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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."*

LAW IN WARTIME

Now that the dark clouds of war have descended upon the United States, the question arises: What about the status of Law? Are we obliged to accept the full force of the ancient maxim: *Silent leges inter arma*? And again: Assuming the continuance of Law, is it not in order to declare a moratorium on mirth and merriment? Perhaps *Obiter Dicta* with its "individual impertinences" should be suspended "for the duration." These are pertinent questions, and timely. We cast our vote in favor of both Law and Laughter.

*To Be or
Not to Be*

First, a defense of *Obiter Dicta*, a plea for jovial jurisprudence even in wartime. One distinctly American trait, which enables our citizenry to surmount catastrophe and to endure hardship, is a vibrant, ever-present sense of humor—a characteristic not wholly absent from the law. CARDOZO, *LAW AND LITERATURE* (1931) 26-30. This risible product is seemingly not "made in Japan" either in the original or imitative pattern. Have you seen the pictures of the "peace emissaries", KURUSU and NOMURA, essaying a toothsome smile? It may well be that the Axis formula calls for a complete ouster of fun and frolic. To indulge in a slightly mixed metaphor, it seems that the goose-step and the gloomy countenance go hand in hand. Not so in free America! Today, more than in normal times, we need *Obiter Dicta*.

*It is
to Laugh*

But more important is the query: May law and order be preserved in time of war? The maxim, *Silent leges inter arma*, is a classic generalization, but nothing more. True, a united people must make great sacrifices to preserve their rights and privileges. Free speech is curtailed. "When a nation is at war many things that might be said in times of peace are such a hindrance that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right." *Schenck v. United States*, 249 U. S. 47, 52 (1919). But it is well to recall that even in the early days of the war, the United States paused to celebrate the One Hundred and Fiftieth Anniversary of the immortal Bill of Rights.

*Silent Leges
Inter Arma*

Law and Laughter—both are not only necessary, but helpful, allies of the American cause. They are factors which may count heavily in the victory march of a nation which guarantees that no person shall "be deprived of life, liberty, or property, without due process of law" (U. S. Const. Amend. V and XIV.); a land which translated a victory slogan out of the treacherous assault at Pearl Harbor and paid tribute to her honored dead and her living heroes who were attacked without warning, without declaration of war, and in defiance of international law. Yet

*Caveat
Axis*

*BIRRELL, *OBITER DICTA* (1885) title page.

humor gleamed forth in the remark of Major Larson, Coach of the Navy Football Team, who paused on his way to his battle station to remark in substance: "That Nipponese Team from the Land of the Setting (*sic*) Sun was *off side* on that first play!" It is up to us to see that the Japs get onside once more. Caveat, Axis!
W. B. K.

WORDS AND PHRASES

*In the regal, legal language of the law,
Who is bold enough to try and pick a flaw?
Would my pen might ever rest, e're it base a lowly jest
On the solemn, ancient verbiage of law.*

The time has come, the walrus said, to speak of many things—especially of savings and waste, and wasting savings and saving waste. The country finds it imperative, not only to produce goods for present necessities, but to provide surpluses for tomorrow's uncertainties. In this all-out effort, housewives are exhorted to save food. Manufacturers are saving time. Money is invested in bonds and stamps, which formerly was squandered on beer and ice-cream sodas. Government officers have put through orders requiring wire clips and pins and metal banded pencils to be discontinued and inter-office envelopes to be used again and again, in order to save paper and pin-money. (New York Sun, Nov. 27, 1941.)

Surpluses and Surplusage

In looking around for some way to join the conservation movement, one wonders that the lawyers have not offered to do their bit, by making a sustained effort to save words. The legal profession seems to be in a position to effect the greatest quantity of saving in this regard. Yet piling of adjective on adjective and phrase on phrase goes on just as if the national situation was prosperous and not extreme.

Word-waste can be eliminated without sacrifice of efficiency in many cases. For example—"sick, sore, lame and disabled" is a usual allegation in pleading. 3 NICHOLS-CAHILL, ANNO. N. Y. CIV. PRAC. ACT (1938) Form 1008 p. 359. By the time the complaint is drawn, the plaintiff knows whether he is sick and disabled or lame and sore—or just sore.

Let's Cut Down

Why not choose the word which fits his predicament and let it go at that? In court orders, we find it "ordered, adjudged and decreed", when it appears that the judgment rendered, would be just as binding if "adjudged", alone were used. *Halbert v. Alford*, 81 Tex. 110, 16 S. W. 814, 815 (1891). A witness must promise to tell "the truth, the whole truth and nothing but the truth". If he tells the whole truth, who can ask for more? A referee swears to "faithfully and fairly" determine and make a "just and true" report. An obligor is "held and firmly bound"—and his obligation remains in "full force and virtue". His bond provides that he shall "well and truly" pay . . . the "just and full" sum. Why not try to cut down legal verbalism?

The *habendum* clause, in a bargain and sale deed, is "to have and to hold the above granted, bargained and described premises"; and in a quit-claim one "remises, releases and forever quit-claims." A deponent "deposes and says". In releases, it is "lawful money of the United States" that is paid. Since when has there been any *unlawful* money of the said United States? The Real Property Law arbitrarily

and by force of statute alone introduced a change whereby thirteen words were construed to mean, what in the old full-covenant deed required one hundred and fifty-two. [N. Y. REAL PROP. LAW § 253 (4).] To follow old forms, cluttered up with verbiage, is like wearing powdered wigs and hoop-skirts in the subways, because our great-grandparents were fond of them.

There are, however, certain words and phrases, used habitually in series by lawyers, which at first glance seem repetitious, but are in reality connotative of separate

*The Apt
Word*

ideas. "Incompetent, irrelevant and immaterial" evidence, for example, is such a series. "Incompetent" evidence refers to inadmissible evidence, whether logically probative of issues or not. *Farmers' Mill & Elevator Co. v. Hodges*, 248 S. W.

72, 76 (Tex. Civ. App. 1923). "Irrelevant" evidence is that which has no logical bearing on the issues in dispute. *Jeffras v. McKillop & Sprague Co.*, 2 Hun. 351, 353 (N. Y. 1874). "Immaterial" matter is matter of unimportance. *Pharr v. Bachelor*, 3 Ala. 237, 245 (1841). "Flotsam and Jetsam" of admiralty origin is another legal couplet indicating ideas as distinct as "ham and eggs". Judge Brown, in *Murphy v. Dunham*, 38 Fed. 503, 509 (D. C. Mich. 1889) distinguishes them as follows: "It (the coal) was not flotsam, because it did not float upon the water. It was not jetsam, because it never had been cast into the sea to save the ship; nor was it ligan, because the very definition of the word from the Latin *ligo*, to bind, indicates that it must be buoyed; but it was simply property lying at the bottom of the sea, which awaits its owner." See also 1 BL. COMM. 290-295 (13 ed. 1800); *Baker v. Hoag*, 7 N. Y. 555 (1853).

The profession, then, must exercise caution, and volunteer not a total but a partial defense of words. Formalism is often imperative. In wills construed after death, and in deeds conveying an exact estate by metes and bounds, certitude must be accomplished above all. In construing such instruments, or in searching down a difficult chain of title, what a comforting assurance the time-worn phrases give, where the meaning of old words has, through constant use, become fixed beyond the shadow of a doubt. A short cut of words may cut short the rights of the parties. Better be wordy than worried in some cases. Let the law continue, as always, to hold the scales of justice with a steady hand, and for this purpose a balanced ration of language is preferable. So

*Have pity on the minions of the law,
Who uphold the right and wilful wrongs abhor,
Let the language, by dissection, paint a glorious cross-section
Of the rightness, erudite-ness of the law.*

ON HIGH SPIRITS

Satire and caricature have found an apt subject in the dimensions of a sleuth's nose and its acuity in detecting felony. The public has been made familiar with the personalities of Ferret, Snoop and Hawkshaw, the detectives, whose inquisitive noses delved deeply into the blackest deeds in the annals of crime. However, there has been

*The Knowing
Nose*

precious little real appreciation of the importance of scientific smelling in law enforcement. Few realize it, but the olfactory organ plays a leading role in detecting misdeeds, especially those involving intoxicants. This is because

of a peculiar and distinctive fragrance that emanates from alcoholic liquids—an allegation made solely “on information and belief”. A recent federal decision judicially recognized the prominence of the proboscis in police work, holding that “in a proper setting a sense of smell may constitute probable cause for believing a particular crime is being committed,” and that, “the odor of whiskey mash emanating from a dwelling house, detected by experienced revenue officers, was in itself probable cause for a reasonable belief that the statutes were being violated.” *United States v. Seiler et al.*, 40 F. Supp. 895, 896 (D. C. Md. 1941).

The sense of smell and the evidence derived from its exercise have been judicially noticed by the courts and their probative value recognized. It has been held no error

to permit a witness to testify that he smelled and tasted a beverage and that it was alcohol. The court said: “It is a matter commonly known as a physical fact that by the use of the senses of smell and taste one can acquire the

A

Specialty?

knowledge that the limpid, mobile, colorless liquid with a hot and pungent taste and a slight, though distinctive, spirituous scent, is the liquid known as alcohol.” *Feagin v. Andolusia*, 12 Ala. App. 611, 67 So. 630 (1915). While no court has gone so far as to require that the nasal antenna be of Cyrano de Bergerac proportions when used in crime detection, nevertheless, Alabama circumspectly requires a witness, who would testify as to the character of an odor, to qualify as a “smeller”. *Anderson v. State*, 20 Ala. App. 505, 103 So. 305 (1925). In New York, it seems that thirty years of smelling and sampling whiskey qualifies one as an expert. *People v. Marx*, 128 App. Div. 828, 112 N. Y. Supp. 1011 (2d Dep’t 1908).

In the roaring twenties, John Barleycorn with his long bulbous nose and lugubrious countenance contributed much to the repositories of the law. Under the National Prohibition Act, 41 STAT. 305, 27 U. S. C. A. § 1 *et seq.*

Arresting Odors

(1919) happily repealed, the mere odor of whiskey mash was not sufficient probable cause for search in the view of some courts. *Staker v. United States*, 5 F. (2d) 312 (C. C. A. 6th 1925). Some authorities were impatient with officers who raided establishments on such evidence saying: “The use of so-called smell warrants should no longer be countenanced.” *United States v. A Certain Distillery*, 24 F. (2d) 557 (D. C. La. 1928). Under the present state of the law, the mere smell of whiskey is not sufficient to constitute probable cause for issuing a warrant for the commission of the crime of possessing “untaxpaid liquor” [*United States v. Lerner*, 35 F. Supp. 271 (D. C. Md. 1940)] but it was held that the smell of *whiskey mash* is sufficient to constitute probable cause for the issuance of a search warrant for the unlawful manufacture of whiskey, *United States v. Seiler, supra*. Cf. 53 STAT. 319, 26 U. S. C. A. § 2834 (1939).

In criminal law, there is a considerable conflict of authority as to the propriety of permitting the members of the jury to taste or smell liquor as an aid in determining its intoxicating character. Some jurisdictions frown upon the practice of permitting the panel to sample liquor, holding that, in effect, it constitutes new evidence received after retirement. *Tro v. State*, 104 Tex. Cr. R. 193, 283 S. W.

Jury Duty Made Pleasant

511 (1926). In *State v. Burcham*, 109 Wash. 625, 187 P. 352 (1920), twenty-four bottles alleged to contain whiskey were introduced in evidence and taken to the jury room to smell and sip while deliberating. The jury, twelve good men and true, promptly opened five of the bottles. This, however, the court held, did

not prejudice the defendant's case, since there was no affirmative showing that any of the jurors had become drunk. Not all mortals, however, possess such powers of restraint. Over two centuries ago in a great trial in England to determine whether or not brandy was excisable, counsel was heard to make the plaintiff cry: "My lord, we are at a full stop and can go no further. Mr. Saunders has drunk up all our evidence." 4 WIGMORE, EVIDENCE (3rd ed. 1940) 263.

PANDORA IN REVERSE

Legend has it that the ills of mankind were unleashed from a box by the curiosity of Pandora. Since then man has found it necessary to conduct an unrelenting war on disease. Magic was an early resort; the word of the ancient Greek, "Pharmakon", combined the elements of both medicine and magic. Out of the Greek root came the anglicized term, pharmacopoeia, which now symbolizes the preparation of all medicines. But alas, the aftermath of magic still lingers on to beguile the gullible and unwary. Although today, most of us are satisfied to rely on reputable medical science to relieve us of our aches and pains, there are still some skeptics and simpletons among us who favor the quack and charlatan. Lawyers have often seen evidence of this in the current cases.

In *Crum v. State Board of Medical Registration and Examination*, 37 N. E. (2d) 65 (Ind. Sup. Ct. 1941) the court upheld the action of the State Board in revoking the appellant's license to practice chiropractic, naturopathy and electric-therapy on the ground of "gross immorality". The means employed by the appellant had no rational relation to the alleviation of human ills. A box-like affair, called

an "etherator", was equipped with dial and knob, neither of which had any connection with the contents of the box. Ostensibly this box was to serve as the means of reincarcerating the ills that escaped Pandora, for with its help the appellant claimed to be able to cure cancer, blindness, arthritis, stomach ailments, heart trouble and varicose veins. Whether curly hair could be implanted upon the feverish brow of the patient, deponent saith not. More remarkable was the claim that he could lengthen or shorten a patient's legs or cause amputated fingers to grow back into place. The modesty of the "doctor's" prognosis was only exceeded by the simplicity of his cure. His usual treatment was started by having the patient moisten a slip of paper with saliva and deposit it through a slit on top of the "etherator". After this was done, the appellant rubbed the knob with his thumb and just talked to the machine!

Another bizarre method was disclosed in *Commonwealth v. Johnson*, 312 Pa. 140, 167 Atl. 344 (1933) where the defendant claimed to heal by remote control with the aid of an electrical instrument, which was not connected to any source of power. The modern medicine-man would rub the knob of his gadget with a piece of paper containing the patient's name. This "nominal" process would so stimulate the defendant's "mind" that he could make a diagnosis, even though he had never seen the patient and knew nothing of his symptoms. Another enterprising physician would have the patient stretch out on a table and place on his abdomen a piece of paper moistened by his saliva. The proper medicine was selected by a

What?
No Mirrors?

process of elimination. Various bottles of medicine would be placed successively in the patient's hand, until one was found which would cause some mysterious line on the patient's abdomen to be depressed. *Minnesota State Board of Medical Examiners v. Schmidt*, 207 Minn. 526, 292 N. W. 255 (1940). Again, a nervous disorder has been treated by a short exhortation, after which a collar with gold tassels was put about the patient's neck. Then the patient was given (not inappropriately) a few nuts to hold in his pocket and told to get two shirts of the very best silk, presumably as part of the cure. *Palotta v. State*, 184 Wisc. 290, 199 N. W. 72 (1924).

Not all experts confine themselves to ailments of the flesh. The appellant's practice, in the *Crum* case *supra*, was not limited to treating physical ills. He also administered "financial treatments" whereby he could cause money to be put into the hands of his patients. *Clarke v. People*, 53 Colo. 214, 125 Pac. 113 (1912) is another case involving money. There a seer and clairvoyant undertook to treat a trusting soul, who feared the loss of her money. Apparently the formula was successful because the patient was painlessly relieved both of her fears and of her money.

Of course, courts deal summarily with all persons pretending to be skilled in the treatment of human ills, even though they are quite properly reluctant to meddle in human beliefs and superstitions. The problem of regulating self-styled "healers" has long been with us. Comment (1937) 6 FORDHAM L. REV. 438. "Those seeking medical attention have no means of estimating the skill and ability of the physician, and must depend upon the State to permit only those qualified to engage in that profession." *People ex rel. Bennett v. Laman*, 277 N. Y. 368, 375, 14 N. E. (2d) 439, 442 (1938). *Dent v. West Virginia*, 129 U. S. 114 (1889).

BE WISE, LAWYER-IZE

While the ordinary prudent man is undoubtedly a paragon of wisdom, with his conduct rightly adopted as the standard, in Torts, Trusts, and other fields of jurisprudence, there have been occasions when his failure to obtain the assistance of an attorney, learned in the law, has brought him frustration, grief and monetary loss. His difficulty usually arises from his misconception of the law as a set of rules based on common sense. In no other branch of the law, have layman's errors seemed as numerous as in that which deals with testamentary disposition. Formalities are often important there, sometimes more important than common sense.

The ordinary layman feels that an indication of his intention to revoke his will should be sufficient to accomplish its revocation. However, in law his failure to cancel the will physically, often frustrates his intent. In *Matter of McGill's Will*, 229 N. Y. 405, 128 N. E. 194 (1920) the testatrix's intent to revoke her will was clearly indicated by her written direction to her attorney to destroy the will. His failure to do so defeated her purpose, because the court held, that the statute required the intent, though obvious, to be accompanied by a revocatory act. In *Matter of Evans*, 113 App. Div. 373, 98 N. Y. Supp. 1042 (1906) the

*Pocketbook
Fever*

*Even Homer
Nods*

*Actions
Speak*

testatrix directed her brother who had custody of her will and was beneficiary thereunder to destroy it. The brother falsely assured her that he had done so. Again the court was compelled to disregard the apparent intent of the testatrix. In spite of a testator's intention to revoke his will, manifested by his unambiguous holographic statement to that effect on the back thereof, another court [*In re Miller*, 50 Misc. 70, 100 N. Y. Supp. 344 (1906)] disregarded the attempted revocation. A similar situation arose [*In re Akers*, 173 N. Y. 620, 66 N. E. 1103 (1902)] where the testator wrote in the margin of the will that he had revoked it; the Court of Appeals held that such notation was not tantamount to a physical cancellation of the instrument and hence the statutory requirement had not been satisfied. Nor is a physical act of cancellation sufficient in law to effect revocation without the manifestation of an intent by the testator to revoke. In *Matter of Hopkins*, 73 App. Div. 559, 77 N. Y. Supp. 178 (1902) *rev'd* on other grounds 172 N. Y. 360, 65 N. E. 173 (1902) the court refused to nullify a will, in the absence of any apparent reason for its cancellation by him, though lines had been drawn through the testator's signature, in view of evidence that persons other than the testator had had access thereto. See *In re Crawford*, 80 Misc. 615, 142 N. Y. Supp. 1032 (1933); *In re Hilderbrand*, 87 Misc. 471, 150 N. Y. Supp. 1067 (1914).

True to the law of averages there have been a small number of reported cases in which a layman's attempt at revocation has proved fruitful. However, in the majority of these cases, the courts indulged in presumptions and drew rather fine inferences from the evidence. A

*The Probative
Exception*

vivid example of this may be found in *In re Clark*, 1 Tucker 445 (1869), where the signature of the testator and the name of the residuary legatee were crossed out. The will was found in a bureau drawer after the testator's death. By making findings that only the testator had access to the drawer, that none of those who would benefit by the decedent's intestacy had access thereto, and finally that there was no proof that the cancellation was accidental, the court was enabled to declare the cancellation to have been the testator's own act accompanied by the necessary *animus*. But these instances of success, by their numerical inferiority, only emphasize the great risk that laymen run, when they take the law into their own hands, even where they are disposing of property of which they are presumably lords and masters.