The Justice of the Peace: Constitutional Questions

George Lawson Partain

West Virginia University College of Law
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The highly controversial subject of the constitutionality of the fee system presently employed in West Virginia to compensate the justices of the peace has recently come to the foreground in response to a statement made by Supreme Court Justice Tom C. Clark at the annual meeting of the West Virginia State Bar in Clarksburg. In reference to the need for judicial reform in West Virginia, Mr. Justice Clark stated that "Article VIII . . . provides for the justice of the peace as a constitutional office on a fee basis, even though the system itself has been declared unconstitutional in criminal cases. . . ." The statement is susceptible of two interpretations—either all fee systems, including the West Virginia system, are unconstitutional, or fee systems are only unconstitutional when they fall within the restricted sense of Tumey v. Ohio, West Virginia being in that category. The purpose of this note is to examine the present statutory scheme of compensating justices of the peace in quest of a determination whether it is unconstitutional, and further to examine the rest of the justice system to determine whether it contains other constitutionally objectionable features.

Obviously, the basis of the statement made by Mr. Justice Clark is traceable to the case of Tumey v. Ohio. The holding in this case is not exactly clear, and the Supreme Court has never given an adequate interpretation of it. A review of the various state supreme court cases applying it reveals considerable disagreement as to its actual meaning.

In the Tumey case, the defendant was arrested and charged with a violation of the state liquor laws and brought to trial before the mayor of a small community in Ohio. The defendant objected to the hearing on the ground that the mayor lacked the required qualifications, but was found guilty and fined one hundred dollars. The mayor received a twelve dollar fee, payable only in the event that the defendant was convicted. Careful scrutinization of the case does not reveal any statement, express or implied, that a fee system is unconstitutional per se. It seems evident that the Court.

2 273 U.S. 510 (1926).
3 Ibid.
intended to hold only that fee systems are unconstitutional when they are of such a nature as to encourage partiality. Supporting this viewpoint is the Court's statement that: "Every procedure which would offer to the average man as a judge to forget to hold 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 of due process of law." Moreover, the case of *Dugan v. Ohio* lends further support to this position. *Dugan* is factually similar to the *Tumey* case, except that the mayor in this case was paid a salary from a common fund to which all the mayors contributed. His salary, however, was not dependent upon the conviction of defendants. The court in holding the mayor was not disqualified from trying this case did not in any measure distinguish it on a fee-salary basis, which the court surely would have done if the ultimate basis of *Tumey* had been the unconstitutionality of a fee system per se. Instead, the court simply said the *Tumey* case was controlling and sought to determine whether the mayor had any interest in the litigation.

Consequently, it seems most probable that the proper interpretation of Mr. Justice Clark's statement is that he used the term "fee system" in the restricted sense of the *Tumey* case. This was obviously the interpretation put upon the decision by the West Virginia Supreme Court of Appeals in 1935 when it ruled the prior fee system unconstitutional. The legislature thereafter enacted the present justice of the peace statute in an effort to retain a fee system but to avoid the infirmities that existed in the prior fee

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9 *Williams v. Brannen* 116 W. Va. 1, 178 S.E. 67 (1935). The fee system as it existed prior to the *Williams* decision created a fund for each justice into which was paid the fine collected from each conviction. The justice was permitted to pocket the court costs, but was required to pay to the sheriff the fine collected. The sheriff in turn credited the amount of the fine to the justice's personal fund. In instances when the defendant was found not guilty, the justice submitted a bill to the sheriff, and the sheriff paid the bill out of the funds accumulated in fines from past convictions. If no funds were accumulated, the justice was not paid. Thus, it was necessary for the justice to convict an appreciable number of defendants to assure his salary in non-conviction cases.

Following the *Williams* decision, the legislature amended the fee system (7-5-15) to enable the justices to draw upon the general county fund in cases where the justice's fund was insufficient to meet the justice's bills as they were submitted. It would seem that if it could be shown that some of the general county funds become dissipated every so often, that this would
systems. No case in West Virginia appears to have ever tested the constitutionality of the present fee system. Thus, its constitutionality is still open to question. On the surface the statutory scheme of compensation appears to meet the requirements of Tumey, but a thorough examination of the act and the procedures involved reveal the existence of possible constitutional objections.

Economic Competition Among Justices

The first plausible constitutional objection to the present arrangement is that it encourages economic competition among the justices. An understanding of the operation of the present fee system is necessary to understand exactly what this economic competition is and why it might possibly engender conduct proscribed in the Tumey case.

The basis for the justice of the peace system is rooted in the West Virginia Constitution which provides that each county is to be laid out into districts, not less than three nor more than ten in number; there is to be elected from each district one justice of the peace, and if the population of any district exceeds twelve hundred, then two justices of the peace are to be elected therein. The constitution does not, however, set forth any specific method of compensation but merely grants the legislature power to prescribe the proper procedure. The legislature, since the first adoption of this provision, has compensated negative the effect of the 1935 amendment to the fee system. According to Mr. Richard Shelton, Executive Director of the West Virginia Ass'n of County Officials, this past year, as in preceding years, several general county funds throughout the state did go dry. Does this mean that the present fee system employed in West Virginia is unconstitutional on this ground? To be sure, the answer is not as simple as it appears. There is a strong argument that, admitting the fact that several general county funds are completely dissipated each year, this does not of itself void the present fee system. This is because the code provides (7-5-7) that when there are insufficient funds to meet the obligations of the county the sheriff is authorized to endorse his signature on the bill which will note the indebtedness of the county to the holder and as such will bear legal interest. Since, at present, the banks in those counties wherein the general county funds have gone dry will cash the bills as though they are negotiable instruments it would appear that this eliminates any interest the justice of the peace could be said to have in seeing that sufficient funds are always available in the general school fund for payment in spite of the lack of funds in the general county funds.

10 W. VA. Code ch. 7, art. 5, § 6 (Michie 1968).
11 W. VA. Const. art. VIII, § 27.
12 Ibid.
13 W. VA. Const. art. IX, § 6.
the justices of the peace on a fee basis. There seem to be two basic underlying thoughts behind the adoption and retention of the fee system by the legislature. First, it wanted a compensatory system that was monetarily self-sustaining. This is evidenced by the constant reenactment of the general school fund plan or "justice fine" fund as it has been called.\textsuperscript{14} Second, it seems obvious that past legislatures have felt that the compensation of the justices should be directly related to the amount of work each performs. In other words, incentive was to be the measure of compensation for the justices.

With this understanding of the constitutional provisions and legislative thought in the background, attention may be turned to an examination of the current legislative fee system employed in criminal cases. The compensation of the justice in criminal cases is determined solely by the number of cases he hears. Likewise, the determination of the number of cases the justice hears rests largely in the discretion of the law enforcement officers in a county. Under the present statutory scheme there is no specific method prescribed for a law enforcement officer's allocation or distribution of cases among the justices of his county. An officer may bring any arrested person or direct any person to whom he gives a traffic ticket to any justice of the peace in the county where the arrest is made or the ticket is tendered. Considering the fact that an officer can take his cases before any of the justices in his county, it seems highly improbable that the justice of the peace can "hold the balance nice, clear, and true between the State and the accused"\textsuperscript{15} in those cases where the officers are the principal witnesses against the accused. Since the justices of the peace are dependent upon the very same officers who are testifying against the accused to provide them with future cases from which they earn a fee, it cannot be assumed that the justices of the peace are entirely free to view the testimony of the arresting officers critically and accept the testimony of the accused. Nor is it likely in those instances where an officer may have acted

\textsuperscript{14} A partial history of the constant reenactment of the fee system is found in Davis, Elkins, & Kidd, \textit{The Justice of the Peace in West Virginia} 15 (Bureau for Government Research W. Va. Univ. Pub. No. 23 1958). The fines of each justice are paid into a fund, which at the end of each year is paid, if any remain after the justices are paid their fees, into the General Revenue fund of the state for the support of the free school system.

\textsuperscript{15} Tumey v. Ohio, 273 U.S. 510, 524 (1926).
hastily or exceeded his authority that the justice will be overly eager to reprimand him.¹⁶

When the arresting officer happens to be a constable, the danger that the justice of the peace will fail to "hold the balance nice, clear, and true between the State and the accused" is at its height. The constable's compensation, like the justice's, is determined on a fee basis.¹⁷ The compensation of the constables stems from basically two sources, arrests and services rendered at the request of a justice of the peace.¹⁸ Thus, by the nature of the statutory scheme, the justices of the peace and the constables are greatly interdependent upon each other to earn their fees. The justice of the peace depends upon the constable to bring the cases before him, and the constable depends on the justice of the peace to assign him to deliver summons and subpoenas and perform other services. It is somewhat natural for a justice of the peace and a constable to pair off and operate as a team. In such instances, there is a real temptation for the two to combine efforts in an attempt to "drum up a little business." Where this kind of relationship exists, it is unlikely that the justice of the peace will ever question his "partner's" testimony or basis for arrest. It is in this type of arrangement that there is a distinct possibility that a justice may attempt to conceal the fact that a constable is making arrests without a valid basis, and, in reasonably close cases, he may not "hold the balance nice, clear, and true between the State and the accused."¹⁹

In civil cases, the justices of the peace must rely on the individual plaintiffs to supply them with enough cases to make the job economically worthwhile.²⁰ In order to insure that the job is economically worthwhile there is a strong temptation to favor the several good "customers" of the county who institute suits in the justice of the peace courts with some regularity. The best "customers" the justice of the peace can have are the local stores and the small loan companies.²¹ If a justice is fortunate enough to have such a "customer," there is bound to exist an air of favoritism toward

¹⁶ For several illustrative cases of this justice-law enforcement officer relationship see Luvera, Justice for a Fee, 53 A.B.A.J. 242 (1967).
¹⁷ W. VA. CODE ch. 50, art. 17, § 1 (Michie 1966).
¹⁸ Ibid.
²⁰ W. VA. CODE ch. 50, art. 17, § 1, (Michie 1966).
²¹ Silverstein, Small Claims Courts versus Justices of the Peace, 58 W. Va.
him. The reason is that a justice is well aware of the fact that such a plaintiff can change his patronage to one of the other justices in the area, which may range from 2 to 19 depending on the county.\(^2\) Thus, considering the fact that these good "customers" bring many suits before the same justice, and that the Code provides that the losing party pays the fees of the justice and the constable, it is hardly surprising that "the justice is likely to favor such a plaintiff."\(^3\) As Mr. Lee L. Silverstein stated in his article on small claims courts, "The fee system makes a justice's income depend in part on which way he decides. No wonder people say j.p. means judgment for plaintiff!"

In as much as the justice's income is in part dependent upon the way he decides certain cases, it would seem a defendant might have a valid due process objection to the justice hearing the case. Such an objection was raised in two recent cases.\(^4\)

In a Michigan case\(^5\) the defendant, charged with a parking violation, was brought before a justice of the peace. After objecting to the qualification of the justice on the ground that the fee system created a climate of unfairness and a temptation to favor the complainant or plaintiff, the defendant demanded a trial by jury and was found guilty of the violation. On appeal, the court stated that the "fee system does not create . . . a pecuniary interest so that in every case the defendant would be deprived of a fair and impartial trial."\(^6\) The court held that since the defendant had had the benefit of a trial by jury, the jury being the judge of fact and law in Michigan, the defendant was not deprived of the fair trial guaranteed him by the state and federal constitution. In a concurring opinion, however, it was stated that the fact that the defendant had demanded a jury trial rendered moot the serious question presented by the case.\(^7\) Thus, because of the factual situation, the Michigan court was precluded from deciding the federal question involved. The language of the court, however, seems to indicate that the defendant had raised a valid constitutional objection.

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\(^2\) W. Va. Const. art. VIII, § 27.
\(^3\) Silverstein, op. cit. supra note 21.
\(^4\) Ibid.
\(^6\) People v. Cheever, supra note 25.
\(^7\) Id. at 166, 121 N.W.2d at 431 (emphasis added.)
In a Washington case, a defendant, convicted by a justice of the peace for operating a vehicle without an operator's license and while under the influence of alcohol, instituted a habeas corpus proceeding. The defendant contended that since the number of cases submitted to a justice determined his income, and the number of cases could be controlled by the cooperation of law enforcement officers, the justices had sufficient interest in the outcome of the case to come within the scope of *Tumey v. Ohio*. The superior court held that the fee statute providing compensation for the justices was violative of the fourteenth amendment, but the state supreme court reversed the decision in a 5-4 vote. The supreme court in reversing the case did not squarely meet the objection raised by the defendant, but instead rested the decision upon the fact that the defendant had refused an offer for a change in venue to a salaried justice at no cost. The court did note certain procedural distinctions between the rights of the defendant in this case and the defendant in the *Tumey* case, but it does not affirmatively appear that the court's majority rested the decision on these distinctions at all.

The four dissenting judges did not accept the waiver argument the majority advanced nor the procedural distinctions, and, concurring in the defendant's contention, stated:

We have here not a disqualification by direct pecuniary interest, but a disqualification by prejudice arising from indirect pecuniary interest. Due process is denied in both

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31 If the objection raised in the instant case were to be raised in West Virginia, it appears that the majority opinion here would offer little, if any, basis for meeting the same objection in West Virginia, since West Virginia does not have a venue changing statute, nor salaried justices, and it would affirmatively appear that the West Virginia court, in the *Williams* case, has already rejected the procedural distinctions the Washington Court set out.
33 *In re Borchert*, 57 Wash. 2d 719, 806, 359 P.2d 789 (1961). The right to be tried before a court which is above reproach on grounds of bias or personal interest is so fundamental to the ideals of Anglo-American law and any pertinent definition of justice, that I cannot in good conscience subscribe to the waiver argument of the opinion. In fact, I would classify absence of personal bias and personal interest as *sine qua non* of the judicial administration of justice. I cannot compromise these and my good conscience to say that respondent waived this fundamental right and was foreclosed from collaterally attacking his conviction.
instances because the tribunal is not impartial. . . . The
income of the justice of the peace depends directly upon
the volume of cases filed. If no cases are filed he receives
nothing. Vice inheres in the system.\textsuperscript{34}

Moreover, the dissenters stated that "the very real likelihood" of
bias has been demonstrated by the published studies of the law's
scholars. The dissenting opinion contained the following excerpts
from these writings:

The fee system, although the amount of fees be not
dependent in terms of the result, tends to impair judicial
integrity. Police and prosecutors can punish a justice
of the peace who discharges defendants whom they wish
to convict, by failing to bring cases before him,\textsuperscript{35}

The primary evil resulting from the fee system is the
pressure it exerts on each justice who operates under it to
get more business in order to enlarge his income. . . .
Most criminal complaints are made by officers exercising
police powers. These officers naturally seek convictions,
and would be expected to patronize justices who aid them
in their efforts rather than those who insist too rigidly
upon protecting the rights of the defendants. A sympa-
thetic attitude toward the views of the police is therefore
quite likely to result in more business and an increase in
the justice's income . . . . It is very common in all states
where the justices compete for business, to find instances
where the sheriff's office, or the state police, or any other
agency engaged in enforcing the criminal law, take most or
all of their cases to certain justices notwithstanding the
fact that other justices may be more conveniently ac-
cessible. In such cases it is not difficult to conclude that
the favored justice renders service acceptable to the
officers who bring in the business.\textsuperscript{36}

The dissenters concluded by stating:

We are confronted, then with a system in which the
income of the unsalaried justice of the peace is utterly

\textsuperscript{34} Id. at 735-36, 359 P.2d at 798-99.
\textsuperscript{35} Id. at 737-40, 359 P.2d 799-80, Citing LUMAS, THE TRIAL JUDGE.
\textsuperscript{36} Id. at 737, 359 P.2d 799, citing Sunderland, A Study of the Justice
of the Place and Other Minor Courts. Conn. B. J. 300.
(sic) dependent upon the whim and caprice of the arresting officers . . . . The test is whether this enticement inheres in the system. It does. On the one side, the justice of the peace is tempted to enhance his income by doing the bidding of the arresting officers; on the other, he must decide impartially in each case. No more is required to show a very real likelihood of bias. It is the constitutional right of every person . . . to be tried by justice of the peace as impartial as the law can devise.\textsuperscript{37}

Therefore it can be stated that strong arguments exist to the effect that the present fee system employed in West Virginia is unconstitutional in criminal cases because it engenders a "procedure that offers 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."\textsuperscript{38} Moreover, it may certainly be argued that the civil jurisdiction of the justice is unconstitutional because the system lends itself to the temptation of the justice to favor regular plaintiffs in order to direct business his way.

\textit{The Question of Judicial Competence}

Why do I speak of the quality of the justice dispensed in the justice courts as "often woefully poor?" In the first place, because the justice of the peace is ignorant of the law he administers, and if he holds a jury trial, the jury is not only also ignorant of the law, but is without the means of being adequately instructed in it since it is the judge of both law and facts and must try and decide both from the conflicting assertions, denials, and the sophistries of the two litigants or their counsel. A jury in even the justice court may conceivably be trusted to determine facts correctly for they are usually somewhat simple; but law is

\textsuperscript{37} \textit{Id.} at 737, 359 P.2d at 799.

\textsuperscript{38} \textit{Id.} at 741, 743, 359 P.2d at 801-3. The concept that a justice must be knowledgeable in the law is not a new concept, but rather one deeply rooted in our jurisprudence. In the Magna Charta, section XLV, we find the statement, "we will not make any justiciaries, constables, sheriffs, or bailiffs, but from those who understand the law of the realm are well disposed to observe it."
never so simple that it cannot be warped and twisted beyond all recognition in the hands of a clever exponent.\textsuperscript{39}

West Virginia is no exception to this statement of complaint against the justice of the peace, and, although there is scant authority on the matter, it may well be that this infirmity offers a second basis for constitutionally objecting to cases being heard by a justice of the peace.

In 1958 the Bureau for Government Research of West Virginia University conducted an extensive study of the justice of the peace system in West Virginia.\textsuperscript{40} One aspect of the study was a questionnaire survey designed to determine the general nature and competency of the justices of the peace in this state. The Bureau sent out questionnaires to some three hundred and eighty justices of the peace in the state, and, while only one hundred and forty-four responses were received, the results of the survey indicated that our justices of the peace are almost entirely without any schooling or learning in the law.\textsuperscript{41} Of those justices responding, only one had had any schooling in law, and approximately one-half of the justices had failed to obtain a high school education.\textsuperscript{42}

This condition is a product of history. From the inception of the office in the fourteenth century\textsuperscript{43} until the turn of this century, the number of persons trained in law has not been sufficient to adequately fill the justices' offices. Thus, there was thrust upon laymen the duty of filling them. Since they were "ignorant of the law", their determinations had to be predicated upon what is commonly called "common sense". The question to be considered here is whether such a determination satisfies the due process requirement guaranteed by the fourteenth amendment.


\textsuperscript{40} Davis, Elkins, & Kidd, \textit{The Justice of the Peace in West Virginia} (BUREAU FOR GOVERNMENT RESEARCH, W. VA. UNIV. PUB. No. 23 1958).

\textsuperscript{41} Id. at 9.

\textsuperscript{42} Id. For a general discussion of the lack of legal training of the justices of the peace throughout the country see Vanlandingham, \textit{The Decline of the Justice of the Peace}, 12 KAN. L. REV. 389, 391, 392 (1964).

\textsuperscript{43} 1 Edw. III, c. 16 (1326-7).
The difficulty in defining the phrase "due process of law" has been repeatedly recognized.\(^4\) It has been said that the term "due process of law" asserts a fundamental principle of justice, rather than a specific rule of law, and thus is not susceptible of more than a general statement of its intent and meaning, which are ascertained in the history of its specific application to cases requiring judicial decision.\(^4\) Therefore, it is necessary to look to the case law to see if there are cases to be found that will shed light on the question considered here.

An examination of the case law reveals that it has generally been held that an erroneous decision of a court on matters within its jurisdiction does not deprive the unsuccessful party of his rights under the due process guaranty where the parties were fully heard in the regular course of judicial proceedings.\(^4\) It has been intimated, however, that if the error is gross and obvious, coming close to the boundary of arbitrary action, there may be a violation of the guaranty.\(^4\) Dicta may be found in several other Supreme Court cases to the effect that when a judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights, then, it does violate the due process guaranty.\(^4\)

The upshot of these cases, it would seem, is that, while the due process clause does not guarantee a judgment will be entered in accordance with the law, it does guarantee that the judgment will be rendered pursuant to law.\(^4\) Moreover, it would seem that if this be true, then the necessary effect of this is that the due process guaranty requires one to be familiar with the law to be a judge, since a person could only render judgments pursuant to law when he is sufficiently knowledgeable in the law to apply it. Therefore, it seems reasonable to assume that one may constitution-

\(^4\) The writer uses the phrase "pursuant to law" as the opposite of an arbitrary or capricious decision.
ally object to any justice of the peace trying a case when it can be shown that the justice is not conversant with the law. For it only stands to reason that, since the justices are not trained in law, their decisions may be arbitrary, and, if arbitrary, then necessarily fall within the scope of the injudicial conduct condemned by the Supreme Court as violative of basic due process.

Examination of the law reveals no case where the question of whether a justice must be learned in law was judicially considered and determined. Several cases hold that "one is not required to be a lawyer to be eligible for a judgeship," but these cases are not directly in point. The objection raised here is confined to the simple assertion that it is a fundamental principle of due process of law that a justice, having the power to deprive a person of his liberty or property, must have a working knowledge of the law since the guarantee of due process of law requires that every man must have his day in court and benefit of general law; and it is questionable whether a judgment based on "common sense" would comply with this demand.

The existing conditions apparently have arisen because it has been forgotten or overlooked that the justice of the peace court is just as much a court of law as any other court of law in this state. Being a court of law, it must render judgments pursuant to law and not pursuant to "common sense." The fact is, and must never be forgotten, "no lawsuit is small; for justice is never a small thing. The smallest matter may be of supreme moment in the life of the individual affected."  

The fact that a defendant may be entitled to a trial, de novo, at the circuit court level, where the judges are judicially competent, does not diminish the strength of the constitutional objection, because in many instances a defendant would ordinarily incur less cost by paying a moderate fine or judgment than by paying appeal costs. And in those instances where a person is erroneously in-

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53 E.g., in Monongalia County the minimum recommended legal fee for trial of a J. P. appeal is $75.00. Monongalia County Bar Ass’n Schedule of Minimum Fees (1965).
carcerated, the defendant may well choose to serve a short sentence to avoid the costs incident to an appeal, or serve the sentence completely unaware of the fact that his rights were violated or abused. The simple fact is, as the West Virginia Court stated in Williams v. Brannen,54 "The Constitution requires that the accused shall be tried before a fair and impartial tribunal in the first instance where he will not face the alternative of paying an unjust fine or resorting to the delay, annoyance and expense of an appeal."55

It may be noted at this point that the full impact of "common sense" determinations becomes even more manifest when considered in light of the foregoing discussion of the economic involvement of the justices in litigation in their courts. Determinations based on "common sense" leave too much room for arbitrary, capricious, and, in many instances, biased decisions. Therefore, it appears that "common sense" determinations by justices of the peace do not satisfy due process guaranties of the constitution.

CONCLUSION

The writer has suggested two possible constitutional objections to a justice of the peace trying a case. Whether the West Virginia Supreme Court of Appeals will sustain the objections is a question that only time will answer. If the objections are sustained, the legislature will be called upon to make wholesale reforms in the present system. Any such reform by the legislature should not be undertaken without reference to the very fine discussions on reform of the justice system found in Mr. Lee Silverstein's article56 and the report prepared by the Bureau of Government Research.57

George Lawson Partain

57 Davis, op. cit. supra note 40.