

1456.

TRIAL—PROBATE COURT—RIGHT OF DEFENDANT IN CRIMINAL CASE  
TO HAVE TRIAL BY JURY WHEN IMPRISONMENT CANNOT BE MADE  
PART OF SENTENCE.

*SYLLABUS:*

*Under the provisions of Section 13452, General Code, applicable to the trial of criminal cases in the probate court under the jurisdiction granted to such court by Section 13424, General Code, a party defendant in a criminal case pending in said court can demand the right of a trial by jury only in a case in which punishment by way of imprisonment may be included in the sentence of the court, in the event of conviction.*

COLUMBUS, OHIO, December 28, 1927.

HON. MERVIN DAY, *Prosecuting Attorney, Paulding, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your communication in re State of Ohio vs. William K., in which you state that “the above entitled case is pending in the probate division of the Common Pleas Court of this county, charging defendant with opening an office for the practice of a limited practice of medicine, to-wit, chiropractic, without first having procured a license from the State Medical Board.” The question submitted for my opinion is whether the defendant in the above entitled case is entitled, as a matter of right, to a trial by jury under the provisions of Section 13452, General Code.

I assume that prosecution of the case referred to in your communication is predicated on the provisions of Section 12694, General Code, which so far as pertinent reads as follows:

“Whoever practices medicine or surgery, or any of its branches before obtaining a certificate from the state medical board in the manner required by law, or whoever advertises or announces himself as a practitioner of medicine or surgery, or any of its branches, before obtaining a certificate from the state medical board in the manner required by law; or whoever opens or conducts an office or other place for such practice before obtaining a certificate from the state medical board in the manner required by law; or whoever not being a licensee conducts an office in the name of some person who has a certificate to practice medicine or surgery, or any of its branches; or whoever practices medicine or surgery, or any of its branches, after a certificate has been duly revoked, or, if suspended, during the time of such suspension, shall, for the first offense be fined not less than twenty-five dollars nor more than five hundred dollars, and for each subsequent offense be fined not less than fifty dollars nor more than five hundred dollars, or imprisoned in the County jail or workhouse not less than thirty days nor more than one year, or both.”

The jurisdiction of probate courts in cases of this kind is provided by Section 13424, General Code, which reads as follows:

“The probate court shall have concurrent jurisdiction with the court of common pleas in all misdemeanors and all proceedings to prevent crime.”

I infer from your communication that in Paulding County the common pleas and probate courts have been combined by vote of the electors of said county under

the authority of Section 7 of Article IV of the Constitution of Ohio and of Section 1604-1, et seq., General Code.

Section 1604-4, General Code, provides that when such combination has been effected, there shall be established in the court of common pleas a probate division for docketing all matters for which the probate court had jurisdiction. From this I infer that in such case the probate division of the Common pleas court has the same jurisdiction in criminal and other matters that is possessed by the probate courts of other counties in which said courts have not been combined, and that the procedure in criminal cases instituted and pending in the probate division of the common pleas court in such case is the same as that in probate courts.

With respect to the right of persons charged with the commission of criminal offenses to trial by jury, Section 5 of Article I of the State Constitution provides:

“The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.”

Section 10 of Article I of the Constitution, so far as pertinent, reads in part as follows:

“In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witness face to face, and to have compulsory process to procure the attending of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed;”

So far as the constitutional guaranties contained in the constitutional provisions above quoted are concerned, it has been established by repeated decisions that the right of trial by jury therein provided for extends only to cases where the punishment that may be imposed in case of conviction includes imprisonment.

*Inwood vs. State*, 42 O. S. 186.

*State vs. Borham*, 72 O. S. 358.

*Hoffrichter vs. State*, 102 O. S. 65.

*Stiess vs. State*, 103 O. S. 33.

*Cochran vs. State*, 105 O. S. 541.

In the absence of any statement in your communication to the contrary, I assume that the charge against the defendant in the above noted case, pending in the probate division of the common pleas court of Paulding County, is an alleged first offense, and in this view it will be noted that the only penalty that could be imposed by the court in case of conviction would be a fine, as provided for in Section 12694.

The precise question submitted is whether, under the provisions of Section 13452, General Code, the defendant in this case is entitled to demand a trial of his case by a jury, notwithstanding the fact that imprisonment will constitute no part of the penalty imposed by the court in case of his conviction on said charge. In considering the provisions of Section 13452, I think it proper to note those of Section 13451 as well. These sections read as follows:

Sec. 13451. “Upon a plea, other than that of guilty, if the defendant does not demand trial by jury, the probate court shall try the issue.”

Sec. 13452. “Before the probate court shall receive any testimony upon the trial, the defendant may demand a trial by jury, and thereupon such jury shall be subject to like challenges as jurors in like cases in the court of common pleas.”

It is obvious, I think, that the provisions of Section 13452, General Code, were enacted for the purpose of giving effect to the constitutional guaranties contained in the provisions of the constitution above quoted. On this point the court in the case of *Sovereign vs. The State*, 4 O. S. 490, a case which grew out of a prosecution for a misdemeanor in the probate court of Muskingum County, after pointing out that at the time of said prosecution no statutory authority had been enacted giving said probate court power to impanel a lawful jury, said:

“The constitution secures the right of trial by such a jury, but does not execute itself; and no power could be derived by the court from the common law, because ‘our courts have no common law jurisdiction in criminal cases.’ ”

The question before us, therefore, is whether the legislature, in the enactment of what is now Section 13452, General Code, has thereby evinced, by the provisions of said section, an intention to go beyond the guaranties contained in the Bill of Rights above quoted, and accord to one charged in the probate court with the commission of a misdemeanor the right of a trial by jury, even though imprisonment can constitute no part of the penalty imposed by the court in case of conviction.

Looking to the provisions of Section 13451, General Code, as if standing alone, I do not believe that the term “jury,” as used therein, would occur to any one as having reference to any jury other than such as a defendant might demand as a matter of constitutional right, and I am inclined to the view that the trial by jury, which the defendant under the provisions of said Section 13452 may demand, is likewise limited to cases where the defendant is entitled to trial by jury as a matter of constitutional right.

In the case of *Silberman et al. vs. Hay*, 59 O. S. 582, it was held:

“The right of trial by jury is a subject matter of general legislation, and laws affecting it must be uniform in operation throughout the state. Section 26, Art. 2, Const.”

Inasmuch as Section 13452, General Code, is in form a general law effective throughout the state, said section in any view as to its construction probably satisfies the requirements of Section 26 of Article II of the Constitution above noted. However, it is not believed that the legislature intended to vouchsafe to one charged in the probate court with an offense the right of trial by jury in any case which, if instituted in the common pleas court or a justice court, as courts of con-current jurisdiction (Secs. 13423 and 13425 G. C.), would clearly not carry with it the right of a trial by jury.

I am inclined to the view, therefore, that the provisions of Section 13452, General Code, apply only to criminal cases pending in the probate court or in the probate division of the common pleas court in counties where said courts have been combined, in which punishment by way of imprisonment, may be imposed, in the event of conviction; and I am of the opinion that the defendant in the case mentioned in your communication is not entitled to the right of trial by jury, if I am correct in my assumption that the charge against said defendant is one of an alleged first offense.

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*