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Obiter Dicta

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"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."* .

PRAGMATISM IN PRACTICE

Planting a New Seed

Recently the highest court of New Hampshire had occasion to change the established law in that state with reference to the taxation of decedent's estates where there was no direction by the testator as to the payment of the tax. Instead of *pro rating* the federal estate tax among all the distributees as was heretofore the rule [*Foster v. Farrand,* 81 N. H. 448, 128 Atl. 683 (1925)], the court decided that it should be deducted entirely from the residual estate. It reached this conclusion in the case of *Amoskeag Trust Company et al. v. Trustees of Dartmouth College,* 200 Atl. 786 (N. H. 1938). The Supreme Court has definitely decided that the Federal tax in question is directed against the estate and not against the interests of the legatee. It was happily phrased by Holmes to be a statute which taxes "not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death." *Edward v. Slocum,* 264 U. S. 61, 63 (1923). So defined, the federal government fixes the nature and amount of the excise tax, but the ultimate apportionment of the amount of such tax is a question to be determined by the states. *Edward v. Slocum,* 287 Fed. 651 (1923) *aff'd* in *Edward v. Slocum, supra.* Hence New Hampshire could follow or change its local law as it saw fit.

The Far Off Hills

The New Hampshire court looked to other states to find their holdings in the same situation. In Massachusetts, they found guidance in the case of *Plunkett v. The Old Colony Trust Company,* 233 Mass. 471, 124 N. E. 265, 7 A. L. R. 709 (1919), which held that the tax should be deducted and paid out of the residual legacy. Illinois [*People v. Northern Trust Company,* 289 Ill. 475, 124 N. E. 622 (1919)], and Iowa [*Brown's Estate v. Hoge,* 198 Iowa 373, 199 N. W. 320 (1924)] have similar rules. Upon a further search, the court discovered the case of *In re Hamlin,* 226 N. Y. 497, 124 N. E. 4 (1919), which held that the entire burden of the Federal Estate Tax should fall upon the residuary estate. The court found that New Hampshire was one of the very few states that deducted the Federal Estate Tax *pro rata* from all of the legatees. Thus, the present law of New Hampshire is now brought into uniformity with the rules of the majority of the jurisdictions in this country and with the rule in New York as set down in the *Hamlin* case.

Uprooting the Cockle

Curiously enough, New York, in 1930, abandoned the rule of *In re Hamlin* and adopted, by legislation, the now discarded New Hampshire doctrine of apportionment. This pertinent fact was not mentioned in the *Amoskeag* case. New York now provides that the Federal Estate Tax shall be equitably *pro rated* among the persons interested in the estate to whom property is or may be transferred or to whom any benefit accrues. N. Y. DEC. EST. LAW (1930) § 124. It was felt after experience with the law New Hampshire has just adopted in the *Amoskeag Trust Company* case that the rule did not operate to social advantage.

*BIRRELL, OBITER DICTA (1885) title page.

After careful study, the commission appointed to investigate defects in the laws of estates [LEGIS. DOC. (1930) No. 69, pp. 197, 226] in their recommendations, explained that experience has demonstrated that usually the residuary legatees are widows, children and more dependent relatives. Before the enactment of the present New York law, the residual estate had the burden of the entire tax whether by gift, or *inter vivos* trust or other forms of transfer taking effect at death. Thus, in many instances the residual legacy was greatly depleted by large gifts given during the lifetime of the testator and not taking effect until his death. As a result many of the close relatives of the testator were left with almost nothing in their residual estate.

By Their Fruits Ye Shall Know Them

Such forceful support of the present New York statutory rule leads one to wonder why the New Hampshire court abandoned it. True, New Hampshire has brought itself into line with many other jurisdictions by its present ruling, but it has previously recognized that consistency with other states is not the only goal of judicial law making. It also recognizes social advantage as a goal of law. The court declares in the *Amoskeag* case, "The doctrine of *stare decisis* is not one to be either rigidly applied or blindly followed. So used, the doctrine would nullify that basic principle of the common law whch permits it to grow and develop to meet new and changing social conditions and would soon render the law inelastic, archaic, and useless to serve the needs of a dynamic community."

Is there not a lesson to be drawn from this situation? Here is a simple, but striking, example of the wisdom of *stare decisis*. Apparently New Hampshire has uprooted and cast into the fire a rule that thorough studies now show to be pragmatically the best. Because its eyes gazed so steadily at the verdant green of the far off hills it missed the rugged beauty of its own fields and forgot they were its sustenance in the past. Before abandonment of traditional rule New Hampshire should at least have considered its impressive support by the New York Commission. *Omnis Innovatio plus Novitate perturbat quam Utilitate prodest.*

TERROR VIA THE ETHER

Playing with Fire

The planet Mars has been the cause of much concern among astronomical scientists for years. Voluminous tomes have appeared concerning the possibility of life on that distant globe. It has offered novelists a fertile field, and now on the wings of a literary effort, we find Mars taking its place even in the legal stratosphere. An old problem is resurrected by the recent radio dramatization of H. G. Wells' scientific thriller, "War of the Worlds". The broadcast was in realistic news-bulletin style. The presentation told of an attack on the earth by warriors from Mars and described vividly the ease and rapidity with which their flame-throwers were "liquidating" our brethren in New Jersey. This dramatization was intended as an entertaining tid-bit, but " . . . thousands from one end of the country to the other were frightened out of their wits. . . . " New York Times, Nov. 1, 1938, p. 22, col. 2.

Hence the question is proposed: " . . . if it could be shown that the Columbia Broadcasting System and Mr. Orson Welles [who prepared, directed and played a leading role in the skit] should reasonably have anticipated that the program, as broadcast, might produce wide-spread panic and fear . . . could liability for damages be predicated on such facts?" N. Y. L. J., Nov. 3, 1938, p. 1454, col. 1. As a general rule, the common law has, from early times, refused to give damages for mere negligence which produced emotional disturbance *alone*, whether nervous shock, fright or mental anguish. *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 45 N. E.

354 (1896); HARPER, TORTS (1933) § 67. This is, perhaps, best exemplified by the cases where women have sought damages for shock and emotional disturbance, on account of being addressed with a proposal of illicit intercourse. The courts have held that if there is no incidental assault, or battery, recovery is to be denied. *Reed v. Maley,* 115 Ky. 816, 74 S. W. 1079 (1903); *Prince v. Ridge,* 32 Misc. 666, 66 N. Y. Supp. 454 (Sup. Ct. 1900).

The Incendiary Burned

But yet courts have allowed a recovery for fright in what are termed the *more outrageous cases,* where the fright was followed by illness, such, for example, as was caused by the defendant's telling a woman, as a practical joke, that her husband had been smashed up in an accident. *Wilkinson v. Downtown,* [1897] 2 Q. B. 57. It would hardly seem that the Columbia Broadcasting System was guilty of an outrageous act, for they gave fair warning, in the form of repeated announcements, of the fictional character of the Martian broadcast. But judging from the terror that was rampant, the broadcasting officials should have been more alive to the probable results of such an unusual mode of radio dramatization. Not all members of a radio audience tune in at the beginning of the program. Consequently, the true import of a program is often distorted. Despite this factor, it is unlikely that litigation would prove successful. However, the cure would seem to be a more rigid control of this type program, or, failing this, its complete elimination as a broadcast possibility.

The reason sometimes given in defense of the rule which forbids recovery for shock or fright *alone,* where the defendant is guilty only of ordinary negligence, is that it would be " . . . impractical and speculative to permit recovery for harms *purely* psychological and emotional. . . . " HARPER, TORTS (1933) § 67. If recovery were allowed in all cases of emotional disturbance, the result might well be a gold rush to the courts. Suffering as many of us do from coffee-nerves, the terrific possibilities of such a rule are apparent. As a nation, we might rapidly degenerate into chronic swooners, and in such case, the consequences might prove much more trying than an actual attack from Mars. Such a state of affairs might also curb human initiative. Those engaged in literary compositions, the moving-picture producers and directors of programs to be transmitted over the ether waves might well consider the possibility of mass consternation resulting from too vivid portrayals of disaster, horror or acute danger.

For Quiet Firesides

However, our legal tribunals should not completely disregard the rights of the individual. One should be able to proceed in his affairs knowing that his right to be free from aggressions upon his peace of mind will receive ample legal protection. Magruder, *Mental Disturbance in Torts* (1936) 49 HARV. L. REV. 1033; Goodrich, *Emotional Disturbance as Legal Damage* (1922) 20 MICH. L. REV. 497. There are situations where a more liberal application of legal principles, which would protect the individual against outrageous aggressions on his mental state, seems desirable. Such liberal interpretation would obviate the necessity of the courts resorting to mental gymnastics to find the physical contact, intentional act or consequent physical impairment necessary to satisfy the current strict rule.