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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."*

CRIME SHOULD PAY!

A certain convict, strangely bored with a sunny southern prison, left without even a goodbye. The state spent eleven hundred odd dollars to reestablish contact with its departed guest. Then one of its legal staff concocted the idea that the rambling rogue ought to reimburse his host for the cost of his recapture. *State Highway & Public Works Commission v. Cobb,* 215 N. C. 556, 2 S. E. (2d) 565 (1939). Argued the public prosecutor: the state has the right to expect its citizens to obey the law (even while they are incarcerated for breaking it), and if they force the state to spend money reapprehending them, a tort is committed against the state's property rights. We put aside the question whether this is southern hospitality, to inquire if it is good law. It was a case of original impression.

"The first day —a guest."

Reflect upon the far flung possibilities of the prosecutor's theory in action. If it is a tort against the state's property rights to commit the crime of escaping jail, and if the state can recover for expenses incurred, then the same reasoning might hold for the crime that put the criminal into jail originally. Recovery of funds expended in the original capture of the criminal would then be possible. And, by the same token, the state could recover for the costs of prosecution. Moreover it would be permissible to create a fictitious count for "use and occupation" of the prison premises—a sort of an implied tenancy for "30 days" or more, dependent upon the sentence imposed. Herein, also, might be annexed the additional item of "board." It costs money to keep guards at a prison. Charge them for that, too. Carry this reasoning a step further. We have an elaborate police system in this country, the cost of which runs into millions, and its only justification is that people insist on breaking the law. Very well, let's make them pay for their anti-social attitudes.

This is not all so far fetched as it seems. In related fields, something has been done on this matter of recovering from the criminal. First of all, there is the fine that is assessed in many criminal sentences. That enables the arresting governmental unit to augment its income at the criminal's expense. At common law there was no recovery from the criminal for any costs or expenses incident to his apprehension and prosecution. See *United States v. Gaines,* 25 L. ed. 733, 734 (1880). Statutes have been enacted in many states permitting recovery of certain specified costs as part of the sentence. Depending on the statutes passed, various states now hold that a defendant, convicted of a felony, is liable for all costs of prosecution. *Frazier v. Toliver,* 204 Ky. 79, 263 S. W. 713 (1924). And it has been held that a defendant is liable to pay a jury fee as part of the costs. *State v. Wright,* 13 Mo. 245 (1850).

"The second— a burden."

*BIRRELL, OBITER DICTA (1885) title page.

He has even been saddled with costs of appeal and with a board bill during incarceration. *Paschal v. Sheppard,* 6 Ky. Op. 387 (1871). One jurisdiction went so far as to charge the defendant, although freed of the charges, with the costs of prosecution, because the circumstances surrounding his arrest were sufficiently suspicious to justify his arrest. *Baldwin v. Comm.,* 26 Pa. St. 171 (1856). Included in at least one liquor enforcement law is a provision which states that violators must pay for the sheriff's costs and full costs of prosecution. S. D. COMP. LAWS (1929) § 10292. Do not the logic and the objectives underlying these statutes support the prosecutor's contentions in the principal case?

"The third— a pest"— Laboulaye.

However, the North Carolina court had different ideas. Why, they argued, sue a man for his "yen for the open spaces and his heeding of the call of the wild"? No, thank you, the court would have none of it. "No crime against the sovereignty of the state violates any of its property rights, and no governmental expenditure paid out for the apprehension of a criminal, or for the maintenance or recovery of his custody incident to the punishment or correction of such a crime can be construed into a tortious invasion of the property rights of the State." So vanished, at least temporarily, the fond hope of the prosecutor that "crime should pay." It was a sparkling hope, though, while it lasted. Logic is in its favor, and a statutory trend as well. But alas, judicial precedents, based on the common law, are not.

JAZZ JURISPRUDENCE

They Shall Have Music

"It is clear that though the cacophony of a swing band may fill the soul of a jitterbug with rapture, it fills the air with barbarous dissonance, in the ears of a weary worker wooing 'tired Nature's sweet restorer'," said Hofstadter, J., in *Peters v. Moses,* 171 Misc. 441, 12 N. Y. S. (2d) 735 (Sup. Ct. 1939). The occasion was the hearing of a suit to enjoin the operation of an inn as a nuisance which was brought by the residents and property owners living near the Claremont Inn on Riverside Drive in New York City. Seemingly someone had tired of "swing". But the court must have had some sneaking sympathy for off-beat rhythm because it enjoined the defendant only from playing music *outdoors after midnight;* on Saturday evenings or evenings preceding holidays the time limit was set at 1 A. M.

Although "nuisance" is a word with a plain meaning in everyday terminology, difficulty is often encountered in determining its exact legal import. Ordinarily a nuisance is defined as an *unreasonable* interference with the plaintiff's right to the peaceful enjoyment of his property, due to the causation by the defendant of smoke, odors, noises or other deleterious and "intangible" effects. HARPER, TORTS (1933) § 179 *et seq.* Whether music falls within the category of legal nuisance is generally a question of fact. This is clearly shown in an interesting case announcing that whether an orchestra is sufficiently annoying to be enjoined as a nuisance, requires reference to the character, volume, time, place, duration and locality of the detonation against which complaint is made. *Peragallo v. Luner,* 99 N. J. Eq. 726, 133 Atl. 543 (1926); *Cleveland v. Citizen's Gaslight Co.,* 20 N. J. Eq. 201 (1869).

Alleged music issuing from a residence used as a vocal studio during daylight hours was held not to be a nuisance in and of itself in *Tonnelli v. Hayes,* 118 Misc. 339, 194 N. Y. Supp. 181 (Sup. Ct. 1922). The rule in this case intimates that had these young aspirants to operatic fame chosen to exercise their vocal chords at night, the court might very well have stepped in and throttled their nocturnal efforts. *Friedman v. Keil,* 118 N. J. Eq. 77, 166 Atl. 194 (1933). Swing is music (objection overruled!). Well, even though swing is merely noise, it is clearly a question of fact whether it is enjoinable in equity. But conceding that the nuisance-value of music is such a question, and hence, bound up with all of the circumstances of its origin, we do not see why there should be so striking a difference in the attitude of other New York courts to sleep-disturbing noises. In *Russell v. Nostrand Athletic Club,* 212 App. Div. 543, 209 N. Y. Supp. 76 (2d Dep't 1925), *modified,* 240 N. Y. 681, 148 N. E. 756 (1925), although the general rules pronounced are in harmony with the principal case, their application to the stated facts and the accompanying language seems to be highly questionable and very oppressive.

Sing a Song of Sunbeams

In the latter case, the defendants were operating an *open air* arena for boxing exhibitions, once a week from 8 P. M. to 11 P. M. The annoyance alleged was the noise from automobiles, street hawkers, and shouting fans, which prevented the neighbors from sleeping. The management was restrained from holding any prize fight, boxing exhibition, wrestling contest or any other similar activity in the night time. This decision seems harsh when compared with that of the *Claremont Inn.* In the *Russell* case, the proceedings occurred only once a week and the arena was peaceful and quiet some time before midnight. In the *Claremont Inn* case, where the revelry occurred every night in the week, under the injunction that was granted, order might not be restored until well on to 1 A. M. weekdays, and later, on the eve of a holiday. In both cases, these nuisances occurred in sections strictly residential. Whether sleeplessness be due to a roaring mob or a clash of cymbals is not important to the neighbors lying wide-eyed on their pillows and it is hard to account for the differing attitudes in the same city.

Perhaps the *Claremont Inn* decision is closer to the tendency of most decisions coming from metropolises. In the final analysis, since the duty devolves upon the finder of the facts, be it judge or jury, *to determine* whether an *unreasonable* annoyance exists, it is obvious that the judge's impression of the standards of the community concerning what is genteel, as well as what is a reasonable bedtime hour, plays an important part in the solution of the problem. The standards of most New York communities have not required the quiet of a monastery garden, nor retirement at dusk, although of course, the quiet life is preferred. But as for people who wish to retire before 1 A. M., the words of Professor Lloyd seem apropos. Exceptionally nervous people, or those whose refinement exceeds the standards of the ordinary and reasonable man "must seek refuge in sound-proof rooms, if they can afford them, or take their chances of the padded cell". Lloyd, *Noise as a Nuisance* (1934) 82 U. OF PA. L. REV. 567, 582. We neutral Americans, though relatively safe from any European invasion of our shores, had best seek some bomb-proof shelter as the only protection against the steady, violent barrage of swing which is being directed against us.

Midnight in Manhattan