

1943

Obiter Dicta

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The dissenting opinion applies a test of practicality, and by its statement that the Board of Tax Appeals "did not invoke wrong legal standards" seems to indicate that technical legal consideration need not be shown to remove these cancellations from the category of gifts.²⁶

Since the effect of the holding in this case is to cast doubt upon the principle established in the *Sanford & Brooks* case,²⁷ it may be expected that legislation will be enacted to eliminate this apparent loophole in the taxing scheme.

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."*

A BIT OF LEGAL SEMANTICS

A case recently decided in the House of Lords presents a problem of testamentary language which is not entirely novel, but proves that judges are ready to accept a popular meaning of language even when it departs from established legal usage (*Perrin v. Morgan*, [1943] 1 All. E. R. 187, H. L. In this case a testatrix, who had drawn her own will, made certain specific devises and then concluded as follows: "I direct that all moneys of which I die possessed of shall be shared by my nephews and nieces now living." Her estate consisted of investments, cash in the bank, dividends received or accrued, rents due and household goods. The question which confronted the House of Lords was the precise meaning and effect of the words "all moneys" which appeared in the above quotation. Should these words be limited to bank deposits and current funds, or should they be extended to include all intangible and tangible personal property as well? The House of Lords held that the words should be given the "popular" meaning intended by the testatrix, rather than the strict "legalistic" meaning. Accordingly they concluded that the bequest effectively disposed of all the net personalty of her estate.

The interesting feature of the case is that the House of Lords was obliged to decide between the narrow legal meaning of the phrase "all moneys" and the meaning which might be given to the same phrase by a layman. In the early common law the word "money" was very strictly construed and embraced only gold and silver coins. This meaning is probably latent in the United States Constitution, Art. 1,

Money
Talks

26. 317 U. S. —, —, 63 Sup. Ct. 577, 582 (1943). The opinion of the Board of Tax Appeals (now the Tax Court of the United States) appears at 44 B. T. A. 425; that of the Circuit Court of Appeals, 7th circuit at 128 F. (2d) 254.

27. 282 U. S. 359 (1931). The principle of this case, discussed *supra* at p. 199, was enacted into statute in a limited form. See *supra* note 11.

*Birrell, *Obiter Dicta* (1885) title page.

Sec. 8, wherein it is provided that "Congress shall have the power to coin money." This restricted meaning has been gradually extended by the courts to include negotiable instruments, bank notes and bank deposits, as well as anything "which passes current as money." The more liberal approach of the layman is evidenced in the standard dictionaries. Webster, for example, defines money as "wealth reckoned in terms of money." So also, Funk & Wagnalls states that money embraces "salable possessions; wealth; property . . ." Faced with these two antagonistic lines of authority, the problem in the instant case was to select a definition which would do justice in the particular circumstances of the case.

There are two facts which amply justify the broad definition imposed by the House of Lords. This was a "home-made" will. In this situation, the courts have always endeavored to prevent intestacy by a liberal construction of the language framed by the unskilled testator in the disposition of his property. *West v. West*, 215 App. Div. 285, 213 N. Y. Supp. 480 (2d Dep't 1926); *Matter of Schriever*, 221 N. Y. 268, 116 N. E. 995 (1917). In a somewhat similar situation the New York Court of Appeals, in speaking about the words "ready money" as used in a "home-made" will, said: "But when read with the context they may be held to mean any kind of personal property, and it is the office of the courts, considering everything which may properly be resorted to for aid, in every case to give effect to the intention of the testator in their use." *Smith v. Burch*, 92 N. Y. 228, 234 (1883).

Another fact which undoubtedly persuaded the House of Lords to adopt a liberal construction was the absence of a residuary clause in the will. If the narrow legal construction of "money" were followed, the testatrix would have died practically intestate since only a negligible part of her estate consisted of "money" in the legalistic sense. There seems to be ample support for the conclusion that the intent of the testatrix contemplated a transfer to her nieces and nephews of all personal property under her control at death. Perhaps the true approach of the House of Lords in departing from the strict line of legal authorities in the instant case is best expressed in the language of Lord Atkin who said in a concurring opinion: "I anticipate with satisfaction that henceforth the group of ghosts of dissatisfied testators who, according to a late Chancery judge, wait on the other bank of the Styx, to receive the judicial personages who have misconstrued their wills, may be considerably diminished." *Perrin v. Morgan*, *supra* at 194.

"THE COURSE OF THE EMPLOYMENT"

One of the most elusive problems of the Workmen's Compensation Law is found in the recurring question: When does an injury to an employee arise "out of and in the course of the employment"? (New York Workmen's Compensation Law, Sec. 10). As Justice Heffernan recently wrote: "The quoted phrase has been a prolific source of litigation and has given rise to countless judicial decisions turning upon nice distinctions and supported by refinements so subtle as to bewilder the reader. It is practically impossible to define a fixed boundary dividing the cases which are within the statute from those that are without. Precedents are of little value for the facts are almost always distinguishable and

A "Home-Made" Will

A Wise Decision

A Nice Question

reasoning by analogy is dangerous. Of necessity each case must stand alone." *Matter of McGrinder v. Sullivan*, 264 App. Div. 640, 641 (1942), 37 N. Y. S. (2d) 1, 2 (3d Dep't 1942).

The subtleties of the above stated question are aptly illustrated in the *McGrinder* case. A bartender ejected an intoxicated customer from the barroom. The latter departed with a threat of revenge. After closing the premises, the bartender walked four blocks and while waiting for a conveyance was assaulted by the irate customer. The applicant's claim for compensation was denied by the State Industrial Board. On appeal to the Appellate Division, it was held, one justice dissenting, that the assault arose out of the bartender's employment and that a liberal construction warranted the conclusion that the claimant's injuries were also sustained "in the course of the employment".

*Unfinished
Business*

The Court of Appeals reversed the order of the Appellate Division and stated: "The question was whether continuity of cause was so combined with continuity in time and space that the quarrel from origin to ending should be taken to be one. . . . The negative answer given by the Board was an act of judgment upon a debatable matter of fact. The Appellate Division was without power to direct the Board to decide the other way as matter of law."

*A
Question
of Fact*

McGrinder v. Sullivan, 290 N. Y. 11, 12 (1943).

Despite the reversal by the Court of Appeals, the *McGrinder* case invites brief consideration of the most difficult question concerning continuity of employment.

*The
Problem
Stated*

When does "the course of employment" come to an end? Two tests are mentioned by the Court of Appeals: (1) continuity of cause and (2) continuity of time and space. There is unanimity of agreement among the parties in the *McGrinder* case that the injuries arose "out of" the employment. The quarrel in the barroom and the ensuing injury outside the premises are interlocked with the bartender's calling. Hence the continuity of cause is clearly established. The real difficulty centers about the question whether the course of employment continues after the employee leaves the employer's premises. There is adequate precedent supporting the contention that the mere leaving of the place of employment does not terminate the liability of the employer under the compensation statute. The principle is well stated in *Bergman v. Buffalo Drydock Co.*, 269 N. Y. 150, 154, 199 N. E. 38, 39 (1935): "Leaving the premises of an employer in an effort to further the interest of the employer is not always an abandonment of the employment." A close distinction is made by the New York courts between traveling from home to work or from work to home and traveling between different places of employment. Injuries sustained during the trip from home to work are not compensable, *Devoe v. New York State Railways*, 218 N. Y. 318, 113 N. E. 256 (1916), nor is an employee generally protected under the compensation statute for injuries suffered while on his way home from work. *Matter of Douglas v. Kenn-Well Contracting Co.*, 249 N. Y. 609, 164 N. E. 603 (1928). The *McGrinder* case is complicated by the further fact that the incidents of the bartender's employment may still be in operation after he concluded his duties for the day. It has been held in *Matter of Field v. Charmette Knitted Fabric Co.*, 245 N. Y. 139, 156 N. E. 642 (1927) that the continuation of a

quarrel, which originates on the employer's premises, may give rise to an award in favor of an employee who was assaulted away from the employer's premises.

How far from the place of employment may an employee roam before he leaves the orbit of his employment? The Appellate Division in the *McGrinder* case suggests:

Distance

a

Test?

"Mere distance alone from the place where the quarrel originated is not the determining factor." However, it seems that distance alone lends something more than enchantment to the problem of continuity of the course of employment. The greater the distance from the employer's plant, the less likely the unbroken chain of his employment. *Matter of Lampert v. Siemons*, 235 N. Y. 311, 314, 139 N. E. 278 (1923); *Matter of Field v. Charmette Knitted Fabric Co.*, *supra*.

Returning once more to the situs of the *McGrinder* case, it may well be that the "pub" of England or the corner saloon of America is aptly termed the poor man's club with the bartender acting as advisor and mentor to the transient members. But the principal case discloses the dangers of the bartender's calling and the possibility that his employment may embrace other hazards than those connected with the prosaic dispensing of liquors over the counter. *State ex rel. Anseth v. District Court of Koochiching County*, 134 Minn. 16, 158 N. W. 713 (1916). The case aptly supports the comment of Justice Heffernan that the clause "arising out of and in the course of the employment" in the Workmen's Compensation Law has been followed by "countless judicial decisions turning upon nice distinctions and supported by refinements so subtle as to bewilder the reader".

RIDE-SHARING AND THE GUEST STATUTES

The rationing of tires and gasoline, as a means of meeting the present shortage in these commodities so essential to our war effort, has given rise to a wide "share-your-ride" program. This raises the question of the legal relation-

"*Share-Your-Ride*"? ship which exists between the owner of the car and those who ride with him, especially in those states which have enacted what are known as "guest" statutes. Such statutes generally exempt the owner of a car from liability for injury to a guest who rides with him provided the injury does not result from the wilful, wanton or grossly negligent misconduct of the host. See Weber, *Guest Statutes* (1937) 11 CINN. L. REV. 24.

The question of the relationship was recently presented to the Court of Common Pleas of Ohio, Cuyahoga County, in *Miller v. Fairley*, 9 Ohio App. 209 (1942). This was an action seeking a judgment declaring the legal relation

A Timely

Decision

between the plaintiff, the car owner, and the two defendants, his fellow employees, who had qualified as a riding group under the provisions of § 504 (a) (7) of the Revised Tire Rationing Regulations by entering into an agreement whereby each of the defendants was to pay the plaintiff twenty cents per day to cover the cost of gasoline and oil consumed. The court held that the host-guest relationship existed under the provisions of the Ohio Guest Statute (§ 6308-6 G. C.) and relied upon the case of *Duncan v. Hutchinson*, 139 Ohio 185, 39 N. E. (2d) 140 (1942) in which it was held that an agreement to share the cost of gasoline and oil consumed on a pleasure trip did not have the effect of transforming the relationship between the parties from that of guest and host to that of passenger for payment and carrier. Such a transformation

would not result, the court indicated, "unless the motorist is, in turn, compensated for such transportation in a manner substantially commensurate with the costs and the hazards of the undertaking." The court in the more recent case was of the opinion that the twenty cents per day represented, according to the terms of the agreement, approximately only one-third of the cost of gasoline and oil consumed on each daily trip, it was not "substantially commensurate" with the cost of the transportation as such and that the relationship, therefore, was that of host and guest; the relationship did not have a business aspect since in a real sense there was no pecuniary benefit accruing to the plaintiff as a result of the agreement which was created "solely and completely for the purpose of conserving our precious supply of rubber". The decision is in keeping with the times and no legal principle seems to have been sacrificed in giving the statute an interpretation consonant with conditions presented by the war. A contrary holding would greatly impair the effectiveness of the "share-the-ride" program, since car owners would hesitate entering into a relationship from which might result liability for those acts of ordinary negligence which today are considered almost risks of the road.

Just a week before this case was decided, the Court of Appeals of Ohio, Summit County, handed down an opinion [*Dougherty v. Hall*, 70 Ohio App. 163, 45 N. E. (2d) 608 (1942)] in which it was held that payment of

A
*Distinction
Made*

seventy-five cents per week by the injured person under the defendant's verbal agreement to transport him to and from his place of employment precluded the relationship of guest and host from arising. There the court found that the payment was "what the parties had agreed was a sufficient compensation for his transportation". This case was so recently decided that it may not have been called to the attention of the judge in the Court of Common Pleas who decided the case first mentioned and at first blush it would seem to represent a contrary holding. However, the Common Pleas judge in his opinion indicates the fact which apparently distinguishes the cases. In the earlier case the seventy-five cents was agreed upon as the cost of transportation as such. It may have been a poor bargain from the car owner's standpoint, nevertheless, the payment was for the transportation as such and did not, as in the later case, represent merely "a sharing of the cost of the gasoline and oil and nothing else". See Weber, *op. cit. supra* 39-40; *Olefsky v. Ludwig*, 242 App. Div. 637 (2d Dep't 1934).

The point of commencement or termination of the "guest" relationship presents close problems which deserve mention. The Supreme Judicial Court of Massachusetts

The
*Beginning
And The End*

was recently called upon to consider the question in *Bragdon v. Dinsmore*, 45 N. E. (2d) 833 (Mass. 1942). Although Massachusetts has no guest statute, it is one of the few states which by judicial decision requires that an automobile guest prove gross negligence on the part of the operator in order to recover. *Masaletti v. Fitzeroy*, 228 Mass. 487, 118 N. E. 168 (1917). In the *Dinsmore* case the defendant car owner had difficulty in parking his car and the plaintiff, who had accompanied him to attend a social event, was injured when the car struck the plaintiff who had stepped in front of the car to direct the defendant. The court held that the relationship of host and guest had not terminated when the plaintiff stepped from the car. This decision seems to be in accord with the settled rule in Massachusetts, *Ruel v. Langlier*, 299 Mass. 240, 12 N. E. (2d) 735 (1938) in

which the court said "the degree of defendant's duty does not depend upon the physical position of the plaintiff at the moment of the accident or upon whether he was in defendant's automobile or outside of it or upon whether in everyday language he would be described as a guest. The degree of defendant's duty depends upon whether the act of the defendant claimed to be negligent was an act performed in the course of carrying out the gratuitous undertaking which the defendant had assumed." In the last cited case plaintiff had gotten out of defendant's car and was pushing the car in order to free it from the snow in which it had become stuck. The rule of the *Ruel* case was laid down in 1938 and has been consistently followed in Massachusetts and in application has tended to enlarge the scope of the guest-host relationship. In *Head v. Morton*, 302 Mass. 273, 19 N. E. (2d) 22 (1939), one in the act of entering a car at the invitation of the owner, was injured when the automobile jolted forward. The court held no recovery could be had where the host was found negligent but not grossly negligent. Again in *Ethier v. Audette*, 307 Mass. 111, 29 N. E. (2d) 707 (1940), the court held that the plaintiff remained a guest of the defendant, who therefore was not liable in the absence of gross negligence, notwithstanding plaintiff did not intend to enter the automobile at the time of the accident and had returned merely to persuade the defendant to go to a restaurant with him. Cases from other jurisdictions having guest statutes show similar interpretations. In *Nemoitin v. Berger*, 111 Conn. 88, 149 Atl. 233 (1930), where plaintiff had entered the car for the purpose of immediate transportation and was injured when defendant slammed the door on his hand, the court held that he was a guest.

However, there are decisions which seem to give a more restricted interpretation to the statutes and to be contrary, at least in spirit, to the Massachusetts and Connecticut holdings. In *Pluckett v. Pailthorpe*, 207 Iowa 613,

A
Narrower
View

223 N. W. 254 (1929), plaintiff was injured by the fall of the door as she was about to enter the car at the invitation of the defendant but in his absence. The court held she was not a passenger within the meaning of the "guest" statute,

since there was neither driver, journey, nor rider. In Michigan where the guests statute is identical with that of Connecticut, we have a seemingly contrary holding in *Hunter v. Baldwin*, 268 Mich. 106, 255 N. W. 431 (1934). In that case the plaintiff drove to town with defendant, spent two hours in the town and planned to return home with him. In cranking the car preparatory to the return trip, plaintiff was injured. The court held that the plaintiff ceased to be a guest when he left the car and that the relationship had not been resumed when the injury occurred. There is a similar holding in *Moreas v. Ferry*, 135 Cal. App. 202, 26 P. (2d) 886 (1933), but the statute defining a guest as one "who accepts a ride in any vehicle moving on public highways" is a distinguishing feature.

This brief reference to some of the cases which have arisen in those jurisdictions which by statute or decision have sought to protect the car owner from the objects

A
Suggested
Reform

of his generosity, points to the present need for remedial legislation in states such as our own where the automobile host remains liable for ordinary negligence. Commendable and necessary as the "share-your-ride" program is, even an insured motorist may hesitate to adopt it if sharing his ride

will expose him to litigation and possibly liability to those who are the beneficiaries of his "good-neighbor" policy.