IN RE ROE CHUNG, 1897-NMSC-016, 9 N.M. 130, 49 P. 952 (S. Ct. 1897)

IN RE ROE CHUNG, Petitioner. Prohibition

No. 740

SUPREME COURT OF NEW MEXICO

1897-NMSC-016, 9 N.M. 130, 49 P. 952

August 25, 1897

Application of Roe Chung, for a writ of prohibition, to H. H. Ribble, a justice of the peace for precinct No. 26, Bernalillo County.

The facts are stated in the opinion of the court.

COUNSEL

Horton Moore for petitioner.

The law under which the actions complained of in the petition, sections 7, 8, 9, act February 27, 1895, is contradictory, inconsistent and unconstitutional. State v. Barlow, 91 N. C. 550; Const. U. S. Amend., art. 8; Comp. Laws 1884, sec. 2594.

The court of the justice of the peace has no jurisdiction to try and determine said causes. 12 Am. and Eng. Ency. of Law 247; Succession of Weigle, 17 La. Ann. 70; Hopkins v. Comm., 3 Metc. (Mass.) 462. See, also, 19 Am. and Eng. Ency. of Law 268; Atkins v. Siddons, 66 Ala. 453; Russell v. Jacoway, 33 Ark. 191; Ex parte Green, 29 Ala. 52; Ex parte Little Rock, 26 Ark. 52; People v. Superior Court, 47 Colo. 81; Clark v. Superior Court, 55 Cal. 199; Wruden v. Superior Court, Id. 504; Arnold v. Shield, 5 Dana (Ky.) 394; People v. McAdam, 58 How., Pr. (N. Y.) 278; Kellogg v. Superior Court, 56 Cal. 231, 241; Quimbo v. People, 20 N. Y. 531; State v. Ridgell, 2 Bail. S. C. 560; 19 Am. and Eng. Ency. of Law 269.

R. W. D. Bryan and S. Burkhart for respondent.

Justice of the peace have jurisdiction to hear and determine such causes as those in question. Comp. Laws 1884, sec. 2321; Act Feb. 27, 1895; State v. Judge of Sup. Dist. Court, 29 La. Ann. 360; Morris v. Lenox, 8 Mo. 252; People v. Seward, 7 Wend. 518; People v. Court of Com. Pleas, 43 Barb. 278.

The laws regulating the practice of medicine and inflicting punishment for violation of their provisions are on the statute books of nearly all the states. The constitutionality of those laws has been recognized by many decisions of the courts of last resort. In nearly

every state, the highest court has, in express terms, held such acts valid. Dent v. West Va., 129 U.S. 114; Eastman v. State, 109 Ind. 278; People v. Pippin, 37 N. W. Rep. (Mich.) 888; Williams v. People, 121 Ill. 84; People v. Blue Mountain Joe, 21 N. E. Rep. (Ill.) 923; Weideman v. State, 56 N. W. Rep. (Minn.) 688; Butler v. Chambers, 30 Id. 308; Staley v. Thompson, 46 Id. 410; State v. Marshall, 15 Atl. Rep. (N. H.) 210; People v. Avensberg, 11 N. E. Rep. (N. Y.) 277; Powell v. Comm., 127 U.S. 678. See, also, Wisconsin v. Insurance Co., 127 U.S. 265; Huntington v. Altril, 146 Id. 657; Comm. v. Kerr, 32 Atl. Rep. (Pa.) 276; 3 Black. Com. 415; Rev. Stat., U. S., secs. 990, 410; Kearny's Code; Laws 1884, pp. 105, 112, 115; Laws 1884, sec. 1968; State v. Easley, 10 Ia. 149; State v. Conlin, 27 Vt. 318; 11 Am. and Eng. Ency. of Law, 760; State v. Leis, 11 Ia. 416; Garray v. Comm., 74 Mass. (8 Gray) 382; Tuttle v. Comm., 68 Id. (2 Gray) 505; Norton v. State, 65 Miss. 297; State v. Small, 64 N. H. 491; Comm. v. Welsh, 2 Va. Cas. 57; Bish., Stat. Crime, sec. 240; 11 Am. and Eng. Ency. of Law 760; Hawkins' Pleas of Crown., 72 Jacob's Law Dic. "Convict;" People v. Butler, 3 Cow. (N. Y.) 347; Bish., Crim. Law, sec. 960; State v. Volmer, 6 Kan. 379; Ex parte Fassett, 142 U.S. 479.

JUDGES

Collier, J. Smith, C. J., and Laughlin, Hamilton and Bantz, JJ., concur.

AUTHOR: COLLIER

OPINION

*{*132}* **{1}** The application for a writ of prohibition was made in vacation to the Honorable H. B. Hamilton, one of the justices of this court, under section 2006 of the Compiled Laws of New Mexico 1884, who, instead of granting the writ, and making it returnable to the next regular term of this court, ordered a rule to issue to respondent, H. H. Ribble, justice of the peace, for him to show cause at the beginning of this term, why such application should not be granted. This court decided to treat this application as if it were made to the court in term time, and accordingly the matter is before us on the application and the answer. Without setting out at large the averments in either, we will consider the following questions raised by the counsel for petitioner and respondent: (1) Assuming the act of the legislative assembly of New Mexico, "to regulate the practice of medicine," etc., approved February 27, 1895, to be a rightful subject of legislation, can the penalties prescribed be legally enforced? (2) Has a justice of the peace court jurisdiction in an action to recover the penalty for a first offense? (3) Does it appear that the causes, the trial of which is sought to be prohibited, relate to subsequent offenses? While some attack is made upon this class of legislation as invalid, it is so well established that it is not only a rightful, but a most frequent, subject of legislation, that we have concluded, despite such attack to assume this much, and content ourselves with an extract from the decision of Williams v. People, 121 Ill. 84, 11 N.E. 881, 884, as follows: "It is the common exercise of legislative power to prescribe regulations for securing the admission of qualified persons to professions and callings demanding special skill, and nowhere is this undoubtedly valid exercise of *{*133}* the

police power of the state more wise and salutary, and more imperiously called for, than in the case of the practice of medicine. It concerns the preservation of the health and the lives of the people." Our statute is very liberal in respect to the requirements for obtaining a certificate legally authorizing the holder to practice medicine in this territory, graduation and diploma not being necessary if examination satisfactory to the board of health be passed, a provision more liberal, perhaps, than should be in a matter so vital to the interests of the public, to whom such a certificate accredits the holder. This seems quite a relaxation of the rule much more stringent in some other jurisdictions. It is objected by counsel for petitioner that there is a provision requiring the recovery of a penalty in an action of debt, which is converted into a fine in proceedings to enforce its collection. In other words, they say that a civil action eventuates in a judgment in a criminal case. The reply to all this, or at least one of the replies, is that such a statute comes under the police power of the state, and it is frequently the case that imprisonment is embraced as a part of the judgment. The most familiar illustration of this occurs in the enforcement of fines imposed for a violation of municipal ordinances. Thus, under the head of "Municipal Corporations" (section 1625, Comp. Laws 1884), we find that all actions to recover a fine or penalty under any ordinance shall be brought in the name of the city or town as plaintiff; that (section 1627) the first process shall be a summons, special provision being made for it being begun; otherwise, if a fine is imposed, order may be made for commitment until the fine and costs are paid. Scarcely any one disputes the validity of such an ordinance, and it is certain that a proceeding begun by a city as plaintiff is not criminal, but at most only quasi criminal. It is stated by Justice Harlan in the case of Railway Co. v. Humes, 115 U.S. 512, 6 S. Ct. 110, 29 L. Ed. 463, "that the power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced -- whether at the suit of a *{*134}* private party or at the suit of the public, and what disposition shall be made of the amounts collected -- are merely matters of legislative discretion." In the face of this authority the question is reduced merely to a consideration of the legality of the imprisonment clause as a means of enforcing the fine recovered. About this we entertain no doubt. An action of debt with the territory as a party suing for the use of the board of health is fully as much an effort to enforce a law quasi criminal as is an action by a municipality as plaintiff, imprisonment being the means of enforcing judgment against all offenders. Both actions are for the enforcement of the police regulations of the territory, and fines are not a debt in the sense that there is no imprisonment therefor. Powell v. Pennsylvania, 127 U.S. 678, 32 L. Ed. 253, 8 S. Ct. 992; Hardenbrook v. Town of Ligonier, 95 Ind. 70; Charleston City v. Oliver, 16 S.C. 47; Ex parte Hollwedell, 74 Mo. 395; Ex parte Reed, 4 Cranch C.C. 582, 20 F. Cas. 404. It is our view, therefore, that there is no inconsistency between recovery and enforcement of the fine which prevents, in any sense, their standing legally together.

{2} The second question we have proposed to consider is, is there jurisdiction in the justice to proceed? The statute provides that any person practicing medicine or surgery without a required certificate "shall for each and every instance of such practice forfeit and pay to the territory of New Mexico the sum of one hundred dollars for the first offense and two hundred dollars for each subsequent offense, the same to be recovered in an action of debt before any court of competent jurisdiction." It is not

disputed that a justice of the peace court has jurisdiction in an action for the recovery of $ 100 or less; but counsel say that a justice of the peace can not sentence for a longer period than thirty days, and, therefore, it not being jurisdictional to enforce the fine by imprisonment the required length of time, this ousts all jurisdiction to proceed in the first instance. The only authority counsel have is that a statute enacted in 1876, and found in the Compiled Laws in section 2321, thus limits the imprisonment. It is *{*135}* sufficient to say that, if this argument prevailed, the law they cite should be held irrepealable. The statute of 1889 (page 12) -- a later statute -- says that for all fines and costs imprisonment may be suffered at the rate of one dollar per day until the days amount to the fine and costs. It is only liberal and just that the act of 1889 should be read into the act of 1895, as we believe must have been the intention of the legislature.

{3} This brings us to the last inquiry we have proposed to ourselves, viz., do the causes whose trial is sought to be prohibited relate to subsequent offenses? If they do affirmatively appear to be suits or prosecutions for subsequent offenses, it is contended that nevertheless the plaintiff could waive demanding more than the amount recoverable for a first offense. Remission of a part of a claim simply to obtain jurisdiction, and without consent of a debtor, is generally held not to be allowable, though there are authorities both ways upon this question. We see no necessity for determining this question, however, as our conclusion depends upon other grounds. These proceedings were within the jurisdiction of the court, so far as appears on the face of the record. The actions sought to be prohibited were yet undetermined, or they were already determined. If they were determined before notice of the writ of prohibition, there is, of course, an end of this case. If they were not determined, then upon the trial the petitioner would have a complete remedy at law by showing by evidence that they were subsequent offenses, if in fact they were. It is our view, however, that the answer of the respondent shows that judgment had been regularly rendered, but not formally entered, in this cause, before notice of the writ of prohibition, and this application might have been dismissed on that ground. As, however, the question seemed one of public importance, we preferred to give these views. The application for the writ of prohibition will be denied, and it is so ordered.