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This Honorable Court

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"THIS HONORABLE COURT"

By

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When the court crier in his time honored ritual invokes the divine blessing upon the "Commonwealth and this honorable court" he seeks benediction upon two abstractions. The "Commonwealth" in legal contemplation is the sovereign, the government organism; the state is the geographical unit. In like manner, "the court", so often confused with the judges of the court, is in reality an intangible and imaginary thing, not unlike the legal concept of a corporation.

The term "court" was defined by Coke and by Blackstone as "a place where justice is judicially administered".[1] Bacon was more exact: "A court is an incorporeal political being, which requires for its existence the presence of its judges, or a competent number of them, and a clerk or prothonotary, at or during which and at a place where it is by law authorized to be held, and the performance of some public act indicative of a design to perform the functions of a court". In *Wagenhorst v. Phila. Life Ins. Co.*[2] the court quoting *McCormick's Contested Election*,[3] said that "by a court is to be understood a tribunal officially assembled under authority of law, at the appropriate time and place, for the administration of justice, and, by judge is to be understood simply an officer or member of such tribunal."

The place where, the time when, and the judges by whom justice is to be administered, are still involved in the ceaseless change of the law. Originally the King was thought of as the fountain of all justice. He could dispense it when or where he liked. Indeed the term "court" is derived from the "curia regis" of the early law and the courtyard of king or baron was often the place for hearing supplants. But the power to adjudicate passed from the king to his ministers and then to judges commissioned for the purpose, and the pressure of the popular will forced the fixing of definite places and definite times for the administration of justice.

In modern times the trend is reversed and relief is sought from the rigidity of sessions and terms and courts *en banc* in a more informal procedure. The judge must decide in any event; what does it matter where or when he decides? So runs the current argument. The old landmarks fade and new ones must be set up.

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1 Co. Litt 58, 3 Bl. Com. 23.
2 358 Pa. 55, 55 A. 2d 762 (1947).
3 281 Pa. 281, 126 A. 568 (1924).

Deeply imbedded in Pennsylvania law is the distinction between matters which must be decided by a court and those which may be decided by a judge of the court. In *Carter's Estate,*[4] the president judge of a district having but one judge revoked the appointment of a guardian for a minor and appointed another. All this was done at night and in the judge's chambers. This attempt to override the fiction of "the court" and to assign the functions to the judge was denounced. It did not matter, in the view of the Supreme Court, whether the judge's chambers were in the court house or not." It was not in the place appointed by law for the assembling of the several courts of Bradford County. Significantly the opinion in *Carter's Estate* does not cite a single precedent. In *Thompson v. Frazier,*[5] confirmation *nisi* of a treasurer's sale in term time in the judge's chambers of a county having but one judge was upheld under the circumstances, but the practice was criticized.

Carter's Estate seems to have been misunderstood by the writer of the opinion in *Com. v. Shawell,*[6] the case in which it was held that one judge of a court having several judges may sit in the Oyer & Terminer to determine the degree of one who has pleaded guilty to murder. There is no conflict between the cases. The fatal mistake in *Carter's Estate* was not the making of an order by a single judge, because the court had only one judge. The error was in making of an order, outside the court room and outside the period of any session of court, which only a court could make.

The distinction between orders which must be made by the court and those which may be made by a judge is preserved in various statutes. For example, petitions for adoption may be presented to the Orphans' Court or a law judge thereof.[7] This means that the judge carries his judicial functions with him for use in adoption cases. He may proceed at any time and at any place within his jurisdiction. In like manner, EQUITY RULE 39 assumes that preliminary injunctions may be granted by the court or a judge thereof. The court of quarter sessions or a judge thereof may issue attachments for failure to support poor relatives.[8]

In some particulars the legislature, or the courts under authority of the legislature, have given judges wide powers even when the court is not in session. The Act of 1889,[9] gives law judges of the several courts the same power to grant citations and rules to show cause in vacation as when court is in session, provided the process is made returnable to a term of court. The Act of 1939[10] gives the president judge of the orphans' court power in vacation to administer the business of the court and to order process to issue. EQUITY RULE 4 provides that "a law judge, in

4 254 Pa. 518, 527; 99 A. 58 (1916).
5 159 Pa. Super. 395, 48 A. 2d 6 (1946).
6 325 Pa. 497, 191 A. 17 (1937).
7 Act of 1925, P.L. 127, 1. P.S. 1.
8 Act of 1911, P.L. 973, 62 P.S. 1960.
9 P.L. 102, 17 P.S. 2081.
10 P.L. 706, 20 P.S. 2311.

vacation or term time, and in chambers or in court, shall have all the powers of the court so far as relates to hearing applications for and entering interlocutory rules, orders, decrees and other matters in the nature thereof."

Behind all this there is a twilight zone where judges may act in the interests of justice although court may not be in session and the judge not at the place of justice. *Com. v. Magee*[11] was a case in which the judge in chambers made an order staying an execution. This order was upheld, the Supreme Court saying: "This species of jurisdiction is exercised *ex necessitate rei* to prevent injustice and oppression, and to facilitate and direct the interlocutory proceedings of suits at law." *Com. v. Magee* was handled very gingerly in the later case of *Irons v. McQuewan*[12] but is nevertheless believed to represent an essential truth.

Despite the obvious advantages of allowing a judge to make orders outside the court room and when court is not in session, there are disadvantages. There is more danger of mistake and of lost records when orders may be signed anywhere. Although the time of lawyers may be saved by the practice, the time of judges is more apt to be wasted. To the judge in chambers writing opinions the sudden appearance of a lawyer with an order to be signed may constitute an interruption to orderly work or a welcome relief from a difficult task, depending upon the current state of the judicial temperament. To be able to select and run down any judge at any time aids the not uncommon practice of seeking a favorable forum for the presentation of legal matters of doubtful merit. More intangible but more important is the injury done to the atmosphere in which justice is administered. Even the routine matter of motion court is more understandable, more convincing, more judicial, because done in the public hall of justice for all to see, and where the very air is charged with the detachment, deliberation and impartiality which should be the essence of the judicial process.

There may be a court without judges, as when no judge is in commission,[13] but there may not be a session of court without the presence of the judge.[14] A judge alone does not constitute a court,[15] but there is no court without a judge.[16] This is because the judicial power of the sovereign, once vested in the king, which alone gives the right to form courts, is now vested in commissioned judges.[17]

If the court has more than one judge, how many must sit to form a court? The Act of 1834,[18] says the president judge and his associates or any two of them or the president judge alone in the absence of others may hold a court of common

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11 8 Pa. 240, 246 (1848).
12 27 Pa. 196 (1856).
13 Levgo v. Bigelow, 6 Ind. App. 677, 34 N.E. 128 (1893).
14 White County Commissioners v. Gwin, 136 Ind. 562, 36 N.E. 237, 22 L.R.A. 402 (1894).
15 Ex parte Gardner, 22 Nev. 280, 39 P. 570 (1895).
16 State v. Jackson, 21 S.D. 494, 113 N.W. 880 (1907).
17 Ex parte Brauche, 63 Ala. 383
18 P.L. 333, Par. 20, 17 P.S. 223.

pleas. Once the three requirements essential to a court are present, *i.e.*, a definite place, a certain time, and the presence of a judge or judges, how many judges must unite in a decision? This is the old question whether one judge of a court may decide or whether the court *en banc* consider the question.

There is no statute nor sets of rules which determine whether a case in court must be decided by all the judges or may be decided by one. There is a presumption that where the order is signed "By the Court" all have agreed.[19] When the court is equally divided the pending motion must fail.[20] In the criminal courts, the Act of 1877,[21] which specifically authorizes one judge to hold criminal courts, was held to furnish warrant for one judge to decide the degree of guilt after a plea of guilty to murder.[22]

There are certain decisions which must be made by the court *en banc*. Motions for a new trial or for judgment *non obstante veredicto* must be so heard.[23] Judge Endlich who was affirmed *per curiam* in the *Caughey* case wisely observed that judgments *n.o.v.* are always to be entered not by the trial judge but by the court *en branc*, otherwise the trial judge is put in the position of overruling the decision of the jury. Exceptions to adjudications in equity must be heard by the court *en branc*.[24] In *Myers v. Consumers Coal Co.*,[25] there were two conflicting decisions of an equity case, each by a judge of the same court, and two appeals. The Supreme Court remarked curtly that it sits to hear appeals from the decrees and judgments of inferior courts, not of judges of those courts. The case was remanded for a decision by the full bench. Similar rulings in equity cases are found in *Carvey* et al *v. Penn. Oil Co.*[26] and *Kicinko* et al. *v. Petrusha* et al.[27]

Cases involving appointive officers of the court must be heard by the court *en branc*. In *Moritz v. Luzerne County*,[28] an interpreter appointed by one judge alone was held not entitled to his salary, and in *Sterrett v. McLean* et al.,[29] where appeal was allowed from the salary board "to the judge or judges", a decision by one judge was void.

In *Summers v. Kramer*,[30] there appears a principle of widespread application. A contract for reindexing the records in the prothonotary's office was signed by both judges of the district. After part of the work was done, one judge filed an

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19 Zaebey v. Allen, 215 Pa. 383, 64 A.587 (1906); Reilly v. Rankin et al, 142 Pa. Super. Ct. 51, 15 A.2d 478 (1940).
20 Cahill v. Benn, 6 Bin. 99 (1813).
21 P.L. 77, 17 P.S. 480.
22 Com. v. Showell, 325 Pa. 497, 191 A. 17 (1937).
23 Gail v. Phila., 273 Pa. 275, 279, 117 A.69 (1922); Caughey v. Briderbaugh, 208 Pa. 414, 415, 57 A. 821 (1904).
24 Madelein's Appeal, 103 Pa. 584 (1883).
25 212 Pa. 193, 200, 61 A. 825 (1905).
26 289 Pa. 588, 137 A. 799 (1927).
27 259 Pa. 1, 8, 102 A. 286 (1917).
28 283 Pa. 349, 129 A. 85 (1925).
29 Sterrett v. McLean, 293 Pa. 557, 143 A. 189 (1928).
30 271 Pa. 189, 114 A. 525 (1921).

ex parte order requiring the filing of an estimate and refusing to approve further payments meantime. Thereupon the president judge entertained a mandamus case, a hearing before the court *en banc* was refused and mandamus was directed to issue. Upon appeal the case was reversed and assigned to another judge; but the point here involved is found in the language of Justice Simpson: "It requires the action of a majority of the court to authorize the entry of a judgment; no one judge can enter it, against the protest of his only colleague who has an equal right to pass on all matters pending in court: *Madlem's Appeal,* 103 Pa. 584 (1883); *Butts v. Armor,* 164 Pa. 73, 30 A. 357 (1894); *Myers v. Consumer's Coal Co.,* 212 Pa. 193, 61 A. 825 (1905).

It may seem strange that there are not more cases turning about the principle that only the full court can enter judgment. The reason doubtless is that when a litigant desires consideration by the full bench he gets it. It is submitted that any case, except those committed by statute to decision by a single judge, may by appropriate exception be brought before the court *en banc.* In *Hanover Township School Directors,*[81] it was said that where there is specific statutory duty imposed upon the court, such as the removal and appointment of school directors or other public officers, all must act.

The present times call for dispatch in the administration of justice; but there is no necessity for violation of the essential merits of our judicial system. It may be the part of wisdom to enlarge the powers of judges to make orders in chambers; but they should be only preliminary orders fixing actual hearings in court, and great care should be taken before permitting judges to make orders indiscriminately at any time and place. The fiction, it often is a fiction in practice, of a court of many judges ready to devote all its talents to the solution of one case should be maintained. The dangerous case may come which requires this bulwark against arbitrary government. So long as any judge of a court may participate in a case if he desires and so long as any litigant may, if he chooses, bring his case before all the judges, the court is truly a court of justice.

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[81] 290 Pa. 95, 137 A. 811 (1927).