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Pecuniary Interest of Justices of the Peace in Kentucky; The Aftermath of Tumey v. Ohio

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RENEWED INTEREST in Kentucky justice of the peace courts was created when the Kentucky Court of Appeals in its 1956 opinion in *Roberts* v. *Noel*[1] reached the conclusion that the United States Supreme Court in its 1927 decision in *Tumey* v. *Ohio*[2] intended to, and did, outlaw all judicial systems in which the trial judge is compensated solely by fees paid by convicted persons. This decision has direct application to Kentucky justices of the peace who are compensated in this manner.[3] The Court will not issue a mandate to enforce its ruling until the expiration of the terms of incumbent justices; however, it has ordered that, before such officials may proceed to try cases, they must inform defendants of their right to demand trial before an impartial court. On a national level, too, the decision has signal importance in that it is the first decision of a state court of last resort, at least so far as

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[1] 296 S.W. 2d 745 (Ky. 1956).

[2] 273 U.S. 510, 47 S. Ct. 437 (1927).

[3] Since the Roberts case was decided, some county judges in the more populous counties have appointed judges called trial commissioners to conduct misdemeanor cases in the county court. These officers are lawyers and are compensated by salary. They are required to make reports of proceedings in their courts to the county judge. The Court of Appeals gave apparent sanction to the office of trial commissioner in its recent decision in Brown v. Hoblitzell,—S.W. 2d—(Ky. 1956).

Some such arrangement as the trial commissioner system does seem necessary, because the Constitution (sec. 135) forbids creation of courts save those established by it. Trial commissioners, appointed by and responsible to the county judge, seem questionable, however, in view of the fact that the Constitution authorizes the election of only one judge for each county. See Judge Sims' dissenting opinion in Brown v. Hoblitzell, supra. See also Meyers v. Walter, 253 S.W. 2d 595 (Ky. 1952). County judges in the more populous counties ought to be given specific constitutional authority to appoint judges to hear both misdemeanor and civil cases in the county court. Such judges should be required to be lawyers and should be compensated by salary.

the author is aware, voiding entirely the criminal jurisdiction of justice courts. It seems proper, therefore, to re-examine the Supreme Court's decision in the *Tumey* case, together with subsequent interpretations of the decision by the Kentucky Court of Appeals and other state supreme courts.

The Tumey Decision

Those who question the constitutionality of misdemeanor cases conducted in justice courts presided over by justices having a pecuniary interest in their result generally rely upon the United States Supreme Court's decision in *Tumey* v. *Ohio.* What this case holds is not exactly clear; the Supreme Court itself has never given adequate explanation of it; and a reading of various state supreme court opinions interpreting it reveals considerable disagreement concerning its actual meaning.

In the case itself, one Tumey was tried and convicted, on a charge of possessing intoxicating liquor, in a mayor's court in North College Hill, Ohio, after his protest that he could not receive a fair trial because of the mayor's financial interest in his conviction. He was tried before the mayor without a jury, without opportunity for retrial, and with review of his case confined to questions of law. In the event of acquittal, the mayor received no compensation. In this particular case, his fees and costs amounted to $12. The village of North College Hill, of which the mayor was chief executive officer, was also in need of revenues, and half of the fines imposed by the mayor's court went to the village treasury. The operation of the mayor's "liquor court," which had county-wide jurisdiction, was evidently intended to provide increased village revenue. For the purpose of enforcing the prohibition law—and also increasing village revenue—the city council was empowered to use any part of the fines going to the city treasury to hire attorneys, detectives, or secret service officers.

In its opinion, the Supreme Court noted that, under the common law, the slightest pecuniary interest of any officer, judicial or quasi-judicial, in resolving the subject matter which he was to decide rendered the decision voidable. Finally, it stated, "From this review, we conclude that a system by which an inferior judge is paid for his services only when he convicts the defendant has not become so embedded by custom in the general practice either

at common law or in this country that it can be regarded as due process of law, unless the costs usually imposed are so small that they may be properly ignored as within the maxim *de minimis non curat lex.*" The Court also stated, "Every procedure which would offer a possible temptation to the average man as judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance, nice, clear and true between the State and the accused, denies the latter due process of law."

While the Supreme Court recognized Ohio's authority to create courts and to establish their jurisdiction, it held that such recognition did not at all affect the question of whether the state had by law vested judicial power in one, who by reason of his interest both as an individual and as chief administrative officer of the village, was disqualified to exercise it. Tumey, the Court said, still had the right to an impartial judge. He had seasonably raised an objection and was entitled to stop the trial because of the disqualification of the judge and because of his official motive to convict.

Interpretation of the Tumey Case by Courts Outside Kentucky

Since the *Tumey* decision, attempts have been made in several states to invalidate convictions in justice courts where it appeared that justices were financially interested in returning convictions. The majority of such efforts have proved unsuccessful, however, because most state supreme courts hold that circumstances present in such cases are unlike those of the *Tumey* case. Some courts hold that the right to demand a jury trial and the right of appeal with a trial *de novo* removes a case from the *Tumey* class.[4] According to such courts, if a fair trial is obtainable anywhere within a state judicial system due process of law can not be said to be denied. In some of these cases there also existed the procedural point that exhaustion of all state remedies is prerequisite to appeal to federal courts.[5]

Other courts hold that, even though a justice be disqualified

[4] Ex parte Steele, 220 N.C. 685, 18 S.E. 2d 132 (1942); Ex parte Lewis, 47 OCR 72, 288 P. 354 (1930); Ex parte Meeks, 20 F. 2d 543 (1927); Hill v. State, 174 Ark. 886, 298 S.W. 321 (1927); Tari v. State, 117 Ohio St. 481, 159 N.E. 594 (1927); Brooks v. Potomac, 149 Va. 427, 141 S.E. 249 (1928).

[5] See particularly Ex parte Meeks, 20 F. 2d 543 (1927).

because of financial interest, in the absence of some constitutional or statutory requirement that courts be presided over by disinterested judges, a judgment rendered by him is not void, but voidable only, and has the effect of legality until declared illegal in a proper proceeding.[6] Such judgment cannot be attached collaterally nor challenged on a writ of habeas corpus.[7] Still other courts, starting from the position that constitutional rights may be waived provided their waiver is not contrary to public policy, hold that, in the absence of some constitutional or statutory provision, failure of a defendant to make seasonable objection to trial before a disqualified judge, when he has or is presumed to have full knowledge of the disqualification, constitutes a waiver of his right to trial by a disinterested judge and estops him from raising the disqualification question on appeal.[8] It should be pointed out that, in its opinion in the *Tumey* case, the United States Supreme Court twice noted that Tumey had raised the disqualification question prior to his trial. But a categorical answer cannot be given to its influence on the decision reached by the Court. Nevertheless, several state supreme courts interpreting and applying the *Tumey* decision lay considerable stress upon it.

Although in most instances, state supreme courts have upheld the constitutionality of their own justice of the peace systems by distinguishing them from that prevailing in Ohio at the time of the *Tumey* decision, in some instances federal and state courts have used the decision in the *Tumey* case to void or outlaw convictions in justice courts. In 1927, one federal district court in the case of *Ex parte Baer*[9] released on a writ of habeas corpus a defendant who had been convicted and given a fine and jail sentence in a Kentucky county judge's court for liquor-law violations. Here, the court held that the defendant had been denied due process of law due to the judge's financial interest in the result of the trial. He had previously appealed to a state court for the writ, but it had been denied. He did not, prior to his trial, raise

[6] Tari v. State, 117 Ohio St., 481, 159 N.E. 594 (1927); City of Grafton v. Holt, 58 W. Va. 182. 52 S.E. 21 (1905); White v. Lane, 153 N.C. 14, 68 S.E. 895 (1910); Ex parte Steele, 220 N.C. 685, 18 S.E. 2d 132 (1942).

[7] Ex parte Steele, 220 N.C. 685, 18 S.E. 2d 132 (1942).

[8] Bryant v. State, 146 Miss. 533, 112 So. 675 (1927); State v. Simmons, 117 W. Va. 326, 185 S.E. 417 (1936); Tari v. State, 117 Ohio St. 581.159 N.E. 594 (1927); Ex parte Steele, 220 N.C. 685, 18 S.E. 2d 132 (1942); Ex parte Meeks, 20 F. 2d 543 (1927); Adams v. Slavin, 225 Ky. 135, 7 S.W. 2d 836 (1928).

[9] 20 F. 2d 912 (1927).

objection to the judge's disqualification, nor did he, before seeking the federal writ, exhaust his state remedies by appealing to the state's highest court.[10] The court stated, however, that he could not be expected to know the justice's disqualification and, consequently, held that he had not waived it. Shortly after the *Baer* case, another federal district court in the case of *Ex parte Meeks*[11] refused to issue a writ of habeas corpus to release from state jurisdiction a defendant convicted under circumstances similar to those in the *Baer* case, on the ground that, even if the principles announced in the *Tumey* case were applicable, the defendant had not objected to the judge's disqualification at the time of trial, nor did he appeal to the circuit court where a trial *de novo* before a disinterested judge was available. These two decisions are at direct variance with each other, with the latter decision being the most commonly accepted interpretation of the *Tumey* case.

A significant state decision interpreting *Tumey* v. *Ohio* is *Williams* v. *Brannen*,[12] decided by the West Virginia Supreme Court of Appeals. Here, the Court awarded a writ of prohibition to a defendant to prevent his trial before a justice who, according to his allegations, would have a pecuniary interest in convicting him. The justice drew his compensation from costs paid by defendants when convicted and from a fund accumulated by fines assessed in his court. He was compensated by the latter method in cases where he rendered a verdict of acquittal and in cases where costs for any proper reason could not be collected from those adjudged guilty. The implication of such a compensation system was that the justice was required to convict in an appreciable number of cases in order to create a fund to secure payment of fees in cases in which he collected no costs. The Court refused to make fine distinctions between the facts in this case and those in the *Tumey* case, holding them inconsequential in view of the Supreme Court's pronouncement in the *Tumey* case that, "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant,

[10] For these two reasons the court's issuance of the writ has been criticized as being unsound in principle. See note in 14 Va. Law Rev. 483-484 (April 1928). See also Tari v. State, 117 Ohio St. 481, 159 N.E. 594 (1927).

[11] 20 F. 2d 543 (1927).

[12] 116 W. Va. 1, 178 S.E. 67 (1935).

or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law." It held that due process of law required that a justice's compensation must not depend upon a fund created by his own convictions and, consequently, declared unconstitutional the West Virginia statutory system of compensating justices. It rejected arguments that right to demand trial by jury and right of appeal with trial *de novo* made conditions in this case different from those in the *Tumey* case. Trial by jury, it said, meant trial before a jury under the direction of a disinterested judge, and right of appeal did not meet the situation because a defendant would ordinarily incur less costs by paying a moderate fine than by paying appeal costs. Further, the Court held that an accused was entitled to a fair and impartial trial in the first instance.

The decision of the West Virginia Court in the *Williams* case declaring unconstitutional the West Virginia statutory system of compensating justices was further explained—and, it seems, its impact lessened—in the court's later holding in *State* v. *Simmons*.[13] The pertinent question in the *Williams* case, it said, concerned the qualification of the justice, not the jurisdiction of his court which, according to it, remained unimpaired. Accordingly, it held that, when a defendant did not raise in the trial court the question concerning the justice's disqualification, it was deemed waived and could not be raised for the first time on appeal. A judgment rendered under such circumstances, it said, was voidable only, not void. Thus it appears that, if the holding in the *Williams* case is considered in the light of the holding in the *Simmons* case, the former case is not at all unique but merely states in somewhat different language what other courts have said, namely, that a justice is disqualified to act when his method of compensation gives him a direct interest in influencing the result of a trial. But disqualified justices actually conduct cases, and the important unresolved question concerns the legality of this practice.

Another case meriting consideration in connection with the *Tumey* decision is *Ex parte Kelly*,[14] decided by the Texas Court of Criminal Appeals. Here, the court reversed a conviction rendered in a justice court on the grounds that it violated both

[13] 117 W. Va. 326, 185 S.E. 417 (1936).
[14] 111 Texas Crim. 54, 10 S.W. 2d 728 (1928).

the United States and Texas Constitutions. Under Texas law, justices were compensated only in those cases in which they found defendants guilty. Right of appeal, moreover, was limited to cases wherein the fine imposed exceeded $100. Although the *Tumey* decision had considerable bearing in the *Kelly* case, perhaps the most significant factor influencing the Court's decision was the fact that the *Texas Constitution* (Art. V. sec. 11) forbids a judge to sit in any case wherein he has an interest. For this reason, the Court held the justice disqualified, and noted that, as a general rule, acts of a judge subject to a constitutional disqualification are void. In a subsequent decision,[15] the Texas Court stated that, in the *Kelly* case, it did not outlaw the jurisdiction of justice courts; it merely held that its legislature, by providing that fees should be payable to justices only in cases wherein they convicted defendants, had disqualified justices who attempted to assess and collect such fees. It stated specifically that ". . . if the duly qualified justice should see fit to exercise his prerogative to try such cases without compensation, it would seem plain that there would be thus no disqualification . . ."

In summary, most courts interpret the *Tumey* principles primarily to disqualify judges from conducting cases wherein they have a pecuniary interest; but the jurisdiction of courts presided over by such judges is left unaffected; and, except in instances where constitutional or statutory provisions require disinterested judges, they recognize that such judges, when waiver to their disqualification exists, may render legal judgments. Further, some courts hold that due process of law is not denied in cases conducted by judges having an interest in the outcome provided appeals may be taken from judgments rendered in them.

Kentucky Justice Courts

Before considering the various interpretations of the *Tumey* decision made by the Kentucky Court of Appeals, it is necessary to discuss the Kentucky justice and the functioning of his court. The Kentucky justice has existed as a constitutional officer since the beginning of the Commonwealth. The present *Constitution* authorizes the voters of each county to elect on a district basis

[15] Ex parte West, 111 Texas Crim. 129, 12 S.W. 2d 216 (1928).

from three to eight of these officials.[16] In addition to being a judicial officer, the justice in all save 13 counties, serves as a member of the fiscal court, the chief governing body of the county. He receives a *per diem* for serving on the fiscal court and fees for his judicial duties.[17]

Kentucky has 678 justices of the peace, but the vast majority are inactive as judicial officers.[18] They function primarily in urban counties where the county judge's time is too occupied with county administrative problems to permit him to hear cases, in a considerable number of county-seat towns, and by custom in certain rural counties, situated particularly in the mountain area of the state. During the 1954-55 fiscal year, 40,651 convictions in misdemeanor cases were returned by 161 justices situated throughout the state. Some justices were much more active than others. Justice courts functioning in 18 of Kentucky's 120 counties returned 23,101 convictions or 57 per cent of the total number. Disregarding county boundaries, it was found that 63 justices situated in 34 counties returned 26,026 convictions or 64 per cent of the total. On the other hand, 47 justices each returned ten or less convictions, with 12 of this number returning only one conviction each.

No legal training is required for holding the office of justice; anyone meeting the usual age and residence requirements may fill it; and in actual practice, justices usually possess but little formal education. Their courts are frequently criticized for their failure to maintain the dignity and decorum so essential to the judicial process.

Kentucky justice courts are courts of record and possess jurisdiction coextensive with the county.[19] They are empowered by statute to conduct preliminary examinations in all felony cases except murder cases and to hear minor civil and criminal cases, their civil jurisdiction extending to all cases in which the value in controversy does not exceed $200 and their criminal jurisdiction extending to cases in which the punishment is limited to a fine of

[16] Sec. 142.

[17] Baldwin's Kentucky Revised Statutes Annotated, 1955 (Hereafter referred to as Baldwin's KRS, 1955), secs. 64.220, 64.240, 64.530.

[18] The author is indebted to Mr. James T. Fleming of the Kentucky Legislative Research Commission for the original compilation of statistics on the 1954-55 fiscal-year activities of Kentucky justices of the peace.

[19] Baldwin's KRS, 1955, sec. 25.660; Constitution of Kentucky, sec. 142.

$500 or imprisonment for one year, or both.[20] (Civil cases are conducted primarily by justices in a few urban counties and will not be discussed in this article). Justice courts, along with county and quarterly courts, the latter courts conducted by county judges, have exclusive jurisdiction to hear misdemeanor cases wherein the punishment imposed does not exceed a fine of $20.[21] When a jail sentence or a fine of $20 or above is imposed, appeal may be taken to the circuit court.[22] In actual practice, however, justice courts possess final jurisdiction in most cases they conduct. This seems evidenced by the fact that during the fiscal year 1954-1955, only seven of the 63 justices returning 100 or more convictions each imposed fines averaging more than $20. Most persons appearing before justice courts are without counsel, and most cases are conducted without juries. But defendants may demand jury trials in all cases in which the punishment imposed by statute is a jail sentence or a fine above $16.[23]

The Tumey Decision and the Kentucky Court of Appeals Prior to the Roberts Decision

In the same year that the United States Supreme Court decided the *Tumey* case, the constitutionality of the Kentucky justice of the peace system was challenged before the Kentucky Court of Appeals when the latter court had presented to it in the case of *Wagers* v. *Sizemore*[24] the question of whether a trial before a Kentucky justice, who was financially interested in the result of the trial, denied a defendant due process of law. In the case, the defendant had been tried and convicted on a charge of obstructing a public highway after his protest that, due to the justice's financial interest in convicting him, he could not receive a fair and impartial trial. The justice's total fees in this instance were $6. Since the fine imposed was only $10, the court's judgment was non-appealable. The defendant was tried before a jury, but the justice argued the case to the jury and directed it to impose a fine. The Court of Appeals, after noting these facts, reversed the conviction, holding itself bound by the decision in the

[20] Russell's Kentucky Practice, Criminal Code, 1953, sec. 49; Baldwin's KRS, 1955, secs. 25.010, 25.610.
[21] Baldwin's KRS, 1955, sec. 25.010.
[22] Russell's Kentucky Practice, Criminal Code, 1953, sec. 362.
[23] Ibid. sec. 331.
[24] 222 Ky. 306, 300 S.W. 918 (1927).

Tumey case. It noted that, prior to trial, the defendant had raised objection to the justice's disqualification and held that since he had done so, the same objection could be made before the Court of Appeals.

In order to remedy the situation created by the *Tumey* and *Wagers* cases, the Kentucky General Assembly enacted legislation placing the compensation of the county judge, who, like justices, had until this time been compensated in misdemeanor cases by fees, on a salary basis.[25] Legislation was also passed placing the compensation of justices in Jefferson County, containing the City of Louisville, on a salary basis.[26] In a suit brought under the Declaratory Judgment Act of 1922 to test the constitutionality of legislation altering the method of compensating the county judge, the Court of Appeals also had presented to it in the case of *Adams* v. *Slavin*,[27] the question of whether justices of the peace, in the absence of seasonable objection to their disqualification, had the right to preside at misdemeanor trials. In its opinion, the Court reviewed its decision in the *Wagers* case, stating that even if the cost statute involved in that case was invalid, the justice had an undoubted right to conduct the trial because he was not then a disqualified judge, being entitled to no costs or a part of the fine in the event of conviction.[28] (This same conclusion it should be recalled, was reached by the Texas Court of Criminal Appeals). In such an instance, it said, the judgment would not be void. The court next noted that the Supreme Court in the *Tumey* case expressly recognized the right of a state legislature to vest jurisdiction in state courts. Finally, it concluded that, "the sole ground on which both the *Tumey* and *Wagers* cases rest is that a defendant has the right to object to being tried by a judge who is financially interested in his being convicted, and that to try him after such objection is to deprive him of the protection of the due process clause of the Fourteenth Amendment." It then raised the question of whether a defendant was also deprived if he did not object to trial. It answered that constitutional rights, at least in misdemeanor cases, may be waived and stated, "We

[25] Kentucky Acts of 1928. Ch. 22.
[26] Kentucky Acts of 1932. Ch. 142.
[27] 225 Ky. 135, 7 S.W. 2d 836 (1928).
[28] This assumes, of course, that an officer can legally neglect to assess and collect a legislative prescribed fee. For further comment on this question see below, "The Roberts Decision."

are of the opinion that where a defendant on a final trial for a misdemeanor fails to seasonably [sic] object to being tried by a justice of the peace, the latter may try him, and in the event of conviction tax the costs against him, as has been the custom for so many years in this Commonwealth."

The latter statement, until 1956 when the Court of Appeals, in the *Roberts* case held justice courts, save those in Jefferson County, to be without jurisdiction to conduct misdemeanor cases, summed up Kentucky law with respect to misdemeanor trials in justice courts. Justices of the peace were really standing disqualified judges; and, as stated by the Kentucky Court of Appeals, they could not collect any fee whatever from a defendant in a misdemeanor case except through "agreement, acquiescence and grace."[29] If an accused protested trial before a justice, the latter was required to transfer his case to an impartial court having jurisdiction to hear it.[30] In the event a justice refused to transfer a case after due protest had been made, the proper remedy was an application to the Court of Appeals for a writ of prohibition to prevent trial.[31] Unfortunately, the vast majority of individuals brought before justice courts had no legal counsel and were themselves too little aware of their legal rights to be able to assert them; and, consequently, such rights were in practice generally rendered meaningless.

The Roberts Decision

By its decision in the *Roberts* case,[32] the Court of Appeals appears to have brought to an end the justice of the peace system as it has functioned in the past. This case originated out of an arrest for a public drunkeness charge. After the arrest, the defendant posted bond for appearance at his trial, but at the time when it was scheduled, he did not appear, being represented, however, by an attorney who objected to the jurisdiction of the court on the ground of the pecuniary interest which the justice had in the result of the trial. (Ordinarily, it seems that objection should have been made, not to the jurisdiction of the court, but to the judge's disqualification.) The justice overruled the objec-

[29] Shaw v. Fox, 246 Ky. 342, 55 S.W. 2d 11 (1932).
[30] Martin v. Wyatt, 225 Ky. 212, 7 S.W. 2d 1048 (1928).
[31] See Pinkleton v. Lueke, Williams v. Same, 265 Ky. 84, 95 S.W. 2d 1103 (1936).
[32] 296 S.W. 2d 745 (Ky. 1956).

tion for the reason that it was not supported by affidavit of the defendant, and stated that he would waive his costs and fees. He then entered an order forfeiting the appearance bond, empanelled a jury, and tried the defendant *in absentia.* The jury found the defendant guilty and fixed his fine at $20. The defendant thereupon appealed to the circuit court for an injunction to restrain enforcement of the judgment; and the injunction being granted, the justice appealed to the Court of Appeals.

The Court, it seems, could very well have decided the case upon grounds other than those on which it actually did. It could have merely sustained the injunction granted by the circuit court; or, on the other hand, it could have held that, inasmuch as the justice in the trial court had waived his costs and fees, no pecuniary interest existed and he therefore was within his legal rights in trying the case. And, indeed, if costs and fees may legally be waived, the latter argument seems logical. Not to be overlooked, moreover, is the fact that the judgment, being a fine of $20, was appealable to the circuit court where a trial *de novo* was available. The Court, however, rejected this argument, stating that an accused is entitled to a fair trial in the first instance. Instead, therefore, of deciding the case by following any of the alternatives noted, the Court stated, "We feel that the time has come to reconsider our interpretation and application of the decision in the Tumey case, as set forth in *Adams* v. *Slavin* . . ." It said that, in the *Adams* case, it had construed the *Tumey* opinion, not as declaring the system unconstitutional or as depriving absolutely of jurisdiction a judge who has a pecuniary interest in the outcome of a case he conducts, but only as recognizing the constitutional right of a defendant to object to trial before a disqualified judge. It added, however, that upon a re-examination of the opinion in the Tumey case, it was led to conclude that the Supreme Court "intended to, and did, declare the entire system unconstitutional." It stated that "no justification exists for perpetrating a system that is designed and calculated to deprive persons of due process of law." It could see no merit, moreover, in its previous holding in the case of *Adams* v. *Slavin* that an accused may waive his constitutional right to a trial conducted by an impartial judge. Here, it declared, "To say, as we did in the *Slavin* case, that the right to trial by a judge free from prejudice may be waived is unrealistic

for as pointed out in Ex parte Baer, 20 Fed. 2d 912, the ordinary person is not aware of his right to object to the jurisdiction; he assumes that the court before which he has been is a lawfully constituted one." (From the language of this statement, it seems that the Court confuses waiver of jurisdiction with waiver of a judge's disqualification. The former can not be waived, but the latter, at least in some instances, can be. It should be added, moreover, that there is authority for the view that justice courts, such as Kentucky's, are lawfully constituted.[33]

The Court recognized that argument might be made for the position that the only unconstitutional feature of the justice of the peace system was the cost statute, and that the jurisdiction of justice courts to try cases without compensation remained. It stated, however, that although this view had been accepted as sound by former Kentucky Courts, the Court as it was now constituted, believing that the legislature did not intend justices to serve without compensation, disagreed. It admitted that the legislature had authority to require justices to try misdemeanor cases without compensation; however, it held that the present cost statute and the statute conferring jurisdiction upon justice courts must be read together, stating that a system under which justices served without compensation could occasion such evils as fee-splitting and would not lead to a fair administration of justice. There is further support for the Court's position if the view is taken that county officers, including justices of the peace, can not legally waive legislative prescribed fees for performing official duties. This view is based on the fact that, all revenues, including fees, accruing to a particular office in excess of those actually required to operate it, belong to the county. The Court ended its opinion by expressly overruling its former ruling in the *Adams* case and by holding that, until some other method of compensation is provided, justices of the peace, save those in Jefferson county, are without jurisdiction to conduct criminal cases. A mandate making this ruling effective, however, will not be issued during the terms of incumbent justices, and such officials may continue to try cases provided they inform defendants of their right to demand trial before an impartial court.

[33] See particularly Tari v. State, 117 Ohio St. 481, 159 N.E. 594 (1927).

The Tumey and Roberts Decisions Reconsidered

In its decision in the *Roberts* case, the Kentucky Court of Appeals perhaps has accorded the *Tumey* decision greater significance than it has heretofore received from any state supreme court. One may agree with the end accomplished by the Kentucky Court in the *Roberts* case—most justice courts are bad and ought to be abolished or radically altered—without concurring entirely with some of the reasoning advanced in its opinion. The *Robert's* decision rests, of course, on the Kentucky Court's interpretation of the United States Supreme Court's opinion in the *Tumey* case. Although the exact meaning of that opinion may not be clear, it holds at least (1) that the Fourteenth Amendment applies to misdemeanor trials conducted in state courts and (2) that a judge is disqualified to try a case wherein he has a direct pecuniary interest. State supreme courts disagree, however, concerning the extent of the Supreme Court's holding in the case, the Kentucky Court of Appeals holding that it outlaws entirely a judicial system wherein judges are compensated solely by fees collected from individuals they convict; however, most other state courts urge, that it stops short of this, holding that, the jurisdiction of a court may remain even though its judge is disqualified.[34] The latter view is probably the correct one, since what the *Tumey* case seems to condemn is a certain type of judicial procedure. It recognizes the right of a state to create courts and to establish their jurisdiction, but holds that exercise of such jurisdiction under certain circumstances constitutes a bar to a valid conviction since it denies due process of law. In other words, jurisdiction must be distinguished from exercise of jurisdiction.

Of vital concern in connection with the Tumey decision is the matter of whether a defendant must raise the question of judicial disqualification in the trial court. The United States Supreme Court both at the beginning and end of its opinion in the *Tumey* case noted that the defendant in that case had done so. Although it is impossible to determine what significance the Supreme Court intended to place upon failure to object to disqualification, several state courts accord it great weight, holding

[34] Despite the ruling of the Court of Appeals in the Roberts case, Kentucky justice courts must continue to possess *some* criminal jurisdiction, inasmuch as the Constitution (sec. 143) makes the criminal jurisdiction of police (municipal) courts to depend entirely on that vested in justice courts.

that, unless seasonable objection is made in the trial court, disqualification is deemed waived. But even if these courts are interpretating the Supreme Court's opinion correctly, another question still arises. Assume for sake of argument that the objection to disqualification must be made; the average defendant in a justice court can scarcely be expected to make it. Indeed, prior to the *Tumey* case, making the objection did not occur even to lawyers. In Kentucky, proceedings in a justice court ordinarily consist in a defendant appearing without counsel before a disqualified justice, who has, as a practical matter, final jurisdiction in his case. It seems difficult to expect due process of law to obtain under such circumstances. Herein, however, may lie the key whereby a criterion may be found to distinguish between a valid and an invalid trial. No claim of denial of due process of law ought to be allowed, it seems, concerning any proceeding in a justice court where a defendant is represented by counsel, for in such situation constitutional rights can be effectively asserted. Moreover, the same principle ought to hold where a defendant who has no counsel is informed of his constitutional rights by the trial judge and while competent to act refuses counsel. In this connection it seems appropriate to note that the recent Court of Appeals order requiring incumbent justices to inform defendants of their right to demand trial before an impartial court may have the effect of making such trials as are actually conducted conform to due process of law. This is based on the assumption that justices will strictly observe the court order and that defendants will voluntarily and intelligently consent to trial.

Although the rule that constitutional rights are considered waived unless claimed at the earliest opportunity—usually in the trial court—is sound, it seems a questionable one when applied to misdemeanor cases in which a defendant is unrepresented by counsel or is not informed of his constitutional rights by the court. Such rights should not be presumed waived through acquiescence due to ignorance. The Kentucky Court of Appeals appears therefore to have decided correctly in the *Roberts* case when it held that a person unaware of his right to an impartial judge can not waive that right. According to the United States Supreme Court, "A waiver is ordinarily an intentional relinquishment or abandon-

ment of a known right or privilege."[35] Accordingly, unless a defendant in a justice court is represented by counsel, or unless he is informed of his right to object and is himself competent to act, waiver of that right does not obtain, inasmuch as unknown rights can not be relinquished. Further, the Supreme Court has held that there is ". . . every reasonable presumption against waiver of fundamental constitutional rights."[36] Such rights may be waived, but their waiver must be competent, voluntary, and intentional.[37] In instances where a defendant has no counsel, it seems that the duty of determining whether a competent waiver has taken place falls upon the court; and, where the court fails to so determine, it seems that serious doubt arises concerning its jurisdiction to proceed.

Right to Counsel in Misdemeanor Cases

A trial may be said to conform to the requirements of due process of law when an accused is afforded full opportunity to assert effectively his constitutional rights. Opportunity for assertion of such rights must be considered present when an accused is represented by counsel, or if, when not represented by counsel, he is informed of them by the court and is himself competent to act. The average defendant in a justice court, having no counsel and being himself generally unaware of his constitutional rights, is certainly in no position to assert them. It is therefore proper to inquire concerning a defendant's right to counsel in state misdemeanor cases.

In the past, the assumption seems to have been—and still prevails in many states—that a defendant in a non-capital criminal case, which, of course, includes a misdemeanor case, is not as a matter of right, entitled to be furnished counsel. Except in very serious cases—sometimes only in capital cases—state constitutional provision to the effect that a defendant has a right to be heard by himself and counsel have not been understood to impose upon the trial court the duty of furnishing counsel to an accused, or even of advising him of his need therefor; rather, such provisions have been taken to mean that a defendant has a right, if he

[35] Johnson v. Zerbst, 304 U.S. 458, 58 Sup. Ct. 1019 (1938).
[36] Ibid.
[37] Bute v. People of Illinois, 333 U.S. 640, 68 S. Ct. 763 (1948); Foster v. Illinois, 332 U.S. 134, 67 S. Ct. 1716 (1947).

chooses, to procure assistance of counsel.[38] Prior to 1938, the Sixth Amendment was understood to have practically the same meaning in its application to cases in federal courts; but, as a consequence of the Supreme Court's decision in *Johnson* v. *Zerbst*,[39] decided that year, the Amendment has been understood to impose a positive duty upon federal courts to furnish defendants in such courts with counsel.[40] But the Supreme Court has never held that the due process clause of the Fourteenth Amendment imposes the same duty on state courts, holding instead that lack of counsel in state non-capital cases denies federal constitutional protection only when its absence results in a denial of the essentials of justice.[41] In other words, if absence of a lawyer results in a defendant's not having a fair and adequate defense, or if it results in his actually being taken advantage of, or prejudiced, due process of law does seem denied.[42]

In Kentucky, as in most states, the assumption seems to be that justice courts—and all lower courts as well—are not required to furnish counsel to an accused.[43] Formerly, the Kentucky Court of Appeals took the position that counsel for an accused was absolutely necessary only in capital cases;[44] but recently it has reversed itself and now holds that counsel is required in all felony cases.[45] The Court's changed position was probably influenced by United States Supreme Court decisions concerning an accused's right to counsel in both state and federal courts. In its

[38] Betts v. Brady, 316 U.S. 455, 62 S. Ct. 1252 (1942); Bute v. People of Illinois, supra; Holland v. Com., 241 Ky. 813, 45 S.W. 2d 476 (1932); Hamlin v. Com., 287 Ky. 22, 152 S.W. 2d 297 (1941); People v. Williams, 225 Mich., 133.195 N.W. 818 (1923).

[39] 304 U.S. 458.58 S. Ct. 1019 (1938).

[40] See particularly Betts v. Brady, supra.

[41] Betts v. Brady, supra. Gallegos v. Nebraska, 342 U.S. 55, 72 S. Ct. 141 (1951); Uveges v. Com. of Pennsylvania 335 U.S. 437, 69 S. Ct. 184 (1948); Palmer v. Ashe, 342 U.S. 134, 72 S. Ct. 191 (1951) Four Supreme Court judges, urging the view that the constitutional guaranty of a fair trial can not be fulfilled unless an accused has counsel to advise and defend him, would extend the ruling in the Johnson case to state trials as well. See the dissenting opinion of Justice Douglas in Bute v. People of Illinois, supra.

[42] Townsend v. Burke, 334 U.S. 736, 68 S. Ct. 1252 (1948).

[43] It has been held that a court is not obligated to furnish counsel to an accused in a misdemeanor case. See State v. Stewart, 38 Ohio L. Abs. 543, 50 N.E. 2d 910 (1943); State v. Martin, 223 Minn. 414, 27 N.W. 2d 158 (1947).

[44] Hamlin v. Com., 287 Ky. 22, 152 S.W. 2d 297 (1941); Moore v. Com., 298 Ky. 14.181 S.W. 2d 413 (1944); Holland v. Com., 241 Ky. 813, 45 S.W. 2d 476 (1932).

[45] Gholson v. Com., 308 Ky. 82, 212 S.W. 2d 537 (1948); Noted 38 Ky. L.J. 317 (1950).

opinion requiring counsel for defendants in felony cases, the Kentucky quoted with approval the following statement of the Supreme Court:

> There are some individuals who, by reason of age, ignorance, or mental capacity, are incapable of representing themselves adequately in a prosecution of a relatively simple nature. Their incapacity is purely personal and can be determined only by an examination and observation of the individual. Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law under the Fourteenth Amendment.[46]

The Kentucky Court further held that common justice demands that every person accused of a felony be given a fair and impartial trial.

Although the stakes involved in misdemeanor cases are certainly less than those involved in felony cases, it seems that the requirements of due process of law demand that the same principles of justice be observed in them. Although as a matter of actual fact they do, constitutional standards of fairness ought not to depend on what court an accused is in.[47] In the past all too little regard has been had for observance of procedures essential to due process in state misdemeanor cases simply because such cases concern petty matters and because but little formal protest has been made to the manner in which such cases have been conducted. Although trial of an accused without counsel in a misdemeanor case is not, in itself, unconstitutional, it may, when taken with other factors, result in a denial of due process of law.[48] Due process of law requires that an accused in a misdemeanor case be given at least a fair trial. One of the elements of such a trial is right to counsel. Importance of counsel would seem to loom great in a trial conducted by a disqualified judge. Absence of counsel under such circumstances would seem to deny due process of law, because it would result in an accused being taken advantage of, for, surely the first duty of counsel, if present, would be to object to the disqualification and to demand trial before an impartial judge. One reason given by the Supreme Court for its refusal to read its interpretation of the Sixth Amendment into

[46] Wade v. Mayo, 334 U.S. 672, 68 S. Ct. 1270 (1948).
[47] Cf. Justice Douglas' dissent in Bute v. People of Illinois, supra.
[48] See Ex parte Carter, 14 N.J. Super. 591, 82 A. 2d 652 (1951).

the due process clause of the Fourteenth Amendment is the fact that, should it do so, argument would be made that counsel should be assigned defendants in justice and all other minor courts.[49] The Court takes the position that it is unreasonable to assume that a fair trial can not be had in a state court unless a defendant has counsel. But when it does so, it evidently presumes a trial conducted before an unprejudiced judge.[50]

Finally, it seems that the United States Supreme Court in the *Tumey* case holds that any judge having a pecuniary interest in a case is disqualified from conducting it. It seems, however, that, although the disqualification does not, in itself, affect the jurisdiction vested in his court by the legislature, such jurisdiction if exercised when there has been no waiver to the disqualification, can be lost. This would seem to result when a court proceeds to conduct a case wherein an accused has not intelligently waived his right to counsel. If jurisdiction is assumed lost under such circumstances, right of appeal, as urged by some courts, is not the proper solution to the problem presented by convictions rendered by disqualified justices.[51]

The decision of the Kentucky Court of Appeals in the *Roberts* case seems correct to the extent that it holds that right to trial before an unprejudiced judge may not be waived. It seems correct also in holding that the Kentucky legislature intends justices of the peace to collect fees in all misdemeanor cases they conduct. But there is considerable doubt concerning its holding that all Kentucky justices, save those in Jefferson County, are without jurisdiction to conduct misdemeanor cases. Such judicial officers, it seems, have jurisdiction to conduct cases when actual waiver to their disqualification exists.

[49] Betts v. Brady, supra.

[50] Mr. Justice Black, speaking recently for a majority of the Supreme Court, stated, "A fair trial in a fair tribunal is a basic requirement of due process." See In Re Murchison, 349 U.S. 133, 75 S. Ct. 623 (1955).

[51] The question of jurisdiction, however, can always be raised on appeal.

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