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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."*

SWEET LARCENY

"But for your words, they rob the Hybla bees
And leave them honeyless."

—Julius Caesar, Act V, Sc. I.

In these days of wars and rumors of wars, it is somewhat reassuring to find that people can still become perturbed over such matters as bees and the larceny of honey. Not that we would belittle the importance of honey. Indeed, it is an ancient and honorable delicacy. Xenophon enjoyed its intoxicating effects when he was *en route* to Trebizond (ANABASIS, IV, 8) and Homer reports that it was offered as a toast to the Grecian dead. ODYSSEY, XI, 27. Many a medieval Englishman's wassail cup would never have been brimming with mead, were it not for the contents of the honeycomb. No wonder, then, that great legal minds have interested themselves in the problem of the busy bee and its honey since the time of Plato. For it is an engaging subject, provided you keep your distance—or better still, discreetly confine your investigation to the security of your study.

Bombs or Bees?

Justinian said bees were *ferae naturae* (INSTITUTES, bk. 2, tit. 1, § 14) and everyone through the ages has heartily agreed with him—especially those who spoke from actual experience. Being *ferae naturae,* the common law held that they were not the subjects of property, other than a qualified right *ratione soli* by which the landowner was given the exclusive right to reduce any wild bees on his land to possession. POLLOCK & WRIGHT, POSSESSION IN THE COMMON LAW (1888) 126. But when unhived and unclaimed, wild bees have consistently been held to belong to him who first reduces them to possession. However, they must be clearly reduced to possession. A little more than a century ago, one timid soul merely marked a tree wherein a buzzing swarm had taken up its abode, and this was held to vest no property in the marker. *Gillet v. Mason,* 7 Johns. 16 (N. Y. 1810). So, too, where a man was given a license (which he failed to exercise) to go on the land of another and take the wild bees thereon, he was deemed not to have any such property in them as to prevent a second licensee from capturing them. *Ferguson v. Miller,* 1 Cowen 243 (N. Y. 1823). However, when bees have been reclaimed and rehived, the American cases say that they remain the property of the apiarist (unless, of course, he abandons them) even if they fly to the land of another. *Goff v. Kilts,* 15 Wend. 550 (N. Y. 1836) and *Brown v. Eckes,* 160 N. Y. Supp. 489 (1916). But in England, it was recently held that the bee-keeper's title lasted only so long as he could pursue them without trespassing, at which point they again became *ferae naturae. Kearry v. Pattinson,* [1939] 1 All Eng. 65 (C. A.).

There are times, too, when the property right in bees, once attained, can be an

*BIRRELL, OBITER DICTA (1885) title page.

expensive thing. For instance, a few years ago a man was held liable for the sudden demise of a number of horses which were fatally stung by his bees. *Ammons v. Kellogg*, 137 Miss. 551, 102 So. 562 (1925). Fortunately for bee-keepers, however, their liability for acts done by bees has not yet been extended beyond this one reported instance. But the subject which has been so sadly neglected in the law is the sweeter side of their lives—their honey.

Oh Death Where Is Thy Sting!

In *Gillet v. Mason*, the court mentioned a comment by Blackstone to the effect that under the Charter of the Forest (9 Hen. III, c. 13, 1217), every freeman should be entitled to the honey found within his woods. 2 Bl. Comm. *393. But no distinction seems to have been made between wild bees' honey and domesticated bees' honey until 1811 when a Pennsylvania court held that it was not larcenous for a man to take wild bees and their honey from the land of another. *Wallis v. Mease*, 3 Binn. 546 (Pa. 1811). The precise question never arose again until recently when a New York court followed the Keystone state decision by holding that honey produced by wild bees is not the subject of larceny. *People v. Hutchinson*, 169 Misc. 724, 9 N. Y. S. (2d) 656 (County Ct. 1938). The reason behind this rule seems to be that if the bees are not the property of the landowner, then the honey is not his property. Admittedly, if the bees were his property, the honey would also belong to him. But does it follow that because the wild bees are not his, that he can have no property right in the honey itself? Seemingly, the court is attributing to the inanimate, lifeless honey the non-proprietary nature of its wild producers.

Finders not Keepers

This is not a case of lost, mislaid or abandoned property. Essentially, it is a problem of the original acquisition of title to matter which previously had no legal owner whatsoever. Although there is a dearth of authority on the point, one decision in particular is very apt. In *Goddard v. Winchell*, 86 Iowa 71, 52 N. W. 1124 (1892), it was held that an aerolite (or meteorite as it is called today) which dropped from the sky, belonged to the one on whose land it fell and not to the first person who found it. And in *Emans v. Turnbull*, 2 Johns. 313 (N. Y. 1807), it was decided that a landowner could retake from a trespasser weeds thrown on his property by the sea. It would seem, therefore, that there is some justification for saying that the honey deposited on the land by beneficent bees is the property of the landowner. All would be well if cognizance were taken by the courts of the distinction made by Emily Dickinson:

Manna from Heaven

"The pedigree of honey does not concern the bee.
A clover anytime to him is aristocracy."

Post No Bills

It is not surprising that dentistry, linked as it is to the health, safety and comfort of the public, should be subject to regulation under the police powers of the states. But how far such regulation may go without violation of the private rights of the individual is a matter still open to some dispute. This is especially true with regard to advertising. Consequently when a legislative body enacts a law determining the limits of proper dental advertisements, a natural repercussion is the test case to ascertain its constitutionality. Such a case was *Levine v. State Board of Registration*, 121 N. J. L. 193, 1 A. (2d) 876 (1938), wherein the court upheld the constitutionality of a statute prohibiting dentists from

No Attractions to Extractions

advertising their prices and the character of their services. Counsel for the dentist in the case asserted that the law deprived the practitioner of his constitutional right of free speech and "erected a wall of silence behind which monopoly and high prices flourish." But with the observation that the practice of dentistry is a privilege and not a business, the court affirmed the thirty-day suspension of the dentist's license.

The New Jersey statute is by no means unique. Probably every state in the Union regulates the practise of dentistry in one way or another with regard to the qualification and conduct of practitioners. In New York the license to practise may be revoked or some other form of discipline imposed if the practitioner has sought patronage by means of handbills, posters, circulars, stereopticon slides, motion pictures, radio or newspapers. N. Y. ED. LAW (1933) § 1311 (2) (g); *Brown v. University of the State of New York*, 266 N. Y. 598, 195 N. E. 217 (1935). Although challenged often enough on the grounds set forth in the New Jersey case and on the further ground that the restraints imposed amount to discriminatory class legislation, similar statutes have been approved in the Supreme Court of the United States, *Semler v. Oregon State Board of Dental Examiners*, 294 U. S. 608, 79 L. ed. 1086 (1935), and in the state courts, *Winberry v. Hallihan*, 361 Ill. 121, 197 N. E. 552 (1935), *Laughney v. Maybury*, 145 Wash. 146, 259 Pac. 17 (1927).

All in all the attitude of the courts must be considered salutary. If the dentist were to be permitted to advertise that he puts a more durable filling in a tooth, might not the physician proclaim to the world that he could perform an appendectomy of the first quality and quote statistics to prove the paucity of his "buried mistakes"? Might not the attorney boast of his ability to talk juries into more generous damage awards than his fellows? Of course there is the cynic who expresses impatience with the traditional notions of professional dignity. He would throw open the doors of some of the whited sepulchres of the professions and rattle the bones within. He speaks of the judge flattered with family Christmas gifts from the grateful attorney recently favored with a reference; he mentions the professional man who has built up a large clientele with personalized advertising over the dinner table and on the golf links. And he asks whether this is not business baiting of a subtle nature, tainted with the hypocrisy of the sacrosanct. He points to his grocer and his building contractor and he wonders if the food he eats or the house he lives in is of poorer quality because these merchants have advertised. If they are not, then why should open and honest advertising hurt the professions? Our cynic suspects that there is some truth in the statement attributed to George Bernard Shaw that the professions are "a conspiracy against the laity."

X-Raying Professional Standards

This is indeed a bold challenge. In answer it may be said that the professions have unrelentingly striven, on their own initiative and sometimes with legislative assistance, to maintain a high standard of conduct among their members. Despite their efforts there have been and in the nature of things there always will be some who are unworthy of their calling and unwilling to adopt its ideals. Each profession has its own set of rules adapted to its peculiar relation to the public. A reading of the CANONS OF JUDICIAL ETHICS or the CANONS OF PROFESSIONAL ETHICS for attorneys, formulated by the American Bar Association, will indicate how exacting these rules may be. According to the CANONS OF JUDICIAL ETHICS §§ 32, 33, for example, a judge must not accept presents or favors from litigants or lawyers practising before him. His official conduct must be free from even the appearance of impropriety and his personal behavior beyond reproach (*id.* § 4). He should not act in a controversy to which a near

". . . gifts blind the eyes of the wise."

relative is a party nor give the impression that he is in any way influenced by rank or wealth (*id.* § 13). The CANONS OF PROFESSIONAL ETHICS for attorneys contain similarly strict rules. They tell us that the lawyer should not purchase any interest in the subject matter of the litigation conducted by him. CANONS OF ETHICS § 10. He must not solicit business directly, nor indirectly through touters of any kind, nor by inspiring newspaper comments about causes in which he is or has been engaged (*id.* § 27).

Silence Is Golden

As for professional advertising in general, experience has demonstrated the necessity of curtailing it in the public interest. Careful and even casual inspection usually reveals the truthfulness of the merchant's advertisement concerning the value of his wares. But unfortunately the same cannot be said with reference to the professional man. The "goods" that he offers are a sincere interest in the welfare of his client, the skill which comes with experience and study, and a jealous love of his own integrity. And because those least possessed of these qualifications would, in their quest for pecuniary advantages, be most inclined to lure the gullible with false claims and promises, it is better that all remain silent.