Fordham Law Review

Volume 9 | Issue 1 Article 7

1940

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."*

HIGHWAY NICKELODEON

Drop Your Coin

The common law rule handed down by Lord Ellenborough a century and a quarter ago, "No one can make a stableyard out of the King's highway," [*Rex v. Cross,* 3 Camp. 224, 227, 170 Eng. Reprints 1362, 1363 (K. B. 1812)], in its modern version, "No one can make a private garage out of the public street," [*Pugh v. Des Moines,* 176 Iowa 593, 156 N. W. 892 (1916)] has been affected with a condition smacking of commercialism in most states. The seemingly illegal use of the streets as a public garage is never objected to provided that "rental" is promptly paid to the municipality in the form of a fine. Of late, methods of collection have been streamlined by the more progressive communities. We have what are known as "parking meters". Progressives are installing the "mechanical cops" in order to give the harassed motorist an opportunity to park conveniently. Now great numbers of autoists park by inserting a coin, generally a nickel, in the robot which sets a time device in operation. The commercial spirit seems to be the same.

The Music Starts

Hardly had the first coin dropped into a parking meter before a chorus of criticism resounded throughout the land, starting with an overture anent due process of law, running the scale of deprivation of property right, and ending in a frenzied blare over the wrongful exercise of police and taxing powers. A new note was sounded when the validity of a "parking meter" ordinance was tested for the first time in New York, in the case of *Gilsey Buildings Inc. v. Village of Great Neck Plaza,* 170 Misc. 945, 11 N. Y. S. (2d) 694 (Sup. Ct. 1939) positing the theory that the ordinance interfered with the plaintiff's easement of access to the highway, as an abutting owner, contrary to the N. Y. CONST., Art. 1, § 6. But it fell on deaf ears in the dispute.

The Anvil Chorus

The scant attention which the courts have paid to complaints of abutting owners in other situations might have warned the plaintiff of the futility of his argument here. The courts have played a symphony of approval from their side of the stage. Interferences with the abutter's rights, which are unlawful when committed by private parties, are generally held to be lawful if a regulation under the police power. The *Elevated Railway Cases* apparently stood for the proposition that an abutter's rights of access, light and air are property rights which cannot be taken by the state without compensation. *Story v. N. Y. Elev. R. R.,* 90 N. Y. 122 (1882); *Lohr v. Metropolitan Elev. Ry.,* 104 N. Y. 268, 10 N. E. 528 (1887). This stand has been considerably modified by more recent decisions. In *Sauer v. New York,* 180 N. Y. 27, 72 N. E. 579 (1904), *aff'd,* 206 U. S. 536 (1907), the city built a viaduct which interfered with the plaintiff's rights of light, air and access, as much so as the elevated railroads, yet the court held these rights to be subject to all reasonable

*BIRRELL, OBITER DICTA (1885) title page.

exercise of the police power. In *Thompson v. Boston*, 212 Mass. 211, 98 N. E. 700 (1912), the right of the city to erect a railing around an excavation was upheld, though it interfered with the plaintiff's right of access. In *State v. Burkett*, 119 Md. 609, 87 Atl. 514 (1913), the power of the city to permit public marketing stalls to be erected at the street curb in front of a department store was sustained even though they thereby prevented employees from using that part of the street for loading and unloading merchandise. The *Elevated Cases*, however, cannot, by any stretch of the imagination, be held analogous to these "parking meter" cases.

The equally discouraging history of the failure of all of the ordinary arguments might have served as notice to the plaintiff. Similar meter ordinances have been upheld in *State ex rel. Harkow* v. *McCarthy*, 126 Fla. 433, 171 So. 314 (1936) and in *Harper v. Wichita Falls*, 105 S. W. (2d) 743 (Tex. Civ. App. 1937) where they were said to be a lawful exercise of the police power to obtain revenue; and in *Ex parte Duncan*, 179 Okla. 355, 65 P. (2d) 1015 (1937) where they were held not to be an unreasonable interference with the right of the public to use the streets. In each case the court discussed the respective right of the public and the property owners in the street.

A Discordant Note

Apparently, only one rasping note in the whole symphony of judicial approval of parking meters is heard. In *Breinig v. Allegheny County*, 332 Pa. 474, 2 A. (2d) 842 (1938), the court held that an abutting owner's right of access to the highway is a property right which cannot be taken without just compensation, and, that as parking may amount to a private nuisance, he may prevent the parking of automobiles in front of his premises despite police regulations to the contrary. New York considers this right, standing alone, as *damnum absque injuria*. *Matter of Grade Crossing Commissioners*, 201 N. Y. 32, 37, 94 N. E. 188, 191 (1911). It is true that in *City of Birmingham v. Hood-McPherson Realty Co.*, 172 So. 114 (Ala. 1936), a parking meter ordinance was held invalid on the grounds that it would deprive the abutting owner of his property without due process of law, in that it unduly interfered with his right of access, and also as an unauthorized exercise of the taxing power. The case, however, is predicated upon a violation, by the ordinance, of a deed of dedication of the streets to the city. The case is criticized and distinguished in *Harper v. Wichita Falls* and in the *Gilsey* case.

It's An Old Tune

Having exhausted every imaginable type of attack, the public, when confronted with the meter, will simply have to grin and bear it. Its acquaintance with traffic signals, which in the long run cost considerably more in gasoline consumption than the new parking charges, should have immunized the public to the unpredictable effects of an expanding police power. But human nature being what it is, while unanimously agreeing that it is worth a nickel to park, seems equally adamant in the contention that there ought to be a law against laws like the "parking meter" ordinances.

Unmeasured Words

What's In A Word

How shall the language of the law be interpreted when given a word of ambiguous meaning? The solution would seem to be to fall back upon common usage. *Tennessee v. Whitworth*, 117 U. S. 139, 147 (1886). We all know that within a comparatively short time, many former meanings of a word may be lost and it will be applied as befits the popular whim. When usage is uncertain, what then? The proposed "Child Labor Amendment" has given rise to such a problem of word analysis.

It is still unsettled. Section 1 reads: "The Congress shall have the power to limit, regulate, and prohibit the *labor* of persons under 18 years of age." What does the term *labor* in this sentence mean? Proponents of the amendment aver that it refers only to *physical labor* of children, employed for hire. Opponents, however, contend that it may cover labor, whether physical *or* mental (and thereby permit Congress to regulate education!). What meanings are latent in the word, "labor"?

It seems to be generally conceded that the word "labor" as used in the proposed amendment is descriptive of "labor" done either gratuitously or for wages. [For a thorough analysis of this point as well as the entire problem and its relation to education, see (1938) 7 FORDHAM L. REV. 217]. But we are primarily interested in the second question, "Does labor cover mental effort?" on which unanimity is sadly lacking.

At common law a "laborer" was taken to be one who did menial or manual services. 1 BL. COMM. *427. For a time, at least, this definition was associated with the word "labor". But the usage of years has worn down the ancient dikes set about it and its diverse meanings now are like a vast flood covering much territory. Thus an architect may labor on plans and specifications for a building. See *Paddock v. Balgord,* 2 S. D. 100, 103, 48 N. W. 840, 841 (1891). Some states have gone to the point of holding that "labor" includes anything that taxes one's strength. A professional ball-player whether he "uses his head" or "pulls a boner" may aptly be said to be laboring; the mental aspect often being more injurious to his physical nature than the manual labor. See *Crooks v. Commonwealth,* 147 Va. 593, 598, 136 S. E. 565, 567 (1927). In *Dixon v. People,* 168 Ill. 179, 183, 48 N. E. 108, 110 (1897), it was said that "labor" was interpretable as "intellectual exertion" or "mental effort". Both "work" and "labor", it seems, are used to describe work whether it be with one's head or with one's hands. *Johnson v. Citizens' Trust Co.,* 78 Ind. App. 487, 489, 136 N. E. 49, 50 (1922). And so a telephone operator whose task involves "intellectual exertion rather than physical labor" may be said to be "laboring", whether she be "plugging" in fact or giving one the wrong number. *Commonwealth v. Connor Co.,* 222 Mass. 296, 110 N. E. 301 (1915).

A Word to the Wise

And thus in a recent decision, *Monahan v. Seeds and Durham,* 117 Pa. Super. 469, 3 A. (2d) 998 (1939), *rev'd on other grounds,* 6 A. (2d) 889 (1939), it was held that the benefit of Workmen's Compensation Laws were available for accidental injuries traceable in major part to overexertion due to *mental efforts.* This is but another enlargement of the already expansive connotation embraced by the meaning of the word "labor." Within our own jurisdiction a further notch in the belt was added. An act to amend the Penal Law in relation to "kick back" of wages was passed. (See RECENT STATUTES, *supra,* p. 144.) Prior to the amendment, the statute referred to persons engaged "in personal services." It was changed in 1939 to those performing "labor" instead. Is there any doubt that the word "labor" within the present statute, which was formerly restricted to contracts for *personal services* only, now includes work of a *mental* nature as well? Whether it be with pen or pick: brawn or brain: one or all, man *labors.*

An Expanding Word

And if "labor" may be done gratuitously or for hire, does not the meaning of the

The Last Word

word "labor" as situated in the so-called "Child Labor Amendment" encompass *mental* work of a *gratuitous* nature? Is not the right "to limit, regulate, and prohibit" the gratuitous *mental* work of minors in effect a broad delegation of authority to Congress which might ultimately lead to Federal control of education without twist or distortion of interpretation? The answers would seem to lie in the changes suggested by opponents: abolish the proposed amendment completely or qualify its objectionable wording to meet the need said to exist in certain situations. In its present form, one wonders if the horse will unseat the rider.