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ADMINISTRATIVE LAW: MUST THE ANGELS WEEP?

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ANY writer on administrative law will do well to define the boundaries of his contemplation, since the ramifications of the topic are infinite and its implications often tenuous. The purpose of the present writer is to suggest two thoughts for the comfort of those who regard administrative law as a necessary evil at best, and a threat to justice—those who would agree with the law school professor who regaled the writer's impressionable youth with the pleasant sentiment that all administrators were nefarious because they were not judges. Calling upon literature for his epitome, the professor described his *bêtes noirs* as "pelting, petty officers . . . drest in a little brief authority, most ignorant of what they are most assured . . . playing such fantastic tricks as make the angels weep." [1]

The first point suggested is that administrative law, far from being a Johnny-come-lately in the legal scheme, actually has from the beginning been one of the primary sources and fortifiers of our law. The second point is that the process by which administrative agencies contribute to the progress of law toward the ideal of justice continues today, as illustrated in the recent Pennsylvania cases involving reimbursement of the cost of relocating highway-situated public utility facilities.

Equal justice under law is the ideal of American political philosophy. But upon first contemplation of even the verbal expression of the ideal, difficulties confront us. Justice seems impossible of unequivocal or complete definition, and the nature of law has been a battleground of legal controversy at least since the Greeks began to discuss such matters some five hundred years before the Christian Era. However, for our purposes we may conceive law as a pattern of rules for social order announced and enforced by courts or other tribunals. But this does not mean that all rule-declaring bodies are the same.

Of course, administrative agencies are different from courts in character and mode of operation. This difference springs, in part from the fact that the agencies are arms of the legislative branch of the government and as such are open to the political pressures which forcibly affect all legislatures, but act much less strongly upon courts. Also, the continuing responsibility for results

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[1] Shakespeare, *Measure for Measure,* Act II, Scene 2.

which attaches to every administrative body differentiates such a body from a court. Only the highest courts need concern themselves with the expression of broad political principles in their opinions; the administrative body, however, must be concerned not only with the application of traditional rules of law but with the formulation of new rules wherever necessary to keep pace with the changing social pattern. A court may apply its legal rule *ruat coelum,* but a commission must adapt itself to practical necessities. Similarly, courts are not expected to ferret out violations of law, initiate proceedings or investigate the consequences of decisions, whereas no administrative body alert to its duties will fail to adopt all active courses calculated to promote compliance with the purposes of the law which it administers. Another distinction in method appears in the recognition that any administrative official *ex necessitate rei* often obtains the materials of his judgment vicariously and, unlike a judge, is not only at liberty, but is usually compelled to rely on the assistance of a staff of technical experts.

But the distinctions mentioned do not mean that justice cannot be done by administrators as well as judges.[2] Actually, over the history of administrative bodies, systems of rules have developed which tended to become as certain and recognizable as the rules of the common law or equity law. In the agencies, as well as in the courts, rational minds have asserted their ethos and have accomplished a stabilizing process. Acceptance of the proposition that the judicial attitude and technique are essential to justice in specific cases and indeed to civilization itself does not necessarily imply a corollary that agencies are less just than courts, for the sense of the word, "judicial" here pertinent is simply that the discretions exercised should not be dependent upon individual whim and caprice and should be free from personal favor and individual self-interest.

Let us turn, then, to the history of our law and see if our present situation has had its counterparts in times past and what results ensued; for we may assume that the anxiety of lawyers will be assuaged if we discover that the law with which they are familiar in the courts has derived in large part from what may fairly be called "administrative law."

Going back to the days of William the Conqueror, we do find him declaring: "I command that all men have and hold the laws of Edward (the

[2] Even though the Pennsylvania Act of 1911, P.L. 1121, seems to be based upon the contrary theory that not until judges are retired "by reason of physical or mental disability" have they sunk to the level of being used in the administrative capacities of "special masters, referees, auditors, or examiners" during their days of dotage. However, it is of pertinent note that prior to the appointment of David Lloyd (1719-1731), no Chief Justice of Pennsylvania was learned in the law, and that his two immediate successors were also laymen. *Induction of Justices,* 268 Pa. xxix.

Confessor) with those additions which I have ordained for the advantage of the English people," but the authorities are agreed that until the treatise of Glanvill (1187-1189), there existed no definite statement of the pre-Conquest laws. The Conqueror himself, as might be expected, was more interested, as well as more occupied, in establishing effective control of his newly acquired realm than in seeking out old laws. Nor did he see fit to ordain formal courts of law. However, to a small group of his close advisors, known as the *curia regis,* and composed of ecclesiastics and others selected for their organizational ability, he assigned a great variety of tasks—legal, executive, and whatnot—falling under the general heads of keeping order and collecting revenues, subject, of course, to immediate control by the king. The duties of the *curia* were more administrative than judicial during the reigns of William I and of his son, William Rufus, who apparently concerned himself more with alienating his subjects than with advancing the rule of law. The succeeding reigns were turbulent and it was not until Henry II (1154-1189) restored the good order of his grandfather's regime that "peace for men and deer" again became a fact and English law as we know it began to take form. The shape and content of this law were determined largely through the activities of the *curia* which, as we have seen, was composed of ministers constantly in the king's employ, resident in his palace, and regularly attendant on his person. The *curia* sat frequently to try suits between the barons or cases in which the king was concerned; and this branch of its activities eventuated in the Court of King's Bench. The *curia* also sat twice a year to receive the accounts of sheriffs and others who owed money to the king, and on these occasions, it held its sessions around a table marked off into squares in order to facilitate the calculations so that it resembled a checkerboard—hence the name exchequer. This accounting function grew in size and importance and the Exchequer gradually evolved into two divisions, the Receipt of the Exchequer, which collected and managed the royal revenue, and the Court of the Exchequer, which in one aspect ascertained and enforced the proprietary rights of the Crown against the subjects and in its other aspect, administered redress between subject and subject in matters personal. Thus, one of the most important and oldest English courts developed from a purely practical administrative group, and the law enforced by that court derived from *ad hoc* administrative determinations.

Another feature of administration in those formative days of the law was the custom, instituted by Henry I and made systematic under Henry II, of sending out justices *in eyre* (on circuit). Since the king had no regular residence and his ministers accompanied him wherever he went, the parties to proceedings before his council were also obliged to follow the court travels

until their cases were decided. Of course, local witnesses who alone knew the facts were naturally reluctant to spend their money and time journeying up and down the kingdom just to assist in proceedings which meant no gain nor loss to themselves. To obviate this difficulty, members of the king's council were sent to try cases in the various shires, but at the same time, they were made responsible for collecting dues and attending to other royal business.

We read that when Henry III died in 1272, "the old Anglo-Saxon dooms were by this time utterly forgotten, the law-books of the Norman Age were already unintelligible, and even the assizes of Henry II, though but a century old, had become part and parcel of the 'common law,' not to be distinguished from the unenacted rules which had gathered round them. Englishmen might protest that they would not change the law of England, but as a matter of fact the law of England was being changed very rapidly by the incessant decisions of the powerful central court." [3] Our friends the *curia* were well on their way.

A compact group, directly representing the king's authority, the *curia* decided what the general custom of England, i.e., the common law, must be taken to be. They had many novel cases and little, if any, recorded authority. Thus they were compelled to be original and to regulate their own procedure, if there was to be order at all in their business. They intended to be consistent and their new procedures, established with an eye to consistency, although designed to provide for urgent matters, determined the bent of the law itself.

By the reign of Edward I, the *curia,* in so far as it continued to be concerned in detail with the law, had divided into the Court of King's Bench (which went where the king went) for criminal cases and other pleas of the Crown, the Court of Common Bench, which sat in Westminster Hall and heard actions between subjects, and the Court of Exchequer, which, as we have seen, combined judicial and administrative functions of collecting revenue and enforcing the fiscal rights of the king. In 1268, each court had a chief justice, thus marking the separation of judicial and governmental functions so that "the head of the court of justice is no longer the prime minister." [4] And still a fourth department of government, administrative in the sense that it was a secretarial bureau for the king, had by this time come to play an important part on the legal scene. This department was the Chancery which issued in the name of the king all of the writs summoning men before any of the king's courts.[5]

[3] MAITLAND AND MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 81 (1915).
[4] MAITLAND, CONSTITUTIONAL HISTORY OF ENGLAND 133 (1908).
[5] In their inception the writs had simply directed compliance with a royal decision already made, but they gradually became vehicles for initiating proceedings.

These writs had two great advantages. First, the defendant only at his peril disobeyed the summons of the king, and secondly, a prospective plaintiff knew that if he could bring his defendant within the terms of a recognized writ, he had "a cause of action." And as the law had received impetus from the administrative necessities of the *curia,* it gained invigoration from the innovations of clever employees of Chancery calculated to provide a writ to fit any situation.[6]

All very well, but rapidly evolving economic, political, and social exigencies and philosophies were outstripping the ingenuity of the writ composers, just as changing times had outrun the capacity of the judges for making corresponding adjustments within the common law. Even the Statute of Westminster II, (1285) providing for the issuance of writs *in consimili casu,* while palliative, was not fully remedial because the conditions requiring attention were in many instances not similar but completely new. With a prescient pessimism rare in legislative assemblies, Parliament, anticipating its failure to meet the situation, provided in the Statute itself an invitation that, if the clerks failed to function adequately, aggrieved parties should "refer themselves until the next parliament, lest it might happen that the court should long time fail to minister justice unto complainants."

The clerks who composed the writs were, of course, employees of the Chancellor and therefore may be pardoned a certain lack of enthusiasm in pursuing the aggrandizement of the law courts, as opposed to the equity jurisdiction of their lord. However that may be, the development of equity took place "outside the sphere of the common law, and upon principles which led to conclusions opposed to the rules of that law. Moreover, the basis of the equity administered by the ecclesiastical Chancellors of this period (the period prior to Henry VIII) was conscience. . . ." [7]

Whether or not we agree with Maitland that "Equity saved the common law," [8] and that "Equity had come not to destroy the law but to fulfill it," [9] it is evident that equity was not originally a part of that law, and that a system of rules evolving under the ægis of the king's first minister, president of his Council and Keeper of the Great Seal, could only be regarded as a form of administrative law. This is particularly clear since no chancellor prior to Sir Thomas More seems to have been a lawyer,[10] and the jurisdiction of the

[6] For example, the writ of "latitat" was made available to a Middlesex plaintiff, where the defendant did not reside in Middlesex, with the allegation that the defendant "latitat et discurrit" (lurks and runs about) in the county in which he really resided.

[7] HOLDSWORTH, SOURCES AND LITERATURE OF ENGLISH LAW 178 (1925).

[8] MAITLAND AND MONTAGUE, *op. cit. supra* note 3, at 128.

[9] MAITLAND, EQUITY 17 (1936).

[10] HOLDSWORTH, *op. cit. supra* note 7, at 192.

chancellor had arisen in the beginning from the reference to him of petitions presented to the King's Council.

In the United States the same basic necessities as in England have given rise to administrative bodies and we can gain salutary perspective from realization that "The fundamental reason for resort to the administrative process is the undertaking by government of tasks which from a strictly practical standpoint can best be performed through that process. . . . No one was thinking of judiciary versus bureaucracy, capitalism versus socialism, or *laissez-faire* versus governmental interference. The early agencies were created because practical men were seeking practical answers to immediate problems." [11]

When we consider the origin of equity, and recall that even today, when separate courts of equity have become anachronistic, a judge must figuratively wear the ermine of a chancellor while dealing with equity jurisprudence, it is a matter of some wonder that lawyers cry havoc at the development of a body of principles outside the law as they have known it.

However, such viewing with alarm is nothing new. We learn of William the Conqueror finding it expedient to quiet the alarmists of his day by promising "respect for the 'law of the land' i.e. for the ancient customs of the people," although "No authoritative statement of them existed." [12] And later monarchs were forced to similar pledges. In spite of the oft quoted maxim, *"Aequitas sequitur legem,"* and the avoidance of frontal attack on the courts—the chancellors gained their ends by restraining litigants—the common lawyers scented battle from afar, though they did little but sit in their Inns of Court and mutter in their ale.

At last, in 1616, the celebrated contest between Chief Justice Coke and Lord Chancellor Ellesmere came to a head. This was the Lord Coke who once declared from his bench, with his customary vehemence, "Take it for a warning, whosoever shall putt his hand to a bill in any English Court after a judgment at law we will foreclose hym forever speaking more in this Court. I give you a faire warning to preserve you from a greater mischief. Some must be made example, and on whom it lighteth it will fall heavy. Wee must look about us, or the common law of England will be overthrown." [13]

Ellesmere also ran a tight court. Intolerant of prolix pleadings, when a replication of "six score sheets when sixteen would have been sufficient" was filed on behalf of one Richard Mylward, he ordered that the Warden of the

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[11] DAVIS, ADMINISTRATIVE LAW 10 (1951).
[12] JENKS, SHORT HISTORY OF ENGLISH LAW 17 (1924).
[13] 2 CAMPBELL, LIVES OF THE LORD CHANCELLORS 211 (1876).

Fleet bring Mylward to Westminster Hall "cut a hole in the myddest of the same engrossed Replication . . . and put the said Richard's head through the same hole, and so let the same Replication hang about his shoulders with the written side outwards, and then, the same so hanging, shall lead the same Richard, bareheaded and barefaced, round about Westminster Hall . . . and show him at the bar of every of the three courts within the hall."

King James had admonished the competing judges that "he saw much endeavor to draw water to their several mills," [14] but found it necessary to summon "The Attorney and Solicitory General, the King's Serjeants, and the Attorney General of the Prince of Wales" [15] to advise him. These worthies recognized that equity had secured a safe position in the legal system. Accustomed to her face, they agreed with Ellesmere that equity could restrain a litigant from enforcement of a judgment obtained in a common law court. Victory, it may be noted, proved a heady thing, for the same Lord Ellesmere prescribed whipping as an appropriate punishment for pauper plaintiffs who sued in his court without cause. And the saying that "power corrupts" finds confirmation in the words of an early eighteenth century English drinking song about

"Your chancery lawyers
Whose subtilty thrives
In spinning out suits
To the length of three lives;
Such suits as the clients
Do wear out in slavery
Whilst pleader makes conscience
A cloak for his knavery."

However, the post mortem of English equity as a separate and superior moral system was pronounced by Lord Justice Buckley, sitting in the Chancery Division of the High Court of Justice when he stated: "This court is not a court of conscience." [16] Apparently equity, at least in his Lordship's opinion, had at last become one with law.

Since the year 1616 has faded into the misty long ago and equity is now an accepted and integral part of the law enforced by the courts, the question arises: Do we really have contemporary need for creative forces which disturb the settled law? This concerns our second point, that the actions of administrative tribunals are still a necessary spur to the progress of law in the journey toward justice. The illustration of the point will deal, for two reasons, with

[14] LYON AND BLOCK, EDWARD COKE: ORACLE OF THE LAW 181 (1929).
[15] CAMPBELL, *op. cit. supra* note 13, at 212.
[16] *Re* Telescriptor Syndicate (1903) 2 Ch. 174, 195.

certain recent decisions of the Pennsylvania Public Utility Commission. First, four out of the five members of that Commission are lawyers,[17] and therefore inclined to recognize the full force of precedents and traditional legal concepts —in this instance related to the law of damages. The second reason is that the apparent impasse involved could not possibly have reached solution through strict adherence to recognized and established principles of law.

In the Spring and Summer of 1954, the Delaware River Port Authority inaugurated action to clear the Philadelphia approach to a new toll bridge (the Walt Whitman Bridge over the Delaware River between Philadelphia and Gloucester, New Jersey). The Authority ordered removal of all utility facilities which would interfere with the approach. It also applied to the Pennsylvania Public Utility Commission for approval under Section 409 of the Public Utility Law[18] to construct the portion of the approach crossing certain railroad tracks, and for allocation of the costs and expenses incident thereto. In addition to railroad facilities, electric lines of the Philadelphia Electric Company and an electric line of the City of Philadelphia were involved.

The Electric Companys' lines were located in the street in accordance with a City permit under which the Electric Company agreed to relocate at its own expense, provided such relocation became necessary "in the construction of water or gas mains, sewers, or any other municipal work." This permit was never revoked by the City. On the contrary, it was the Authority which directed the Electric Company to remove its facilities.

The Authority was agreeable to paying the cost of relocating the Railroads' water main and signal conduits, estimated at $34,266. Its witnesses also indicated that the Authority would probably agree to pay the cost of relocating the City's electric line, estimated at $1,500. However, the Authority refused to pay the cost of relocating the Electric Company lines. The sole reason given for this discrimination against the Electric Company was that, in the opinion of Authority counsel, the Authority as a matter of law could not be required to pay such costs.

So much for the basic facts. The law, as the Port Authority saw it, was crystal clear that where utility facilities occupied a street, relocation costs, being consequential damages, were not subject to reimbursement. For this view, there was, it must be conceded, some color of authority. First, there

[17] Chairman Schwartz is a former District Attorney, Commissioner Houck is a former judge, Commissioner Sharfsin is a former City Solicitor of Philadelphia, and Commissioner Conly is an experienced practitioner at the Alleghany County Bar. Commissioner Stahlnecker, while not a lawyer, has had long seasoning as an administrator and is thoroughly familiar with the rule of law maintained by Pennsylvania Courts.

[18] PA. STAT. ANN. tit. 66, § 1179 (1954).

were three Pennsylvania Supreme Court decisions: two held that where street-situated utility facilities were relocated to make way for river bridge approaches in Philadelphia, no damages were payable,[19] and the third [20] established the same principle of *damnum absque injuria* in a case involving the construction by the City of Philadelphia of a subway on Broad Street. Second, the Public Utility Commission and its predecessor, the Public Service Commission, had uniformly, over the years, required utilities to bear their own relocation costs where facilities occupied streets. Third, from January 1, 1914, the effective date of The Public Service Company Law [21] to June 1, 1937, the effective date of the repealing Public Utility Law,[22] Article V, Section 12 of The Public Service Company Law had explicitly required that relocation of utility facilities as part of crossing construction should be made at the expense of the utility.

Counsel for the Electric Company contemplated this formidable array of legal obstacles and took heart only from the spirit of the good old maxim, *"ubi jus, ibi remedium."* The basis of the *jus* was the conviction that all costs associated with a project which would benefit only toll payers should be paid out of tolls and not borne by electric customers whose service was in no way advantaged.[23] The Electric Company, therefore, decided to try for the *remedium.*

The position of the Electric Company before the Commission reduced itself to three propositions. The first, of course, was the basic principle that he who benefits should pay. The second, declared by a witness and supported by an exhibit, was that the cost, if paid from toll funds, would be only dollar-for-dollar, whereas if the costs were collected through rates, the rate payers, over the life of the property, would be required to contribute $3.80 for each dollar of relocation cost, this result being due to the effect of taxes and depreciation requirements. The third proposition was that the exercise of Commission jurisdiction, no longer restrained by statutory fetters, could be exercised to direct reimbursement as "allocation of *costs,*" even though the decisions prohibited the awarding of *"damages."*

The Commission weighed the equities and ordered 100% reimbursement by the Port Authority. Recognizing the validity of the new law and precep-

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[19] Delaware River Port Joint Comm'n Case, 342 Pa. 119, 19 A.2d 278 (1941), and Philadelphia Elec. Co. v. Commonwealth, 311 Pa. 542, 166 A. 892 (1933).

[20] Philadelphia Elec. Co. v. Philadelphia, 301 Pa. 291, 152 A. 23 (1930), *appeal dismissed,* 283 U.S. 786 (1931).

[21] Act of July 26, 1913, P.L. 1374.

[22] PA. STAT. ANN. tit. 66 § 1562 (1954).

[23] It must be clearly understood that neither a utility, as such, nor its stockholders bear utility capital or operating costs. These costs are passed on to the customers through rates.

tively unperturbed by its novelty, the Pennsylvania Superior Court affirmed.[24] The Pennsylvania Supreme Court refused an appeal. Thus, the outcome of this exercise of administrative discretion to correct inequities is an outstanding example of justice through administrative law. Once again, circumstances had required a new look for the law. So long as municipal, state, and federal street and highway changes were limited in magnitude and intermittent in occurrence, the rule that the utilities should pay their own relocation costs was not unduly onerous and its superficial logic seemed valid enough. However, as public improvements mutiplied in number, ballooned in extent, and soared in cost, it became necessary to scrutinize the justice of forcing utility rate payers to contribute to the cost of such improvements, not only through taxation or tolls, but, and in addition, specifically through four-to-one payments for facility changes which brought them no benefit.

The principle that he who benefits should pay, obviously applicable in the comparison between toll payers and rate payers, has been refined in cases involving situations where the comparison was not so sharp. Where an improvement could be used by local residents without charge, the Commission ordered reimbursement of only one-half the facility relocation costs, thus taking into account the relative benefits made available as between local and through travellers.[25] The Superior Court again affirmed.[26] Thus, it may be said with assurance that the reason which is the life of the law has not ceased to find original expression outside the law courts nor to gain its way into the corpus juris no matter how formidable the obstacles. This point implies no lack of recognition of the lively powers of courts to expand and adapt many phases of the law, but it does suggest that when we quote Lord Coke [27] to reassure ourselves that "Out of the old fields must come the new corn," [28] we should recall that sometimes hybrid seed will yield a better harvest.

The administrative tribunal, like a court, is concerned with matters of grave importance not only to the body politic but to individuals and groups of individuals, and, like a court, its decisions are fraught with consequences to the parties before it. The virtue preceived in the judiciary is said to be that it thinks and acts judicially. But there are upright administrators as well as upright judges, and litigants in some courts have had occasion to complain as bitterly as parties before commissions that justice has been denied. It is

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[24] Delaware River Port Authority v. Pennsylvania Pub. Util. Comm'n, 180 Pa. Super. 315, 119 A.2d 855 (1956).

[25] Where improvements are of predominately local benefit, the utilities do not ask reimbursement, since their rate payers are primarily benefitted.

[26] Dep't of Highways v. Pub. Util. Comm'n, 185 Pa. Super. 1, 136 A.2d 473 (1957).

[27] 2 INSTITUTE 22.

[28] Coke was paraphrasing Chaucer, *Parlement of Foules,* Poem, fourth stanza.

useless for those who deplore the growth in the number and authority of administrative bodies to wring their hands over a *fait accompli.* Rather, they should make common cause with the entire body of right-thinking citizens to insist that the personnel of administrative tribunals be chosen according to standards which will assure the same spirit in those tribunals as seems so glorious when clothed in the judicial robe. After all, it is not merely the difference in the forum which inspires confidence in the court, nor is it the difference in the habiliments of the presiding personnel. If what we are happy to think of as the "judicial mind" operates in the administrative processes, surely there will be no occasion for alarm.