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Courts -- Circuit Judges -- Effect of Error in En Banc Proceedings

Arthur J. Franza

mailed to plaintiff. The case follows the authority of a previous New Jersey case which denied workmen's compensation because the only available evidence was hearsay, thus denying the right of the workman's beneficiary.[14]

Perhaps a better rule in cases of this type would permit reliance on substantial hearsay when legally competent evidence is not available.[15] By requiring agencies to follow outmoded rules of evidence, justice is often denied, especially in workmen's compensation cases. Administrative findings should be permitted on reliable, trustworthy evidence, regardless of technical common law admissibility.[16]

William A. Ingraham

COURTS—CIRCUIT JUDGES—EFFECT OF ERROR IN EN BANC PROCEEDINGS

The defendant circuit judge issued a search warrant and pursuant to statutory provisions,[1] appointed an elisor to serve it. The plaintiff sheriff filed a declaratory bill and requested the circuit, excepting the defendant,[2] to hear the cause *en banc*. The senior Judge[3] then assigned the cause to five judges within the circuit. One of the judges recused himself, convinced an *en banc* proceeding would be contrary to law and result in reversible error. The recusant then asserted that the judgment of one circuit judge is the determination of the judicial circuit under the Florida Constitution.[4] *Sullivan v. Milledge*, 2 Fla. Supp. 125 (11th Cir. Ct. 1949).

Where the constitution provides for more than one judge in a particular circuit,[5] the questions to be resolved are:

1. Is it reversible error, under existing law, and in the disposition

14. Andricsak v. National Fireproofing Corp., 3 N.J. 466, 70 A.2d 750 (1950).

15. *See* NLRB v. Remington Rand, 94 F.2d 862, 873 (2d Cir.), *cert. denied* 304 U.S. 576 (1938).

16. 1 WIGMORE, EVIDENCE 41-42 (3d ed. 1940) (*residuum* rule is not wise and satisfactory for general adoption).

1. FLA. STAT. § 47.12 (1951). . . . A justice of the peace or a constable, in the respective counties, may serve all process in cases where the sheriff is interested, and in cases of necessity the judge of the circuit court may appoint an elisor to act instead of the sheriff.

2. Since the conflict arose between the sheriff and defendant Circuit Judge, plaintiff felt said Judge ought to be excepted.

3. FLA. CONST. Art. 5, § 43. . . . Wherever there are two or more Circuit Judges appointed for a Circuit the business may be divided among the Circuit Judges . . . as may be prescribed by law, and where no provision has been made by law, the distribution of the business of the Circuit between the Circuit Judges of the Circuit, . . . and the allotment or assignment of matters and cases to be heard, decided, ordered, tried, decreed or adjudged, shall be controlled or made when necessary by the Circuit Judge holding the commission earliest in date. . . .

4. FLA. CONST. Art. 5, § 43. The Legislature may from time to time . . . provide for the appointment of one or more additional Circuit Judges for such Circuit. . . . He shall have all the powers and perform all the duties that are or may be provided or prescribed by the Constitution or by statute . . . and all statutes concerning Circuit Judges shall apply to him.

5. *Ibid.* State *ex rel.* Palmer v. Atkinson, 116 Fla. 366, 156 So. 726 (1934).

of ordinary litigation, to participate *en banc* in the adjudication of an issue?

2. Is it contrary to law to sit *en banc* when such determination affects the rights and powers of the judicial circuit *itself*, rather than the rights and interests of litigants before the court?

The plaintiff sheriff contended that the judgment rendered would be the effective determination of the court *in toto* rather than the decision of an individual judge. The sheriff argued an *en banc* proceeding would be more authoritatively treated by the entire circuit. However, the Florida courts have decreed otherwise. As early as 1931 it was held that a single judge constitutes a circuit court.[6] In the event there is more than one judge within the circuit, each judge is vested with power to exercise *all* the authority of the judicial circuit,[7] in the absence of controlling organic or statutory provisions.[8] The Florida Supreme Court held the action of a circuit judge is the action of the circuit court.[9] The court is an entity. Its separation is purely fictional[10] being for convenience and practicality only.

In the interpretation of the Illinois Constitution,[11] almost identical to Florida's, it was held that it *is* error for more than one judge to preside or participate jointly in a given case.[12] Each judge, alone and independent of the others, should perform all the functions and discharge all the duties imposed on the circuit by the Constitution[13] or statute. It is not a group office; the judges ". . . cannot and do not act jointly . . ."[14] The determination of one judge is the determination of the circuit. The Illinois court indicated that if it were contemplated that a majority of the judges should sit *en banc*, the drafters of the constitution would have so provided; if it were intended that a certain number constitute a quorum, they would have again so provided, as they did for the Supreme Court.[15]

It is only with reference to the second stated question that Pennsylvania courts differ from the Illinois position. For the Common Pleas Courts of Pennsylvania, an equivalent of the Florida Circuit Court, it was held that in most matters the judgment of a single judge is the determination of the court.[16] The court was defined as a tribunal, officially assembled under authority of law, whereas a judge is simply an officer or member of that tribunal.[17] A distinction was made between the powers and duties of a

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6. Meyer v. Nator Holding Co., 102 Fla. 689, 136 So. 636 (1931).
7. United American Ins. Co. v. Oak, 123 Fla. 159, 166 So. 547 (1936).
8. City of Coral Gables v. Blount, 131 Fla. 36, 178 So. 554 (1938).
9. State *ex rel* Brooks v. Freeland, 103 Fla. 663, 138 So. 27 (1931).
10. Peterson v. Speakman, 49 Ariz. 342, 66 P.2d 1023 (1937).
11. ILL. CONST. Art. VI, § 23.
12. Wayland v. City of Chicago, 369 Ill. 43, 15 N.E.2d 516 (1938); Courson v. Browning, 78 Ill. 208 (1875); Hall v. Hamilton, 74 Ill. 437 (1874).
13. ILL. CONST. Art. VI, 23.
14. People *ex rel* Jonas v. Schlaeger, 381 Ill. 146, 45 N.E.2d 30, 35 (1942).
15. Harvey v. Van De Mark, 71 Ill. 117 (1873); Jonas v. Albee, 70 Ill. 34 (1873).
16. *In re* Hanover Township School Directors, 290 Pa. 95, 137 Atl. 811 (1927).
17. Carter's Estate, 254 Pa. 518, 99 Atl. 58 (1916).

court, and the functions of a judge. Whether an act is to be performed by the court or the judge is generally determined by the character of the act. Whenever it is a statutory power or duty conferred upon the court, it can only be discharged by the assembled tribunal, "however composed, whether of one judge or several."[18] The power of removal or appointment of school directors,[19] public officials,[20] and guardians, is conferred upon the court and "court" means court *en banc*.[21]

The Pennsylvania position seems the more reasonable in differentiating the stated questions. It is highly improbable that the drafters of the Florida Constitution intended to have the opinion of one circuit judge bind the full circuit in the interpretation of constitutional and statutory powers conferred on that circuit. Such a conclusion would be illogical in that the minority opinion of one, asserted first, could prevail. This would be especially true if the remaining judges not participating, were to have a contrary opinion. Certainly this question is important enough to have merited a discussion in the majority opinion.

Arthur J. Franza

COURTS — JUDICIAL IMMUNITY VS. CIVIL RIGHTS

Plaintiff, confined as a delinquent[1] on an order issued without notice or hearing in violation of his rights under the Fourteenth Amendment, brought an action by virtue of the Civil Rights Act[2] against the judge who promulgated the order. *Held*, the judicial immunity of a judge acting within his authority is not derogated by the Civil Rights Act. *Francis v. Lyman*, 108 F. Supp. 884 (D. Mass. 1952).

The principle that exempts judges from civil liability for acts in the exercise of their judicial functions has "a deep root in the common law."[3] Judges are not civilly liable when such acts are in excess of their jurisdiction,[4]

18. Moritz v. Luzerne County Co., 283 Pa. 349, 352, 129 Atl. 85, 86 (1925).
19. In re Hanover Township School Directors, 290 Pa. 95, 137 Atl. 811 (1927).
20. Novak v. Koprivsek, 58 York 16, 29 North 201 (1944).
21. Carter's Estate, 254 Pa. 518, 99 Atl. 58 (1916).

1. MASS. GEN. LAWS c. 123, § 116 (1932).
2. REV. STAT. § 1979 (1875), 8 U.S.C. § 43 (1946) "Every person who, under color of any statute . . . of any State . . . subjects . . . any citizen of the U. S. . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . for redress."
3. Yates v. Lansing, 5 Johns. 282, 291 (N.Y. 1810); Bradley v. Fisher, 13 Wall. 335 (U.S. 1871); Yaselli v. Goff, 12 F.2d 396 (2nd Cir. 1926), *aff'd*, 275 U.S. 503 (1927); Allen v. Biggs, 62 F. Supp. 229 (E.D. Pa. 1945); Allard v. Estes, 292 Mass. 187, 197 N.E. 884 (1935); Landseidel v. Culeman, 47 N.D. 275, 181 N.W. 593 (1921); Hammond v. Howell, 2 Mod. 218, 86 Eng. Rep. 1035 (1678); 2 COOLEY, TORTS 420 *et. seq.* (4th ed. 1932).
4. As distinguished from acts where no jurisdiction over the subject matter exists. Bradley v. Fisher, 13 Wall. 335 (U.S. 1871); Randell v. Brigham, 7 Wall. 523 (U.S. 1868); Allard v. Estes, 292 Mass. 187, 197 N.E. 884 (1935).