

DE MINIMIS NON CURAT LEX

While maxims play an important part in the development and growth of the law, legists differ as to their merit. Some, in times past, have regarded them as being of the same force and effect as statutes, more critical writers consider them misleading, on the ground that they are not worth their face value, others take a middle ground, treating maxims as useful servants but dangerous masters.

Sometimes there is a seeming antinomy presented by these aphorisms, for example the apparent contrast between *de minimis non curat lex*, and no wrong without a remedy. At times they fuse into a harmonious rule of law, as in those cases where the canon of construction *cessante ratione legis cessat ipsa lex* is resorted to for the purpose of ascertaining the content of a maxim, sought to be applied to a novel situation. Frequently important bodies of law owe their origin to legal adages; thus, the vast subject of the law of agency derives from the legal proverb, *qui facit per alium facit per se*, and according to *Blackstone's Commentaries*,¹ the doctrine of the right of riparian proprietors to alluvion gained by imperceptible degrees, originated in the maxim *de minimis non curat lex*. Often where a case arises in which judicial precedents cannot be found, and no statutory authority exists, a court finds itself obliged to resort to general principles of public policy, and maxims are frequently resorted to as creative agencies in the establishment of new precedents in jurisprudence.²

Courts of law exist to enforce rights and redress wrongs, not to encourage litigation, hence they will not take jurisdiction of moot cases, nor take cognizance of vexatious suits. In general it would be unnecessarily irksome and tedious, and beget a marked tendency to delay justice, if courts were to require the mathematical precision of a micrometer. Therefore it is necessary and expedient that the law should not be concerned with trivial

¹ 2 BL. COMM. *262.

² The Code Napoleon seems to impose a similar duty on judges where it provides that "The judge who shall refuse to determine under pretext of the silence, obscurity or insufficiency of the law, shall be liable to be proceeded against as guilty of a refusal of justice."—Code Civil, Art. 4.

matters. Thus the doctrine of riparian accretion arose, also the rule that the law does not consider fractions of a day. Where, however, ordinary convenience, which justifies application of the rule, would be outweighed by considerations of substantial justice, *cessante ratione legis cessat ipsa lex*.

Many of the technicalities which in sundry times and at divers places have become a reproach to the administration of the law, would have been ineffective, had courts resolutely refused to take cognizance of points which are unsubstantial, frivolous, and without merit. It is not intended, however, that laboring as they do under increasing pressure of work, courts should be subjected to lax or slovenly procedure, for that would tend towards unnecessary delay in the despatch of business, and create the very mischief sought to be eliminated by the policy of the maxim *de minimis*. Concededly, it is not a trifle to offend against procedural requirements that a pleading should be concise, or that a brief should be furnished with a table of contents.

1. The maxim is inapplicable to the positive and wrongful invasion of another's property or person.

While torts are classified as a branch of private law, they have a social aspect which is not to be lost sight of. Unchecked, they are a menace to public safety, through the encouragement of wrong-doing leading to breach of the peace and other crime. Legislation in Massachusetts, Pennsylvania and other States, making certain acts of trespass infractions of the criminal law, is a clear recognition of this principle. The duty of the citizen to check tort-feasors is well phrased by Dr. von Jhering, who says:

“The law, to exist, demands that there should always be a manly resistance made to wrong. . . . Resistance to injustice, the resistance to wrong in the domain of law, is a duty of all who have legal rights, to themselves . . . for it is a commandment of moral self-preservation—a duty to the commonwealth; for this resistance must, in order that the law may assert itself, be universal. . . . Every man who enjoys the blessings of the law should also contribute his share to maintain the power of the law and respect for

the law. Every man is a born battler for the law in the interest of society.”³

By submission to repeated acts of dominion over his property, it is possible for a man to deprive his family of their lawful heritage through the operation of statutes of limitation.⁴ The inherent rights of man to life, liberty, property and the pursuit of happiness, are not mere figments of fancy; on the contrary, they are vital, fundamental principles, essential to the continuance of a well-ordered civilization. It necessarily follows that public policy and an enlightened self-interest are alike opposed to considering wanton breaches of personal rights as being within the orbit of the maxim.

As a general rule, torts, being violations of legal duty, are not deemed trifles in the eye of the law. Consequently the maxim *de minimis non curat lex* is not applicable to actions sounding in tort, for wilful infringement of personal rights;⁵ and where damages for such infractions are incapable of computation by monetary standards, the law will imply them.⁶ So deeply rooted is this principle that, where a legal right is invaded and a legal recovery is necessary to its vindication, the implication of damage will be drawn, even where in fact the breach of legal duty has yielded a pecuniary benefit to a plaintiff.⁷ And a new trial will not be refused in an action of tort where small damages have been awarded, on the ground that the maxim applies thereto.⁸ Nor will a right to maintain an action for the value of property be denied on the ground that the amount involved is trivial.⁹

The law of nuisance is on a different footing from that of most torts, as nuisance is not actionable *per se*, which means that

³ THE STRUGGLE FOR LAW (Lalor's transl. 1879) 30, 77.

⁴ HOLMES, THE COMMON LAW (1881) 98.

⁵ Sappington v. R. R., 127 Ga. 178, 56 S. E. 311 (1906); Seneca Road Co. v. R. R., 5 Hill 170, 175 (N. Y. 1843); Campbell v. Cottelle, 38 R. I. 320, 95 Atl. 665 (1915); Wood v. Waud, 3 Ex. 748 (1849).

⁶ R. R. v. Flagg, 43 Ill. 364 (1867); Smith v. Holcomb, 99 Mass. 552 (1869); R. R. v. Allen, 53 Pa. 276 (1866).

⁷ Dewire v. Hanley, 79 Conn. 454, 65 Atl. 573 (1907).

⁸ Campbell v. Cottelle, *supra* note 5.

⁹ Ives v. Edison, 124 Mich. 402, 83 N. W. 120 (1900); Wartman v. Swindell, 54 N. J. L. 589, 25 Atl. 356 (1892).

damage therefrom has to be shown, and will not be implied, and that it is a question of degree rather than of kind. No action will lie for a nuisance except where it causes actual damage to the plaintiff, and where it is based upon discomfort or inconvenience, the discomfort or inconvenience complained of must be substantial and not trivial, from the standpoint of the average member of the community. As expressed by Vice-Chancellor Knight Bruce, in the case of *Walter v. Selfe*,¹⁰ an actionable nuisance "must cause an inconvenience with the ordinary comfort physically of human existence . . . according to plain and sober and simple notions . . ." Here, the maxim is plainly applicable.

Defamation is another class of torts in which the question of triviality, in law, is frequently relevant, for many imputations that would be considered offensive to good taste, have been held to be too trivial to be actionable. The gradations of traducement in Anglo-American law show this; and cautious observance by certain types of publications of the boundaries between actionable and non-actionable falsehood often illustrate it. Actionable calumny ranges from statements actionable *per se*, such as imputation of crime or ignorance of one's calling, to those of which the courts will take cognizance only where special damage can be shown as a result, in which latter class of cases the maxim is clearly applicable. The anomalies of the common law respecting evil-speaking, lying and slandering, have been attributed to the historical fact that mendacity was once a common subject for spiritual censures.

It has been shown by the learned author of a well-written note,¹¹ that courts in many jurisdictions afford protection against wilful interference of third parties with a contract right. In such cases, it is conceived, the maxim would not be deemed applicable. Nor is it likely that such classes of trespasses as were at one time regarded to be criminal, and punishable by fine for breach of the peace, which fine was imposed in addition to the damages as-

¹⁰ 4 De G. & Sm. 315, 322, 64 Eng. Repr. 849 (1851).

¹¹ *Tortious Interference with Contractual Relations*, 31 HARV. L. REV. 1017-1022 (1918).

sessed (until the statute 5 W. & M. c. 12, substituted costs payable to the plaintiff for the fine payable to the crown) would be considered trivialities in the eyes of the law.

Actionable negligence is a complex question. It comprises: First, (to paraphrase the language of the Anglican prayer-book) an allegation that the defendant has done those things which he ought not to have done, or has left undone those things which he ought to have done; and secondly, an averment that such conduct is a violation of the standard of legal duty. Where a court decides, on motion for non-suit or otherwise, that a given state of facts which constitutes negligence falls short of being actionable, it holds, in effect, that the act or omission complained of is a trifle in law. Hence it may be considered a safe conclusion that the principle *de minimis* applies to actions for negligence.¹²

2. Applicability of the maxim to breaches of contract.

Despite modern legislation devised for the protection of creditors, such as bulk sales acts, and statutes making it a criminal offence to issue a check where there are insufficient funds for its payment, the general trend of jurisprudence is towards leniency to those who fail to carry out their contractual obligations.¹³ It is therefore to be expected that the law would be more clement towards breach of contract than it is towards torts, and such is the case. Thus we find debtors' exemption acts, bankruptcy laws, and similar legislation, in our American jurisdictions side by side with Constitutional prohibitions against the enactment of laws impairing the obligations of contracts. As has been observed by Mr. Justice Holmes, the relation between contractor and contractee is voluntary,¹⁴ which, it goes without saying, is vastly different from that arising between the tort-feasor and his victim. In a mild degree we find this attitude of leniency reflected in judiciary law. Accordingly we find that a new trial has been

¹² The importation of American precedents in the law of negligence into the civil law jurisdiction of Porto Rico is gratifying evidence of the meritoriousness of this branch of American jurisprudence.—See Hamilton, *Germanic and Moorish Elements of the Spanish Civil Law*, 30 HARV. L. REV. 303, 318 (1917).

¹³ A striking illustration of the same tendency at one period in ancient history is to be found in DEUTERONOMY 15: 1, 2.

¹⁴ HOLMES, *op. cit. supra* note 4 at 302.

refused for error in insignificant items in an action for breach of contract;¹⁵ and where merely nominal damages are involved,¹⁶ except where such damages would carry costs.¹⁷ Likewise an appeal has been denied where the error assigned is a mistake of a small sum of money.¹⁸

Substantial performance on the part of the plaintiff must be shown, when suit is brought upon a contract; but he need not show literal compliance with unimportant details of his agreement. Whether or not a defect or omission in the matter of performance of a condition precedent has been committed by such complainant is matter of substance or mere triviality is, as a rule, deemed to be a question of fact, and not a question of law;¹⁹ at the same time, where there has been a breach of contract, it is horn-book law that the obligation be laid upon the party not in fault to mitigate the damages caused by the defaulter's act, so far as possible without loss to himself.²⁰ Again a plaintiff has no right to bring an action of quasi-contract on the ground of failure of consideration, where the defendant's breach or omission is not of such a nature as to indicate an intention to repudiate his agreement. On this ground it has been decided that where one has failed to give a note or acceptance, required of him by a contract under which he has purchased goods, he cannot be sued on said contract until the expiration of the period of credit originally agreed upon.²¹ In such case, however, it has been suggested that the delinquent is suable immediately on the breach of the special agreement, and that damages would be re-

¹⁵ *Cruthers v. Donahue*, 85 Conn. 629, 84 Atl. 322 (1912).

¹⁶ *Beattie v. R. R.*, 84 Conn. 555, 80 Atl. 709 (1911); *Thren v. Ames*, 149 Ill. App. 147 (1909); *Abbott v. Walker*, 204 Mass. 71, 90 N. E. 405 (1910) *semble*.

¹⁷ *Lund v. Lachman*, 29 Cal. App. 31, 154 Pac. 295 (1915).

¹⁸ *Willey v. Bowden*, 14 Ga. App. 379, 80 S. E. 910 (1914).

¹⁹ *Miller v. Benjamin*, 142 N. Y. 613, 617, 37 N. E. 631 (1894).

²⁰ *Kingman v. Western Mfg. Co.*, 92 Fed. 486 (C. C. A. 8th 1899); *Black v. Woodrow*, 39 Md. 194, 215 (1874); *Hosmer v. Wilson*, 7 Mich. 294 (1859); *American Publishing Co. v. Walker*, 87 Mo. App. 503 (1901); *Clark v. Marsiglia*, 1 Denio 317 (N. Y. 1845); *Heiser v. Mears*, 120 N. C. 443, 27 S. E. 117 (1897); *Davis v. Bronson*, 2 N. D. 300, 50 N. W. 836 (1892); *Collyer v. Moulton*, 9 R. I. 90 (1870); *Tufts v. Weinfeld*, 88 Wis. 647, 60 N. W. 992 (1894).

²¹ *Manton v. Gammon*, 7 Ill. App. 201 (1880); *Hanna v. Mills*, 21 Wend. 90 (N. Y. 1839); *Dutton v. Solomonson*, 3 B. & P. 582 (1803); *Mussen v. Price*, 4 East 147 (1803).

coverable to the amount of the sales price, less a rebate of interest for the period of the stipulated credit.²² A part performance which is a substantial, bona fide compliance with a contractual obligation, is all that is necessary²³ (which imports that trivialities would be ignored); unless, as in cases where time is stipulated to be of the essence of a contract, incidental and otherwise non-essential features are agreed by the parties to be matter of substance.²⁴ Likewise, in contracts of suretyship, the rule that any alteration made in the principal contract, without his consent, discharges the surety as to subsequent transactions, is, it is conceived, subject to the principle *de minimis* where the alteration is unsubstantial or is beneficial to him. This view is supported by the reasoning of the authorities which hold that where a surety guarantees the carrying out of more than one distinct undertaking, and one of such undertakings is changed or an additional one agreed to by a distinct contract, such change does not affect the surety's liability as to the undertaking which remains unaltered.²⁵

The equitable practice of relief against forfeiture for lapse of time where not essential to the substance of a contract, points to the adoption in equity of the principle of the maxim *de minimis non curat lex*, in pursuance of the adage that equity follows the law. Readers who are interested in the civil law are respectfully referred to the concurrent mediæval maxim, *de minimis non curat prætor*,²⁶ which, for aught the writer knows to the contrary, may be senior to that of the common law. Another application of the maxim in equity, whether derived from the common law, civil law or both, is afforded by the rule that a contract will not be cancelled for mistake, where such mistake does not affect its

²² *Hanna v. Mills*, *supra* note 21.

²³ *Chambers v. Jaynes*, 4 Barr 39 (Pa. 1846); *Gilman v. Hall*, 11 Vt. 510 (1839); 2 PARSONS, CONTRACTS (9th ed. 1904) 811.

²⁴ *Sneed v. Wiggins*, 3 Ga. 94 (1847); *Kemp v. Humphreys*, 13 Ill. 573 (1852); *Westerman v. Means*, 12 Pa. 97 (1849); 2 PARSONS, *op. cit. supra* note 23 at 812.

²⁵ *Garnett v. Farmers' Bank*, 91 Ky. 614, 16 S. W. 709 (1891); *State v. Swinney*, 60 Miss. 39 (1882); *Bank v. Traube*, 75 Mo. 199 (1881); *Mayor v. Kelly*, 98 N. Y. 467 (1885); *Dawson v. State*, 38 Ohio St. 1 (1882); *Harrisburg Assn. v. U. S. Fidelity Co.*, 197 Pa. 177, 46 Atl. 910 (1900).

²⁶ *Cusson v. Delorme*, 6 Quebec Q. B. 202, 214 (1897).

substance.²⁷ The rule is different, however, in cases where equitable relief is sought against actual fraud, for courts of equity will not inquire into the extent of the injury done, if the party seeking relief has been misled to his prejudice in the slightest degree; provided that the amount of pecuniary loss inflicted is at all appreciable.²⁸

3. The derivative rule that the law will not regard fractions of a day.

The rule that the law does not regard fractions of a day has been stated to be based upon necessity; but it is believed that it is founded upon considerations of practical convenience and expediency. As mere convenience should not outweigh considerations of substantial justice, it is almost universally the case that, where material, courts will regard fractions of a day. It is to be borne in mind that the parent maxim emphasizes that the law does not take cognizance of trifles, consequently its corollary, that judicial attention will not be directed to fractions of a day, is limited to those cases where the fraction is relatively of such trivial importance as to be practically immaterial and irrelevant to the issues in a litigation.

In the service of process, notice and pleadings, it has been held that the rule applies: *e. g.*, where service of summons is required to be made at least six days before the return day, a service in the afternoon of the second day of April has been held valid where returnable in the morning of the eighth of April.²⁹ The rule that a man comes of age at the beginning of the day preceding the twenty-first anniversary of his birth is familiar to all who have had anything to do with the conduct of elections. As a practical matter very few people could give the hour of their birth, so here the convenience of the rule amounts almost to necessity. Even the day of birth is often a fact of which proof is not easily accessible. This has been shown by the experience

²⁷ 2 POMEROY, EQUITY JURISPRUDENCE (3d ed. 1905) § 856, and cases cited in notes 1, (a) and (b). Compare article 1110 of the Code Napoleon, "Mistake is not a cause for annulling the agreement except when it occurs in the very substance of the thing which is the subject thereof," etc.

²⁸ 2 POMEROY, *op. cit. supra* note 27, § 898, and cases cited in notes 3 and (b).

²⁹ Columbia Turnpike Road v. Haywood, 10 Wend. 422 (N. Y. 1833).

of many native-born citizens of middle age or advanced years, who, when applying for passports, are unable to furnish certificates of birth, owing to the dearth of records, prior to the year 1880, upon which such certificates can issue. The familiar rule of the common law that an infant *en ventre sa mere* is regarded as an heir, makes it unnecessary to consider fractions of a day, where an infant is born the day of the death of him through whom an inheritance is claimed. Unlike the hour of birth, the hour of death is almost always noted. This fact is so well recognized that most probate courts require the hour as well as the day of death, as part of their records. Hence, where a judgment was entered on the day of the death of a defendant, but after the time of his death, it has been held that the fiction of the relation of judgments to the first moment of the day of entry does not apply, and that such judgment is not entitled to priority out of the proceeds of the sale of real estate over the claims of general creditors.³⁰ Ordinarily, however, a judgment is a lien during the entire day of its entry, and will take priority over a mortgage entered at a recorded hour on the same day³¹—a contingency that is customarily provided against by conveyancers and title insurance companies. If, however, it were required by statute that a note of the hour and minute of entering a judgment be registered, the rule would probably be otherwise.³² The policy of such a statute as that last mentioned is doubtful. In the first place it deprives claims ripe for judgment of their protection against sudden impairment of assets subject to execution; and in the second place, it would make for intolerable confusion in populous centers where court clerks are besieged by lawyer's clerks competing for priority of attention. The doctrine that fractions of a day will not

³⁰ Patterson's Appeal, 96 Pa. 93 (1880). *Contra*, Wright v. Mills, 4 H. & N. 488 (1859).

³¹ Alrichs v. Thompson, 5 Harr. 432 (Del. 1854). *Contra*, Goetzinger v. Rosenfeld, 16 Wash. 392, 47 Pac. 882 (1897). The doctrine of Alrichs v. Thompson is generally law in American jurisdictions. A few jurisdictions adhere to the old common law rule that judgments relate back to the first day of the term in which they are entered, and some others postpone the lien of a judgment to the last day of the term; both classes of cases give equal priority to all judgments entered in the same term. See LOYD, CASES ON JUDGMENTS, 158, n. 2, and 159, n. 4.

³² See Alrichs v. Thompson, *supra* note 31.

be regarded in the entry of judgments, and the consequent relation back of the lien of a judgment to the first moment of the day of entry, results in the rule that judgments entered on the same day have equal priority,³³ and gives rise to the principle that a judgment has priority over any conveyance entered upon the same day.³⁴

Sometimes the doctrine concerning fractions of a day is stated in the form of the dogmatic fiction that in law there are no fractions of a day—that a day is a mathematical point of no dimension, so to speak. Dogmatic fictions are frequently employed on account of the convenience afforded by their compressed form of stating legal doctrine; but it is urged that they are inapplicable wherever the basic reasons of their underlying principles cease to exist. It follows that the doctrine of relation is subject to the *ratio legis*—*Cessante ratione legis, cessat ipsa lex*.

It has frequently happened that the question whether the hour at which a statute takes effect shall be considered has been the subject of contest. Sometimes the fiction prevails and at other times it yields to principles of greater weight. Where a bankruptcy or insolvency law is repealed on the day of presentation of a petition thereunder, the doctrine of relation governs, even though such petition has been filed at an hour prior to the going into effect of the repeal statute.³⁵ While not so stated, it is surmised that the cancellation of unpaid debts is not deemed a proper ground for refusal to apply the fiction of relation. To give the fiction any force in such a case would certainly divert it from its original purpose. On the other hand, where considerations of justice require the setting aside of the fiction, the maxims *Fictio cedit veritati* and *Fictio juris non est ubi veritas* would apply, as in the case of *Louisville v. Portsmouth Savings Bank*.³⁶ In the case just cited a township—which had previously voted a donation to a railroad, which gift was to be raised by a special

³³ *Rockhill v. Hanna*, 15 How. 189 (U. S. 1853); *Cook v. Dillon*, 9 Iowa 407 (1859); *Waterman v. Haskin*, 11 Johns. 228 (N. Y. 1814); *Bruce v. Vogel*, 38 Mo. 100 (1866).

³⁴ *Boyer's Estate*, 51 Pa. 432 (1866).

³⁵ *Matter of Welman*, 20 Vt. 653 (1844).

³⁶ 104 U. S. 469 (1881).

tax—voted to issue bonds in discharge of its undertaking. On the day that the bond issue was voted, the people of the State voted in favor of a new Constitution containing a provision which forbade donations by townships, etc., to railroad or other private corporations. In the forenoon of the election day a town-meeting was held of fifty-four voters, of whom fifty-two voted in favor of the bond issue. On appeal to the United States Supreme Court it was held that the State Constitution did not go into effect prior to sunset, when the polls closed, and that the authorization of the bond issue took place prior thereto, that while the law, in general, does not take cognizance of the fractions of a day, courts may do so when substantial justice requires it.

4. Applicability of the maxim *de minimis* to tax questions.

In the days immediately preceding the outbreak of the Revolutionary War, opposed to the British conception that the right of taxation derives from the possession of sovereignty, was the American contention: "No taxation without representation." This clash of principles, persisted in by the retention of the three pence per pound duty on tea, termed by its supporters "that figment of a tax, that pepper-corn rent," led to the independence of the United States. Taxation has thus had a deep political significance in our American jurisdictions, and there is still so much of a political character in the enactment and administration of tax laws, that courts, as non-political agencies of government, have found the general subject of taxation a matter of great delicacy to deal with. It is a truism that the power to tax is the power to destroy (a famous illustration of which has been the elimination of state bank-notes by a prohibitive tax upon circulation) and, in all probability, the consideration of this potentiality is a contributing factor in impelling many courts to feel that incidents of taxation are not trivial, and that the maxim does not apply to excessive assessments or levies. On the other hand, there is the feeling (which occasionally manifests itself in dissenting opinions) that taxes, as a source of public revenue, are essential to the promotion of the general welfare, and that it is a serious matter to invalidate their collection. This latter posi-

tion has led to legislation in some jurisdictions authorizing tax sales of property which is worth considerably more than the amount sought to be collected;³⁷ and even (in one state at least) validating sales or tax titles thereunder where part of the tax is illegal.³⁸

In general, a sale for unpaid taxes is valid where there has been substantial compliance with the law in every step of the proceedings,³⁹ consequently trivial deviations from tax law procedure would not invalidate such sales. Some authorities, however, require strict construction of statutes authorizing tax sales, treating their requirements as mandatory and assimilating the procedure to the strictness of forfeiture proceedings.⁴⁰ When it comes to an excessive assessment or levy, the general rule is that, except where otherwise expressly provided by statute, a sale of property for taxes is void if there is any excess and the maxim *de minimis* will not prevent the slightness of the excess from invalidating the sale.⁴¹ A modern American court is not likely to attribute to the law-making power a statutory intent that an authority conferred by it to assess or levy taxes is an elastic one, and that such limits as are laid down by the legislature could be passed; for if overstepping the authority laid down in a tax act were left to the discretion of tax assessors and collectors, the question of abuse thereof would rest largely upon the personal equation of the membership of the courts and make for confusion in lieu of a desirable certainty. Power to collect more taxes than are needed savors too much of the antiquated system of the farmers-general to be lightly ascribed to tax legislation.

³⁷ *E. g.*, *Southworth v. Edmands*, 152 Mass. 203, 25 N. E. 106 (1890).

³⁸ *Rhodes v. Sexton*, 33 Iowa 540 (1871).

³⁹ *People v. Kankakee & S. Ry.*, 265 Ill. 497, 107 N. E. 218 (1914); 2 COOLEY, *TAXATION* (3d ed. 1903) 912-914.

⁴⁰ *Holland v. Hotchkiss*, 162 Cal. 366, 123 Pac. 258 (1912); *Wilson v. McKenna*, 52 Ill. 43 (1869); *Brown v. Veazie*, 25 Me. 359 (1845); *Hough v. City of North Adams*, 196 Mass. 290, 82 N. E. 46 (1907); *Cahoon v. Coe*, 57 N. H. 556 (1876); *Landis v. Vineland*, 61 N. J. L. 424 (1898); *Wilson v. Bell*, 7 Leigh 22 (Va. 1836).

⁴¹ *Treadwell v. Patterson*, 51 Cal. 637 (1877); *McLaughlin v. Thompson*, 55 Ill. 249 (1870); *Genthner v. Lewis*, 24 Kan. 309 (1880); *Collins v. Lane*, 151 Ky. 8, 150 S. W. 977 (1912); *Hus v. Merriam*, 2 Green 375 (Me. 1823); *Burroughs v. Goff*, 64 Mich. 464, 31 N. W. 273 (1874); *Lufkin v. Galveston*, 73 Tex. 340, 11 S. W. 340 (1889); 2 COOLEY, *op. cit. supra* note 39, 955-957.

5. The maxim *de minimis* as a canon of statutory interpretation.

An eminent educator, whose helpful guidance through the mazes of legal study is gratefully remembered by many former pupils, is said to have voted against the purchase of statute books for the library of a famous law school. He felt that ample material for the training of lawyers was contained in the volumes of reported cases. His colleagues, however, realizing that this is an era of legislation, voted for the addition of statute books to their library. In recognition of the prominent part that legislation now plays, a number of law schools have courses in Statutes.

One of the first questions which frequently arise in the interpretation of a statute is whether it is mandatory or directory. To solve the problem many rules of thumb, based upon form, have been suggested, tested, and frequently discarded. It is respectfully submitted that whether a statutory provision is mandatory or directory is seldom a matter of form, that on the contrary the problem is largely a question of its importance in the light of the subject-matter and general purpose of the act of which it is a part, and that where literal compliance with its terms is not essential to the carrying out of the legislative intention, the maxim is applicable. The general trend of judicial decisions seems consistent with this view. "Criminal law, as well as civil, knows the maxim '*De minimis non curat lex*,' which has controlling application to the enforcement of a statute which aims at the repression of real and substantial abuses."⁴² A stamp act has been held to be subject to the maxim, because there was no coin small enough to pay the tax, if it were attempted to enforce literal compliance with the terms of the statute.⁴³ In a murder case, an appellate court has decided that a statutory requirement that an order holding a special term of court shall be posted ten days before the commencement of the term was merely directory and that a notice of eight days was sufficient, it being deemed that the notice was intended solely to prevent surprise, and that the statutory purpose had been fully complied with.⁴⁴ A statute

⁴² U. S. v. Hocking Valley Ry., 194 Fed. 234, 250 (N. D. Ohio 1911).

⁴³ Baxter v. Faulam, 1 Wils. K. B. 129 (1746).

⁴⁴ Blimm v. Comm. 70 Ky. 320 (1870).

declared that in every action thereunder against a carrier for loss or damage, with interest from the date of filing a claim with such carrier, the event of failure to pay the same within a prescribed period subjected such carrier to a penalty, provided that no penalty be imposed unless the plaintiff recovered the full amount of his claim; the claim filed was for \$16.88 and the amount proved was \$16.87½. Held, that the maxim *de minimis* applied to the discrepancy of a fraction of the smallest current coin—it being “too trivial for the practical administration of the law.”⁴⁵

In general, unsubstantial deviations from the letter of a statute are disregarded, the prime question being whether they are material, in the light of the *ratio legis*; the legislative intention, whenever it can be legitimately arrived at, being the polestar for the judicial interpreter. Where, however, statutes are of a class that is strictly construed, such as acts in derogation of common right or actions for penalties, the maxim *de minimis* does not apply to their requirements⁴⁶—as a general rule. And the smallness of a sum involved, provided that it be appreciable, is not in itself a ground for application of the maxim to the interpretation of a statute or municipal ordinance, so as to deprive a court of jurisdiction in a test case.⁴⁷ Moreover, a matter which ordinarily would be too trivial for a court to consider, will be judicially determined if it appear that the trifle might lead to consequential results.⁴⁸ And where there is found to be a conflict among statutes *in pari materia*, and such conflict relates to an immaterial matter, the maxim will be applied and the trivial discrepancies will be disregarded.⁴⁹ It is hardly necessary to observe that a court has no authority to substitute its own opinion of the materiality or substantialness of a statutory requirement for that which may be unequivocally and unmistakably expressed or implied by the language of the lawmaker.

⁴⁵ *Laundry Co. v. Ry.*, 83 S. C. 209, 65 S. E. 239 (1909).

⁴⁶ *Mayhall v. Woodali*, 192 Ala. 134, 68 So. 322 (1915).

⁴⁷ *Montgomery L. & T. Co. v. Avant*, 202 Ala. 404, 80 So. 497 (1918).

⁴⁸ *State v. Superior Court*, 136 Wash. 87, 238 Pac. 985 (1925).

⁴⁹ *State v. Dunn*, 76 Neb. 155, 107 N. W. 236 (1906).

6. Applicability of the maxim to adjective law.

The early stages of legal development may be termed ritualistic. Sales, bailments and other contracts were made the subject of a dramatic dialogue by the parties interested in the presence of witnesses, in order to ensure the sanction of enforceability. The modern marriage service is a recognizable historic survival of this practice of antiquity. Court procedure was equally ritualistic and in the course of time a tradition of the sacredness of form led to the adoption of such devices as fictions in order to ensure that there would be an available remedy for the vindication of a recognized legal right. Nowadays the tendency of the courts is to look to the substance rather than the form of matters in issue; tribunals, for illustration, decline to trouble a jury with evidence which could not reasonably satisfy it,⁵⁰ and support this practice on the ground that the law does not regard trifles; and, in general, the rigidity of form yields to the practice of holding procedural requirements directory rather than mandatory.

At present, the crying evil of the law's delays is fostered in too many jurisdictions by legislation encroaching upon the proper and appropriate functioning of courts with minute and often irksome details of procedural requirement which fetter courts and earnest parties litigant alike. As Dean Pound has well said,

"More than one unhappy feature of American administration of justice which is a factor for ill in the conditions of which complaint is made so justly today, is a result of shortsighted, ignorant application of lay common sense to difficult problems of law and of judicial administration, which called not for common sense, but for the uncommon trained sense of experts."⁵¹

Mr. Elihu Root observes on the same subject that:

"During the sixty odd years which have elapsed since the reform of American procedure by codification there has

⁵⁰ *Jewell v. Parr*, 13 C. B. 909 (1853); *Offut v. World's Columbian Exposition Co.*, 175 Ill. 472; 51 N. E. 651 (1898).

⁵¹ Presidential address at the 49th (1926) annual meeting of the American Bar Association.

been a constant movement towards . . . complex and technical procedure, caused by legislative interference with the details of practice. . . . The New York Code, as a horrible example, has been swelled in this way to more than eight times its original dimensions."⁵²

Mr. Chief Justice Taft suggests a remedy for this state of affairs by calling for: first, the repeal in a number of jurisdictions of legislation which restricts the judge in the exercise of his control in the trial of cases; and secondly, the enactment of suitable laws giving the judges the means of expediting the initiation, trial and final determination of litigation.⁵³

The best that the judicial interpreter can do, while and where such conditions as have just been outlined are prevalent, is to resort to the presumptions against inconvenience and unreasonableness; discriminate between that which is mandatory and that which is directory; and, after ascertaining what is matter of substantial requirement, apply the principles *cessante ratione legis cessat ipsa lex* and *de minimis non curat lex* as canons of construction. It is believed that the situation should not be discouraging, for excellent materials are available for the use of draftsmen of reformatory procedural legislation. A notable contribution towards a solution of the problem of abridging the law's delay has been made by Professor Whittier in his masterly discussion of *Notice Pleading*.⁵⁴ Notice pleading, as the article shows, is a system whereby a claim or defense offered is required to be stated in simple terms sufficient to give reasonable notice to the opponent, as opposed to the old method of requiring a statement of the salient facts necessary to be proved in order to establish a claim or defense. The professor attributes great success to the system, as worked out by the Municipal Court of Chicago and the State courts of Michigan. Congress in its codification of the laws of Alaska offers a model statute for dealing with variances by providing that:⁵⁵

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ 31 HARV. L. REV. 501 (1918). See also Part IV of Professor Sunderland's article, *The Michigan Judicature Act of 1915*, 14 MICH. L. REV. 551 (1916).

⁵⁵ ALASKA COMP. LAWS (1913) § 919.

"No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleadings to be amended upon such terms as shall be just."

This statute is highly reformatory for it checks frivolous objections on the one side, and punishes wilful or grossly negligent slackness on the other side.

It has often been remarked that justice delayed is justice denied. Nothing can be more disheartening than for a litigant to find himself obliged to fight a case over again in a lower court to maintain a point which admits of final determination in an appellate court to which it has been carried. This mischief is provided against in an Arkansas statute some thirty-five years old⁵⁶ giving power to the State Supreme Court to make final disposition where the record is in such shape as to admit of such action. The act provides that:

"The Supreme Court may reverse, affirm or modify the judgment or order appealed from in whole or in part and as to any or all parties, and when the judgment or order has been reversed the Supreme Court may remand or dismiss the cause and enter such judgment upon the record as it may in its discretion deem just."

A Kentucky statute forbids a reversal except for substantial error.⁵⁷ The Virginia Code of 1924 at Section 6331 enacts that:

"No judgment or decree shall be reversed . . . for any error committed in the trial where it plainly appears from the evidence given at the trial, that the parties have had a fair trial on the merits, and substantial justice has been done."

⁵⁶ ACTS OF ARK. (1891) 280, ARK. DIG. STAT. (Crawford, 1921) § 2177.

⁵⁷ Weick v. Dougherty, 139 Ky. 528, 90 S. W. 966 (1906).

It is believed that enough has been shown to indicate that there is ample material, some of which has been tested by time and experience, which is readily available for use by those who may be charged with the important duty of drafting procedural acts adapted to modern conditions. That "the law takes no account of trifles . . . is a maxim which relates to the ideal rather than the actual law. The tendency to attribute undue importance to mere matters of form—the failure to distinguish adequately between the material and the immaterial—is a characteristic defect of legal systems."⁵⁸

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⁵⁸ SALMOND, JURISPRUDENCE (7th ed. 1924) 533.