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A NOVEL SYSTEM OF CRIMINAL COURT CALENDAR PRACTICE

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Kings County, New York, which is coterminous with the geographical lines of Brooklyn, constitutes the most populous of the five boroughs of the City of New York, with about 3,000,000 people. Except for the State Supreme Court, where criminal cases are seldom tried, the County Court of Kings County has exclusive jurisdiction over all felony cases, which in the State of New York are prosecuted by indictment. The court is composed of five County Judges who preside over six parts.

For a period of over 50 years, from 1894 to 1947, the District Attorney of the County had assumed responsibility for making up the calendars of cases for each of the Court's parts. This in effect amounted to a system whereby the prosecutor personally made his own selection of judges to try particular cases. On December 16, 1947, after lengthy deliberation over the subject, the Board of Judges of the County Court formulated and adopted a new ruling which removed from the hands of the District Attorney control over County Court calendars. On November 8, 1949 a new calendar practice was inaugurated and to implement it the Board of Judges adopted a set of rules designed to make for complete judicial control over the Court's own calendars.

Although, as indicated already, five judges constitute the Court, another part—Part VI—was established for the purpose of facilitating the Court's business. This is presided over by a different judge of the Court each month assigned on a rotation basis. The following business is transacted: the Grand Jury is organized; Grand Jury presentments are received and defendants arraigned; motions are made as provided by rule; Youthful Offender proceedings are considered; calendar assignments are made; other miscellaneous business is handled.

The "machinery" of this new plan begins to function when indictments are presented by the Grand Jury to the judge presiding in Part VI. The Grand Jury files its indictments on Thursday of each week. A calendar is prepared containing the names of the defendants and the numbers of their indictments. This calendar is submitted to the calendar clerk who ascertains from each judge how many cases he desires to have assigned to his part during the forthcoming week. To illustrate: if there are 50 indictments to be assigned and the judges request an equal number of cases, the clerk prepares ten slips for each of the five judges. Each slip contains a note as to the respective part—number and date of drawing.

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The indictment slips are then placed in individual opaque cylindrical capsules measuring 2" x ¾" and these in turn are deposited in a large revolving metal drum referred to as "the trial part drum."

Fifty additional slips are then prepared, each containing the indictment number and the date of the drawing. Each of these, in turn, is placed in identical capsules and in turn deposited in an "indictment drum." Upon the convening of Part VI, a court clerk mans the trial drum while another clerk supervises the indictment drum. They are revolved several times to assure proper mixing of the capsules. This is done in open court in the presence of the presiding judge and the District Attorney or his representative who must attend as required by the rules. Counsel for any defendant whose name is represented in the capsules may also be present and demand an inspection of the slips, capsules and drums before the drawing commences and this same privilege extends to the prosecution. When these preliminaries are disposed of, the presiding judge directs that the drawing of capsules proceed. Each clerk simultaneously draws a capsule from his respective drum. The capsules are opened, the slips withdrawn, and the two slips are stapled together and passed to the judge. The latter then announces the number of the indictment and the part to which it is assigned. An entry to this effect is immediately made by the judge on the assignment calendar which has already been prepared in the form of an order. Drawings continue until all the capsules in the drums are exhausted and assigned in the manner prescribed. At the completion of the drawing the presiding judge signs the calendar which is recorded in the clerk's docket of the court and filed as a permanent record.

> "As a matter of administrative policy, pleas of guilty are not accepted by the Court at the time of original arraignment; a not guilty plea is entered and counsel is assigned if necessary, as required by the Constitution and statute. A disposition must await the assignment of the case from the drum to one of the parts of the Court. The Judges have found that this practice tends toward a more equal distribution of the business of the Court."

All applications and motions relating to a case are returnable in the part to which the case has been assigned. A case once assigned to a part thereafter remains there unless it is later ordered transferred for cause. A judge sitting in the part to which the case has been assigned may disqualify himself, in which event he signs an order directing that it be returned to the drum for reassignment at the next regular drawing. If a contingency arises requiring the transfer of a case to a specified part for trial or disposition an order is prepared by the calendar clerk which all judges, pursuant to the rules, are required to sign.

If it appears at the time of arraignment that certain indictment numbers refer to companion or related cases, the District Attorney so advises the calendar clerk so that he may prepare his indictment number slip to include the indictment numbers of all such related cases, so that, when drawn, they shall be assigned to the same part. Companion or related cases which are unwittingly drawn for different parts may be transferred by direct order of a judge to the part where the earlier companion case was assigned. In every case where issue has been joined by the arraignment of a defendant or defendants, the indictment numbers must be included in the drum at the next regular drawing, which is usually held on the day following arraignment. Thus, no case can ever be pigeon-holed or lost or inadvertently mislaid.

After the cases have been thus assigned to the respective parts, a 4" x 5" index card is prepared for each case by the calendar clerk. On this are listed the name of the defendant, his indictment number, the crime charged, date of arraignment, whether in jail or at large on bail, and the date and part to which assigned. Space is left for the recording of later dates when the case appears on the calendar in the assigned part of the action taken or disposition made. A duplicate card is furnished each judge on the assignment of cases so that he has full knowledge at all times of the status of his calendar.

To facilitate ready reference, a small red tab is placed by the calendar clerk on the bottom of each index card where a defendant is in jail. Where a case has not been disposed of within one month after arraignment, whether bail or jail, a small yellow tab is attached to the index card. If a period of two months elapses after arraignment without disposition, an orange tab replaces the yellow one; and a green tab is used to show that a case has not been disposed of after a lapse of three months. Each judge is thus able to see at a glance of his index card tray how many defendants are in jail, how many are on bail, and the number of months each defendant has been awaiting disposition.

Where a "jam" of cases is likely to occur in a particular part because of a prolonged trial, the judge may sign an order directing that his pending cases be returned to the indictment drum for reassignment as new cases.

In the event a mistrial is declared (because of a jury disagreement or for any other cause), the indictment remains in the same part unless the judge of that part orders that it be placed in the drum for reassignment to another part. In the event a conviction is reversed on appeal, the case is returned to the same trial judge.

Where a prosecutor has the privilege of selecting a judge at will to

try cases as he did under the old system it follows that he can arbitrarily choose a judge noted for sternness and who does not coddle the convicted anti-social criminal. Or he can select a judge well known for extreme leniency in certain types of cases. Again he can pick a judge favorably inclined to the acceptance of a lower plea or he can flood a judge's calendar with the "flotsam and jetsam of cases" while other judges are favored with interesting and more important cases. In addition, the prosecutor can "shop around," so that when a lower plea is rejected by one judge, he may adjourn the case and restore it to the calendar of another judge who is more likely to accept a reduced plea. In sum, the prosecutor under the old system could hand-pick a judge to preside over a trial, a prerogative never vested by law or practice in counsel for the accused.

As mentioned earlier, the new Calendar Rule was adopted on December 16, 1947. However, the new practice was not actually inaugurated until almost a year later. Between these dates, the power of the County Judges to adopt the new Calendar Rule was the subject of litigation in the State Supreme Court. In a test case[1] the District Attorney sought to have this question judicially determined: "Does the District Attorney of Kings County have the authority to select the County Judge to preside over a trial?"

Upon the argument in the Supreme Court the District Attorney urged that exercise of the power to prosecute crime and control the prosecution included control of the calendars of pending criminal cases. Among the objections urged by him was that he always proceeded on the basis that all the judges are of equal integrity, "although not of equal experience or diligence" and that he had been guided only by the duty imposed upon him by law to conduct prosecutions to a speedy conclusion in as efficient and successful a manner as possible. The judges maintained that the court was created by the Constitution of the State of New York and that the power to regulate the calendar was an inherent right arising out of the exercise of judicial functions. The judges pointed to the Federal District Courts and other courts composed of more than one judge, such as those in Pittsburgh, Boston, Cincinnati, Cleveland, Detroit, Los Angeles, Denver, St. Louis and Miami, where the district attorneys do not have the control of the calendar and the concomitant privilege to name the judge who is to preside at the trial of a case.

The District Attorney's application for a writ of prohibition was denied. The court (Mr. Justice Hill) said:

[1] McDonald v. Goldstein, 191 Misc. 863, 83 N. Y. S. 2d 620 (Sp. Term, Kings Co. 1948).

The District Attorney takes the position that he has the right, as such, to supervise the judges of the County Court of Kings County. He has proceeded on the basis that all the judges are of equal integrity although not of equal experience and diligence, and he "has been guided only by the duty imposed upon him by law to conduct prosecutions." It is the people's prerogative, not the District Attorney's to say who will preside over the County Court of Kings County. If the people want a lenient judge or a severe one, it is for them to determine, not the District Attorney. Courts must be independent and free from outside supervision, especially by any of the litigants. It can never be the duty or prerogative of the District Attorney to weigh the experience and diligence of the judges before whom he appears as attorney for one of the parties. The decision to select judges to preside over the County Court of Kings County is the prerogative of the people and I think in this case too much emphasis has been placed on the judge, not enough on the court. After much reflection on the subject, and after due consideration of the persuasive arguments on each side, it is my considered judgment that the Board of Judges of the Kings County Court is clothed with ample prerogative to adopt the calendar rule in question. . . . In a multiple court there can be no vested right on the part of any litigant to select the judge to preside over his trial. . . .

Running through the history of our State and Nation is the theme "the protection of the rights of the individual." A court dealing with the life and liberty of the people must be free from outside control. Just because Kings County has an honest, efficient and fair District Attorney, and that he will deal with individual rights, justly is no guarantee that one less efficient, less honest, less fair, would not use unusual powers to further his own ends, be they political or otherwise. That a judge should ever be burdened with the thought that his assignments depended on the district attorney's appraisal of his court work is unthinkable in American jurisprudence. Ours is "a government of laws and not of men", as John Adams wrote in the Massachusetts Constitution. The people, on the one hand, and the defendant on the other, in a criminal case, have the right to a trial in a designated court, not before a selected judge.

It follows that the Kings County Court Judges are clothed with power to promulgate the rule which is the subject of this motion. Not only do the Judges have the right to make rules for the assignment of cases but they have no right to delegate that power to the Disrict Attorney.[2]

An appeal to the Appellate Division was taken by the District Attorney; the District Attorney's Association of the State of New York

[2] McDonald v. Goldstein, 191 Misc. 863, at 868-69, 83 N.Y.S.2d 620 at 625-26.

appeared as amicus curiae. In this court the District Attorney urged that if the County Judges were vested with control of the calendar that "chaos, administrative inefficiency and demoralization in the enforcement of the criminal law, in view of the volume of cases, would result."

The Appellate Division held that the Calendar Rule adopted by the County Court was valid, saying:

> The District Attorney is a quasi-judicial officer. He is an officer of the court, but only to the extent that all attorneys are officers of the court. He is not a part of the County Court by virtue of his office. . . . He is not, therefore, endowed wth any function of the County Court. One of the functions of a court is the regulation of the order of its business of adjudicating causes. The right of a court to regulate the order of its business or its calendar practice is vested in it by an express or an implied grant of power. Where, as here, there is no express grant of power to make rules to control its calendar practice, the power to do so is implied from the statutory or constitutional provision creating the court. The power is implied or results from the general grant of jurisdiction to adjudicate specified causes. . . . The right of the County Court, moreover, to exercise its rule-making power was recognized by the Legislature in section 279 of the Judiciary Law. When the County Court was given jurisdiction of criminal causes in 1894, and acquiesced in the District Attorney making up separate calendars for its two parts, it was merely informally utilizing the District Attorney as its instrument to regulate calendar practice. This procedure did not effect a renunciation, destruction or loss by the court of its power to regulate calendar practice. This interpretation of its course of action makes inapplicable the principle of practical construction invoked by the District Attorney to sustain his assertion of power.
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> The conclusion is inescapable that the rule adopted by the County Court, properly construed, is valid.[3]

Thus the question posed was now judicially determined. The judges of the County Court realized, however, that there were possible abuses to guard against and it was recognized that a system would have to be devised which would eliminate the human factor from the assignment of cases. If this were not done, the old defects might continue and many new ones might also arise. It devolved upon the judges to plan and put into practice a system which would bring all defendants to swift and certain justice, whether they happened to be in jail or on bail. There developed problems which challenged the ingenuity of the court personnel and the judges.

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[3] McDonald v. Goldstein, 273 App. Div. 649, 651, 79 N. Y. S. 2d 690, 693-94 (2d Dep't 1948).

As a first step a survey was made of the various systems employed by the courts of virtually every large city in the country. From this survey emerged ideas and further planning and finally the development of the system now in use. Every possible "bug" inherent in any new system has been eliminated to the satisfaction of the court and none of the weaknesses anticipated by the District Attorney have been noted. Instead of "chaos, administrative inefficiency and demoralization in the enforcement of the criminal law," greater speed and efficiency have resulted. The new system guarantees to defendant and prosecution absolute impartiality in the selection of the trial judge and has practically abolished unnecessary delay in the disposition of pending cases. Abuses which bedeviled the court under the old system have been eliminated so that justice now functions smoothly and efficiently without fear or favor.

The new method of calendar control has been in operation now for over a year; it has worked so well that the District Attorney himself on several occasions has expressed in writing his gratification with the expeditious manner in which cases coming before the court have been disposed of. At no time in the history of the County Court had there been available at a quick glance a complete record of all pending cases in each part of the court. Now the judges are fully aware at every moment of the movement and extent of crime in the County as reflected in their cards of both disposed and pending cases and the court is also in a position to furnish the community with a prompt and accurate picture of the business of the court. After all, it is the citizens of the community who have elected the judges as their representatives to direct the proper and just administration of the law.