Are Footnotes in Opinions Given Full Precedential Effect?

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Indeed.[1]

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1. Approximately once a decade, a litigator who has run out of colorable arguments has asserted that particularly damning language in an opinion does not control the case at bar because the language appears in a footnote (this argument is herein referred to as the "Footnote Argument"). The federal and California courts have been the victims of such arguments five times since 1939, and have uniformly and vigorously defended a per se rule that the size of typeface does not bear in any way upon the weight accorded the ideas expressed therein. This Article seeks to sound the death knell of the Footnote Argument by providing a comprehensive review of the entire question and by demonstrating the futility of the argument in the face of the judicial declaration that note and text are of equal precedential value.

The earliest Footnote Argument was made in Gray v. Union Joint Stock Land Bank, 105 F.2d 275 (6th Cir.), rev'd on other grounds, 308 U.S. 523 (1939), in which counsel for farmers-appellants were dismayed by the Supreme Court's opinion in Wright v. Vinton Branch of Mountain Trust Bank, 300 U.S. 440 (1937). In Wright, the Court had noted that a court may halt proceedings at any time under the second Frazier-Lemke Act, a farmers' relief provision in the bankruptcy laws, if rehabilitation of the debtor appeared improbable. Id. at 462 n.6. The Circuit Court flatly rejected the contention of appellants that this footnote was not binding, holding that "while a footnote may sometimes make [an opinion] chaotic and bewildering, it is as much a part of it as that in the body." Gray, supra, 105 F.2d at 279. From the first appearance of the Footnote Argument, then, the courts have taken a per se approach that refuses to inquire into the level of chaos and bewilderment engendered by a footnote in an opinion.

The California District Court of Appeal took an identical stand in Melancon v. Walt Disney Productions, 127 Cal. App. 2d 213, 273 P.2d 560 (1954), a stockholder's derivative action. The California Supreme Court had ruled, in Melancon v. Superior Court, 42 Cal. 2d 698, 703 n.4, 268 P.2d 1050, 1053 n.4 (1954), that a third-party defendant may move to require the plaintiff to furnish security for costs. The lower court on remand dismissed the Footnote Argument with a footnote of its own, obliquely citing Gray; the note has been praised as a fine piece of judicial prose, D. MELLINKOFF, THE LANGUAGE OF THE LAW 443-44 (1963), and is reproduced in toto in the Appendix hereto. The Gray and Melancon cases have been cited approvingly by judges in both the federal and California court systems. See United States v. Egelak, 173 F. Supp. 206, 210 (D. Alaska 1959); People v. Jackson, 95 Cal. App. 3d 397, 402, 157 Cal. Rptr. 154, 157 (1979); see

generally 21 C.J.S. Courts § 221 at 407 & n.3 (1940); 20 AM. JUR. 2D Courts § 189 at 525 & n.20 (1965). But cf. Kirkland, Rethinking United States v. Detroit Timber & Lumber Co., 1 J. ATTEN. SUBT. 16 (1982) (per se rule may not apply where matter in footnote is not represented in the syllabus in jurisdictions adhering to the Ohio rule).

An independent and perhaps more satisfying defense of the per se rule, however, is found in Phillips v. Osborne, 444 F.2d 778 (9th Cir. 1971), in which the Court of Appeals held itself bound by the language of its own decision, Phillips v. Osborne, 403 F.2d 826, 828 n.2 (9th Cir. 1968), on the applicability of the abstention doctrine. The court rejected the Footnote Argument thus:

> The appellees would down-grade the significance of that language because it appears in a footnote. We think that the location, whether in the text or in a footnote, of something which the writer of an opinion thinks should be said, is a matter of style which must be left to the writer. A notable example of a footnote of great significance is footnote No. 4 in the opinion of Mr. Justice Stone (later Chief Justice Stone) in United States v. Carolene Products Co., 304 U.S. 144, [152 n.4 (1938)]. See, among the many comments which that footnote has excited, that of Judge [Billings] Learned Hand, "Chief Justice Stone's Concept of the Judicial Function" in "The Spirit of Liberty" (Dillard Ed. 1952) 201, 205.

Phillips v. Osborne, 444 F.2d 778, 782-83 (9th Cir. 1971). The per se rule is therefore founded upon considerations of the writer's individual autonomy, cf. I. KANT, GRUNDLEGUNG ZUR METAPHYSIK DER SITTEN (1785) (L. Beck trans. 1969), and upon the possibility of greatness to which all footnotes, like all texts, may aspire.

APPENDIX

The full text of the relevant note in Melancon v. Walt Disney Productions, 127 Cal. App. 2d 213, 214 n.*, 273 P.2d 560, 561 n.* (1954), is as follows:

> There is no merit in plaintiff's contention made at the oral argument that the ruling of the Supreme Court was not binding since it appeared in the footnote in the opinion. A footnote is as important a part of an opinion as the matter contained in the body of the opinion and has like binding force and effect. See cases cited 21 C.J.S. (1940) p. 407, Courts, footnote 3.

The rhetorical flourish of identifying the "cases" cited in a Corpus Juris Secundum footnote as authority for the per se rule is appealing in its symmetry. Its luster is tarnished, however, by the fact that only one case is actually cited in 21 C.J.S. Courts § 221 at 407 n.3, or in the 1954 Supplement thereto--the Gray case, discussed supra. The logic and style of the note, of course, outweigh the slight inflation of supporting authority.