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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."*

THE RED "STAR" CHAMBER

A Speedy and Public Trial

Blackstone, in his old-fashioned way, believed that a trial was "the examination of the matter of fact in issue." 3 BL. COMM. *330. He thought that a trial must have some element of contest. This was said, however, at a time when it was still believed that the law existed to serve men, and that it was not solely a weapon in the hands of the ruling class to safeguard its interests. He was probably also influenced by the proverbial old English sporting instinct which allegedly thrives on opposition. Today, however, while the Soviet plan for an ouster of the bourgeois concepts of law has not been notably successful in the course which it originally charted [Gsovski, *The Soviet Concept of Law* (1938) 7 FORDHAM L. REV. 1] it has, nonetheless, achieved amazing success in a branch of the law which it apparently never intended to transform, *i.e.,* trial procedure. It seems to have eliminated the element of contest entirely from the recent Moscow treason trials by the simple method of securing confessions from all defendants.

A Step Forward

From the point of view of the true pragmatist, the great weakness in Blackstone's definition of a trial lies in its emphasis on an "issue". Issues are confusing things at best, and the settling of them consumes much time, money and energy. And yet, very often when they are ostensibly settled, the pangs of doubt persist in gnawing at the breast of the settlor. They are a stumbling block in the path of the efficient administration of justice. It is not, therefore, difficult to understand why the admiration of certain circles of the legal world, addicted to speed and economy, has been excited in recent months by the smoothness with which procedure operates in the courts of the U. S. S. R. [*Cf.* Pound, *Individualization of Justice, supra* p. 164, wherein speed, which is also used as an argument for administrative law, is considered as possessing defects of its own] The adjective law of the Soviet Union has fully justified the glowing hope that it would accomplish the maximum political effect on the work of the courts, and at the same time constitute a safeguard against mistake. See Hazard, *Soviet Law: An Introduction* (1936) 36 COL. L. REV. 1236, 1260-1261. If there is one thing which is outstanding about the great Soviet trials, it is the absence of mistake. The high percentage of accuracy can only be attributed to the fact that Soviet jurists have gone to the roots of the difficulty in more unsophisticated jurisdictions, and have trimmed down that old chassis "issues" into the streamlined 20th century model. There is, for example, before the actual trial takes place a dress rehearsal, in which an investigator gathers together the evidence and the actors run through their lines. The defense is spared the annoyance of seeking its evidence, for the kindly investigator collects the evidence for *both* sides. Hazard, *supra,* 36 COL. L. REV. at 1261. The defendant is informed of the case against him. He confesses. The result of this is that no new evidence appears on the trial which will make it impossible for the court to proceed. Indeed, one of the apologists for the Moscow trials explains that the prevalence of confessions is due to this system of letting the accused know what the case is against him beforehand. PRITT, AT THE MOSCOW TRIAL (1937) 6-7.

*BIRRELL, OBITER DICTA (1885) title page.

True Confessions

The trial begins. The indictment is read. That of the latest trials, which is representative of all Soviet indictments, constituted a resume of the confessions of the accused coupled with a running commentary to give the trial a theme. N. Y. Times, Mar. 3, 1938, p. 14, col. 1-8. Happy factory workers throng the court; there are sandwiches and beer for foreign diplomats and correspondents in a nearby room. Gusts of humor sweep through the baby-blue tinted courtroom. Denny, *Trial in Moscow a Strange Picture,* N. Y. Times, Mar. 6, 1938, § E, p. 5, col. 7. Defendant follows defendant, relating hair-raising testimony in the most matter of fact tones. Since, under the Soviet law, confessions are not to be trusted, because it is sometimes found that a defendant may lie to shield others [Hazard, *supra,* 36 COL. L. REV. at 1262], it becomes necessary for all defendants, in addition to implicating the unseen defendant, Trotsky, to incriminate all the other defendants, so that no man will be convicted on the strength of his own confession.

The Defense Rests

Another improvement is the consequent removal of the strain under which a defense attorney operates in bourgeois countries. In addition to being spared the task of collecting the evidence at the preliminary hearing, during the trial itself he taxes neither the court's time, nor his own throat, by thundering objections. This would serve only to drag a red herring in the form of an issue across the judicial trail. An observer at the latest trial reports that the defense attorneys "have not opened their mouths except to yawn or take glasses of water" [Denny, *supra*]—a welcome innovation in the interest of speed and efficiency. Their sole function, according to the same source, is to make pleas of extenuating circumstances for their guilty clients. An added factor in trials of this magnitude is the presence of a spare judge, possibly to officiate in the event that one of the other judges, swept away by the prevailing mood, himself confesses.

Thus it is that the Soviets have introduced an entirely new concept of jurisprudence—the trial without an issue. The aforementioned apologist for the recent trials limited his perspective, however, to those who know they are guilty. What of those who doubt their own guilt, or who even believe themselves to be innocent? Certainly these people deserve some mention. It would seem that a true servant of the working class, even knowing himself innocent, should plead guilty and confess in the interests of time, economy and good government.

De Minimis non curat Lex

Herein lies the key to a higher form of society. If enough innocent people pleaded guilty, not only would our courts operate more efficiently by eliminating the befogging influence of miserable issues, but the increase in death sentences might, of its own momentum, rid us of our terrible problem of unemployment. The Soviet Union, by a mere transformation of our outmoded concept of a "trial", has rendered us a great legal and sociological service.

"TERRIER TRUSTS"

At early common law, because of their base nature, dogs were not considered articles of property. Yet when they began to assume an important role in aiding and comforting humans, we find the law readjusting its prior position. Dogs could be included within the class of property protected by larceny statutes. *Mullaly v. New York,* 86 N. Y. 365 (1881). At the present time the care of *ferae domesticae* has reached great proportions. No longer do these household members have to be content with the crumbs from the table; now solicitous merchants have prepared foods which are dietetically sound, dependent upon the age and habits of the consumers. Medicinal and tonsorial ministrations are *de rigeur* in all the better

kennels. In cemeteries, monumental art perpetuates the fine qualities of the universal Fido.

In line with this tendency was a newspaper report emanating from Chicago. It seems that "Pet", a ten year old Spitz, is sole beneficiary of a $30,000 testamentary trust. An aged spinster, the testatrix, was alleged to be incompetent by two cousins who sought to void her will. Circuit Judge Burke upheld the will in the absence of satisfactory evidence of the incompetency. By the will's stipulations the trustee is to select a woman whose home must be childless as the custodian of "Pet". She must guard and nourish "Pet" on the income derived from the fund. Further, upon the dog's death, the principal sum is to go to the Anti-Cruelty Society. Chicago Daily Times, February 24, 1938, p. 1, col. 4.

A Dog's Life

In New York a trust established for the benefit of, and limited on the lives of five animals and one human being was declared void, since it suspended the ownership of personal property for more than two lives in being. Surrogate Wingate left the question open as to a limitation on the lives of two domestic animals, but said, "It is probable, however, in view of the phraseology of subdivision 3 of section 96 of the Real Property Law, referring to 'use of any *person*' that such result would be unavoidable even were two, only, in existence at testatrix' death." *In re Howells' Estate,* 145 Misc. 557, 565, 260 N. Y. Supp. 598, 606 (Surr. Ct. 1932). Yet, an English case upheld a trust for animals, declaring that such trusts are not illegal merely because brutes and not humans are the beneficiaries, providing the trust did not last too long. *In re Dean,* 41 Ch. Div. 552 (1889). As to this point of the length of the trust for animals, an Irish case cited in *In re* Howells' Estate took the view that with reference to perpetuities, "lives" means human lives, not those of animals. When pressed with the suggestion that the dogs in question could not outlive the testator by 21 years, a touch of humor tempered the court's reply: "In point of fact neighbour's dogs and cats are unpleasantly long-lived; but I have no knowledge of their precise expectation of life." The court made it apparent that such a trust must be measured by human lives. *Re Kelly, Cleary v. Dillon* [1932] Ir. R. 255, 261.

Cases "On All Fours"

Authority is found holding that a trust for an animal or an inanimate object may not be upheld as a private trust since the *cestui* is obviously devoid of legal personality. An attempt to include such a trust in the charitable class is criticised by Bogert " . . . the difficulty with calling a trust for 'my dog, Dick', charitable is not that the dog in question is a definite animal. . . . The result of caring for Dick in comfort for the rest of his life is not an appreciable elevation in the character and disposition of any considerable number of mankind." 2 BOGERT, TRUSTS (1935) § 379. In accord, another commentator is authority for denying the validity of a trust for an animal. "No animal can be the owner of property, even through the medium of a human trustee." SALMOND, JURISPRUDENCE (9th ed. 1937) 419.

Poodles and Perpetuities

So it seems safe to say that the trust for "Pet" would not be upheld by the foregoing authorities. The implication is that the statutes on trusts are creatures of the legal mind, and hence would not be stretched even to the advantage of potential four-legged plutocrats.