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Obiter Dicta

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OBITER DICTA

"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 Animal Kingdom

"Man is a rope stretched between the animal and the Superman. . . . "
Nietzsche, Thus Spake Zarathustra, Prologue, Chap. 4.

Man, himself by definition part animal, has from time immemorial, been closely concerned with those lower in the echelon of creation. He works them, plays with them, hunts and eats them. Occasionally he is hunted and eaten by them. It is not surprising then that that noble product of man's rationality, the law, touching as it does upon every aspect of his life, is frequently concerned with animals. In this respect we shall comment briefly, but first a definition of terms is desirable.

Who goes there?

According to *Commonwealth v. Turner,* 145 Mass. 206, 300, 14 N.E. 130 (1887), " 'Animal' in its common acception includes all irrational creatures. . . . " This definition however, is a bit too broad. It would automatically include most of your wife's relatives and your great aunt Matilda. On the other extreme is *Brooks v. Moore,* 13 B.C. 91 (1907), which solemnly remarks the obvious by stating that the term "animal" includes a horse. Such an opinion would be disputed only by the most partisan members of the baggy tweed and *eau de Man O' War* set. The best definition would seem to lie between the two. We shall proceed now to an examination of the case law and legislation on the subject.

Famous Last Words

In *Baker v. Snell,* 2 K.B. 352, 354 (1908), defendant's servant, charged with the keeping of defendant's dog, which was known to be vicious, released it in the midst of a number of other servants, saying at the time, "I'll bet the dog will not bite anyone. . . . Go it Bob!" Whereupon the dog bit the plaintiff. Defendant's big mistake was in hiring such person in the first place. He undoubtedly was a member of a distinct breed easily recognized by its propensity for attempting to fill inside straights, loudly proclaiming that they were on the boxing team at Upton Pompton Junior High and can lick any man in the house, and quoting the Reader's Digest to convince their doctor his diagnosis is incorrect. The latter gambit often takes the form of quoting their wife's brother to their lawyer for similar reasons.

Man's Best Friend

Incidentally, mastiffs, hounds, spaniels and tumblers were, at one time, the only dogs in which the common law recognized a property. *Ireland v. Higgins,* Cro. Eliz. 125, 78 Eng. Rep. 383. The case would never be so decided today. It would arouse great indignation by making mutts out of Rin Tin Tin and Lassie, and put out of business all those people who make a living by yearly convincing thousands that they ought to pay seventy-five dollars more and get the pure bred Humpherton-Wowser with the nerves of a communist at a Holy Name rally, instead of the happy little pooch whose left ear is a millimeter out of line.

* Birrell, Obiter Dicta (1885) title page.

Interesting is *Lynn v. State*, 33 Texas Crim. 153, 25 S.W. 779 (1894). It lays down the rule that homicide in defense of a dog is justifiable. This case however, must be limited strictly to its facts. It cannot be extended to include headwaiters, the boss's nephew or your wife's brother. Those who defend such people deserve to have the book thrown at them. The courts have gone along with the great tide of popular sentiment and refused to apply the rule of *Lynn v. State* in such cases.

Dog's Best Friend

In *Scribner v. Kelley*, 38 Barb. (N.Y.) 14 (1862), it was held that the strange appearance of an elephant causing plaintiff's horse to become unruly, was not such an act of the elephant as to render its keeper liable without showing that such was the effect on horses generally, and that the keeper knew thereof. This case would appear sound. The elephant was probably not overly impressed by the horse's looks either, and certainly the poor pachyderm, as opposed to modern women, cannot be blamed for his appearance. Nowhere in the facts does it state that the elephant employed lipstick, powder, rouge, cream, mascara, henna or any such camouflage; he just stood there as God had created him and the silly horse bolted. If the horse was frightened, it must be remembered that the elephant's feelings were probably hurt; after all he is thought quite attractive by others of his kind, which is attested by the fact that elephants, in one form or another, have been around for a million or so years.

The Night is Young And You're so Beautiful

We conclude our survey of the case law with *Copley v. Wills*, (Texas Civ. App.) 152 S.W. 839 (1913). Here, a boy gave peanuts to a monkey running at large in a museum. When he stopped to pick up a peanut the monkey had dropped, the ungrateful primate bit him. The boy was held not responsible for the attack. This is a shocking case. It could never have happened in New York. In the Metropolitan Museum, all monkeys running at large are dressed in elaborate suits of fifteenth century armor. Feeding them peanuts is strictly forbidden and it is impossible for them to bite since the visors on their helmets must be kept closed at all times. Secondly, a New Yorker would never think of picking up a peanut dropped by a monkey. Fresh from battling his fellow humans on the subway, his attitude is almost universally to the effect that the monkey can bloody well pick up his own peanuts. The case, however, can be said to be the rule in Texas, where the men are polite, the monkeys ungrateful, and the museums must really be something.

Do Not Feed The Animals

We turn now to a consideration of legislation in respect to animals. The field is so broad that we shall limit ourselves to two representative samples enacted recently in New York.

Chapter 306 of the New York Session Laws of 1956 amends section 273 of the Conservation Law to prevent the taking of aquatic insects without a license. To those accustomed to the necessity of procuring a license to take lion in Kenya, Kodiak bear in Alaska and tiger in Hyderabad, it will take time to get used to the idea that license is now required to take a waterbug in New York. But time can accustom men to many things and the day may yet come when the late movie on television will contain the following typical scene from a British importation: The setting is a popular men's bar in Nairobi. Peter Frothingham, white hunter, is seated alone nursing a scotch and splash and examining the bolt from his Mannlicher-Schoenauer when he is approached by one of his oldest friends, Sir Pharnesworth Hyphen-Smith:

The Macomber Affair

"Mind if I join you Peter?"

"Not at all old boy. I say Smitty, you look a bit shakey."

"Just in. Number One boy badly mauled. Sticky business."
"Water-buffalo?"
"Aquatic insect."
"Bad show old boy, bloody shame."
"Ironic thing that. Wasn't out for acquatic insect. Ruddy creature attacked us. Puts me one over my license. Have to explain to the commissioner."
"He'll understand."

Status Quo

Subdivision 2 of section 252 of the Conservation Law as amended by chapter 183 of the New York Session Laws of 1956, provides for an open season on mink. As far as the ladies are concerned, as the husbands well know, this statute merely codifies the common law.