Fordham Law Review

Volume 5 | Issue 2 Article 9

1936

# Obiter Dicta

# OBITER DICTA

"An *obiter dictum*, in the language of the law, is a gratuitous opinion, an individual impertinence, which, whether it be wise or foolish, right or wrong, bindeth none—not even the lips that utter it."*

## SUPPLEMENTARY RELIEF FOR THE MORTGAGOR

*Equity and Deficiency Judgments*

In no field of jurisprudence has the mollifying influence of equity been more pronounced than in the relation of mortgagor and mortgagee. The translation of the equity of redemption out of the harsh and exact terms of the mortgage bond constitutes "the most magnificent triumph of equity over the injustice of the common law." 1 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 162. Today we are facing in mortgage law another contest between the "rigor of the law" and the "conscience of equity." What will be the result?

With the advent of the depression, the foreclosure sale produced a single bid and a single bidder. The mortgagee bought the mortgaged property at his own figure. In addition to the loss of his property, the mortgagor faced a deficiency judgment for the major part of the original mortgage indebtedness. Sensing the inequities of that situation, the New York Legislature, assembled in special session, passed an emergency amendment to Section 1083 of the Civil Practice Act [Laws Ex. Sess. 1933, c. 794], providing that the deficiency judgment might be entered only for the difference between the "fair" value of the property and the mortgage indebtedness. The Court of Appeals held that the given amendment did not operate retroactively. *Feiber Realty Corp. v. Abel*, 265 N. Y. 94, 191 N. E. 847 (1934).

*Equity versus Legislature*

At once the courts were confronted with the question: Did the legislative fiat close the door to equitable action in relation to deficiency judgments not expressly within Section 1083a of the Civil Practice Act? Justice McGeehan in *Dry Dock Savings Institution v. Harriman Realty Co.*, 150 Misc. 860, 861, 270 N. Y. Supp. 428, 430 (Sup. Ct. 1934), said in vigorous terms: "Chancery does not now, any more than it ever did, need the fiat of the Legislature to allow it to prevent the rigid rules of law from working injustice." It was likewise stated in the case of *Monaghan v. May*, 242 App. Div. 64, 65, 273 N. Y. Supp. 475, 478 (2d Dep't 1934), that a court of equity has the power to determine, even in the absence of statute, the fair value of foreclosed property and to assess a deficiency judgment accordingly. The Court of Appeals, however, in *Emigrant Sav. Bank v. Von Bokkelen*, 269 N. Y. 110, 116, 199 N. E. 23, 25 (1935), said in a dictum: "Perhaps it should be said that we do not approve the decision in *Monaghan v. May*." In the face of this dictum, the Appellate Division, in the case of *Guaranteed Title & Mortgage Co. v. Sheffres*, 285 N. Y. Supp. 464, 465 (App. Div. 2d Dep't 1936), said of *Monaghan v. May*, *supra*: "Its doctrine was not an innovation. It was a modern restatement of an anciently exercised power. The soundness of that far reaching and basic doctrine should not be abandoned by this court until the Court of Appeals has before it a case in which the question is squarely presented." Thus stands New York law at the moment.

Interesting questions present themselves in connection with the stated issue: Does the merger of law and equity in New York mean that the principles of equity are

* BIRRELL, OBITER DICTA (1885) title page.

submerged? See N. Y. CIV. PRAC. ACT (1920) § 8. Throughout the history of the law, equity has traditionally assumed the role of protector of the mortgagor. The instant emergency seems to give rise to a similar opportunity for equity to intervene even in the absence of the affirmative mandate of the Legislature. The classic definition of equity comes to mind: "In some cases it is necessary to leave the words of the law, and to follow what reason and justice requireth, and to that intent, equity is ordained, that is to say, to temper and mitigate the rigor of the law." DOCTOR AND STUDENT, Dialogue I, c. 16.

---

## A SOPHISTICATED YOUTH

The clamoring of the realist against the precedent-buttressed fortress of common law principles is not always "sound and fury signifying nothing." Perhaps nowhere is his cause more forcefully pleaded, and nowhere the stubbornness of *stare decisis* more clearly revealed than in the pages of the New York reports on the question of infants' liability stemming from contract. The rationale behind the common law rule which permitted the infant to avoid his contract was grounded in a concept of infancy almost completely outmoded in this modern day and age. Fashioned as a shield to protect artless youth from the enticements of a mature salescraft, the defense has become a many-edged weapon which can be wielded with disastrous efficacy against a now thoroughly routed adult adversary.

*The Shield of Infancy*

Your modern infant may go so far as to induce the adult to enter into the contract by misrepresenting his age. The Court of Appeals has ruled not only that he is not estopped to plead the defense of infancy [*International Text Book Co. v. Connelly*, 206 N. Y. 188, 99 N. E. 722 (1912)], but that the misrepresentation, when pleaded as a defense by an adult defendant in an action brought by the infant as plaintiff, is insufficient in law [*Sternlieb v. Normandie Nat. Securities Corp.*, 263 N. Y. 245, 188 N. E. 726 (1934)], and this though the infant be barely under the magic age of twenty-one. Further, since the controversy though tainted with fraud arises *ex contractu*, the infant may not be sued in tort. *Collins v. Gifford*, 203 N. Y. 465, 96 N. E. 721 (1911). Even where the suit is based on a wilful breach of warranty, a form evolved from the common law tort action in deceit, the infant is impregnable behind his wall of precedent. See 1 WILLISTON, CONTRACTS (1920) § 246.

*The Shield Becomes a Sword*

A ray of hope pierced the darkness of the adult world when it was decided that an infant seeking to rescind his purchase of a bicycle must make monetary restitution for its use and depreciation. *Rice v. Butler*, 160 N. Y. 578, 55 N. E. 275 (1899). The joker in this situation lies concealed in the fact that had he made a more thorough job of wrecking the bicycle, the infant would not have been obliged to make *any* restitution. A more recent decision, distinguishing the case of securities which were worthless when tendered back to the vendor, protected the infant to the full amount of the purchase price. *Sternlieb v. Normandie Nat. Securities Corp.*, 152 Misc. 303, 273 N. Y. Supp. 229 (Sup. Ct. 1934). The climax is capped by a holding that these speculating infants are exempt from the statutory assessments on holders of bank stocks, although this is a liability sounding in quasi contract. *Broderick v. Aaron*, 266 N. Y. 506, 195 N. E. 175 (1935).

It is a far cry from bicycles to bank stocks. The legal heart may melt at the spectacle of improvident youth succumbing to the wily temptings of sellers of alluring unnecessaries. But it would seem that the ballast has shifted and today the unfortunate adult is more in need of protection than our modern infant. Chief Judge Crane issued what must frankly be termed a broad hint to the legislature in *Sternlieb v. Normandie Nat. Securities Corp.*, 263 N. Y. 245, 251, 188 N. E. 726, 728 (1934), when he went so far as to cite verbatim an Iowa statute changing the common law, and concluded his recognition of the New York law with this unenthusiastic dictum, "Well, the law is as it is, and the duty of this court is to give force and effect to the decisions as we find them".

*The Counter Attack*

---

## An Ineffectual Weapon

A growing tide of lawlessness presented a problem to the legislators of New York State. This they determined to solve by forging new weapons to be used in the grim warfare against the forces of organized crime. As one result of aroused popular demand there was added to the arsenal of the criminal law the so-called Public Enemy Law. N. Y. Laws 1935, c. 1921, Penal Law § 722 (11). This statute was intended to enable prosecutors to reach the leaders of the rackets, too clever to be convicted for the crimes which everyone knew they were vicariously committing. The statute created a new species of disorderly conduct, making it an offense for a person of evil reputation to consort with criminals, for an unlawful purpose and with intent to breach the peace. To relieve the prosecution of the always difficult task of proving in the first instance the double intent essential to the crime, the mere fact of consorting was made *prima facie* evidence of intent, placing upon the defendant the burden of explanation.

*The Weapon*

The weapon having been created, two tests were necessary: its practical effectiveness and its ability to withstand the counter-assault of unconstitutionality. Three cases were consolidated and brought before the Court of Appeals. *People v. Pieri*, 269 N. Y. 315, 199 N. E. 495 (1936). As construed by the court, the statute was shown to be constitutional beyond the shadow of a doubt. Little solace, however, must the decision have afforded the law enforcement agencies of the state, while great indeed must have been the rejoicing among those gentlemen whose livelihood is obtained by "ways that are dark and tricks that are vain". For in reversing the judgments of conviction upon the ground that the People in each instance had failed to make out a case the court reduced the effectiveness of the statute as an anti-crime weapon to approximately a minus-infinity.

*The Crucible*

It seems almost impossible to quarrel with the court's disposition of the cases. The presumptive intents arise only after proof of the other essential facts. Proof of the defendant's evil reputation presents no difficulty. But what is a "criminal"? The mere existence of a formidable criminal record or of an evil reputation or of both does not necessarily make its possessor a "criminal". To determine when a particular person is a criminal seems a well nigh impossible task. This same vagueness attaches to the term "consorting". For example, in one of the cases before the court a meeting for a period of two minutes was held not to constitute "consorting". In the light of the court's decision the potential big gun fashioned by the legislature

*Where Lies the Flaw?*

reveals itself as a bean shooter. Responsibility for the inefficacy of the statute lies with the legislature, not the court. But perhaps the war against crime does not require new weapons. Efficiency in law enforcement would obviate their necesstiy.

---

## THE DRAMA OF THE SUPREME COURT

Amidst all the vigorous pamphleteering and proselytizing being conducted today on the dialectics of constitutionalism and the powers of the Supreme Court, it is remarkable what comparatively little attention has been devoted to the *modus operandi* of judicial review and the expediency of the current procedural pattern. Over and above the categories of jurisdiction prescribed in the Constitution, there has arisen a separate body of doctrine purporting to determine whether the issues presented in a particular case are susceptible of judicial disposition. In the concurring opinion of Justice Brandeis in the recent TVA case [*Ashwander v. Tennessee Valley Authority*, 56 Sup. Ct. 466, 480 (1936)], there appears a succinct and comprehensive statement of the formulae and refinements of justiciability as they have been developed by the Court, pursuant to its policy of yielding only to absolute necessity in exercising its power to review the constitutionality of legislation.

*The TVA Decision*

Our threefold form of government was established to afford protection against bureaucracy. In behalf of the continued existence of the judicial review, the doctrine of *Marbury v. Madison* is reiterated. It is urged that the power of the Court evolved only as a necessary concomitant of the primary design, in that no other method obtained to secure adherence to the organic law. Thus, to curtail that prerogative would disrupt the unity of the tripartite scheme, subject our polity to the autocratic and vacillating temper of legislative bodies and plunge our national sovereignty into a chaos of competing entities. See McBain, *The Issue: Court or Congress?* N. Y. Times, Jan. 19, 1936, § 7 at 1. A less pessimistic view of the consequences of such action is taken by those who, without disputing the integrity of the Court or the *bona fides* of its intentions, regard the judicial veto as an unwarranted interference with the processes of democracy and an unsalutary influence upon social progress. See Lerner, *The Riddle of the Supreme Court* (1936) 142 NATION 121; *id.* at 213; *id.* at 273; *id.* at 379. The fundamental issue creating this sharp division of opinion is thus seen to be essentially political, involving conflicting views as to the nature of government and its efficacy as a medium of attaining social security and economic stability.

*Separation of Power*

The suggestion, however, that the *retroactive* operation of judicial action has outlived its usefulness in constitutional law and is itself an independent factor strongly contributing to our national maladjustment, might well bear inquiry. See Gartner, *When Should the Constitutionality of Acts of Congress be Determined, During Enactment or Years Afterward?* (1935) 24 GEO. L. J. 98. The cautious approach of the Court in the TVA decision, and the deliberate circumscribing of the issues, left unsettled and still open to attack the broader and more significant aspects of that legislative program. Comment has recently been directed to the practise of the Court of going beyond the immediate necessities of a particular case and thereby giving its decision a prospective effect. See Albertsworth, *Advisory Functions of the Federal Supreme Court* (1935) 23 GEO. L. J. 643. Further evidence of this tendency has been discerned in the Railroad Pension and *Schechter*

*Adjudication versus Advice*

cases. See Powell, *Commerce, Pensions and Codes* (1935) 49 HARV. L. REV. 1. The narrow scope of the TVA decision indicates the elusive character of this advisory function and the possible abandonment of the policy. The slim margin by which the Court was able to render an opinion on the merits induces speculation as to the widespread confusion and uncertainty which would have resulted had jurisdiction actually been denied and even the limited adjudication deferred. To avoid contingencies of this character, a procedure similar to that of the advisory opinion now employed in several state jurisdictions has been suggested, the effect of which would be to preserve the institution of judicial review and at the same time to facilitate the immediate determination of the propriety of legislative activities. See Comment (1936) 5 FORDHAM L. REV. 94. While the scheme has been objected to as subversive of our traditional system of balance of power and as conducive to a myopic evaluation of the facts in any given case, its advantage would seem to lie in the compromise it might establish between the two seemingly irreconcilable schools of thought on the desirability of judicial supremacy.

In view of the very strong probability that the electorate will witness no little agitation on the entire subject in the approaching campaign, it would be highly regrettable if no concerted effort were made by the legal fraternity to present these issues on a level somewhat more enlightening than the invective and pessimism of political slogans and clichés.