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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."*

Now What of Trust and Gift Income?

Truly the way of the taxpayer is hard. He is taxed if he does and taxed if he doesn't. The current principle of taxation seems to be: 'Tis better to tax a thousand non-tax avoiders than to let one tax-avoider escape. It is getting to the point where it is presumed, almost as a matter of law, that the only motive a man can have when he creates a trust is to deprive the government of revenue. For centuries before 1916 men created trusts for laudable purposes and received the benison of the law. But now his motives are suspect and he is guilty of evil intentions until he establishes his innocence beyond a reasonable doubt. Even so, he pays, most of the time. When a father makes a gift to his daughter on her wedding day the tax-gatherer sniffs an odor in the air which is not of orange blossoms. Is the poltroon trying to reduce his surtax by getting rid of income-producing securities? And the rascal thinks to reduce his estate taxes, too. "Sweet charity" are not bright words of the tax lexicon.

Misanthropy Rampant

Where, oh where, is that rule that a tax statute is to be construed in favor of the taxpayer? Where is that naive faith that most men, even *some rich men* (perish the thought), made gifts and set up trusts in the spirit of the Sermon on the Mount? Gone, all gone, with the horse and buggy, crinoline, bustle and mustache-cup to the heaven of the dear, dead days beyond recall. Ah well, we drop a tear and on to things in store. "Watchmen, what of the night?" Tell us what its signs of promise are. For indeed signs and portents are in the skies. Nash, *What Law of Taxation?* (1940) 9 Fordham L. Rev. 165.

Time Was

Let us not burden the reader here with the steady progress of cases which have taxed to the donor of trust funds the income of the trust if he retained a vestige of control, or might by some concatenation of circumstances come into enjoyment again of the principal, or if he devoted the income to the discharge of his legal obligations. But *Burnet v. Wells,* [289 U. S. 670 (1933)] must have a passing notice. The settlor established an irrevocable trust to pay for insurance on his life, the proceeds upon his death to be held or applied for the benefit of his dependents. Although the court admitted that providing insurance for one's dependents is not counted to be a legal obligation yet it is "in the thought of many a pressing social duty". And, mark you, although he would never see the principal or its income again under any circumstances whatever, yet the funding of the insurance policies would give him continuing "peace of mind and happiness". The income of the trust was "used for his benefit in such a sense and to such a degree that there is nothing arbitrary or tyrannical in taxing it as his."

Peace of Mind and Happiness

Now along comes Horst and sweeps our doubts away. *Helvering v. Horst,* 61 Sup.

Ct. 144 (1940). In a weak moment Father detached from bonds that he owned some interest coupons not yet due and said: "Here, Son, is a little gift. Cash the coupons as your own." Son did so when the coupons matured. Who realized the income from the bonds? You guessed the answer. Father. He "diverted the payment from himself to others as the means of procuring the satisfaction of his wants. . . . Such use of his economic gain . . . to procure a satisfaction which can be obtained only by the expenditure of money or property, would seem to be the enjoyment of income." He procured "a satisfaction which is procurable only by the expenditure of money or money's worth."

Pleasurable Sensations

Settlors! Donors! The next step is but a short one. The income of *any* trust for any purpose will soon be taxed to you. The income of any gift will soon be taxed to you.

The Night Looks Dark

Any settlor once owned the property from which the income flows, did he not? If he accumulated the principal by his own efforts he now takes a solid satisfaction in observing the fruit of his endeavors devoted to an object close to his heart. It may even give him peace of mind and happiness. Even one who creates a trust for the sole purpose of saving taxes will derive a malignant joy from the hope (vain hope) that he has circumvented the Treasury. If he had paid over the income of the trusteed property to the beneficiary without settling it in trust that would have been his income, would it not? Why bother with such trivialities as the interposition of a trust? And so with gift; after all, a trust is but a form of gift.

Put Not Your Trust in Trusts

But hold—when he discovers that the income is taxable to him, his satisfaction, peace and happiness take flight. Maybe he can't be taxed after such a discovery, only before. I'm so confused, I can't think.

G. W. B.

Styles In Court

With styles changing as rapidly as they do, we were not really surprised to learn recently, that wearing a beard in court is no longer *le dernier cri.* A prisoner at the bar of a New York tribunal protested against having his hair and his beard trimmed. However the court ordered the hair cut and the beard shaved. *People v. Strauss,* 174 Misc. 881, 22 N. Y. S. (2d) 155 (County Ct. 1940); see also *State v. Tettaton,* 159 Mo. 354, 60 S. W. 743 (1900). Because not so long ago, courts were perfectly willing to have prisoners prevented from shaving, [*Ross v. State,* 204 Ind. 281, 182 N. E. 865 (1932)], we think this fluctuation in styles should be brought to the attention of barbers and lawyers alike.

A New Hair-Do

It seems as if the courts have permitted district attorneys to be arbiters of tonsorial fashions. Certain it is that here, as in many other flexible rules of law, there is a solid principle in the background. In the *Strauss* case it was the District Attorney who asked that the beard be *shaved* because he thought it would be used as a disguise to prevent identification of the prisoner, and in the *Ross* case, it was the District Attorney again who asked that the prisoner *appear* with the beard because he thought that the absence of the beard was being used as a disguise. The judges were persuaded to agree with them despite the argument of the prisoners that the procedure was a violation of the constitutional privilege against being compelled to be a witness in one's own criminal prosecution.

There are other examples of law enforcement agencies preparing prisoners for trial and setting the mode of dress for them. When a prisoner was forced to take his clothes off in jail in order to be examined by a doctor for wounds, the court held it proper. *State v. Miller,* 71 N. J. L. 527, 60 Atl. 202 (1905). The defendant's objection, rephrased in terms similar to those used in the *Strauss* case, was answered by the curt retort that the defendant was not "testifying"; it was the examining doctor alone who was the witness. So a court has compelled a defendant to take off his shirt to exhibit scars, and to don a shirt found at the scene of the crime. *State v. Oschoa,* 49 Nev. 194, 242 Pac. 582 (1926). This practice seems to have the sanction of the United States Supreme Court. In *Holt v. United States,* 218 U. S. 245 (1910) the accused was compelled to put on a shirt in order to be identified as the person seen at the scene of the homicide. Justice Holmes rationalized the court's position when he said: "But the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort *communications* from him. . . . " (Italics supplied.) Wigmore states that the crux of the privilege is freedom from *testimonial compulsion.* No one will be permitted *"to extract from the person's own lips* an admission of his guilt. . . ." 8 WIGMORE, EVIDENCE (3d ed. 1940) §§ 2263, 2265. (Italics supplied.)

Try It For Size

Thus it appears from the cases and text writers that the privilege against self-incrimination is not as broad as it seems at first glance. With recent scientific methods such as fingerprinting, lie detectors, aiding the prosecution in the presentation of evidence, the courts will constantly meet new problems concerning the privilege. Summers, *Science Can Get The Confession* (1939) 8 FORDHAM L. REV. 334, 337. The rule is flexible enough to solve such new situations, without the danger of future curtailment of so vital a privilege. Narrow interpretation of the privilege, as were pleaded for in the *Strauss* case and the *Ross* case, would make the administration of the penal law hazardous and difficult.

Cut To Fit

HOMILY TO TAXPAYERS

Nothing is certain except death and taxes but some people will hope to the end that they can avoid both. It is interesting to note the enormous amount of tax litigation that springs from this hope. Section 23 (a) of the 1938 Revenue Act (and of previous revenue acts) provides that in computing taxable net income there shall be allowed as deductions: " . . . all the ordinary and necessary expenses paid or incurred . . . in carrying on any trade or business". 26 U. S. C. A. 23 (a). In the leading case of *Welch v. Helvering,* [290 U. S. 111 (1933)] the court defines a "necessary expense" as one that is "appropriate and helpful" and an "ordinary expense" as one that is "common or frequent" or "normal". Some hopeful sensed a way out.

Hope in Your Heart

Ned Sparks, the cantankerous character performer, recently requested the court to allow him to deduct the sum of $3000 expended for false teeth, from his net income, as an ordinary and necessary business expense. After several of his natural molars had been extracted, a distressing hiss distorted his speech. Such articulation, argued Mr. Sparks, "would not do in my business". Thereupon he purchased two sets of artificial upper teeth. It was his opinion that $3000

Teeth in Your Law

of the money expended should be regarded as a business expense because with them he earned considerable money. It seems he was willing to pay $500, for their use at mealtimes. The forensic power of Mr. Sparks' hissless speech availed him not. The court in its wisdom said, "It would be difficult to imagine anything more personal than a set of false teeth". Teeth are intended to be and are used, not only during business hours and for business purposes but at other times and for other purposes as well as gnashing them at the courts, for example. Section 24 of the Revenue Act of 1938 provides that *personal,* living or family expenses are not deductible in computing net income. *Sparkman v. Commissioner of Internal Revenue,* 112 F. (2d) 774 (C. C. A. 9th, 1940). Although in the case of *Denny v. Commissioner of Internal Revenue,* [33 B. T. A. 738 (1935)] the Board of Tax Appeals ruled that the cost of bridgework to replace teeth knocked out of an actor's mouth while making a prize-fight picture was deductible as a necessary and ordinary business expense, the Circuit Court of Appeals was not overawed.

Sparkle in Your Eye

Maybe Sparks did not spend enough on his teeth. Or maybe he should have given a false teeth party. The lavish Hollywood parties given by our cinematic stars are a methodical madness. Much of the money spent on these ventures can be considered an ordinary and necessary business expense. These affairs enhance the reputation of the actor and tend to secure theatrical engagements more easily. *Blackmer v. Commissioner of Internal Revenue,* 70 F. (2d) 255 (C. C. A. 2d, 1934). Likewise the expenditures of a lawyer in entertaining his clients at a country club are considered professional expenses. *King v. Commissioner of Internal Revenue,* 10 B. T. A. 1297 (1927). But compare *Ellis v. Commissioner of Internal Revenue,* [50 F. (2d) 343 (App. D. C. 1931)] in which the court held that a lawyer, who was appointed a member of a special committee by the American Bar Association to study and report on criminal procedure in Europe, could not deduct the expenses of the trip as ordinary and necessary business expenses.

Payment in Your Palm

While *income* derived from an illicit business, is taxable, even when its illegal nature is declared by the Constitution, the suggestion that the tax-payer would be entitled to deduct illegal expenses such as bribery brought the curt judicial retort: "This by no means follows, but it will be time enough to consider the question when a tax-payer has the temerity to raise it". *United States v. Sullivan,* 274 U. S. 259, 264 (1927). However in *Alexandria Gravel Co. Inc. v. Commissioner of Internal Revenue,* [95 F. (2d) 615 (C. C. A. 5th, 1938)] a company deducted payments made to a person, in fact a state senator, to sell gravel to the state highway department. The majority of the court took a "liberal" view and said, "The revenue laws of the United States are not over-squeamish", and because it could not find any testimony that Senator Dore, in fact, agreed to use personal or political influence, the taxpayer is not to be deprived of his right to these deductions. The court insists on a clear showing that the transactions were tainted. Compare *Commissioner of Internal Revenue v. Sunset Scavenger Co., Inc.,* 84 F. (2d) 453 (C. C. A. 9th, 1936).

All this seems to indicate that a wise man will pay his taxes and let it go at that. Lawyers, boards of tax appeals, investigators from the department of internal revenue are an unpredictable group. One never knows whether they will see it the right way. They disturb one's rest. They upset one's digestion. And at the end it might well be asked even if success crowns one's efforts "What doth it profit a man?"

PRACTICE AND PROCEDURE—IN MODERN DRESS

Doing things backwards seemingly attracts both attention and good fortune to all except lawyers. We have noticed how an intrepid pilot took off in a plane for California and landed in Ireland and the arms of fame. Many remember the football player who scored a touchdown on a brilliant run down the field, later discovering that he had crossed the goal line he should have been defending, but earning honors and gratitude from the opposing student body. Columbus started off in the wrong direction and wound up in marble and bronze. Lately, proceeding backwards has become fashionable in the law if we are to believe some author's descriptions of successful judicial behavior. The process is to arrive at a decision of litigation by first deciding the issues on the basis of a hunch or guess and then searching for reasons. FRANK, LAW AND MODERN MIND (1930) 103. Such action never suffers the indignity of a reversal.

Fame in Reverse

Yet, we advise the profession to eschew the backward advance on the basis of recent cases which warn of its unprofitable character. A rare and tragi-comic incident occurred during an upstate criminal trial. It upset the usual concept of District Attorneys as impassive, impersonal and persistent prosecutors. After the state had completed its case and rested, the District Attorney made a motion for a mistrial *in behalf of the defendant,* over strenuous objection of the prisoner's counsel. The trial judge, confused but courageous, granted the motion. It was later held error to grant the motion, but to retry the defendant would subject him to double jeopardy. *People ex rel. Totalis v. Craver,* 174 Misc. 325, 20 N. Y. S. (2d) 533 (Sup. Ct. 1940). The New York Courts are committed to the view that the improper discharge of a jury before rendering a verdict places the defendant in jeopardy. He may not be retried again for the same crime. *People* ex rel. *Brinkman v. Barr,* 248 N. Y. 126, 161 N. E. 444 (1928); *People* ex rel. *Herbert v. Hanley,* 142 App. Div. 421, 126 N. Y. Supp. 840 (1st Dep't 1911). Thus one District Attorney will have to stand for re-election on the basis of having accomplished an indirect acquittal.

Not According to Hoyle

Another instance of "putting the cart before the horse" is found in the case of *Matter of Herle,* [173 Misc. 879, 19 N. Y. S. (2d) 263 (Surr. Ct. 1940)]. A petition was filed in Surrogate's Court praying that an alleged will be denied probate before probate proceedings had even been instituted. While the court did not decide the question it seems that this attorney was not so much off the beaten track. It has been held in *Irving v. Bruen,* [110 App. Div. 558, 97 N. Y. Supp. 180 (3rd Dep't 1906), *aff'd* 186 N. Y. 605 (1906)] that under Section 2653 (a) of the Code of Civil Procedure an action at law may not be maintained to set aside a will before probate, but suit may be brought in equity for such relief. Apparently, the court, by analogy could reach the same conclusion under Section 147 of the Surrogate's Court Act which permits an action to set aside the probate of a will.

According to "Herle"

There are some who cannot distinguish motion from progress and they are happy if only they are going somewhere. Forward or backward, direction is not important to them. But the rules of procedure require forethought of the results of the procedural device selected. It may or may not be fruitful. But it will not do to start off on a route the end of which we know not. The goal reached may be the land of milk and honey but equally well it may be the desert isle. Before we announce that we are "on our way", let us give thought to our juristic destination.

Travel by the Compass