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JUSTICES OF THE PEACE—QUALIFICATION IN CLASSES OF OFFENSES
 ENUMERATED IN SECTIONS 12694, 12695, AND 12696, GENERAL
 CODE—STATE MEDICAL BOARD CASES—TUMEY CASE DISCUSSED.

SYLLABUS:

1. *In cases involving violations of Sections 12694, 12695 and 12696, General Code, which, as provided in Section 1295, General Code, it is the duty of the Secretary of the State Medical Board to enforce, if no security for costs be demanded, from complainant under the provisions of Section 1499, General Code, and the defendant raises seasonable objection to the qualification of the justice of the peace because of his direct, substantial pecuniary interest in the outcome, such objection should be sustained and the complaint withdrawn and filed in a proper court, where such disqualification does not exist. If, as provided in Section 13499, General Code, the costs are secured, no such interest exists and therefore such an objection may be properly overruled and final judgment rendered.*

2. *Since crimes defined by Sections 12697, 12698, 12700 and 12701, General Code, are felonies, and since the recent decision of the Supreme Court of the United States in the case of Tumey vs. The State of Ohio, decided March 7, 1927, and reported in the Ohio Law Bulletin and Reporter, Vol. XXV, March 14, 1927, does not affect the jurisdiction of justices of the peace to act as examining magistrates, the jurisdiction of a justice of the peace over the crimes denounced in said section is not affected.*

COLUMBUS, OHIO, April 28, 1927.

DR. H. M. PLATTER, *Secretary, The State Medical Board, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date which reads as follows:

“The State Medical Board is experiencing considerable difficulty in filing cases for violation of the Medical Practice Act. Under the provisions of Sections 12694 and 13423, justices of the peace, mayors’ courts and police judges have jurisdiction within their respective counties in all cases of violation. In several instances justices have stated that they could not handle cases, while others have stated they would bind all cases over to the grand jury.

The department requests that we be advised how we may proceed.”

Section 1295, General Code, provides in part as follows:

“The Secretary of the State Medical Board, shall enforce the provisions of law relating to the practice of medicine, surgery or midwifery in this state. If he has knowledge or notice of a violation of such law, he shall investigate the matter, and, upon probable cause appearing, file a complaint and prosecute the offender. * * * ”

The following penal sections of the General Code relate to the practice of medicine, surgery or midwifery in this state:

Section 12694 pertains to practicing medicine or surgery, or any of its branches before obtaining a certificate from the State Medical Board in the manner required by law, a violation of which section is punishable by a fine of not less than twenty-five dollars, nor more than five hundred dollars for the first offense, and by a fine of not less than fifty dollars, nor more than five hundred dollars, or imprisonment in

the county jail or workhouse for not less than thirty days nor more than one year, or both, for each subsequent offense.

Section 12695 has to do with practicing midwifery without first obtaining a certificate from the state medical board, a violation of this section being punishable by a fine of not less than twenty-five dollars, nor more than one hundred dollars.

Section 12696 relates to practicing osteopathy without complying with the provisions of law relating thereto, the offenses denounced by this section being punishable by a fine of not less than twenty-five dollars, nor more than five hundred dollars, or imprisonment in the county jail for not less than thirty days, nor more than one year or both.

Section 12697 has to do with the filing of a false diploma or forged affidavit with the State Medical Board, and a violation of this section is punishable by imprisonment in the penitentiary for not less than one year nor more than five years.

Section 12698 relates to swearing falsely before the State Medical Board, a violation of which is punishable by imprisonment in the penitentiary for not less than one year, nor more than five years.

Section 12700 has to do with issuing a false medical diploma, a violation of which is punishable by a fine of not less than one hundred dollars, nor more than one thousand dollars, or by imprisonment in the penitentiary for not less than one year, nor more than three years or both.

Section 12701 pertains to the issuing or selling of a false medical diploma, a violation of which is punishable by a fine of not less than one hundred dollars, nor more than one thousand dollars, or by imprisonment in the penitentiary for not less than one year, nor more than three years, or both.

In addition to the general jurisdiction given a justice of the peace by provisions of Section 13422, General Code, certain statutes specifically give such a magistrate final jurisdiction in certain classes of cases.

By Section 13423, General Code, a large number of offenses are specified over which justices of the peace, police judges, and mayors are given final jurisdiction. This section provides in part as follows:

"Justices of the peace * * * shall have jurisdiction, within their respective counties, in all cases of violation of any law relating to:

* * * * *

16. The violation of any law in relation to the practice of medicine or surgery, or any of its branches."

In all cases other than felonies involving the kinds of offenses specified in Section 13423, supra, a justice of the peace has final jurisdiction to hear and determine the case without a jury if the penalty be only a fine and with a jury if imprisonment be part of the penalty. See Opinion No. 392, Opinions of the Attorney General for 1927, rendered under date of April 27, 1927, and addressed to the Secretary, State Board of Pharmacy.

It will be noted that all the offenses denounced in the penal sections of the General Code above enumerated, with the exception of those defined in Sections 12697, 12698, 12700 and 12701, are misdemeanors.

It is a well established principle that in misdemeanor cases where imprisonment is not a part of the punishment, unless the law provides a trial by jury the right to be so tried is not given the accused, and his demand may be refused. To this effect see *Inwood vs. State*, 42 O. S. 186 and *State vs. Smith*, 69 O. S. 196.

Therefore, in all cases involving the violations of laws, which (as provided in Section 1295, supra,) it is the duty of the Secretary of the State Medical Board to enforce except those involving violations of Sections 12697, 12698, 12700 and 12701, which as above stated define crimes which are felonies, a justice of the peace, by the

provisions of Section 13423, *supra*, is given final jurisdiction. By that I mean, the justice is given jurisdiction to try the defendant on the charge made against him, and to find him guilty and impose a penalty or acquit him, and not the mere authority to inquire into whether an offense has been committed, and discharge the defendant or bind him over to another court. In those classes of cases enumerated in Section 13423, *supra*, the justice of the peace is not an examining magistrate, he is a trial court.

I assume that the difficulty the State Medical Board is experiencing in filing cases for violation of the Medical Practice Act is the result of the recent decision of the Supreme Court of the United States in the case of *Tumey vs. State of Ohio*, decided March 7th, 1927, and reported in the Ohio Law Bulletin and Reporter, Vol. XXV, March 14, 1927. And the question that presents itself is, what, if any effect the decision in the case of *Tumey vs. The State of Ohio* has in these classes of cases?

As regards violations of Sections 12697, 12698, 12700 and 12701, the decision in the *Tumey* case has no effect. The crimes therein defined, the penalty for which may be imprisonment in the penitentiary, are felonies. In such cases the justice of the peace can only act as an examining magistrate and if it appears that an offense has been committed, and that there is probable cause to believe the accused guilty, bind the accused over to the proper court.

Opinion No. 174, dated March 11, 1927, Opinions of the Attorney General for 1927, answers your inquiry as to these sections of the General Code. In this opinion it was held:

“The decision of the Supreme Court of the United States in the case of *Ed. Tumey vs. The State of Ohio*, No. 527, on the October Term 1926 Docket in no way affects the eligibility of a justice of the peace as an examining magistrate. In other words, the power of justices of the peace throughout the State of Ohio to bind accused persons over to the grand jury is in no way affected by said decision.”

With references to prosecutions for violations of Sections 12694, 12695 and 12696, your attention is directed to Section 13499 of the General Code, which provides:

“When the offense charged is a misdemeanor the magistrate, before issuing the warrant, may require the complainant, or, if he considers the complainant irresponsible, may require that he procure a person to become liable for the costs if the complaint be dismissed, and the complainant or other person shall acknowledge himself so liable and such magistrate shall enter such acknowledgment on his docket. Such bond shall not be required of a sheriff, deputy sheriff, constable, marshal, deputy marshal, watchman, or police officer, when in the discharge of his official duty.”

By the provisions of this section a justice of the peace may require the complainant, unless he be a sheriff, deputy sheriff, constable, marshal, deputy marshal, watchman or police officer, in the discharge of his official duties, to secure the costs and be liable to pay the same in the event the accused be found not guilty. By requiring the complainant to secure the costs it cannot then be said that the magistrate has such a pecuniary interest in the outcome of the case as would disqualify him from hearing and determining the cause. It is, therefore, my opinion that if the justice of the peace, in compliance with the provisions of Section 13499, *supra*, requires the complainant to secure the costs so that he will be liable therefor in the event the complaint be dismissed, the decision in the case of *Tumey vs. State of Ohio* has no application or effect.

If the justice of the peace does not require the complainant to secure the costs,

as above stated, or if the affidavit is filed by a sheriff, deputy sheriff, constable, marshal, deputy marshal, watchman or police officer in the discharge of his official duty, no provision is made by law whereby the magistrate may recover fees and costs if the complaint be dismissed. Only upon a finding of guilty can the costs be taxed against the defendant, and under these circumstances the justice of the peace has a direct, personal pecuniary interest in the outcome of the case. Only if he finds a defendant guilty may he tax the fees and costs and collect the same. In such case a defendant may properly raise an objection to the qualification of the justice of the peace to hear and determine the cause because of his interest in the outcome of the case.

It is my opinion, therefore, that if, under such circumstances, such an objection be made to the qualification of the justice of the peace to hear and determine the cause such an objection should be sustained. To overrule such an objection duly and seasonably made would come squarely within the decision of the case of *Tumey vs. The State of Ohio*. If such an objection be so raised the complaint should be withdrawn and filed in a proper court where such an objection could not be made. However, if defendant fails to raise such an objection to the qualification of the magistrate, he in effect waives any such right to object that he might have had and thereby submits himself to the judgment of the court, and in such event the justice of the peace may hear and determine the cause and render final judgment.

Summarizing, it is my opinion that for violations of Sections 12697, 12698, 12700 and 12701, the status of a justice of the peace is not affected by the decision in the *Tumey* case. Neither is his status affected in the event the justice of the peace, as provided by Section 13499, requires complainant to secure the costs in event the complaint be dismissed. But if no security for costs is provided, and the defendant raises an objection to the justice of the peace hearing and determining the cause because of his disqualification on the ground of his interest in the outcome, such an objection would be well taken and the complaint should be withdrawn and filed in a proper court where such an objection would not lie.

In the event the defendant raises no objection to the justice of the peace hearing and determining the cause, or if the defendant pleads guilty, then the justice of the peace may render final judgment and the *Tumey* case has no application.

Respectfully,

EDWARD C. TURNER,

Attorney General.

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ASSESSMENTS AGAINST BENEFITED REAL ESTATE FOR WORK
DONE UNDER SECTION 6948, GENERAL CODE, CANNOT BE IN-
CREASED WITHOUT NOTICE TO AFFECTED PROPERTY OWNERS.

SYLLABUS:

Assessments against benefited real estate may not be increased to pay the cost of extra work in the construction and improvement of county roads done under the provisions of Section 6948, General Code, without giving the property owners affected by such assessments notice thereof and the right to a hearing as provided in Section 6922 of the General Code.

COLUMBUS, OHIO, April 28, 1927.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your communication of recent date, which reads as follows: