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Constitutional Law—Justice of the Peace Disqualified by Pecuniary Interest—1961 Statute Held Invalid

P, charged with a misdemeanor, sought a writ of prohibition to restrain respondent, a Justice of the Peace for Kanawha County, from trying his case. *P* contended respondent was disqualified from hearing the case by reason of a pecuniary interest in the outcome thereof. Under provisions of a 1961 enactment of the West Virginia Legislature (W. Va. Acts 1961, ch. 71), W. VA. CODE ch. 50, art. 19 (Michie 1961), justices of the peace in counties of over 200,000 population are to be paid a salary in lieu of fees, as formerly provided. Salaries are paid solely from a justices' account in the general fund of the county, and all fines, fees and costs collected by the justices are remitted to that account. *Held*, writ of prohibition awarded. The statute is in violation of W. VA. CONST. art. III, § 10, and U. S. CONST. amend. XIV, § 1. *State ex rel. Osborne v. Chinn*, 121 S.E.2d 610 (W. Va. 1961).

The Supreme Court of the United States, in a landmark decision, recognized the maxim that "no man ought to be a judge in his own cause." *Tumey v. Ohio*, 273 U. S. 510 (1927). Defendant therein was charged and convicted of a liquor violation in a small town mayor's court, and the mayor received twelve dollars in costs and fees. In event of defendant's acquittal the mayor would have received no compensation. In reversing the lower court conviction the Supreme Court held: "Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law." For a collection of cases see Annot., 50 A.L.R. 1256 (1927). The statutory enactment challenged in the present case gives justices of the peace only one source of salary, a fund provided by costs and fees collected in cases tried by them. The statute further provides that any balance of funds at the end of the fiscal year is to be paid to the county general fund. Legislation of this type encourages finding an accused guilty, and tempts the justice to levy a substantial fine.

The West Virginia Supreme Court in *Williams v. Brannon*, 116 W. Va. 1, 178 S.E. 67 (1935), declared the then existing statutory method of compensating justices of the peace to be unconstitutional. W. VA. CODE ch. 7, art. 7, § 15 (1931). Under that statute justice's fines were paid into a general school fund and kept under the account of the individual justice making the payment. Where a

justice of the peace in a misdemeanor case could not collect his fees and costs from the parties to the suit he was paid from the school fund, but only to the extent of his prior payments to that fund. Therefore, when costs and fees in a case were not collected from the litigants, a justice was paid solely from a fund created by prior convictions. The statute was accordingly held unconstitutional as a denial of due process of law. See also 41 W. VA. L.Q. 268 (1935). The amended statute for compensation of justices now in effect provides that justices are to be paid out of the general school fund or general county fund, as the court may direct. W. VA. CODE ch. 7, art. 7, § 15 (Michie 1961). In an Ohio case challenging the 1927 *Tumey* decision a mayor, sitting as judge, had levied fines and paid the proceeds thereof into a general fund from which his salary as mayor was drawn. This statute was held constitutional, as the mayor received his salary regardless of the number of convictions. *Dugan v. Ohio*, 277 U.S. 61 (1927). A justice may receive fees and costs from an accused upon conviction, but this fact does not create such an interest as to disqualify the justice under the constitutional guaranties. 16A C.J.S. *Constitutional Law* § 708 (b) (1956).

The decision in *Williams v. Brannon*, *supra*, has been modified by *State v. Simmons*, 117 W. Va. 326, 185 S.E. 417 (1936). The defendant, convicted of a misdemeanor by a justice of the peace, upon appeal raised the question of the justice's pecuniary interest under W. VA. CODE ch. 7, art. 7, § 15 (1931). The judgment of the justice was considered only voidable, and the objection to the disqualification of the justice was held waived by the failure of defendant to raise the question in the trial court. Kentucky adopts the view that the failure to protest the qualifications of a justice in the trial court does not waive that right. This view is based on the theory that the ordinary person is not aware, nor could be expected to be aware, of his right to object to a justice's qualifications. *Roberts v. Noel*, 296 S.W.2d 745 (Ky. 1956). Some courts have gone even further and held that the right to demand a jury trial and the right to a trial de novo upon appeal are enough to secure one tried in a justice court the guaranties of due process. *Brooks v. Potomac*, 149 Va. 427, 141 S.E. 249 (1928). This view was expressly rejected in the *Williams* case, *supra*. The West Virginia Supreme Court noted one might well incur less costs in paying a moderate fine than by bearing the costs on an appeal, "for which reason many an innocent man has submitted to an unjust decision in an inferior

court," and the court accordingly held that the unrestricted right to appeal does not guarantee due process.

The concurring opinion by Judge Calhoun in the principal case presents two additional grounds, not argued in the case, upon which the legislative enactment in question might have been held unconstitutional. W. VA. CONST. art. XII, § 5, provides in part: "The legislature shall provide for the support of free schools by appropriating thereto . . . the net process of all forfeitures and fines accruing to this State under the laws thereof." The statute in the principal case provided that fines assessed shall be remitted to a designated account, and the balance, if any, after paying specified expenses, "shall become a part of the regular county general fund." This completely diverts fines from the school system. In *State v. Parkins*, 63 W. Va. 385, 61 S.E. 337 (1908), a statute providing that game wardens should receive as compensation all fines assessed by them was held to be in violation of article XII, section 5 of the West Virginia Constitution. The act in the present case further provided, in section 5, that "the judge of any court of record exercising appellate jurisdiction from a justice court . . . may, in absence, sickness, or inability of a justice to act, appoint a special justice to sit during the absence." W. VA. CONST. art. VIII, § 30, provides in part: "Vacancies in the office of . . . justices of the peace, shall be filled by the county court of the county until the next election." The case of *State ex rel. Neal v. Barron*, 120 S.E.2d 702 (W. Va. 1961), held the quoted provisions of the Constitution as mandatory, and that vacancies were not to be filled in any manner other than by the county court. The concurring opinion in the principal case should be closely noted by those who anticipate future drafting of legislation in this area.

John Everett Busch

Criminal Law—Defense of Others

Upon hearing cries for help, *D* discovered two men choking and kicking a third man who was lying on the ground. *D* fired four shots with his rifle wounding both assailants. At the trial, the jury was instructed that ". . . before one person has the right to use force in the defense or aid of another, the circumstances must be such that the person on whom the assault is being made has the right of self-defense." The jury found *D* guilty of atrocious assault