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DISSENTING OPINIONS.

It is a notable fact that discussions regarding suggested changes in the substantive law are usually conducted calmly and moderately, as befits men engaged in an earnest attempt to attain justice; but those concerning a change in its administration are quite commonly thoughtless and intemperate, befitting neither the person nor the subject. Probably speeches and papers, which inveigh against dissenting opinions, are more declamatory, and present fewer real arguments, than any others.

In speaking on the subject of dissents on other than constitutional grounds, so fair and able a lawyer as Hampton L. Carson, Esq., says, in his admirable paper on "Great Dissenting Opinions":[1] "As a general rule, dissenting opinions receive slight attention. The active practitioner is chiefly concerned with the law as it is declared by a majority of the court, and pays little heed to a shrill or feeble shriek as to what it might or ought to be. . . . Dissenting opinions [even by the greatest of judges] while commanding the respect of a passing glance, do not arrest the fixed gaze of the profession, because they are felt to be of but local significance, out of harmony with the order of existing things, and but futile and idle protests which failed of effect even at the moment of their utterance."

[1] 50 Alb. L. J. 120; 22 Wash. L. Rep. 585. This interesting paper should be read by every student of constitutional law.

Another less conservative writer says:[2] "The dissenting opinion is like the small boy making faces at the big boy across the street, whom he cannot whip"; and another,[3] in order to prevent them, would make it a "part of the judicial oath of office to keep inviolate the secrets of the consultation room."

Still another says:[4] "When a judge has fully combatted his brethren in the conference, it is, in our view, something like judicial treason for him—unless it is a case very exceptional—to show why the judgment of his fellows is worthy only of disrespect. The legislature of Pennsylvania prohibits the publication, in the reports, of any dissenting opinion; leaving their authors to publish them, if they like, as the late Judge Baldwin did his, at his own cost and in a worthless volume by themselves." When it is recalled that the Act of April 11, 1845,[5] thus referred to, applied only to the decisions of the Supreme Court of Pennsylvania, upon which tribunal Judge Baldwin never sat, and that, as a Justice of the Supreme Court of the United States, he had no difficulty in getting his dissents printed in the official reports—at least from *Ex parte Crane et al.*,[6] at the beginning of his service, to *Groves v. Slaughter*,[7] which was near its end—the value of this diatribe may be properly estimated. It would be interesting to know, however—if this objector's belief, as to dissenting opinions, is to be considered worthy of even a passing notice—to what crimes he would liken the action of counsel who ask a court to overrule its prior opinions, and that of the judges who in fact do this.

So, also, another writer,[8] having in mind the ancient practice regarding juries who could not agree, with elephantine humor says: "How refreshing it would be, in cases of our judges in courts of last resort, not agreeing on their final judgment,

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[2] V. H. Robertson in 39 Am. L. Rev. 23.
[3] 22 Cent. L. J. 313, 314, answered in 20 Am. L. Rev. 428, 430.
[4] 1 Upper Canada Law J. (n. s.) 177, 178.
[5] P. L. 374.
[6] 5 Peters 190, 200 (U. S. 1831).
[7] 15 Peters 449, 510 (U. S. 1841).
[8] C. A. Hereshoff Bartlett in 32 Law Mag. & Rev. 54, 64.

that they should not either have food or drink, but in addition should be coerced by being transported from town to town in a cart."

Historically considered, it is clear the subject is not of such a character, or so burning in its nature, as to cause intemperance in thought or language. By an order of the Privy Council, adopted in 1627 (and continued by the Judicial Committee of the Privy Council, when it was constituted by the parliamentary Act of 1833), it is provided that, "When the business is to be carried according to the most voices, no publication is afterwards to be made by any man, how the particular voices and opinions went." This excludes dissenting opinions in that tribunal. On the other hand, in the House of Lords, the judges, either orally or in writing, state the reasons for the judgment they advise in each case, and these are published in the official reports; hence there the antagonistic views always appear. It is interesting to note that this difference in method probably arose from the fact that all judgments of the former tribunal, because of its close connection with the king, were considered as his voice, and he, of course, could not have two opinions on a given subject at one time; while the judgments of the House of Lords were based on its own jurisdiction solely. The reason for the former practice of course ended when the king was shorn of his powers; but both still continue, no one alleging, however, so far as the writer is aware, that one method benefits the community more than the other, or proposing to change the procedure in either tribunal.

In most if not all of the courts of last resort in this country, the judges originally expressed their opinions *seriatim*; the dissents, of course, thereby always appearing. As the business of the courts grew, however, this practice was necessarily modified; where deemed essential, one or more minority opinions was filed, each dissenting judge expressing his concurrence in the one which stated his views.

In Pennsylvania there have been legislative attempts to control the matter, but they have proved of little avail. By the

Act of April 11, 1845,[9] already referred to, official reports and a State Reporter were for the first time authorized, section 2 providing "that no minority opinions of the said [supreme] court shall be published by said reporter." Two years later, in *Dunn v. Commonwealth*,[10] the next year in *Weber v. Samuel*,[11] and in many later cases, the reasons for disagreeing were stated orally and published; in 1859 in *Yeager's Appeal*,[12] Judge Reed said "it is not my intention to dissent," but in effect did so in a published opinion; and after 1867, beginning with *Commonwealth v. Cluley*,[13] the act was as much "honored in the breach as in the observance." Indeed, during the period while the Act of 1845 was in force—that is, at least until the passage of the Act of May 11, 1871,[14] hereinafter referred to—one or more of the judges of the Supreme Court dissented in 395 cases; in some, the fact of dissent, or the filing of such an opinion, was only noted; in others, the reasons were orally stated and published; while in still others a written dissent was officially reported, just as if there had been no such statute By the Act of March 3, 1868,[15] the reporter was authorized to publish the "minority opinions of the said court" on constitutional questions; but most of the dissents, both before and after that date, were upon other grounds.

None of the later statutes deal with the matter of dissenting opinions, though the Act of 1845 [16] appears to have been treated as impliedly repealed by them, if, indeed, it had not already fallen into "innocuous desuetude." The Act of May 11, 1871,[17] says: "It shall be the duty of the judges of the Supreme Court to give their opinion in writing, and file the same of

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[9] See Note 5, *supra*.
[10] 6 Pa. 384, 389 (1847).
[11] 7 Pa. 499, 527 (1848).
[12] 34 Pa. 173, 176 (1859).
[13] 56 Pa. 270, 275 (1867).
[14] P. L. 266.
[15] P. L. 46.
[16] P. L. 374.
[17] See Note 14, *supra*.

record, upon every point upon which a judgment of reversal shall be entered in said court, and in such other cases as the majority of the said judges shall deem of sufficient importance to require their opinion to be reduced to writing and filed of record." This was followed by the Act of June 12, 1878,[18] which provided in Section 4 that "The court shall cause to be reported such of its decisions, whether made in disposing of motions or otherwise, as determine any theretofore unsettled, or new and important, or modify any theretofore settled, questions of law in this Commonwealth, or that give construction to a statute of ambiguous or doubtful import, together with such other of its decisions as may be deemed by the court of public interest and importance." This was succeeded by the Act of May 19, 1887,[19] which required the "publication [of] such of its decisions as the court may designate"; and by the Act of March 28, 1889,[20] under which "all the cases decided by the Supreme Court" are required to be published, those "marked by the several justices of said court 'to be reported' shall be reported in the manner heretofore practiced; those cases not so marked, shall be condensed by the omission thereform of all parts of the history, arguments and opinions of the court below, not necessary to a proper understanding of the points ruled." It is difficult to understand why there should ever be printed that which is "not necessary to a proper understanding of the points ruled"; but the legislative purpose was a good one, and the Court has endeavored to give effect to it, though not exactly in the way provided.

So far as concerns the courts of last resort in the several States, investigation shows that the subject is not of such great importance as the writers on it seem to believe. For instance, in the ten years between January 1, 1912, and December 31, 1921, 4339 opinions were filed by the judges of the Supreme Court of Pennsylvania, of which but sixty-five were accompanied

[18] P. L. 201.
[19] P. L. 127.
[20] P. L. 22.

by dissenting opinions, and in nine others some judge simply noted his dissent, without giving his reasons for it. In the Supreme Court of the United States, during the same period, 2349 opinions were filed, 125 being accompanied by dissenting opinions, and 180 others by dissents noted. In addition there were forty-nine cases in which one or more judges "concur in the result" reached by the majority, without stating wherein they agree and wherein they disagree with the conclusions of law or fact set forth in the majority opinion.[21] There were also 582 other cases which were dismissed for want of jurisdiction, or the judgments simply affirmed or reversed on the authority of specified decisions. It is no reflection on that great tribunal, that it has had a larger percentage of disagreements, in whole or in part, than any other court of last resort; for, unlike the membership of a State court, it is not a homogeneous body; its judges are drawn from all parts of our great country, from all schools of political and constitutional thought, from communities in some of which the common law is the basis of their jurisprudence, in others the civil law, and in still others a mixture of the two, and from localities where, because of their necessities, custom has changed the law to meet the exigencies of the differing situations. This statement does not excuse, however, either the dissenting from an opinion or concurring in its result, without giving the reasons for so doing, a practice which, as shown above, is so common in that court. In the judgment of the writer hereof, neither practice can be justified on any

[21] This form of concurrence is in effect a dissent *pro tanto;* it bears the same relation to the majority opinion as does a dissent noted, without reasons expressed for it; and should, of course, be considered and treated in the same way. At least during the period referred to in the text, such concurrences do not appear in the decisions of the Supreme Court of Pennsylvania. It is a curious fact that concurrences, with or without the reasons being given, sometimes provoke as much or more unpleasantness as dissents generally. The late Judge Ashman, of the Orphans' Court of Philadelphia County, used to say that he did not mind a dissenting opinion in cases where he spoke for the majority, but that by a concurrence the writer in effect said: "You have reached a right conclusion without having sense enough to know how to get there." If this statement contains even a modicum of truth, the resentment must be much aggravated where the judge simply concurs in the result.

hypothesis which takes into account either the judge's duty to the public generally or to the particular litigants.

Though some of the reasons in favor of and against the habit of dissenting, and of publishing such opinions, necessarily appear in this paper, it is not intended to state them fully or discuss any of them at length. The custom was inherited as a part of our judicial system, and will not down as the result of either argument or statutory enactments, much less because of biting sarcasm or thoughtless criticism. He who supposes that men, in or out of judicial office, can be made to think or act alike, on these or any other subjects, has studied human nature in a cloister, and not in a world where humanity "lives and moves and has its being." It is not inappropriate, however, to call attention to two matters which may largely account for the antagonism to all dissents; namely, the habit, already referred to, of simply noting the fact without giving any reason for it, and the unjudicial language frequently appearing in majority and minority opinions, when both are written and filed, but particularly in the latter. This again points out what writers on the subject have usually overlooked, that election or appointment to judicial office does not remove, though happily it sometimes does, and always should control, the expression of such resentments as naturally arise during a heated discussion of subjects believed to be important.

It would seem clear that, if a litigated question is of sufficient moment to require a dissent, the reasons for it ought always to be stated. The instances are extremely rare, where, from its mere notation, anyone can tell whether it is on matters of fact, or of law, or of both. The only thing the public knows, is that the court is not unanimous in its judgment, and this, without cogent reasons given, necessarily tends to dissatisfaction with the judiciary. Nor does this practice aid the dissenting judge; some will say he cannot answer the majority opinion; others that he is too lazy to do so; and the losing party will be apt to believe that, if he had done so, the majority view might have been changed.

So, also, since the matter is of such public importance that a dissent is required, it should be made gravely and earnestly, as befits the occasion. Sarcasm is too frequently indulged in; but, as this is not a legal weapon, it seldom proves efficacious in any business or profession, whereof justice, or even logic, is the cornerstone. It may result in amusing, but not in convincing; it may display anger or bad taste, but not judicial qualities. Perhaps the minority opinion in *Hole v. Rittenhouse*,[22] illustrates this as clearly as possible when it says: "The judgment now about to be given, is one of 'death's doings.' No one can doubt that if Judge Gibson and Judge Coulter had lived, the plaintiff could not have been thus deprived of his property; and thousands of other men would have been saved from the imminent danger to which they are now exposed of losing the homes they have labored and paid for. But they are dead; and the law which should have protected those sacred rights has died with them. It is a melancholy reflection, that the property of a citizen should be held by a tenure so frail. But 'new lords, new laws' is the order of the day. Hereafter, if any man be offered a title which the Supreme Court has decided to be good, let him not buy if the judges who made the decision are dead; if they are living let him get an insurance on their lives; for ye know not what a day or an hour may bring forth." The only effect of that, or any similar opinion, is to cast reproach on the court, whose integrity the writer should have been swift to sustain and never to assail. As is usual where judicial propriety is forgotten, this dissent wholly failed to accomplish the purpose intended, and its requiem may be briefly sung: the majority opinion [23] was never thereafter either "distinguished, doubted, or overruled"—as the dissenting judge there prophesied would result—and to the professional mind of today it is difficult to understand how the court could have decided otherwise than as it did.

In the endeavor to find some rule or rules which should guide a judge in determining whether or not it is wise to dis-

[22] 2 Phila. 411 (Pa. 1855).
[23] 25 Pa. 491 (1855).

sent, the first question necessarily is: What, speaking generally, are the differing views on the subject? Regarding this, we find—with some notable exceptions to the contrary—that judges usually align themselves in one or the other of two antagonistic classes. Some feel they have done their whole duty when they have striven to the utmost to convince their colleagues, and claim that a dissent only results in harming the administration of the law, by showing it is not an exact science, as necessarily must be the case, however, since, to a great degree, it is only a science of opinion,[24] and no two men always have the same opinion, unless one is a mere disciple of the other. Other judges claim they were appointed or elected to give to every litigant, and to the public generally, the full benefit of their legal conclusions, and the reasons for them, unaffected by the opposite judgments of their brethren.

In the opinion of the writer these extreme views are both measurably wrong; and it is not difficult to demonstrate that they proceed from the same mistaken source, namely, that the duty of the judge is limited to doing justice as between the parties to each litigation. The scope of his duty is, however, far broader than this; it is to render judgment according to law, without regard to the particular litigants. The former idea, which is really the mistaken method of the Orient, gives as wide a scope for favoritism as it does for equity, and inevitably results in uncertainty.

The late Judge Cadwalader, of the United States District Court for the Eastern District of Pennsylvania, used to say, in substance: The public will be less harmed by a corrupt judge, who knows the law and generally follows it, than by an upright one who does not know it, and simply tries in each case to do that which he thinks will be justice as between the parties; and Lord Coke epitomized the same thought in "the knowne certaintie of the law is the safetie of all." Because of this the common law lays down rules, founded on long experience, by which the actions and contracts of men may be tested and judg-

[24] Wm. A. Bowen in 17 Green Bag 690, 693.

ments rendered accordingly, without weighing, except in connection with these rules, the action or contract under consideration in the particular case.

It is easy for a judge, after he has given much thought to a litigated question, and comes away from the consultation with his judgment unshaken, to convince himself that his study should not be permitted to go for naught, and hence he should place his dissent upon record. Under such circumstances, however, the presumption that he is wrong and the majority right, is just as great as it was when he failed, as counsel, to maintain his contention at the bar of the court; and it is even more necessary that he should do nothing to cast doubts and uncertainties upon the law, or to bring its administration into disrepute. Admittedly a dissent may tend to do both of these things, and hence it should never be announced or filed, unless the reasons for so doing are stronger than the opposing considerations.

On the other hand, it is still easier to say: "I have done all I could to convince my brethren; the burden of any resulting harm is, therefore, theirs and not mine; hence I will not dissent, no matter what results may flow from the majority opinion." This is the argument of the lazy man, and no judge, who appreciates his high office and the duties devolving upon him because of it, can conscientiously be thus indifferent to results. It has been well said that "the law is a jealous mistress"; to the just judge its proper administration is the end and aim of his judicial life.

Assuming, then, that the duty of the judge is to render judgment according to law, and that, from the very nature of his office, he must do all he can to prevent its injury, through ignorance as well as through favoritism, and yet must do nothing which will tend to render it uncertain or to bring it into disrepute, by what standard should he be guided in determining whether or not he ought to dissent in a particular case? In answering this question it is evident—though writers on the subject have given little heed to the distinction—that a different rule should be applied to cases pending in courts of first instance, than to those in courts of last resort.

In the former, every decision is, to a certain degree, tentative only. For instance, the practice or procedure sanctioned by the majority may be disapproved on appeal; the contract may be otherwise construed; and the essential facts may be found differently. Hence, justice to the litigants would seem to require a dissenting judge to set forth at length his opinion in regard to these matters—as well as to those hereinafter referred to as proper subjects for dissent in an appellate court—not merely because the latter is entitled to know his individual judgment in regard to them, but also in order that the losing party below may not be unnecessarily handicapped on the appeal. A presumption always exists in favor of a judgment appealed from, especially when there has been no dissent; and this becomes almost conclusive, when it depends upon disputed questions of fact.

Perhaps there can be no better exemplification of the essential truth of what has just been said, than the record of the Orphans' Court of Philadelphia County, when composed of Judges Hanna, Ashman, Penrose and Ferguson—"the old court," as its surviving practitioners still love to call it. With perhaps one exception, its judges did not measure higher than the leading members of its bar, but it became *par excellence* the court in which justice was judicially administered, because every real question brought before it received the individual consideration of each judge, as well as the judgment of the majority, and in every worth while case, if opinions differed, dissents were filed. The history of that court shows that the dissenting opinion, no matter by whom written, frequently became the judgment of the Supreme Court on appeal; or, though failing to convince in the particular case, became, through further consideration in later litigation, the final conclusion of law on the subject.

What has been said in regard to courts of first instance, of course applies *pro tanto* to intermediate courts of appeal, such as the United States Circuit Courts of Appeals, the Superior Court of Pennsylvania, and the courts of last instance in every State in the Union, when the questions involved may be reviewed by the Supreme Court of the United States. In all such cases the final appellate tribunal and the litigants are entitled to have the views

of each judge recorded, as well as the judgment of the court itself.

When, however, a case is pending in a court of last resort, and the majority have finally agreed upon its judgment, a dissent will not benefit the losing party, and his interests require no further consideration. Hence, different principles of action necessarily apply, and the question whether or not a dissent should be written and filed should not be difficult to answer generically, though doubtless it will not always be found easy to apply the answer to the individual instances which arise. Probably, in this final stage of the case, every one would agree that no dissent should be filed unless it is reasonably certain a public gain, as distinguished from a private one, will result. This being so, the test which each judge should apply is: Is the matter of such public importance (being careful to distinguish this from a mere ephemeral interest), that a dissent is needed in order to safeguard the rights of the citizens generally, or future litigants in cognate cases? This would exclude all dissents where the only difference between the judges is in relation to practice or procedure, to matters of fact or to the construction of particular contracts; for in these the public has no interest. Erroneous decisions regarding practice and procedure can readily be cured by legislation. A misunderstanding of the facts, or a wrongful interpretation of a contract, affects only the parties to the litigation. In regard to the former it is well said in *Yoders v. Amwell Township:*[25] "In determining whether a conclusion of law in any adjudicated case is a precedent in a subsequent one, the value of the first, usually, is measured by its similarity or dissimilarity to the second in its controlling facts. And even if the court, announcing the conclusion, misapprehends or mistakes the facts, the conclusion, to be of any value as a precedent, must be taken as applicable to the facts as assumed by the court; they, as concerns the judgment, are the facts, and whether existing or non-existing either prompt or compel the conclusion of law that determines the judgment."

[25] 172 Pa. 447, 457 (1896).

Under all such circumstances, the public good is best conserved by apparent unanimity in the decisions of the court.[26] Assuming the minority was right and the majority wrong, and that the losing party will feel resentment, it is better that this should be against the entire court than against some of its individual members. Moreover, unanimity tends to prevent resentment; and this is especially to be desired in cases involving the life of an appellant.

On the other hand, if a judge is fully convinced, after a careful review of the matter, that the decision of the majority will wrongfully affect the citizens generally, or establish a precedent which will deprive other litigants of any of their constitutional, statutory or common law rights, he is not justified, even though he stands alone, in silently submitting to the opinion of his colleagues, however great they may be; for not infrequently by such insidious approaches great rights are minimized and finally destroyed. He should be careful however, lest he deceive himself into the belief that a dissent is needed. The presumption that the majority is right still remains in force and should be given full effect. Carefully, indeed prayerfully, he should consider the subject, and only dissent because there is left open to him, in conscience, no other course to pursue.[27]

Alex. Simpson, Jr.

Philadelphia, Pa.

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[26] [It is of interest to note that since the preparation of this paper, the American Bar Association has announced in its Journal of February, 1923, the Proposed Canons of Judicial Ethics. No. 19 on Judicial Opinions reads in part: ". . . It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision. A judge should not yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. Therefore except in case of conscientious difference of opinion on fundamental principle, dissents should be discouraged."—Editor.]

[27] The writer freely admits he has not always been guided by the principles above expressed. For instance, in Commonwealth v. Zec, 262 Pa. 251, 257 (1918), and Nolle v. Mutual Union Brewing Co., 264 Pa. 534, 542 (1919), (where he dissented because he believed then, as he still does, that he was right), he would not have announced his dissents had he then given to this subject the careful consideration which the preparation of the present paper has compelled him to do.