and misdeeds" (*Hellman*, *supra*, at p. 968, f.n. 2) we do consider the respondent's misconduct in determining the petitioner's claim to support. As the court in *Hellman* stated at p. 967:

> "Support laws . . . were not promulgated for the purpose of rewarding a wife's good behavior. An order of support seeks to secure a reasonable allowance for the maintenance of the wife so that she may not become a charge of the state. Thus, . . . we must not focus our attention solely on the wife's conduct in reviewing her right to support. We must look at all the circumstances present in each case. If we were to mechanically apply the appelee's inflexible rule, if we did not view each case in its entirety, then certainly we would eventually occasion an inequitable termination [or refusal] of support"

The facts and circumstances of this case lead to the conclusion that the petitioner has not forfeited her right to support from the respondent. The need of the petitioner for the support is established, as is the earning capacity of the respondent to pay. An order for support will be entered in favor of the petitioner effective September 12, 1977.

ORDER

NOW, this 14th day of December, 1977, it appearing to the Court that Grandon H. Carmack, respondent, owes a duty of support to his wife and has a net weekly earning capacity of $64.00, and that affiant has no net take home pay;

IT IS ORDERED that respondent pay the cost of these proceedings and enter into his own bond in the amount of $3,000.00 to guarantee faithful compliance with this order, and commencing Monday, September 12, 1977, pay to Judith Carmack via the Collection Officer of this Court, the sum of $20.00 plus $.20 service charge and a like sum of $20.20 each Monday thereafter until further order of the Court for the support of Judith Carmack.

BEEGLE, et al v. GREENCASTLE—ANTRIM SCHOOL DISTRICT AND GREENCASTLE-ANTRIM SCHOOL BOARD, C.P., Franklin County Branch, Vol. 7, Page 134, In Equity

Equity - Preliminary Injunction - Review by Court En Banc - Right to File Amended Pleading - Discretion of School Board

1. The Court consisting of a single judge sitting in equity, sustained the defendants' preliminary objections, in the nature of a demurrer, to the plaintiffs' complaint, whereupon plaintiff filed exceptions to the decision of the Court and asked for a hearing by the full court en banc, which in Franklin County consists of two judges.

2. No rule of court or statute requires that preliminary objections be considered by the court en banc.

3. In that a single judge has the power to grant summary judgment, he also has the power to dismiss a case on preliminary objections in that both actions bring about the same end result.

4. There is no authority to file exceptions to a court's ruling on preliminary objections.

5. If a party is seeking to have his preliminary objections heard by the court en banc he should raise this issue at the time of argument when it would be more convenient for the Court to grant his request. If the party does not raise the issue at the time of argument he cannot later complain that his case was not heard by the full court.

6. The courts are not super school boards with the authority to substitute their judgment for that of the duly elected members of the school board. It is only when the school board transcends the limits of its legal discretion that the court may issue an injunction.

William J. Peters, Esq., Attorney for Plaintiffs

Jan G. Sulcove, Esq., Attorney for Defendant, Greencastle-Antrim School Board

Rudolf M. Wertime, Esq., Solicitor for Greencastle-Antrim School District Attorney for Defendant, School District

OPINION AND ORDER

EPPINGER, P.J., February 27, 1978:

This action in equity to restrain a school district and the school directors (the district) from closing a school was filed by seven resident taxpayers (residents) of the district. Preliminary objections were filed, a demurrer and a motion to strike. At the time set for the hearing on the application for a preliminary injunction, counsel for the district asked for an immediate decision on the preliminary objections.

Ruling was reserved, counsel were given an opportunity to file briefs and argue the case, and testimony was taken. Later,

SHERIFF'S SALES, cont.

bersburg, Franklin County, Pennsylvania, deceased.

Walter — First and final account, statement of proposed distribution and notice to the creditors of William H. Walter & Richard B. Walter, executors of the Last Will & Testament of Ernest W. Walter, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

Yorgey, Sr. — First and final account, statement of proposed distribution and notice to the creditors of The National Central Bank, Ruth E. York & John E. Yorgey, Jr., executors of the estate of John E. Yorgey, Sr., late of Greene Township, Franklin County, Pennsylvania, deceased.

GLENN E. SHADLE
Clerk of the Orphans' Court
Franklin County, Pennsylvania

(3-10, 3-17, 3-24, 3-31)

NOTICE OF LEGAL ADVERTISING RATE CHANGE FOR FICTITIOUS NAME REGISTRATION NOTICES

Please Note: At a special meeting of the board of directors of Franklin County Legal Journal held on March 9, 1978, it was decided that since fictitious name registration notices ordinarily run about the same length, with only occasional variance, and since bookkeeping and collection problems may be reduced by establishing a flat rate for the same, a flat rate for publication of such notices, to include both the advertising and the proofs of publication, would be established immediately, subject to further change by the board at a later meeting, if experience indicates a need therefor.

Accordingly, the established rate for such advertisements, including two proofs of publication, until further action of the board, will be $14.25, per insertion.

after the argument, the demurrer was sustained and the case was dismissed without the right to file an amended complaint. That was on September 7, 1977. On September 21, 1977, the residents filed a paper captioned *Exception to Order of Court Sustaining Defendants' Demurrer and Dismissal of the Case.* While the language of the body of the paper uses the word *accept* where *excepts* seems appropriate, we are treating the paper as exceptions.

What the residents are asking for now is a review of the pleadings by a court en banc and the right to file an amended complaint. In Franklin County, the court en banc is two judges, one of whom has already heard the case. Should the matter be reviewed, and assuming the judge who did not hear the case was of the opinion that the residents should be allowed to file an amended complaint, there is a strong chance that the court would be equally divided. What to do? In *Nunamaker v. New Alexandria Bus Co., Inc.*, 371 Pa. 28, 88 A.2d 697 (1952), where there was a four-member court and all four sat as a court en banc and were equally divided, the court said it was not necessary for the entire court to sit as a court en banc. The court added that if the four judges did insist upon participating at any given time and an equal division of opinion resulted, then an outside judge should be called in as an additional member of the court, there should be a reargument and the matter disposed of by majority action.

In an era where judicial time is at a premium and there are limited funds for supplying visiting judges, it is hard to conceive that the procedure authorized by Nunamaker promotes judicial economy, though we recognize the case as binding authority. Of course where the number of judges is three or more, the district should have no problem because a court en banc of an uneven number can be assembled. In a two-judge district, the only way to do this is to have one judge consider the matter. It is, after all, no different than when Franklin County was a one-judge county.

To induce us to grant the reargument before a court en banc, residents have cited *Hollidaysburg Manor Associates v. Blair County Board of Assessment and Revision of Taxes*, 26 Pa. Commw. Ct. 628, 364 A.2d 959 (1976). In that case, taxpayers appealed a real estate tax assessment imposed by the county board of assessment to the common pleas court. Apparently on the merits, the lower court ruled in favor of the taxpayers and the board filed exceptions. The taxpayers moved to quash the exceptions on the ground that the board should have appealed to the Commonwealth Court. That order was an appealable order (Sect. 402(4) of the Appellate Court Jurisdiction Act of 1970, P.L. 673, 17 P.S. Sect. 211.402) as is

ours sustaining this demurrer and dismissing the case. *Love v. Temple University*, 422 Pa. 30, 220 A.2d 706 (1969), *Brandywine Area School District v. Vancor, Inc.*, 426 Pa. 448, 233 A.2d 240 (1967).

A three-judge panel of the Commonwealth Court held, however, that the exceptions should have been heard by the court en banc because the practice of filing exceptions to the order of a single judge is well established, promotes judicial efficiency and should be encouraged. We confess to being surprised by this decision since it arose in Blair County, which like Franklin County, has two judges. As we have already stated, the result is likely to produce delay and do nothing to promote judicial economy. Even if there is no division in the court en banc and the findings of the hearing court are sustained there has been an imposition on the time of the other litigant, counsel and the court and the case is no further along. And should the court en banc reverse the hearing judge, the other party is free to appeal and the same issues would be presented on such appeal.

Our Supreme Court said, in *Davis v. Pennzoil Company*, 438 Pa. 194, 264 A.2d 597 (1970), that a single judge has the right to grant summary judgment. Pa. R.C.P. 249a provides, "Except where the court is required to act en banc, a law judge may perform the function of the court . . . ". The court concluded that with the exception of where action en banc is mandatory, an act of an individual law judge is presumed to be the act of the full court.

Here we are passing on preliminary objections. We are not dealing in a situation where a decree in the nature of a decree nisi based on facts heard by the court might have been filed. Pa. R.C.P. 1028(c) states in the second sentence, "The court shall determine promptly all preliminary objections". Subsection (e) of the same rule and Pa. R.C.P. 1083 give the court discretion in allowing or not allowing an amendment to the pleading. We know of no statute or rule requiring that preliminary objections be considered by the court en banc and counsel have pointed to none. In writing the rules the Supreme Court mandated prompt action in deciding preliminary objections and we conclude there is no authority to file exceptions to a court's ruling on preliminary objections. It seems obvious that if a single judge has the power to grant summary judgment, he has the power exercised here to sustain a demurrer and dismiss the case since it amounts to the same thing.

There is another point, perhaps not so strong. If the residents wanted the preliminary objections passed on by a

court en banc, at the time of the argument they should have insisted on that right. Then it would have been convenient and no imposition except on the time of the second judge, assuming of course the right to argue the matter before such a court. We think there should be a corollary to the rule that a party may not sit by silent, take his chances on a verdict, then complain of a matter which, if error, could have been eradicated if brought to the court's attention, *Zeman v. Borough of Canonsburg*, 423 Pa. 450, 223 A.2d 728 (1966) and that a party may not appear for argument, argue his case before one judge without protesting and then contend he has the right to an argument before a court en banc. Supplementing the opinion we delivered from the bench, it is appropriate at this point to discuss the Court's action in sustaining the demurrer and dismissing the complaint. School boards are given broad discretion in order to administer the public school system by the Public School Code, Act of March 10, 1949, P.L. 30, 24 P.S. 5-501 and it is only when the board transcends the limits of its legal discretion that it is amenable to the injunctive processes of a court of equity. *Detweiler v. Hatfield Borough School District*, 376 Pa. 555, 104 A.2d 110 (1954).

Actions taken by the board are within their discretion unless the action was based on a misconception of law, ignorance through lack of inquiry into facts necessary to form an intelligent judgment or the result of arbitrary will or caprice. *Hibbs v. Arensberg*, 276 Pa. 24, 26, 119 A. 727, (1923). The heavy burden of proving this abuse rests with the party seeking the injunction. *Zebra v. School District of the City of Pittsburgh*, 449 Pa. 432, 296 A.2d 748 (1972).

In determining if the complaint has averred such an abuse of discretion, the Court in the case of *Muller v. Narberth School District.* 79 Mont.L.R. 131 (1961) stated at page 133:

> **The Court does not function as an advisor to municipal authorities, or as an arbiter in disputes such as the present one. Judicial hearing is warranted only where the well-pleaded, material and relevant facts and inferences establish fraud, official misconduct, arbitrary and capricious abuse of power or descretion by municipal officials.**

Plaintiffs do not allege any facts which would support the Court assuming jurisdiction in this matter.

We are presented only with a difference of opinion on how to best educate the children of the district. "Arbitrariness and caprice must not be confused with bona fide differences of opinion and judgment. The former are indices of motivation

and intention, while the latter, by definition, concede proper motivation and intention and differ only as concerns methods and modes of achievement and realization." *Dochenetz v. Bentworth School District*, 6 Pa. Commw. Ct. 173, 185 (1972); *Kennedy, et al. v. Ringgold School District*, 10 Pa. Commw. Ct. 191, 194 (1973).

Merely stating that the board has abused its power does not make it so. The courts are not super school boards with the authority to substitute their judgments for that of the duly elected members of the School Board. Thus, this demurrer had to be sustained and the case dismissed for pleading over could not present an issue which would give this Court jurisdiction.

ORDER OF COURT

NOW, February 27th, 1978, the exceptions to the Court's order sustaining the demurrer and dismissing the case are dismissed.

Editor's Note—
The foregoing case was appealed to the Commonwealth Court of Pennsylvania, to 406 C.D. 1978; see notice filed March 10, 1978.

FARMERS AND MERCHANTS TRUST COMPANY OF CHAMBERSBURG V. HESS, C.P. Franklin County Branch, Execution No. 1975-297, A.D. No. 1976-24

Sheriff's sale - proper cause for setting aside and ordering resale - Pa. R.C. P. 3132 Purchanser's Unilateral Mistake - Purchaser's Penalty for Negligence

1. Unilateral mistake of a purchaser in failing to understand the meaning of the expression "under and subject to" is proper cause for setting aside a Sheriff's sale and ordering resale of real property under Pa. R.C.P. 3132 where their mistake is asserted by petition prior to delivery of the Sheriff's deed, and where denial of their petition would impose an unconscionable, unreasonable and lasting financial hardship on them and unjustly enrich the defendant. However, a penalty will be exacted from the petitioners for their negligent mistake which led to this factual situation and this litigation by having them pay the costs of the Sheriff's sale, plus all interest accrued on the plaintiff bank's judgment and on the mortgage during the period of time petitioners secured the stay of these proceedings, plus a sum for expenses and counsel fees of defendant in connection with this litigation.

Lawrence C. Zeger, Esq., Attorney for Petitioners

Richard K. Hoskinson, Esq., Attorney for Plaintiffs

Thomas J. Finucane, Esq., Attorney for Defendant

OPINION AND ORDER

KELLER, J., January 6, 1978:

This proceeding is before the Court on the petition of William D. Rotz and Twyla K. Rotz, his wife, petitioners, to set aside a sheriff's sale of real estate owned by Ronald D. Hess, defendant, and order the refund to petitioners of their downpayment of $7,700.00.

FINDINGS OF FACT

1. On January 26, 1977, the Farmers and Merchants Trust Company of Chambersburg, plaintiff, filed praecipes for writs of execution to Nos. 24 - 1976 E.D. and 297 - 1976 E.D. directing the Sheriff of Franklin County, Penna. to levy upon and sell specifically described real estate of the defendant located in Peters Township, Franklin County, Penna. and his personal property to collect $24,408.05 with interest from date and costs and $1,758.89 with interest from date and costs.

2. Pursuant to the praecipes writs were issued and the levies made.

3. The plaintiff realized $9,500.00 toward the total sum due from defendant by the private sale of certain personal property of the defendant prior to the sheriff's sale of defendant's real estate.

4. Pursuant to the writs of execution and advertisements the Sheriff conducted an execution sale of the defendant's real estate located in Peters Township, Franklin County, Penna. on March 25, 1977.

5. The defendant had granted a mortgage on the said real estate to the Mechanics' Building and Loan Association. The lien of the mortgage was a first lien in the amount of $15,345.64 as of March 25, 1977.

6. Within a week of March 25, 1977, the petitioner William D. Rotz inquired at the sheriff's office as to the amount "against" the defendant's real estate and was advised of the total amount of the plaintiff's executions and that he should secure the services of an attorney. At the time of the inquiry neither the Sheriff nor his deputies had been made aware of the existence of the mortgage lien.

7. Immediately prior to the sale an officer of the Mechanics' Building and Loan Association delivered a letter