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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 Ridiculous and the Sublime

"He said they that were serious in ridiculous matters would be ridiculous in serious affairs." Plutarch, Morals, quoting Cato the Elder.

Since all of us have at one time or another been so unfortunate as to have been exposed to the ridiculous statements of others and some of us (even more unfortunately) have found that we have made them, it will not surprise anyone that such statements have evolved themselves into a point of law; specifically the defense to the allegation of fraud that the misrepresentation relied upon was in fact a statement so ridiculous on its face that no reasonable man would have believed it. Here then, is a careful analysis and critical commentary upon six major cases in point.

"The Eyes of Texas are Upon You"

In *Buckingham v. Thompson,* 135 S.W. 652 (1911) an enterprising Texas realtor evidently feeling that even the great state of Texas was too small a territory of operations, sent out literature to various parts of the United States concerning a particular ranch property he had listed, and described it as: richer than the valleys of Southern California; that it could not be kept from becoming a land of gold; that it was a land of fruit and flowers and happy homes; that independence was to be had there for the asking; that all eyes were on Texas, particularly Southwest Texas. . . . Due reference was made to the Garden of Eden, Monte Cristo and Aladdin's lamp. This the Texas court held to be statements "so extraordinary that no man of ordinary sense could be supposed to take them . . . at their face."

While engaged in the analysis of this case we inquired of our uncle, a Texan and lawyer of note, what he thought of the decision. Barely able to control himself, he gave it as his opinion that the judge who held the statements to be exaggerated ought be hanged, and the real estate man who wrote them ought be shot for understatement tantamount to treason. Thus we must report that (unofficially at least) the law of Texas on this point is unsettled.

"La vie en Rose"

The case of *H. Hirschberg Optical Co. v. Michaelson,* 95 N.W. 461 (1901) concerned a product known as "H. Hirschberg's Improved Diamond and Nonchangeable Spectacles and Eyeglasses" for which it was claimed that they had been chemically treated so as to fit the eye indefinitely; supposedly one's eye could run the gamut from myopia to astigmatism and back again and the lenses need never be changed. In speaking of these claims the court said: "In these days of almost miraculous new discoveries and inventions it would not be astonishing to know that glass might be treated chemically to improve the quality, but that it could be so treated as to adapt itself to the eye, year after year, as old age grew upon the person using it, is too preposterous for belief. . . ."

* Birrell, Obiter Dicta (1885) title page.

To understand this decision it must be borne in mind that it was rendered in 1901, well before the advent of television. We believe that had it been handed down this year its holding would have been exactly opposite. We arrived at this opinion after exhaustive research which consisted principally in watching numerous late movies on television, as a result of which, in addition to acquiring a British accent, we observed that the statements made in the instant case were the quintessence of sober reasonableness when compared with the frantically delivered metaphysical contradictions claimed for the merchandise displayed in the commercial announcements.

Further, anyone of the opinion that these statements are too ridiculous to be believed ought to discover from the Better Business Bureau the annual gross income of those adherents to the belief that everything in the world can be rebuilt as "good as new" including, presumably, their own reputations. *Jekshewitz v. Groswald*, 265 Mass. 413, 164 N.E. 609 (1929) ruled that where the person misled was a recent immigrant a representation by defendant to her that all they had to do in order to be married was to sign a piece of paper defendant obtained at City Hall, was not too ridiculous to be believed by her.

"It's only a Paper Moon"

Commented the plaintiff at time of signing: "It don't seem like a wedding at all." Which would indicate that the case also stands for the proposition that there may be something to a woman's intuition after all.

The legal principle under discussion can also work in reverse, i.e., the statements made can be believable but the recipient ridiculous. In *Sutton v. Grenier*, 177 Iowa 532, 159 N.W. 268 (1916) defendant was sued upon his refusal to perform a contract to pay $1,000 and convey 400 acres worth $14,000, for land which was (a) not even in the state in which he wanted it, (b) of which he saw only a photograph, and (c) worth actually only $2,500.

"Roll out the Barrel"

His defense: the misrepresentation as to value and the fact that plaintiff and one Pringle induced him to drink two quarts of beer during the negotiations. Defendant prevailed, thus proving the value of stiff opposition.

Incidentally, in its decision the court observed that it was ". . . unable to say from observation or experience that two quarts of beer, taken under such circumstances, could not have so addled the brain or befuddled the judgment of defendant as to render him more easily misled into an inequitable contract. . . ."

In *Nicholas v. Lane*, 93 Vt. 87, 106 Atl. 592 (1919), the Vermont court held the statement of vendor to vendee that there was "no better land in Vermont" to be obviously nothing more than highly exaggerated opinion so that vendee had no right to rely thereon. This is an obvious victory for the objective rule. For an excellent example of the subjective view, pose as a prospective buyer and ask any Vermont farmer for his opinion of his land.

"Home Sweet Home"

We have reserved the best for the last. What *Lawrence v. Fox* is to Contracts and *MacPherson v. Buick* is to Negligence, *Ellis v. Newbrough*, 6 N.M. 181, 27 Pac. 490 (1891), is to the law of Ridiculous Statements.

The plaintiff had joined and remained a member in excess of one year of a Utopian group known as the "Faithists." The group lived in common on a tract of land in the state of New Mexico. Not being the type to do anything by halfway measures, the group elected its own god and wrote its own bible. Desirous of increasing its membership, this enterprising group distributed literature containing excerpts

"The Wonderful Wizard of Oz"

from their bible (entitled Oahspe) describing the tract of land they inhabited (the Land of Shalam) and a considerable amount of the surrounding real estate extending for many miles in all directions. It was by this literature that the plaintiff contended he was misled, and as a specimen we cite the following: "Next south lay the kingdom of Himalawowoaganapapa . . . a kingdom of seventy cities and six great canals, coursing east and west and north and south, from the Ghiee mountain in the east, to the West mountain, the Yublahahcolaesavaganawakka, the place of the king of bears, the EEughehabakax, (grizzly). And to the south . . . on the deserts of Geobiathhaganeganewohwoh, where the rivers empty not into the sea, but sink into the sand, the Sonogallakaxkax, creating prickly Thuazhoogallakhoomma, shaped like a pear." As an illustration of that portion which was not designed as a description of the Land of Shalam, the following description was given: "In the high north lay the kingdom of Olegalla, the land of giants, the place of yellow rocks and high spouting waters. Olegalla it was who gave away his kingdom, the great city of Powafuchwowitchavagganeabba, spread along the valley of Anemoosagoochakakfuela. Gave his kingdom to his queen, Minneganewashaka, with the yellow hair long hanging down." "This," said the court, "unquestionably refers to Chicago."

The court in a rather left-handed manner summed up the case and the law in point when it said: "It is insisted however that the appellee has a right to recover for a deceit practiced upon him; that he was misled by the Oahspe and other writings of the society. On the contrary, defendants maintain that the appellee is a man who can read, and who has ordinary intelligence, and this the appellee admits. This admission precludes any inquiry as to whether appellee's connection with the Faithists . . . gave evidence of such imbecility as would entitle him to maintain this suit."

More succinctly stated, the rule is that one cannot be heard to say he relied upon a statement so patently ridiculous as to be unbelievable on its face, unless he happens to be that special object of the affections of a court of Equity, an idiot.