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## SUPREME COURT OPINIONS OF JUSTICE KEPHART

WILLIAM C. PETTIT\*

Almost twenty-one years have elapsed since Judge (now Mr. Justice) Kephart wrote his first opinion for the Superior Court of Pennsylvania.<sup>1</sup> Since that time, in addition to his Superior Court opinions, he has written more than seven hundred opinions as a member of the Supreme Court. Not only his long period of service on the appellate courts of the state but also his mastery of many distinct phases of the law and a zeal in a humane tempering of justice make it fitting to consider the opinions he has announced.

Study of the work of the Supreme Court cannot but impress upon one the fact that law is touched with relatively few personalities. This ought not prevent some comment upon the work of men who ably interpret and expound the law. In the pattern of decisions that the court has wrought, the force of Justice Kephart's judicial reasoning can never go unnoticed. In the realm of equity, that broad field of jurisprudence correcting that "wherein the law (by reason of its universality) is deficient,"<sup>2</sup> he demonstrates a mastery of the art of weighing good faith and applying laches. Including his Orphans' Court opinions, as it is only right to do, we find that his equity opinions far outnumber any other single type of opinion.<sup>3</sup> The judicial career of the former Cambria county lawyer bids fair to become also that of a noted chancellor. Yet he is, withal, a learned law judge holding the common law to be not a fixed, unyielding set of principles but a law which "adapts itself to changing conditions as marked by the progress of public, material and social affairs."<sup>4</sup>

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<sup>1</sup>Shaffer v. Bahr, 57 Pa. Super. Ct. 48 (1914). Probably the most famous of his Superior Court opinions was Ben Avon Borough v. Ohio Valley Water Co., 68 Pa. Super. Ct. 561 (1917). His statement of the rules for determining present value for purposes of utility rate-making were considered favorably by the United States Supreme Court. See Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287 (1920).

<sup>2</sup>Blackstone, quoting Grotius' *De Aequitate*, paragraph 3.

<sup>3</sup>His opinions in negligence cases are next most numerous.

<sup>4</sup>Nesbit v. Riesenman, 298 Pa. 475 (1930).

What has been said of the life of Mr. Justice Brandeis might be applied to the career of Justice Kephart, namely, that no change from forum to bench came with greater ease.<sup>5</sup> This was due to a seasoned and diversified experience in a work-a-day world, so essential for the man whose work on the bench is to live. After a dozen years of private practice, he went to a county solicitorship and subsequently ascended the bench for the first time in 1914.

He has written :

"I believe it absolutely and essentially necessary, for the integrity of the police force of any municipality, that the chief police officer should have a liberal disciplinary control over his men; but it should be only a disciplinary control. Especially should it not be a power that might be subverted to evil influences surrounding his office, or that could be made the tool of oppression either for personal or political ends."<sup>6</sup>

" . . . . . under the rule now laid down, a husband may easily defeat the claim of his wife after his death even to the extent of making her a pauper, and she has no redress no matter how just or meritorious her claim. It is no answer to say that a fair-minded husband would not do this; it should not be possible for any husband to do it."<sup>7</sup>

"Section 10 reposes an autocratic power in the insurance commissioner. He may not only investigate, but he may also determine whether liquidation or closing shall take place. . . . This section of the act so flagrantly violates the due process clause and our Bill of Rights that no defense can be made for it."<sup>8</sup>

"The act is, therefore, socialistic. If the act is not opposed to any constitutional barrier, this reason cannot appeal to us. . . . "<sup>9</sup>

"While there are many cases of property damage due to subsidences, and people located thereabouts have been permitted to suffer because of what was then, and is now declared to be, a mistaken idea as to the power of an individual to sell property without surface support, yet that was the Commonwealth's blunder, and the Commonwealth should pay for its mistakes from general funds or use for this purpose the money now to be received from taxes on this very coal."<sup>10</sup>

"What reasonable relation has the set-back line or space in front of houses in ordinary residence districts, to the health, safety, or morals of the community? . . . . . To bring this, and other like regula-

<sup>5</sup>45 Harvard Law R. 38.

<sup>6</sup>McCoach v. Philadelphia, 273 Pa. 317 (dissent) (1922).

<sup>7</sup>Beirne v. Cont., Equitable Co., 307 Pa. 570 (dissent) (1932).

<sup>8</sup>National Automobile Corp. v. Barford, 289 Pa. 307 (1927).

<sup>9</sup>Busser v. Snyder, 282 Pa. 440 (1925).

<sup>10</sup>Mahon v. Pennsylvania Coal Co., 274 Pa. 489 (1922).

tions, under the police power, would be to sweep away constitutional guarantees on the ownership of property. It is regulation run mad."<sup>11</sup>

These excerpts give some clue to the judicial philosophy of the man. His opinions contain few of the "epigrammatic thrusts" of a Holmes. Justice Kephart relies as little on powerful exposition to reach demonstrable truth as he does on the marshalling of facts. His style of writing is coolly logical, almost curt at times.<sup>12</sup> With short, simple sentences, he details facts of cases, states arguments of counsel before the court, and then proceeds to affirm or disaffirm them. Rarely are his opinions verbose; many of them are only three or four pages in length.<sup>13</sup> Yet he has the distinction of writing one of the longest opinions of the court in recent years. In sustaining the Talbot act of 1931 appropriating money to the Department of Welfare for state aid for care of the poor, he wrote an opinion thirty-five pages long dealing with many questions of constitutional law.<sup>14</sup>

The Supreme Court had construed important sections of the Workmen's Compensation Act of 1915 in relatively few cases before Justice Kephart was elected to the court in 1918. As a member of the Superior Court, he had heard some, and written opinions in a few, compensation cases. His first opinion in this branch of the law was rendered December 13, 1917.<sup>15</sup> His many opinions dealing with the rights of workmen show Justice Kephart's familiarity with the compensation law of Pennsylvania. A number of important decisions construing that act have been made by the Supreme Court in opinions by Justice Kephart. Less than four years after the court held the act to be constitutional,<sup>16</sup> he wrote the opinion construing the word "contractor" and permitting the employee of a sub-subcontractor to sue the principal contractor.<sup>17</sup>

In two subsequent cases, *post*, he discussed *in extenso* the rights and liabilities of employer and employee and helped to a great extent to clarify and interpret the act of 1915. Thus in *Gallivan v. Wark Co.*,<sup>18</sup> he upheld the right of the employee of a sub-contractor to sue the principal contractor notwithstanding the fact that the employee had received compensation from his immediate employer. In *Zimmer v. Casey*,<sup>19</sup> his opinion again dealt with

<sup>11</sup>White's Appeal, 287 Pa. 259 (1926).

<sup>12</sup>"Counsel there as here sought to impale the decision on the name public garage' and what it means. We did not enjoin a name; what *was* enjoined was the use of building under given conditions in a residential neighborhood." *Ladner v. Siegel*, 296 Pa. 579 (1929).

<sup>13</sup>His shortest opinion is *Kahn v. Quaker City Cab Co.*, 264 Pa. 510 (1919), one page long, citing no cases.

<sup>14</sup>*Commonwealth v. Liveright*, 308 Pa. 35 (1932).

<sup>15</sup>*Hennessey v. U. S. Repair Co.*, 68 Pa. Super. Ct. 553 (1917).

<sup>16</sup>*Anderson v. Carnegie Steel Co.*, 255 Pa. 33 (1916).

<sup>17</sup>*Qualp v. James Stewart Co.*, 266 Pa. 502 (1920).

<sup>18</sup>288 Pa. 443 (1927).

<sup>19</sup>296 Pa. 529 (1929).

compensation, injuries and the common law liability of employers and employees, holding that compensated employees injured through negligence of co-workers may still sue as at common law to redress their rights against said co-employees. He has so interpreted the act that the statement, "elective compensation (is) to take care of injured employees in a material way," has become a fact.

"In determining liability under the Workmen's Compensation Law," he wrote fourteen years ago, "we must be guided by the clear intendment of the act as expressed by the words and definitions there used; if prior judicial decisions tend to limit or curtail the effect of words and phrases that are used with a certain meaning defined by the act, the legal rules announced by such decisions must give way to what the lawmaking body prescribed the use and meaning of the words to be."<sup>20</sup>

In the field of constitutional law, Justice Kephart has written many important opinions for the court. Especially is this true in regard to the power and manner of the legislature to appropriate money as controlled by Article III, section 18 of the Constitution: "No appropriations . . . shall be made for charitable, educational or benevolent purposes, to any person or community, nor to any denominational or sectarian institution, corporation or association." To the interpretation of this clause he has addressed himself. Thus in *Busser v. Snyder*,<sup>21</sup> the first old age pension case, it was argued that the phrase "to any person or community" had a restricted meaning, hence pension money could be given to old persons as a class. Justice Kephart, writing the opinion of the court, said :

"This contention is not sound; 'person' and 'community' are not limited to the idea of a single person or place where persons are located; they are used in an inclusive sense, relating to an individual or a group or class of persons, wherever situated, in any part or all of the Commonwealth. It applies to persons, kind, class and place, without qualification. The language of the Constitution is an absolute and general prohibition. . . . What the Constitution prohibits is the establishment of any such policy which causes an appropriation of state moneys for benevolent purposes to a particular class of its citizens, whether under the guise of an agency, as an arm of the government through which a system is created, or directly to an individual."

It was this opinion that declared the first old age assistance act unconstitutional.

Again in *Collins v. Martin*,<sup>22</sup> in passing upon the validity of the act of

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<sup>20</sup>*Qualp v. James Stewart Co.*, supra.

<sup>21</sup>282 Pa. 440 (1925).

<sup>22</sup>290 Pa. 388 (1927).

1925<sup>23</sup> appropriating one million dollars to the Department of Welfare to pay for the treatment of the indigent sick in hospitals not owned by the Commonwealth, the above section was considered by Justice Kephart. It was contended that the care of indigent sick is a governmental function and an appropriation to enable the performance of that function cannot be classed as being one for a charitable purpose, even though worked out through a sectarian institution. While such activity, Justice Kephart wrote, may "assume the form of a governmental function or duty, of which we shall speak later," such activity does not lose its chief characteristic, viz, the state's work of charity. He wrote:

"There should be no doubt as to the comprehensiveness of this provision in the Constitution. It states in short (and this is the real thought underlying the constitutional provision) that the people's money shall not be given for charity, benevolence or education to persons or communities, or for any purpose to sectarian and denominational institutions, corporations, or associations. This mandate comes direct from the people. It is placed on those in authority, to be followed without exception or reservation of any character. . . . It is an exemplar of one of the most fundamental concepts of our government."

In the decision, *supra*, sustaining the Talbot Act which appropriated ten million dollars to the Department of Welfare for payment to political subdivisions to care for the poor, this section of the Constitution was again considered. It was said that counties or poor districts, which received the money must be classed as communities; that an appropriation to be used in the discretion of such recipients is an appropriation for a charitable or benevolent purpose. Writing the opinion of the majority of the court, Justice Kephart said:

"Having twice decided that appropriations to perform obligatory public duties or functions are not charities or benevolences, we again hold that the State, in performance of its governmental duty to take care of the poor, is not forbidden by Article III, section 18, either directly to assume this obligation, or to permit and aid one of its subsidiaries of government to perform it, or to have it performed by an institution not forbidden by the Constitution. As long as these channels are kept clear, constitutional inhibitions will not disturb such acts."

When the legislature by act of 1931, P. L. 106 made an appropriation to the Department of Welfare for the maintenance of certain hospitals, naming them and the amounts to be received, Justice Kephart wrote a dissenting opinion, contending that such act violated Article III, section 3 of the Constitution.<sup>24</sup> He there said:

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<sup>23</sup>Appropriation Act, April 13, 1925, p. 159.

<sup>24</sup>*Constitutional Defense League v. Waters*, 309 Pa. 545 (1932).

"Article III, section 15, of the Constitution provides: 'The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative and judicial departments of the Commonwealth . . . all other appropriations shall be made by separate bills, each embracing but one subject.'

"The act under consideration does make one hundred seventy distinct and independent appropriations by one bill, which embraces one hundred and seventy different subjects of appropriations, namely money to be paid different hospitals. . . . To uphold (the act) is not to construe but to rewrite this section of the Constitution."<sup>25</sup>

An exhaustive opinion reviewing the law on third party beneficiary contracts is his opinion in *Greene County v. Southern Surety Co.*<sup>26</sup> He there held that though creditor beneficiaries cannot recover on a contract to which they are not parties, a donee beneficiary may recover where the consideration for the promise is transfer of property or money to the promisor or where unusual circumstances are present.<sup>27</sup>

In two important cases dealing with constitutional law, Justice Kephart's opinions have been considered by the United States Supreme Court. In *Commonwealth v. Di Santo*,<sup>28</sup> the state Supreme Court upheld the right of the state by act of legislature to regulate the business of selling steamship tickets. This decision was later reversed by a decision of the federal Supreme Court, three justices dissenting.<sup>29</sup> The opinion written by Justice Kephart, though reversed on appeal, found favor with Justices Holmes, Brandeis and Stone. "If Pennsylvania must submit to seeing its citizens defrauded, it is not because Congress has so willed but because the Constitution so commands. I cannot believe that it does," wrote Justice Brandeis.<sup>30</sup>

In 1921, the legislature passed the Kohler Act<sup>31</sup> regulating the mining of anthracite coal. This act made it unlawful "so to conduct the operation of

<sup>25</sup>Other opinions of his dealing with questions of constitutional law are: *Tucker's Appeal*, 271 Pa. 462 (1921); *Heisler v. Thomas Colliery Co.*, 274 Pa. 448 (1922) (dissent); *White's Appeal*, 287 Pa. 259 (1926); *Cameron's Account*, 287 Pa. 560 (1926) (dissent); *Highland v. Russell Co.*, 288 Pa. 230 (1927); *National Automobile Corp. v. Barford*, 289 Pa. 307 (1927); *Commonwealth v. Widowich*, 295 Pa. 311 (1929); *Clark's Case*, 301 Pa. 321 (1930); *Commonwealth v. Central R. R. Co.*, 308 Pa. 274 (1932) (dissent); *Soldiers & Sailors Memorial Bridge*, 308 Pa. 487 (1932).

<sup>26</sup>292 Pa. 304 (1927).

<sup>27</sup>See *Commonwealth v. Great Amer. Indemnity Co.*, 312 Pa. 183 (1933) overruling the *Greene County* case. "It is to be regretted that this determination by the Court has been reached only after so many cases have been decided on the authority of the *Greene County* case," said Justice Kephart in the former case.

<sup>28</sup>285 Pa. 1 (1925).

<sup>29</sup>*Di Santo v. Commonwealth*, 273 U. S. 34 (1927).

<sup>30</sup>op. cit.

<sup>31</sup>May 21, 1921, P. L. 1198.

mining anthracite coal as to cause the caving-in" of buildings, notwithstanding the fact that right of surface support had been waived. Justice Kephart's dissent from the decision of the court upholding the validity of the act is a moving and forceful opinion.<sup>32</sup> The majority opinion was, he felt, "a long stride in the development of the law of police power. . . . The logical result of the majority opinion will go far to bring about the condition so earnestly longed for by those advocating equalization of property." The act, he wrote, transferred from its owners a property right (already paid for)—the right to remove coal supporting surface areas. His lone dissent was not a voice crying in the wilderness. A majority of the Supreme Court of the United States agreed with his dissent.<sup>33</sup> Said Justice Holmes: "It is our opinion that the act cannot be sustained as an exercise of the police power. . . . The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

The court's three most recent cases dealing with use of injunctions in labor disputes have resulted in opinions by Justice Kephart. His concurring opinion in *Kraemer Hosiery Co. v. Am. F. Workers*<sup>34</sup> is a quasi-dissent from a majority of the court which in its opinion had approved an injunction forbidding defendants "from picketing plaintiff's plant in combination with others, for the purpose of inducing or attempting to induce employees . . . to become connected with" the union. The evidence showed mass picketing, annoyance, "opprobrious and vile expressions to those who remained at work," and violence. Recognizing that "these were not peaceable acts of persuasion which labor organizations may use to secure members," he felt that such acts should be restrained. But a sweeping injunction was not to his liking. "I would modify the injunction," he wrote, "so as to restrain appellant from committing any of the acts which I have described as being unlawful."

The right of labor to picket peacefully as stated in dicta of the Supreme Court in the *Kraemer* case, *supra*, and in *Jefferson & Indiana Coal Co. v. Marks*<sup>35</sup> is squarely upheld by Justice Kephart in *Kirmse v. Adler*.<sup>36</sup> Writing the opinion of the court, he felt that "picketing, if peaceful and unaccompanied by coercion, duress, or intimidation, is lawful." Furthermore, employees of a plant have an "unquestioned right to present their case to the public in newspapers or circulars in a peaceful way." Is the court impliedly sustaining boycotts? Much depends on what the court finds to be the facts. "The controlling factor," wrote Justice Kephart, "must be, do the methods used involve intimidation or coercion in any form?" The purpose of the union in this case,

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<sup>32</sup>Mahon v. Pennsylvania Coal Co., *supra* note 10.

<sup>33</sup>Pennsylvania Coal Co. v. Mahon, 260 U. S. 393 (1922).

<sup>34</sup>305 Pa. 206 (1931).

<sup>35</sup>287 Pa. 171 (1926).

<sup>36</sup>311 Pa. 78 (1933).

through the acts complained of, was to secure work for union men even though it resulted in discharge of nonunion men. This was not an unlawful purpose, he felt.

Justice Kephart would view with alarm a too ready use of injunctions as a method of settling labor troubles. "This court . . . . in considering them has never impressed the strong arm of an equitable injunction unless the circumstances imperatively required it."<sup>37</sup> Such a view is an expression of his critical liberalism. It is in accord with the rational, modern view of a man who feels that social progress "must and will break through any judicially established principle, as it must and will break through any law that impedes its natural growth."<sup>38</sup>

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<sup>37</sup>Kirmse v. Adler, *supra*.

<sup>38</sup>Burke v. Hollinger, 296 Pa. 510 (1929).