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# RES JUDICATA—The Effect of The Oklahoma Supreme Court Scandal

In the 1954 decision of *Johnson v. Johnson*[1], the Oklahoma Supreme Court reversed a lower court holding disallowing the admissibility of a will to probate. In a per curiam decision adopted by Justices Johnson, Welch, Arnold and Blackbird, with Justice Corn concurring, the court ordered the will admitted to probate and the estate of the decedent distributed.

Approximately four years later, the Supreme Court of Oklahoma announced another seemingly routine decision in *Oklahoma Company v. O'Neil.*[2] This case involved an alleged fraudulent contract for the purchase of an oil and gas leasehold working interest. Again the lower court was reversed by a split decision with Justices Johnson, Welch, Corn, Davison and Carlile adopting the per curiam opinion.

Both of these cases lay dormant for a number of years until reports of the alleged taking of bribes and other misconduct on the part of several Oklahoma Supreme Court justices became public in early 1964. Of those involved, former Justice Corn is the only one pertinent to this note. In 1964, he was convicted on federal criminal charges for filing false income tax returns. While serving his sentence, he made statements under oath to federal authorities in which he admitted taking bribes continuously from 1938 to 1959 from an Oklahoma City attorney in return for his vote in deciding certain cases appealed to the high court. Former Justice Corn also implicated two other justices, Johnson and Welch, who voted with the majority in the *Johnson* and *O'Neil* cases.[3] The ensuing Oklahoma Supreme Court scandal resulted in attempts by defeated litigants to reopen cases decided during the period

1 279 P.2d 928 (Okla. 1954).
2 333 P.2d 534 (Okla. 1958).
3 For a brief review of these events see 36 OKLA. B.J. 601, 704 (1965).

when one or more Oklahoma Supreme Court justices were allegedly taking bribes.

Article VII of the Oklahoma Constitution requires that "[a] majority of the members of the Supreme Court shall constitute a quorum, and the *concurrence of the majority of the said court shall be necessary to decide any question.*"[4] The Bill of Rights of the Oklahoma Constitution provides: "The courts of justice of this State shall be open to every person, and speedy and certain remedy afforded for every wrong and every injury . . . and *right and justice shall be administered without sale, denial, delay or prejudice.*"[5] The relevant statute regarding the receiving of bribes by public officials provides that every judicial officer who does so "*shall forfeit his office,* be forever disqualified to hold any public office . . . *and be punished* by imprisonment . . . or by fine . . . and imprisonment . . . ."[6]

The Oklahoma Supreme Court based its decision on the petitions to reopen the *Johnson*[7] and *O'Neil*[8] cases on this foundation of statutory and constitutional law. In the second *Johnson* case, petitioners sought to have the mandate withdrawn and the decision vacated in the original *Johnson* case. The petition was based solely on participation of former Justice Corn in that case; it was stipulated that there was no actual bribery involved in the original case. The issue presented was whether the fact that former Justice Corn was admittedly accepting bribes in return for his vote worked an automatic forfeiture of his office and/or rendered him ineligible to participate in the decision brought under review.

4 OKLA. CONST. art. VII, § 3 (emphasis added).
5 OKLA. CONST. art. II, § 6 (emphasis added).
6 OKLA. STAT. tit. 21, § 382 (1961) (emphasis added).
7 424 P.2d 414 (Okla. 1967) (petition to relitigate *Johnson v. Johnson* will hereafter be referred to as the second *Johnson* case).
8 431 P.2d 445 (Okla. 1967) (petition to relitigate *Oklahoma Company v. O'Neil* will hereafter be referred to as the second *O'Neil* case).

If this question were answered in the affirmative, the original case would not have been decided by a "majority of the court" as required by the Oklahoma Constitution.

The court first considered the statutory provision regarding forfeiture of office. It held that the statute "requires at least a formal adjudication of guilt in a proceeding where due process is afforded, and may even require conviction in a criminal proceeding. Since no proceeding of either character was had, there was no forfeiture of office . . . under the statute."[9] The court based this construction of the statute on the need for due process to adequately protect the accused official's interests. However, it is not illogical to reach the interpretation petitioners argued. It is possible the legislature intended for the forfeiture of office and disqualification provisions of the statute to come into effect automatically without a "formal adjudication of guilt" and the punishment clause to become applicable only upon conviction.

The court next considered the allegation that assuming Justice Corn was not automatically disqualified to hold office under the statute, his corrupt activity at the time disqualified him from participating in the decision. The court looked to the provision in Article II of the Oklahoma Constitution which requires that "justice be administered without sale." The court construed this clause to mean that a violation occurred only where it is shown that there was actual "sale, denial or prejudice" involved in the specific case. "If a decision is rendered in a particular case without sale . . . then, even though the decision be participated in by a judge who has been corrupt in other cases, we think, the requirements of the provision have been met."[10] Further, the court opened the door for the second *O'Neil* case, by implying that it would

[9] 424 P.2d at 419.
[10] *Id.* at 420.

vacate judgments in "those cases where there is at least some evidence that wrong-doing influenced the decision."[11]

The foregoing conclusions of the court were strongly attacked in a special concurring opinion by Special Justice Merrill. He argued that former Justice Corn became disqualified to sit on the bench from the beginning of his unlawful acts. Special Justice Merrill pointed out that decisions reached by a judge disqualified by reason of bias, relationship to the parties or counsel, or interest in the litigation have been ruled void in Oklahoma and in other jurisdictions.[12] His argument was that "these disqualifying factors were insignificant compared with the enormity revealed by the record before us."[13] He would have reopened the original case if the petitioners had alleged that at the first trial they did not know of the corrupt agreement between former Justice Corn and the Oklahoma City attorney, and that they had no reason to inquire into it as required by statute.[14]

It has long been recognized that no judge should preside over litigation where he is not completely independent, disinterested and impartial.[15] Several Oklahoma decisions have applied the rule that parties to lawsuits are entitled to a determination by an impartial court, free from bias, prejudice and interest.[16] In *State* ex. rel. *Garret v. Freeman*,[17] the Oklahoma Supreme Court stated: "We conceive it to be the duty of this court to hold the scales level, and to see to it, insofar

[11] *Id.*
[12] *Id.* at 421-23. See cases cited notes 23-25 *infra.*
[13] 424 P.2d at 423.
[14] OKLA. STAT. tit. 25, § 13 (1961).
[15] Norton v. Inhabitants of Fayette, 134 Me. 468, 188 A. 281 (1936); State v. Muraski, 6 N.J. Super. 36, 69 A.2d 745 (Super. Ct. 1949).
[16] State *ex. rel.* Larecy v. Sullivan, 207 Okla. 128, 248 P.2d 239 (1952); State *ex. rel.* Wade v. Crawford, 178 Okla. 230, 62 P.2d 620 (1936); Coker v Crump, 124 Okla. 150, 288 P. 321 (1930); State *ex. rel.* Lowry v. Walden, 142 Okla. 115, 285 P. 951 (1930); London v. Ogden, 130 Okla. 89, 265 P. 139 (1928); State *ex. rel.* Garrett v. Freeman, 102 Okla. 291, 229 P. 296 (1924); Son v. Linebaugh, 101 Okla. 291,

as we can, that impartial justice is meted out by an unbiased judge . . . ."[18] The court also stated that "[t]his court shall see to it that no suspicion attach to the course of judicial proceeding, in order that it may be made apparent . . . to the community that the judicial proceedings are impartial and beyond reproach; this to the end that the confidence in our judicial system may be sustained."[19] In a later case in which the trial judge's son was the plaintiff's attorney, the Oklahoma Supreme Court on review stated that wherever the existence of substantial grounds for the disqualification of a judge is shown, he should not try the case. If he should attempt to do so, the high court may order him to disqualify himself.[20] Also, by statute[21] in Oklahoma, "[n]o judge . . . shall sit in any cause . . ." in which he is interested,[22] where he is related to any party,[23] where he has been counsel for

225 P. 686 (1924); State *ex. rel.* Vahlberg v. Chismore, 90 Okla. Crim. 244, 213 P.2d 293 (1949).

[17] 102 Okla. 291, 229 P. 296 (1924). The court ordered issuance of a writ of mandamus requiring the presiding judge in a pending election contest suit to certify his own disqualification due to his sympathy with the Ku Klux Klan and his financial relationships with defendant's attorneys. See Garrett v. London, 107 Okla. 72, 229 P. 1079 (1929), for the decision in this case when tried on its merits under a new trial judge.

[18] 102 Okla. at 294, 229 P. at 298.

[19] *Id.* at 293, 229 P. at 297-98.

[20] State *ex. rel.* Bennett v. Childers, 188 Okla. 14, 105 P.2d 762 (1940).

[21] OKLA. STAT. tit. 22, § 571 (1961).

[22] *See* State *ex. rel.* Richardson v. Keen, 185 Okla. 539, 95 P.2d 120 (1939); Cimarron Util. Co. v. City of Guymon, 171 Okla. 344, 43 P.2d 143 (1935); Riley v. Carter, 165 Okla. 262, 25 P.2d 666 (1933); Edwards v. Carter, 167 Okla. 282, 29 P.2d 605 (1933); State *ex. rel.* Dabney v. Ledbetter, 156 Okla. 23, 9 P.2d 728 (1932); State *ex. rel.* Short v. Owens, 125 Okla. 66, 256 P. 704 (1927); Lawton Rapid Transit Ry. Co. v. City of Lawton, 31 Okla. 458, 122 P. 212 (1912).

[23] *See* State v. Pitchford, 43 Okla. 105, 141 P. 433 (1927); State *ex. rel.* Short v. Owens, 125 Okla. 66, 256 P. 704 (1927); Hengst v. Burnett, 40 Okla. 142, 135 P. 1062 (1913).

either side or where any proceeding in which he has acted as attorney is questioned.[24] The statute expressly includes all common law grounds for disqualification such as bias and prejudice, relationship with counsel of either party, and statements and expressions of opinion by the judge. The Supreme Court of Oklahoma and the Oklahoma Court of Criminal Appeals have disqualified trial judges and ordered new trials on the common law grounds as well as on the statutory grounds.[25]

The court's decision in the second *Johnson* case was based on a more far-reaching concept. This concept has been forcibly set forth by the eminent New York trial lawyer Mr. Louis Nizer in his book, *The Jury Returns*.[26] Nizer discussed a divorce action where the grossly wrongdoing husband obtained a divorce from his wife in a court presided over by a judge who had received gifts from the husband's attorney. The judge had been disciplined by the bar association, recommended for impeachment by a grand jury, and in fact, nar-

[24] *See* Harjo v. Chilcoat, 146 Okla. 62, 294 P. 119 (1930); Hamilton v. Pendleton, 111 Okla. 55, 237 P. 611 (1925); First Nat'l Bank v. Southwestern Sur. Ins. Co., 95 Okla. 259, 219 P. 690 (1923); Powers v. Cook, 48 Okla. 43, 149 P. 1121 (1915); Dowell v. Hall, 85 Okla. Crim. 92, 185 P.2d 232 (1947); Sawyer v. State, 73 Okla. Crim. 186, 119 P.2d 256 (1941); Goad v. State, 43 Okla. Crim. 411, 279 P. 927 (1929).

[25] *Bias and prejudice*: Stokes v. State, 366 P.2d 425 (Okla. 1961); State *ex. rel.* Harden v. Edwards, 176 Okla. 187, 56 P.2d 402 (1936); Twin City Fire Ins. Co. v. First Nat'l Bank, 145 Okla. 293, 242 P. 833 (1930); State *ex. rel.* Short v. Martin, 125 Okla. 24, 256 P. 681 (1927); *Relationship to Counsel*: Morissette v. Musgrave, 188 Okla. 222, 108 P.2d 123 (1940); State *ex. rel.* Mayo v. Pitchford, 43 Okla. 105, 141 P. 433 (1914); *Expressions of Opinion*: State *ex. rel.* Reeves v. Bellah, 311 P.2d 264 (Okla. 1957); Hearn v. Miller, 168 Okla. 411, 33 P.2d 506 (1934); O'Brien v. Clark, 5 Okla. Crim. 122, 113 P. 543 (1911); Crawford v. Ferguson, 5 Okla. Crim. 377, 115 P. 278 (1911).

[26] L. NIZER, THE JURY RETURNS (1966).

rowly escaped impeachment by the state legislature. All appeals by the wife based on the constitutional safeguards of a fair and impartial trial, equal protection of the law, and due process failed.[27] Why it failed was explained by Nizer as follows:

> The answer lies in the philosophical principle that the law's objective is to achieve stability in the social order. It will even sacrifice an individual, if to protect him means to create general chaos. If every decision ever rendered by a judge whose integrity comes under suspicion were subject to review, the settled rights of hundreds of citizens would be cast in doubt. The confusion and injury would be limitless. Litigants who had relied on the court's decisions and disposed of property, or spent the judgments collected, or remarried and raised new families, would be subject to new trials in retrospect. The injustice from such a belated effort to correct a possible wrong might far exceed the injustice done to an aggrieved victim.
>
> Furthermore, there are practical considerations requiring the same conclusion. Years may have passed since the possible corrupt decision. Evidence may have disappeared. Witnesses may have died. The revival of contests may constitute a new injustice to litigants, who must cope with stale issues which they had a right to think were determined forever.
>
> Besides, who can be certain that even a corrupt judge was always corrupt? It is an unwarranted assumption that every decision he handed down was tainted. Yet if one case is opened, is not the door ajar for re-examination for all his cases?
>
> If one balances the grievance of justice denied to a few individuals against the chaotic uncertainty and instability of a general reopening of all contests previously put to rest, the rule that finality of decision for all is more important than rectifying the possible grievances of a few, can be understood. Above all is the salient fact that judicial venality is uniquely rare, far rarer than absconding bank officials, corrupt public officials, or de-

27 U.S. CONST. amends. V, VI, VIV.

> ceiving business executives. . . . In a society where imperfection due to human failing must be reckoned with, the individual citizen must occasionally be sacrificed in the interest of the public good.[28]

This concept of the law was recognized by the court in the second *Johnson* case.[29] However, as was pointed out in the concurring opinion, of the one thousand cases decided from 1938 to 1959 which were split decisions in which Justice Corn was with the majority, many of these cases represented compliance with the custom of allowing a judgment to be rendered by the concurring vote of any five justices without express participation by the other four. In other words, some of the decisions which appear to have been decided by a majority of only five may actually have been six to three, seven to two, eight to one or even unanimous decisions. Therefore, the argument against a general review of hundreds of settled decisions is substantially weakened since there would not be nearly as many cases which would be reviewable as the record might indicate. The apparent difficulty with this reasoning is, of course, the problem of determining which of the one thousand cases fit into this category. The concurring opinion also expressed an interesting policy argument in rebuttal to the philosophical reasoning against relitigation of previously settled cases. The rule prohibiting reopening of cases where no actual wrongdoing is shown may actually encourage judges to enter into corrupt agreements. "In the interest of justice, of integrity, of public confidence in the due administration of justice, it should be the law that no man so deaf to the obligations of a judge as to put his vote at the command of another should be permitted to effectuate judgments outlasting the revelation of his infamy."[30]

The decision in the second *Johnson* case was followed by

[28] NIZER, *supra* note 26, at 419.
[29] 424 P.2d at 418.
[30] *Id.* at 423.

the courts' ruling in the second *O'Neil* case. In that case, former Justice Corn testified before a court appointed referee that he had received a bribe for his vote in reversing the lower court in the original *O'Neil* case. The court, relying on the same statutory and constitutional provisions it had in the second *Johnson* case, unanimously granted the bill of review, recalled the mandate issued in the *O'Neil* case, and vacated that decision. The court further ordered that it would hear the case on its merits. The only difficulty encountered by the court was the statutory provision concerning the sufficiency of the evidence.[31] The court held that the uncorroborated testimony of former Justice Corn concerning the bribe in the original *O'Neil* case, although controverted by evidence of respondents, was sufficient to hold that former Justice Corn's vote in that case was null and void; therefore, the case was not decided by a "majority of the court" under the Oklahoma Constitution.

As a result of these recent decisions, it would appear that certain cases decided by the Oklahoma Supreme Court between 1938 and 1959 may be subject to review. Where it can be shown that former Justice Corn or any other justice participated and voted with the majority under the influence of a bribe in a five to four decision, the case will be reviewed on its merits in a trial de novo before the Oklahoma Supreme Court. Under the rule of the second *O'Neil* case, the uncorroborated testimony of the bribed justice may be sufficient evidence to establish the taking of the bribe.

In analyzing these cases, one may argue that the Oklahoma Supreme Court is applying different rules at different levels of litigation in cases involving disqualification of judges. At the trial level, the high court has not been hesitant to

[31] OKLA. STAT. tit. 12, § 381 (1961): "No person shall be disqualified as a witness in any civil action or proceeding, by reason of his interest . . . or by reason of his conviction of a crime; but such interest or conviction may be shown for the purpose of affecting his credibility."

order disqualification of a trial judge or to render a trial court's decision void where the judge, by reason of statutory or common law disability, was not qualified to sit. This has been true even though no actual wrongful motive or actions on his part were alleged or proved.[32] On the other hand, at the appellate level, where the wrongdoing justice sits on the bench of the highest court of the state, that court will not render its own prior decisions null and void merely because that justice participated in the decision. Instead, the court has required that it be shown that he actually acted wrongfully in the specific case under review. By avoiding important constitutional and statutory obstacles through adroit statutory construction, the court was able to reach this result. There is no constitutional or statutory provision precisely in point which would render high court decisions void. It may be that the policy argument as presented by Nizer against reopening all such cases was the real foundation of the court's decision in the second *Johnson* case. This is not necessarily invalid reasoning. It is a very forceful argument — but again the double standard appears. Certainly, but for the policy argument against reopening such cases, Justice Corn in the second *Johnson* case could have been declared disqualified to sit for the statutory reason of interest or at least for the common law reasons of bias and prejudice. If he had been disqualified, the original *Johnson* case and all those in a similar situation would be subject to relitigation.

In support of the practical argument against reopening cases such as those under consideration is the legal argument of res judicata; that is, a final judgment on merits by a court of competent jurisdiction is conclusive of rights of parties in all later suits on points and matters determined in the former suit.[33] It should be noted, however, that in cases such as the *O'Neil* case where actual wrongdoing by a state

[32] See notes 22-25 *supra*.
[33] For a discussion of the doctrine of res judicata see Harness v. Myers, 143 Okla. 147, 288 P. 285 (1930).

supreme court justice was shown, the original parties did not have their "day in court", at least at the appellate stage, due to the unlawful acts of a member of the court. It follows that the doctrine of res judicata would not apply since these cases were not in a strict sense "determined on their merits" as required by the doctrine. Hence, if this argument is adopted, the Oklahoma Supreme Court has been consistent in refusing to reopen the *Johnson* case and in ordering a new trial in the *O'Neil* case.

There are numerous reported cases involving various forms of misconduct on the part of trial judges. In such instances, the aggrieved individual is protected by his right to appeal to an untainted court of review. The problem of res judicata is, therefore, not presented. This is not so, however, where the highest appellate court was itself contaminated by one or more dishonest members. In that situation, the same court must, after it has been purged of its infection, deal with the question of whether prior cases decided during the period when it was contaminated with the cancer of corruption should be relitigated. It is then that all the problems of res judicata come to bear. It appears, in Oklahoma at least, the courts believe that public policy favoring a stable judicial system outweighs the private interest in protection of individual rights. Therefore, prior litigation will not be reopened unless actual corruption in a specific case is shown. It is indeed fortunate that the situation rarely arises where an appellate court, instead of looking toward the future, must consider and disturb the settled past.

*W. Jay Jones*