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CPL § 170.15(3): Conflict of Interest as a Basis for Removal of a Criminal Action

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alienability of the subject property, and that unless the statutory terms were strictly observed, this privilege would be transformed from a safeguard into a weapon to be used against the owner of real property. For this reason, the Court of Appeals determined that once this privilege was invoked, a failure to conform to the statutory provisions foreclosed the granting of an additional notice of pendency.[302] Moreover, Justice Gagliardi noted that the Judicial Conference in response to *Israelson*, recommended that CPA 123 be amended to make cancellation mandatory where timely service of summons was not accomplished.[303] When this recommendation was included in CPLR 6514, the last vestige of discretion was extinguished.[304]

The court's conclusion in *Deerfield* that a second filing of a notice of pendency is unauthorized under CPLR 6514(b) is clearly appropriate.[305] To permit the filing of a second notice would once again result in the alienability of the subject property being in doubt. Such a consequence would pose a serious hardship to any defendant who sought to engage in a transaction involving his property. Additionally, allowing a second notice would provide an opportunity for a plaintiff to wield the notice as a weapon against a defendant, a clear misapplication of the purpose of a notice of pendency.

CRIMINAL PROCEDURE LAW

CPL § 170.15(3): Conflict of interest as a basis for removal of a criminal action.

Under section 170.15 of the Criminal Procedure Law,[306] the trial of a defendant arraigned upon an information, simplified information, prosecutor's information, or misdemeanor complaint in a city, town, or

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302 *Id.*

303 *See* SECOND ANNUAL REPORT OF THE N.Y. JUDICIAL CONFERENCE 117-20 (1957). In 1957, CPA 123 was amended to include the Judicial Conference's recommendation. *See* N.Y. SESS. LAWS [1957], ch. 877, § 586.

304 The plaintiff in *Deerfield* sought to compare his position to that of a plaintiff in a mortgage foreclosure action, since the plaintiff in such an action may file following the cancellation of a prior notice of pendency. However, the case relied upon by plaintiff, Robbins v. Goldstein, 36 App. Div. 2d 730, 320 N.Y.S.2d 553 (2d Dep't 1971), *appeal dismissed*, 28 N.Y.2d 924, 271 N.E.2d 702, 323 N.Y.S.2d 173, *stay granted*, 30 N.Y.2d 621, 282 N.E.2d 128, 331 N.Y.S.2d 42 (1972), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 147, 176-77 (1971), clearly distinguished mortgage foreclosures from other real property actions involving cancellation of notices of pendency. *See generally* RPAPL 1331.

305 Since the enactment of the CPLR, two other cases have dealt with the issue presented in *Deerfield*; both have held that a second filing was impermissible. *See* Pelligrina v. Falcone, 160 N.Y.L.J. 101, Nov. 22, 1968, at 17, col. 5 (Sup. Ct. Kings County); Telchman v. Marrazzo, 42 Misc. 2d 354, 247 N.Y.S.2d 741 (Sup. Ct. Kings County 1963).

306 N.Y. CRIM. PRO. LAW § 170.15 (McKinney Supp. 1974).

village court can be transferred to another local criminal court on several grounds.[307] One such ground for removal is the disqualification or incapacitation of all of the judges of the court in which the defendant is arraigned.[308]

In *People v. Kessler*,[309] the defendant was charged with violating a town ordinance by excavating wetlands without first obtaining a permit from the Shelter Island Town Board. As a substantial owner of real estate on Shelter Island, the defendant had been attempting to subdivide and develop a portion of his property. His efforts had led to numerous disputes with the town board, culminating in several civil suits.[310] Under the Town Law, Shelter Island is classified as a town of the second class.[311] Accordingly, section 60 of the Town Law authorizes the town's justices of the peace to sit on the local board.[312] In this case, two justices of the Shelter Island Justice Court were members of the board.[313] The defendant contended that such an arrangement created an inherent conflict of interest. If his case remained in the Shelter Island Justice Court, the defendant argued, a justice of the peace would be required to render a decision in a criminal proceeding arising from the violation of an ordinance enacted by a local legislative body of which he was a member.[314] Consequently, the defendant re-

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307 Removal from one local criminal court to another is mandated when the defendant is not arraigned in a court having trial jurisdiction of the offense. *Id.* § 170.15(1). A motion for removal may also be made when disposition of the defendant's case within a reasonable time is unlikely because the court is unable to form a jury. *Id.* § 170.15(3)(a).

308 *Id.* § 170.15(3)(b).

309 77 Misc. 2d 640, 354 N.Y.S.2d 517 (Suffolk County Ct. 1974).

310 *Id.* at 641, 354 N.Y.S.2d at 518-19.

311 N.Y. TOWN LAW § 10 (McKinney Supp. 1974). Section 10 divides towns into two classes. Those with populations of less than 10,000 are categorized as second class. Additionally, the statute specifically provides that every town in Suffolk County is a town of the second class.

312 N.Y. TOWN LAW § 60(2) (McKinney 1964) provides that in every town of the second class, the supervisor, the justices of the peace, and the town councilman shall constitute the town board.

Section 60-a permits the town board of a second class town in which there are two town councilmen, and two justices who serve as members of the board, to "determine that town justices shall not be members of the town board and that the membership of such board shall consist of a town supervisor and four town councilmen." Consequently, two additional councilmen are to be elected at a general election. *Id.* § 60-a.

313 77 Misc. 2d at 641, 354 N.Y.S.2d at 519. The case did not clearly establish whether there were more than two justices of the peace in Shelter Island.

314 A justice who is also a member of the town board exercises judicial, executive, and legislative functions as a consequence of two provisions of the Town Law. Section 64 authorizes the town board to perform such executive functions as awarding contracts, acquiring and conveying real property, and making designated appropriations. N.Y. TOWN LAW § 64 (McKinney Supp. 1974). Section 130 authorizes the town board in its legislative capacity to enact various ordinances, rules, and regulations and to provide for their enforcement through the appointment of a town official or employee. *Id.* § 130.

quested that the Suffolk County Court issue an order transferring his case to the Justice Court of the Town of Southampton.

In granting the application for transfer,[315] Justice Signorelli held that the defendant's right to due process under the fourteenth amendment would be violated in a trial before a justice who discharged both a judicial and legislative function.[316] The court found this due process consideration all the more imperative in light of the ongoing legal controversy between the town board and the defendant.[317]

In addition to its finding of a conflict of interest, the *Kessler* court endorsed the view that a judge should disqualify himself when circumstances create the suspicion that he harbors a bias against a defendant in a criminal proceeding before him.[318] This area has been the subject of few decisions in New York. In those cases that have considered the implication of the mere appearance of judicial bias, no unanimity of view has been achieved.[319] One approach is that expressed in *People v. Graydon*,[320] wherein the court stated that the appearance of the dispensation of justice is an important element of a fair trial, since, in its absence, both the defendant and the public are likely to question the impartiality of the trial afforded the defendant.[321] A contrary view

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315 77 Misc. 2d at 643, 354 N.Y.S.2d at 520. In addition to granting the order, the court recommended that the legislature amend sections 60 and 60-a of the Town Law to prohibit the simultaneous exercise of judicial, executive, and legislative powers by justices. *Id.*

316 Professor David D. Siegel has suggested that an alternative method for resolving cases such as *Kessler* is available under a recent amendment to UJCA § 106 (McKinney Supp. 1974). The section in question permits each Appellate Division, under certain circumstances, to make assignments of town and village justices to other towns and villages. Professor Siegel's suggestion entails the transfer of a judge rather than the case, which he admits is more cumbersome than the mere transfer of the case. UJCA § 106, supp. commentary at 81 (McKinney 1974).

317 77 Misc. 2d at 642, 354 N.Y.S.2d at 520.

318 *Id.* at 642-43, 354 N.Y.S.2d at 520. At common law, the judiciary was extremely sensitive to situations in which a judge had any interest in the outcome of the litigation, civil or criminal, before him. *See* Tumey v. Ohio, 273 U.S. 510, 514 (1927). This concern was reflected in the maxim "that no man can be a judge of his own cause." People *ex rel.* Union Bag & Paper Corp. v. Gilbert, 143 Misc. 287, 288, 256 N.Y.S. 442, 443 (Sup. Ct. Washington County), *aff'd*, 236 App. Div. 873, 260 N.Y.S. 939 (3d Dep't 1932).

319 One early Appellate Division opinion stated that "the State is bound to furnish every litigant not only an impartial judge, but one who has not, by any act of his, justified a doubt of his impartiality." McCormick v. Walker, 158 App. Div. 54, 58-59, 142 N.Y.S. 759, 764 (1st Dep't 1913). *Accord*, People v. Graydon, 59 Misc. 2d 330, 331, 398 N.Y.S.2d 555, 556 (Sup. Ct. Nassau County 1969); People v. Kohl, 17 Misc. 2d 320, 321-22, 192 N.Y.S.2d 83, 85-86 (Niagara County Ct. 1959). *Contra*, People v. Capuano, 68 Misc. 2d 481, 485, 327 N.Y.S.2d 17, 23 (Monroe County Ct. 1971) (where the record is barren of any exhibition of partisanship, circumstances apt to cause prejudice are not sufficient for one court to impose its ethics on another court); People v. Bonnerwith, 69 Misc. 2d 516, 522, 330 N.Y.S.2d 248, 255 (Justice Ct. Town of Rhinebeck 1972).

320 59 Misc. 2d 330, 298 N.Y.S.2d 555 (Sup. Ct. Nassau County 1969).

321 *Id.* at 331, 298 N.Y.S.2d at 556.

was expressed in *People v. Bonnerwith*.[322] According to the *Bonnerwith* court, more than a slight showing of judicial bias must be present before a judge should be disqualified, stating that "[t]he proponent should be required to show clear circumstances which would render a particular judge unfit to hear the case."[323]

The United States Supreme Court has addressed itself to the problem of disqualification in *Tumey v. Ohio*[324] and *Ward v. Village of Monroeville*.[325] In both of these cases, a judge was disqualified because of a conflict of interest stemming from his dual role of judge and mayor.[326] While not condemning the mere union of judicial and executive power, the Court in each case stated that due process of law was denied in a situation where an official "occupies two practically and seriously inconsistent positions, one partisan and the other judicial . . . ."[327] Although not dispositive of whether mere "appearances" are enough to disqualify a judge,[328] these decisions lend support to the *Kessler* court's finding of a conflict of interest sufficient to warrant disqualification of the Shelter Island justices of the peace.

INSURANCE LAW

Ins. Law § 167(3): Insurer absolved from defending Dole *claim against driver-spouse where passenger-spouse is plaintiff in main action.*

With its decision in *State Farm Mutual Automobile Insurance Co. v. Westlake*,[329] the Court of Appeals has reversed a trend which

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322 69 Misc. 2d 516, 330 N.Y.S.2d 248 (Justice Ct. Town of Rhinebeck 1972).

323 *Id.* at 522, 330 N.Y.S.2d at 255.

324 273 U.S. 510 (1927).

325 409 U.S. 57 (1972).

326 The Court found that the accused individuals in both cases were denied due process as required by the fourteenth amendment because of the pecuniary interest the judges had in the outcome of the respective cases. In Tumey v. Ohio, 273 U.S. 510 (1927), part of the fine levied in the case went to the village, some of which was used to supplement the salary of the judge himself. *Id.* at 521-22. In Ward v. Village of Monroeville, 409 U.S. 57 (1972), the revenue from fines of the type involved provided a substantial portion of the revenue of the village in which the judge served as mayor. *Id.* at 58.

327 409 U.S. at 60, *quoting* Tumey v. Ohio, 273 U.S. 510, 534 (1927).

328 Tumey v. Ohio, 273 U.S. 510 (1927) can be interpreted as supporting the position that there need not be a finding of specific bias to disqualify a judge. The Court noted that the evidence in *Tumey* clearly established the guilt of the accused, and that he had received the minimum fine possible, but stated that irrespective of the evidence against him, the defendant had been denied the right to an impartial judge. *Id.* at 535.

In like manner, Ward v. Village of Monroeville, 409 U.S. 57 (1972), can be interpreted as supporting the same view. There, the Court found that an Ohio statute which disqualified judges who were interested, biased, or prejudiced in the outcome of litigation before them, did not sufficiently protect the rights of the defendant, since it appeared to require a showing of special prejudice. *Id.* at 61.

329 35 N.Y.2d 587, 324 N.E.2d 137, 364 N.Y.S.2d 482 (1974). *Westlake* was an action for declaratory judgment instituted by State Farm Mutual Automobile Insurance Company. The insurer sought a declaration of "nonresponsibility to defend or to pay any