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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."*

THE LAWYER'S BEST FRIEND

In Ten Easy Lessons

It is a far cry from the town crier, in pantaloons, clanging bell and healthy voice, to the gargantuan "fourth estate" of the present day. And over the distances there rings in steady accompanying cadence the clarion call for a free press. We are proud that the legal profession has played no small part in establishing the principle of freedom of the press in the law. But history and cases have shown that this concept, advantageous and democratic as it may be, has need of that which will confine it to its proper borders. Accordingly in *Shortz v. Yetter,* Legal Intelligencer, Feb. 26, 1940, the Court of Common Pleas of Pennsylvania has held that a book giving legal advice on how to make a last will and testament, written by a layman, constituted an unlawful attempt to practice law and restrained further publication and distribution of the book. Following fast upon this decision there rose in a crescendo the criticism that the court was unduly restricting freedom of the press.

It should not be overlooked, in the midst of this trumpeting that the right to practice law, in all its forms, may be a property right [*Unger v. Landlords Corp.,* 114 N. J. Eq. 68, 168 Atl. 229 (1933)]; or at least, as most jurisdictions hold, a franchise which vests in certain individuals, and in them alone, by reason of many years' study on their part, not to mention meriting the long awaited nod of the character committee. Nor should it pass unnoticed that the best interests of society are served only when trained individuals are the liaison between the law and the layman. *Matter of Co-operative Law Co.,* 198 N. Y. 479, 92 N. E. 15 (1910). The constitutional provision guaranteeing freedom of the press permits liberty of action only to the extent that it does not interfere with or deprive others of rights. No one has a right to use the privileges he has in a way that injures his fellow citizens and one who imagines he has such a right "labors under a serious misconception of his duties and obligations to his fellow citizens and to the state itself." *People v. Most,* 71 App. Div. 160, 75 N. Y. Supp. 591 (1st Dep't 1902). The problem is to weigh the value of the constitutional guaranty of a free press against the protection of the public interests. But it should not be assumed that individuals alone have invaded the practice of law without right. Numerous corporations annually issue pamphlets advising all and sundry of the law in particular matters. And it is more than a rumor that many real estate and business brokers, notaries public and even the groceryman on the corner [*Gerbrich v. Freitag,* 213 Ill. 552, 73 N. E. 338 (1905)] bestir themselves to draw wills, deeds and other instruments which define and grant legal rights.

The frequent result of such unauthorized practice of the law, especially the draft-

*BIRRELL, OBITER DICTA (1885) title page.

ing of wills, is the defeat of the testator's lifelong objectives regarding the disposition of his estate to mention nothing of the increase in litigation. Perhaps we should not decry this last fact. Justice Day of the Supreme Court of Nebraska gave a pertinent example when he told the story of a family who called upon a business friend to draw a will, the contents of which gave rise to ten different litigations, some of them reaching the highest court in the state. One of the lawyers had suggested erecting a monument to the draftsman with a tablet thereon inscribed "Erected by the grateful lawyers of the county". Even the field of poetical expression has not failed to take cognizance of this view. Lord Neave in his *Judicial Review* writes,

"Legal" Aid Society

> Ye lawyers who live upon litigants' fees,
> And who need a good many to live at your ease,
> Grave or gay, wise or witty, what'er your degree,
> Plain stuff or Queen's counsel, take counsel of me.
> When a festive occasion your spirit unbends,
> You should never forget the profession's best friends;
> So we'll send round the wine and a light bumper fill
> To the jolly testator who makes his own will.

This present trend of thought was also uniquely expressed by Gest, when he wrote, "Every man who knows how to write thinks he knows how to write a will, and long may this happy hallucination possess the minds of our lay brethren, for surely St. Ives, the patron saint of lawyers, extends to none a heartier welcome in the life beyond than to the jolly testator who draws his own will." GEST, DRAWING WILLS AND SETTLEMENTS OF ESTATES, 1. Be that as it may, the judicial precedent of *Shortz v. Yetter* deserves to mature rather than decay, for surely the public is entitled to better service . . . whether it wants it or not.

A query posed by this decision is whether it will lead to injunctive actions by all types of licensed people against unfair infringements. The answer is subject to conjecture. Since 1931 however, when the use of the injunction by members of a profession to prevent encroachment on their field was first recognized [*Dworken v. Apt. House Ass'n*, 38 Ohio 265, 176 N. E. 577 (1931)] judicial precedent has almost exclusively limited such relief to the legal profession while refusing to grant it in the case of doctors, dentists and chiropodists. In a recent case in New York [*In re Clark*, 256 App. Div. 674, 11 N. Y. S. (2d) 432 (1st Dep't 1939)] where an injunction was sought to restrain the publication of a book, *How to make Your Last Will and Testament secretly without other Legal Aid*, the court cast some doubt on the availability of injunctive relief. It denied the injunction stating that if the sale of the pamphlet constituted a violation of the penal law the defendant should have been criminally prosecuted therefor. The court supplemented this by stating that the defendants had, moreover, discontinued the sale and distribution of the pamphlet as soon as the order to show cause was served upon them.

By legislative enactment and judicial decision the proposition that the public is to be protected from the practices of those persons who are not properly qualified to assume the mantle of a legal practitioner has been firmly engrained in our law. *Fitchette v. Taylor*, 191 Minn. 582, 254 N. W. 910 (1934). A lifetime of accumulation of property representing the fruit of the effort of years deserves protection that will insure its preservation to the owner during his lifetime and its posthumous distribution in conformity with his wishes. And it is only by the earnest

Amateur Talent

prosecution of interlopers that this can be effectuated and the public interest adequately served.

WASTRELS AND WEDDED BLISS

Life is becoming increasingly paradoxical. Persons with too little money have always been cautioned by our sages against embarking upon matrimonial ventures. And now it seems that even those whose grip on the horn of plenty is a little infirm may be enjoined judicially from seeking the tie that bindeth. In Massachusetts recently, a probate court granted a temporary injunction to the parent-guardian of an adjudicated spendthrift, restraining him from contracting a marriage within that state. *In re Engels,* N. Y. Herald-Tribune, Sept. 28, 1939, p. 4, col. 4. The prospective groom was far above the legal age required for contracting a marriage without consent of his guardian.

Silencing The Wedding Bells

Laws governing the adjudication of spendthrifts and the appointment of guardians to save their estates from ruin are mere creatures of state legislation. *O'Donnell v. Smith,* 142 Mass. 505, 511, 8 N. E. 350, 352 (1886). The common law was willing to concede that appointment of guardians for spendthrifts might be a benefit both to the individual and his family, but it felt that the only restriction on the use of one's property should be: *sic utere tuo, ut alienum non laedas.* 1 BL. COMM. *305. The Roman law, however, regarded the *prodigus* as a madman to be forthwith committed to the care of the curators by the praetor. No other justification was needed beyond the maxim, "a fool and his money are soon parted." However, if later it was shown that the spendthrift was capable of conserving his golden hail of *aurei,* the guardianship ceased. ULPIAN, FRAG. xii: 2, 3; PAULUS, SENT. iii: 4a, 7.

In general, today under the statutes a "spendthrift" is one "who by reason of excessive drunkenness, gaming, idleness, and general debauchery" might travel the road from rags to riches, in reverse, and become a public charge. 3 BOUVIER (3d ed. 1914) 3110; MASS. GEN. LAWS (1932) c. 4, § 7. It does not appear how idle one must be to be placed under guardianship as a spendthrift, but it is evident that great care must be exercised lest the number of guardianships become overwhelming. Perhaps the *apologia* of Stevenson should be kept in mind: "Just now, when every one is bound . . . to enter on some lucrative profession . . . a cry from the opposite party who are content when they have enough" may not be amiss. STEVENSON, *An Apology for Idlers* in VIRGINIBUS PUERISQUE.

Money Mad

In one instance, it appears that a husband may be adjudicated a spendthrift at the request of his loving wife for staying out once too often. *Pinkston v. Semple,* 92 Ala. 564, 9 So. 329 (1891). It may be a matter of satisfaction to know that the *feme covert* is by no means exempt. *Tillinghast v. Holbrook,* 7 R. I. 230 (1862). Since it is the purpose of the statutes to prevent and restrain only those who are wasting their property in frenzied fashion, a mere tendency to squander money, or weak-minded habits in general, will not require adjudication. *Appeal of Morey,* 57 N. J. 54 (1876). The effect of the adjudication is similar to that of insanity and deprives the ward of the power to contract except for necessaries. *McCrillis v. Bartlett,* 8 N. H. 569 (1837); *Sullivan v. Lloyd,* 221 Mass. 108, 108 N. E. 923 (1915); *Thompson v. Boardman,* 1 Vt. 367 (1828). However, it should be borne in mind that in the case of insanity, the disability itself is the cause of non-contractual power, while in "spendthriftcy", the incapacity rises by force of statute alone. *Manson v. Felton,* 13 Pick. 206, 210 (Mass. 1832).

Whether the marriage of a spendthrift ward ought to be subject to restraint remains a question. Waiving other considerations and looking at the technical legal consistency of this decision with other legal doctrine, we notice that spendthrift statutes are concededly in derogation of fundamental rights and liberties. *Strong v. Birchard,* 5 Conn. 357 (1823); they must be strictly construed. *Ellis v. Cramton,* 50 Vt. 608, 611 (1878). They were never intended to restrict the personal liberty or capacity of the ward, but only to deprive him of the power to act in financial matters. In the case of a female ward, marriage terminates guardianship of the person, since rights inconsistent with such a guardianship thereby spring into being. See *Bartlett v. Cowles,* 15 Gray 445 (Mass. 1860); *Sullivan v. Lloyd,* 221 Mass. 108, 115, 108 N. E. 923, 926 (1915). Why, therefore, may he not exercise his *personal* liberty and marry, if sufficient funds are in his guardian's hands to care for himself and his family? Financially the guardian may still watch over his property. It is said that the guardianship does not extend over the person. *Boyden v. Boyden,* 5 Mass. 427 (1809). One learned court has maintained that a guardian cannot separate a ward from his wife. *Ex parte Chace,* 26 R. I. 351, 58 Atl. 978 (1904). Others faced with similar problems have held that the marriage of an adjudicated spendthrift taking place without the state, even if to evade its statutes, may not be set aside by the ward's guardian. Marriage within the domicile of the ward without the guardian's consent is at most held to be a mere deviation of form. See *Sturgis v. Sturgis,* 51 Ore. 10, 93 Pac. 696 (1906).

Free White and Twenty-one

Some justification for the principal case may be found in *Sullivan v. Lloyd, supra,* wherein it was declared that a spendthrift may not marry. That case, however, does not effect a reconciliation with the tendency of earlier decisions within the same state, although such an attempt was made. For to concede that control of a spendthrift's person and property are matters necessarily distinct and to be kept apart, and yet to deny him marriage on the ground that the statute must be taken to embrace all contracts, including marriage, seems unwarranted. So vital a decision should not lightly be drawn by broad interpretation from a statute that must be strictly construed. If the permission of the guardian is necessary for the marriage, the future may find that the consent of three persons is an essential to the same ceremony, belying the age-old adage that "three's a crowd." On the other hand, it must be admitted that we *doubt* whether such a marriage would succeed practically. The result might be needless expense and litigation in the divorce courts. The moral and psychological effect upon the wife and children of a hopeless idler would certainly not be desirable.

A Good Provider

It's A "Circus"

We used to talk glibly, a few years ago, about "law", "justice", "due process" and so forth. But we learned much to our dismay that we had been indulging in dangerous practices. The semantic surgeons of the Stuart Chase persuasion brought us up short with a plea for a major operation on words. Loose, abstract verbiage, they said, is *verboten.* You should use only words which have a definite "referent", *i.e.,* an object or situation in the *real* world to which the word refers, like "pig", "iron", or "mud". Forthwith, we made a firm resolution to amend our erring ways. If semantics was the science of words,

Some Antics of Semantics

then we agreed it should be an *exact* science. No more "due process" or "proximate cause" for us—it was all too intangible and vague. Since that time we have been as tight-mouthed as a clam—sparing and selective in our choice of words. If in the middle of August the thermometer read 105° F., was the day "hot"? Not at all. The day was an *oven*! For you can "see" an oven; yes, and a mere child may "feel" an oven. Simple enough.

When Is A Circus?

The other day, however, we had occasion to run across a legal dispute which shook our confidence in our realist semantics. It involved the word "circus". Now ever since we have been old enough to clutch a bag of peanuts, we have been quite *sure* that we knew what a circus was. To borrow a term from our realist brothers in the law, we have "observed" circuses time and again—as recently as a month ago. Surely, if ever a word had a definite "referent" (and didn't require definition or explanation) it was "circus". But here was a learned court in Missouri sitting in solemn and judicial conclave, and defining a circus as a performance given by a traveling company on a vacant lot under a tent "or some other kind of temporary enclosure". *National Exhibition Co. v. City of St. Louis,* 136 S. W. (2d) 396 (Mo. 1940). Having always seen our circuses in New York City, the query immediately presented itself, "If a circus necessarily connotes a canvas covering, then what have we been witnessing in Madison Square Garden these past years? We had seen clowns, and elephants and acrobats—but not under a tent. Pursuing our inquiry a little further—and with no little amount of trepidation—we found that a "Buffalo Bill" wild west show had been held not to be a circus. *State v. Cody,* 120 S. W. 267 (Tex. Civ. App. 1909). We breathed easier, at this reassurance that our life-long conception of a circus was not wholly erroneous. Then when we stumbled upon *People v. Keller,* 96 Misc. 92, 161 N. Y. Supp. 132 (N. Y. Gen. Sess. 1916) in which a cabaret show was held not to amount to a circus our "referent" for "circus" took shape again.

Farewell, "Referents"!

This concrete state of semantic perfection was not to last long, however. For out of the blue came the startling discovery that by virtue of the wording of a Delaware statute, a motion picture exhibition was deemed a circus. *State v. Morris,* 1 Boyce 330, 76 Atl. 479 (Del. 1910). Now we were completely at sea. The circus which we had seen and which we knew to be a circus, was not a circus because it was not under a tent while the motion picture show which we knew was not a circus, was a circus. Dazed and shaken, we clutched for our "referent". It slipped through our fingers and vanished into thin air. Had the circus evaporated, too? We felt sure it hadn't—an assurance bolstered by the knowledge that every child knew what a circus was. But would it require some explanation—perhaps a definition? Evidently it would.

The moral is, of course, obvious to all who remember that certain philosophers have condemned this tendency to consider only concrete things and tangible objects—and to deny reality or utility to all else. One ambitious semanticist who insisted that we get rid of all words without a definite referent, violated his own mandate in the very title of his book, *The Tyranny of Words.* What is Tyranny? We haven't seen it under glass, yet. Words are slippery things, indeed, but lawyers and laymen know, if our modern semanticists do not, that they are not clarified merely because they refer to external objects.

Even a "circus" must be defined—and sad to admit, by words without a definite referent.