Fordham Law Review

Volume 10 | Issue 3 Article 6

1941

Obiter Dicta

OBITER DICTA

"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."*

More Words on Words

Words are not, as we have thought, merely tools which a craftsman may easily and artfully wield to serve the purpose of cogent expression. They have taken on life and grown to such gargantuan proportions, that we have become the slaves of language. That's where our semanticists and word-surgeons come in. Like the Greeks, they have a word, the exact word, for every relation. The dangerous practice of using words without definite "referents" has led us into the valley of chaos. This danger and the necessity for the strict disciplining of words has been recognized by our government, which has availed itself of the services of prominent semanticists to solve the problem of unruly "referents" in public affairs. Moley, *Business in the Woodshed,* Sat. Eve. Post April 6, 1940, p. 22.

The Tripping Tongue

A recent decision illustrates how much work is to be done by our word disciplinarians in the judicial department of our government as well. The plaintiff had purchased a herd of cattle which was driven across the boundary from Mexico to his ranch in New Mexico; the ranch being bonded as a warehouse. A property tax was levied on the cattle by the State of New Mexico and plaintiff protested the levy on the ground that, as the cattle had not lost their status as "imports", they were not subject to state taxation. In support of his contention the plaintiff urged upon the court the doctrine of the "original package" created by the Supreme Court in *Brown v. Maryland,* 12 Wheat. 419 (U. S. 1827). At once the court was confronted with a difficult problem of verbiage. Does the term "original package" envelop a cow? If so, what were the contents and what was the package? The court held the term inapplicable to these pastoral peregrinations down Mexico way saying: "Taking a single cow, on the original package theory, there is no clear cut manner in which to differentiate the cow as the receptacle from the cow as to its contents. And the cow as the contents of its own receptacle certainly would not be the same two years after it came to graze upon the ranch." *Tres Ritos Ranch Co. v. Abbott,* 44 N. M. 556, 105 P. (2d) 1070 (1940).

Senorita Elsie Borden

The test adopted by the Supreme Court, which received the name "original package test", was that as long as imported goods remain in the original package and in the hands of the original consignee, they are still subject to federal regulation. Any interference by a state violates the "commerce clause" of the Constitution. *Southern Pac. Co. v. City of Calexico,* 288 Fed. 634 (1923); *Low v. Austin* 13 Wall. 29 (U. S. 1871); *City of Galveston v. Mexican Pet. Corp.,* 15 F. (2d) 208 (1926).

*Birrell, Obiter Dicta (1885) title page.

However, the test appears to have broken down and now it "has ceased to be a factor in defining the limits imposed upon a state's taxing power by the commerce clause so far as interstate 'imports' are concerned". ROTTSCHAEFER, CONSTITUTIONAL LAW (1939) 333.

The courts, however, have not been reluctant to apply the test in cases involving interstate commerce where it will effect a just result. In *Western Union Tel. Co. v. Foster,* 247 U. S. 105 (1917) the test was so used. The Western Union Co. in New York supplied messages in code to various stock brokers located in other states. After arrival at a central point within the state, the messages were decoded and sent to the individual subscribers. The Public Service Commission of Massachusetts ordered the plaintiff to cease certain discriminatory practices and the Supreme Court annulled the order holding that the messages were still in interstate commerce and subject to federal control since the original package was not broken by a mere decoding at their intermediate destination. The decoded message was still treated by Justice Holmes as part of the "original package". A package has been defined as: "First, a receptacle of whatever form or character, and second, the contents thereof." *Mexican Pet. Corp. v. City of South Portland,* 121 Me. 128, 115 Atl. 900 (1922).

Unscrambling Words

In the light of the *Western Union* case we pose the question: if the cows in the principal case were primarily transported to be used as milking cows, does that mean that the taking of milk from the cow (or cows) might permit of the treatment of the cows as original packages? In the mind's eye a milch cow fulfills the definition of a package even more so than a telegraphic jumble. Yet in *Baldwin v. Seelig,* 294 U. S. 511 (1935) the fact that milk, shipped in cans from Vermont, was taken out of the original container and put into bottles in New York did not permit New York to regulate the minimum prices to be paid in New York. The milk was still subject to federal control under the interstate commerce clause.

"Udder" Confusion

Despite the holding of the Supreme Court in the *Baldwin* case, the application of the original package doctrine to the *Tres Ritos Ranch* decision would be unsound. In the former case, Justice Cardozo warned: ". . . the test of the original package is not an ultimate principle. . . . Formulas and catchwords are subordinate. . . ." The herd of cows, not milk, was the subject of sale; the herd was permanently at rest in New Mexico; the state intervention was by way of taxation, not regulation. *American Steel and Wire Co. v. Speed,* 192 U. S. 500 (1904).

As Broom said, long before modern semantics arrived, "He who considers merely the letter of an instrument goes but skin-deep into its meaning." BROOM'S LEGAL MAXIMS (10th ed. 1939) 466. This same warning applies to such a formula as the original package doctrine. In the graphic language of a master of words: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Holmes, J., in *Towne v. Eisner,* 245 U. S. 418, 425 (1918).

THE "HOTFOOT" COMES TO COURT

Ever popular with practical jokers of the convivial tavern is that effective non-liquid stimulant, the *hotfoot.* It is destined to take an honored place in American folklore. *Cf.* ARNOLD, THE FOLKLORE OF CAPITALISM (1937). For the edification of the younger generation, whose knowledge of the pastime may not antedate the era of the safety match, it might be pointed out that the hotfoot is an old institution, hoary with tradition and varied in its forms, depending upon the whimsicality and ingenuity of the operator. At the turn of the century in the lusty West, the approved method of administering it, was first to saturate with alcohol the pedal extremity of a stupefied patron and then apply the match. In *Curran v. Olsen,* 88 Minn. 307, 92 N. W. 1124 (1903), such an alcoholic hotfoot was administered a victim.

Western Style

Out of the historic Bay State, hard by the Plymouth Rock, came a more streamlined technique. The *Blue Ribbon Spa* is the *locus quo* of the festivities. A bartender and another patron "started a little blaze" under the foot of a sleeping patron. The victim in this last case sued the owner of the tavern and the Supreme Judicial Court of Massachusetts, after giving weighty deliberation to the matter, issued a solemn pronouncement that the bartender was acting for a purpose solely his own not within the scope of his employment and that the defendant owner was not liable for the consequences of the act. *Sullivan v. Crowley,* 307 Mass. 189, 29 N. E. (2d) 769 (1940). The court might well have added that it wasn't cricket either, for participation in the administering of a hotfoot by a bartender adds an unwelcome touch of professionalism to a pursuit heretofore purely "amateurish".

Bay State Technique

As for the law, the general rule that the doctrine of *respondeat superior* does not apply when a servant commits an assault of a purely personal nature, having no connection with his duties and not in furtherance of his master's business, is in point. *Western Union Telegraph Co. v. Hill,* 67 F. (2d) 487 (C. C. A. 5th 1933); *Muller v. Hillenbrand,* 227 N. Y. 448, 125 N. E. 808 (1920). However, in some jurisdictions where the thermal treatment has been the subject of litigation under circumstances similar to those in the Massachusetts case, a contrary view has been taken. In *Curran v. Olsen, supra,* it was neither the bartender nor another patron who acted as operator but a cook in a restaurant belonging to a third party. The alcohol, however, was furnished by the fun-loving and cooperative bartender who well knew the purpose of the cook's requisition. When the victim sued, the defendant tavern owner offered the unique defense of contributory negligence on the part of the plaintiff in falling asleep. The plaintiff, it seems, had witnessed the cook's dexterity in administering the hotfoot twice that night to other victims and had, indeed, laughed heartily thereat. That, however, countered the plaintiff, was a hotfoot on a different shoe and in this the court concurred. The owner was held liable for negligence in caring for the safety of the guest.

"Hotfoot" on a Different Shoe

On a similar set of facts, involving a heat application administered with the same *modus operandi,* the Arkansas court reached a contrary result. *Peter Anderson & Co. v. Diaz,* 77 Ark. 606, 92 S. W. 861 (1906). The court declared that a saloon-keeper does not hold himself out to the public as a protector of those who

may be patrons of his saloon and drew a distinction between the liability of a saloon-keeper and that of a common carrier or innkeeper.

Hot on the heels of *Curran v. Olsen* and *Peter Anderson & Co. v. Diaz, supra,* came a decision from the State of Washington, involving another unimaginative bartender whose ingenuity failed to transcend the much overworked alcoholic *hotfoot.* Having two precedents before it, the learned court considered both fully and found for the plaintiff. Here, too, the court viewed the matter from the point of view of agency, holding that the bartender was the employer's delegated representative and that inasmuch as the employer was charged by law with the duty of preventing disorderly conduct in his establishment, he was liable when the act was committed by the person whom he had placed in control. *Beilke v. Carroll,* 51 Wash. 395, 98 Pac. 1119 (1909).

A Footless Formula

The tavern, it seems, is in need of an Emily Post to formulate a *Uniform Law of Barroom Etiquette* or a Blackstone to spell out the *Elements of Podiatric Jurisprudence,* for the conflicting decisions are of little help in determining the liability of a proprietor who does not live within a jurisdiction where the *"hotfoot"* has been litigated. Bartender, saloon-keeper, patron and victim must, in the present state of things, learn the hard way.

Up the Ladder

"Nickel, Nickel, Nickel"

The line of demarcation between grand and petit larceny has been clear in this state. It has been a mere matter of arithmetic to discover where the "petit" leaves off and the "grand" begins. As distinct as the monetary qualification in the law, have been the social differences in their own professional circles, between the petty thief and the grand "larcener". However, by a recent decision of the Court of Appeals [*People v. Cox,* 286 N. Y. 137, 36 N. E. (2d) 84 (1941)] the social and economic barriers have in certain instances been lowered and the petty thief may look forward to reception into the more magnificent and munificent orbit of grand larceny.

The current case held that the nickels taken in a series of thefts by a subway employee, continuing over a period of about three years, in a number of subway stations, ranging from Chambers Street to Kingsbridge Road in the Bronx, might be totaled to make a sum of over $500 and thus support an indictment for grand larceny, although the daily peculations never amounted to more than 200 nickels. The court apparently took notice of Benjamin Franklin's adage: "take care of the nickels and the dollars will take care of themselves."

Taking or Tacking

This is the first decision of this type in this state although in England and in twenty-five other states the doctrine has often been applied. If the taking is one transaction, or series of transactions with a common scheme, the aggregate value of the property taken is to determine the grade of the offense. 32 American Jurisprudence 889. However, in *Rex v. Birdseye* [4 Car. & P. 386, 172 Eng. Rep. R. 751 (1830)] the defendant looted a house of its furniture and found the prospect of carrying off the booty in a single trip too fatiguing. After a first haul, he returned in two minutes for the second. Then he took half an hour's

respite before returning for the third and final trip. The court held the first and second trips constituted but a single larceny but the half hour interim broke the unity and the third trip was considered a separate crime. This of course would allow a *stare decisis*-minded felon equipped with Bulova stop watch to empty a house, by making fresh journeys at half hour intervals with his ill-gotten treasure. Holmes "bad man" [HOLMES, COLLECTED LEGAL PAPERS (1921) 171] who kept informed on the developments in the advance sheets would then never find it necessary to contemplate any greater crime than petty larceny.

Making Hay Slowly

A somewhat similar situation occurred in the case of *Flynn v. State,* [47 Tex. Cr. R. 26, 83 S. W. 206 (1904)] where it appeared that the complaining witness, while inebriated, offered to buy beer for the defendant. The defendant took the witness' roll of bills for the purpose of paying and each time kept a few bills for himself until the complainant's capital had dwindled from $85 to a mere $5. The defendant was convicted of grand larceny despite his modest plea that he never took more than $50 at one time. An even more brazen defense was offered by the defendant in the case of *State v. Donaldson,* [35 Utah 96, 99 Pac. 447 (1909)] who succeeded in fleecing two foreigners (Scotchmen, no less!) touring the wild and wooly west (at cards). The defense offered to a grand larceny charge, was that the defendant had to split his winnings with other accomplices and he should be charged with stealing only that which he could "rightfully" keep as his very own. Needless to say he failed to impress the court with his logic. Had he succeeded felons would undoubtedly try to subtract the cost of bribery from the amount purloined as overhead expenses. Indeed, that very point was collaterally made by counsel for the defendant in *United States v. Sullivan,* 274 U. S. 259, 264 (1927). Judge Holmes' reply to this impertinence was: ". . . it will be time enough to consider the question when a taxpayer has the temerity to raise it." No case has yet been found where a foot pad limited his demand on his victim to the statutory amount and no more in order to escape a more lengthy incarceration. Another possibility apparently overlooked is to invite the victim to stand by until daylight and then to relieve him of his valuables in order to escape the provisions of the N. Y. PENAL LAW 1294 sub. 1 which states that the taking of property of any value from the person of another, in the night time, is grand larceny in the first degree.

A line of decisions involving the theft of gas, electricity, oil and other such substances is represented by the leading case of *Wood v. People* [222 Ill. 293, 78 N. E. 607 (1906)] in which the defendant dancing master (even at rest) managed to keep warm and his gas bill down by the simple expedient of diverting the gas through a hose before it could be clocked by the meter. The hose would be disconnected a few days before the representative of the gas company appeared to read the meter in order to divert suspicion. However, he was apprehended and charged and convicted of grand larceny despite his plea that on no single day more than $15 worth of gas was stolen.

This legal amalgamation of a series of transactions into a single transaction may in some cases meet the layman's sense of justice. Yet such a principle will have to be developed cautiously if startling results are to be avoided. With respect to larceny, whether a series of petty larcenies are to be treated as grand larceny, will to some extent, have to be a question of degree, probably for the court. It would

seem that the minimum requirements should be (1) that there be a common victim; (2) that the property stolen be of a similar kind; (3) that each particular larceny be effected in a similar manner; and (4) that the thief shall have during the time when the series of larcenies are being committed an intent to repeat the criminal act. All these factors should be requisite in addition to the presence of a common scheme or plan.