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CONSTITUTIONAL LAW—THE FEE SYSTEM OF JUSTICE COURT JUDGES: VIOLATIVE OF FOURTEENTH AMENDMENT DUE PROCESS?—*Brown v. Vance*, No. 72J-91(N) (S.D. Miss. 1978).

INTRODUCTION

In 1972 three plaintiffs in separate suits challenged the constitutionality of Mississippi's justice of the peace[1] and mayor's court systems. The federal district court suits were subsequently consolidated in *Brown v. Vance*[2] and emerged as a broad attack on both the criminal and civil jurisdiction of the justice of the peace courts and on the use of the fee system of compensation for presiding judges.

A major thrust of the plaintiff's attack became moot following the 1976 U.S. Supreme Court decision in *North v. Russell*.[3] The Court held that trials before lay judges which were appealable with a de novo trial violated neither the due process nor equal protection guarantees of the Constitution.[4] The remaining challenge to the court systems to be determined thus became the use of the fee system[5] to compensate judges.

The plaintiffs conceded that justice of the peace fee statutes were constitutional on their face since the judge received a fee irrespective of whether he acquits or convicts. However, they argued that the effects of the court system in operation were unconstitutional.[6]

The plaintiffs contended that judges are dependent for their livelihoods on the fees derived from civil and criminal litigation before their courts. On the civil side creditors seeking adjudication of civil collection suits may choose more than one justice court judge in the

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[1]Prior to 1975 the presiding officers of the lower county court system were known as justices of the peace; however, the designation for the office was changed in that year by constitutional amendment to justice court judges. MISS. CONST. art. 6, § 171 (1890, amended 1975).

[2]No. 72J-91(N) (S.D. Miss. 1976), *appeal docketed*, No. 78-3225 (5th Cir. Oct. 11, 1978).

[3]427 U.S. 328 (1976).

[4]*Id.* at 339.

[5]When this case was heard, justice court judges received a uniform fee of six dollars in all criminal cases docketed and affidavits signed. This fee was due whether conviction or other disposition resulted. A uniform fee of eight dollars was provided in all civil cases. This fee was payable by the losing party whether the case was contested or not. Also provided was an additional eight dollar fee for proceedings involving levy of executions on judgments, attachments, and garnishment proceedings. MISS. CODE ANN. § 25-7-25(a), (b), (g) (Supp. 1975) (current version at Supp. 1978). Fees are awarded as costs and are adjudged against the party whom judgment is rendered against. MISS. CODE ANN. § 11-9-127 (1972).

[6]No. 72J-91(N) (S.D. Miss. 1978), *appeal docketed*, No. 78-3225 (5th Cir. Oct. 11, 1978) (citing Melikian v. Avent, 300 F. Supp. 516 (N.D. Miss. 1969)).

county when filing.[7] The plaintiffs argued that judges are aware that creditors will take their suits elsewhere for collection if they obtain unsatisfactory results from a particular court. Therefore, the plaintiffs argued that the judges are more likely to rule in favor of creditors in order to continue securing collection suits and thus derive their fees.[8] Likewise on the criminal side, the plaintiffs argued that judges are more likely to be conviction oriented. In the two Mississippi counties where judges have concurrent jurisdictions[9] it is possible for law enforcement officers to prefer one judge over another when making affidavits returnable. The judges are aware of this preference power and the potential loss of fees resulting from adverse decisions and thus render decisions favorable to the officers in order to continue to obtain their "business." In the remaining Mississippi counties where there is only one judge per district, the potential exists for law enforcement officers to make arrest tickets returnable to the wrong judge and set up roadblocks in the district of "friendly" judges in order to obtain convictions. Thus, the plaintiffs argued, in operation the fee system works to give justice court judges an unconstitutional pecuniary interest in the outcome of both civil and criminal cases coming before their courts.[10]

The district court rejected the plaintiffs' contentions finding that they had failed to meet the burden of proof to support their arguments. In criminal matters the district judge said there could be no forum shopping in the eighty single-judge district counties if law enforcement officers and judges follow the applicable law since jurisdiction is proper in criminal cases only in the district where the violation occurred.[11] Although the plaintiffs had introduced into evidence "a relatively small number" of arrest tickets returnable to the wrong justice court judge, the court found the defendant's

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[7]MISS. CODE ANN. § 11-9-101 (1972), which provides that the jurisdiction of a justice court judge shall be co-extensive with his county, and venue is proper in either the district where the debt is incurred, where the defendant resides, or where the property is located.

[8]No. 72J-91(N) slip op. at 7 (S.D. Miss. 1978), *appeal docketed*, No. 78-3225 (5th Cir. Oct. 11, 1978).

[9]*Hinds and DeSoto Counties have two judges in each of the five districts within the* counties with both judges having concurrent jurisdiction over crimes which take place within their district. MISS. CODE ANN. § 9-11-1 (Supp. 1975) (current version at Supp. 1978). An arresting officer has discretion in deciding which judge the accused will appear before. The officer may take the defendant before a judge other than the one in whose district the violation occurred.

[10]No. 72J-91(N) slip op. at 9 (S.D. Miss. 1978), *appeal docketed*, No. 78-3225 (5th Cir. Oct. 11, 1978).

[11]*Id.* at 8.

evidence stronger on this point.[12] "[T]he facts show that law enforcement officers, and particularly the Mississippi Highway Patrol, have been instructed to charge the alleged violator 'within the district . . . where the violation occurred and no place else' . . . and that disciplinary measures would be instituted against any patrolman who violated that directive."[13]

The court found that the location of highway patrol speed-traps was based on reasonable considerations such as traffic counts and types and classifications of roads instead of the availability of a "convicting" judge.[14]

Concerning civil cases the court found that although forum shopping by creditors may create a disparity between the fees of the various justice court judges in a county, the practice does not violate a defendant's constitutional rights. The district judge said that on numerous occasions justice court judges have found in favor of the defendants or entered judgments for less than that sued for by creditor-plaintiffs and the creditors continue to file suits in their courts.[15] The federal judge also said that creditors testified that other factors, such as efficiency and judicial experience, are elements considered by them when determining where to file their actions.[16]

In weighing the evidence the court strongly relied on *Withrow v. Larkin*[17] which stated that plaintiffs "must overcome a presumption of honesty and integrity in those serving as adjudicators."[18] Considering this presumption and the evidence, the judge decided that the plaintiffs had failed to meet the burden of proving the fee system operated to deny constitutional rights.[19]

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[12] *Id.* at 9. The court accepted the defendants' arguments finding that the plaintiffs introduced no evidence to show whether the judge was available in the district where the violation occurred, whether or not the violation continued across district lines, whether the locations appearing on the face of the tickets were general or local, whether the charge was contested, and whether the judge received the tickets and if he did receive them, what disposition was made thereof. *Id.*

[13] *Id.*

[14] *Id.* at 12.

[15] *Id.* at 21-22.

[16] *Id.* at 22-23.

[17] 421 U.S. 35 (1975). *See also*, Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n., 426 U.S. 482, 493, (1976); Central Ark. Auction Sale, Inc. v. Bergland, 520 F.2d 730 (1978); Giles Lowery Stockyards, Inc. v. Department of Agriculture, 565 F.2d 321, 324 (1977); Marathon Oil Co. v. EPA, 564 F.2d 1253, 1265 (1977); Gross v. United States, 531 F.2d 482, 490 (1976); Klinge v. Lutheran Charities Ass'n. of St. Louis, 523 F.2d 56, 63 (1975); Euster v. Pennsylvania State Horse Racing Comm'n., 431 F. Supp. 828, 833 (E.D. Penn. 1977); Kelly v. Action for Boston Community Development, 419 F. Supp. 511, 523 (D. Mass. 1976); Rite Aid Corp. v. Board of Pharmacy, 421 F. Supp. 1161, 1176-77 (D. N.J. 1976); Stebbins v. Weaver, 396 F. Supp. 104, 114 (S.D. Wisc. 1975).

[18] 421 U.S. 35, 47 (1975).

[19] No. 72J-91(N), slip op. at 32 (S.D. Miss. 1978), *appeal docketed*, No. 78-3225 (5th Cir. Oct. 11, 1978).

THE COURTS, FEE SYSTEMS, AND DUE PROCESS

The right to an impartial tribunal is guaranteed by the due process clause of the fourteenth amendment of the United States Constitution.[20] This right applies equally to criminal and civil litigation.[21] Historically, courts at various levels have considered the constitutional issue of whether a defendant's due process of law is violated when he is tried by a judicial officer[22] who has a pecuniary interest in fees payable by the litigants. Due process requires that a judicial officer who receives fees from the litigants be disqualified.[23] However, the degree of interest necessary to disqualify a judicial officer under a fee system has yet to be clearly defined by the United States Supreme Court.

A fee system was first held invalid by the Court in *Tumey v. Ohio*.[24] The Court held that a convicted defendant was denied due process if the receipt of a fee by the mayor was predicated upon a conviction.[25] The Court stated that, "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, . . . denies the [defendant] due process of law."[26] In *Tumey* the Court also set forth language sufficient to meet the standards of the maxim *de minimis non curat lex*.[27] This precept supports the view that a judicial officer may receive fees in a trivial amount and not be disqualified from hearing the case. In no case, however, has the court found any fee so negligible as to be appropriately disregarded. Expanding this restraint, one state court has held that any pecuniary interest that a judicial officer has in a case, however remote, will disqualify him.[28]

In *Ward* v. *Village of Monroeville*,[29] the United States Supreme Court applied the possible temptation doctrine of *Tumey* to the case of a mayor acting as a judicial officer. The mayor had wide executive

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[20]*See* Mayberry v. Pennsylvania, 400 U.S. 455 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Bloom v. Illinois, 391 U.S. 194 (1968); Chapman v. California, 386 U.S. 18 (1967); Offutt v. United States, 348 U.S. 11 (1954).

[21]*See* Johnson v. Mississippi, 403 U.S. 212, 216 (1971); Fay v. New York, 332 U.S. 261, 268 (1946).

[22]In the interest of brevity "judicial officer" is used to represent judge, justice of the peace, police court justice, or similar judicial officer.

[23]*See* Connally v. Georgia, 429 U.S. 245 (1977); Ward v. Village of Monroeville, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927); Bennett v. Cottingham, 290 F. Supp. 759 (N.D. Ala. 1968), *aff'd* 393 U.S. 317 (1969). *See also* Gibson v. Berryhill, 411 U.S. 564 (1973).

[24]273 U.S. 510 (1927).

[25]*Id.* at 522.

[26]*Id.* at 532.

[27]*Id.* at 531 ("The law does not concern itself with trifles.").

[28]*See, e.g.*, West Virginia *ex rel.* Reese v. Gies, 156 W.Va. 729, 198 S.E.2d 211 (1973); West Virginia *ex rel.* Moats v. Janco, 154 W.Va. 887, 180 S.E.2d 74 (1971); West Virginia *ex rel.* Osborne v. Chinn, 146 W.Va. 610, 121 S.E.2d 610 (1961).

[29]409 U.S. 57 (1972).

powers and was responsible for his village's finances. A major portion of the village's income was derived from the fines imposed by the mayor in the mayor's court. The Court held this combination of executive responsibility for village finances and judicial functions was a violation of the fourteenth amendment's due process guarantee of a trial before a disinterested and impartial judicial officer.[30]

Ward also considered the issue of whether the right to appeal and to a trial de novo guaranteed a defendant due process even though the judicial officer had a pecuniary interest at the outset. Some courts had earlier held that the right to appeal and to a trial de novo secured due process.[31] But in *Ward* the Supreme Court rejected this reasoning, stating that an accused is entitled to a "neutral and detached judge in the first instance."[32]

A few courts have held that even though a trial is before a justice of the peace compensated on a fee basis, due process of law requirements are fulfilled by the right to a jury trial.[33] In *Melikian v. Avent*[34] the plaintiffs attacked the constitutionality of the justice of the peace courts in Mississippi contending that the fee system induced justices to favor creditors so they would continue patronizing the justice court. This was particularly so, the plaintiffs asserted, since venue could have been in more than one court. The federal court hearing *Melikian* found no authority to support the plaintiff's assertion, nor was it impressed by the merits of the argument. The court held that due process was assured by the right to a jury trial with a six member jury.[35]

The presence of due process safeguards, or the lack thereof, in compensation systems wherein judicial officers are paid only upon the conviction of an accused in criminal cases has been considered by many courts. Generally, the courts hold that the judicial officer has an unconstitutional pecuniary interest in the outcome and is disqualified from hearing the case.[36] Other courts, however, have held

[30] *Id.* at 59-60.

[31] *See, e.g.*, Application of Borchert, 57 Wash. 2d 719, 359 P.2d 789 (1961); *Ex parte* Steele, 220 N.C. 685, 18 S.E.2d 132 (1942), *cert. denied*, 316 U.S. 686 (1942); Brooks v. Town of Potomac, 149 Va. 427, 141 S.E. 249 (1928). In Mississippi a defendant has a right to appeal and to a trial de novo in circuit court, MISS. CODE ANN. §§ 11-51-85, 91 (1972). In counties with a county court, appeals are heard de novo in county court, MISS. CODE ANN. §§ 11-51-81, 91 (1972).

[32] 409 U.S. at 62.

[33] Melikian v. Avent, 300 F. Supp. 516 (N.D. Miss. 1969); People v. Cheever, 370 Mich. 165, 121 N.W.2d 430 (1963). *See also* State v. Davis, 16 Ohio Misc. 282, 241 N.E.2d 750 (1968).

[34] 300 F. Supp. 516 (N.D. Miss. 1969).

[35] *Id.* at 518-19.

[36] *See, e.g.*, Tumey v. Ohio, 273 U.S. 510 (1927); Bennett v. Cottingham, 290 F. Supp. 759 (N.D. Ala. 1968), *aff'd* 393 U.S. 317 (1969); Hulett v. Julian, 250 F. Supp. 208 (M.D. Ala. 1966); Keith v. Gerber, 156 W. Va. 787, 197 S.E.2d 310 (1973); Doty v. Goodwin 246 Ark. 149, 437 S.W.2d 233 (1969); Conkling v. De Lany, 167 Neb. 4, 91 N.W.2d 250 (1958); Roberts v. Noel, 296 S.W.2d 745 (Ky. 1956); Rolo v. Wiggins, 149 Fla. 264, 5 So. 2d 458 (1942).

that the pecuniary interest of a judicial officer in statutory costs does not disqualify him.[37] The United States Supreme Court recently held a Georgia statute involving issuance of a search warrant[38] by an interested judicial officer violative of the fourth and fourteenth amendments.[39] An unsalaried justice of the peace received a fee if the warrant was issued but not if it was denied. The Court held that the defendant was not subjected to a neutral and detached magistrate, but one with a substantial pecuniary interest in the outcome.[40]

Under another system of compensation judicial officers are paid from a fund obtained from proceeds of their court. Proceeds include fees paid by litigants, fines, and forfeitures. Courts have reached different results when reviewing these systems. Some courts have held that the judicial officer is disqualified as the system creates an unconstitutional pecuniary interest.[41] Differing with this view, other courts have held such a pecuniary interest to be too remote to disqualify the judicial officer.[42] A system whereby justices of the peace are paid monies produced from tax levies has also been upheld.[43]

In civil cases, several systems of compensation have been held to produce sufficient pecuniary interest to disqualify a judicial officer. Fees payable to a justice of the peace only if he could secure costs from debtors has been held sufficient to disqualify the justice.[44] Likewise, the West Virginia Supreme Court held that an increase in fees payable upon execution on the judgment would also suffice to disqualify an officer.[45] The court followed its previously announced dictate in *State ex rel. Osborne v. Chinn*.[46] In *Osborne* the West Virginia Supreme Court held that a justice of the peace is disqualified when he has a pecuniary interest in a case tried by him, however remote.[47] The same court has also declared unconstitutional a system of paying the justice of the peace for each civil suit entered and tried.[48] A West Virginia statute[49] provided that a justice of the peace would receive a

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[37]*See, e.g., Ex parte* Steele, 220 N.C. 685, 18 S.E.2d 132 (1942), *cert. denied*, 316 U.S. 686 (1942); Crosby v. State, 49 Ga. App. 210, 174 S.E. 721 (1934); Moulton v. Byrd, 224 Ala. 403, 140 So. 384 (1932).

[38]GA. CODE ANN. § 24-1601 (1971).

[39]Connally v. Georgia, 429 U.S. 245 (1977).

[40]*Id.* at 250-51.

[41]*See, e.g.*, West Virginia *ex rel.* Osborne v. Chinn, 146 W. Va. 610, 121 S.E.2d 610 (1961); Williams v. Brannen, 116 W. Va. 1, 178 S.E. 67 (1935).

[42]*See, e.g.*, Moulton v. Byrd, 224 Ala. 403, 140 So. 384 (1932); *Ex parte* Guerrero, 69 Cal. 88, 10 P. 261 (1886).

[43]West Virginia *ex rel.* Moats v. Janco, 154 W. Va. 887, 180 S.E.2d 74, 81 (1971).

[44]Limerick v. Murlatt, 43 Kan. 318, 23 P. 567 (1890).

[45]West Virginia *ex rel.* Reece v. Gies, 156 W. Va. 729, 198 S.E.2d 211 (1973).

[46]146 W. Va. 610, 121 S.E.2d 610 (1961).

[47]*Id.* at 612, 121 S.E.2d at 612.

[48]West Virginia *ex rel.* Shrewsbury v. Poteet, 202 S.E.2d 628 (W. Va. 1974).

[49]W VA. CODE § 50-17-1 (1966) (repealed 1976).

five dollar fee for every suit entered and tried regardless of the outcome. Each justice had county-wide jurisdiction.[50] The court reasoned that to maximize his income a justice had to hear the most cases possible. The court held that the system furnished an inducement for a justice to increase his "business" by favoring plaintiffs.[51] This was held to violate a state constitutional mandate[52] against administering justice for sale.[53]

THE MISSISSIPPI JUSTICE COURT SYSTEM UNDER SCRUTINY

In 1969 the first official study of the Mississippi judiciary was completed by the Mississippi Judicial Commission. The Commission found that the fee system resulted in substantial abuses.[54] Further, it concluded that the fee system of compensation for justices of the peace and constables created a potential for many abuses "even among men who are conscientious and honest."[55] The study recognized the dilemma produced by a justice who knows that a law enforcement officer or creditor can take his business elsewhere.[56] In 1969 the same conclusions were also reached in a study by the Law Enforcement Assistance Division of the Office of the Governor.[57]

In 1975 a study commissioned by the Mississippi Judicial Council concluded that the fee system had commercialized the justice courts.[58] A survey of 147 citizens who had contact with justice courts revealed that forty-five per cent held an unfavorable opinion while only twenty per cent viewed the court favorably. Thirty-five per cent expressed no opinion.[59] The public appeared to have a negative perception of the "appearance of justice" in the operation of justice courts, the study concluded. The main reason for this perception was the close relationship the system fostered between judges and the users of their courts.

The 1975 study found that the public felt justice court judges were too dependent on the highway patrol.[60] Likewise, a negative public perception of the relationship between justice court judges and

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[50]W. VA. CODE § 50-2-4 (1966) (repealed 1976).

[51]West Virginia *ex rel.* Shrewsbury v. Poteet, 202 S.E.2d 628, 631 (W. Va. 1974).

[52]W. VA. CONST. art.3, § 17.

[53]West Virginia *ex rel.* Shrewsbury v. Poteet, 202 S.E.2d 628, 632 (W. Va. 1974).

[54]REPORT OF THE MISSISSIPPI JUDICIARY COMMISSION TO THE 1970 REGULAR SESSION OF THE LEGISLATURE OF THE STATE OF MISSISSIPPI, 58 (Jan. 6, 1970) [hereinafter cited as 1970 LEGISLATIVE REPORT].

[55]*Id.*

[56]*Id.*

[57]MISSISSIPPI COURTS COMPREHENSIVE PLAN UNDER THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968 AS PRESENTED TO THE LAW ENFORCEMENT ASSISTANCE DIVISION OF THE OFFICE OF THE GOVERNOR STATE OF MISSISSIPPI 13-72 (Oct. 16, 1969).

[58]2 COURTS STRATEGY 45 (1975).

[59]4 *id.* at 7-44.

[60]*Id.* at 7-40. In at least one county, it had become customary for judges to buy dinner for highway patrolmen who operated radar details on road blocks in their districts.

sheriffs was also found.[61] The study concluded that justice court judges view sheriffs as a principal provider of business.[62] In addition, the relationship between each justice court judge and his constable was found to undermine public perception of judicial objectivity.[63] Furthermore, the study concluded that the payment of civil fees directly to the justice court judge rather than through the county permitted financial abuses.[64] One example is the use of criminal process to collect a civil debt.[65] Testimony gathered during litigation of *Brown* indicated that creditors recognize that the justice court judges need their "business."[66] Likewise, one Jackson County judge had a "business" card printed for distribution to creditors.[67]

In *Brown* the court concluded that since justice court judges follow the applicable law concerning venue and jurisdiction there could be no "forum shopping."[68] However, the two studies specifically found problems with venue being respected by the courts. In the 1975 study, interviews with justice court judges revealed that fourteen per cent felt that venue was not being observed.[69] The study concluded that this resulted in favored judges receiving cases not within their venue.[70] The 1969 study emphasized that a potential existed for

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Testimony of James L. Garner, Jr. and W. R. Patterson, TRANSCRIPT OF STENOGRAPHIC NOTES TAKEN AT THE PUBLIC HEARING OF JUSTICE OF THE PEACE COURTS AND JUDGES BEFORE THE MISSISSIPPI JUDICIARY COMMISSION, New Capitol Building, Jackson, Mississippi, August 16, 1969, pp. 21, 49-50 [hereinafter cited as STENOGRAPHIC NOTES].

[61] 2 *id.* at 48.

[62] 4 *id.* at 7-40.

[63] 2 *id.* at 47. In certain areas of the state husband and wife teams serve as judge and constable. 4 *id.* at 7-42.

[64] 2 *id.* at 45.

[65] Mississippi *ex rel.* Richardson v. Edgeworth, 214 So. 2d 579 (Miss. 1968). *See also* Testimony of Mayo Grubbs from the STENOGRAPHIC NOTES, *supra* note 60 at 15.

[66] *See* Brief of Plaintiffs—Appellants at 30, Brown v. Vance, No. 78-3225 (5th Cir. appeal docketed Oct. 11, 1978).

> Q. So, Mr. Covington (a Hinds County justice court judge) has been in your office and stated to you about needing business and sending us business?
> A. Yes, sir. Words to that effect.
> Q. Let me ask you what have you understood to be what Justice Court Judge Covington wants?
> A. He wants and needs business in order to have income to make a profit. It's just that simple.
> Q. He wants your business?
> A. Sure, he wants all the business he can get at the present time.

[67] *Id.* at 29. The card read as follows:

> We work on bad checks around the clock.
> SATISFACTION GUARANTEED
> Also on bad accounts.
> References furnished on the jobs we perform

[68] No. 72J-91(N), slip op. at 8 (S.D. Miss. 1978), *appeal docketed*, No. 78-3225 (5th Cir. Oct. 11, 1978).

[69] 4 COURTS STRATEGY 7-4 (1975).

[70] *Id.*

creditors to use the defendant's ignorance of proper venue for their benefit.[71]

The amount of compensation as well as the disparities in the compensation received by justice court judges is indicative of the potential for competition within the system. In 1975 the median income of a justice court judge was between $2,000 and $2,500, which is less than the per capita state average.[72] After the number of justices was reduced to five in all but two counties,[73] the median income rose to $3,005 in 1977.[74] In 1977 the largest gross income was $63,353, the largest net income was $25,905, while two justices reported zero net income.[75] Twelve justices reported no criminal fees while forty-seven reported no civil fees in 1977.[76] The conclusion that competitive tendencies could be promoted by a system that so distributes compensation can easily be drawn.

ANALYSIS BY THE COURT

In *Brown* the court recognized that a "fair trial in a fair tribunal" is a fundamental requirement of due process.[77] The court also established that this requirement applied equally to civil and criminal cases.[78] After holding the "possible temptation" doctrine in *Tumey*[79] applicable,[80] the court discussed its expansion in *Ward*[81] and *Gibson v. Berryhill*.[82] However, the court held that the plaintiffs had not met their burden of proof. It stated:

> If the test were whether the plaintiffs were able to produce the testimony of any person that the fee system presented a source of possible temptation, the Court might conclude that they should prevail; however, the test is whether the system presents a 'possible temptation to the *average man* as a judge', and this Court finds that the plaintiffs have not carried their burden under this test, particularly in light of the presumption of honesty and integrity described in *Withrow*.[83]

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[71] 1970 LEGISLATIVE REPORT, *supra* note 54, at 59.

[72] 4 COURTS STRATEGY 7-6 (1975).

[73] MISS. CODE ANN. § 9-11-1 (Supp. 1975) (current version at Supp. 1978).

[74] This figure is derived from the 1977 Annual Financial Statements from 405 justice court judges filed with the Secretary of State.

[75] *Id.*

[76] *Id.*

[77] 72J-91(N), slip op. at 29 (S.D. Miss. 1978), *appeal docketed*, No. 78-3225 (5th Cir. Oct. 11, 1978) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).

[78] *Id. Compare* Johnson v. Mississippi, 403 U.S. 212, 216 (1971) *with* Fay v. New York, 332 U.S. 261, 268 (1946).

[79] *See* notes 24-27 and accompanying textual material, *supra*.

[80] 72J-91(N), slip op. at 30 (S.D. Miss. 1978), *appeal docketed*, No. 78-3225 (5th Cir. Oct. 11, 1978).

[81] *See* notes 29-32 and accompanying textual material, *supra*.

[82] 411 U.S. 564 (1972).

[83] No. 72J-91(N), slip op. at 32 (S.D. Miss. 1978), *appeal docketed*, No. 78-3225 (5th Cir. Oct. 11, 1978).

By so stating the court made clear that the *Withrow* presumption of honesty and integrity is rebuttable.

Traditionally, federal courts have applied the *Withrow* presumption in administrative cases in which an unconstitutional risk of bias was alleged to exist because the adjudicator also acted as the investigator in the case.[84] In *Brown*, however, the alleged risk of bias was a result of the judge having a pecuniary interest in the outcome of the case. It appears, therefore, that the court in *Brown* did not apply the proper standard to determine the constitutionality of the operation of the fee system. The plaintiffs did not allege that the combination of investigative and adjudicative functions created an unconstitutional risk of bias. Rather, their contention was, as in *Tumey*, that a judicial officer had a pecuniary interest in the outcome of the case. No other federal court has used the *Withrow* presumption to limit that contention.

In *Marathon Oil Co. v. Environmental Protection Agency*[85] the United States Court of Appeals for the Ninth Circuit specifically noted this distinction. The court considered whether due process was violated when a regional administrator reviewed a draft permit which he originally issued. Upholding the review, the court stated that this situation "more nearly resembles the permissible combination of investigation and adjudication sanctioned by *Withrow v. Larkin*, . . . than, for example, the situation in which a judge receives as compensation part of a fine which he levies, *Tumey v. Ohio*, ..."[86] The words of the Court in *Tumey* immediately preceding the "possible temptation" doctrine support this conclusion. The Court held that "the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and greatest self-sacrifice could carry it on without danger of injustice."[87]

The court's cursory treatment in *Brown* of trial by jury in justice courts further indicates its use of the improper standard of constitutionality in deciding the case.[88]

In *Melikian v. Avent*,[89] the Federal District Court for the Northern District of Mississippi held that the right to a jury trial dissipates the possibility of prejudice of a justice court judge.[90] In *Brown* the court,

[84]*See, e.g.*, Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n., 426 U.S. 482, 493 (1976); Central Ark. Auction Sale, Inc. v. Bergland, 570 F.2d 724, 730-31 (8th Cir. 1978); Giles Lowery Stockyards, Inc. v. Department of Agriculture, 565 F.2d 321, 324 n. 2 (5th Cir. 1977); Gross v. United States, 531 F.2d 482, 490 n. 5 (Ct. Cl. 1976); Klinge v. Lutheran Charities Ass'n. of St. Louis, 523 F.2d 56, 63 (8th Cir. 1975); Euster v. Pennsylvania State Horse Racing Comm'n., 431 F. Supp. 828, 833 (E.D. Penn. 1977); Rite Aid Corp. v. Board of Pharmacy, 421 F. Supp. 1161, 1176-77 (D.N.J. 1976); Stebbins v. Weaver, 396 F. Supp. 104, 114 (W.D. Wis. 1975).

[85]564 F.2d 1253 (9th Cir. 1977). *See also* Kelly v. Action for Boston Community Develop., Inc., 419 F. Supp. 511, 523 (D. Mass. 1976).

[86]Marathon Oil Co. v. Environmental Protection Agency, 564 F.2d 1253, 1265 (9th Cir. 1977).

[87]Tumey v. Ohio, 273 U.S. 510, 532 (1927).

[88]No. 72J-91(N), slip op. at 24 (S.D. Miss. 1978), *appeal docketed*, No. 78-3225 (5th Cir. Oct. 11, 1978).

[89]300 F. Supp. 516 (N.D. Miss. 1969).

[90]*Id.* at 518-19. *See also* People v. Cheever, 370 Mich. 165, 121 N.W.2d 430 (1963).

after deciding that juries are selected in a fair and impartial manner,[91] never set forth that conclusion. Perhaps the court noted that the Supreme Court in *Ward* criticized this "procedural safeguard" reasoning. In *Ward* the Court held that any unfairness at the trial level could not be corrected on appeal by a trial de novo.[92]

In Mississippi's justice courts, either party may demand a trial by jury composed of six persons. A judge must conform his judgment to the verdict of the jury.[93] The jury venire is selected by the constable after being so ordered by his justice court judge.[94] A constable may select any citizen competent to serve on a jury in circuit court.[95]

However, it appears that jury trials are seldom elected. In a sample of eighty-four justice court judges made in 1975, seventy-four per cent had conducted no jury trials in criminal cases and sixty-five per cent had never presided over a civil jury trial.[96] Nine per cent of the judges had conducted between one and three criminal trials while only seventeen per cent had had over four criminal trials.[97] On the civil side twenty per cent of the judges had held between one and three jury trials while only fifteen per cent had conducted more than four civil trials.[98] That jury trials are seldom sought perhaps reflects the level of confidence litigants and defendants have in the court's administration of such trials. The infrequent election of jury trials also appears to place the validity of "procedural safeguard" reasoning in *Melikian* into question.

CONCLUSION

Due process requires that "justice must satisfy the appearance of justice."[99] The appearance of justice requires a "neutral and detached judge in the first instance"[100] and a "fair trial in a fair tribunal."[101] In *Tumey* and *Ward* the systems of compensation were deemed unconstitutional without a showing of actual bias by any one judicial officer. It was sufficient that the systems created a "possible temptation to the average man as a judge."[102] The court in *Brown* held that the

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[91]No. 72J-91(N), slip op. at 25 (S.D. Miss. 1978), *appeal docketed*, No. 78-3225 (5th Cir. Oct. 11, 1978).

[92]409 U.S. at 61.

[93]MISS. CODE ANN. § 11-9-143 (1972) (civil trials); MISS. CODE ANN. § 99-33-9 (1972) (criminal trials). *See also* Shaffer v. Bridges, 295 F. Supp. 869 (S.D. Miss. 1969), *appeal dismissed*, 397 U.S. 94 (1970).

[94]*See* note 93, *supra*. *See also* MISS. CODE ANN. § 19-19-7 (1972).

[95]MISS. CODE ANN. § 13-5-1 (1972).

[96]4 COURTS STRATEGY 7-39 (1975).

[97]*Id.*

[98]*Id.*

[99]Offutt v. United States, 348 U.S. 11, 14 (1954).

[100]Ward v. Village of Monroeville, 409 U.S. 57, 61-62 (1972); *See also* Callan v. Wilson, 127 U.S. 540, 556 (1887).

[101]*In re* Murchison, 349 U.S. 133, 136 (1955).

[102]Tumey v. Ohio, 273 U.S. 510, 532 (1927), *quoted with approval in* Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972).

plaintiffs had not shown that the justice court system operates in a manner which does not allow judges to make detached and impersonal judgments.[103] The court's reliance on the *Withrow* presumption of honesty and integrity to limit the *Tumey* "possible temptation" test is in error.

In addition, the court's reliance on the right to a jury trial to uphold the constitutionality of the fee system is ripe for challenge. The need for a jury trial as a "procedural safeguard" admits the existence of the potential for unconstitutionality. The United States Supreme Court has rejected this "procedural safeguard" reasoning.[104]

The economics of the fee system operates to stimulate the desire for compensation. Justice court judges are viewed as entrepreneurs and their courts as "businesses." To earn daily bread and butter the system forces maximization of the collection of fees.[105] In *Ward* the Court held "plainly that [a] 'possible temptation' may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court."[106] Certainly that temptation is no less possible when a justice court judge is responsible for his own finances.

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[103]No. 72J-91(N), slip op. at 32 (S.D. Miss. 1978), *appeal docketed*, No. 78-3225 (5th Cir. Oct. 11, 1978).

[104]Ward v. Village of Monroeville, 409 U.S. 57, 61-62 (1972).

[105]Analysis reveals that the fee system operates as a basic "market system." The science of economics is premised on the theory that a market system forces men to maximize profits. For an introduction, *see* R. HEILBRONER, THE ECONOMIC PROBLEM chs. 1-3 (6th ed. 1977).

[106]Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972).