as "valuable coupons", given with purchases, [*Chamber of Commerce of Plattsmouth v. Kieck*, 257 N.W. 493 (Neb. 1934)] or stamps entitling customers to a chance on merchandise, [*State v. Caspare*, 115 Md. 7, 80 Atl. 606 (1911)] or even the distribution of excursion tickets by motion picture theatres [*People v. Cardas*, 28 P. (2d) 99 Cal. App. 1933)] are all familiar to the layman. At present, the faddish public is enthralled with the so-called "bank-nite" scheme. In fact, in Chicago so enthusiastic was the support accorded the idea, that there is now in vogue in that city, an *all-day* "bank-nite" plan. Alluring as they are, the layman does not appreciate that these novel designs to make parting with money as sweet a sorrow as possible often find their way to court, to gray the legal temple and furrow the legal brow.

Already, the foundations have been laid for two opposing attitudes to the question of whether or not "bank-nites" are illegal lotteries. Both views recognize that there are three elements to a lottery, namely, a prize, a chance to win the prize, and a valuable consideration paid for the chance. In the "bank-nite" schemes, the first two essentials are eminently present. Prizes ordinarily are cash. Chances of winning depend upon the operation of the particular scheme and the number of participants though paradoxically, increasing popularity of the game spells out a decline in the individual's chance of success. But whether the third element, the payment of a valuable consideration, is present seems to the courts debatable, and on that issue they divide.

Pro and Con

Two controverted views are discernible in the New York cases. In *People v. Miller*, 271 N. Y. 44, 2 N. E. (2d) 38 (1936) a "bank-nite" scheme was held to be a lottery. Evidence that one might participate without purchasing a ticket of admission was excluded by the trial court because it doubted the credibility of the testimony. Therefore, the issue, as presented to the Court of Appeals was whether payment entitling one to admission plus a chance to win constitutes payment of a valuable consideration for the chance. It was held that this amounted to the payment of a valuable consideration. In a more recent case, *People v. Shafer*, 160 Misc. 174, 289 N. Y. Supp. 649 (Co. Ct. 1936), a slightly differ-

The Status at Present

ent plan was held not to be a lottery. The generous cinema magnate provided, in this game, that the purchase of a ticket of admission was not a condition to an opportunity of participating. Moreover the proof in the record revealed that participation was absolutely free. Elsewhere some support for the stated refinement in the *Shafer* case is found. [*State v. Hundling,* 220 Iowa 1369, 264 N.W. 608 (1936); *State v. Eames,* 183 Atl. 590 (N.H. 1936)]. On the other hand, in *Central State Theatre Corp. v. Patz,* 11 F. Supp. 566 (S.D. Iowa 1935) and in *Commonwealth v. Wall,* 3 N. E. (2d) 28 (Mass. 1936), it was held that the game does not cease to be a lottery because some or many of the players are admitted to play free, provided that others continue to pay for their chances. In the Massachusetts case the court attempted to distinguish the *Hundling* and *Eames* cases on the ground that in those cases "free participation was a reality", whereas it was not in the case at bar. Because of the unconvincing distinction the latter cases seem *contra* the law as promulgated in the *Shafer* case. Likewise they represent a more realistic interpretation of the law. The defendant's object was to "fill the theatre, not the lobby and the sidewalk." By strategy the true purpose of the law is evaded.

A Benign Judiciary

Writers upon the subject disapprove of the decisions which have allowed schemes, similar to that in the *Shafer* case, to prevail. Haley, *The Broadcasting and Postal Lottery Statutes* (1936) 4 GEO. WASH. L. REV. 475; Pickett, *Contests and the Lottery Laws* (1932) 45 HARV. L. REV. 1196. It was said in *People v. Gillson,* 109 N.Y. 389, 404, 17 N.E. 343, 348 (1888) that the Legislature sought to prevent lotteries because the purchase of lottery tickets "cultivates a gambling spirit, and tends to a hatred of honest labor, and to a desire to obtain riches or money without the necessary expenditure of industrious energy". Such a distinction as appears in the *Shafer* case, indexes the court's reluctance to interfere too strenuously with the desire of the human race to get something for nothing.*

* Since the above comment was written, the New York Court of Appeals affirmed *People v. Shafer* (3 judges dissenting). N. Y. Times, Jan. 1, 1937, at p. 8.