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THE POWER OF THE KENTUCKY COURTS TO DISREGARD PROVISIONS OF THE CODE

In 1902, under the provisions of sections 738 and 740 of the Code¹ which provide that the appeal will be dismissed unless appellant file the transcript in the office of the Clerk of the Court of Appeals at least twenty days before the first day of the second term of the Court next after the granting of the appeal, the Court of Appeals of Kentucky, in an action contesting a primary election regarding the docketing of a case at the time filed so as to give it an advanced and immediate hearing, said that in order to give it a speedy hearing to which appellants were entitled under a fair construction of the election statute² the Court is authorized and required to docket the case whenever filed without regard to the time the transcript is filed in the clerk's office.³

There the Court of Appeals did not comply with the Code, basing its decision on a fair construction of the election statute. Had the Court abided by the Code the party receiving the judgment would have been delayed several months in getting his name certified as having won the primary election.

In September 1913, the Court purported to construe the Code⁴ in the case of *Price v Russell*⁵ so as to allow the decision of the Court to become final prior to the thirty day delay required by the Code. Thus appellee was enabled to get his name certified before the general election in November.

Clark v Robinson,⁶ decided in 1914, held that the mandate

¹ KENTUCKY CODES (Carroll, 1938) sec. 738 and 740.

² KENTUCKY STATUTES (Thum's Supp., 1915) sec. 1565 cc.

³ *Graham v Graham*, 113 Ky 743, 24 Ky. L. Rep. 20, 67 S.W 1004 (1902)

⁴ KENTUCKY CODES (Carroll, 1938) sec. 760: "1. The Court of Appeals may make rules for the convenient dispatch of business, the preservation of order, the argument of cases or motions, and the manner and time of presenting motions or petitions for rehearing, therein; and the time for issuing its mandates and decisions, and the mode of enforcing its mandates and orders, and may change the same: Provided, That no mandate shall issue, nor decision become final, until after thirty days, excluding Sundays, from the day on which the decision is rendered, unless the court, in delay cases, otherwise direct; "

⁵ 154 Ky 824, 159 S.W 573 (1913).

⁶ 159 Ky 33, 166 S.W 801 (1914).

of the Court may be issued immediately when, in the judgment of the Court, this is necessary for the public interest or to prevent great injury. This decision is in regard to section 760 of the Code, as was the decision in *Price v Russell*.

These three decisions hinge on the purported construction placed on the Code by the Court⁷ and in no wise state that authority exists for completely disregarding the code section concerned.

However, in *Burton v Mayer*,⁸ the Court, in considering section 760 of the Code, abandoned the grounds on which the previous cases on this point were decided (namely, a fair construction of that section) and held flatly that the Code could be disregarded where the rules of practice are unworkable. In such cases the Court held it could draw upon its inherent power to carry out the purposes of the Constitution of the Commonwealth of Kentucky, which provides that all judicial power shall be vested in the courts,⁹ since the rules of practice and procedure are, therefore, within the judicial power and subject to the control of the courts.

Chief Justice Stites in his opinion said, "Rules of practice and procedure are, fundamentally, matters within the control of the courts in the administration of justice. The courts accept legislative *co-operation* in rendering the judiciary more effective. They deny the right of legislative *dominance* in matters of this kind."¹⁰

And again in the opinion

"So long as the rules of practice fixed by the Legislature accord with the proper and effective administration of justice, they should be, and they are, followed to the letter. Where, however, a situation arises in which the administration of justice is impaired or the general rules of practice are unworkable, the duty undoubtedly rests on the courts to draw upon the reserve of their inherent power, not in the assertion of a domination over other co-ordinate branches of govern-

In *Clarke v. Robinson*, 159 Ky. 33, 166 S.W. 801 (1914), the Court cited as authority for its holding *Graham v. Graham*, 113 Ky. 743, 24 Ky. L. Rep. 20, 67 S.W. 1004 (1902), and *Price v. Russell*, 154 Ky. 824, 159 S.W. 573 (1913).

⁷ 274 Ky. 263, 118 S.W. 2d 547 (1938).

⁹ KENTUCKY CONSTITUTION, sec. 109.

¹⁰ *Burton v. Mayer*, 274 Ky. 263, 267, 118 S.W. 2d 547, 549 (1938).

ment, but in co-operation with the legislative and executive branches to carry out the purposes of the Constitution."¹²

This is a case in which adherence to the Code would prevent carrying into effect the provisions of the "General Registration and Purgation Act."¹² where thirty days must elapse before the mandate of the Court shall issue. Under that act a house to house canvass "shall be made during the first two weeks of the sixty day period next preceding the date upon which the primary is to be held." This period had already started to run when the decision was handed down, and it would have expired before the mandate could issue under section 760 of the Code.

We find no equivocation or apologies in the words of Chief Justice Stites, nor is there reason for either. However, The Chief Justice cited as a precedent *Clark v Robinson* and explained the Court's position saying, "Deference for a valid act of the General Assembly which has become a law of the Commonwealth clearly requires that we exert our own power to make it effective even though in so doing we contravene a rule of practice generally accepted as binding."¹³

In the opinion of Justice Thomas in *Commonwealth ex rel. Atty. Gen. v Furste*¹⁴ handed down in 1941, the opinion in *Burton v. Mayer* is quoted in part. However, it is to be noted that the question in that case, according to the construction of the Court, involved a conflict between section 760 of the Code and section 124 of the Constitution of the Commonwealth of Kentucky¹⁵ That case approved the holding in *Burton v. Mayer*, nevertheless.

It is well to mention also that the Court in searching the Kentucky Constitution was unable to find any provision in it either directing or permitting the General Assembly to pre-

¹² 274 Ky. 263, 267, 118 S.W. 2d 547, 549-550 (1938).

¹³ Ky. R. S. (1946) 117,530 (1)

¹⁴ *Burton v Mayer*, 274 Ky. 263, 267, 118 S.W. 2d 547, 550 (1938)

¹⁵ 288 Ky. 631, 157 S.W. 2d 59 (1941).

¹⁶ Ky. Consr. sec. 124: "The Clerks of the Court of Appeals, Circuit and County Clerks, shall be removable from office by the Court of Appeals, upon information and good cause shown. The Court shall be the judge of the facts as well as the law. Two-thirds of the members present must concur in the sentence."

scribe rules for the Court's procedure. And in *Commonwealth ex rel. Atty. Gen v Furste*, the Court in its opinion said further:

"However, for the purpose of preserving uniformity of procedure and thereby prevent confusion in the practice, together with the further fact that the Court itself has not prescribed its own set of rules affecting the practice under consideration, this court has uniformly followed in the ordinary run of cases the enacted court rules as embodied in the respective Codes of Practice and by acquiescence has approved them and will no doubt continue to do so until modification should be attempted, if ever."¹⁶

Thus in 1941 we find the Court of Appeals denying without reservation the power of the General Assembly to prescribe the rules of practice and procedure in the courts of this Commonwealth.

It is interesting to note that in 1944 the General Assembly recognized the power of the Court to set aside provisions of the Code when it provided, by amending the statute regarding the contesting of elections,¹⁷ that the Court might issue its mandate immediately after announcing its decision.

That is the law in Kentucky as it is today on the question of the Court's disregarding provisions of the Code. Except in cases in which the provisions of the Code have been set aside as preventing or hindering the Court in conforming to provisions of the Kentucky Constitution, the Court has disregarded the Code only where failure to do so would result in totally defeating the purposes of the law as adjudged by the Court in the case wherein its decision was made.

J. PELHAM JOHNSTON

¹⁶ 288 Ky. 631, 635, 157 S.W. 2d 59, 61 (1941).

¹⁷ Ky. R. S. (1946) 122.090.