

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 If such an objection be so raised the complaint should be withdrawn and filed in a proper court where such an objection could not be made.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on the ground of his interest in the outcome, such an objection would be well taken and the complaint should be withdrawn and filed in a proper court where such an objection would not lie.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.

403

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:

"We respectfully request you to render this department your written opinion upon the following question:

Section 6948, G. C., provides for the making of extra work contracts in connection with the construction of county roads and the last sentence in the section provides that the cost and expense of such extra work shall be paid by the county commissioners out of any funds available therefor and the amount shall be charged to the cost of construction of said improvement and apportioned as the original contract price for the said improvement.

In the case of a road improvement wherein a part of the cost and expense is assessed against the property benefited and the assessments are made upon the basis of the estimated cost of the improvement and the extra work contracts provided for in Section 6948, G. C., make the cost of the improvement exceed the estimated cost, may the assessments against benefited property owners be increased to cover such additional cost without notifying the property owners of such increased assessments?"

The substance of your inquiry is: After special assessments have been levied against real estate benefited by a road improvement, and it becomes necessary to let extra work contracts as provided in Section 6948 of the General Code, to complete said road project, may assessments against benefited property owners be increased to cover the cost of such extra work, without notifying the property owners of such increased assessments?

Section 6948 of the General Code, makes provision for those instances wherein work in addition to that contemplated in a contract for a road improvement is necessary. After placing certain limitations upon a board of county commissioners as to entering into contracts for extra work without advertisement for bids, said section provides:

"* * * The costs and expenses of such extra work shall be paid by the county commissioners out of any funds available therefor, and the amount shall be charged to the cost of construction of said improvement and apportioned as the original contract price for the said improvement."

It will be observed from the language of said section that provision is made that the cost of such extra work shall be apportioned as the original contract price, which would include assessments against real estate as provided in Section 6919 of the General Code.

Without quoting such section, it is sufficient to say that it provides four different methods by which a board of county commissioners may apportion the cost of a road improvement, any one of which may be adopted. It will be observed that in each of the four methods enumerated therein, real estate is assessed for such improvement. A reading of said section will reveal that special assessments against property can only be made according to the benefits which will result to the real estate assessed. The special benefit plan of making an assessment is the only method by which a board of county commissioners can assess the real estate abutting upon a proposed improvement, or the real estate situated within one-half mile, one mile or two miles of either side thereof.

It will be noted that Section 6919, General Code, contains this language:

"* * * According to the benefits accruing to such real estate."

Special assessments are not valid unless notice is given to the owners of

property affected by such assessments as provided in Section 6922 of the General Code.

Before estimated assessments are adopted by a board of county commissioners, said board must publish once each week for two consecutive weeks in a newspaper published and of general circulation in such county notice that such estimated assessments have been made and that the same are on file in the office of the county commissioners. If no newspaper be published in said county the county commissioners must publish such notice in a newspaper of general circulation in the county. Such notice must state the date when objections, if any, will be heard to the proposed assessments.

The legislature in using the word "shall" in reference to the giving of said notice left no discretionary powers in a board of county commissioners as to the giving of such notice, and the provisions of the statute in this respect are clearly mandatory, the notice being a condition precedent to the levying of special assessments.

The purpose of giving notice to property owners, against whose land assessments are made, is obviously in order that they may be notified of the amount of their assessment, and if the assessments exceed the benefits resulting to their property by reason of such improvement to offer them an opportunity to adjust said assessment, as provided by law.

In those cases of road improvements wherein extra work is necessary to complete them, it would be destroying the rights given to property owners as set forth in Section 6922 of the General Code, if further assessments could be made for the same improvement without notifying the property owners of the increase in their assessments.

The language of Section 6948, General Code, which in part reads: "* * * and the amount shall be charged to the cost of construction of said improvement and apportioned as the original contract price for the said improvement" gives the board of county commissioners the right to levy further assessments against property when an improvement requires extra work for its completion so long as such further additional assessments do not exceed the benefits accruing to property owners. There seems to be no doubt as to this right being vested in the county commissioners. However, before the county commissioners can apportion the property owners' share of the cost of extra work, such property owners must be given the notice as provided in Section 6922 of the General Code. Each property owner is given the right to object to such assessment and to have the same heard.

Answering your question specifically, I am therefore of the opinion that assessments against benefited property owners may not be increased to pay the cost of extra work 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.

Respectfully,
EDWARD C. TURNER.
Attorney General.