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# Notes on Recent Cases

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# NOTES ON RECENT CASES

**CONSTITUTIONAL LAW—Due Process of Law.—Compensating judge out of fine imposed.** Plaintiff in error was arrested, brought before the village mayor, and charged with a violation of the Ohio Prohibition Act. He made a motion for dismissal of his case on the grounds that the magistrate was disqualified by reason of the fact that under the Ohio Code the fees and costs of the magistrate were dependent upon the conviction of the accused, in violation of the Due Process clause of the Federal Constitution. The motion was denied; he was convicted and a fine and imprisonment pronounced upon him. The case ran the gamut of the judiciary in Ohio and was brought to the U. S. Supreme Court on a writ of error to reverse the decision of the Ohio supreme court, affirming the conviction. *Held,* the proceedings were a denial of Due Process of Law because of the "direct, substantial, pecuniary interest" of the magistrate against the accused. *Tumey v. State of Ohio,* 47 Sup. Ct. (Adv. Ops.) 437, 71 L. Ed. (Adv. Ops.) 508. Chief Justice Taft, delivering the opinion of the court, searches the entire history of Common law usage and practice in England, from which our conception of Due Process is derived, and concludes that "a system by which an inferior judge is paid for his services only when he convicts the defendant has not become so embedded by custom in the general practice, either at common law or in this country, that it can be regarded as due process of law, unless the costs usually imposed are so small that they may be properly ignored as within the maxim *'de minimis non curat lex'.*"

It is inconsistent with American precepts of a fair and impartial trial, and contrary to our sense of justice that a judicial or quasi judicial officer be permitted to have any interest, pecuniary or otherwise, in the outcome of a case pending before him. *Pearce v. Atwood,* 13 Mass. 324; *Taylor v. Worcester Co.,* 105 Mass. 225; *Stockwell v. White Lake,* 22 Mich. 341; *Moses v. Julian,* 45 N. H. 52, 84 Am. Dec. 114; *State v. Crane,* 36 N. J. Law 394; *Nelson v. State,* (Nebr.) 211 N. W. Adv. Ops. 175; *Findley v. Smith,* 42 W Va. 299, 26 S. E. 370.

The pecuniary interest and prejudice of the justice, as an *indi-*

*vidual,* in the instant case was not the only reason for holding the proceedings unconstitutional. The court also held that there was a denial of Due Process in the fact that the mayor, trying the case (without a jury), and assessing a large fine which was split between the city and the state, was acting in a dual capacity as a judicial and executive officer whose conflicting positions offered strong inducement while sitting as a judicial officer to deny the accused a fair and impartial trial for the sake of the city coffers. Likewise it was held in *State ex. rel. Colcord v. Young,* 31 Fla. 594, 12 So. 673, 19 L. R. A. 636, 34 Am. St. Rep. 41, and, in *Boston v. Baldwin,* 139 Mass. 315, 1 N. E. 417, that it was a denial of due process for a judicial officer to hold two inconsistent offices, one partisan and the other judicial. W. L. T.

**CONTRACTS—Enforcement of Illegal Contracts.** Plaintiff, the holder of a lottery ticket which bore the winning number, entrusted the ticket to defendant who presented same to the parties in charge and procured the prize, an automobile, which he refused to deliver to plaintiff when so requested. Defendant resisted the plaintiff's suit in replevin on the alleged unenforceability of an illegal contract. Held, "The rule that the law will not enforce an illegal contract has application only as between the immediate parties to the contract" *Matta v. Katsoulas,* (Wisc. 1927) 212 N. W. 261.

Although the parties to an illegal contract, cannot invoke the aid of courts of law or equity in the enforcement of their agreements the defense of illegality is not open to third persons. *Edward Thompson Co. v. Pakulski,* 220 Mass. 96, 107 N. E. 412; *Bohn Mfg. Co. v. Hollis,* 54 Minn. 223, 55 N. W. 1119, 40 Am. S. R. 319, 21 L. R. A. 337; *Farmers Bank v. Detroit R. R. Co.,* 17 Wis 372. An action will generally lie to compel an agent to account for money or property received for his principal "although it was received by the agent as the fruits of an illegal transaction" Agency 2 C. J. sec. 411. The defendant in the principal case ought not to be permitted on any theory to take advantage of an illegal transaction in which he had no active participation.

W. L. T.

**DEATH—Recovery by administrator for death of voluntary victim of abortion.** The defendant performed a crude operation upon plaintiff's intestate causing miscarriage followed by death resulting from septicemia, a germ disease induced by the negli-

gent and unsanitary method of treatment pursued by defendant in the course of her illegal act. Plaintiff, as administrator, brought a tort action against defendant for the death and conscious suffering of decedent. *Held,* the voluntary participation of deceased in an operation to produce abortion, in violation of law, bars recovery in an action for her death and suffering. *Szadiwicz v. Cantor,* (Mass. 1926) 154 N. E. 251.

It is well settled and consonant with sound reason, that one party to a contract in violation of a criminal statute cannot recover damages from the other contracting party in an action *ex contractu. Myers v. Meinrath,* 101 Mass. 368, Am. Rep. 368; *Shellenberger v. Ransom,* 41 Neb. 631, 59 N. W. 935, 25 L. R. A. 564; *Riggs v. Palmer,* 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819; *Pennington v. Todd,* 47 N. J. Eq. 569 21 Atl. 297, 11 L. R. A. 589, 24 Am. St. Rep. 419; *Norbeck v. State,* 32 S. D. 189, 142 N. W. 847, Ann. Cas. 1916 A. 229; *Kirkpatrick v. Clark,* 132 Ill. 342, 24 N. E. 71, 8 L. R. A. 511, 22 Am. St. Rep. 531; *McCullough v. Virginia,* 172 U. S. 102, 19 Sup. Ct. 134, 43 L. Ed. 382; 6 R. C. L. 816. For the same reason an action cannot be maintained on the contract theory in a case similar to the one under discussion. *Hunter v. Wheate,* 53 App. D. C. (1923) 206, 289 Fed. 604, 31 A. L. R. 980.

In *tort* actions the general rule may be stated that illegal conduct and participation of plaintiff in an act of which he complains, if it be the proximate or concurring cause of the injury, is a bar to recovery. *Wallace v. Cannon,* 38 Ga. 199, 95 Am. Dec. 385; *Deeds v. Strode,* 6 Ida. 317, 55 Pac. 656, 96 Am. St. Rep. 263, 43 L. R. A. 207; *Toledo R. R. Co. v. Beggs,* 85 Ill. 80, 28 Am. Rep. 119; *Drake v. Pa. R. R. Co.,* 137 Pa. St. 352, 20 Atl. 994, 21 Am. St. Rep. 883; *Miller v. Lamery,* 62 Vt. 116, 20 Atl. 199; *Hiller v. Ladd,* 85 Fed. 703. Ordinarily consent to an act resulting in harm is not a basis for a civil action. *Ill. Cent. R. R. Co. v. Allen,* 39 Ill, 205; *Fitzgerald v. Cavin,* 110 Mass. 153; *Markley v. Whitman,* 95 Mich. 236, 54 N. W. 763, 35 Am. St. Rep. 558, 20 L. R. A. 55; *Coldnamer v. O'Brien,* 98 Ky. 569, 33 S. W. 831, 36 L. R. A. (N. S.) 862; *Levy v. Kansas City,* 168 Fed. 525 22 L. R. A. 862. But this rule does not apply to acts detrimental to life, or constituting a commission of a crime or breach of peace. *Adams v. Waggoner,* 33 Ind. 531, 5 Am. Rep. 230; *Grotton v. Glidden,* 84 Me. 589, 24 Atl. 1008, 30 Am. St. Rep. 413; *Commonwealth v. Collberg,* 119 Mass. 350, 20 Am.

Rep. 328; *Stout v. Wren,* 8 N .C. 420, 9. Am. Dec. 653; *Milliken v. Heddesheimer (infra), Shay v. Thompson,* 59 Wis. 540, 18 N. W. 473, 48 Am. Rep. 538; 1 Cooley, "Torts", 3d. ed. p. 282. There are few cases in the books involving the law and facts of the principal case; and no case can be found strictly on all fours, establishing a precedent for the decision of the Massachusetts court; but a similar rule has been applied by other courts to similar facts from which the inference might be drawn that they are in accord. However, there is a difference in facts lending opportunity for a distinction to be made. In *Coldnamer v. O'Brien, supra,* recovery was denied but the action was against parties, who were not responsible for her condition, for inducing plaintiff to submit to an abortion operation. In *Hunter v. Wheate, supra,* the husband consented to and participated in the preparation and consultation preliminary to the commission of the illegal act. In direct conflict with the tenor of these cases are; *Milliken v. Heddesheimer,* (Ohio 1924) 144 N. E. 264, 33 A. L. R. 53; *Miller v. Bayer,* 94 Wisc. 123, 68 N. W. 869; *Lembo v. Donnell,* (1917) 116 Me. 505, 101 Atl. 469.

Of course the nature and extent of the right of action for death is defined and limied by the statute creating it, but under the common statute the weight of authority and better reason casts its favor toward the right of recovery for the death of a voluntary victim of abortion. Consent of the deceased should not be a bar to the action for wrongful death because it is founded on a right distinct from any that may have been in the victim. Consent as a defense should only apply between the immediate parties and participants in the act producing abortion. The kin of the decedent should not be barred from recovery in their right by a shield placed around the one who perpetrated the illegal act. The Massachusetts court excused itself on the grounds of public policy but even from that standpoint its ruling is dangerous because it will tend to increase abortions by permitting malpractice scoundrels to go about their unholy business protected by a rule of law saving them harmless from all financial responsibilities. W. L. T.

**DIVORCE—Association of spouse with one of opposite sex as consituting cruel and inhuman treatment.** The husband by a cross bill demanded a divorce on the ground of cruel and in-

human treatment, which consisted of association by his wife with a certain man against the protests of the husband who had found them together under suspicious circumstances and had forbidden her to continue her intimate relations with him. The wife, in defiance of her husband's protestations, refused to give up the society of the other man and her husband ordered her out of the house. After she left her husband, she resided at several places to which the other man constantly repaired to continue his attentions towards her. Adultery was neither alleged nor proved. It was contended on behalf of the wife that since adultery did not constitute "cruel and inhuman treatment", then suspicion of adulterous conduct and the mental anguish accompanying such suspicion could not; but the court *held* that the wife's continued association against the protests of her husband was so "cogent and persuasive of wrongdoing" that it amounted to cruel and inhuman treatment within the statutory ground for divorce. *Tschida v. Tschida* (Minn. 1927) 212 N. W. 193.

Cruel and inhuman treatment was first designated as a ground for divorce to relieve an innocent spouse from further danger of maltreatment to life or health. At first it was confined to cases of physical punishment; later it was recognized by the courts that mental distress was just as derogatory to life and health as physical suffering; now it is quite generally admitted that mental anguish resulting from wrongful conduct amounts to cruel and inhuman treatment. "Divorce" 19 C. J. sec. 88, citing cases. Mental suffering equivalent to cruel and inhuman treatment must be such that it is an impairment, or serious enough to cause a reasonable fear of resulting injury, to life or health. *Andrews v. Andrews,* 120 Calif. 184, 52 Pac. 298 (false charge of insanity); *Driver v. Driver,* (Ind.) 52 N. E. 401 (imputations of either *ante,* or *post,* nuptial unchastity); *McClintock v. McClintock* 147 Ky. 409, 144 S. W. 68, 39 L. R. A. (N. S.) 1127 (indifference, neglect, annoyance and humiliation); *Weigel v. Weigel,* (N. J.) 47 Atl. 183 (mental suffering caused by abuse); *Whitehead v. Whitehead* (N. H.) 79 Atl. 516 (knowledge of other's infidelity); *Dickinson v. Dickinson,* 54 Ind. App. 53, 102 N. E. 389 (insinuations of theft and adultery); *Marks v. Marks* (Minn.) 64 N. W. 561, 45 Am. St. Rep. 466, (scolding, abusive language); *Craig v. Craig* 129 Ia. 192, 105 N. W. 446, 2 L. R. A. (N. S.) 669, (manifestation of love for another.)