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NOTES

PECUNIARY INTEREST OF A JUSTICE OF THE PEACE IN FINAL TRIAL OF A MISDEMEANOR IN KENTUCKY— VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

In 1927, the Supreme Court of the United States in *Tumey v Ohio*¹ held that a defendant who was tried by the mayor of a city for a misdemeanor in which, on conviction, a material part of the fine and costs went to the mayor as a fee for his services in so presiding, he getting no fee in the event of an acquittal, was thereby deprived of the protection of the due process clause of the Fourteenth Amendment. The Court said

“ 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.*”²

The Court pointed out that this practice prevailed in Arkansas, Kentucky, Nebraska, North Carolina, Georgia, Ohio, and Texas.

At the time of the above decision, a Kentucky statute³ provided that county judges, city or police judges, and justices of the peace were entitled to certain costs for services rendered in their respective courts and as far as those services applied when the jurisdiction was concurrent with the circuit courts they were entitled to charge and receive the same fees allowed by law to clerks of circuit courts for similar services. Circuit court clerks were entitled to receive 10% of all fines and forfeitures received in their respective courts⁴ and as a consequence, county judges and justices of the peace in addition to the costs, were thereby entitled to 10% of all fines recovered

¹ 273 U. S. 510, 71 L. Ed. 749, 47 Sup. Ct. 437 (1927).

² U. S. CONST. AMEND. XIV

³ 273 U. S. 510, 531, 71 L. Ed. 749, 758, 47 Sup. Ct. 437, — (1927).
KY. STAT. (Carroll, 1922) sec. 1731.

⁴ KY. STAT. (Carroll, 1922) sec. 1721.

in their courts and paid into the state treasury in cases whereof the circuit court had concurrent jurisdiction.⁶ City or police judges in cities of all classes were not entitled to this 10% of fines or the costs recovered in their court as they were required to pay into the city treasury all fines and costs collected in criminal cases⁷ and received a salary in lieu of the statutory fees.⁸ Therefore, at that time the county judges and justices of the peace were affected by the above decision.

About nine months after the *Tumey* decision, the Kentucky Court of Appeals was confronted with *Wagers v Sizemore*,⁹ in which the petitioner had sought an injunction in the circuit court against a justice of the peace to enjoin the justice from issuing a *capias pro* fine against him. The petitioner alleged that he had been arrested on a warrant for obstructing the highway and brought before the justice of the peace, that he had objected to trial before the justice on the ground that the justice was pecuniarily interested in the case and would receive a portion of the fine as well as the costs in the event of conviction, that the justice had proceeded with the trial and a jury was impaneled which returned a verdict of guilty and fixed his fine at \$10. It was shown that the justice was interested in the judgment made up of fine and costs to the extent of \$6, he being entitled to \$5 costs and \$1 of the fine. The defendant's demurrer to the petition was sustained by the circuit court. The judgment was reversed by the Court of Appeals and citing *Tumey v Ohio* it directed the lower court to overrule the demurrer, pointing out that the objection had been seasonably made, the trial could not be appealed as the fine imposed was only \$10, the justice had directed the jury to enter a fine against the defendant and the sum of \$6 which the justice would receive as a result of the judgment was not so small that it could be properly ignored within the maxim *De minimis non curat lex*.

To meet the situation created by these decisions, Kentucky, in 1928, by appropriate legislation, provided that the fiscal courts were to fix a reasonable compensation for the county

⁶ *Craig, Auditor of Public Accounts v. Shelton*, 201 Ky 790, 258 S.W 694 (1924).

⁷ KY. STAT. (Carroll, 1922) sec. 3360.

⁸ KY. STAT. (Carroll, 1922) sec. 3356.

⁹ 222 Ky. 306, 300 S.W 918 (1927)

judges for their services in presiding in the final trials of misdemeanor cases¹⁰ and made them ineligible to receive part of the costs and fine as a fee. The sum taxed as costs was to be paid by the county judge into the county treasury.¹¹ This was followed by legislation in 1932 which provided that justices of the peace in counties of over 250,000 population¹² were to be compensated by a salary from the county and that the fees and costs formerly due the justice must be paid to the county treasury.¹³ There is no ground for an objection where the fines and costs are paid into a general fund, even though the salary of the judge or justice may be paid out of the general fund, as it is said that their relations to the fund are too remote to warrant a presumption of bias toward convictions in prosecutions before them.¹⁴

The Kentucky Court in an early case on this subject, pointed out that constitutional rights in the trial of misdemeanor cases may be waived by a defendant and where he fails to object seasonably to being tried by the 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 the Commonwealth, maintaining that the cost statute was valid, the justice does have jurisdiction to try such misdemeanor cases, and that the sole ground on which the *Tumey* case rested was that it was deprivation of the protection of the due process clause where a trial was had after the defendant had *objected*.¹⁵ This interpretation of the decision in the *Tumey* case is contrary to the one given by the lower federal courts. They have proceeded on the theory that the Supreme Court held that the statutes creating jurisdiction and the procedure to be employed were unconstitutional.¹⁶ In *Ex parte Baer*¹⁷ which involved an

¹⁰ Ky. R. S. (1946) sec. 25.260.

¹¹ Ky. R. S. (1946) sec. 453.030.

¹² Jefferson County only

¹³ Ky. R. S. (1946) 64.250.

¹⁴ *Dugan v Ohio*, 277 U. S. 61, 72 L. Ed. 784, 48 Sup. Ct. 439 (1928)

¹⁵ *Adams, Judge v Slavin*, 225 Ky. 135, 7 S.W. 2d 836 (1928) *Accord, Tari v State*, 117 Ohio St. 499, 159 N.E. 594 (1927) *Bryant v State*, 146 Miss. 533, 112 So. 675 (1927).

¹⁶ *Ex parte Hatem*, 38 F. 2d 226 (1930) *Ex parte Baer*, 20 F. 2d 912 (1927) see: *Morgan v. United States*, 32 F. Supp. 546, 561-562 (1940).

¹⁷ 20 F. 2d 912 (1927), cited *supra* note 16.

application for a writ of habeas corpus to the Federal District Court of Eastern Kentucky by a defendant who had been convicted by a county judge of Kentucky,¹⁸ the writ was granted although the defendant had not objected to the county judge trying the case and though he had been entitled to an appeal and had failed to avail himself of this remedy. The Federal District Court of Western Kentucky in a later case denied the writ under an almost identical set of facts but this denial was based on the ground that the defendant had a right of appeal to the circuit court where the defect of lack of due process would have been cured by a trial de novo.¹⁹ The theory adopted by the federal courts was upheld by dictum in one intervening Kentucky decision which contained language to the effect that the cost statute as applied to misdemeanor cases is invalid and the justice of the peace can not legally collect of a defendant, convicted in his court, any fee whatsoever otherwise than by agreement, acquiescence and grace.²⁰ However, the subsequent Kentucky decisions are based on the former theory.²¹

There seems to be little doubt but that the interpretation given by the federal courts is the correct one. The Supreme Court in the very first paragraph of the *Tumey* opinion states that the question in the case is whether certain statutes providing for the trial by the mayor deprives the accused of due process of law because of the pecuniary and other interests which those statutes give the mayor in the result of the trial.²² After reviewing the statutes involved the Court said

"Every *procedure* (writer's italics) which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant denies the latter due process of law."²³

Included in the review of the cases and authorities on which the Court based its conclusion was Cooley's work on *Constitutional Limitations*. The Court quoted the following from

¹⁸ County judges were on the fee system at that time.

¹⁹ *Ex parte Meeks*, 20 F. 2d 543 (1927).

²⁰ *See Shaw v. Fox*, County Judge, 246 Ky. 342, 353, 55 S.W. 2d 11, 16 (1932).

²¹ *Williams v. Lueke*, Justice of the Peace, 265 Ky. 84, 95 S.W. 2d 1103 (1936).

²² 273 U. S. 510, 514, 71 L. Ed. 749, 751, 47 Sup. Ct. 437 (1927).

²³ *Id.* at 532, 71 L. Ed. at 758.

this work where, after referring to cases which hold that certain interests do not disqualify a judge and explaining that the reason for such holding is that the interest is so remote, trifling and insignificant that it would not influence a judge, Cooley said

"But except in cases resting upon such reasons we do not see how the legislature can have any power to abolish a maxim²⁴ which is among the fundamentals of judicial authority"²⁵

There has long been a split of authority as to whether the interest of a judge renders the judgment void²⁶ so that the objection may not be waived or whether it is voidable²⁷ so that the objection may be waived. Some of the authorities which take the view that such a judgment is voidable make an exception in cases of inferior tribunals where there is no right of appeal.²⁸ The Court in the *Tumey* opinion does not prefer either of the above views over the other. Instead of making a preference, it makes a distinction between the various interests that might disqualify a judge and shows that neither rule can consistently be applied to all of these different interests.²⁹ It states that all questions of judicial qualification may not involve constitutional validity, that matters of kinship, personal bias, state policy, and remoteness of interest would generally seem to be matters of legislative discretion, but that it certainly deprives a defendant in a criminal case of due process of law to subject him to the judgment of a court, the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in the case.³⁰ Admitting that the objection to trial before a judge on ground of kinship, bias or certain other

²⁴ No one ought to be a judge in his own cause.

²⁵ 273 U. S. 510, 532, 71 L. Ed. 749, 758, 47 Sup. Ct. 437,— (1927), COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 873.

²⁶ *Taylor v. County Commissioners of Worcester*, 105 Mass. 225 (1870) *Stockwell v. Township Board of White Lake*, 22 Mich. 341 (1871) *First National Bank v McGuire*, 12 S.D. 226, 80 N.W. 1074 (1899).

²⁷ *Dimes v. Grand Junction Canal Co.*, 3 H.L. Cas. 749 (1852) *Sampson v. People*, 188 Ill. 592, 59 N.E. 427 (1901), *Moses v. Julian*, 45 N.H. 52 (1863)

²⁸ *Moses v Julian*, 45 N.H. 52 (1863) cited *supra* note 27. FREEMAN, JUDGMENTS (5th ed. 1925) sec. 329.

²⁹ See *Owens v. Dancy* 36 F. 2d 882, 884 (1929).

³⁰ 273 U. S. 510, 523, 71 L. Ed. 749, 754, 47 Sup. Ct. 437 (1927).

interests may be waived, the Kentucky Court and others are in error in applying this rule to the cases involving a direct, substantial, personal pecuniary interest.

An objection by an accused in an examining court held by a justice of the peace is not a valid one as he is not denied due process of law inasmuch as the justice is paid for his services out of the state treasury and therefore does not have a financial interest in the outcome of the proceeding.³¹

In *Wagers v Sizemore* where the justice was proceeding after a constitutional objection had been asserted and where the punishment was such that it could not be appealed, the relief granted was by way of injunction. In a later case, where relief was sought by way of injunction before the judgment was rendered and while the trial was still in progress the Court indicated that under these circumstances a writ of prohibition was the correct remedy.³² The writ of prohibition, in this type of case, will not be granted by the circuit court because under the Kentucky theory the justice is within his jurisdiction even though he is proceeding in error and the application for the writ must therefore be made to the Court of Appeals.³³ The requisite for this writ is that great and irreparable injury would be suffered by the applicant with no adequate remedy open to him. This requisite is met in cases of this nature where the trial is still in progress and the punishment for the particular misdemeanor charged, as prescribed by statute, is such that there is a possibility of it being nonappealable.³⁴

Various methods have been used in attempts to circumvent the effect of the *Turney* case. An agreement between a justice and a city whereby the justice, who is disqualified by a misdemeanor's objection, transfers the case to a city judge in return for part of the fine or costs which may be imposed, is illegal

³¹ *Martin, County Judge v Wyatt*, 225 Ky. 212, 7 S.W. 2d 1048 (1928).

³² *Ibid.*

³³ *Williams v. Lueke, Justice of the Peace*, 265 Ky. 84, 95 S.W. 2d 1103 (1936) cited *supra* note 21.

³⁴ See *Adams Express Co. v Young*, 184 Ky. 49, 53, 211 S.W. 407, 408 (1919), *Williams v. Lueke, Justice of the Peace*, 265 Ky. 84, 88, 95 S.W. 2d 1103, 1105 (1936), cited *supra* notes 21 and 33; KENTUCKY CRIMINAL CODE (Carroll, 1938) sec. 362 provides that a judgment for imprisonment or for a fine of twenty dollars or more is appealable to the circuit court unless otherwise provided by statute.

and void as against public policy³⁵ It has also been held that the interest of a justice is not destroyed because another agrees to be liable for the costs if the proceeding results in an acquittal.³⁶

There seems to be little possibility of a trial by a disinterested justice of the peace as the one presiding would always be entitled to the fee of \$2 for his services as provided by the cost statute in the event of a conviction plus 10% of the fine imposed.³⁷

A private citizen who brings an action in the name of the state as prescribed by statute is entitled to a portion of the fine on conviction but the objection cannot be used by the accused in this type of case as the pecuniary interest of the citizen does not affect the judge and the citizen has no voice in the decision.³⁸

In some other states this constitutional objection has been deemed inapplicable because of various reasons, such as the smallness of the fees, the existence of other sources for their payment, and the safeguarding of the interests of the accused by giving him rights to a change of venue, a jury trial, and an appeal.³⁹ Little can be gained from reading the few Kentucky decisions on this subject as regards the possibility of the Court holding that the above reasons cure the defect of lack of due process. In *Wagers v Sizemore* the court held that an interest in the amount of \$6 was not *de minimis* and in view of the apparent attitude of the Appellate Court it seems that it would be an extraordinary case where the costs were so small that the *de minimis* rule would be applied. This same case is the only one in which it can be determined that a jury was used and the possibility of a jury curing the defect was not mentioned but it should be noted that this could be considered an exceptional case as the justice in addition to arguing the case to the jury

³⁵ *Howard v Commonwealth*, 231 Ky. 54, 20 S.W. 2d 1011 (1929).

³⁶ *Ex parte Hatem*, 38 F. 2d 226 (1930) cited *supra* note 16.

³⁷ See *Cole v Commonwealth*, 234 Ky. 776, 780, 29 S.W. 2d 32, 34 (1930) (County judge vacated the bench after an objection was made and called the nearest justice of the peace to hear the case. The same objection was made to the justice and this was sustained).

³⁸ *Froedge v Commonwealth*, 289 Ky. 168, 158 S.W. 2d 426 (1942).

³⁹ See *State v Shelton*, 205 Ind. 416, 186 N.E. 772, 775 (1933), *Ex parte Lewis*, 47 Okla. Cr. 72, 238 Pac. 354, 356 (1930).

also directed a verdict against the defendant. It seems that a jury trial would not cure the defect because the justice has the right to control the introduction of evidence, including the right to rule on the relevancy and materiality of questions propounded by himself.⁴⁰

A change of venue as defined by the Kentucky Court "means the transferring of a cause from a court in which it was brought or is pending to another coordinate one."⁴¹ A change of venue from a justice's court would necessarily be to that of another justice of the peace and the same valid objection could be made by the defendant.⁴²

In view of the fact that the *Kentucky Criminal Code* provides that on appeal from a justice's court the cause is to be tried anew in the circuit court, as if no judgment had been entered below,⁴³ it seems certain that the right of appeal is a cure for the defect in this state. Several cases have so held⁴⁴ and it is a settled principle of constitutional law that the entire judicial procedure of a state is to be considered in determining the sufficiency of due process.⁴⁵

It may be concluded that while the inferior courts of Kentucky were seriously affected by the *Tumey* decision in 1927, today, due to legislative changes, the effect is felt only by justices of the peace throughout the state with the exception of Jefferson County. The Kentucky Court holds that the justice does have jurisdiction in these misdemeanor cases notwithstanding the *Tumey* case and in the event the objection is waived by silence or otherwise or is not seasonably made, he may continue the proceedings and on conviction tax the costs against the defendant. This is contrary to the view taken by the lower federal courts which state that the statutes creating the jurisdiction and procedure are unconstitutional and a violation of the due

⁴⁰ See *Ex parte Kelly*, 111 Tex. Cr. 57, 10 S.W. 2d 728, 729 (1928).

⁴¹ *Pierce v Crisp*, 267 Ky. 420, 102 S.W. 2d 386 (1935)

⁴² Ky. R. S. (1946) sec. 452.360.

⁴³ KENTUCKY CRIMINAL CODE (Carroll, 1938) sec. 366.

⁴⁴ *Ex parte Meeks*, 20 F. 2d 543 (1927), *supra* note 19; *Hill v. State*, 174 Ark. 886, 298 S.W. 321 (1927).

⁴⁵ *Moore v Dempsey* 261 U. S. 86, 67 L. Ed. 543, 43 Sup. Ct. 265 (1922) *Frank v Mangum*, 237 U. S. 309, 59 L. Ed. 969, 35 Sup. Ct. 582 (1914), *Downer v Dunaway*, 53 F. 2d 586 (1931), *Dunn v Lyons*, 23 F. 2d 14 (1928).

process clause. This writer is of the opinion that the latter view is the correct one and that it would be upheld by the Supreme Court of the United States on review. Although some other states fail to uphold this constitutional objection due to various reasons such as smallness of the fees, rights to a change of venue, a jury trial and an appeal, there is little reason to believe that the Kentucky Court would be influenced by these reasons with the exception of the right to appeal. The right to appeal should cure the defect as the cause is tried *de novo* in the circuit court. If a justice continues the proceeding after a seasonable objection has been made, relief may be obtained by a writ of prohibition from the Court of Appeals if the charge is such that punishment may be given from which there can be no appeal.

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