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CASENOTE

Washington Justice Court System—Constitutionality of the Fee System of Compensating Justices of the Peace.

In the case of *In re Borchert*[1] the Washington Supreme Court decided that a person tried before an unsalaried justice of the peace on a criminal charge was not deprived of due process of law because the justice was compensated on a fee basis. A concurring opinion and two dissenting opinions were written in the 5-to-4 decision.

Richard N. Borchert was arrested by the King County Sheriff for several traffic violations and taken before an unsalaried justice of the peace. He challenged the jurisdiction of the court upon the ground that compensation of the justice on a fee basis under RCW 3.16.070 gave the justice a direct, substantial pecuniary interest in reaching a conclusion against him and thereby denied him due process of law in violation of the fourteenth amendment to the United States Constitution. Borchert refused a change of venue to a salaried justice which was offered by the presiding justice. He was found guilty, fined and jailed. He sought a writ of habeas corpus in superior court on the same grounds raised in the justice court. The writ was granted and this appeal was brought.

Borchert's position was that the fee system of compensating justices of the peace renders them pecuniarily interested in the outcome of cases before them in two primary ways. First, the justices have opportunity to collect several fees only if they convict. Under RCW 3.16.070 an unsalaried justice of the peace may receive one or more of the following fees if a defendant convicted before him is jailed and/or appeals: for transcript of judgment—$1.00 (a transcript of judgment is necessary for appeal[2] and is paid for by the appealing party[3]); for committing to jail—$.50; for taking recognizance of bail—$.75. As respondent's brief points out, "This means for every conviction in which the defendant is either sent to jail or desires to appeal or both, the justice receives besides the $2.00 filing fee anywhere from 50¢ to $2.25 per case —which would not be received upon an acquittal."[4] Second, because

[1] 157 Wash. Dec. 624, 359 P.2d 789 (1961).
[2] RCW 10.10.040.
[3] RCW 3.16.070.
[4] Brief for Respondent, p. 11.

police officers tend to take cases before justices evidencing a strong tendency to convict and because the income of unsalaried justices of the peace is directly proportional to their volume of cases, the justice is motivated to maintain a high conviction rate in order to develop a working relationship with the police.[5]

The court relied primarily on three grounds in reaching the decision: (1) Trial before an unsalaried justice of the peace in Washington does not deny a defendant due process of law because several procedural safeguards are available to him. (2) Borchert's challenge to the court's jurisdiction was based on a charge of bias and was improperly made because bias of a judge goes not to his jurisdiction, but to the venue and the venue was not challenged. (3) Since Borchert refused a proffered change of venue to a salaried justice, he waived his right to be tried before a disinterested court.

In contending that he was denied due process of law, Borchert relied largely upon the leading case of *Tumey v. Ohio*.[6] There the Supreme Court of the United States held that a person tried before a court, the judge of which had a direct and substantial pecuniary interest against him because collection of his fees was dependent upon conviction, was deprived of due process of law under the fourteenth amendment.

The Washington court, however, refused to apply the rule of the *Tumey* case, distinguishing it from the present case largely on the basis of procedural safeguards extant in Washington which were not available under Ohio law. The court advanced five distinctions.

1. Fee justices were not authorized by the Ohio constitution while they are authorized by the Washington constitution.[7]

2. In *Tumey*, there was no right to jury trial whereas in Washington this right is guaranteed by statute.[8]

3. While Tumey had no right to a change of venue, such right is

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[5] The two halves of this theory have been elaborated upon in these ways: "It requires more naivete than I can muster to believe that police officers who feel that they have apprehended a guilty person would not, when allowed freedom of choice, be more likely to select a justice of the peace who is prone to convict." *In re* Borchert, 157 Wash. Dec. 624, 656 & n.17, 359 P.2d 789, 807 & n.4 (1961) (dissenting opinon of Finley, C.J.). "[T]he temptation to tip the balance in favor of the state is nourished not only by the opportunity to double the fee, but also by the knowledge that the entire source of revenue can be cut off at the whim of the arresting officer." *In re* Borchert, memorandum opinion of James, J., Superior Court of the State of Washington for King County. See RCW 46.64.010, .015. *But compare,* RCW 3.20.131, 46.52.100.

[6] 273 U.S. 510 (1927).

[7] See WASH. CONST. art. IV, § 13.

[8] RCW 10.04.050.

guaranteed in Washington where the defendant fears the judge is not impartial.[9]

4. The right to appellate review in Ohio was restricted to questions of law only, while in Washington, the right to appeal with trial de novo is provided.[10]

5. In *Tumey,* the judge's compensation was entirely dependent upon conviction, while in Washington, the judge is compensated by the county even though there is an acquittal.[11]

A careful analysis of the majority opinion, the *Tumey* decision, and recent treatment by other states, reveals a number of weaknesses in the Washington court's approach to the due process issue.

The majority regards as significant the fact that the Washington fee justice courts are authorized by the state constitution whereas the offending tribunal in *Tumey* was not. It is submitted that this is a distinction without a significant legal difference.

As the *Tumey* decision itself indicates, a judicial system giving a judge a pecuniary interest in cases before him is no less repugnant to the Constitution of the United States when founded upon a state constitution than when founded upon a state statute.[12]

Judge Foster points out in his dissent that for purposes of determining whether a law infringes a federal constitutional right, it does not matter whether that law has as its source a state statute or a state constitution.[13] Article VI, Clause 2 of the federal constitution clearly supports this view.[14] The principle has been definitively stated by the United States Supreme Court.[15]

The Washington court's view does receive some support from several decisions by other state courts which were rendered soon after the *Tumey* decision in 1927.[16] In these cases, of which *Moulton v. Byrd*[17]

[9] RCW 3.20.100.
[10] RCW 10.10.010.
[11] RCW 10.46.210.
[12] Tumey v. Ohio, 273 U.S. 510, 531 (1927) (by implication).
[13] *In re* Borchert, 157 Wash. Dec. 624, 638-39, 359 P.2d 789, 797 (1961).
[14] "This constitution and the laws of the United States... shall be the supreme law of the land;... any thing in the Constitution or laws of any state to the contrary notwithstanding."
[15] "For the protection of the Federal Constitution applied, whatever the form in which the legislative power of the state is executed; that is, whether it be by a constitution, an act of the legislature, or an act of any subordinate instrumentality of the state...." Standard Computing Scale Co. v. Farrell, 249 U.S. 571, 577 (1919). *Cf.,* Guinn v. United States, 238 U.S. 347 (1915); Russell v. Sebastian, 233 U.S. 195 (1914).
[16] *Cf.,* Moulton v. Byrd, 224 Ala. 403, 140 So. 384 (1932); See also, Jordan v. State, 172 Ga. 857, 159 S.E. 235 (1931); Harding v. Minas, 206 Ind. 661, 190 N.E. 862 (1934); State v. Schelton, 205 Ind. 416, 186 N..E 772 (1933); Hitt v. State, 149 Miss. 718, 115 So. 879 (1928).
[17] 224 Ala. 403, 140 So. 384 (1932).

is typical, the courts reasoned that the *Tumey* case (outside of its original facts) was insufficient to overcome the concept of due process dictated by the state constitution, legislature and judiciary. None of the cases dealing with this point reached the Supreme Court. The view which they express was thought by one legal analyst to be extinct.[18]

A procedural safeguard set forth by the majority as distinguishing the *Tumey* case is the defendant's right in Washington, to demand a trial by jury. Cases from other jurisdictions conflict on the significance of this point. Several early decisions in other states support the majority's position.[19] However a West Virginia case, *Williams v. Brannen,*[20] quoting from the Supreme Court, takes the position that " 'Trial by jury,' in the constitutional sense, requires such a trial to be under the superintendence of a disinterested judge."[21] A passage quoted by Judge Foster in a footnote to his dissent is perhaps pertinent. "It is difficult, however, to understand how [a right to trial by jury] ... would protect the defendant from a partial tribunal. The justice ... would still be the presiding officer of the court, with the same powers to instruct the jury, decide on admissabili'y [*sic*] of evidence, and rule on motions."[22]

The majority also cites the defendant's right to a change of venue if he believes the justice to be partial.[23] As will be pointed out below,[24] there is substantial authority that the pecuniary interest of a judge is a disqualifying factor which goes to the jurisdiction and not to the venue. It is questionable whether this jurisdictional defect is cured by the defendant's unexercised right to remove the case to another court, if the interested judge actually decides the case.

There is also a practical limitation upon the efficacy of a right to a change of venue in the normal case. As pointed out in a similar context in a Kentucky case,[25] and a federal case,[26] the ordinary person is

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[18] See, Lee, *The Emergence and Evolution of a Constitutional Right to a Fair Trial Before a Justice of the Peace,* 20 FED. B.J. 111, 120 (1960), which disposes of that view with the statement, "The arguments advanced ... are not considered today."

[19] State v. Schelton, 205 Ind. 416, 186 N.E. 772 (1933). *Cf., Ex parte* Steel, 220 N.C. 685, 18 S.E.2d 132 (1942).

[20] 116 W. Va. 1, 178 S.E. 67 (1935).

[21] *Id.* at 3, 178 S.E. at 69.

[22] *In re* Borchert, 157 Wash. Dec. 624, 648 & n.13, 359 P.2d 789, 803 & n.12 (1961) (dissenting opinion of Foster, J.), quoting from 10 IND. L.J. 320 (1933).

[23] It may be noted that the statute relied upon here by the Washington court may provide no relief to the defendant seeking a disinterested court, because it allows a transfer of venue only to the next nearest justice court, which may also be presided over by an unsalaried justice of the peace. See RCW 3.20.100.

[24] *Infra,* p. 526-28.

[25] Roberts v. Noel, 296 S.W.2d 745 (Ky. 1956).

[26] *Ex parte* Baer, 20 F.2d 912 (E.D. Ky. 1927).

not aware of his right to object; he assumes that the court before which he has been taken is a lawfully constituted one. It is not unreasonable for a defendant to expect an impartial tribunal in the first instance.

A similar criticism may be made of the majority's fourth distinction, the existence of a right of appeal to a superior court with trial de novo. There is a group of early state court cases distinguishing *Tumey* from their local court systems upon this same ground.[27] However the West Virginia and Kentucky courts have vigorously rejected the argument that such a right of appeal affords due process, though the original tribunal may be pecuniarily interested.[28] The question may be posed whether due process is achieved when a defendant must try his case twice in order to receive a decision from an assuredly impartial tribunal, a procedure likely to be costly to him in both time and money.

An attempt is also made to distinguish *Tumey* on the ground that the fee justice would receive compensation from the county regardless of the result reached in cases before him.[29] Here, for a fleeting instant, the Washington court touches upon and leaves what seems to be the crucial issue of the case—does the Washington system of compensating unsalaried justices of the peace on a fee basis provide them with a direct and substantial pecuniary interest in the outcome of the cases before them as that system is interpreted in the light of the *Tumey* opinion?

Although unsalaried justices do receive their fees from the county if they acquit, Borchert objected to two additional features of the system which he contended provide the justices with such a direct and substantial interest. Briefly, again, they were that by convicting, a justice gains the opportunity to collect additional fees and also makes his court more attractive to conviction-minded police officers.

The fact that these features of the system were regarded as highly significant by the four dissenting judges and have been censured by at

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[27] Hill v. State, 174 Ark. 886, 298 S.W. 321 (1927); State v. Gonzales, 43 N.M. 498, 95 P.2d 673 (1939); *Ex parte* Steele, 220 N.C. 685, 18 S.E. 2d 132 (1942); *cert. denied*, 316 U.S. 686 (1942).

[28] Roberts v. Noel, 296 S.W.2d 745 (Ky. 1956); Williams v. Brannen, 116 W. Va. 1, 178 S.E. 67 (1935).

[29] Although this is the language used by the court, it is not strictly correct. The unsalaried justice of the peace may deduct his fees from any fines levied, see RCW 10.04.110, 3.16.160; OPS. ATT'Y. GEN. 178 (Wash. 1919-20), but upon acquittal must submit a cost bill to the county. See RCW 10.46.210. This procedure necessarily results in some inconvenience, delay in payment, and additional administrative expense for the justice of the peace. These factors were pointed out in respondent's brief, page 12, but were not mentioned by the court.

least one legal writer indicates that they are of some consequence.[30] They have been a subject of general criticism for a number of years.[31]

These factors formed the basis upon which the superior court judge granted the writ of habeas corpus applied for and constituted the mainstays of Borchert's entire case. Yet the majority disposed of these factors, and the issues which they raised, by virtually ignoring them.

A careful reading of the *Tumey* decision and subsequent references thereto by the Supreme Court indicates that where a judicial system *does* provide a judge with a direct and substantial pecuniary interest in the outcome of cases before him, to attempt to distinguish the *Tumey* case because more extensive procedural safeguards are available than those existing in its fact pattern is to ignore the fundamental policy underlying that decision.

The *Tumey* opinion placed little emphasis on the lack of procedural safeguards as found in Washington, the presence of which the Washington majority regards as controlling. Rather, the basic evil at which the *Tumey* decision struck was the presiding judge's direct, personal and substantial pecuniary interest in the outcome of the case before him.

The *Tumey* decision defines a primary concept of due process of law, a concept contained in the following passages. "[I]t certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him . . . ."[32] Even more broadly, "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, or which might lead him not to hold

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[30] Stevens, *Washington State Courts with Criminal Jurisdiction: The Law and Some Problems* (1957). (Unpublished article in University of Washington Law School Library.)

[31] This criticism has resulted in some legislative action. After a four-year study, the Washington Legislative Council proposed a complete reorganization of the justice court system designed to accomplish, among other things, the elimination of the features which were objected to by Borchert. After extensive amendment, this proposal eventually resulted in the passage of chapter 299, Session Laws of 1961, which places justices of the peace covered by the act on a salary basis. It also contains new venue restrictions limiting the power of police to choose the justice court in which they will bring cases. However, the very limited application of this act leaves a large number of justices of the peace on an unsalaried basis and operating under the original fee provisions. The act is mandatory in only three counties—King, Pierce and Spokane. Other counties may elect to come under the act by a majority vote of their county commissioners. For comment on this legislation, see Stevens, *Judicial Administration, Survey of Washington Legislation—1961*, 36 WASH. L. REV. 297 (1961).

[32] Tumey v. Ohio, 273 U.S. 510, 523 (1927).

the balance nice, clear and true between the State and the accused, denies the latter due process of law."[33]

In looking to the settled modes and usages of procedure existing in the English common law to establish the standard for procedural due process of law, Chief Justice Taft found that "indeed, in analagous cases it is very clear that the slightest pecuniary interest of any officer, judicial or quasijudicial, in the resolving of the subject matter which he was to decide, rendered the decision voidable."[34] "There was at the common law the greatest sensitiveness over the existence of any pecuniary interest, however small or infinitesimal, in the justices of the peace."[35]

A reading of the entire *Tumey* opinion clearly indicates that the Court was satisfied that the pecuniary interest factor alone constituted a fatal denial of due process of law. It appears that in noting the other procedural defects, the court was simply adding supporting evidence to a foregone conclusion.[36]

In a more recent (1955) case, *In re Murchison*,[37] the Supreme Court reaffirmed the view of the *Tumey* decision regarding the pecuniarily interested judge. The court there added, "Such a stringent rule may sometimes bar trial by judges who have no actual bias.... But to perform its high function in the best way 'justice must satisfy the appearance of justice.' "[38]

Does a court system containing features such as those raised by *Borchert*, involving such an inherent proclivity toward partiality on the part of the justices constitute a "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, or which might lead him not to hold the balance nice, clear, and true between the State and the accused ..."?[39] Does it provide an unsalaried justice with "a direct, personal, substantial, pecuniary interest in reaching a conclusion against [the defendant] ..."?[40] With particular reference to the justice's reliance for income upon cases filed by the police, does this factor provide him with a "direct dependence ... upon convictions for com-

[33] *Id.* at 532.
[34] *Id.* at 524.
[35] *Id.* at 525.
[36] See Lee, *The Emergence and Evolution of a Constitutional Right to a Fair Trial Before a Justice of the Peace*, 20 FED. B.J. 111, 121 (1960).
[37] 349 U.S. 133 (1955).
[38] *Id.* at 136.
[39] Tumey v. Ohio, 273 U.S. 510, 532 (1927).
[40] *Id.* at 523.

pensation for his services as a judge . . ."[41]—the feature which the Supreme Court found objectionable in the *Tumey* case?

Answers to these questions are not free from doubt. The appellant argued strongly that for constitutional purposes they should be answered in the negative, contending that any interest created in the justices by the fee system is so indirect and remote as to be imaginary only.[42]

However, the possibility that the above features of the system could influence the unsalaried justice of the peace is clear. The constitutional significance of this possibility is a question which should be judicially determined through application of the tests set forth in *Tumey*. Answers to these questions are necessary to a complete determination of the case. Answers of, "no" would render any further consideration of the case unnecessary. If the answer to any one question is "yes," then it is difficult indeed to avoid application of the *Tumey* case to the present facts. The Washington court provided no such answers.

The Washington court's preoccupation with distinguishing away *Tumey* seems to have caused it to ignore the fundamental policy expressed by the Supreme Court regarding the interested judge. Thus, no application of that policy to the case at hand was made.

It is interesting to note that the majority has incorporated into its opinion almost every device by which state courts have sought to avoid the application of *Tumey* to local fee justice systems since that opinion was rendered.[43] Considered individually, these grounds are less than convincing. Though they have been accepted by some courts, they have been rejected by others. Do they attain cumulatively what they seem to fall short of individually? Since none of the cases utilizing them has reached the Supreme Court, the question is open. Close scrutiny of the *Tumey* opinion suggests that they do not if a direct and substantial pecuniary interest is conceded to exist in the judge.

The Washington court also disposed of *Borchert* on the ground that his objections were properly directed only to the venue and that in refusing a change of venue, he waived any lack of due process.

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[41] Dugan v. State, 277 U.S. 61, 64 (1928). In Dugan v. State, the Supreme Court re-emphasized the pecuniary interest factor in the *Tumey* case, but distinguished the case then under consideration on the primary ground that the pecuniary interest of the judge in question was too indirect and remote to constitute a denial of due process. For a comparison of these cases, see, DOWLING & EDWARDS, AMERICAN CONSTITUTIONAL LAW 605 (1954).

[42] See Brief for Appellant.

[43] See Lee, *The Emergence and Evolution of a Constitutional Right to a Fair Trial Before a Justice of the Peace.* 20 FED. B.J. 111 (1960).

In this disposal of the case on the basis of rules concerning a biased judge, the court appears to have misconceived the issue. The problem presented by this case is one of the disqualification of unsalaried justices of the peace by reason of their pecuniary interest, as distinguished from bias. The questions of the bias of a judge and the pecuniary interest of a judge in the outcome of the case before him are quite different both on analysis and in their legal consequences.

The doctrines surrounding the issue of the interested judge stem from the universally recognized principle that no man can be judge of his own cause.[44] The general rule is well settled that a direct pecuniary interest in the subject matter of a suit will disqualify a judge from acting therein.[45] Basically, he must stand to gain or lose financially depending upon which way a case before him is decided.

On the other hand, bias refers to the existence of an *actual* state of mind on the part of the judge—an existing opinion on his part regarding one of the parties to an action which strongly militates either for or against that party. "The words bias and prejudice... refer to the mental attitude or disposition of the judge towards a party to the litigation."[46] ... "Bias and prejudice mean a hostile feeling or spirit of ill will toward one of the litigants, or undue favoritism or friendship toward one."[47]

The distinction between bias and interest is clearly recognized by the Supreme Court in *In re Murchison.* " [N]o man is permitted to try cases where he has an interest in the outcome .... Such a stringent rule may sometimes bar trial by judges who have no actual bias ...."[48]

Decisions in Washington are in agreement that where a party believes the court to be biased against him, he has the privilege of demanding a change of venue.[49] If he fails to seek a change of venue before a decision is made, he is held to have waived the disqualification, and the judgment of the court, though erroneous, is not void.[50] It is this

[44] See Tumey v. Ohio, 273 U.S. 510 (1927); 48 C.J.S. *Judges* § 78 (1947).

[45] See 48 C.J.S. *Judges* § 78 (1947) for a collection of cases on this point.

[46] Hudspeth v. State, 188 Ark. 323, 325, 67 S.W.2d 191, 192 (1933). *Accord,* Evans v. Superior Court, 107 Cal. App. 372, 290 Pac. 662 (1930); Tuttle v. Tuttle, 48 N.D. 10, 181 N.W. 898 (1921). *Cf.,* State v. Waterman, 36 Idaho 259, 210 Pac. 208 (1922).

[47] Haslam v. Morrison, 113 Utah 14, 20, 190 P.2d 520, 523 (1948). *Cf., In re* Hale's Estate, 231 Ia. 1018, 2 N.W.2d 775 (1942). See also these Washington cases, State v. Lindberg, 125 Wash. 51, 215 Pac. 41 (1923); State *ex rel.* Stevens v. Superior Court, 82 Wash. 420, 144 Pac. 539 (1914).

[48] 349 U.S. 133, 136 (1955). See Tuttle v. Tuttle, 48 N.D. 10, 181 N.W. 898 (1921) (on petition for rehearing).

[49] State v. Clark, 125 Wash. 294, 216 Pac. 17 (1923); State v. Vanderveer, 115 Wash. 184, 196 Pac. 650 (1921).

[50] State v. Clark, 125 Wash. 294, 216 Pac. 17 (1923); State v. Vanderveer, 115

analysis which the court applies; writing the opinion as if Borchert had alleged bias instead of interest.

Where the disqualification of the judge is the result of his having a pecuniary interest in the outcome of the case, however, there is authority that such a disqualification affects the court's jurisdiction, in addition to the venue, rendering the acts of the judge void.[51] This conclusion has been reached because disqualification by interest is a matter of public policy,[52] and on the basis of statutory disqualification of the interested judge.[53] No Washington cases deal with this point.[54]

Thus, under the analysis of most opinions dealing with the pecuniary interest of a judge, Borchert's challenge to the jurisdiction of the court, rather than the venue, was entirely proper. Borchert waived nothing by refusing a change of venue, having made a timely and proper objection to the court's jurisdiction.

The concurring opinion is almost entirely devoted to establishing the fee justice courts as constitutional under the state constitution. This point was not in issue in the case and it is difficult to see to what end it is raised by the concurring judge. The concurring opinion in part contains a statement which appears in essence effectively to undermine the position of the majority on the due process question. It states, "The system is not a model one. Under present conditions, *it does not approach minimum standards for the administration of justice.*"[55] (Emphasis added.) It is difficult to regard a judicial system which "does not approach minimum standards for the administration of justice" as affording due process of law to a defendant tried thereunder.

However questionable the grounds, by this decision the Washington court has closed the door to reformation of the fee justice system by

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Wash. 184, 196 Pac. 650 (1921); State *ex rel.* Stevens v. Superior Court, 82 Wash. 420, 144 Pac. 539 (1914). See Krebs v. Los Angeles Ry. Corp., 7 Cal.2d 547, 61 P.2d 931 (1936); Montalto v. State, 51 Ohio App. 6, 199 N.E. 198 (1935).

[51] Roberts v. Noel, 296 S.W.2d 745 (Ky. 1956). *Cf.*, Tumey v. Ohio, 273 U.S. 510 (1927). See also 48 C.J.S. *Judges* § 95 (1947); 30A AM. JUR. *Judges* § 210 (1958).

[52] State *ex rel* Richardson v. Keen, 185 Okla. 539, 95 P.2d 120 (1939).

[53] Postal Mut. Indem. Co. v. Ellis, 140 Tex. 570, 169 S.W.2d 482 (1943). It is notable that Washington has such a statute. RCW 2.28.030 provides, "[a judicial officer] shall not act as such ... in an action ... in which he is directly interested." No mention of this statute was made by the Washington court.

[54] Though cases in some jurisdictions may be found which appear to take a contrary position, generally they concern a complete failure to raise the interest issue. *E.g.*, Brown v. State, 149 Miss. 219, 115 So. 436 (1928); Tari v. State, 117 Ohio 481, 159 N.E. 594 (1927). Borchert *did* make a timely objection to the justice's alleged interest, though his challenge was to the jurisdiction rather than to the venue.

[55] *In re* Borchert, 157 Wash. Dec. 624, 632, 359 P.2d 789, 794 (1961) (concurring opinion of Weaver, J.).

state judicial action. It now appears unlikely that the case will be appealed.[56] Removal of the features of the system to which Borchert objected must now be accomplished, if at all, by more affirmative legislation than was enacted during the 1961 session[57] or through action by individual counties, under the terms of that legislation.[58]

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[56] Notice of appeal to the Supreme Court of the United States was filed on June 13, 1961, and the record was filed with the clerk of that court on July 26, 1961. However, the case had not been docketed as of November 1, 1961. (Rule 13 of the Revised Rules of the Supreme Court requires the appealing party to docket the case with the Court within 60 days of filing of the notice of appeal.) Counsel for Borchert have indicated that no further action is contemplated.

[57] Wash. Sess. Laws 1961, ch. 299. See note 31 *supra* for discussion of this legislation.

[58] *Ibid.*