

## Criminal Procedure

### JUSTICE OF THE PEACE — JURISDICTION IN MISDEMEANOR CASES—PLEA OF GUILTY—COMPLAINT BY PERSON OTHER THAN PARTY INJURED

When a person accused of a misdemeanor is brought before a justice of the peace upon a complaint which is not made by the party injured, and pleads guilty, at the same time waiving in writing the right of trial by jury and consenting to be tried by the court, does the justice have final jurisdiction to sentence the accused?

This was the precise question raised in the case of *Ex parte Stahl*, 49 Ohio App. 105, OHIO BAR, April 15 (1935). Stahl was charged with a second offense in violation of the motor vehicle act, for driving an automobile while in the state of intoxication. The complaint was made by a constable before the justice of the peace, Stahl pleaded guilty and then signed a writing in which he waived the right of trial by jury and consented to be tried by the court. The justice proceeded to render final judgment of sentence upon the defendant and he was committed to the county jail. On Stahl's application for a writ of habeas corpus, the appellate court decided that the justice acted without jurisdiction, that the accused was unlawfully restrained of his liberty, and therefore ordered his discharge from custody.

The Court of Appeals reached the above result after an attempt to apply a strict interpretation of section 13433-9 of the General Code, which provides that: "When a person charged with a misdemeanor is brought before a magistrate on the complaint of the party injured, and pleads guilty, such magistrate shall sentence him to such punishment as he may deem proper according to law, and order the payment of costs. If the complaint is not made by the party injured and the accused pleads guilty, the magistrate shall require the accused to enter into a recognizance to appear before the proper court as provided where there is no plea of guilty."

Why the legislature saw fit to make a distinction between a complaint brought by the party injured and one brought by some third person, is entirely a matter of conjecture. In *Hanaghan v. State*, 51 Ohio St. 24, 36 N.E. 1072 (1894), the suggestion was made that probably the object was, "to prevent collusive complaints," whereby, in the absence and without the knowledge of the injured party, the accused was enabled to escape adequate punishment. The Court of Appeals in the principal case was in accord with this suggestion, but in view of the

fact that in many misdemeanor cases there cannot be an injured party at all, while in others there seldom is an injured party to be concerned about the proper punishment of the prisoner, such a reason seems doubtful. From a study of the history of this code section, it appears more likely that there was no particular reason for such a distinction; that it may have been merely an accident.

Under the first criminal code, when a person was arrested on a warrant for assault, or assault and battery, or an affray by fighting, issued on complaint of the *party injured*, and pleaded guilty, the justice of the peace had power to assess a fine; but he might refuse to assess the fine altogether, in which case it was his duty to recognize the accused to appear before the court of common pleas. 29 Ohio Laws 195 (1831). In 1837 an inconspicuous amendment added to the jurisdiction of the justice the case of an affray by fighting or boxing, *on complaint of any person who shall have seen the same*. 35 Ohio Laws 87.

The code of criminal procedure retained the provision giving the magistrate final jurisdiction *at his own discretion*, where the complaint was brought by the party injured, but further provided: "If the complaint be not by the party injured, the defendant shall be recognized so to appear (before the proper court)." Section 34, 66 Ohio Laws 293 (1869). This significant change in phrasing may have been motivated by some desire to protect the defendant from unfair treatment at the hands of the constable and the magistrate, as suggested by counsel in the principal case, but it seems just as probable that the draftsmen overlooked the amendment of 1837, or didn't fully appreciate the important change they were making.

According to the accepted view in Ohio, a penal statute cannot be enlarged by construction, and this applies to the sections giving final jurisdiction to magistrates. *Hanaghan v. State*, ante—but see *Marvin v. State*, 5 N.P. 209, 7 O. Dec. (N.P.) 204 (1898), where the opposite result was reached. Where a statutory provision is capable of several interpretations, however, its legislative history may be of some assistance in deciding which interpretation to adopt. So far as a complaint brought by some third person where the accused pleads guilty, is concerned, the present statute is definite; the justice is directed to require the defendant to enter into a recognizance to appear before the proper court. But where the defendant expressly waives his right to a jury trial in writing and submits to be tried by the magistrate, just what the result under the statute shall be is not nearly so clear.

Originally the statute made no provision for waiving a jury. In 1831 it was provided: "If the defendant shall decline pleading guilty to

the accusation, he shall, upon hearing of such accusation be either discharged, committed, or recognized, as the case may require." 29 Ohio Laws 195. The code of criminal procedure (1869) merely added more detail as to how the defendant should be recognized to appear before the proper court. 66 Ohio Laws 293, sections 35, 37, 38, and 43. In 1877, after providing for an examination of the defendant by the magistrate where there was no plea of guilty, and for a recognizance to appear before the proper court where it appeared an offense had been committed and there was probable cause to believe the prisoner guilty, it was further stipulated, "but if the offense charged is a misdemeanor, and the accused in a writing subscribed by him, filed before or during the examination, waive a jury and submit to be tried by the magistrate, he may render final judgment." 74 Ohio Laws 320, section 18; Revised Statutes (1880), section 7147. The present analogous section, 13433-10 of the General Code, is substantially the same.

To get a full understanding of the jurisdiction conferred upon a justice of the peace under the present statute, sections 13433-9 and 13433-10 must be considered together. This is made clear by the statute itself, since the last words in section 13433-9 are, "as provided where there is no plea of guilty." In one instance final jurisdiction is conferred upon the justice; where the accused is charged with a misdemeanor and he pleads guilty, the complaint having been brought by the party injured. In two instances the justice is directed to require the accused to enter into a recognizance: where the accused pleads guilty to a misdemeanor, the complaint not having been made by the party injured; and where there is no plea of guilty, it having appeared that an offense (felony, or misdemeanor) had been committed and there is probable cause to believe the accused guilty. Finally, it is provided that where the offense charged is a misdemeanor and the defendant waives a jury in writing, the justice may render final judgment. Thus, by waiving his right to a jury, the defendant is permitted to confer final jurisdiction upon the justice where he otherwise would have none.

There are two situations where the justice ordinarily has no final jurisdiction, and no valid reason appears for distinguishing between them. Both tend to protect the accused in his constitutional right to a trial by jury, and if that protection is voluntarily waived there is nothing in the statute which prevents the justice from taking final jurisdiction. The mere fact that the accused has pleaded guilty does not take away his right to a jury trial if he is recognized to the proper court. As it was said in *Hanaghan v. State*, ante: "The plea may be used against him on the trial, but it is not conclusive evidence of his guilt; it may dispense with

the necessity of an examination into the truth of the complaint, but it does not take away his right to a trial by jury."

The Court of Appeals in the principal case took the view that where the accused pleads guilty there is no need of a jury and no occasion for a waiver of a jury, and a waiver under such circumstances is a mere nullity. This view has support in the case of *State v. Wolf*, 26 N.P. (N.S.) 593—decided in the Probate Court of Montgomery county, Feb. 28, 1927. But the better view seems to have been taken by the Common Pleas court of the same county in *Foster v. State*, 26 N.P. (N.S.) 476—decided June 27, 1927. It was said in the latter case: "In the Probate court the defendant, by section 13452 of the General Code, may, if he so demands, have a trial by jury. When a defendant before the magistrate files a writing subscribed by him waiving a jury, he then waives his right, on being bound over to the Probate court, to demand a jury in that court; and that being all the right he had to a jury, the legislature gives the justice of the peace power to proceed with his case." In other words, it is not a jury in the magistrate's court that is waived. In discussing the conflict between these two cases, the Attorney General said: "I am of the opinion that the opinion of the Common Pleas court correctly states the law." O.A.G. 1928, opinion no. 1604, page 115.

If any difficulty is experienced in disposing of the provision that the written waiver shall be filed "before or during the examination," which might seem to limit the application of the waiver provision to section 13433-10, reference is again made to the last words of section 13433-9, "as provided where there is no plea of guilty." This phrase was tacked on when section 13433-9 was amended in 1889, twelve years after the waiver provision was incorporated in section 13433-10. By this amendment, the magistrate was no longer given the option of recognizing the accused to the proper court when the complaint was brought by the party injured and the plea was guilty; it was provided that the "magistrate shall sentence him to such punishment as he may deem proper." 86 Ohio Laws 171. In view of this important change, the phrase above must have been inserted for the very purpose of bringing the last half of section 13433-9 within the purview of the waiver provision in section 13433-10.

The Court of Appeals also argued in the principal case that it was nonsensical to "submit to be tried by the magistrate," where there had been a plea of guilty. Counsel presented the same argument to the Supreme Court in the case of *State v. Borham*, 72 Ohio St. 358, 74 N.E. 220 (1905), but it was rejected, the court pointing out that the

prisoner "hears" the charge and the court "hears" the plea; the magistrate may as certainly and as lawfully "determine," upon the confession, as he could upon the testimony of witnesses. In that case, section 1817 of the Revised Statutes was under consideration, providing that a mayor should have final jurisdiction to *hear* and *determine* any prosecution for a misdemeanor unless the accused was entitled to a trial by jury.

The decision in *Hanaghan v. State*, ante, relied upon by the Court of Appeals in the case under discussion, established the rule that a plea of guilty is not the equivalent of a waiver of a jury and submission to be tried by the magistrate. There was no express waiver in writing involved in that case. In the course of its discussion the court said: "Such a plea (of guilty) may dispense with the necessity of an examination into the truth of the complaint against the accused, but it does not take away his right of trial by jury. The statute has required his express waiver in writing to deprive him of that."

In general, the courts have treated sections 13433-9 and 13433-10 together, with no visible attempt to exclude the situation where the complaint is not made by the party injured and there is a plea of guilty, or to confine the waiver provision to section 13433-10. It is usually said that the magistrate has no final jurisdiction unless the defendant pleads guilty or waives a jury trial. *In re Zacharow*, 13 N.P. (N.S.) 119, 57 Bull. 285 (1912); *Howard v. State*, 2 N.P. (N.S.) 285, 14 O. Dec. 483 (1903); *Peters v. State*, 8 N.P. 595, 11 O. Dec. 562 (1901); *Rockwell v. State*, 25 N.P. (N.S.) 171, (1924); *Sickles v. State*, 7 N.P. (N.S.) 338, 19 O. Dec. 117 (1908); *Ex parte McCann*, 3 Dec. Rep. 38, 2 W.L.G. 219 (1858). This general attitude has been reflected in an opinion of the Attorney General, declaring that where an affidavit is filed by one *not* the party injured in a misdemeanor case, and the accused in a writing filed before trial waives a trial by jury and submits himself to be tried by the magistrate, such magistrate has the right to hear and determine such case. O.A.G. 1920, opinion no 1656, page 1083. Other opinions have been in accord with this view. O.A.G. 1925, opinion no. 2884, page 681; O.A.G. 1927, opinion no. 577; O.A.G. 1916, opinion no. 1440, page 589; O.A.G. 1916, opinion no. 1865, page 1437.

Closely related to this discussion is the broad problem of the advisability of retaining or abolishing the justice of the peace courts in this state. In spite of the fact that the recent bill before the Ohio Assembly to abolish justice of the peace courts was defeated, there still remains considerable popular sentiment in favor of their abolishment, the opinion

being that they are incompetent and antiquated. Willoughby, Principals of Judicial Administration, page 302-306. Some judicial tendency in this direction is indicated by the decision in *Tumey v. State*, 273 U.S. 510, 71 L.Ed. 749, 50 A.L.R. 1243, 47 Sup. Ct. 437, 25 O.L.Rep. 236 (1926), where it was held that pecuniary interest in the case disqualifies the justice, as where he gets no fee except in case of conviction. In view of this sentiment, the interpretation of the Court of Appeals in the principal case might be justified, as tending to cut down the jurisdiction of justices of the peace.

But there is another side to the picture. Although the prosecutor, under section 13437-34 of the General Code, may go directly to the Common Pleas court on information, such is not the common practice. The result is increased expense on the counties for grand juries. An added burden of litigation is also placed directly upon the Common Pleas courts, perhaps necessitating further delays under the present set-up. Recent decisions in Ohio have tended to limit the *Tumey* decision. *Tarr v. State*, 117 Ohio St. 481, 57 A.L.R. 284, 159 N.E. 594 (1928), *State v. Guyton*, 8 Abs. 349 (1930), *Testa v. State*, 8 Abs. 333 (1929).

Without entering this controversy further, suffice it to say that it seems better to leave it to the legislature to make some decisive change in our present set-up, which would eliminate the possibility of further congestion and complications in the courts. It would seem, therefore, that under the most logical interpretation of sections 13433-9 and 13433-10 of the General Code, final jurisdiction is conferred upon a justice of the peace where there has been a written waiver of a jury trial by the accused, although the complaint has been brought by someone other than the party injured and there has been a plea of guilty.

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## Dower

### WIDOW'S RIGHT OF DOWER IN PERPETUAL LEASEHOLD ESTATE—MERGER OF LEGAL AND EQUITABLE INTERESTS IN SAME PERSON

In 1913, a trust agreement was entered into between John Swift and others, the corpus of the trust being a ninety-nine year lease renewable forever. Swift later acquired eleven-twelfths of the equitable interests and the legal title of the former trustee. Such was the situation on April 23, 1931, at which time Swift assigned the property to H. N.