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# The Justice and His Fees

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## STUDENT NOTES

### THE JUSTICE AND HIS FEES

One John Williams, charged with a misdemeanor,[1] attacked the very power of the justice of the peace to try the case on the ground that the latter had a direct pecuniary interest in the result arising under the statutory fee system. Under that system, all claims of justices for fees in misdemeanor cases, not paid directly by the defendant, were payable exclusively from the so-called "general school fund", no justice being permitted to draw from the fund a greater amount in fees than he himself contributed to it in fines.[2] In one of the most important local decisions of recent years,[3] the court, in issuing the writ of prohibition, held that since it was necessary to convict in an appreciable number of cases in order to secure payment of fees, the justice was wholly disqualified by interest.

Those who are convinced that the fee system is pernicious[4] will applaud this decision without being over-critical of its rationale. On principle, the case undoubtedly reaches a desirable result. The practice of allowing justices of the peace no compensation except by fees[5] collected from the convicted,[6] while rarely

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[1] The misdemeanor consisted of carrying an oversupply of powder into a mine in violation of W. VA. REV. CODE (1931) c. 22, art. 2, § 63.

[2] W. VA. REV. CODE (1931) c. 50, art. 17, § 14, and c. 7, art. 5, § 15. See also c. 50, art. 17, § 11, providing for the amount of fees payable. The history of these sections is interesting. Before the 1931 revision, the justice was not limited by the amount in fines that he contributed. The revisers explained that the fees were made payable only out of the fines paid in by that particular justice "so that the dilatory justice cannot profit by the diligence of some other justice".

[3] Williams v. Brannen, 178 S. E. 67 (W. Va. 1935).

[4] This seems to be the concensus of opinion among legal writers and members of the profession generally, in this state and elsewhere. See Keeler, *Our Justice of the Peace Courts — A Problem in Justice* (1930) 9 TENN. L. REV. 1; Pound, *The Administration of Justice in the Modern City* (1913) 26 HARV. L. REV. 302; Smith, *The Justice of the Peace System in the United States* (1926) 15 CAL. L. REV. 118; *Report of Committee on Judicial Administration and Legal Reform,* OHIO STATE BAR ASS'N REP. (1935) (mid-winter meeting) 555; Sommerville, *Justices and Their Courts* (1895) 2 W. VA. BAR 45; Simms, Address: W. VA. BAR ASS'N REP. (1930) 41.

[5] Apparently most states "provide only fee compensation for their minor courts", although most of them have statutes making the county or state liable therefor. See note (1927) 36 YALE L. J. 1171, 1173; see also Smith, *op. cit. supra* n. 4, at 120, n. 8.

[6] The United States Supreme Court in Tumey v. Ohio, 273 U. S. 510, 47 S. C. 437 (1926), lists seven states, not including West Virginia, where such a system then prevailed.

questioned,[7] is plainly unjustifiable. It will be noted, however, that the fee system creating the interest was statutory, which would ordinarily necessitate, under our legal system, the discovery of a constitutional peg upon which to hang its invalidity.

The court, in relying primarily on the *common law* maxim, *nemo debet esse judex in propria causa,* to demonstrate the unconstitutionality of the stautory scheme in question, apparently ignores the above-mentioned requirement.[8] It is evident, however, that what the court actually intends is that, apart from the written constitution, the maxim "no man can be judge in his own cause" is deemed too sanctified for legislative circumvention. This doctrine, illustrating nicely the strong common law bias of the judiciary, is not entirely unsupported. It dates from Lord Coke's famous dictum in *Bonham's Case,*[9] and, although probably largely repudiated by later English judges,[10] has been followed in some American decisions,[11] having previously been approved by way of dictum by the West Virginia Court.[12] Nevertheless, it is doubtful whether such a natural law concept has any legitimate place in our own political society, which intends an omnipotent legislature within the confines of the written constitution.[13]

The true basis for the decision appears to be that first enunciated by the Supreme Court in *Tumey v. Ohio,*[14] and re-

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[7] It is suggested that the acquiescence in this practice is probably due to the insignificance of the amounts involved in cases falling within the jurisdiction of such officers. See note (1927) 50 A. L. R. 1256, 1258. Again, it has been attributed to the absolute right of appeal from the decision. See Keeler, *op. cit. supra* n. 4.

[8] This is apparent from the fact that the court cites two West Virginia cases as establishing the inviolability of the maxim in this state. Findley v. Smith, 42 W. Va. 299, 26 S. E. 370 (1895); and City of Grafton v. Holt, 58 W. Va. 182, 52 S. E. 21 (1905). In these cases the constitutionality of a statute is not involved, the interest of the judge arising wholly apart from statute.

[9] For an interesting and instructive discussion of this case and its history, see Plucknett, *Bonham's Case and Judicial Review* (1926) 40 HARV. L. REV. 30.

[10] *Ibid.* at 58 *et seq.*

[11] Pearse v. Atwood, 13 Mass. 324 (1816); Winans v. Crane, 36 N. J. L. 394 (1873). In the latter case it was said, p. 403: "The maxim under consideration has always been regarded in English jurisprudence as elementary and fundamental in judicial action, and I think can no more be materially invaded by the legislature than it could pass an act that a judge might decide according to lot. . . ."

[12] Forest Coal Co. v. Doolittle, 54 W. Va. 210, 216, 46 S. E. 258 (1903).

[13] "Common right is vague at best and cannot compare with a well drawn constitution as a check upon legislative action." Plucknett, *op. cit. supra* n. 9. For a discussion of the theory that there is an unwritten as well as a written constitution, see McClain, *Unwritten Constitutions in the United States* (1902) 15 HARV. L. REV. 531.

[14] *Supra* n. 6.

affirmed in the present case.[15] In that case Chief Justice Taft declared that "every procedure which would offer possible temptation to the average man as judge to forget the burden of proof required to convict the defendant . . . . denies the latter due process of law."[16] Due process, guaranteed by both federal[17] and state[18] constitutions, restrains the legislature,[19] and certainly nothing is more essential to its existence than a trial by an impartial and disinterested judge. It is, of course, permissible to look to the established procedure and rules of common law for a definition of due process in any particular case,[20] and it is in this regard that the extreme sensitiveness of the common law to a financially interested judge performs its legitimate function.

Another aspect of the decision merits consideration. Prohibition lies for lack of jurisdiction[21] and, therefore, in order for the writ to issue here, it was necessary to hold that the justice had a disqualifying interest in the case from its very inception,[22] *i. e.*, from the time the warrant was issued. Otherwise, the statutes creating the interest in the result of the case being void, the justice, no longer having any interest in the actual trial, would still retain his jurisdiction of the cause. In the light of the fact that any fee system of remuneration would embody this same interest in instigating litigation this view of the case assumes great importance.

Although the instant case affects the status of the fee system only in regard to criminal proceedings, its existence in civil cases is equally vicious.[23] With respect to the latter, the interest of the justice is in encouraging litigation so as to increase the sum total of his fees. And obviously, this interest is best furthered by render-

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[15] Syllabus 2.

[16] Tumey v. Ohio, *supra* n. 6, at 532.

[17] U. S. CONST., Amend. XIV, § 1.

[18] W. VA. CONST., Art. III, § 10.

[19] Burdick, THE LAW OF THE AMERICAN CONSTITUTION (1st ed. 1922) § 233. See also Murray v. Hoboken Land and Improvement Co., 18 How. 272, 15 L. Ed. 372 (1855).

[20] Murray v. Hoboken Land and Improvement Co., *supra* n. 19.

[21] W. VA. REV. CODE (1931) c. 53, art. 1, § 1. "The writ of prohibition shall lie . . . . when the inferior court has not jurisdiction . . . ." For cases holding that prohibition is the proper remedy to prevent action by a judge who is disqualified by interest, see Price v. Sturgiss, 82 W. Va. 523, 97 S. E. 193 (1918); Coal Co. v. Doolittle, *supra* n. 12.

[22] With respect to this point the court said: "The prospect for fees arising from his (the petitioner's) arrest might have influenced the issuance of the warrant. The stream from the fountain of justice must be pure from its very source."

[23] See generally the references in n. 4, *supra*. See also note (1927) 13 VA. L. REG. (N.S.) 367; Note (1928) 36 YALE L. J. 1171.

ing verdicts favorable to those who bring the "business" to the court.

The decision in the instant case made imperative legislation to save our inferior courts from atrophy. For obvious reasons the substitution of a salary for fees would have been desirable.[24] Nevertheless, the recently enacted statutes pretended to be nothing more than a variation of the fee system.

The effect of the new statutes is to entitle the justice of the peace to a flat fee of three dollars[25] in each criminal case and proceeding, for which sum the county is liable.[26] No longer limited in his recovery of fees to the amount of fines which he pays in, the justice's interest in convicting the defendant has disappeared. It is apparent, on the other hand, that nothing in the statutes obviates the pecuniary interest of the justice in instigating criminal litigation in order to increase the sum total of his fees. This being true, the instant case, as understood by the writer, renders the validity of the present scheme doubtful.

The present case subjects to the searchlight of informed opinion the entire justice of the peace system. There are those who believe that a drastic reorganization of our inferior courts has become imperative.[27] So firmly entrenched, however, in our constitution[28] is the justice of the peace court that anything approaching complete abolition would necessitate a constitutional amendment.[29] True, there is no constitutional prohibition against

[24] A bill to that effect was introduced and referred to the Committee on the Judiciary. See H. B. No. 56. This bill would have provided for a salary of from $300 to $1500 per annum, to be fixed in advance by the county court.

[25] The emergency act passed Jan. 17, 1935, and effective from passage, fixed this fee at one dollar. See H. B. No. 65. This sum was in lieu of the variable amount formerly provided. See W. VA. REV. CODE (1931) c. 50, art. 17, § 11. The fee was increased to its present amount by the Committee Substitute for H. B. No. 56, passed Mar. 9, 1935, and effective from passage.

[26] This change was effected by H. B. No. 64, passed Jan. 17, 1935, and effective from passage, amending W. VA. REV. CODE (1931) c. 7, art. 5, § 15, and H. B. No. 56 (Committee Substitute) amending W. VA. REV. CODE (1931) c. 50, art. 17, § 14.

[27] See n. 4, *supra*. See also Harley, *Ultimate Types of Inferior Courts* (1916) 22 CAS. AND COM. 3; *Efficient Local Courts* (1919) 3 AM. J. SOC. 13; *Rep. Com'n On W. Va. Const.* (1930) 30-32.

[28] See W. VA. CONST., art. 8, § 1, expressly vesting general judicial power in the justice of the peace. See also art. 8, § 26, providing for the division of each county into districts, with a minimum of one justice in each district.

By the constitution, the justice is given civil jurisdiction in "actions of assumpsit, debt, detinue, and trover" if the amount in controversy does not exceed $300. No criminal jurisdiction is expressly provided. It is merely stated that the justice shall have such criminal jurisdiction as the legislature shall provide. See W. VA. CONST., art. 8, § 28.

[29] See the proposed amendment of the Commission on the Constitution of West Virginia, *supra* n. 27. The gist of the proposal is to take from the

putting the justice on a salary, or against imposing upon the office certain qualifications in the nature of legal training and experience. But while the former change would seem desirable, the practicability of the latter, under the present system, appears doubtful.[30]

There is no dearth of suggested plans looking toward the establishment of a substitute court.[31] The situation is somewhat the establishment of a substitute court.[31] The situation is somewhat complicated by the fact that the justice performs, apart from the actual trial of cases, a useful function as a conservator of the peace, and by the additional fact that there seems to be a real need for some sort of a "poor man's court".[32] Likewise, while the experience of other states will be instructive, any successful scheme must, of necessity, consider peculiar local conditions and requirements. The consideration, and many others serve to caution us that action, without careful study and deliberation, is not advisable.

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justice all of his civil jurisdiction, leaving him little more than the traditional conservator of the peace.

[30] The thought is that it would be difficult in many rural districts at least to find qualified attorneys who would assume the duties of the office.

[31] See n. 27, *supra;* and see *Remedy Proposed For Justices' Courts* (1928) 11 AM. JUD. SOC. 30.

Practically all suggested plans would abolish the Justice of the peace as a judicial officer, or strictly limit his powers, and set up in his stead some form of county court, to be a court of record, with a qualified judge, on a salary basis, with appeal for cause and not as a matter of right.

It is, of course, possible under our state constitution, which provides for the establishment of inferior courts, to set up a county court with concurrent jurisdiction with the justice without the neccesity of a constitutional amendment. See W. VA. CONST. art. 8, § 19.

[32] See Sommerville, *op. cit. supra* n. 4; Rockel, *Justice of Peace's Court* (1914) 78 CENT. L. J. 23, discussing the Kansas experiment in small claims courts.