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# Obiter Dicta

business activity and that there were insufficient facts to warrant a disregard of the entity.

The proposition concerning assignment of income in the principal case is primary and distinct from the proposition concerned with disregard of the corporate entity. If the assignment was ineffectual to avoid imposition of income tax upon the assignor, then the valid existence of the corporate assignee is irrelevant, since the assignor becomes the responsible taxpayer. As a tax-saving device, this recent decision does not disclose a new loophole. At current corporate normal[35] and surtax[36] income tax rates, declared-value excess-profits tax rates[37] coupled with the capital stock tax,[38] and the excess profits tax rates,[39] the corporation is scarcely a shield against the incidence of income taxation. Earnings from personal services cannot be effectively assigned. A valid assignment by parting with ownership of income-producing property itself is a drastic device for avoiding taxes. Assignment without the relinquishment of legal control and economic benefit is not likely to receive a taxpayer's desired interpretation.

## 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 Tribute to Mr. Justice Sutherland

On Monday December 18, 1944, a meeting of the Bar of the Supreme Court of the United States was held in the Supreme Court Building. Its solemn purpose was to take appropriate action in memory of the late Mr. Justice Sutherland. Following deserved tributes from Honorable George Wharton Pepper and Mr. Attorney General Biddle, Chief Justice Stone pronounced one of the most inspiring eulogies to his former Associate Justice.

Despite the fact that the Chief Justice "was one of those who sometimes differed" with Mr. Justice Sutherland, he paid eloquent tribute to his work on the Court during his sixteen years of service. The Chief Justice said in part: "Sound legal principles adequate to meet all the vicissitudes of human experience never sprang full-fledged from the brains of any man or group of men. They are the ultimate resultant of the abrasive force of the clash of competing and sometimes conflicting ideas—ideas which are rooted in different experiences and different appraisals of all the multifarious interests which it is the concern of government to foster and protect. The time will come when it will be recognized, perhaps more clearly than it is at present, how fortunate it has been for the true progress of the

*Sutherland, J., Dissenting*

35. Int. Rev. Code § 13 (1939).
36. Int. Rev. Code § 15 (1939).
37. Int. Rev. Code § 600 (1939).
38. Int. Rev. Code § 1200 (1939).
39. Int. Rev. Code § 710 (1939).

*Birrell, Obiter Dicta (1885) title page.

law that at a time when the trend was in the opposite direction, there sat upon this Bench a man of stalwart independence, and of the purest character who, without a trace of intellectual arrogance, and always with respectful toleration for the views of colleagues who differed with him, fought stoutly for the constitutional guaranties of the liberty of the individual." [89 L. Ed. 246 (1945)].

*The Torch of the Law*

Then the Chief Justice followed with a pertinent reference to the current tendency to confuse change and progress in the law, and quoted from Mr. Justice Sutherland's address in 1917 when he was President of the American Bar Association: "I am not in favor of standing still. Of course we must have advance, but we must at our peril distinguish between real progress and what amounts to a mere manifestation of the speed mania. Among the games of the ancient Greeks there was a running match in which each participant carried a lighted torch. The prize was awarded not to the one who crossed the line first, but to him who crossed the line first with his torch still burning." [*Id*].

*A Present Problem*

There has been manifest of late the false assumption that rapid change necessarily spells improvement in the law. It may spell confusion and uncertainty. Elsewhere (Kennedy, *Portrait of the New Supreme Court* (1944) 13 FORDHAM L. REV. 1-16) it has been noted that this danger has been particularly pronounced in the recent decisions of the Supreme Court of the United States which disclose division and dissents in approximately 50% of the decisions of the Supreme Court in the October 1944 Term and thus far in the October 1945 Term. Warnings are currently made by the Justices themselves against the precipitate uprooting of settled precedents without a careful study of the immediate and remote consequences of such overthrow of legal landmarks. The dissenting opinions of Chief Justice Stone and Mr. Justice Jackson in *United States v. South-eastern Underwriters Association,* 322 U. S. 533 (1944) provide a present-day warning, in the words of Mr. Justice Sutherland, that we "must at our peril distinguish between real progress and what amounts to a mere manifestation of the speed mania."

W. B. K.

## IS A HORSE A VEHICLE?

*Jural Semantics*

"Legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of things, as the ordinary man has a right to rely on ordinary words addressed to him." So says Justice Frankfurter in *Addison v. Holly Hill Fruit Prod. Inc.,* 322 U. S. 607, 618 (1944). But the ascertainment of the sense of things can be a task difficult of achievement. The captious mind of the lawyer often objects to, or contravenes such literary bonds.

Subject of such controversy recently was the word "vehicle" in New York. *Douglass v. City of New York,* — Misc. —, 36 N. Y. S. (2d) 214 (City Ct. 1942), *rev'd, mem.,* 266 App. Div. 717, 41 N. Y. S. (2d) 935 (1st Dep't 1943). A woman was injured by a policeman's horse, while watching a parade in New York City. She sought to hold the City liable for her injuries under § 50-b of the General Municipal Law which, prior to the 1941 amendment, read, in part as follows: "Every city . . . shall be liable . . . for the negligence of a person duly appointed . . . in the operation of a municipally owned vehicle within the state in the discharge of a statutory duty imposed upon such a person or municipality." Under this statute the munici-

pality's common law immunity is reduced and the city is subjected to liability for torts committed by its employees. The City admitted that the woman had been injured as a result of the negligence of a person duly appointed while discharging a statutory duty but the case allegedly failed on another requirement, namely, that a horse could not be considered a "vehicle" within the meaning of the statute quoted above. To support this contention the Corporation Counsel cited Bouvier's definition of a vehicle which refers to vehicle as an "artificial contrivance," and Black's definition which uses the same descriptive phrase. Counsel for the plaintiff, on the other hand, invoked Webster's definition of a vehicle, namely, "a vehicle is anything in or on which any person or thing is or may be carried." A horse, he contended, would clearly come within this definition.

*What is a "Vehicle"?*

The term "vehicle" has been the subject of much litigation and has been held to embrace many objects. So, a horse-drawn road grader, *Sant v. Continental Life Ins. Co. of St. Louis,* 49 Idaho 691, 291 Pac. 1072 (1930); a bicycle, *People v. McDonald,* 167 Misc. 670, 3 N. Y. S. (2d) 784 (City Ct. 1938); a sled, *Long v. Hicks,* 173 Wash. 17, 21 P. (2d) 281 (1933); a rowboat, *MacKnight v. Fed. Life Ins. Co.,* 278 Ill. App. 241 (1934); all were held to be vehicles. Even an eleven-year old boy drawing a little wagon was held to be "in charge of a vehicle" within a statute regulating traffic signals. In this case a dairy truck backed over the boy and it was defendant's contention that the boy was not within the protection of the code requiring the defendant's driver to give the stated signal. But the court held that the little wagon was a "vehicle" and the boy was entitled to be given the signal. *Spears Dairy v. Bohrer,* Tex. Civ. App. 54 S. W. (2d) 872 (1932).

*Operation of a Horse?*

In the instant case, the learned Justices of the Appellate Division refused to decide that the horse came within the term "vehicle." But the trial court had held that a horse could properly be included within the term "vehicle." However, such a construction—that is substituting the term "horse" for the term "vehicle"—would make the statute read "in the operation of a . . . horse." "Operate" in its ordinary sense is applied to mechanical and inanimate contrivances. *Witherstine v. Employers' Liability Assurance Corp.,* 235 N. Y. 168, 139 N. E. 229 (1923). Therefore, it would seem that one would not apply the word "operate" to an animate object subject to its own volition. Counsel for the plaintiff argued that if animals were not meant to be included the statute would have been worded "motor-driven vehicles," whereas defense counsel contended that if the intent was that the statute was to include animals, they would have been expressly mentioned. Both arguments are subject to criticism: for the adjective "motor-driven" might prove too restrictive of the term "vehicle" whereas, to enumerate fully all things covered by the term would be a waste of words.

*More Words*

Later, in 1943, the question was again brought to the fore. A man was injured while trying to stop a runaway horse, which had thrown its rider, a New York City policeman. The injured man attempted to predicate the City's liability on the basis of the new words annexed to § 50-b of the General Municipal Law by the legislature in 1941 and after the happening in the *Douglass* case. The amended statute now reads in pertinent part as follows: "Every city . . . shall be liable . . . for the negligence of a person duly appointed . . . in the operation of a municipally owned vehicle *or other facility of transportation. . . .*" The italicized words were added by the legislature in 1941. The trial court still following the *Douglass* decision, refused to admit that the horse came within the confines of the amended statute. It was said that since the stat-

ute is in derogation of the common law, it must be strictly construed. Therefore, the court dismissed the complaint as to the defendant solely on the ground that § 50-b did not extend the statutory waiver of governmental immunity to negligence in the "operation" of a city-owned horse. On appeal, however, the Appellate Division declared, two justices dissenting, that a horse could properly be considered "a facility of transportation" within the meaning of the 1941 amendment. *Bernadine v. City of New York,* 182 Misc. 609, 44 N. Y. S. (2d) 881 (Sup. Ct. 1943), *rev'd,* 268 App. Div. 444, 51 N. Y. S. (2d) 888 (1st Dep't 1944).

Two questions still remain to be answered. The first is what will be the effect of the doctrine of *ejusdem generis,* in construing the amendment to § 50-b. Under this doctrine when general words in a statute follow the enumeration of particular words, the general words will be construed as qualified and limited to matters or things of the same special character as those previously enumerated. *People v. Lamphere,* 219 App. Div. 422, 219 N. Y. Supp. 390 (4th Dep't 1927). Applying this doctrine of *ejusdem generis* to the amended words of the statute—"other facility of transportation"—it would seem that they must be construed as applying to things of the same character as the special word "vehicle," preceding them, namely inanimate objects. Therefore a horse would not be included in the general designation of "facility of transportation." And another objection still remains. In the light of the recent decision of the Appellate Division, which assimilated the word "horse," with "other facility of transportation," the statute would still be construed to read "operation" of a horse! Whether this construction was contemplated by the legislature or whether it is purely judicial fiction, the fact remains that it is an unusual handling of common words.

## A Tax-Free Profit

Two years ago this Department of the Law Review considered the question whether the expression "all moneys" contained in an English will included property such as securities. (1943) 12 Fordham L. Rev. 202. In a recent tax case the Federal Court was called upon to determine whether the converse meaning is true, that is, whether the word "property" used in the Internal Revenue Code includes money. The Sixth Circuit Court of Appeals, in its opinion in *Tri-Lakes Steamship Company v. Commissioner of Internal Revenue,* 146 F. (2d) 970 (C. C. A. 6th, 1945) stated and applied the general rule that the term property in its ordinary and natural meaning was sufficiently comprehensive to include money. Comment (1935) 4 Fordham L. Rev. 307. The Court furthermore dispelled the belief, vitalized by an *obiter dicta* of the Board of Tax Appeals in an earlier case (*Stimson Mill Co. v. Commissioner,* 46 B. T. A. 141), that money did not constitute property within the meaning of Section 112 (b) (6) of the Internal Revenue Code which provides that no gain or loss shall be recognized upon receipt by a corporation of "property" distributed in complete liquidation of a subsidiary.

*Is Money Property?*

In the *Tri-Lakes* case the taxpayer had acquired the stock of the subsidiary for $29,000 and received therefor on the complete liquidation of the subsidiary $207,000 in cash. The Commissioner contended that the difference, $178,000, was taxable income. The taxpayer contended that there was no taxable income because the money had been received as a tax-free distribution within the meaning of Section 112 (b) (6). The decision of the Circuit Court that a cash distribution was intended by Congress to be comprehended by "property" distribution as used in

*A Profit Made*