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Obiter Dicta

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In this sense, the two changes are extremely beneficial¹⁹ and although primarily intended to alleviate a distressing procedural hardship that became more burdensome with New York City operating public utilities, the sections have statewide application.

However, it is unfortunate that having squarely in mind the differences existing between the judicial departments and finding the rule propounded by the First Department not to their liking, the legislature did not clarify the matter generally with respect to examinations and eliminate the peculiarity of having two different public policies in operation in the same state.

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."*

GONE BUT NOT FORGOTTEN

A *cause célèbre* may have its genesis in unpretentious beginnings. In a recent action to recover on a policy of insurance, involving only two hundred and fifty dollars, a

The "Spirit"
Is Willing

dire threat was made to the time honored practice of law firms continuing under the names of deceased partners. In effect, the plaintiff charged that a rose smells not so sweet when known by another name; and entered a motion to strike

out an answer subscribed in the name of the law firm of "Alexander and Green", claiming it to be a nullity since neither Alexander nor Green was alive. The motion was denied. Undaunted, the plaintiff's attorney carried his argument to the Appellate Term charging that the appearance under the name of Alexander and Green constituted an affront to the court, a fraud on the public, an unlawful appropriation of the prominence of the dead and an unfair advantage in the race of competition. Such eloquence may have deserved a better fate, but the Appellate Term left the plaintiff's attorney with no solace except such as might be found in one of Emerson's essays defending the elusive value of non-conformity. The appellant's motion was denied in an opinion which declared that neither the N. Y. PARTNERSHIP LAW nor the N. Y. PENAL LAW prohibits the practice in question, and that if any change is desired, it is a matter for determination by the legislature. *Mendelsohn v. Equitable Life Assurance Society*, 178 Misc. 152, 33 N. Y. Supp. (2d) 733 (App. Term 2nd. Dep't 1942).

In England, in a case somewhat similar to the one in question, a dispute arose among the survivors of a dissolved partnership of solicitors as to the right to use the firm

mended by the Judicial Council. See THIRD ANNUAL REPORT OF THE JUDICIAL COUNCIL, LEGIS. DOC. (1937) No. 48 at 245, 253.

19. The examination before trial that is now permitted as against a municipal corporation is similar to the examination of the state in the Court of Claims. N. Y. CT. OF CL. ACT § 17 (2), N. Y. LAWS 1939, c. 860.

*Birrell, *Obiter Dicta* (1885) title page.

*Silent
Partners*

name. The court held that since there had been no sale of good will or provision as to the use of the firm name, each surviving partner had a right to its use. *Burchell v. Wilde*, 1 Ch. 551, 69 L. J. Ch. 314 (1900); cf. 24 HALSBURY'S LAWS OF ENGLAND 515 (2d ed. 1937). The practice, however, has had the serious consideration of the American Bar Association. The CANONS OF ETHICS, Canon 33 provides: ". . . The continued use of the name of a deceased or former partner, when permissible by local custom, is not unethical but care should be taken that no imposition or deception is practiced through this use. . ." It has long been recognized that an attorney owes the court absolute good faith and that any intentional deceit renders him unfit for his high calling. *In re Zanger*, 266 N. Y. 165, 194 N. E. 72 (1935). Where the stationery of a firm reveals the names of the present partners, however, there is little likelihood of clients being deceived as to their true identity. *Burchell v. Wilde, supra*. A new amendment to the N. Y. PENAL LAW § 440-b (6) specifically exempts partnerships of attorneys from the requirement of filing a certificate setting forth the true names, residences and business addresses of the partners, and thus gives at least a passive legislative sanction to the practice of continuing the use of the firm name.

*"The Cohens
and
The Kellys"*

The importance of acquiring a distinctive name for business purposes is elsewhere recognized. Mr. Cohen, a budding young foot doctor, discovered to his chagrin that he would be but one of hundreds of Cohens listed in the telephone directory. How then was he to attract attention to his art and make himself stand out as a boon to bunion sufferers and a curer of corns extraordinary? He decided to assume the name of Kagan and petitioned the City Court to permit him to do so. Unfortunately for him, however, his petition was denied. After noting that the name of Kagan was derived from a long line of Irish educators and scholars, the court similarly found Cohen to be an equally old and honored name, well suited to the practice of any profession the petitioner might pursue. *Petition of Cohen*, 163 Misc. 795, 297 N. Y. Supp. 905 (1936).

*The Law
of
Names*

At common law, any name could be adopted, provided the party assuming it did not do so with the intent to defraud. *International Union Bank v. National Surety Co.*, 245 N. Y. 368, 157 N. E. 269 (1927); *Romans v. State*, 178 Md. 588, 16 A. (2d) 642 (1940). The assumption of a family name by a stranger was also permissible and gave the members of that family no right of redress. *Manz v. Philadelphia Brewing Co.*, 37 F. Supp. 79 (D. C. Pa. 1940). The common law right to change one's name freely has not been restricted even though statutory procedure for effecting such change has been enacted, because such statutes have been construed as being merely a device for making the change a matter of record. *United States v. McKay*, 2 F. (2d) 257 (D. C. Nev. 1924); *In re Useldinger*, 35 Cal. App. (2d) 723, 96 P. (2d) 958 (1939). And see, *Smith v. U. S. Casualty Co.*, 197 N. Y. 420, 90 N. E. 947 (1910); N. Y. CIV. RIGHTS LAW § 60. Surviving partners at common law have the right to continue the use of the firm name after death of a partner, even though it includes the name of the deceased. *Kirkman v. Kirkman*, 20 Misc. 211, 45 N. Y. Supp. 373 (1897) *aff'd* 26 App. Div. 395, 49 N. Y. Supp. 683 (2d Dep't 1898); *Mason v. Dawson*, 15 Misc. 595, 37 N. Y. Supp. 90 (1896). On the other hand, when all partners entitled to the use of the firm name die or retire, the right to use the name dies with the last survivor and does not pass to personal representatives. *Fisk v.*

Fisk, Clark & Flagg, 37 Misc. 737, 76 N. Y. Supp. 482 (1902) *aff'd* 73 App. Div. 626 (1st Dep't 1902). By statutory modification, however, where business has been carried on in the *sole* name of a resident of this state for five years prior to his death, the right to use the name of the deceased passes on as a part of his personal estate and may be used by any person who becomes legally entitled thereto. N. Y. PARTNERSHIP LAW § 80 (3). A different problem may arise on dissolution, and in trade partnerships it has been held that the firm name attaches to the good will and is inseparable from it, each partner being entitled to have it converted into cash and included in the firm accounts. *Slater v. Slater*, 175 N. Y. 143, 67 N. E. 224 (1903) No special rule of law applies to hair tonic firms, but where a receiver of the hirsute-partnership assets has been appointed and a sale directed for the benefit of the dissolved partnership, each party is enjoined from using the firm name. *Kridos v. Evanthes*, 250 App. Div. 203, 293 N. Y. Supp. 797 (2d Dep't 1937).

The adjudicated cases treat almost exclusively of trade partnerships and contain little on the question of rights of law partners to continue the use of the firm name on death or dissolution. Conceivably some remote benefit might be derived from the use of the name of a disbarred attorney. In *Matter of Kaffenburgh*, 188 N. Y. 49, 80 N. E. 570 (1907) after the death of one partner and conviction and disbarment of the other, one Kaffenburgh, a clerk, attempted to practice in the firm name of "Howe and Hummel". Since Howe was dead and Hummel's right to practice law under his own or the firm name was lost by disbarment, Kaffenburgh was held to have no right to practice in the firm name. The reasonable implication of the court's decision, however, is that Kaffenburgh would have had the right to practice law under the name of Howe and Hummel if he had been a member of the existing firm. Cf. N. Y. PENAL LAW § 277. It should be noted that while the practice of continuing the firm name after death or retirement of partners is prevalent among law firms of repute, it is by no means universal. Some firms change their names each time a partner dies or retires. While such changes obviate all possibilities of being attacked in the same manner as was Alexander and Green, admittedly the stationery bills run high. Heretofore the possibility of saving words has been considered. *Obiter Dicta*, (1942) 11 FORDHAM L. REV. 116. With the present shortage of paper in mind, a patriotic justification might now be urged for the retention of the old firm name.

WHAT'S YOURS?

Today, amid the wail of sirens and the thundering reverberations of bombs, a new and dangerous weapon has appeared in court. It is a dark, sweet-tasting syrup commonly mixed with carbonated water and frequently bottled, known as coca-cola. This beverage has been found to have a devastating effect upon a venerable and sacrosanct process of justice: trial by jury. The Supreme Court of Texas recently held that the purchase by the victorious plaintiff of a five-cent coca-cola for a juror, before a verdict had been reached, was sufficient grounds for the granting of a new trial. *Texas Milk Products Co. v. Birtcher*, 157 S. W. (2d) 633 (1941).

The question of how much, if any, refreshment may be furnished to a juror has been before the courts many times and there are many different decisions. Arkansas

*"Without Meat,
Drink, Fire,
or Candle"*

believing implicitly in the unbiased wisdom of its jurors, and in their ability to separate "the wheat from the chaff" in whatever garden grown, has held that giving one juror a soft drink and furnishing another juror with a cigar did not justify a new trial. *St. Louis Southwestern Ry. v. Ellenwood*, 123 Ark. 428, 185 S. W. 768 (1916). Mayhaps the court found that the cigar was of such inferior quality that it definitely overcame any advantage gained by the soft drink; which only brings to mind Tom Marshall's pertinent observation that "what this country needs is a good 5¢ cigar." Whether the above surmise has any value may become questionable in New York. We have a case where a generous litigant forgot to furnish the soft drinks but gave the jurors cigars. Gene Tunney, who inveighed against tobacco in his recent article *Nicotine Knockout, or the Slow Count*, might approve the result. (December 1941, 39 *READER'S DIGEST* 21.) The court gave the defeated litigant another chance. *Steenburgh v. McRorie*, 60 Misc. 510, 113 N. Y. Supp. 1118 (1908). Our Western brethren, the Kansans, appreciate a good cigar. They showed their appreciation of the litigant's sense of the finer things in life by not reversing a decision where cigars were circulated among the jurors quite as freely as in the New York case. *Wichuta & W. R. Co. v. Fehheimer*, 49 Kan. 643, 31 Pac. 127 (1892).

The doctrine of *res ipsa loquitur* has many supporters, perhaps none more fervent than the unfortunate plaintiff who gave the jurors a box of cigars when their value was the fact in issue. The effect was disastrous. *Platt v. Threadgill*, 80 Fed. 192 (C. C. W. Va. 1897). A "joint venture" seems to be permitted by the courts, for when the defendant gave the jurors cigars and the petitioner's attorney gave them peanuts the verdict was allowed to stand. *Drainage Com'rs of Dist. No. 8 v. Knox*, 237 Ill. 148, 86 N. E. 636 (1908). There are many moot points yet to be decided. We have not found any cases in the Descriptive Word Index under the headings "popcorn" or "pretzels".

*Judge
for
Yourself*

It is a long and serpentine trek from soft drinks to hard liquor. To make the transition easier, we may first look into the effects of beer upon a verdict and note that beer is safer than coca-cola, if the juror treats the successful litigant. *St. Paul F & M Ins. Co. v. Kelly*, 43 Kan. 741, 23 Pac. 1046 (1890). Whisky brings us into the realm of trouble. Vermont will unquestionably reverse if you treat a juror to a drink. *Parkhurst v. Healy*, 95 Vt. 357, 115 Atl. 491 (1921). But in Mississippi, the capacity of the juror is an important factor. Where the juror is an habitual drinker, one drink will not call for a new trial. *Brookhaven Lumber & Mfg. Co. v. Illinois C. R. Co.*, 68 Miss. 432, 10 So. 66 (1890). One drink would probably do no more than whet the juror's appetite and do little, if anything, to stimulate the juror's favor. The enviable reputation of alcohol as a pain palliative, persisting from the days of the Roman Empire to the present, was apparent in one case, where an erudite trial justice, having a higher opinion of "whisky than of lawyers" oratory, allowed each party to treat the jury to a bottle of whisky, in order, as he so aptly phrased it, "to enable them to listen to remarks of counsel." But the higher court did not agree with him. *Kellogg v. Wilder*, 15 Johns. 455 (N. Y. 1818). It can be said with reasonable assurance that you can give a juror a drink of water. The tender of *aqua pura* will have no after effects on the verdict, since the court, with austere dignity, avails itself of the maxim: *De minimis non curat lex*. *Mitchell v. Corpening*, 124 N. C. 472, 32 S. E. 798 (1899).

The next time you meet a juror at a bar, remember the moral of this discourse. When the bartender serves you with your whisky and the conventional "chaser", observe the laws of the state even though you violate the decent amenities of social custom. Proffer the proverbial "chaser" to the juror, and drink the hard liquor yourself.

TAKE IT OR LEAVE IT

Lest the over zealous sheriff, in his effort to execute his warrant, strip the shirt from the back of the judgment debtor, the legislatures of the various states have wisely exerted a restraining influence by gratuitously allowing certain exemptions to unfortunate debtors. *Myers v. Moran*, 113 App. Div. 427, 99 N. Y. Supp. 269 (1906). This is done so that the debtor's family may not become a public charge and that family unity may remain unbroken. *Wilcox v. Hawley*, 31 N. Y. 648, 657 (1864); *Griffin v. Sutherland*, 14 Barb. 456, 459 (N. Y. 1852). The importance of such a statute cannot be minimized. To be most efficacious however, a statute of this type must be kept abreast of the times. In New York, § 665 of the Civil Practice Act, originally enacted in 1829 (2 R. S. 367), has been amended several times for this purpose. See, 7 NICHOLS-CAHILL ANNO. N. Y. CIV. PRAC. ACT (1938) § 665 p. 525. The latest addition is subdivision 6-a (April 3, 1942) which exempts, "A wedding ring," and "a watch not exceeding in value thirty-five dollars." 107 N. Y. L. J. No. 83 p. 1506 (Apr. 10, 1942).

Take It Easy

The story of these amendments is a commentary on domestic progress. "One sewing machine" was added to the exemptions in 1860 (L. 1860 ch. 152) and a lamp and coal scuttle were added in 1891 (L. 1891 ch. 112). The legislature started to clean house when they dropped the spinning wheel, candles, and andirons from the books (L. 1920 ch. 925, § 665). But what are the New York modernists thinking of, when their statute still exempts "Ten sheep, with their fleeces, and the yarn or cloth manufactured therefrom; one cow; two swine; the necessary food for those animals; . . ." N. Y. CIV. PRAC. ACT § 665 sub. 4. These items and in fact most of the specific articles exempted by the New York statute, are of little or no use to the great majority of people living in cities. New York City, for example, has an ordinance which provides that ". . . no cattle, swine, sheep . . . shall be kept . . . within or adjacent to the built-up portions of the city of New York without a permit issued therefor by the board of health." N. Y. SANITARY CODE, ch. 20, Art. 2, § 11. When the original act was passed in 1829, the majority of the people lived in rural areas, but today 82.8% of the population of this state is classified as urban. WORLD ALMANAC, 589 (1942).

The Old Spinning Wheel

Among the exempted articles are also meat, fish, flour, groceries, and vegetables provided for family use. Although the courts have reiterated the rule that this statute should be construed liberally (*Hartmann v. Wood*, 57 App. Div. 23, 67 N. Y. Supp. 1046 (1901) one court reached the result that, "Wheat is not flour within the meaning of the section." *Salsbury v. Parsons*, 36 Hun. 12, 17 (N. Y. 1885). Food would be of little value unless it could be cooked, and therefore all the necessary utensils for cooking are in the same exempt category along with fuel and oil for the family's use for sixty days.

Food for Thought

If the delinquent debtor has no more than four children he avoids many social