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Robert G. Simmons

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The Use and Abuse of Dissenting Opinions*

Robert G. Simmons**

In the Good Book it is written that certain men came down from Judea and taught of the necessity of obeying the Law of Moses regarding circumcision, and that Paul and Barnabas "had no small dissension and disputation with them." An agreement was not reached, and so the issue was taken to the Apostles and Elders.

At least from that day to this day to this there has been dissension and disputation regarding substantially all laws from those dealing with trifling matters to laws of great importance. It is a human trait.

Judges are human and fallible. The placing of a gown of silk around their shoulders does not change that fact. But it is to be remembered that the lawyer and judge have, or should have, that inherent characteristic that delights in independence of thought. They are prone to probe and explore the basis and soundness of laws and no small dissension and disputation has followed.

The creation of appellate courts of odd-numbered judges has implicit in it the expectation that judges would disagree. They do.

The Bar and public know little of the dissensions and disputations of the conference room out of which unanimous opinions result. There are those who would confine the dissenting to the cloister of the consultation room. The result in some instances would be to exchange integrity of thought for solidarity of opinion, and principles of law for harmonious answers to litigation.

There are others who would limit dissents to the "important" issues, principles of law, and cases. But who is to determine what questions and cases are important and not important? Judges should remember always that courts deal with the rights of individuals, the litigation is theirs, and to every litigant his case is important. Were it not so, it would not be before a court.

Should a dissent be made because of a difference of understanding of issues or facts? The answer to that must be with

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**Chief Justice of Nebraska.

the individual judge, bearing in mind that correct rules of law applied to issues not made or facts not shown can often result in an unjust decision and the casting of doubt on the administration of justice in the courts. The effect does not ordinarily go beyond the case at hand.

However, when the soundness of rules of law are in question or their soundness conceded and the applicability questioned, the effect may be far reaching in its impact on other like matters.

It has been said that the law is the perfection of reason. The reasoned dissent exposes the rules stated by a court to the pitiless examination of bench and bar. A dissent does not ordinarily change the result in the case where it is made. It is an appeal to the intellect of tomorrow.

The law is not an exact science. It must be constantly tested by reason. The dissent challenges that continued testing. It respects the underlying thought in *stare decisis*, but subjects established rules to the processes of evolution — not revolution.

The law is not static. It grows — and the dissenting opinion is one of the processes that aids that development as the law meets and solves new situations. It is sometimes necessary to restate the reason of old rules when applied to new situations. It is sometimes necessary to put new wine in old bottles. If the rules of law, stated by majorities, are correct, then they can withstand the criticism of a dissent. If they are in error, then the well-reasoned dissent may come into its own — provided judges are not static-minded.

There are many courts that have, or have had, "dissenting judges." Some have been given the accolade of the "great dissenter." To me that title belongs to Lord Coke. He dissented from the established *stare decisis* rule of the divine right of kings. He did not keep his dissent within the confines of the minds of his associates. Had he done so, the result might have been quite different. He stated it to the king, to his bench and bar — and pinpointed the movement from which came the independent judiciary of England and later the United States. It was a courageous dissent. It was not popular with the Crown. Time proved its merit. I anticipate that every court in America

has similar situations where well-reasoned dissents have balanced the law and in time prevailed.

Chief Justice Hughes wrote: "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."

Chief Justice Stone wrote: "A considered and well stated dissent sounds a warning note that legal doctrine must not be pressed too far. It sometimes, for better or for worse, arrests a trend and sometimes reverses it. Its appeal can properly be only to scholarship, history and reason, and if the business of judging is an intellectual process, as we are entitled to believe that it is, it must be capable of withstanding and surviving these critical tests."

What is the ultimate test? The Canons of Judicial Ethics say: "Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort."

Within that rule a dissent becomes not a privilege, but a duty.