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Indictment and Information--Kentucky Constitutional Limits and Proposed Changes in the Use of the Information

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The second method also appears to be more logically reasoned in that it is based upon sound agency principles, whereas the first method is based upon fiction.

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INDICTMENT AND INFORMATION— KENTUCKY CONSTITUTIONAL LIMITS AND PROPOSED CHANGES IN THE USE OF THE INFORMATION

At the present time Kentucky, by statute, allows the use of the information in circuit courts for the prosecution of certain misdemeanors, and for all offenses within the jurisdiction of courts inferior to the circuit court.[1] The purpose of this paper is to ascertain the extent to which the information may be used in Kentucky and to examine its possible future uses.

Analysis of Constitution

The Kentucky Constitution § 12 provides:

> No person, for an indictable offense, shall be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, or by leave of court for oppression or misdemeanor in office.

Since the exceptions within this section are extremely limited, no particular importance is attached to them in the development of this paper.

This provision, on its face, would appear to prohibit the use of the information in *all* cases in which the indictment *may* be used, and since the present use of the information[2] overlaps the permitted uses of the indictment,[3] it would appear that the present use of the information is partly unconstitutional. However, such a literal interpretation has not been adopted by the Kentucky Court of Appeals. The court has wisely limited the application of the constitutional provision which otherwise would have tied the hands of a prosecut-

[1] Ky. Rev. Stat. § 455.080 (1959) provides in part:
> In circuit court, persons charged with misdemeanors for which the highest penalty that may be imposed is a fine of one hundred dollars and imprisonment for fifty days may be prosecuted . . . by information filed by the Commonwealth's attorney or county attorney in the circuit court. In courts inferior to circuit courts, any offense within the jurisdiction of the court may be prosecuted on [an] . . . information filed before the judge or justice.

[2] Ky. Rev. Stat. § 455.080 (1959).

[3] Ky. Crim. Code § 9 (1959). The indictment *or* information may be used in the circuit courts for offenses having punishments of not more than one hundred dollars and imprisonment for fifty days.

ing attorney in the inferior courts in situations where a complaining witness refused to swear out a warrant.

In *Lakes v. Goodloe*[4] the court said that it had consistently held that the term "indictable offense," as used in section 12 of the Kentucky Constitution, has reference to common-law offenses or to statutory offenses, the punishments for which are "infamous"; and that "infamous" punishment in this jurisdiction is death or imprisonment in the penitentiary of the state following a conviction of a *felony.* There are no Kentucky cases which conflict with the views expressed in the *Lakes* case.

Having found that section 12 applies to common-law and statutory felonies, the constitutional limits on the use of the information may be ascertained by reference to a statutory definition of offenses. Kentucky defines public offenses as follows:

> Offenses are either felonies or misdemeanors. Offenses punishable with death or confinement in the penitentiary are felonies. All other offenses, whether at common law or made so by statute, are misdemeanors.[5]

Thus, it may be said that *all* misdemeanors in Kentucky may constitutionally be prosecuted by information, since section 12 of the Kentucky Constitution only prohibits its use in cases involving felonies.[6] The present limits imposed on the use of the information in prosecuting misdemeanors in Kentucky are those imposed by statute upon the circuit court.[7]

Expanding The Use of The Information

Prosecution by information is more efficient than prosecution by indictment. It is cheaper, it saves time, and it properly centers responsibility upon the prosecutor for actions which are largely under his control.[8] Even where the indictment is used, the Grand Jury may serve merely to rubber stamp the opinion of the prosecuting attorney.[9]

[4] 195 Ky. 240.252, 242 S.W. 632, 639 (1922).

[5] Ky. Rev. Stat. § 431.060 (1959); See also Ky. Crim. Code §§ 5-7 (1959).

[6] Lakes v. Goodloe, 195 Ky. 240, 242 S.W. 632 (1922). The holding in the Lakes case on this point finds support in the following cases: Baldwin v. Commonwealth, 314 Ky. 369, 235 S.W. 2d 771 (1951); Louisville & N. R. R. v. Commonwealth, 175 Ky. 372, 194 S.W. 315 (1917); Ford v. Moss, Judge, 124 Ky. 288, 98 S.W. 1015 (1907); Louisville & N. R. R. v. Commonwealth, 112 Ky. 635, 66 S.W. 505 (1902); Lowry v. Commonwealth, 18 Ky. L. Rep. 481, 36 S.W. 1117 (1896).

[7] Ky. Rev. Stat. § 455.080 (1959); See Singleton v. Commonwealth, 306 Ky. 454, 208 S.W. 2d 325 (1948) and Commonwealth v. Lay, 202 Ky. 683, 261 S.W. 7 (1924).

[8] Miller, "Informations or Indictments in Felony Cases," 8 Minn. L. Rev. 379 (1924); Moley, "The Initiation of Criminal Prosecutions by Indictment or Information," 29 Mich. L. Rev. 403 (1931); but Cf. Dession, "From Indictment to Information-Implications of the Shift," 42 Yale L. J. 163 (1932).

[9] Potts, "Waiver of Indictment in Felony Cases," 3 Sw. L. J. 437, 447 (1949).

In days when there was no organized police force and no prosecuting attorney, the grand jury rendered an invaluable service in initiating prosecutions after a crime was committed. Today, these conditions do not exist. By virtue of an organized police force, prosecuting attorney and greater communication facilities, most of the cases considered by the grand jury are ones in which arrests have already been made, preliminary hearings have been held, and the prisoners are being held in jail or have been released on bail.[10]

Generally a prosecuting attorney of any training and judgment would not "be so apt to respond to public hysteria or to private importunity as would the grand jury."[11] Persons related to, or closely connected with the prosecutor or the accused may be on the grand jury as may persons who have a strong personal opinion or pecuniary interest in the matters to be dealt with. Such persons should not be on grand juries, but frequently are.

Having justified expanding the use of the information, the problem arises as to what extent it may be used in felony cases. While section 12 of the Kentucky Constitution gives a defendant the right to be prosecuted by indictment in a felony case, there exists a possibility that he might waive this right and be tried on an information for a felony.

In the federal courts, Rule 7(a) and (b)[12] permits prosecution of non-capital felonies by information, if the defendant, "after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment."[13] This rule has been held to be constitutional,[14] even though the Fifth Amendment to the Constitution of the United States provides that "No person shall be held to answer to a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury."[15]

A majority of states now permit prosecution of indictable offenses by information or permit waiver if felonies are required to be prosecuted by indictment.[16] The arguments presented above in support of the information are equally applicable to permitting waiver of indictments.[17] It may further be said that to refuse waiver may work an enormous hardship on an indigent person who is unable to

[10] Miller "Informations or Indictments in Felony Cases," 8 Minn. L. Rev. 379, 389 (1924).
[11] Id. at 401.
[12] Fed. R. Crim. P. (1946).
[13] Fed. R. Crim. P. 7 (b) (1946).
[14] Barkman v. Sandford, 162 F. 2d 592 (5th Cir. 1947).
[15] For discussion of other constitutional rights which may be waived in federal courts see United States v. Gill, 55 F. 2d 399 (D. N. M. 1931); for the dominant rationale in such cases see Patton v. United States, 281 U. S. 276 (1930).
[16] Note, 1 Texas Law and Leg. 22, n. 25 (1947).
[17] Note, 1 Texas Law and Leg. 22 (1947).

make bail and must be kept in jail until the grand jury convenes, which may be as seldom as twice a year in some areas of the country.

However, some states refuse to permit waiver of indictment. In *People ex rel. Battista v. Christian*[18] the New York Court of Appeals held a statute permitting waiver of indictment void as being contrary to a state constitutional provision requiring that no person should be held to answer for an infamous crime unless on presentment or indictment of a grand jury.[19] In holding that the right to an indictment could not be waived, the court said:

> [T]he rule can be deduced that waiver is not permitted where a question of jurisdiction or fundamental rights is involved and public injury would result. A privilege, merely personal, may be waived; a public fundamental right, the exercise of which is requisite to jurisdiction to try, condemn, and punish, is binding upon the individual, and cannot be disregarded by him. The public policy of the state as expressed in the Constitution takes precedence over his personal wish or convenience. . . .[20]

Kentucky apparently has chosen to follow New York in this area of the law, for in *Singleton v. Commonwealth*[21] the Kentucky Court of Appeals seemingly reached a similar conclusion in an opinion which relied on the *Christian* case for support. *Singleton* merely involved waiver in a *misdemeanor* case in the circuit court for an offense that statutorily could only be prosecuted by indictment.[22] However, it is believed that this opinion would be followed all the more in a case involving waiver of an indictment in a *felony* case where prosecution was sought on an information.

Even though the information might not constitutionally be extended to cover prosecution of felonies, its use may be expanded to cover more or all misdemeanors prosecuted in the circuit courts under the present Kentucky Constitution. It should be noted that the present limits on the use of the information in circuit courts are the same as those enacted in 1893[23] when the use of the information was first permitted in Kentucky. In 1893 the concurrent jurisdictional limits of circuit and inferior courts were the same as the limits imposed on the information.[24] It apparently was intended that use of the information be allowed in circuit courts only to the extent it was permitted in the inferior courts. Since that time, the con-

[18] 249 N.Y. 314, 164 N.E. 111 (1928); Comment, 24 Ill. L. Rev. 319 (1929).
[19] N. Y. Const. art. 1, § 6.
[20] People ex rel. Battista v. Christian, 249 N.Y. 314, 315, 164 N.E. 111, 112 (1928).
[21] 306 Ky. 454, 208 S.W. 2d 325 (1948).
[22] Commonwealth v. Lay, 202 Ky. 683, 261 S.W. 7 (1924).
[23] Ky. Acts (1893), ch. 182 § 15.
[24] Ky. Acts (1893), ch. 221 § 67 (Justices' Courts); Ky. Const. § 143 (Police Courts); Ky. Crim. Code § 13(6) (1959) (County Courts).

current jurisdictional limits of inferior courts have been extended to "five hundred dollars or twelve months."[25] This alone might justify an extension in the use of the information to this extent, at the circuit court level.

In view of the reasons discussed above in favor of the information, it is felt that its use should be extended to cover all prosecutions for misdemeanors in circuit courts. Such an extension would relieve the grand jury of hearing cases involving misdemeanors where the defendant desires to plead guilty or where the prosecutor has sufficient evidence to act without the approval of the grand jury. To this extent the grand jury would have more time to investigate public officials and the management of public institutions, which are perhaps its most important functions today.[26]

Wilbur D. Short

[25]Ky. Rev. Stat. § 25.010 (1959); Ky. Rev. Stat. § 26.010 (1959).
[26]The powers of the grand jury to investigate are set forth in Ky. Crim. Code § 102 (1959).