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## NONPAREIL AMONG JUDGES

HENRY S. MANLEY

Death and retirement for the age limit are the common occasions for praising judicial service. The subject of this short biography has not died or retired, but he has served so long and importantly that recognition and appraisal seem overdue. It is believed no other figure in Anglo-American jurisprudence has been a judge so long, upon so many courts, or has been trusted by his judicial brethren to announce their decisions upon such a variety of important issues.

Little is known about Judge Per Curiam's early professional labors or his private life during the long years of his fame. It can be said of him peculiarly that his work has been his whole life. He has revealed his mind and personality to us through his opinions, and otherwise he has been remarkably self-effacing. As to his family, it is known only that he bears some undefined relationship to Anonymous, the prolific author. There is no record of his training in the law, or service at the bar, or sitting alone in the lower courts.

It is believed that he served on the English appellate courts even before the American Revolution, and is part of the American heritage from English law. The earlier cases in the first report by Dallas show him rendering decisions in the Pennsylvania courts as early as 1760. Under Chief Justice Marshall he suffered an eclipse, and there was reason to believe that the opinions in *McCulloch v. Maryland*<sup>1</sup> and other cases which Marshall announced without noticing any dissent were actually non-unanimous. This caused President Jefferson to complain about Marshall's "habit of caucusing opinions," and for many years it was an article of the Jeffersonian creed that each justice should deliver a separate opinion on every case before the Court.<sup>2</sup> This ideal very nearly has been realized in the Supreme Court of the United States in recent years.

The last preceding remarks may appear to be a digression from Judge Per Curiam, but really they introduce some topics particularly related to his special genius. It is common error to say of his opinions that they are rendered "in a case in which the judges are all of one mind, and which is so clear that it is not considered necessary to elaborate it by an extended discussion."<sup>3</sup> It is this misunderstanding which has sometimes

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<sup>1</sup> 4 Wheat. 316 (U. S. 1819).

<sup>2</sup> WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 113-115 (1922).

<sup>3</sup> 21 C. J. S. 401; *Clark v. Western Assurance Co.*, 146 Pa. 561, 23 Atl. 248 (1892); *Dowling v. Salliotte*, 83 Mich. 131, 47 N. W. 225 (1890).

caused a judge dissenting from his brethren to appear resentful that Judge Per Curiam was the majority spokesman.<sup>4</sup>

True it is, that conciseness and conciliation are characteristic features of Judge Per Curiam's opinions, and his services often are employed when those relatively humble demands are all that are made upon him. Particularly when directing a reversal and proceedings below, which may bring the case back to the appellate court, it sometimes is desirable to avoid extensive exposition associated with the name or names of particular judges. It would be a great underestimate of the complexity and versatility of Judge Per Curiam's judicial service to suppose that such cases are the measure of his capacity. More striking although less frequent and less known is his service in cases which for one reason or another have involved long debates in the consultation room, or would involve such debates except for his tactful intervention.

As example of the last sort is *State ex rel. Frazier v. Seibel*.<sup>5</sup> A few days before election Judge Per Curiam decided who should be on the ballot, and all would have been well had his brethren left the matter there. Instead, after election they attempted to state their reasons, which required three separate opinions, of which one was written by two dissenters. Defensively, the majority opinion said: "If fresh justice is sweetest, as Lord Bacon says it is, that per curiam filled the bill."<sup>6</sup>

Election cases, involving important voting groups or powerful political figures, not infrequently require the services of Judge Per Curiam, and in these he performs an important service. Other judges are subject to criticism in such matters, whether their votes are for or against the forces that helped put them on the bench or may be needed to retain them there. For somewhat similar reasons issues involving unions or veterans or other significant groups of citizens may be dealt with in a per curiam opinion. There may be a division within the court having a pattern or appearance of a pattern that would prompt undesirable gossip. Concealing the mere fact of division and thus giving an appearance of certitude may be a matter of agreement among judges who are not agreed on the decision. In such classes of cases, if his judicial brethren shrink at all from giving an opinion specific authorship, Judge Per Curiam courageously lends the weight of his reputation to the result. These are not the common instances of his service, but neither are they so uncommon that they can pass unnoticed without injustice to him.

The admission must be made that some of the occasions for his opinions have not been altogether helpful to Judge Per Curiam's reputation. He

<sup>4</sup>See, for an instance, *Minor v. Fike*, 77 Kan. 806, 93 Pac. 264 (1907).

<sup>5</sup>262 Mo. 220, 171 S. W. 69 (1914).

<sup>6</sup>*Id.* at 222, 171 S. W. at 69 (1914).

has been drafted for too many hard cases. It has even been thought necessary, in some jurisdictions, to affirm that his opinions have the usual authority as precedents. A judge of the New York Court of Appeals recently has said that "a per curiam opinion is one where we agree to pool our weaknesses." This is, of course, merely the absence of defensiveness which is the final proof of acceptance. The high standing which Judge Per Curiam enjoys among his brethren in the Court of Appeals can be seen in its reports.

In the back of each volume of New York reports commencing with volume 147 and prior to volume 289 the State Reporter put a "Tabular List of Opinions," from which one could readily see how many opinions were written by each judge and on what topics. In volume 147 Judge Per Curiam had one opinion and his seven brethren had 84; in volume 288 he had 18 and the other judges 63. In volume 289 is only the note:

"Due to war restrictions on the use of paper the Tabular List of Opinions usually included in the New York Reports is omitted from this volume."

In all subsequent volumes, of which 296 is the most recent to appear in bound form, the Tabular List is lacking. Anybody curious enough about the matter to tabulate the eight volumes will find that Judge Per Curiam wrote the opinions in about a fifth of the cases,<sup>7</sup> excepting the memorandum decisions, which are wholly his.

It does not appear that Judge Per Curiam ever wrote a dissenting opinion for the Court of Appeals, but he sometimes has persuaded the Court by a very narrow margin.<sup>8</sup> Dissents by one judge, or one or more judges not participating, are relatively common features of cases decided by Judge Per Curiam. Considerably more than half of his cases are reversals or modifications.<sup>9</sup>

It is the more remarkable that an extensive use of per curiam opinions

<sup>7</sup>The cases decided upon per curiam opinions commence at the following page numbers: 289 N. Y. 54, 66, 69, 70, 72, 98, 100, 101, 104, 108, 145, 171, 244, 310, 323, 344, 348, 350, 352, 353, 357, 407, 410, 417, 419, 509; 290 N. Y. 11, 70, 117, 181, 186, 188, 310, 325, 477, 518, 525, 537; 291 N. Y. 65, 75, 77, 81, 98, 109, 179, 224, 241, 245; 292 N. Y. 50, 109, 111, 115, 116, 127, 154, 201, 204, 230, 235, 468, 498; 293 N. Y. 16, 32, 36, 39, 82, 217, 218, 229, 233, 440, 467, 555, 649; 294 N. Y. 5, 6, 22, 31, 58, 204, 263, 292, 497, 500, 522, 554, 557, 583, 584, 610, 628, 632; 295 N. Y. 97, 320, 354, 357, 390, 395, 539, 541, 544, 545; 296 N. Y. 10, 15, 16, 62, 65, 85, 93, 151, 161, 165, 231, 239, 242, 244, 305, 409.

In the eight volumes, 117 opinions are per curiam out of a total of 601 cases preceding the memorandum decisions.

<sup>8</sup>For examples, see *People v. Greenburg*, 289 N. Y. 72, 43 N. E. 2d 816 (1942); *People v. Barone*, 289 N. Y. 100, 43 N. E. 2d 829 (1942); and *Matter of Brokaw*, 293 N. Y. 555, 59 N. E. 2d 243 (1944), each a four to three decision. Two judges dissented from per curiam decisions in *Matter of McCall*, 289 N. Y. 104, 44 N. E. 2d 385 (1942); *People v. Regan*, 292 N. Y. 109, 54 N. E. 2d 32 (1944); *Matter of Woollard*, 295 N. Y. 390, 68 N. E. 2d 181 (1946); and *People ex rel. Rao v. Adams*, 296 N. Y. 231, 72 N. E. 2d 170 (1947).

<sup>9</sup>In the last eight volumes (289-296 N. Y.), 67 of the 117 per curiam cases were reversals or modifications.

has grown up in New York appellate courts, because they adhere to the practice of assigning each case to a particular judge by rotation upon the argument. Their practice in this respect is in contrast with that of the Supreme Court of the United States, where the assignment is not made until after consultation and the decision has been determined. The arguments in favor of the respective methods were presented about 1928 by two outstandingly able commentators.<sup>10</sup>

Mr. Hughes, in his Columbia lectures in 1928, said that the method of assignment in the Supreme Court of the United States worked well:

"I regard it as far better than the method of some Courts of assigning cases in rotation so that the judges know when the case is argued, unless there is some division making a different assignment necessary, who is going to write the opinion. In the Supreme Court every judge comes to the conference to express his views and to vote, not knowing but that he may have the responsibility of writing the opinion which will accord with the vote. He is thus keenly aware of his responsibility in voting. It is not the practice of the Supreme Court to postpone voting until an opinion has been brought in by one of the judges which may be plausible enough to win the adherence of another judge who has not studied the case carefully."<sup>11</sup>

Strong words, and somewhat more persuasive than the opposed argument of Mr. Hiscock, then recently retired from the Chief Judgeship of the Court of Appeals. He said that after long experience he felt very strongly that assignment of cases by rotation was a better method than that of assignment by the Chief Judge. The first reason he gave was that some cases were alive with interest and others were a drudgery, and a Chief Judge would not be able to assign them without some associate feeling disappointed. His second reason was that assignment by rotation avoided specialization of certain judges in particular classes of cases, in which event:

". . . it would be equally natural for other judges, unconsciously, to think they might safely rely on the judgment of one who had become a specialist in that class of cases and thus fail to exercise that independent judgment which litigants are entitled to expect from every member of an appellate court."<sup>12</sup>

Ex-judge Hiscock, even more clearly than Ex-judge Hughes, premised his case on recognitions of judicial fallibility. This is an additional reason why non-members of the judicial guild well may be wary of joining battle on the Court of Appeals side.

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<sup>10</sup>HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 57-65 (1928); Hiscock, *The Court of Appeals of New York: Some Features of its Organization and Work*, 14 CORNELL L. Q. 131, 138-140 (1929).

<sup>11</sup>HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 59 (1928).

<sup>12</sup>Hiscock, *The Court of Appeals of New York: Some Features of its Organization and Work*, 14 CORNELL L. Q. 131, 138 (1929).

Each commentator noted, with differing judgments, a greater tendency towards judicial participation in the oral argument of cases in the Supreme Court, and a greater tendency to let the attorneys argue undisturbed in the Court of Appeals. Neither suggested that this was related to the method of assignment, which in the Supreme Court encourages the justices to look at the briefs in advance of the argument, but such may be the fact. It has even seemed that the method of the New York appellate courts has sometimes tended towards only one member of the bench being attentive at all to oral argument. This observation is not so pointed in recent years as it was some years ago.

In 1927, when the Workmen's Compensation Law was relatively new, an insurance carrier succeeded in a remarkable contention before the Appellate Division, Third Department, Justice Hinman dissenting.<sup>13</sup> An award had been made for the death of a truckman. He was accustomed to doze while his wagon was on the ferry from New York City to Jersey City, and while so dozing he was killed. It was contended, and the Appellate Division was persuaded, that the claim should be dismissed, because the driver's sleep was a temporary vacation from his employment. Arguing for the claimant in the Court of Appeals the venerable and sententious E. C. Aiken stated the facts and the decision below and paused for a thoughtful space. Then he said:

"Sometimes when I have argued cases in the Third Department I have observed some of the justices to have their eyes closed. I don't know whether they were asleep, but if they were asleep I wouldn't argue that they necessarily were taking vacations from their judicial employments. Now coming to this Court—"

"You needn't go any further with that line of argument," said Chief Judge Cardozo, his eyes twinkling. "This Court has your point." Mr. Aiken suspended argument, his case won.

Perhaps we are strayed a long way from our appreciation of Judge Per Curiam, and perhaps not. The suggestion may be made that it is time to re-examine the occasions for his usefulness, and some of the procedures with which he is associated. Perhaps the danger of leaning upon specialists, which Judge Hiscock feared, sometimes is present with less justification. If it is true that judges might resent the assignment of some classes of cases because they are a drudgery, the same judges will not be critical of the reasoning of others, unhappily burdened with those cases by the process of rotation. Perhaps the better method would be no allocation of personal responsibility before consultation, less interval between argument and consultation, and more personal responsibility for the decisions announced.

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<sup>13</sup>Matter of Corrina v. De Barbieri, 221 App. Div. 631, 225 N. Y. Supp. 92 (1927), *rev'd*, 247 N. Y. 357, 160 N. E. 397 (1928).