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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."*

Portrait of Two Judges

Two books have recently reached my desk. The first is written by Max Lerner. It is entitled *The Mind and Faith of Justice Holmes* and consists in the main of excerpts from Holmes' writings with explanatory forewords by Professor Lerner. (See Ford, Book Review, *infra* p. 303). The second is from the pen of Judge John C. Knox, senior United States judge in the Southern District of New York, and is aptly entitled *Order in the Court.* Both books deal with the law interspersed with extra legal materials. Each reveals the personality and philosophy of a judge in action. Together they suggest to a reviewer an interesting study of contrasted judicial careers. Lerner sings the praises of the "mind and faith" of the peerless judge whose former dissents have now been translated in a considerable degree into the majority opinions of the reformed Supreme Court. *Order in the Court* modestly unfolds the autobiographical story of a humble Federal judge doing his daily work without fanfare or fuss.

Two Books

In the well known essay wherein he condescends to deliver his "eulogy" over the Natural Law, Justice Holmes cynically remarks that "there is in all men a demand for the superlative so much so that the poor devil who has no other way of reaching it attains it by getting drunk." Certain it is that this alleged urge to superlatives (without the aid of intoxicating beverages) is strongly evidenced in the extravagant praise heaped upon Holmes by his many followers. Justice Cardozo rates his distinguished predecessor on the Supreme Court as "the greatest of our age in the domain of jurisprudence." Justice Frankfurter, lifelong admirer of Justice Holmes, credits him above all others with shaping and directing the course of American current law. But Lerner refuses to limit the excellence of Holmes to the "domain of jurisprudence"; with spread-eagle magniloquence his blurb proclaims that "Holmes was perhaps the best-rounded mind and personality that America has produced." This is high adulation and from eminent sources, but one may wonder whether Holmes' admirers may not be doing him a disservice in proclaiming him as the greatest jurist and "the best-rounded mind" of the New World. No one familiar with the life of Holmes can deny his personal charm and eternal youth, his sparkling style and sweep of learning, but it is suspected that his admirers have forgotten his own warnings anent the excessive use of superlatives in their maximum rating of Holmes as a judge and particularly as a philosopher.

High Praise

In marked contrast with the acclaim of Holmes the judicial journey of Judge Knox has aroused no similar applause from jurists or legal philosophers. He has

*Birrell, Obiter Dicta (1885) title page.

been quietly performing his judicial work for a quarter of century. Into his courtroom have come seamen, tradesmen, aliens, criminals and common folk with their quarrels and disputes to be settled by the application of rules of law sometimes softened by a sympathetic regard for the frailties of humankind. Devoid of all attempt at literary style and telling the story of his judicial career in simple language, Judge Knox is no match for the jurist so expert "in mating adjective and noun", the verbal craftsman who—in the thought of Cardozo— was able to pack the phosphorescence of a page into a single paragraph. Few "great cases" appeared upon Judge Knox's docket to balance the mighty causes passed upon by Justice Holmes in Massachusetts and later in Washington. Indeed, Lerner makes it seem that any case that Holmes decided became great because of the majestic sentences which fell from his gifted pen.

Holmes v. Knox

The unfairness of attempting to weigh the judicial accomplishments of Holmes and Knox seems to be accentuated when we recall the advantages of heredity and environment enjoyed by the former. Son of the "Autocrat of the Breakfast Table", having access in his youth to the best table conversation in New England, reared in the environs of Beacon Street, sitting at the feet of Emerson, Wendell Phillips and Theodore Parker, young Holmes naturally developed a facility of expression and ability to turn out "pretty phrases" that remained his pride and joy during his long life. The danger is that this architect of words may have failed to distinguish form from substance, and may have missed the great truths of life in his quest for a smart aphorism. Judge Knox came from the countryside of Pennsylvania; he did not enjoy an early association with the brilliant James boys, William and Henry, or receive his education at Harvard with the elite of New England; he started his legal career in New York without a friend or patron; and following a brief tenure as special assistant in the office of the Attorney General, he was appointed federal judge. Yet this man seems to have caught something in his journey through life that failed to attract the attention of the dwellers in Beacon Street, something that reminds us of the plain homespun philosophy of Lincoln, something that we believe symbolizes the true American tradition.

Holmes' Philosophy

What is the mental afterglow of a reviewer who has read Lerner's appraisal of Holmes as perhaps the peer of all minds and personalities in a country which has given us Washington, Lincoln and Wilson? The writings of Holmes himself provide our answer. He tells us that the essence of truth is physical force; that there is no natural law or absolute rights; that law and morals must be completely severed; that current morals are mere passing fancies of the moment and without enduring value. Turning to an appraisal of man, Holmes reduces him to the status of a "cosmic ganglion" whose bowels are rated as important as his brains, for functioning and living are the things that really count. "It would be well", he says, "if the intelligent classes could forget the word sin and think less of being good." And at the end, the very end of life, his last words would be "O Cosmos, lettest thou thy ganglion dissolve in peace!" (See Ford, *The Fundamentals of Holmes' Juristic Philosophy* (1942) 11 FORDHAM L. REV. 255).

One closes Lerner's volume with the sad and sickening feeling that the lofty praise and superlative rating of Justice Holmes need a revaluation. It is feared that the

warmth and color of Holmes personality have warped the judgment of his intimates and associates. The facial beauty of his juristic style has overshadowed his cynical and give-it-up pessimism; his spirit of defeatism is veneered with pretty phrases. A final appraisal of Holmes—man, jurist, philosopher—must wait a more matured judgment divorced from the fulsome praise and extravagant enthusiasm of his contemporaries.

Pending such postponed evaluation, the reader may turn to *Order in the Court* and read the memoirs of a judge who knows not, or at least believes not, the "cosmic-ganglion" theory of life and law; who conceives of justice as a living attainable objective; a wise judge who mixes law with compassion and believes that "in a world where justice everywhere holds her scales at even balance, mankind will never fail to improve upon the past."

W. B. K.

The Testamentary Character of United States Savings Bonds

Recently a statute was passed in New York which settles any dispute as to the disposition of the proceeds of non-transferable United States Savings Bonds. Section 24, Personal Property Law (L. 1943, Ch. 632) now provides that the right of a beneficiary to receive payment of a bond according to its terms shall not be defeated by any statute or rule of law governing transfer of property by will. However, since many United States Savings Bonds are presently held in estates of persons who died before the effective date of the new statute, the question of rights arising under these bonds in the absence of such a statute is still of significance in New York as well as in jurisdictions which have not enacted such legislation.

The New York Statute

In *Deyo v. Adams,* 178 Misc. 859 (1942) an executrix sought to recover for the estate certain United States Savings Bonds purchased in the name of the decedent and payable to him with provision therein that on his death said bonds, if still outstanding, would be payable to his sister. The sufficiency of the complaint was sustained at Special Term. It was held that the attempted disposition of the proceeds of the bonds was a testamentary disposition and void for failure to comply with the Statute of Wills (N. Y. Dec. Est. Law § 21). The court relied heavily upon *McCarthy v. Pieret,* 281 N. Y. 407, 24 N. E. (2d) 102 (1939), which involved a mortgage extension agreement providing that, in the event of the mortgagee's death, payments of interest and principal due thereafter should be made to the plaintiffs, a brother and nieces of the mortgagee. An action to recover interest payments under the agreement was brought against the mortgagor, who interpleaded the decedent's administrator. A majority of the Court of Appeals held the agreement to be testamentary in character and so invalid under the Statute of Wills. The basis for the holding was that no present interest was created in the beneficiary at the time the agreement was made since the interest of the beneficiary was contingent upon the death of the mortgagee before maturity of the bond. The opinion in *Deyo v. Adams* also cited *Decker v. Fowler,* 199 Wash. 549, 92 P. (2d) 254 (1939), where it was

A New York Decision

held that certain United States Savings Bonds belonged to the testate rather than to the beneficiary because the donor had not absolutely and irrevocably divested himself of present control over the property.

A Contrary Holding

A contrary result was reached in a later New York case, in which the plaintiff in *Deyo v. Adams* instituted a proceeding in the Surrogate's Court to compel a co-executor to take no position adverse to that of the petitioning executrix in the pending action in the Supreme Court. *In Re Deyo,* 42 N. Y. S. (2d) 379 (1943). Surrogate Foley's decision that the bonds were not assets of the estate was based upon the application of the doctrine that a third party beneficiary may enforce a contract clearly intended for his benefit, at least where there is a certain degree of family relationship between the promisee and the beneficiary. *Seaver v. Ransom,* 224 N. Y. 233, 120 N. E. 639 (1918); see (1943) 29 CORN. L. Q. 109. However, the flaw in this argument is that at the time the contract is made, that is, at the time the bond is issued, the beneficiary acquires no vested right. If a promise is in terms conditional, the beneficiary can acquire no right under it unless and until the condition happens or is performed. 2 WILLISTON, CONTRACTS § 364 (A). In the bond cases the condition upon which the right is to vest is the death of the donor, and therefore, the provision for payment to the beneficiary would seem to be testamentary in character. [*Cf.* 52 YALE L. J. 917 (1943)].

The Correct Approach

However, Surrogate Foley also pointed out that even if a conflict between the State law as of wills and regulations of the Treasury Department pertaining to Savings Bonds did exist, the latter should govern, disagreeing with the holding in *Deyo v. Adams* that the federal regulations do not preclude the application of state law determining the validity of the devolution of the property. The conflicting views of the Supreme Court and the Surrogate are reflected in the administration of another estate. The Surrogate first decided that the bonds in question belonged to the estate, rather than the named beneficiary, following *Deyo v. Adams. In Re Karlinski's Estate,* 38 N. Y. S. (2d) 297 (1942). However, prior to the entry of a final decree, the United States Attorney intervened and asked for a reconsideration of the decision. The Surrogate reversed his prior decision on the ground that war bonds have been sold under the representation that the obligation will be paid in the manner designated in the bond, and to deny payment to the beneficiary because of a formality hampers the raising of funds necessary to prosecute the war. *In Re Karlinski's Estate,* 43 N. Y. S. (2d) 40 (1943). The Congressional power to declare war carries with it the power to put into effect such procedures as are reasonably adapted to achieve victory. *International Association of Machinists v. E. C. Stearns & Co.,* 178 Misc. 661, 664, 36 N. Y. S. (2d) 156, 159 (1942). The statute authorizing the Secretary of the Treasury to issue United States Savings Bonds subject to such terms and conditions as he may prescribe is a valid exercise of the power conferred upon Congress under Article I, Section 8 of the Constitution "to borrow money on the credit of the United States." It clearly lies within the implied power of Congress to provide a method of payment on its obligations and the regulations under which the bonds were issued have the force of Federal law. *Warren v. United States,* 68 Ct. Cl. 634 (1929); *cert. denied* 281 U. S. 739 (1930), decided that the Treasury can not be compelled to make payment of a bond to anyone