Are Footnotes in Opinions Given Full Precedential Effect?

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TNDEED.[1]

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1 On several occasions in American judicial history, a litigator who has run out of colorable arguments has asserted that particularly damning language in a prior opinion does not control the case at bar, though all other requirements for binding precedent or *stare decisis* be met, because the language appears not in the text but rather in a footnote. The federal and California courts have been the victim of such an argument (herein the "Footnote Argument") at least five times since 1939, and have uniformly and vigorously defended a *per se* rule: the size of typeface does not bear on the weight accorded the ideas embodied therein. This article seeks to sound the death knell of the Footnote Argument by providing a comprehensive review of its treatment by the courts.

The earliest reported Footnote Argument was made in *Gray v. Union Joint Stock Land Bank,* 105

F.2d 275, 279 (6th Cir.), *rev'd on other grounds*, 308 U.S. 523 (1939), in which counsel for the farmer-appellants was dismayed by the Supreme Court's footnote in *Wright v. Vinton Branch of Mountain Trust Bank*, 300 U.S. 440, 462 n.6 (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 law, if rehabilitation of the debtor appeared improbable. The Sixth Circuit flatly rejected the appellants' contention 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." The court wisely refused to establish any particular quantum of chaos or bewilderment required for language in a footnote to be disregarded.

A California appellate court took a similarly blunt stand in *Melancon v. Walt Disney Productions*, 127 Cal.App.2d 213, 214 n.*, 273 P.2d 560, 561 n.* (1954), a stockholder's derivative action. The California Supreme Court had ruled, in a footnote 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, citing a footnote as authority:

> * 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 the 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.

This wonderfully recursive *riposte* has been praised as a fine example of durable judicial prose (David Mellinkoff, The Language of the Law 443-444 (1963)).

The *Gray* and *Melancon* rejections of the Footnote Argument have been cited approvingly in subsequent federal and California cases (*see United States v. Egelak*, 173 F. Supp. 206, 210 (D. Alaska 1959); *California 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 ed.); 20 Am.Jur.2d *Courts* § 189 at 525 & n.20 (1965 ed.)). *But cf.* J. David Kirkland, Jr., *Rethinking United States v. Detroit Timber & Lumber Co.*, 1 J. Atten. Subt. 16 (1982) (discussing *Detroit Timber* footnote affixed to United States Supreme Court decision syllabi).

These rejections of the Footnote Argument are authoritative, but they do not provide reasons for the courts' decisions. An independent and more satisfying treatment is found in *Phillips v. Osborne*, 444 F.2d 778, 782-783 (9th Cir. 1971), in which the Ninth Circuit held itself bound by the language of its own footnote, *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 Learned Hand, "Chief Justice Stone's Concept of the Judicial Function" in "The Spirit of Liberty" (Dillard Ed. 1952) 201, 205.

The respect paid footnotes by the courts is therefore founded on the writer's individual autonomy, *cf.* Immanuel Kant, Grundlagen zur Metaphysik der Sitten (1785), and on the possibility of greatness to which all footnotes, like all texts, may aspire.