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Dissenting Opinions

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DISSENTING OPINIONS

By

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On May 25, 1955, the Chief Justice and five Associate Justices of the Supreme Court of Pennsylvania ordered that a Dissenting Opinion written by Justice Michael A. Musmanno of that Court not be published in the Pennsylvania State Reports. That order entered by the majority of the Court was a jurisdictional intrusion and plainly *coram non judice.* The Supreme Court possesses no power to determine which of its Opinions shall and which shall not see the light of day in the official publications of the Commonwealth.

The Opinions of the Supreme and Superior Courts are printed in the official Reports by authority of the Act of 1943,[1] which specifically declares: "The decisions of the Supreme Court of Pennsylvania and of the Superior Court shall be published under the supervision of the State Reporter."

What is meant by "decisions"? The narrowest and strictest definition of the word would be the fragmentary phrase at the end of the Opinion which says: "Judgment Affirmed" or "Judgment Reversed." Obviously the Act of 1943 does not intend any such compressed construction. A decision is the authoritative expression of the Court, embracing in its obvious scope the official declarations of all the Justices. Since 1943 there has not been one instance, except where Justice Musmanno's Opinions were involved, where the present State Reporter did not publish all Dissenting Opinions written and filed by the Justices of the Supreme Court. It is noteworthy that the Act of 1943, in its mandate that decisions "shall" be published, makes no distinction between majority and minority Opinions.

The Federal statute which authorizes the printing of the United States Supreme Court Opinions employs almost precisely the same phraseology which appears in the Pennsylvania statute, namely, "The decisions of the Supreme Court of the United States shall be printed . . . ." As in the Pennsylvania statute, no reference is made to the printing of Opinions contrary to the vote of the majority of the Court; but even to suggest that the Minority Opinions of the United States Supreme Court might not be published would be as fanciful as asserting that opposition debates against legislative proposals of the Executive Department should be banned from the Congressional Record.

The Dissenting Opinions of the United States Supreme Court have always been regarded as part of its official decisions. The very first Opinion prom-

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1 PA. STAT. ANN. tit. 17, §§ 1731.1 - .10 (Purdon 1955).

ulgated in that tribunal was a Dissenting Opinion by Mr. Justice Thomas Johnson in *Georgia v. Bailsford,*[2] as a result of the early practice of seriatim Opinions beginning with the latest appointee. The Dissenting Opinion in the case of *Chisholm v. Georgia,*[3] became the basis of the Eleventh Amendment to the Constitution of the United States. The Dissenting Opinions in the *Dred Scott* case supplied the foundations for the Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution. United States Supreme Court Justice Robert H. Jackson said in 1951:

> "A court opinion which puts out a misleading impression of unanimity by avoiding, or confusing, an underlying difference is a false beacon to the profession. Far better that the division be forthrightly exposed so that the profession will know on what narrow grounds the case rests and can form some estimate of how changed facts may affect the alignment in a subsequent case."[4]

Justice Alex Simpson, Jr., of the Pennsylvania Supreme Court, writing in 1923, said:

> "Justice to the litigants would seem to require a dissenting judge to set forth at length his opinion in regard to 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."[5]

For one hundred years the Dissenting Opinions of the Justices of the Supreme Court of Pennsylvania have been published in the State Reports. Why was an exception made in the *Tribune Review Publishing Co.* case?[6] Some legal history is here in order.

On March 1, 1954, John Wesley Wable, referred to in the press as the "phantom killer," went on trial for his life in the courthouse at Greensburg, Pennsylvania, accused of having feloniously slain two motorists on the Pennsylvania Turnpike. The events of the killings, which had naturally received enormous attention in the newspapers, inevitably stirred great public interest in the trial with its inevitable drama, suspense, and awesome issue hanging in the balance. To supply its readers with pictorial as well as written coverage of the courtroom proceedings, the editor of the Greensburg Morning Review and Daily Tribune assigned a news photographer to obtain pictures of the defendant and others who had fatefully been drawn into the murder story. However, when the photographer and the editor himself arrived at the courthouse, they were warned by the Sheriff of Westmoreland County, Howard Budd Thomas, that any attempt on their part to use a camera would subject them to contempt-of-court-punishment since the judges of Westmoreland County had

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2 1 U. S. (2 Dall.) 13 (1793).
3 1 U. S. (2 Dall.) 13 (1793).
4 100 PITT. L. J. 3 (1952).
5 71 U. PA. L. REV. 3-13 (1923).
6 379 Pa. 92 (1955).

the week before announced a Rule of Court prohibiting photography in the courthouse and county jail.

On March 2, 1954, the Tribune Review Publishing Company, availing itself of the Act of Congress of June 25, 1948,[7] sought in the United States District Court a restraining order to prevent the Sheriff of Westmoreland County from enforcing the Rule of Court mentioned. The Pittsburgh Post-Gazette, which had also sent in vain a photographer to Greensburg, joined in this action. After a hearing lasting several days, the District Court, speaking through Chief Judge Wallace Gourley, entered an order directing that proceedings be stayed—

> "pending a determination of proceedings to be brought with reasonable promptness in the Supreme Court of Pennsylvania to have adjudicated the legality of the order or regulation issued by the Courts of Westmoreland County."

With reasonable promptness the Tribune Review Publishing Company and the Pennsylvania Newspapers Publishers Association applied to the Supreme Court of Pennsylvania for a writ of prohibition against the judges of the Court of Common Pleas of Westmoreland County to prevent the enforcement of the Rule of Court in question. The defendants in the action maintained (1) that there was no justiciable question involved since no one had actually been arrested, and (2) that the plaintiffs had no rights which had been infringed. On April 12, 1954, the Supreme Court ordered the case on the argument list for hearing at Harrisburg, specifying that the matters to be argued were: "(1) Whether the question is presently moot and academic; (2) the merits of the controversy."

On May 25, 1954, counsel for both sides argued at length before the full Court. Some four hours were consumed in the presentation of the case, during which time the Chief Justice vigorously asserted from the bench that every person had a right not to be photographed against his wish. One or two other Justices supported this view, still others supported different views. The writer voiced the opinion that once a person participated in a public event he was more or less in the public domain and he could no more object to being photographed than he could to being written about. During the argument, time was also devoted to discussing the question as to whether the petitioners were entitled to an adjudication in this litigation since no one had actually been arrested or punished as the result of any alleged violation of the prohibitory Rule of Court.

One or more of the Justices suggested from the bench that a justiciable question would arise if a press photographer violated the Rule of Court, was prosecuted and subjected to a penalty, and then appealed to the Supreme Court. The writer stated he did not approve of such a procedure because it implied that the law itself invited deliberate violations. Furthermore, the writer declared that no citizen should be required to subject himself to the ignominy of a jail sentence in order to ascertain his constitutional rights. Once the Court

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[7] 62 STAT. 932 (1948), 28 U. S. C. § 1343 (1950).

forbade the petitioners from asserting a right to which they were constitutionally entitled, a cause of action arose, the writer insisted.

It was then suggested by counsel and by one or more members of the Court that an amicable test case could be prepared with an expeditious appeal to the Supreme Court, at which time the question of constitutionality and legality of the Court Rule would be resolved. At the consultation of the Justices of the Supreme Court which followed the oral argument, the writer repeated and reaffirmed the views he had expressed from the bench. After some discussion the Chief Justice declared he would endeavor to have the parties agree to an amicable test case.

On June 28, 1954, the Justices met for consultation in Philadelphia, and the *Tribune Review Publishing* case, (hereinafter to be referred to as the *Tribune* case), was discussed. Two or three days previously the Chief Justice had circulated among the other Justices for their consideration a "Per Curiam"[8] Opinion which called for a dismissal of the Writ of Prohibition. The consultation date fell so soon after the circulation of the Majority Opinion that no opportunity was allowed for the formulation of a Dissenting Opinion prior to the meeting. Accordingly, the writer recommended that the filing of the Majority Opinion be delayed so that he might prepare a dissent in accordance with the views he had orally declared from the bench and which he had reaffirmed at the first judicial consultation on the subject.[9] The Chief Justice asked Justice Musmanno to withhold any Dissenting Opinion because an amicable test case would undoubtedly be initiated in Westmoreland County and thus, on the re-argument before the Supreme Court, he could present his position. The Chief Justice said he would talk to one of the prominent counsel on the petitioners' side, and, once obtaining the assurance that a new case would be launched, he would notify the writer, whereupon the latter's Dissent would not need to be written or filed. A day or two later, the Chief Justice called the writer by telephone (as he had now returned to Pittsburgh after the session in Philadelphia) and stated that he, the Chief Justice, had talked to counsel and he was certain an amicable action would be initiated.

The Majority Opinion was filed on June 29, 1954, but in spite of the assurances of an amicable test case, nothing happened. It was further learned from the Associated Press that there was no indication that there would be any so-called amicable test case. Accordingly the writer prepared a Dissenting Opinion, and on July 8, 1954, nine days after the Majority Opinion had been handed down, he filed it with the Prothonotary of the Supreme Court, Western District of Pennsylvania, who entered the Opinion on the docket, made all other

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[8] It is a mistaken impression that "Per Curiam" means a unanimous decision. It means no more than it says: "By the Court". A "Per Curiam" decision may be rendered on a 4 to 3 vote and even by a divided court. Bryn Mawr v. Baldt, 268 Pa. 259, 100 Atl. 743 (1917).

[9] The writer here is not divulging any intramural conversations which were not made part of the record in the case of Musmanno v. Eldredge, 1 Pa. D. & C. 2d 535 (1955); 382 Pa. 167, 114 A. 2d 511 (1955).

suitable entries on the papers in the case, and sent out 26 copies of the Opinion to the various Courts, publishing houses, and persons entitled to copies of all Supreme Court Opinions. Copies were, of course, immediately mailed to all the Justices.

For four months nothing was done about printing either the Majority Opinion or the Dissenting Opinion in the Pennsylvania State Reports. Then, on November 9, 1954, at a routine consultation of the Justices in Philadelphia, the Chief Justice advanced the startling proposition that the Dissenting Opinion should not be published because it was filed "too late." This statement overlooked the fact that the nine days' retardation was due to the Chief Justice's own entreaty that the Dissenting Opinion be withheld—at least temporarily. Furthermore, the post-filing of a Dissenting Opinion is not unprecedented or unique. It has happened on numerous occasions in both the Supreme and Superior Court. Of course, while not a practice to be encouraged, it is apparent that situations do arise, as in this one precisely, where it is impossible for the Dissent to be prepared before the time the Majority insists on filing the Opinion of the Court. As recently as June 27, 1955, Justice Chidsey handed down his Opinion in the case of *Yiddisher Kultur Farband*,[10] a copy of which we had received only 2 or 3 days previously. The writer asked that the filing of the Majority Opinion be delayed to give him a chance to prepare a dissent. Justice Chidsey and the others insisted on filing the Majority Opinion forthwith, and this was done, with the understanding that the Dissenting Opinion could be filed later. It was filed in August.

Following are a few of the cases which can be found in the State Reports where the Dissenting Opinions post-dated the Majority Opinion: *Com. v. Barnak;*[11] *Johnson v. Rulon;*[12] *Phila. Electric v. Phila.;*[13] *Beirne v. Continental Equitable Title & Trust Co.;*[14] *Holly v. Ashe;*[15] *Com. v. Kilgallen.*[16] In some of these cases the Dissenting Opinion followed the Majority Opinion by as long a time as from one to three months.

Thus, it was distressingly unprecedented for Laurence Eldredge to state, as he did on November 11, 1954, that he did not intend to print in the State Reports the Dissenting Opinion in the important *Tribune case.* The failure to print this Dissent would place not only the writer, but the Court itself, in an anomalous position, because while the State Reports would be announcing a unanimity in the *Tribune* case decision, the official docket would show the contrary. To that extent, the State Reports would be proclaiming a falsehood. For the integrity of the record and the dignity of truth, some remedial action

10 382 Pa. 553, 116 A. 2d 555 (1955).
11 357 Pa. 391, 54 A. 2d 865 (1947).
12 363 Pa. 585, 70 A. 2d 325 (1950).
13 301 Pa. 291, 152 Atl. 23 (1930).
14 307 Pa. 570, 161 Atl. 721 (1932).
15 116 Pa. Super. 577, 177 Atl. 343 (1935).
16 175 Pa. Super. 52, 103 A. 2d 183 (1954).

was imperative. The State Reporter had to be compelled by the processes of the law he was defying to print the Dissenting Opinion which he had now had in his possession for four months. Accordingly, the writer filed a Complaint in Mandamus in the Commonwealth Court in Dauphin County.

In his Answer to the Complaint, Mr. Eldredge asserted that he was merely acting on the order of the Chief Justice in the matter. Then, under the heading of New Matter, he went on to relate something which had transpired in the Supreme Court consultation chamber. In the Complaint the writer had painstakingly refrained from referring to judicial intramural discussions, but when Mr. Eldredge pushed the door ajar so as to reveal only a slice of the chamber, it became obligatory on the writer to fling the door wide open to let the light of reality fall on all the proceedings, thus dissipating the half-truths resulting from only an angular view of the conference. Accordingly, in the Reply to New Matter, the writer related:

> "Paragraph 23. The plaintiff's Dissenting Opinion would have been filed with the Majority Per Curiam Opinion had it not been for the tacit understanding that the plaintiff reserved the right to file a dissenting opinion in the event the test case was not begun.
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> "Paragraph 26 . . . the Chief Justice assured the plaintiff several times that the Tribune case was coming before the Court again and it was understood that if it did not, a Dissenting Opinion would be accepted."[17]

These averments were not controverted by the defendant so that when he moved for Judgment on the Pleadings in the Dauphin County Court, he admitted their verity.[18]

Mr. Eldredge selected for counsel to represent him the former United States Supreme Court Justice Owen J. Roberts, the former United States Senator George Wharton Pepper, and the prominent Philadelphia lawyer Robert T. McCracken. Counsel for the writer were former Common Pleas Judge J. Dress Pannell, former Pennsylvania State Senator George Kunkel, and the prominent Philadelphia lawyer James J. Davis. On December 22, 1954, the case was argued in the Dauphin County courthouse before a full bench consisting of Judges Paul G. Smith, Wm. H. Neely, Walter R. Sohn, Homer L. Kreider, and Karl E. Richards.

It was the contention of Mr. Eldredge and his attorneys that the Supreme Court could prohibit the publication of the Dissenting Opinion for any reason it chose because it was clothed with supreme power in deciding the contents of the State Reports. However, they pointed to no statute which conferred such power; they cited no decision which awarded it omnipotence over the State Re-

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17 See paper books and printed record in the case of Musmanno v. Eldredge, 382 Pa. 167, 114 A. 2d 511 (1955).

18 London v. Kingsley, 368 Pa. 109, 81 A. 2d 870 (1951); Sensinger v. Boyer, 153 Pa. 628, 26 Atl. 222 (1893); Fried v. Fisher, 328 Pa. 497, 196 Atl. 39 (1938).

ports. Of course, their failure in this respect was due to the simple fact that the law of Pennsylvania is empty of any such delegation of absolute authority.

Counsel did refer to the Act of June 12, 1878,[19] which said that "The Court shall cause to be reported such of its decisions," with a description, then, of what those decisions were to be. But this Act of 1878 is only a relic in the museum of the past. It was repealed by the Act of 1951.[20] Defendant's counsel also resurrected the Act of March 12, 1889,[21] which said that the several Justices of the Supreme Court shall mark certain cases "to be reported" and that cases not so marked were to be reported in an abbreviated form. But that Act is also entombed with the dead, because it too was repealed by the Act of 1951, *supra.* After citing these two defunct statutes, Justice Roberts proceeded with a type of argument that one assuredly would never find in a text book on logic. He asserted that since the Acts of 1878 and 1889 had given the Supreme Court some discretion with regard to the printing of Opinions, the repeal of those statutes now conferred upon the Supreme Court complete and untrammeled authority in that matter. It was like saying that by withdrawing the authority which allowed one to enter only two floors in a 50-story building, he was now authorized to possess the whole fifty stories!

The Supreme Court has no inherent powers. It can only act under the authority vested in it by the Pennsylvania Constitution which nowhere says that the Court may decide which portion of its activities shall become known to the public. It would be contrary to every principle of democracy that any department of government should determine for itself how much of its business may be evaluated by the people. If it were to be admitted that the Supreme Court may suppress Dissenting Opinions, one would have to concede that it could also shroud Majority Opinions; and eventually the legal profession, as well as the general public, could never know with precision how much of the iceberg of the law floated above and how much was hidden beneath the sea of revelation.

In his brilliant argument before the Commonwealth in Harrisburg, Judge Pannell quoted from Chief Justice Hughes who said:

> "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."[22]

Dissenting Opinions on constitutional questions are particularly "an appeal to the brooding spirit of the law." It was perhaps for that reason that the Pennsylvania Legislature in 1868 provided that:

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19 PA. STAT. ANN. tit. 17, §§ 1691-1694, 1697, 1699, 1702-1706 (Purdon 1930).
20 PA. STAT. ANN. tit. 17, §§ 1690.1-.5 (Purdon 1955).
21 PA. STAT. ANN. tit. 17, §§ 1696, 1701 (Purdon 1930).
22 32 J. AM. JUD. SOC'Y 106 (1948).

> "The reporter aforesaid is hereby authorized to publish minority opinions of the said court on all constitutional questions."[23]

The printing of Minority Opinions on constitutional questions is of paramount importance because Constitutions are made and amended only by the people. And how are they to know whether the Constitution is meeting the requirements of the sovereign State unless there is absolute freedom of expression on the part of the judges who interpret it?

It cannot be denied that a constitutional question was involved in the *Tribune* case. In their prayer for relief the petitioners declared that the action of the Westmoreland County Court in shutting out photographers from the courthouse and jail was:

> "in contravention of the rights of Petitioner's members under *Article I of Section VII of the Constitution of Pennsylvania* and under the *First* and *Fourteenth Amendments to the Constitution of the United States* and is an abridgement of the rights of Petitioner's members to freedom of speech and of the press." (Emphasis added.)

The *Tribune* case, therefore, came precisely within the Statute of 1868. Justice Roberts endeavored to argue that the Act of 1868 gave the State Reporter discretion in determining whether or not to publish Minority Opinions on constitutional questions; but it is unthinkable that the representatives of the people would place in the hands of a State employee, in no way particularly qualified for such selectivity, the power to decide what Minority Opinions on the Constitution should be printed. The conclusive proof that the State Reporter did not have any such power is demonstrated in the fact that since 1868 (and for many years prior thereto) ALL Dissenting Opinions, on constitutional questions and non-constitutional questions, have been published in the State Reports.

We have seen that the Constitution does not give the Supreme Court the privilege contended for it by Mr. Eldredge and his counsel, and it is clear also that there is no statute conferring that absolute power on the defendant or the Court. On what basis then could the Supreme Court order suppression of Justice Musmanno's Dissenting Opinion? Law is intended to be the essence of reason. Even if it were to be assumed, arguendo, that some authority of printing selectivity existed in the Supreme Court, certainly that power could not be exercised arbitrarily. What would happen to our whole system of jurisprudence if the highest appellate court of a State could, without reason, explanation, or citation of statute or precedent, reverse a practice which has been accepted and officially followed for over a hundred years?

In his argument before the Dauphin County Court, Justice Roberts never attempted to justify the exclusion of the Dissent in the *Tribune* case on the ground that it was filed "too late." His position was that the Court of Common Pleas of Dauphin County could not order the State Reporter to disobey an order

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28 PA. STAT. ANN. tit. 17, § 1695 (Purdon 1930).

of the Supreme Court. And on that basis the Dauphin County Court on January 5, 1955, entered judgment in favor of the defendant.

The case was appealed to the Supreme Court, and it was argued in Philadelphia on April 26, 1955. The writer, of course, being one of the litigants, naturally did not sit on the argument. The Chief Justice and Justices Stearne, Jones, Chidsey and Arnold were in effect litigants on the other side since they had issued the order which suppressed the Dissenting Opinion. It could be assumed, therefore, that they would not sit to pass judgment on their own act. But they sat. There was precedent for the appeal to have been heard by Justice Bell alone, because he had not voted for the non-publication of the Dissenting Opinion.[24]

Senator George Wharton Pepper and Attorney Robert T. McCracken presented the oral argument for the appellee. After Senator Kunkel made a preliminary presentation the writer argued the case for the appellant.

In the Supreme Court, Eldredge through his counsel, advanced the strange proposition that the Act of 1951 made him an agent of the Supreme Court. As the writer stood at the lectern addressing the Court as counsel-litigant, and not as an Associate Justice of that Court, he handed opposing counsel a copy of the Act of 1951 and asked them to explain how, even by employing the most tortured interpretation of words, they could arrive at the conclusion that the Act in question made Eldredge a Supreme Court agent. Not only is the word "agent" not used in the statute but there is not even the remotest hint that any principal-agent relationship exists between the Supreme Court and the State Reporter. An agent binds his principal. It is bizarre even to assume that anyone without judicial qualifications or position could bind a judicial tribunal on the principle of respondeat superior. Mr. Eldredge's role is an obvious one: he is a State official charged with supervising the printing of State Reports. To call the State Reporter an agent of the Court is as absurd as it would be to call him an Assistant Justice.

Neither Senator Pepper nor Mr. McCracken was able to justify the use of the word "agent," but in supporting the position of their client they assumed they were defending the action of several members of the Supreme Court, which in verity they were. Consequently they drew on any available weapon of argumentation which appeared to them to uphold the Court's precipitate action in ordering the non-publication of the writer's Dissenting Opinion. Unable to point to any statute or decision which authorized the Supreme Court to exclude Dissenting Opinions from the State Reports, they went to the extent of declaring that the State Reporter should not print any Dissenting Opinions at all! Thus, they said:

> "The function of the State Reporter is to make available to the Bench and Bar decisional law of Pennsylvania as announced by its highest

[24] Com. v. Mathues, 210 Pa. 372, 59 Atl. 961 (1904).

> court. The decisional law is the law which is stated in the opinion of the Court. A dissenting opinion is no part of the decision but a *protest* against it."

By advancing this argument, Mr. Eldredge placed himself in a position of stultifying inconsistency since he is constantly printing Dissenting Opinions. In volume 375 of the State Reports, as late as October 15, 1953, in the case of *May v. Fidelity*,[25] he printed an 8,000-word Dissenting Opinion of the Chief Justice which covered 26 pages. In his Dissenting Opinion Chief Justice Stern said:

> "The result reached by the majority of the court in this case is so contrary to what I conceive to be right and proper, and does such injustice, as I firmly believe, to the grandchildren of the testatrix who have been disinherited, that I cannot do other than record my earnest dissent." (pp 147-173.)

Is that not a protest against the decision of the Court, and if so, why did Mr. Eldredge print it? In November, 1954, he printed two Dissenting Opinions by Justice Allen Stearne, neither of which had anything to do with constitutional questions. Nor did the Chief Justice's voluminous dissent in the *May* case deal with a constitutional question.

As the writer stood at the podium he piled up volume after volume of State Reports until he feared the ceiling might be reached—all containing Dissenting Opinions written by his colleagues, and not questioned by Mr. Eldredge or anyone else. Nor were any of those dissents dedicated to constitutional questions. If Mr. Eldredge printed these Dissenting Opinions, on what basis of reasoning could he exclude the Dissent in the *Tribune* case?

In seeking to justify the Supreme Court's usurpation of authority in refusing to publish the *Tribune* case Dissenting Opinion, Eldredge and his counsel were apparently ready to go to any length in sophistry and equivocation. They were even willing to sacrifice, in this particular instance, freedom of speech. They said:

> "The Court as a whole should have discretionary power to decide in a given case that the publication of a particular dissenting opinion would be contrary to public policy."

This would mean that the Supreme Court could exercise a totalitarian control which does not exist anywhere in the United States, namely, the power of censorship. This would mean giving absolute authority to the majority of the Supreme Court to decide what shall be said and how it shall be said by a Justice elected by the people and charged with the same responsibility as devolves on those who happen to form for a brief, fleeting moment a majority.

In order to close the State Reports to the Dissenting Opinion, Eldredge and his counsel were even willing to take to the execution block the inalienable right of every American citizen to register a protest against what he regards to be injustice. They said:

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[25] 375 Pa. 135, 99 A. 2d 880 (1953).

> "The right of an individual Justice to record dissent is indisputable; but to have a dissenting opinion published is not an absolute right but one which must be subordinated to considerations affecting the dignity of the Court as an organ of government."

This said in effect that a Justice may dissent behind closed doors but he may not dissent so that the people may know what is happening in their tribunals. Of what use would be a dissent that does not inform the legal profession of the misapplication of law, of misinterpretation of facts, and ignoring of constitutional guarantees that the dissenter sincerely believes he has found in the Majority Opinion? To say that dissents may be suppressed in order to preserve the dignity of the Court is to give a false meaning to the word dignity. Dignity means, above all, integrity and forthrightness. Pointing out an error or admitting an error is one of the most dignified acts that can be performed by a human being or by an institution which places truth above all other considerations. Justice Roberts probably held a similar view when he was on the Supreme Court of the United States. In an incumbency of 15 years, he dissented 185 times.

The arguments advanced by defendant's counsel through their brief and in person were an unrestrained attack on Dissenting Opinions, but no one could know better than Justice Roberts and Senator Pepper that Dissenting Opinions often become Majority Opinions. Many of the Dissenting Opinions by Justice Holmes and Justice Brandeis have today been embodied in the stare decisis of the land.

On our own Supreme Court, Dissenting Opinions of one day have become the ruling law of another day. In the case of *Thomas v. Hempt Bros.*,[26] Justice Jones wrote the Majority Opinion and Justice Musmanno wrote a Dissenting Opinion. The case was appealed to the Supreme Court of the United States[27] and the Supreme Court reversed. In the case of *Meixell v. Hellerton Boro Council*,[28] Justice Bell wrote the Majority Opinion and Justice Musmanno wrote a Dissenting Opinion. A year later the same case came before the Supreme Court again. This time the Majority reversed its previous position, and Justice Musmanno wrote the Opinion for a unanimous Court. These two cases alone should be enough to establish that the writing of Dissenting Opinions is not merely a matter of exercising judicial penmanship. An enormous amount of hard work goes into writing Dissenting Opinions,—work dedicated to truth, reason, and the majesty of the law. Dissenting Opinions are so integrally a part of our legal system that to defend them is as superfluous as carrying common law to Blackstone. Yet, in the year of our Lord 1955, the Supreme Court of one of the oldest States in the Union suppressed a Dissenting Opinion. And an ex-Justice of the United States Supreme Court and an ex-Senator of the United States supported that suppression. This would seem to point out quite dramatically that we can-

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26 371 Pa. 383, 89 A. 2d 776 (1952).
27 345 U. S. 19 (1953).
28 370 Pa. 420, 88 A. 2d 594 (1952).

not assume that our liberties are always so safe that they can never be lost or damaged. We can never take for granted that representatives elected by the people, whether in the Courts or in the Legislative Halls, will always be immune from harassment as they speak out their honest conviction. Eldredge's attorneys went so far in the case under discussion as to utter the most shocking doctrine that has ever been presented in a courtroom. They said:

> "Situations may well be imagined in which an angry Justice might, if unrestrained by authority, impair or even destroy the public confidence."

In the courtroom, now crowded with lawyers who had gathered to hear the arguments, the writer replied to this amazing statement as follows:

> "I want to say to the authors of this odious and contemptible declaration of gag rule that when the time comes that an angry Justice, if he be angry because of injustice being perpetrated in his presence, may not speak out in behalf of justice, then the figure of Justice, always represented as blindfolded in the Courts, should whip off the bandages to see what is transpiring in the Courts under the name of justice!"

On May 25, 1955, the Supreme Court affirmed the decision of the Dauphin County Court and filed a "Per Curiam" Opinion.[29] The Opinion said that the Dissenting Opinion in the *Tribune* case was filed "after the Court had adjourned its sessions for the summer and its members were scattered." But it was not the fault of the writer that the members scattered. He remained at his duties until they were accomplished. The business of the Court does not come to a standstill because the Chief Justice and Associate Justices scatter like boys at the end of school. Furthermore, the writer sent a copy of his Dissenting Opinion to each one of the Justices at the addresses they themselves had furnished. And each one of the Justices had this Dissenting Opinion in his possession for four months before the question of publication arose so that they had ample opportunity to prepare and file comments on the Dissenting Opinion if they were so minded.

The Court said further that the Dissenting Opinion was not a proper dissent because "the Order of this Court in the *Tribune* case did not discuss, much less decide, the merits of the very important legal question involved." But a Dissenting Opinion is not limited to matters discussed in the Majority Opinion. It often happens that a Dissenting Opinion is written for the precise reason that the Majority of the Court failed to discuss or decide a very important question in the case. The Court added that it "had expressed no views whatever" on the merits of the controversy, but this statement did not accord with the realities of the situation. The very order authorizing the argument, as we have already indicated, declared that the Court would give consideration to "the merits of the controversy," and it will be recalled that the Chief Justice and other Justices discussed at length from the bench the merits of the controversy. The

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[29] 382 Pa. 167, 114 A. 2d 511 (1955).

fact then that the Majority failed to pass upon an issue which it had discussed and considered did not preclude the writer from directing attention to it in his Opinion. It is ridiculous to assume that because the Majority, as we see it, neglects to discuss a very important constitutional question before it, a Justice of the Minority should compound the neglect by a similar silence.

The Opinion filed by the Court on June 29, 1954, in the *Tribune* case, as one glance at it will show, was very fragmentary and conveyed no idea to the reader what propositions had been argued and how the Court arrived at its conclusions. The Opinion gave no consideration whatever to the monumental constitutional question raised in the briefs and at oral arguments, namely, freedom of the press. It became, therefore, almost imperative, if the legal profession was to derive any benefit or information from the Court's action, that a comprehensive Opinion, stating all the facts and issues involved, be written. The writer undertook that obligation. But his efforts in this direction turned out to be fruitless when the State Reporter declined to publish his Opinion. Thus, the report on the *Tribune* case, as it now appears in the State Reports[30] remains as a vague, meaningless statement on one of the most important problems ever to come before the appellate court of any State in the Union.

In view of the fact that a lawsuit on the same question may still come before the Supreme Court, the Court said further that the writer's Opinion discussing the issue of the freedom of the press meant "prejudging a question which was yet to come before this court." This statement is a non sequitur which not even a vessel of irrelevancy would hold. Every case is decided on its current merits and not on what may arise in future litigation. If the argument advanced by the Court in this respect were to be literally followed, it would mean that the Chief Justice would be disqualified from considering the subject of the Westmoreland County Rule of Court if and when it comes before us again because, according to the President Judge of the Westmoreland Court of Common Pleas, the Chief Justice approved of the embattled Rule of Court before it was promulgated.[31]

On August 18, 1955, in a speech delivered before a convention of the State chief justices of the nation in Philadelphia, Chief Justice Stern said that Dissenting Opinions should be written only on "really important problems."[32] But who determines whether a problem is important or not? Is there a litigant who has felt that the problem which has been gnawing at his spirit, corroding his soul, and robbing his nights of sleep is not an important one? Was the problem in the *Tribune* case not an important one? It dealt with nothing less than freedom of the press. Is that not important?

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30 379 Pa. 92 (1955).
31 PHILADELPHIA LEGAL INTELLIGENCER, Feb. 17, 1954; Pittsburgh Post-Gazette, Feb. 16, 1954; Pittsburgh Press, Feb. 17, 1954.
32 Philadelphia Inquirer, Aug. 19, 1955; Pittsburgh Press, Aug. 19, 1955; Pittsburgh Post-Gazette, Aug. 20, 1955.

The Chief Justice said also in that speech that he did not read Justice Musmanno's Dissenting Opinions. This was indeed an extraordinary admission because the most important function of a Chief Justice is to ascertain the vote and views of the Justices of the Court over which he presides. Failing to read and to give consideration to Dissenting Opinions may not only lead the Court into embarrassing situations; it may well throw particular branches of decisional law into alarming chaos. One illustration will suffice.

On March 14, 1955, the Majority of the Supreme Court of Pennsylvania handed down a decision in the case of *Perpetua v. Phila. Transportation Co.*,[83] from which decision the writer dissented. The plaintiff-motorist in that case was denied recovery in spite of the fact that he was proceeding through an intersection on a green light when he was struck by a motor bus entering the intersection against a red light, the majority of the Court holding that the plaintiff's case failed to show that he continued to look as he proceeded through the intersection.

On June 27, 1955, three months later, in the case of *Koehler v. Schwartz*,[84] the Supreme Court allowed a recovery in precisely the same fact-situation which obtained in the *Perpetua* case, namely, the plaintiff-motorist, with a green traffic light in his favor, was proceeding through an intersection when he was struck by a trailer-truck which entered the intersection with a red light against it.

That an appellate court should, within three months, decide the same fact-situation in two wholly opposite ways is deplorable, of course, but there is something much more revealing involved here than inconsistency. Justice Musmanno wrote the Dissenting Opinion in the *Perpetua* case; he wrote the Opinion for a unanimous Court in the *Koehler* case. The law which he set forth in the *Koehler* case is precisely the same law which he expressed in his Dissenting Opinion in the *Perpetua* case—almost verbatim. Had the Chief Justice read the Dissenting Opinion in the *Perpetua* case, the Court may not have been placed in the incongruous position of handing down law in two different ways over a period of only three months. How are lawyers to advise their clients when the Supreme Court fluctuates in its appraisement of cardinal principles of law in this fashion?

The subject of Dissenting Opinions has become an interesting topic for discussion at judicial conferences and bar association meetings, but no one can seriously believe that without Dissenting Opinions the law would progress as it should and must. Dissenting Opinions are often the pillars which are ready to take over the burden of supporting a sagging principle of law when the reasons of the Majority in a given case may weaken and fall. Dissenting Opin-

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83 380 Pa. 561, 112 A. 2d 337 (1955).
84 382 Pa. 352, 115 A. 2d 155 (1955).

ions have often been the shock troops in the battle for justice on the battlefield of reason versus formality and intelligence versus blind technicality.

The filing and printing of Dissenting Opinions is part of the classic American system of checks and balances. If Majority Opinions are to be regarded as infallible and as the expression of a unanimous Court when in fact they may not be, a system will have been developed which will perpetuate error, stifle correction, and paralyze progress in the law which must ever command the needs of today.

If the day should ever come that the majority may suppress minority views, it would be a devastating blow to democracy, because the history of the human race establishes conclusively that no power or institution, no matter how honorably disposed, can have absolute power without some day exercising that power to the grave detriment of the people.

The quest for truth must be unceasing. There must always be a challenge to smugness, there must ever be a protest against an over-assurance born of uninhibited power. Secular infallibility is either a product of the imagination, or of the ego exerted through absolute force, or through the supine indifference of those it would enslave. In any event, it cannot co-exist with the living, breathing spirit of the Law.