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Max L. Veech
University of Michigan Law School

Charles R. Moon
University of Michigan Law School

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Max L. Veech * and *Charles R. Moon* †

AN age-old maxim often applied but infrequently rationalized is that of *de minimis non curat lex.* In the recent case of *Steve Anderson v. Mt. Clemens Pottery Company*,[1] the United States Supreme Court focused attention upon the doctrine by ruling that it should be applied in determining whether "walking time" and other "preliminary activities" constitute "work" for which employees are entitled to compensation under the Fair Labor Standards Act of 1938.[2] The so-called "portal-to-portal" problems which have arisen as a result of the last mentioned ruling make timely a discussion of the origin, meaning, function and application of the maxim.

I

THE MAXIM, ITS ORIGIN AND FUNCTION

The maxim is variously stated[3] and variously translated[4] in treatises and reports. One of the earliest English collections of maxims in

* A.B., J.D., University of Michigan.

† A.B., J.D., University of Michigan.

[1] Decided June 10, 1946, 328 U.S. 680, 66 S. Ct. 1187.

[2] 52 Stat. L. 1060, 29 U.S.C. (1940) § 201 et seq.

[3] *De minimis non curat lex*, BROOM, LEGAL MAXIMS, 10th ed., 88 (1939); BOUVIER'S LAW DICTIONARY, 3d rev. 8th ed., 2130 (1914); SALMOND, JURISPRUDENCE, 6th ed., 476 (1920). In the civil law it is often stated *Minima non curat Praetor*, 1 DERNBERG, PANDEKTEN 326, note 5 (1902); or *De minimis non curat Praetor*, AUGOSTINI BARBOSAE, TRACTATUS VARII 102 (1644); TRAYNER, LATIN MAXIMS AND PHRASES, 2d ed., 137 (1876). The historical source of the maxim is demonstrated in its statement as *Minima res non dat restitutionem* in ALBERICI DE ROSATE BERGOMENSIS, DICTIONARIUM JURISTAM CIVILIS, QUAM CANONICI (Venice, 1581).

[4] "The law doth not regard trifles," BRANCH, PRINCIPIA LEGIS ET AEQUITATUS, 1st Am. ed. from 4th London ed., 36 (1824); "The law does not concern itself about trifles," BROOM, LEGAL MAXIMS, 10th ed., 88 (1939); MORGAN, LEGAL MAXIMS, 3d ed., 55(1878); "The law takes no account of trifles," SALMOND, JURISPRUDENCE, 6th ed., 476 (1920); "The law does not notice or concern itself with trifling matters," BOUVIER'S LAW DICTIONARY, 3d rev. 8th ed., 2130 (1914).

which this maxim is included states it as, *de minimis non curat lex* and translates it, "The law doth not regard trifles."[5] Later translations frequently use the verb "concern" instead of "regard."[6] Although it may appear to be an unimportant distinction, it is believed that the subsequent discussion will show that the translation using the verb "regard" more truly expresses the real purpose and use of the maxim. The translation of the maxim using "concern" was a source of much humor to a writer in the *Albany Law Journal*[7] in 1880 who discusses many cases in which the law obviously did very much concern itself with trifles, generally not mentioning the maxim. Cases are cited, for instance, where the issue hinged on the meaning of one word or upon the presence or absence of a punctuation mark, or, as he laughingly points out, "a hair from the head of the prophet Mohammed." Actually, in every case in which the *de minimis* maxim is cited or applied, the law is *concerning* itself with what is found to be or alleged to be a trifle. These trifles, however, are not *regarded* as being a worthy basis for a decision or other action by the court.

The maxim was not known as a maxim in the Civil Law until about the Fifteenth Century. Instances in which its principle has been applied to particular problems can be found as far back as Callistratus,[8] and Ulpianus and Paulus,[9] in writings compiled in Justinian's *Digest;* but in the list of rules in condensed form contained in the *Digest* neither *de minimis* nor a variation of it was included.[10] One of its earliest appearances as a maxim was in 1644[11] in Augustini Barbosae's book of

[5] BRANCH, PRINCIPIA LEGIS ET AEQUITATUS, 1st Am. ed. from 4th London ed., 36 (1824).

[6] See note 4, supra.

[7] Rogers, "De Minimis Non Curat Lex," 21 ALBANY L.J. 186 (1880).

[8] D.4.I.4. With regard to *restitutio in integrum*, an action whereby the Praetor could relieve minors and others from bargains legally binding but inequitable, Callistratus stated that the action should not be granted if the amount involved is insignificant or the matter unimportant. See the translation in 3 SCOTT, THE CIVIL LAW 55 (1932). See also 1 MONRO, THE DIGEST OF JUSTINIAN 201 (1904).

[9] D.4.III.9-11. With regard to the same action referred to in note 10, supra, it was said that the action ought not to be granted indiscriminately; "for instance . . . if the amount involved is insignificant, *Paulus*, That is to say, not over two *aurei*, *Ulpianus*, It should not be granted." 3 SCOTT, THE CIVIL LAW 71, 72 (1932); 1 MONRO, THE DIGEST OF JUSTINIAN 220 (1904).

Another example may be found in D.18.I.54, where it was stated by Paulus: "Res bona fide uendita, propter minimam causam inempta fiere non debit. See 5 SCOTT, THE CIVIL LAW 18 (1932).

[10] 11 SCOTT, THE CIVIL LAW 297-318 (1932).

[11] A collection published a few years earlier is by Alberici De Rosate Bergomensis, supra, note 3, in which appears the statement "*Minima res non dat restitutionem.*" This is, of course, not as broad a statement of the maxim.

maxims, *Tractatus Varii*, where it was stated as *de minimis non curat Praetor* and *quod Praetor non curat de minimis*. From these beginnings modern writers in Civil Law now state the maxim as we know it.[12]

The development of *de minimis* in the Common Law followed a similar pattern. Bracton, writing in the Thirteenth Century, discussed situations in which the principle of the maxim was applied, but the maxim was not stated as such.[13] Coke, writing in the Sixteenth and Seventeenth Centuries, stated the principle in its present day form,[14] but he apparently did not yet regard it as a maxim.[15] In the Eighteenth Century Blackstone used the maxim as an independent principle of law, as it is now used.[16] The earliest collection found in which the maxim is included is by Thomas Branch, and was published in the United States in 1824.[17] Since that time the use of the maxim has increased steadily in all courts and the field of its application has steadily broadened.[18]

One of the earliest reported English cases in which the maxim was stated and applied in its present form is that of *York v. York*,[19] digested in Viner's *Abridgement* as holding:

> "No action lies of a waste but to the value of a penny; for de minimis non curat lex."[20]

An even earlier case is translated in the Selden Society Year Book Series in which waste was charged for cutting three ash trees and two sallows. The court is reported to have held:

[12] 2 RICCOBONO, NUOVO DIGESTO ITALIANO 548 (1937).

[13] 1 BRACTON, DE LEGIBUS, Twiss ed., 69 (1878), (I. 1, fol. 9); and 4 id. 607 (1878) (I.4, fol. 316).

[14] COKE, SECOND INSTITUTE, c. 5, p. 306.

[15] COKE, FASCICULUS FLORUM or A HANDFUL OF FLOWERS (1618). This little volume lists many rules and maxims but does not include *de minimis non curat lex*, or its variations, among them.

[16] 2 BLACKST. COMM. 262; 3 BLACKST. COMM. 228; 4 BLACKST. COMM. 36.

[17] BRANCH, PRINCIPIA LEGIS ET AEQUITATIS, 1st. Am. ed. from 4th London ed. (1824). Other early collections of maxims which do not include *de minimis non curat lex* are: NOY, THE PRINCIPAL GROUNDS AND MAXIMS, 2d Am. ed. from 9th London ed. (1824); also id., 1st Am. ed. from 7th London ed. (1808); id., 1st London ed. (1642); FRANCIS, MAXIMS OF EQUITY, 1st. Am. ed. (1823); WINGATE, MAXIMES OF REASON (1658).

[18] In F.A.D. Andrea, Inc. v. Dodge, (C.C.A. 3d, 1926) 15 F. (2d) 1003 at 1005, the court said, "However, it is the growing policy of the law not to take notice of trifling matters. 'De minimis non curat lex' is a maxim which has greater force today than ever."

[19] Y.B. 9 Henry 6, p. 66 b (1431).

[20] 22 VINER'S ABRIDGEMENT 458 (1745). In the margin is this note, "and by Anderson, if Judgment had been entered, it had been Error; for the Value of Waste shall be to 40 d. at the least. Noy 4. Thore vs. Thomas." (Y.B., 42 Edw. 3, 13.)

> "The waste in this case is too trifling for us to adjudge it waste and so entitle the plaintiff to have recovery of the place wasted; for strictly speaking, to cut down sallows which will grow again is not waste." [21]

Whether or not the actual wording of the maxim was used does not appear from the original report in legal French or its translation. This use of the principle of the maxim in waste cases is noted by Bracton[22] who lived and wrote in the reign of Henry III.[23]

Thus far in the English cases the maxim had been used only in waste situations. The next step was for someone to make use of the precedent thereby created in another fact situation. In *The Case of the Mines*,[24] in the argument of counsel, this step was taken. This was a case between Queen Elizabeth and the Earl of Northumberland involving the ownership of certain mines located beneath lands owned by the Earl. The Queen claimed that all gold and silver mines belonged to the Crown and supported this claim by producing many commissions and leases from the ancient records in which the ownership of such mines by the Crown, irrespective of ownership of the overlying land, was expressly or impliedly recognized. The Earl contested this claim, relying principally upon the defense that these particular mines were copper mines, although they did contain some gold and silver, and, therefore, belonged to him as landowner, or, in the alternative, that at least the copper in these mines belonged to him. Counsel for the Earl thus sought to distinguish between a copper mine containing gold and silver and a gold and silver mine containing copper. Their argument was as follows:

> ". . . And therefore where an action of wast is given for wast done to the disherison, &c. yet it has been held that if the wast done is but of the value of 2d. the plaintiff shall not have judgment, for *de minimis non curat lex*, and this is not within the words or intent of the Act.[25] And so in the said commissions or leases of base mines, in which *aliquid auri vel argenti habetur*, the intent of the King and of the words are, where the gold or silver is worth more than the base mine, or at least is equivalent to the whole charge of getting it, for otherwise it shall not destroy the

[21] Anon, Y.B., 8 Edw. 2, Wast. 11, Case I (1315), Seldon Society Y. B. Series, p. 121.

[22] 4 BRACTON, DE LEGIBUS, Twiss ed., 607 (1878), (I.4, fol. 316).

[23] 1 KENT COMM., 2d ed., 499, 500 (1832). Henry III, 1216-1272 A.D.

[24] 1 Pl. Rep. 310, 75 Eng. Rep. 472 (1568).

[25] Statute of Gloucester, 6 Edw. 1 (1278).

thing of greater value. So that they are only to be taken in this sense, viz. where there is a great plenty of gold or silver in the mines. . . ."[26]

The Court of Exchequer held for the Queen as to ownership by the Crown of gold and silver mines. As to the other issue, it held that, since the Earl had admitted in his pleadings that there was gold and silver in the mines but had not pleaded the quantity of gold and silver, it must be presumed that it was in a substantial quantity. The mines, therefore, were the property of the Crown.

The case usually cited in the collections of maxims, in connection with *de minimis*, is *Taverner v. Dominum Cromwell.*[27] This case involved, among other things, the question of whether or not a copyholder could have a prescriptive right to cut trees on copyhold land. In deciding this question the court is reported to have said:

"For the second, they held the prescription good. For Walmsley said there is a difference between a prescription for freehold land and for customary land; for custom which concerneth freehold ought to be throughout the county, and cannot be in a particular place. . . . But a prescription concerning copyhold land is good in a particular, for *de minimis non curat lex*, and the law is not altered thereby, and it may be there is but one copyholder there, for which he might prescribe; and *Beaumond* agreed to this difference, and custom to have profit *a prender*, *privilege*, or *discharge*, may very well be in a particular, and by *Owen* it was ruled accordingly in Collis's case in the Queen's Bench."[28]

An earlier case, *Foiston v. Crachroode*,[29] had held that a copyholder could not prescribe against the lord either in the lord's name or in the copyholder's own name, but he had to allege a "custom." However, the copyholder could allege the "custom" to be for *one* copyholder to have common of estovers in the lord's wood, even though he could not claim prescription which would have to be in his own name.

Taverner, in his case, had prescribed for one copyholder only, but not by name. The court spoke of custom and said that as to copyhold land custom may be particular. The court was in effect circumventing the rule against prescribing against the lord, and was allowing a par-

[26] 1 Pl. Rep. 310 at 329, 75 Eng. Rep. 472 (1568).

[27] Cro. Eliz. 353, 78 Eng. Rep. 601 (1594). Except Branch, who, in his collection, cites the Case of the Mines, 1 Pl. Rep. 310, 75 Eng. Rep. 472 (1568). See discussion, supra.

[28] Cro. Eliz. 353, 78 Eng. Rep. 601 (1594).

[29] 4 Co. Rep. 31 (b), 76 Eng. Rep. 962 (1587).

ticular practice to be called a "custom" in the manor, although it was not a true "custom" which would be as to all copyholds in the manor. The court thus applied the *de minimis* doctrine to avoid a technical application of the law pertaining to copyholders and prescriptions.

In these three early examples of the use of the maxim, in three different situations, it was used as an interpretive aid. In the waste situation *de minimis* was used to determine when that which we would now call a statutory right of action arises. In the mines case use of *de minimis* was proposed for the interpretation of a phrase appearing in ancient leases and commissions. In the copyhold case *de minimis* was used to circumvent a too literal application of a common law rule of property. This early development of the maxim indicates that it is a rule of reason, a substantive rule that may be applied in all courts [30] and to all types of issues.[31]

The writers of treatises and compilations support this conclusion. Thus, in Broom's *Legal Maxims*,[32] the maxim is cited and discussed in the section entitled "The Mode of Administering Justice." Salmond says concerning the maxim:

> "The law takes no account of trifles. This is a maxim which relates to the ideal, rather than to the actual law. The tendency to attribute undue importance to mere matters of form—the failure to distinguish adequately between the material and immaterial—is a characteristic defect of legal systems. See § 10."[33]

Section 10 is as follows:

> "Another vice of the law is formalism. By this is meant the tendency to attribute undue importance to form as opposed to substance, and to exalt the immaterial to the level of the material. It is incumbent on a perfect legal system to exercise a sound judg-

[30] The maxim *de minimis non curat lex* or abbreviations thereof appear in the reports of a great many cases. In many it is the basis for the decision of the court, in others it is found not applicable, and in still other cases, the maxim is merely cited as an additional argument or to illustrate a point in *dictum*. Frequently the reference to the maxim is so brief that it does not find its way into the headnotes of the cases, or the digest, or other indices which makes it difficult to discover all the cases in which the maxim may have been used. See cases cited throughout this article.

[31] "Criminal law, as well as civil, honors the maxim, De minimis non curat lex. . . ." United States v. Hocking Valley Ry. Co., (D.C. Ohio 1911) 194 F. 234 at 250. ". . . the Powers of a court of equity are not to be called into exercise to consider matters of trifling amount, or to recover nominal damages." Cummings v. Barrett, 10 Cush. (64 Mass.) 186 at 190 (1852); Swedish Evangelical Lutheran Church v. Shivers, 16 N.J. Eq. 453 (1863).

[32] 10th ed., c. 3, § 2 (1939).

[33] SALMOND, JURISPRUDENCE, 6th ed., 476 (1920).

ment as to the relative importance of the matters which come within its cognisance; and a system is infected with formalism in so far as it fails to meet this requirement, and raises to the rank of the material and essential that which is in truth unessential and accidental. Whenever the importance of a thing in law is greater than its importance in fact, we have a legal formality. The formalism of ancient law is too notorious to require illustration, but we are scarcely yet in a position to boast ourselves as above reproach in this matter. Much legal reform is requisite if the maxim *De minimis non curat lex* is to be accounted anything but irony."[84]

In *Latin for Lawyers* the maxim *de minimis* is stated and translated, and is then related to another maxim:

"*Boni judicis est lites dirimere* (4 Co. 15).—It is the duty of a good judge to prevent litigation."[85]

In California the maxim is part of the Civil Code,[86] "The law disregards trifles." It is one of thirty-three Maxims of Jurisprudence enacted into the code in 1872, preceded by the following heading:

"The maxims of jurisprudence hereinafter set forth are intended not to qualify any of the foregoing provisions of this code, but to aid in their just application."[87]

It is significant that not once, from the earliest Roman times to the present, has any court, including those which have refused to apply the maxim in the case before them, expressed any doubt as to its right to use the maxim in an appropriate case. Whether the court be applying a constitutional, statutory or common law rule of law, it has felt empowered to interpret that rule with the aid of *de minimis non curat lex*. So, although there are no cases which expressly determine the power of the court to use *de minimis*, the many, many cases in which it has been used must by implication be determinative of the existence of this power in the court.[88]

The function of the maxim is, therefore, as an interpretive tool to inject reason into technical rules of law and to round-off the sharp

[84] Id. 25.

[85] LATIN FOR LAWYERS, 2d ed., 146 and 130 (1937).

[86] Cal. Civ. Code (Deering, 1941) § 3533.

[87] Cal. Civ. Code (Deering, 1941) § 3509.

[88] So far as "portal-to-portal" problems under the Fair Labor Standards Act are concerned, the power to apply *de minimis* is, of course, specifically determined by the decision in Anderson v. Mt. Clemens Pottery Company, 328 U.S. 680, 66 S. Ct. 1187 (1946). The Supreme Court of the United States in that case expressed no doubt as to the applicability of the maxim to these problems.

corners of our legal structure. It is not a mere rule of damages,[39] and for this reason it is asserted that the translations of the maxim which use the word "regard" are more descriptive of the principle embodied in the maxim than the translations which use the word "concern."

II

FACTORS CONSIDERED IN APPLYING MAXIM

It is readily apparent that a principle which has reasonableness as its ultimate end cannot be easily defined. It cannot be said that six cents, six inches or six minutes is *de minimis*, apart from a specific fact situation. The tolerances allowed in constructing a hand pump of the type often seen in farm yards cannot be used in making a syringe for use by a physician. As one author has said, "No precise criterion exists to determine what is the minimum the law will notice. . . ."[40] The cases in which *de minimis* is used cannot, therefore, be readily reconciled, and, since identical fact situations rarely occur, there is seldom direct precedent to be applied in a new case.[41] It is for this reason that the historical origin and development of the maxim is important. In the absence of a controlling authority arising out of a similar fact situation, the only help that can be gotten from the many cases in which *de minimis* has been used is an indication of certain factors which have been considered by the courts in applying or refusing to apply *de minimis*.

The cases in which the maxim is applied and discussed, the cases in which the maxim is applied but not discussed and the cases in which the maxim is neither applied nor discussed, divergent and irre-

[39] Fullam v. Stearns, 30 Vt. 443 at 455 (1857): "The maxim *de minimis non curat lex*, I apprehend, whenever it is applied correctly to take away a right of recovery, has reference to the injury, and not to the resulting damage."

But see Eller v. Railroad, 140 N.C. 140, 52 S.E. 305 (1905), and see infra, p. 560.

[40] W. T. HUGHES, TECHNOLOGY OF LAW 56 (1893). It is put more prettily by W. F. FOSTER, LATIN MAXIMS OF ANGLO-AMERICAN LAW COMPILED AND TRANSLATED INTO ENGLISH VERSE 15 (1924).

[41] Ungrich v. Shaff, 119 App. Div. 843, 105 N.Y.S. 1013 (1907), quoted infra, p. 549. This paucity of direct precedent was noted, with some impatience, by the district court in its opinion on rehearing filed February 8, 1947 in Anderson v. Mt. Clemens Pottery Company, (D.C. Mich. 1947) 69 F. Supp. 710. The best precedent this court could find were rulings of the Administrator of the Wage and Hour Division [W. H. MAN., 1944-1945, pp. 234, 242, 1193; 5 W. H. REP. 148 (1942)] and three court decisions: Walling v. Peavey-Wilson Lumber Co., Inc., (D.C. La. 1943) 49 F. Supp. 846; Cameron v. Bendix Aviation Corp., (D.C. Pa. 1946) 65 F. Supp. 510; Buelow v. Connor Lumber and Land Co., (Wis. 1944) 11 Lab Cas. ¶ 63, 220.

concilable as they sometimes are, reveal at least an underlying uniform understanding as to the function of the maxim and as to the factors to be considered in using it.

A. *Purpose.* Probably the most important of the factors is the purpose behind the statutory phrase, contractual clause, or common law rule sought to be interpreted and applied. For example, in *Manchester Mills v. Manchester*[42] the court was considering a petition to abate a tax levy under a statute which allowed abatement where the tax was unjust in comparison with taxes on other property. The question was as to the admissibility of evidence and the extent of an investigation to be allowed or required as to the taxes on other property. The court said:

> ". . . The question is, Does justice require an abatement? It is a broad and comprehensive inquiry, not to be restricted by artificial, arbitrary, immutable rules, inconsistent with substantial justice which the statute was designed to secure. The investigation must have reasonable limits. Unlimited, in point of time and subject matter, it might produce the injustice of litigation unreasonably protracted. The maxim, *de minimis non curat lex,* may properly be applied in this class of cases. The justice to be administered is to be sufficiently exact for the practical purposes of the legislature, who did not intend to invite the parties to a struggle for costs, or a ruinous contention about trifles."[43]

Another example is found in *United States v. Hocking Valley Ry. Co.*[44] Counsel for the defendant argued against the government's construction of the word "discrimination" in the statute[45] by pointing out that it would promote a multitude of small suits and petty criminal prosecutions against the railroad. The court felt that *de minimis* would be adequate protection against this possibility, saying:

> "We see no occasion for alarm that the construction which defendant's counsel contend against may involve the carrier in a maze of complaints involving matters of little consequence in which one shipper may complain that he is not receiving precisely and exactly the same detailed consideration which he thinks his competitor is obtaining. Criminal law, as well as civil, honors 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 in transportation of a kind known

[42] 58 N.H. 38 (1876).
[43] Id. at 39.
[44] (D.C. Ohio 1911) 194 F. 234.
[45] Elkins Act of 1903, 32 Stat. L. 847, 49 U.S.C. (1940) § 41.

and appreciated by all in the business as well as by the general public."[46]

[46] (D.C. Ohio 1911) 194 F. 234 at 250. Similar use of *de minimis* is made in French Guiana, 2 Dods. 151, 165 Eng. Rep. 1445 (1817). Other examples of the use or discussion of the *de minimis* principle as an aid in statutory interpretation are: The Reward, 2 Dods. 265, 165 Eng. Rep. 1482 (1818), a classic case, discussed in BROOM, LEGAL MAXIMS, 10th ed., 89 (1939), as follows: "Where trifling irregularities or even infractions of the strict letter of the law are brought under the notice of the Court, the maxim *de minimis non curat lex* is of frequent practical application. . . . So, with reference to proceedings for an infringment of the revenue laws, Sir. W. Scott observed that 'the Court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim, *de minimis non curat lex*. Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice would weigh little or nothing on the public interest, it might properly be overlooked.' "

This statement is cited and relied on in Re Opening of Oneida Street, 37 App. Div. 266, 55 N.Y.S. 959 (1899); Bristol-Myers Co. v. Lit Bros., 336 Pa. St. 81, 6 A. (2d) 843 (1939). See generally, Industrial Assn. v. United States, 268 U.S. 64, 45 S. Ct. 403 (1925); In re Blount, (D.C. Ark. 1906) 142 F. 263; Consolidated Gas Co. of N.Y. v. Newton, (D.C. N.Y. 1920) 267 F. 231; In re United Light & Power Co., (D.C. Del. 1943) 51 F. Supp. 217; State v. Watts, 48 Ark. 56, 2 S.W. 342 (1886); Wilkerson v. State, 13 Mo. 91 (1850); People v. Richmond, 5 Misc. 26, 25 N.Y.S. 144 (1893); Springfield Road, 73 Pa. St. 127 (1873); State v. Railway Companies, 128 Wis. 449, 108 N.W. 594 (1906); Hernulewicz v. Jay, 6 B. & S. 697, 122 Eng. Rep. 1352 (1865). Numerous cases discuss *de minimis* in connection with the commerce question in cases under the NLRA: NLRB v. Fainblatt, 306 U.S. 601, 59 S. Ct. 668 (1939); NLRB v. Suburban Lumber Co., (C.C.A. 3d, 1941) 121 F. (2d) 829; NLRB v. Cleveland-Cliffs Iron Co., (C.C.A. 6th, 1943) 133 F. (2d) 295; and the FLSA: Mabee v. White Plains Pub. Co., 327 U.S. 178, 66 S. Ct. 511 (1946); Goldberg v. Worman, (D.C. Fla. 1941) 37 F. Supp. 778; Gerdert v. Certified Poultry & Egg Co., Inc., (D.C. Fla. 1941) 38 F. Supp. 964; Hooks v. Nashville Breeko Block & Tile Co., (D.C. Tenn. 1941) 39 F. Supp. 369; Muldowney v. Seaberg Elevator Co., (D.C. N.Y. 1941) 39 F. Supp. 275; Drake v. Hirsch, (D.C. Ga. 1941) 40 F. Supp. 290; Rauhoff v. Henry Gramling & Co., (D.C. Ark. 1941) 42 F. Supp. 754; Tucker v. Hitchcock, (D.C. Fla. 1942) 44 F. Supp. 874; Walling v. Mutual Wholesale Food & Supply Co., (D.C. Minn. 1942) 46 F. Supp. 939; Ling v. Currier Lumber Co., (D.C. Mich. 1943) 50 F. Supp. 204; Spier v. Gulf Coast Beverages, (D.C. Fla. 1943) 50 F. Supp. 653; Brown v. Minngas Co., (D.C. Minn. 1943) 51 F. Supp. 363; McKeown v. So. Cal. Freight Forwarders, (D.C. Cal. 1943) 52 F. Supp. 331; Daly v. Citrin, (D.C. Mich. 1943) 53 F. Supp. 876; McDaniels v. Clavin, (Cal. 1942) 128 P. (2d) 821, 22 Cal. (2d) 61, 136 P. (2d) 559 (1943); Horton v. Wilson & Co., 223 N.C. 71, 25 S.E. (2d) 437 (1943); Brooks Packing Co. v. Henry, 192 Okla. 533, 137 P. (2d) 918 (1943). *De minimis* has been used in place of the "Scintilla Rule": Offutt v. World's Columbian Exposition, 175 Ill. 472, 51 N.E. 651 (1898); Campbell v. Everhart, 139 N.C. 503, 52 S.E. 201 (1905). It is also discussed in patent and copyright infringement problems: Mathews Conveyor Co. v. Palmer-Bee Co., (C.C.A. 6th, 1943) 135 F. (2d) 73; Hoffman v. LeTraunik, (D.C. N.Y. 1913) 209 F. 375; Stork Restaurant v. Marcus, (D.C. Pa. 1941) 36 F. Supp. 90; Northhill Co. v. Danforth, (D.C. Cal. 1942) 51 F. Supp. 928.

On the other hand, when construing attachment statutes, tax statutes and similar statutes having forfeiture features, statutes which are by tradition strictly construed, it is found that *de minimis* is used sparingly[47] or not at all.[48] This rule is interestingly stated in *Walton v.*

[47] *Attachment:* Hightower v. Handlin & Venneys, 27 Ark. 20 (1871); Huntington v. Winchell, 8 Conn. 45 (1830); Douglass v. Mainzer, 40 Hun (47 N.Y. S. Ct.) 75 (1886); McKinney v. Reader, 6 Watts (Pa.) 34 (1837); Paul v. Slason, 22 Vt. 231 (1850); 44 A.L.R. 168 at 184 (1926).

Tax: In general *de minimis* is used more frequently and generously in testing validity of tax assessments than in testing validity of tax sales. Maish v. Arizona, 164 U.S. 599, 17 S. Ct. 193 (1896); Rothschild v. United States, 179 U.S. 463, 21 S. Ct. 197 (1900); Lumaghi Coal Co. v. Helvering, (C.C.A. 8th, 1942) 124 F. (2d) 645; O'Grady v. Barnhisel, 23 Cal. 287 (1863) (sale case: see later California cases under note 49, infra); Gilbert v. New Haven, 39 Conn. 467 (1872); Thatcher v. The People, 79 Ill. 597 (1875); City of Chicago v. Wilshire, 238 Ill. 317, 87 N.E. 383 (1909); Dwinel v. Soper, 32 Me. 119 (1850); Workman v. Worcester, 118 Mass. 168 (1875); Coleman v. Shattuck, 2 Hun (6 N.Y. S. Ct.) 497 (1874); People ex rel. Jessup v. Kelly, 33 Hun (40 N.Y. S. Ct.) 389 (1884); Hetfield v. Plainfield, 46 N.J.L. 119 (1884); Love v. Spur Independent School Dist., (Tex. Civ. App. 1940) 143 S.W. (2d) 793; Kelley v. Corson & Richardson, 8 Wis. 182 (1859); Baxter v. Faulam, 1 Wils K.B. 129, 95 Eng. Rep. 532 (1746); 44 A.L.R. 168 at 185 (1926); 97 A.L.R. 842 (1935); 147 A.L.R. 1141 at 1143 (1943).

Other Statutes: B. & M. White Laundry Co. v. Railway Co., 83 S.C. 209, 65 S.E. 239 (1909), (penalty for failure to pay claim without suit); Christian v. Fry, 108 Colo. 394, 118 P. (2d) 459 (1941), (improper fee for appeal costs).

[48] *Attachment:* Boyd v. Page, 30 Me. 460 (1849); Thayer v. Mayo, 34 Me. 139 (1852); Glidden v. Chase, 35 Me. 90 (1852); Grosvenor v. Chesley, 48 Me. 369 (1859); Pickett v. Breckenridge, 22 Pick. (39 Mass.) 297 (1839); Chenery v. Stevens, 97 Mass. 77 (1867); Downward & Co. v. Jordan, 7 Pa. Dist. 273 (1898); 44 A.L.R. 168 at 184 (1926).

Tax: Most of these cases involve validity of tax sales. Fallbrook Pub. Utility Dist. v. Cowan, (C.C.A. 9th, 1942) 131 F. (2d) 513; Lumsden v. Erstine, 205 Ark. 1004, 172 S.W. (2d) 409, 147 A.L.R. 1132 at 1143 (1943); Treadwell v. Patterson, 51 Cal. 637 (1877); Axtell v. Gerlach, 67 Cal. 483, 8 P. 34 (1885); Boston Tunnel Co. v. McKenzie, 67 Cal. 485, 8 P. 22 (1885); Huse v. Merriam, 2 Me. 375 (1823); Case v. Dean, 16 Mich. 12 (1867); Burroughs v. Goff, 64 Mich, 464, 31 N.W. 273 (1887); Wells v. Burbank, 17 N.H. 393 (1845); Lufkin v. City of Galveston, (Texas 1889) 11 S.W. 340; 44 A.L.R. 168 at 185 (1926); 97 A.L.R. 842 (1935); 147 A.L.R. 1141 at 1143 (1943).

Other Statutes: Smith v. Bank of Enterprise, 148 Ala. 501, 42 S. 551 (1906), (satisfaction of mortgage statute); Lindsay-Strathmore Irr. Dist. v. Superior Court, 182 Cal. 315, 187 P. 1056 (1920), (judge's interest in suit before him); State v. Green, 37 Mo. 466 (1866), (holding trial into Sunday); State ex rel. Cook v. Fidelity and Deposit Co., 91 W. Va. 191, 112 S.E. 319 (1922), (jurisdictional amount of controversy); Edwards v. Kearzey, 96 U.S. 595 (1877), (impairment of obligation of contract); Frisbie v. United States, 157 U.S. 160, 15 S. Ct. 586 (1895), (criminal prosecution for excessive attorney fee); Regina v. Illidge, 2 Car. & K. 871, 175 Eng. Rep. (1849), (criminal prosecution for forgery); Bruner's Appeal, 57 Pa. St. 46 (1868), (action to surcharge executor).

Moore[49] where the court, in answering the contention that a seven cent excess in interest charged at a tax sale was *de minimis*, says:

> "From the case of Shylock vs. Antonio, reported at large by Shakespeare, down to the last volume of Oregon reports, the courts have held that statutes providing for a forfeiture shall be strictly construed, and far be it from this court to say that a sum of money coined by the government of the United States, which under certain circumstances it is a penitentiary offense to steal, and which is sufficient to furnish bread to the hungry, cheering drink to the thirsty, and to the miser the means of contributing to charity, shall be treated as unsubstantial in a case of this character."[50]

In the field of contract construction *de minimis* is frequently used.[51] A typical example is the early New York case of *Turley v. Insurance Company*.[52] This case involved the construction of a fire insurance policy provision requiring, on the proof of claim, the certificate of the magistrate or notary living nearest to the fire. The court said:

> "This clause of the contract of insurance is to receive a reasonable interpretation; its intent and substance, as derived from the language used, should be regarded. There is no more reason for claiming a strict literal compliance with its terms than in ordinary contracts. Full legal effect should always be given to it, for the purpose of guarding the company against fraud or imposition. Beyond this, we would be sacrificing substance to form—following words rather than ideas.
>
> "It seems the residence of a notary happens to be a few feet nearer the fire than the office of the Judge, and we are asked to go into nice calculation of distances, and settle the point upon the law of mensuration. *De minimis, etc.*, is a sufficient answer to this objection. The spirit of the condition requires no such mathematical precision from the assured. Its object is completely secured by the proximity of the certifying magistrate."[53]

[49] 58 Ore. 237, 113 P. 58 (1911); rehearing den., 58 Ore. 241, 114 P. 105 (1911).

[50] 58 Ore. 237 at 243.

[51] In Kenyon v. Western Union Tel. Co., 100 Cal. 454, 35 P. 75 (1893), the court said, ". . . and in general, where a contract right is violated, the maxim *de minimis non curat lex* has no application, and nominal damages will be given . . . ," but even in this case, the court refused to reverse the judgment for failure to give these nominal damages. Contra, Campbell v. Cottelle, 38 R.I. 320, 95 A. 665 (1915).

[52] 25 Wend. (N.Y.) 374 (1841). Followed in Paltrovitch v. Phoenix Inc. Co., (N.Y. S. Ct. 1893) 68 Hun. 304, 23 N.Y.S. 38.

[53] 25 Wend. 374 at 377.

Similar generous use of *de minimis* in construing contracts is generally made,[54] the extent of the application being governed largely by what the parties to the contract seemed to regard as significant.[55]

With respect to what might be regarded as common law rules (although they are now sometimes restated in statutes) *de minimis* is also frequently discussed in relation to the purpose of the rights and obligations created by the rules. *Ungrich v. Shaff*[56] was a suit for specific performance of a contract to purchase land. The defendant refused to complete the purchase because a wall below the surface encroached 1 to 1½ inches for 54 feet and a loose stone retaining wall encroached up to 5 inches for 46 feet. The court said:

> "There can, of necessity, be no fixed rule for determining the extent of an encroachment necessary to bring any particular case outside the rule *De minimis non curat lex*, since the facts in each case are invariably different, and the test to be applied is to consider whether the encroachment is substantial enough to seriously interfere with the use and enjoyment of the premises. Each case must be determined upon its own merits."

The court then concluded,

> ". . . neither of the encroachments complained of was substantial enough to justify the vendees in refusing to complete their contract, . . . The case, as already indicated, it seems to me, comes within the rule, *De minimis non curat lex*."[57]

In defining the rights and obligations of riparian owners *de minimis non curat lex* is used in a manner which is especially indicative of

[54] Building contracts: Flannery v. Rohrmayer, 46 Conn. 558 (1879); Beers v. Wolf, 116 Mo. 179, 22 S.W. 620 (1893); Smith v. Gugerty, 4 Barb. (N.Y.) 614 (1848); Van Clief v. Van Vechten, 130 N.Y. 571, 29 N.E. 1017 (1892); Cassino v. Yacevich, 261 App. Div. 685, 27 N.Y.S. (2d) 95 (1941). Miscellaneous contracts: F.A.D. Andre, Inc. v. Dodge, (C.C.A. 3d, 1926) 15 F. (2d) 1003; Guscetti v. Dugan, 60 Cal. App. 187, 212 P. 397 (1923); Pollak v. Danbury Mfg. Co., 103 Conn. 553, 131 A. 426 (1925); Lee v. Lee, 191 Ga. 728, 13 S.E. (2d) 774 (1941); Sheldon v. Eakle, 160 Ill. App. 282 (1911); Horr, Warner & Co. v. Hawkhurst, 7 Ohio Dec. Rep. 168 (1876); Milligan v. Marshall, 38 Pa. Super. 60 (1909); Rixey's Admr. v. Moorehead, 79 Va. 575 (1884); Helmholz v. Greene, 173 Wis. 306, 181 N.W. 221 (1921); Whitcher v. Hall, 5 B. & C. 269, 108 Eng. Rep. 101 (1826).

[55] In Davis v. Sabita, 63 Pa. St. 90 (1869), speaking of a six inch reservation in a plat, the court says, "Nor can courts disregard reservations expressly and carefully made for a purpose not unlawful, on the principle of *de minimis*." Id. at 94.

[56] 119 App. Div. 843, 105 N.Y.S. 1013 (1907).

[57] Id. at 1014. See also, Valentine v. McGrath, 4 Alaska 102 (1910), (court of equity denied injunctive relief on ground of *de minimis*, but granted leave to file suit for damages); Perkins v. Raitt, 43 Me. 280 (1857); Duhain v. Mermod, Jaccard & King J. Co., 73 Misc. 423, 131 N.Y.S. 11 (1911).

the importance of the purpose factor in using the maxim. In an often quoted statement Chancellor Kent said:

> "... Streams of water are intended for the use and comfort of man; and it would be unreasonable, and contrary to the universal sense of mankind, to debar every riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use made of it be made under the limitations which have been mentioned; and there will, no doubt, inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current. But *de minimis non curat lex*, and a right of action by the proprietor below, would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury, and the manner of using the water. All that the law requires of the party, by or over whose land a stream passes, is, that he should use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish, or affect the application of the water by the proprietors below on the stream. He must not shut the gates of his dams, and detain the water unreasonably, or let it off in unusual quantities, to the annoyance of his neighbour." [58]

This emphasis upon the reasonableness of the exercise of the riparian rights, before considering the amount of water used, again illustrates that the principle of *de minimis* is a substantive rule of law.

Frequent mention of *de minimis* is made in cases of technical trespass where the defense of insignificant or nominal damage only is raised. Some courts have in this situation announced that,

> "This maxim is never applied to the positive and wrongful invasion of another's property." [59]

[58] 3 KENT COMM., 2d ed., 440 (1832). See also Embrey v. Owen, 6 Exch. 353, 155 Eng. Rep. 579 (1851); Marshall v. Peters, 12 How. Pr. 218 (1856); Sparks Mfg. Co. v. Newton, 57 N.J. Eq. 367, 41 A. 385 (1898); Paterson v. E. Jersey Water Co., 74 N.J. Eq. 49, 70 A. 472 (1908); Roberts v. Martin, 72 W. Va. 92, 77 S.E. 535 (1913).

[59] Seneca Road Co. v. Auburn Rochester R.R. Co., (N.Y. 1843) 5 Hill 170 at 175. The origin of this rule is often attributed to Ashby v. White, 2 Ld. Raym. 938, 92 Eng. Rep. 126 (1702), where the majority of the court dismissed a suit for damages for denial of right to vote by application of *de minimis*. On appeal to the House of Lords the majority of the court was reversed, [1 Bro. P.C. 62, 1 Eng. Rep. 417 (1703)], thereby adopting the dissenting opinion of Chief Justice Holt. See also Reeves v. Jackson, 207 Ark. 1089, 184 S.W. (2d) 256 (1944); Hartman v. Tresise, 36 Colo. 146, 84 P. 685 (1905); Wartman v. Swindell, 54 N.J.L. 589, 25 A. 356 (1892); Elicottville and Great Valley Plank Road v. Buffalo and P.H. R.R. Co., 20 Barb. (N.Y.) 644 (1855); Blashfield v. Empire St. Tel. and Tel. Co., (N.Y. S. Ct.

The basis for this strictness in these cases, of course, is also the purpose behind common law rules of trespass, i.e., protection of one's peaceable possession of his property and the prevention of the acquisition of adverse rights by prescription.[60]

In other words, it becomes apparent that the "trifles" which the courts "regard," or do not "regard," are not only measured in cents, seconds, inches, etc., but are measured in terms of the purpose behind the rule of law sought to be interpreted and in terms of the injustice that may be done by a strict and technical application of that rule. The "regard" must receive at least as much emphasis as the "trifles" if the courts are to reach a reasonable result[61] and administer substantial justice.[62]

B. *Practicality.* Not only do the courts consider the purpose of, or policy behind, rules of law in applying *de minimis*, but they also consider another form of policy which really includes public convenience and necessity, private convenience and just plain everyday practicality. One example of this is found in the references by the United States Supreme Court, in the *Mt. Clemens* case, to *"the realities of the industrial world"* and *"the actualities of working conditions."*[63] Almost every case in which the *de minimis* doctrine has been used has this factor in it. This factor and the "purpose" factor arise out of the endeavor to make rules of law workable through the application of the maxim. To that extent, the cases discussed herein under *"Purpose"* are pertinent here also.

Another example of consideration by a court of the "practicality"

1892) 18 N.Y.S. 250; Adler v. Met. El. Ry. Co., 18 N.Y.S. 858 (1892); Moore v. N.Y. El. Ry. Co., 4 Misc. 132, 23 N.Y.S. 863 (1893); Grunzfelder v. Interborough Rapid Transit Co., 164 App. Div. 928, 149 N.Y.S. 437 (1914); Atty. General v. The Lombard and South Street Pass Ry. Co., (Pa. Common Pl. 1874) 1 Wkly. N.C. 489; Bell v. Ohio & Pa. R.R. Co., (Pa. 1854) 1 Grant 105; Campbell v. Cottelle, 38 R.I. 320, 95 A. 665 (1915); Webb v. Portland Mfg. Co., (C.C. 1838) 3 Sumn. 189.

[60] This is emphasized by the technical trespass cases in which *de minimis* is applied. Cummings v. Barrett, 10 Cush. (64 Mass.) 186 (1852) and Purdy v. Manhattan Elev. Ry. Co., (N.Y. City and Co. Common Pleas 1891) 13 N.Y.S. 295, where injunction was refused on ground of *de minimis non curat lex* although a technical trespass. Fenlon v. Western Light & Power Co., 74 Colo. 521, 223 P. 48 (1924); Shafer v. King, 82 Colo. 258, 259 P. 1042 (1927); Knight v. Abert, 6 Pa. St. 472 (1847); Paul v. Slason, 22 Vt. 231 (1850); Middleton v. Jerdee, 73 Wis. 39, 40 N.W. 629 (1888). See also stream cases, supra, note 58.

[61] 3 KENT COMM., 2d ed., 440 (1832); Embrey v. Owen, 6 Exch. 353, 155 Eng. Rep. 579 (1851).

[62] Meeks v. Carter, 5 Ga. App. 421, 63 S.E. 517 (1909); York v. Stiles, 21 R.I. 225, 42 A. 876 (1899); Ramsburg v. Kline, 96 Va. 465, 31 S.E. 608 (1898).

[63] The full statement is quoted in the text, infra, p. 564.

factor is found in *Hernulewicz v. Jay*[64] where the validity of a clause in a deed of arrangement by a debtor was the issue. This clause provided that if funds for a dividend to creditors became available before all creditors had assented to the deed or had proved their claims, sufficient funds would be set aside to pay these non-assenting creditors, upon request by them in writing. The court held that this provision was not unreasonable or burdensome, saying:

> "The object of the statute was to work out the distribution of the effects of insolvents among their creditors, which it would be impossible to do if we were to hold that any trifling differences of this kind would vitiate a composition deed. The maxim *de minimis non curat lex* is applicable here."[65]

There is a large group of cases, illustrative of this factor, involving the use of *de minimis* in connection with requests for new trials and with appeals based upon technical errors by a trial court or a jury. Typical of these cases is *Wolff v. Prosser*[66] where a partition decree erroneously provided for distribution of $10 to a person not a party to the proceedings. The court said:

> "We think this is a proper case for the application of the maxim, *de minimis* etc., and that the error was without substantial injury."[67]

Behind these cases[68] is both public convenience and private convenience, and the desire to promote the practical and speedy adminis-

[64] 6 B. & S. 697, 122 Eng. Rep. 1352 (1865). See also In re Blount, (D.C. Ark. 1906) 142 F. 263; Springfield Road, 73 Pa. St. 127 (1873); Doremus v. City of Paterson, 73 N.J. Eq. 474, 69 A. 225 (1908).

[65] 6 B. & S. 697 at 1354, 122 Eng. Rep. 1352 (1865).

[66] 73 Cal. 219, 14 P. 852 (1887).

[67] Id. at 220.

[68] Wilson v. McEvoy, 25 Cal. 169 (1864); Bustamente v. Stewart, 55 Cal. 115 (1880); McAllister v. Clement, 75 Cal. 182, 16 P. 775 (1888); McDougal v. Fuller, 148 Cal. 521, 83 P. 701 (1906); Brady v. Ranch Mining Co., 7 Cal. App. 182, 94 P. 85 (1907); Meeks v. Carter, 5 Ga. App. 421, 63 S.E. 517 (1909); Jensen v. Chicago G. W. Ry. Co., 64 Minn. 511, 67 N. W. 631 (1896); Spunner v. Roney, 122 Ill. App. 19 (1905); Brackway v. McClun, 148 Ill. App. 465 (1909); Buettner v. Polar Bar Ice Cream Co., (La. App. 1944) 17 S. (2d) 486; Palmer v. Degan, 58 Minn. 505, 60 N.W. 342 (1894); Hopkins v. Kitts, 37 Mont. 26, 94 P. 201 (1908); Campbell v. King, 32 Mo. App. 38 (1888); Hackworth v. Zeitinger, 43 Mo. App. 32 (1891); Paxson v. St. Louis Drayage Co., 55 Mo. App. 566 (1893); Cameron v. Hart, 57 Mo. App. 142 (1894); Cameron Sun v. McAnaw, 72 Mo. App. 196 (1897); Corbett v. Spring Gardens Ins. Co., 85 Hun 250, 32 N.Y.S. 1059 (1895); McGregor v. Harm, 19 N.D. 599, 125 N.W. 885 (1910); Ritchie v. Shannon, 2 Rawles (Pa.) 196 (1828); Ley v. Huber, 3 Watts (Pa.) 267 (1834); York v. Stiles, 21 R.I. 225, 42 A.

tration of justice. It is just not good common sense to encourage or allow further litigation at an expense in excess of the most that can be gained. As one court said, "We shall not order a play that is not worth the candle." [69]

The great number of these cases of appeal for technical error, and the almost universal expression of the error in monetary terms, has given rise to the tendency to associate *de minimis* with monetary values.[70] However, the cases already discussed herein must show that monetary value is not the sole criterion for application of the maxim. In the technical trespass cases the presence of a continuing right which might be cut off by prescription prevents or drastically limits the application of *de minimis*,[71] irrespective of monetary values. In other situations also, the presence of a question of importance beyond the monetary values will limit or prevent the use of *de minimis*, irrespective of monetary values. Thus, in *Ballin v. L. A. County Fair*[72] the plaintiff claimed $3.70 as his winnings on a $2.00 pari-mutuel bet at the race track. The defendant had tendered him $3.60, the difference representing opposing theories on the proper computation of "breakage" as defined in the statute authorizing the betting. The court found that the plaintiff's method of computation was correct and refused to sustain a judgment for defendant on the basis of *de minimis* saying,

> "The rule of *de minimis*, on which defendant relies, will be applied to such cases only where an award of a nominal amount will not carry costs and no question of right is involved.[73] . . .

876 (1899); Wallace v. First Nat. Bank, (Texas Civ. App. 1922) 246 S.W. 737; Ellis v. National City Bank, 42 Tex. Civ. App. 83, 94 S.W. 437 (1906); Ramsburg v. Kline, 96 Va. 465, 31 S.E. 608 (1898); Bond v. Davis, 48 W. Va. 27, 35 S.E. 889 (1900); Haas v. Prescott, 38 Wis. 146 (1875); McKone v. Met. Life Ins. Co., 131 Wis. 243, 110 N.W. 472 (1907); Phillips v. Green, 288 Ky. 202, 155 S.W. (2d) 841 (1941). Cases of this type are discussed at length in Clark v. Mason, 264 Ky 683, 95 S.W. (2d) 292 (1934). See also 44 A.L.R. 168 at 174 to 184 (1926).

[69] Van Gorder v. Sherman, 81 Iowa 403 at 405, 46 N.W. 1087 (1890). See also Rixey's Admr. v. Moorehead, 79 Va. 575 (1884).

[70] In the annotation, 44 A.L.R. 168 (1926), the annotator says: "Certain general observations may here be made: First that the maxim operates in courts of law only where no right other than to recover money is involved. . . ." The annotator himself cites some cases which do not support this observation and many more can be cited. It is submitted that this annotator has mistaken the evidentiary means of demonstrating the factual existence of a trifle in some cases, with the end sought to be obtained by the maxim.

[71] Supra, notes 59, 60.

[72] 43 Cal. App. (2d) 884, 111 P. (2d) 753 (1941).

[73] Wilson v. McEvoy, 25 Cal. 169 (1864), (partially contra on costs); Payne v. Stevens, 1 Ga. App. 266, 57 S.E. 916 (1907); Davis v. Haugen, 133 Minn. 423, 158 N.W. 705 (1916); Hensel v. Noble, 95 Pa. St. 345 (1880).

> Moreover there is here involved the construction of a statute on a matter which is doubtless of interest to many persons, and for this reason also the maxim referred to should not be applied."[74]

Any remaining doubt that monetary value is but one form of evidence used to establish the presence of the "practicality" factor should be dispelled by the case of *Wilkerson v. The State*[75] where no money was involved and where *de minimis* was the ground for upholding an indictment in which the defendant's name was spelled Wil*kin*son.

The "purpose" factor seems to say that a litigant is entitled to "substantial justice." The "practicality" factor says that he is entitled to no more than "substantial justice." The picture of *de minimis* is thus beginning to take shape.

C. *Intent.* In everyday life one is always more ready to excuse an innocent mistake than one made intentionally or through carelessness. It is natural, therefore, to expect that courts in using a flexible tool such as *de minimis* will consider the factor of "intent." In this discussion "intent" is used not only in the crime and fraud sense,[76] but it also includes honest intent,[77] implied intent,[78] negligence[79] and in-

[74] 43 Cal. App. (2d) 884 at 887, 111 P. (2d) 753 (1941). The same problem arises and the same result is reached in Feeney v. Eastern Racing Assn., 303 Mass. 602, 22 N.E. (2d) 259 (1939). *De minimis* does not alone prevent attack on constitutionality of an act, Schwartz v. Essex County Bd., 129 N.J.L. 129, 28 A. (2d) 482 (1942).

[75] 13 Mo. 92 (1850).

[76] Smith v. His Creditors, 59 Cal. 267 (1881); Pearson v. Pearson, 230 N.Y. 141, 129 N.E. 349 (1920). See cases, supra, note 60.

[77] Johnson v. Jaqui, 27 N.J. Eq. 552 (1876); Mitchell v. Littlejohn Transp. Co., (La. 1942) 10 S. (2d) 651.

[78] An interesting case on this point is Glanvill v. Stacey, 6 B. & C. 541, 108 Eng. Rep. 551 (1827). This was an action to collect tithes from the defendant. The defendant had paid tithes from the part of his crop harvested and collected by him, but the plaintiff claimed tithes in rakings which were left upon the ground in the course of harvesting the crop. In the argument, early cases were cited in which rakings were exempted from the payment of tithes on the ground of the maxim, *de minimis non curat lex*, except where the rakings were, through intent or deceit, abnormally large. It was admitted in this case that the defendant was guilty of no fraud or intent to deprive the parson of his tithes and that the mode of harvesting employed by him was that usually employed in the vicinity. But the Court said that ". . . a course of harvesting, by which so large a portion is not subjected to the tithing, even when great care is taken . . . operates in itself as a deceit . . .," and held that plaintiff was entitled to the tithe of that left after the first raking; that quantity left after the second raking was "probably too small to be worthy of attention."

[79] Billingsly v. Groves, 5 Ind. 553 (1854); Valentine v. McGrath, 4 Alaska 102 (1910); Lumaghi Coal Co. v. Helvering, (C.C.A. 8th, 1942) 124 F. 645.

advertence.[80] Very often the important feature to the court in applying *de minimis* is "lack of intent."[81] There are many decisions in *de minimis* cases which can only be reconciled by the difference in the factor of "intent" which was present and considered by the courts.[82]

An early New Jersey case contains the following statement on intent:

> ". . . Any intentional change is substantial; that variance only is disregarded, which may occur where there is the intent and exercise of an honest effort to reach identity. The law regards not trifles."[83]

The many cases previously cited and discussed herein in connection with the use of *de minimis* in appeals[84] illustrate a situation where "intent" is often considered as a factor along with "practicality." In *Mitchell v. Littlejohn*[85] there was an error of $1.95 in computing the judgment in compensation proceedings. On appeal the court said:

> "In view of the good faith of the defendant, the purpose and motive prompting this deduction, though done in error, and the trivial amount involved, we feel justified in affirming the judgment rendered below. Plaintiff's contention is sufficiently answered by the maxim '*de minimis non curat lex.*'"[86]

In other cases of this type it has been held that an error, no matter how small, caused by the misdirection of the trial judge cannot be overlooked,[87] although in one case the court looked at the problem from the other side and said that if the error is caused by the court,

[80] Cassino v. Yacevich, 261 App. Div. 685, 27 N.Y.S. (2d) 95 (1941); O'Grady v. Barnhisel, 23 Cal. 287 (1863); Van Clief v. Van Vechten, 130 N.Y. 571, 29 N.E. 1017 (1892).

[81] Kullman v. Greenebaum, 92 Cal. 403, 28 P. 674 (1891); Slaughter v. First Nat. Bank, 109 Ala. 157, 19 S. 430 (1895).

[82] This is demonstrated by comparing Embrey v. Owen, 6 Exch. 353, 155 Eng. Rep. 579 (1851), with Webb v. The Portland Mfg. Co., (C.C. 1838) 3 Sumn. 189. In the former a small diversion of water as part of a reasonable use for irrigation and without any intention to injure the lower riparian owners was upheld, but in the latter case a small diversion which by design carried the water around plaintiff's mill was prohibited. See also 44 A.L.R. 168 at 191 (1926).

[83] Johnson v. Jaqui, 27 N.J. Eq. 552 at 555 (1876).

[84] Supra, note 68.

[85] (La. 1942) 10 S. (2d) 651.

[86] Id. at 655.

[87] Boyden v. Moore, Admx., 5 Mass. 365 (1809); Brewer v. Tyringham, 12 Pick. (29 Mass.) 547 (1832).

"... it can in no sense be considered as a conscious and intended dereliction by the defendant, and the maxim *de minimim* [sic] is clearly applicable."[88]

Thus, because *de minimis non curat lex* is basically a rule of reason, the presence or absence of "intent" is important evidence to be considered in determining the reasonableness of the situation to which the maxim is to be applied.

D. *Mutuality*. Inherent in all applications of *de minimis*, as in the application of all other legal principles, is the availability of the principle to either party. In refusing to reverse a judgment on appeal for a technical error the courts do not look to see if it is the plaintiff or the defendant who is seeking reversal.[89] By the factor of "mutuality," however, is meant more than this underlying principle of even handed justice. "Mutuality" is the factor considered in the particular situations in which the courts apply *de minimis* in favor of one party because, in the same situations, it is also applied against him.[90]

Such a situation is found in Blackstone's discussion of the rules of law applicable to alluvion and dereliction:

"And as to lands gained from the sea, either by *alluvion*, by the washing-up of sand and earth, so as in time to make *terra firma* (firm land); or by *dereliction*, as when the sea shrinks back below the usual watermark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex* and, besides, these owners, being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss."[91]

The portal-to-portal claims have given rise to counter claims for periods of productive time allegedly devoted by employees to per-

[88] Jones v. Backus & Rogers, (Pa. S. Ct. 1886) 18 Wkly. N.C. 556 at 560; 44 A.L.R. 168 at 178 (1926).

[89] See cases cited supra, note 66.

[90] O'Grady v. Barnhisel, 23 Cal. 287 (1863); Rixey's Admr. v. Moorehead, 79 Va. 575 (1884); Cameron v. Bendix Aviation Corp., (D.C. Pa. 1946) 65 F. Supp. 510.

[91] 2 BLACKST. COMM. 262. The same rule is stated in 1 BRACTON, DE LEGIBUS, Twiss ed., 69 (1878). Followed in Warren v. Chambers, 25 Ark. 120 (1867); Adams v. Frothingham, 3 Mass. 352 (1807); Knudsen v. Omanson, 10 Utah 124, 37 P. 250 (1894). This is the general rule in almost all jurisdictions, although de minimis is not always mentioned in stating it. 71 A.L.R. 1256 (1931). The Michigan Supreme Court adopted the rule in 1930, overruling previous contrary decisions. Hilt v. Weber, 252 Mich. 198, 233 N.W. 159 (1930).

sonal pursuits, tardiness and loafing.[92] In this field the courts undoubtedly will accord much weight to the "mutuality" factor. In *Pollak v. Danbury Mfg. Co.*[93] the court applied *de minimis* to claims of this nature made by an employer, saying:

> ". . . even where the servant occupies a position of authority and responsibility, he is still subject to the same obligation of obedience to the reasonable orders of the master, for it is the right of the master to manage his business as he pleases. To this statement we have only to add that, under the universal principle, *de minimis non curat lex*, there may, of course, be derelictions of duty by the servant so trivial or inconsequential that the law will not take note of them. The trial judge ought to have instructed the jury in accordance with these principles."[94]

A recent application of the "mutuality" factor in a suit brought under the Fair Labor Standards Act is found in the decision in *Cameron v. Bendix Aviation Corp.*[95] This decision on the problem of pay for time spent waiting to punch the time clock, was apparently considered acceptable authority by the United States Supreme Court in the *Mt. Clemens Pottery Company* case,[96] although the problem was not present in that case. In the *Cameron* case the court said:

> "I accept these statements as correctly interpreting the intent and purposes of the Act. The Act deals with human beings, not machines. Under ordinary conditions of factory employment there are minute fractions of the working day necessarily, and sometimes unnecessarily, lost both to employer and employee, which, on a strictly dollar and cents basis, are waste. The record of this case shows that it was not customary for the employer to deduct periods of a minute (sometimes more) from an employee's time on every occasion upon which it might have done so. For example, the time cards showed a number of days when the employees punched in a minute late in the morning for which no deduction from their pay was made. It also appears that, after lunch, most

[92] The record before the district court and the United States Supreme Court in Anderson v. Mt. Clemens Pottery Company, supra, note 1, contained undisputed testimony to the effect that the employees spent 25 to 30 minutes daily in personal pursuits (Record U.S. S. Ct., p. 1175 and pp. 1282-1294). The Supreme Court on rehearing did not "deem it necessary to touch upon" the question of off-setting this time against walking time.

[93] 103 Conn. 553; 131 A. 426 (1925).

[94] Id. at 558.

[95] (D.C. Pa. 1946) 65 F. Supp. 510, 6 W. H. Cases 24.

[96] 328 U.S. 680 at 691, 66 S. Ct. 1187 (1946).

> of the employees usually punched in some time before the end of the lunch period, so that the time clock gave no indications of the precise time when they reported for work, and there seem to be a number of occasions when they were a minute or two late in getting back to their desks at 1:15, for which lost time no deduction was made. Unless this was a unique establishment, there were many other occasions during working hours when minutes were lost to the employer in one way or another, as to which it did not impose a penalty. To interpret the Act any more strictly than the Administrator himself has done, it seems to me, would lead to the elimination of all reasonable human give-and-take adjustments on both sides, and would probably be more detrimental, in the long run, to the interests of the employees than to those of the employer."[97]

When considering the "mutuality" factor in applying *de minimis* as an aid in interpreting a rule of law, the court should, therefore, endeavor to reach a construction which operates equally and fairly on all parties and in all similar situations.

E. *Value.* The foregoing discussion indicates that in many instances of the use of *de minimis* an important factor is "value." In some of the cases it almost seems that "value" was the only factor considered,[98] but a closer examination of these cases and a comparison of them with similar cases demonstrates that, at the most, "value" was the only factor that needed to be considered. If "value" were the only factor, then the *de minimis* cases would be in hopeless conflict and confusion.

The cases involving errors in computing taxes,[99] errors in computing judgments or verdicts[100] and errors in attachments, levies and executions,[101] are cases which, on first impression, seem to turn on a consideration of monetary values. On second thought, however, these values are seen to be really evidence pointing out the "purpose" and "practicality" factors also involved.[102] In the cases of "positive and wrongful invasion of another's property"[103] quantitative values are unimportant and the right violated is the important thing. In cases

[97] (D.C. Pa. 1946) 65 F. Supp. 510 at 511.
[98] See note 70, supra.
[99] Supra, notes 47 and 48.
[100] Supra, note 68.
[101] Supra, notes 47 and 48.
[102] See discussions of these factors, supra, pp. 545 et seq. and 551 et seq.
[103] Supra, note 59.

such as the building contract cases,[104] patent and copyright cases,[105] and other contract cases,[106] the courts are seeking the meaning of "substantial" and the values are at most comparative, as they are in cases where the values are expressed in percentages.[107]

The "value" factor is discussed in *In re United Light and Power Co.*,[108] a case arising under the Public Utility Holding Company Act of 1935,[109] as follows:

> "It seems to me a powerful argument for court approval of a plan of distribution of the property of a public utility holding company when not only the commission recommends, but also where the plan is considered by practically all the owners of such property to be fair and equitable. The interest behind the 10 preferred shares of the dissidents, when compared with the 5% allocation to all the common shareholders, might very well fall into the realm of de minimis. Such a view brings a rule of life into a rule of law." [110]

"Value" was considered unimportant, however, in *Smith v. Bradlee*,[111] a suit by a shareholder against the directors of a corporation. The court said:

> "Nor does the circumstance that the common shareholder-plaintiffs own but a few shares of that common stock make the maxim de minimis non curat lex applicable, for, in an action brought and prosecuted in autre droit, neither the proportion nor the value of the plaintiffs' holdings of stock is relevant to the right of action."[112]

The "value" which the courts are considering, therefore, is an indefinite term. It includes absolute values[113] and relative values,[114]

[104] Supra, note 54.
[105] Supra, note 46.
[106] Supra, note 54.
[107] Supra, note 46.
[108] (D.C. Del. 1943) 51 F. Supp. 217.
[109] 49 Stat. L. 838, 15 U.S.C. (1940) § 79.
[110] (D.C. Del. 1943) 51 F. Supp. 217 at 225.
[111] (N.Y. S. Ct. 1942) 37 N.Y.S. (2d) 512.
[112] Id. at 519.
[113] Smith v. Bradlee, (N.Y. S. Ct. 1942) 37 N.Y.S. (2d) 512; Rose v. State, (Cal. 1940) 105 P. (2d) 302.
[114] Kullman v. Greenebaum, 92 Cal. 403, 28 P. 674 (1891); J. L. Brandeis & Sons v. N.L.R.B., (C.C.A. 8th, 1944) 142 F. (2d) 977; Case v. Dean, 16 Mich. 12 (1867).

monetary values[115] and human values,[116] public values[117] and private values.[118] Actually, it is submitted, the use of "values" in *de minimis* cases is as evidence indicative of the reasonableness of the interpretation of the rule of law involved, as this interpretation is presented to or adopted by the courts. Thus the values are often expressed in terms of money, distance, weight, time or other quantitative terms because there is no other way to designate them, but the means must not be confused with the end.

III

RIGHT OF ACTION OR DAMAGES?

Some of the confusion in the *de minimis* cases seems to arise out of an attempt to use the maxim solely as a rule of damages, whereas it is more properly used in determining whether or not a right of action exists.[119] The maxim has been used to deny recovery where it is clear that a right of action exists,[120] but more often, if there is no question as to the existence of a right of action, the maxim is said to be inapplicable.[121] In many other cases it is clear that the application of the maxim has had the effect of denying the existence of a right of action.[122] As appears from the quotations at the beginning of this article, the earliest uses of the *de minimis* principle in both the Civil Law and the Common Law involved the problem of whether or not a right of action was to be granted, and the principle was applied to deny a right of action in stated situations.

The case of *Doremus v. City of Paterson*[123] clearly emphasizes this use of *de minimis*. This was a proceeding to assess damages against the city for polluting a river and lake by emptying sewage into it. The city claimed a prescriptive right to pollute the river and lake by reason

[115] Columbus Gas & Fuel Co. v. Public Utilities Commission, 292 U.S. 398, 64 S. Ct. 763 (1933).

[116] Wilkerson v. The State, 13 Mo. 92 (1850).

[117] Fairbanks v. United States, 181 U.S. 283, 21 S. Ct. 648 (1901).

[118] Duhain v. Mermod, Jaccard & King J. Co., 73 Miss. 423, 131 N.Y.S. 11 (1911); 2 BLACKST. COMM. 262, and alluvion cases cited supra, note 91.

[119] By right of action is also meant breach of duty or contract in situations where the defense is based upon a breach of duty, by the plaintiff, as in Cassino v. Yacevich, 261 App. Div. 684, 27 N.Y.S. (2d) 95 (1941).

[120] For example, appeal cases, supra, note 68; trespass cases, supra, note 60; tax cases, supra, note 48.

[121] Supra, note 59.

[122] For example, waste cases, supra, note 19; stream cases, supra, note 58; contract cases, supra, note 54; encroachment cases, supra, note 57.

[123] 73 N.J. Eq. 474 (1908).

of having emptied sewage into them, without objection or hindrance, for more than the statutory period. It thus became necessary for the court to determine when *actionable pollution* of the river and lake began. In so doing the court considered much expert testimony on the flow of water required to absorb and purify given quantities of sewage. The court finally arrived at a determination of:

> "... the summer of 1892 as the time when the water had certainly become sensibly and injuriously polluted. The maxim *de minimis* would probably apply to the time previous."[124]

This date was too recent to support the creation of a prescriptive right in this case. So, though sewage had been emptied into the river many years before 1892, no right of action accrued until 1892 when the amount of sewage became no longer *de minimis*.

To revert to the analysis herein by factors, in some cases the "value" and "practicality" factors are such that the effect of the application of *de minimis* is synonymous with *injuria sine damno*, while in other cases the "intent," "purpose" and "practicality" factors are so important that *de minimis* is used to arrive at a conclusion of *dammum absque injuria*.

The cases which have been cited and discussed in this article show that if a right of action exists, *de minimis* is applied very grudgingly, if at all, but that where *de minimis* is used as an aid in establishing or denying a right of action in the first instance, it is more generously used. It becomes important, then, to decide which type of problem is presented.

IV

THE MAXIM IN PORTAL-TO-PORTAL LITIGATION

By "portal-to-portal litigation"[125] is meant the many suits,[126] apparently based upon the decision in the case of *Anderson v. Mt. Clemens Pottery Company*,[127] which have been filed in the past few months. It is these suits which, according to the *Mt. Clemens* decision, involve "the application of a *de minimis* rule." The decisions in the

[124] Id. at 485.

[125] Called "gate-to-gate" in the pamphlet published by the Bureau of National Affairs, YOUR WORKING TIME PROBLEM UNDER THE WAGE & HOUR LAW (1946).

[126] Newspaper releases state that over $5,000,000,000 of such suits have been filed. The Eastern District of Michigan, Southern Division (Detroit) had 175 such suits on its docket, as of March 20, 1947.

[127] Supra, note 1.

earlier and true "portal-to-portal" suits in the iron[128] and coal[129] mining industries made no mention of *de minimis*. This is presumably because the distances traveled in each case,[130] the unsafe conditions of travel, and the time involved obviated the applicability of *de minimis*. However, where the facts so indicate, there is, of course, nothing to prevent the consideration of *de minimis* in any type of "portal-to-portal" problem.[131]

Patently, the most pertinent decision on the applicability of the maxim in portal-to-portal litigation is the *Mt. Clemens* decision itself. It is important, therefore, to examine this decision to determine first, if *de minimis* was used as a limitation on the existence of a right of action or as a limitation on damages, and, second, whether any specific finding was made as to what period of time was or was not *de minimis*.

As to the first problem, the majority opinion delivered by Justice Murphy began as follows:

> "Several important issues are raised by this case concerning the proper determination of working time for purposes of the Fair Labor Standards Act of 1938. . . ."[132]

The opinion then proceeded to outline the factual picture, the history of the controversy, and the findings and decisions of the master, the district court[133] and the circuit court of appeals.[134] It was then held that the circuit court of appeals, and the master, had imposed upon the employees "an improper standard of proof," and that "an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated. . . ." Turning to the

[128] Tennessee Coal Co. v. Muscoda Local, 321 U.S. 590, 64 S. Ct. 698 (1944).

[129] Jewell Ridge Co. v. Local No. 6167, 325 U.S. 161, 65 S. Ct. 434 (1945).

[130] In the Tennessee Coal Co. case, the men rode in mine cars 3,000 to 12,000 feet and then walked up to two miles. 321 U.S. 590 at 596. In the Jewell Ridge Co. case, the men rode in mine cars 4,250 to 25,460 feet and then walked 500 to 1,500 feet. 325 U.S. 161 at 164.

[131] Recent reports tell of a coal mine in Ohio with a passenger elevator, cement lined corridors in which to walk from the elevator, and an underground eating and recreation room. Here *de minimis* might find application. In the Tennessee Coal Co. case the activities of the miners on the surface from the time they came upon the employer's premises until they reached the portal of the mine (activities similar to those in surface industries such as obtaining and returning lamps and tools and checking in and out) were held not compensable working time by the circuit court of appeals because of the "practical difficulties" of computation, and no appeal was taken from this portion of the decision. The Supreme Court said, "These activities consume but a few minutes." 321 U.S. 590 at 595.

[132] 66 S. Ct. 1187 at 1190 (1946).

[133] (D.C. Mich. 1943) 60 F. Supp. 146.

[134] (C.C.A. 6th, 1945) 149 F. (2d) 461.

facts of the case, Justice Murphy agreed with the master in his determination that no uncompensated productive work was proved and that the time clocks did not record the actual time worked by the employees. The proofs did show, however, that the employees were "on the premises for some time prior and subsequent to the scheduled working hours," during which they punched-in, walked to their work benches and performed preliminary activities. It was then said:

> ". . . Since the statutory workweek includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace, the time spent in these activities must be accorded appropriate compensation." [135]

and

> ". . . It follows that the time spent in walking to work on the employer's premises, after the time clocks were punched, involved 'physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.' . . . Work of that character must be included in the statutory workweek and compensated accordingly, regardless of contrary custom or contract.
>
> ". . . But under the conditions prevalent in respondent's plant, compensable working time was limited to the minimum time necessarily spent in walking at an ordinary rate along the most direct route from time clock to work bench." [136]

A similar, but abbreviated, discussion as to preliminary activities after arriving at the work bench was set forth, with the conclusion:

> ". . . Hence they constitute work that must be accorded appropriate compensation under the statute." [137]

From these portions of the opinion it might appear that the Supreme Court intended to rule that the Fair Labor Standards Act of 1938 [138] created a right of action for *all* uncompensated walking time and preliminary activities, as defined in the *Mt. Clemens* case.[139] But the opinion did not stop with the above quoted holdings. It went on to state, as to walking time:

[135] 66 S. Ct. 1187 at 1194 (1946).
[136] Ibid.
[137] Id. at 1195.
[138] 52 Stat. L. 1060, § 7(a), 29 U.S.C. (1940) § 207(a).
[139] And the Tennessee Coal Co., 321 U.S. 590, 64 S. Ct. 698 (1944), and Jewell Ridge Co., 325 U.S. 161, 65 S. Ct. 434 (1944), cases, supra, notes 123 and 124.

"We do not, of course, preclude the application of a de minimis rule where the minimum walking time is such as to be negligible. The workweek contemplated by § 7 (a) must be computed in light of the realities of the industrial world. When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. *It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.* The de minimis rule can doubtless be applied to much of the walking time involved in this case, but the precise scope of that application can be determined only after the trier of the facts makes more definite findings as to the amount of walking time in issue."[140]

and as to preliminary activities:

"Here again, however, it is appropriate to apply a *de minimis* doctrine *so that insubstantial and insignificant periods of time spent in preliminary activities need not be included in the statutory workweek.*"[141]

Comparing this decision as a whole, and particularly the above quoted portions dealing with *de minimis*, with the statements and decisions set forth in this article, from the earliest Civil Law and Common Law sources down to the present date, in which *de minimis* was used as an aid in determining the existence or non-existence of a right of action, it is a fair conclusion that the same use of *de minimis* was made by the United States Supreme Court in the *Mt. Clemens* case. No other explanation seems reasonable for the above quoted statements, especially the italicized portions thereof.

Justice Murphy's order of remand also makes it appear that the proper use to be made of *de minimis* in the portal-to-portal situations is as a limitation on the existence of a right of action and not as a limitation on damages. This order reads:

"Thus we remand the case for the determination of the amount of walking time involved and the amount of preliminary activities performed, giving due consideration to the *de minimis* doctrine, and calculating the resulting damages under the Act."[142]

[140] Italics supplied. 66 S. Ct. 1187 at 1195 (1946).
[141] Ibid. Italics supplied.
[142] Id. at 1195.

If *de minimis* were to be applied only as a rule of damages, the order should have read:

> Thus we remand the case for the determination of the amount of walking time involved and the amount of preliminary activities performed, and calculating the resulting damages under the Act giving due consideration to the *de minimis* doctrine.

As previously stated, if the determination of the existence of a right of action is the problem to which *de minimis non curat lex* is to be applied in the portal-to-portal litigation, the precedents justify a more generous application of this maxim than if damages are the only problem.

The district court[143] to which the case was remanded by the above order, said:

> ". . . nor are we concerned with the question of whether the time spent in 'preliminary activities' or 'walking' are compensable. The holding of the Supreme Court in this case is that they are compensable subject to the 'de minimis' rule and 'in light of the realities of the industrial world.'"[144]

And in discussing the *Tennessee Coal* and *Jewell Ridge Company* cases the court questioned how anybody could claim,

> ". . . that walking time of the type and amount involved in this case can be considered as compensable 'in light of the realities of the industrial world'?"[145]

These statements embodied in an opinion which denied recovery indicate that *de minimis* was used in that case to deny the existence of a right of action.

On the second problem, the district court did not decide that any finding was made by the Supreme Court in the *Mt. Clemens* case as to what period of time was or was not *de minimis*. The district court concluded that, under any theory, all of the walking and preliminary activities time involved in that case was *de minimis*. In addition, the district court stated that:

> ". . . we would not go lower than 12 minutes as above restricted (the minority opinion indicates that 10 minutes would surely be *de minimis*) and without setting any *de minimis* figure

[143] Eastern District of Michigan, Southern Division, Judge Frank A. Picard.
[144] 69 F. Supp. 710 at 713 (1947).
[145] Id. at 719.

herein, hold all the walking and preliminary activities time consumed in this case is *de minimis*."[146]

and that:

"From the above[147] it is apparent that this court not only could but should, by the great weight of what authorities there are, declare all walking and preliminary activities time involved in this case as *de minimis*."[148]

The following statement in the opinion of Justice Murphy was advanced as the basis for the argument that a specific finding was made by the Supreme Court as to the amount of time which was *de minimis:*

"Those arrangements in this case compelled the employees to spend an estimated 2 to 12 minutes daily, if not more, in walking on the premises."[149]

The only other basis for this contention is the fact that the case was remanded, thereby implying that there was compensable time involved beyond the scope of *de minimis*. Neither basis, however, seems very strong when it is remembered that the *Mt. Clemens* case did not originate and was not presented as a portal-to-portal case before the master, the district court, or the circuit court of appeals. The district court on rehearing was very careful to point this out and to conclude that the portal-to-portal issue was first injected into the case in the employees' petition for certiorari to the United States Supreme Court.[150]

Before the master, the plaintiff employees tended to minimize the walking time and preliminary activities in support of their contention that all time shown on the time cards was working time, a portion of which had not been paid for. To meet this contention the defendant company emphasized the time consumed by employees (both necessarily and unnecessarily) in walking and preliminary activities, in explanation of the time shown on the time cards which was in excess of the actual "whistle to whistle" time on the basis of which the employees were paid.[151] It is readily apparent that the Supreme Court, in a case

[146] Ibid.

[147] For rulings and cases relied on by the district court, on rehearing, see supra, note 45.

[148] 69 F. Supp. 710 at 718 (1947).

[149] 66 S. Ct. 1187 at 1194 (1946).

[150] 69 F. Supp. 710 at 711-713 (1947).

[151] Two other elements increase the general factual confusion in this case and make it difficult to assay its full value as a precedent in other cases. The first of these factors is that this defendant operated a piece-work factory and the plaintiffs were paid solely on a piece-work basis. Therefore, the keeping of time had no relation, except in cases of overtime, to the wages paid. Time was kept primarily to comply with the

tried on these theories, was not likely to make any specific decision as to time involved and as to what was or was not *de minimis* under the portal-to-portal theory. It seems reasonable to conclude that on this "chameleonic pattern of the factual fabric"[152] the Supreme Court intended only to lay down the applicable general principles. The district court, as indicated, took some further testimony, heard arguments and decided that all time involved in the case was *de minimis*.[153]

V

CONCLUSIONS

At least until a body of specific precedent is built up by decisions in some of these cases, the courts in applying *de minimis non curat lex* to portal-to-portal situations will have to resort to a very large extent to general principles derived from other types of cases.

The historical development of the maxim shows its function to be as a rule of reason. In *Cameron v. Bendix Aviation Corporation* the court said:

> "The true test is whether the employee was unreasonably deprived of time which he should have had free. . . ."[154]

The maxim is to be used in these portal-to-portal situations to determine when a right of action to recover for uncompensated compensable working time has arisen under the Fair Labor Standards Act.

> "It is only where an employee is required to give up a substantial measure of his time and effort that compensable working time is involved."[155]

Fair Labor Standards Act. The piece-work rate paid was sufficiently high so that even if the plaintiffs established their full claim as to time worked they had received single time compensation therefor, and would be entitled only to one-half time and the statutory penalty (section 16). Furthermore, although employees would gain the retroactive lump sum payment they sought, they would lose in the future. Any diminishing of the production time so as to get it and the walking and preliminary activities time within eight hours would only deprive the employees of pay since they would be unable to produce as many pieces on each shift. The coal miners, also piece rate workers, did not face this problem as they were already on a seven hour day and so could add travel time without losing any actual working time. (See dissent in Jewell Ridge Co. case).

The second peculiar element in the Mt. Clemens case was the claim originally made of 56 minutes of uncompensated work consisting of 14 minutes each at morning in, noon out, noon in, and evening out. The lunch hour was 30 minutes, yet the plaintiffs claimed they worked 28 minutes of it!

[152] 69 F. Supp. 710 at 713 (1947).

[153] Supra, note 144.

[154] (D.C. Pa. 1946) 65 F. Supp. 510 at 512.

[155] Anderson v. Mt. Clemens Pottery Company, (U.S. 1946) 66 S. Ct. 1187 at 1195.

As for the "purpose" factor, the United States Supreme Court has decided that "working time" under the Fair Labor Standards Act includes "substantial" and significant periods of walking and preliminary activities time.[156] Whether or not that interpretation agrees with one's ideas of the purpose of the act is not here relevant. But in applying *de minimis* to decide when substantial time is involved, the purpose of the overtime provision [section 7 (a)] of the act, which is said to be to spread employment and curtail exhausting work schedules,[157] should be considered.[158] In addition, the reasonableness and the private purposes (safety of the employees, convenience of employees' transportation, or convenience of an employer's special accounting system, convenience of an employer's plant protection program) of the arrangements at the employer's premises which give rise to the walking and preliminary activities time should be given consideration.[159]

The presence and import of the "practicality" factor in the portal-to-portal problems is obvious. As has previously been pointed out, the decision of the Supreme Court in the *Mt. Clemens* case stated specifically that this factor should be considered in applying *de minimis* in these cases. On this point the district court, on rehearing in the *Mt. Clemens* case, said:

> "It was in the light of all the realities of the industrial world, not only part, that we have attempted to decide this case."[160]

"Intent" is another factor which is of obvious importance in the portal-to-portal litigation. The size of the *ad damnum* clauses in the complaints filed indicates either that industry did not know that it was violating the Fair Labor Standards Act, or that, as organized labor has claimed,[161] it was taking a colossal gamble on not being caught. Whichever view is taken, however, would seem to indicate that, at least as to retroactive claims, *de minimis* should be liberally applied in accordance with the general principles set out herein under *"intent."* If the defendant employer was acting in good faith, as the district court found

[156] Ibid.

[157] Jewell Ridge Co. v. Local No. 6167, 325 U.S. 161 at 167, 65 S. Ct. 434 (1945).

[158] For example, if the walking and preliminary activities time would not increase employment if considered part of the workweek, it may be held *de minimis*. It seems especially clear that extensive retroactive claims can have little relationship to these purposes, at least where the employer acted in good faith.

[159] See infra, remaining conclusions.

[160] 69 F. Supp. 710 at 722 (1947).

[161] Brief filed with the district court, on rehearing in the Mt. Clemens case, on behalf of the C.I.O. national organization, as *amicus curiae*.

to be true in the *Mt. Clemens* case[162] then only large amounts of uncompensated walking and preliminary activities time, occasioned by unreasonable regulations and arrangements made by the employer, should be recognized as a basis for recovery. If the defendant employer was taking a gamble and acting with knowledge that he was violating the act, then, as the general principles indicate, he has no right to rely on a generous use of *de minimis* in his favor. On the other hand, if the employees knowingly allowed the situation to continue for years without objection, meanwhile negotiating contracts where the issue could have been raised, then they also are guilty of gambling and are not entitled to expect an application of *de minimis* against the employer. As to future claims, the "intent" factor will largely be one of implied "intent," as in the tithes cases,[163] arising out of the reasonableness of the situation and the tendency of the arrangements as an unnecessary burden on the employee or an undue benefit to the employer.[164]

The quotation from the *Cameron* case[165] is a clear demonstration of the importance of the "mutuality" factor in applying *de minimis non curat lex* in "working time" cases. To the same effect is the following from the opinion of the district court on rehearing in the *Mt. Clemens* case:

> "We ought to have in mind always that we are in great part an industrial nation where very recently mass production and fair relations between capital and labor served us so well; that we should look upon labor and industry as a team pulling in the same direction, or as husband and wife where the give or the take is not all on one side."[166]

Since neither the Supreme Court nor the district court can be said to have made any specific determination as to what time was not *de minimis* in the *Mt. Clemens* case, they did not set any upper limit to be expressed in quantitative terms of value. The district court held merely that at least 2 minutes of preliminary activities and 6.2 minutes of walking time was *de minimis*. Both opinions clearly indicated that the "value" factor could not be given a flat figure to apply to all cases.

[162] 69 F. Supp. 710 at 720 (1947). The district court held that even if it was wrong on *de minimis*, the employer, having acted in good faith in reliance on the approval and rulings of the Administrator of the Wage and Hour Law, should be spared by an application of "the doctrine of retroactivity."

[163] Supra, note 78.

[164] See preceding quotation from opinion of Justice Murphy.

[165] Supra, note 97.

[166] 69 F. Supp. 710 at 721-722 (1947).

In fact they did not even give a flat figure to apply to this one case. It is submitted that the "value" factor properly to be considered in the portal-to-portal litigation is to be expressed in terms of burden imposed upon the employee and benefit gained by the employer by the arrangements made and provided for getting the employee into and on the employer's premises and at his work place, actually engaged in those activities known as his "job."