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SOME OBSERVATIONS ON WAIVER OF JURY TRIAL IN CRIMINAL CASES

THE right of trial by jury, long considered a fundamental right, evolved out of the common law as a part of the movement which over a period of many years relieved the English people of the evils of arbitrary justice that had developed during the period of the absolute monarchy. The time had been in English legal history when the accused in a criminal prosecution was denied the benefit of counsel and the right to testify in his own behalf; it was during this period that trial by jury, which had earlier been considered as a privilege only, came to be considered as a necessity—in order to establish between the accused and the state a buffer which would be effective to insure a more just result in criminal prosecutions. Since many of the circumstances which fostered the development of the jury as a device for protection against the Crown have now largely disappeared, it seems not improper to inquire whether present conditions justify continued unbending adherence to this historic attitude toward a defense erected during an earlier period in resistance to tyrannical methods in the administration of criminal justice, especially if it is found that non-waivability of jury trial disserves rather than fosters the ends of justice.

I

As population increased and social organizations became more complex with a resulting increase in the crime rate, it became more and more difficult for the criminal courts to keep abreast of their dockets. As soon as it became understood that the administration of criminal justice, under these changed conditions, was greatly impeded by the cumbersome jury trial, England began to experiment as early as 1847 with a statute which permitted waiver of

the jury in certain juvenile cases.¹ This statute met with such success that other legislation continued to be passed from time to time extending the right to waive trial by jury to other types of criminal cases, until in 1925 the present Criminal Justice Act was passed permitting waiver of trial by jury in all classes of criminal cases and providing further that some types of criminal actions should be triable only by the court.² As a result of the increase in summary jurisdiction and the extension of waiver of trial by jury thus provided for, in the year immediately following the passage of the Act approximately 90 per cent of the defendants charged with indictable offenses were dealt with in summary courts or waived trial by jury, only the remainder being tried by jury.³ A considerable saving of time and consequently of expense in the criminal courts of England was effected by this legislation, and it has been generally recognized that the administration of criminal justice was thus made more rapid and more efficient.

Such experimentation with waiver of jury trial was not confined to England. For now more than two hundred years, waiver has been permitted in some form in the courts of Maryland.⁴ Even after Maryland became a state and ratified the United States Constitution, the earlier practice was continued, with a legislative pronouncement of the procedure following in 1809. The reason given for the enactment of the latter measure, as stated in the bill, was "the great saving of time and expense." This statute provided that courts of criminal jurisdiction should "determine on the whole merits of the case, which may be to said courts respectively submitted."⁵ The present Maryland statute, which has been construed to extend to both felony and misdemeanor cases, and even to capital cases, reads: "Any person presented or indicted may

¹ Juvenile Offenders Act, 1847, 10 and 11 VICT., c. 82.

² Criminal Justice Act, 1925, 15 and 16 GEO. V, c. 86.

³ HOWARD, *CRIMINAL JUSTICE IN ENGLAND* (1931) 310, 311.

⁴ See Bond, *The Maryland Practice of Trying Criminal Case by Judges Alone, Without Juries* (1925) 11 A. B. A. J. 699.

⁵ Maryland Acts of 1809, c. 144.

instead of traversing the same before a jury, traverse the same before the court, who shall thereupon try the law and the facts."⁶ Under this statute, 30,107 cases were disposed of by the Criminal Court of Baltimore during a recent six-year period.⁷ Of these, 1,237 cases were tried before juries and 25,940 by the Court. Included in the 25,940 court trial cases were 13,294 pleas of guilty and 12,646 contested cases. In terms of percentage, only 4.10 per cent of all cases disposed of were tried before juries. Of the contested cases, 91.09 per cent were tried by the Court, only 8.91 per cent being tried by juries. Thus more than 90 per cent of the defendants who protested their innocence chose to be tried by the court rather than by the jury.

The waiver of trial by jury has also long been used in Connecticut as a means of increasing the efficiency of the administration of criminal justice. A statute providing for the practice, enacted in 1874, was repealed in 1878 but was promptly re-enacted. The Connecticut Supreme Court, in *State v. Worden*,⁸ decided in 1878, upheld the validity of such a statute as coming clearly within the constitutional provisions relating to trial by jury. It is to be noted that the constitutional provisions under which this case was decided are almost identical with the provisions of the Texas Constitution.⁹ The present statute in Connecticut provides that in all criminal cases the accused may elect to be tried by the court, with the sole qualification that in capital cases the court shall consist of three judges instead of one.¹⁰

That this practice has been continued to the present in Maryland and Connecticut may be taken as some evidence that it has worked with measurable success and to the satisfaction of the public concerned. While some states have thus passed statutes permitting

⁶ MD. CODE ANN. (Flack, 1930) art. 75, § 109.

⁷ Frank, *Trying Criminal Cases Without Juries in Maryland* (1930) 17 VA. L. REV. 253. The period for which statistics are given was 1924 to 1930.

⁸ 46 Conn. 349 (1878).

⁹ TEX. CONST. (1876) Art. I, § 15; CONN. CONST. (1818) Art. I, § 21.

¹⁰ GEN. STAT. OF CONN. (1930) § 6477.

waiver of trial by jury in all cases, others have limited the right of waiver to prosecutions for misdemeanors and felonies below the grade of a capital offense; still others have limited the right to misdemeanors alone. In some states, by judicial decision, waiver in felony cases has been permitted. In the appendix which follows this note, an attempt has been made to classify the several American jurisdictions according to the type of statutory or judicial rule in force.¹¹

II

In the past some doubt has been expressed as to the constitutionality of a criminal trial without a jury in felony cases.¹² Article III, § 2 of the United States Constitution provides that "The trial of all crimes, except in cases of impeachment, shall be by jury. . . ." The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed. . . ." These provisions would seem to be mandatory in nature and for many years were so construed by the federal courts.¹³ However, the case of *Patton v. United States*,¹⁴ decided in 1930, took the opposite view and dispelled any doubt that had previously existed. In that case the defendant was under indictment for the penitentiary offense of conspiring to bribe a prohibition agent. When during the trial one juror was unable to continue on the panel because of severe illness, the defendant and his counsel agreed in open court, after a statement by the court that both sides were entitled to a jury of twelve men, that the trial should proceed with the remaining eleven jurors. The prosecutor consented and the trial proceeded with the result that the defendant was convicted and sentenced to a prison term. Defendant then ap-

¹¹ See Appendix, p. 53 *infra*.

¹² *Low v. United States*, 169 Fed. 86 (C. C. A. 1st, 1909).

¹³ *Coates v. United States*, 290 Fed. 134 (C. C. A. 4th, 1923); *Blair v. United States*, 241 Fed. 217 (C. C. A. 9th, 1917); *Low v. United States*, 169 Fed. 86 (C. C. A. 1st, 1909).

¹⁴ 281 U. S. 276 (1930).

pealed to the circuit court of appeals, claiming that as a matter of law his constitutional right to a trial by a jury of twelve men could not be waived. Upon certification of the question thus presented, the Supreme Court, in an opinion affirming the conviction, took the view that there is no difference in substance between consent to be tried by fewer than twelve jurors and a waiver of a jury altogether, since a consent to proceed without one juror is indistinguishable from a consent to proceed without two, without three, or without twelve.¹⁵ Then the Court, dealing with the problem as though it were a question of complete waiver of a jury, held that the Constitution conferred a right of jury trial upon the accused which he could forego at his election. This right of waiver, it was held, extended to all types of criminal cases and was recently reaffirmed by the Supreme Court.¹⁶ This interpretation of the constitutional provision for trial by jury has become the basis for Rule 23 of the Federal Rules of Criminal Procedure, which provides that trial by jury may be waived by a defendant in any case required to be tried by a jury, with the approval of the court and the consent of the government.¹⁷ Thus it seems well settled that under the United States Constitution trial by jury is a right which may be waived by the defendant with the consent of the prosecution.

The Texas Constitution provides that the "right of trial by jury shall remain inviolate" and empowers the legislature to regulate and maintain such right.¹⁸ Inasmuch as this wording would seem

¹⁵ The basis for this conclusion was that the common-law jury was composed of twelve men and the Constitution has long been considered as establishing the right of trial by jury as it existed at common law at the time of its adoption. *Id.* at 289.

¹⁶ See *Adams v. United States ex rel. McCann*, 317 U. S. 269 (1942).

¹⁷ FED. RULES CRIM. PROC. (1946) Rule 23, provides: "(a) *Trial by Jury*. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government. (b) *Jury of Less Than Twelve*. Juries shall be of twelve, but at any time before verdict, the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than twelve. (c) *Trial Without Jury*. In a case tried without a jury, the court shall make a general finding and shall in addition on request find the facts specifically."

¹⁸ TEX. CONST. (1876) Art. I, § 15.

to have no greater scope than the comprehensive language of the United States Constitution interpreted in the *Patton* case, it seems clear that the Texas Legislature, without impairing any privilege or right accorded the people by the Texas Constitution, could enact a statute permitting waiver of trial by jury in all cases with the consent of the prosecution. The existing Texas statutes relating to the matter provide that the accused in a criminal case may waive any right secured to him by law, except the right of trial by jury in a felony case in which he enters a plea of not guilty.¹⁹ Another provision permits the accused, with the consent of the prosecutor and the approval of the court, to waive trial by jury in all cases not punishable by death in which the defendant pleads guilty.²⁰ Thus, trial by jury cannot be waived at present in capital cases and contested felony cases, and a defendant in either sort of prosecution who denies that he is guilty of the felony of which he is accused cannot avoid a jury trial however much to his prejudice it may be.

III

Although the average citizen regards the institution of the jury trial as one of the bulwarks of freedom, it is now generally believed, in the light of experience in the jurisdictions permitting waiver, that this reverence is not so widely shared by those who are facing the prospect of conviction as has been supposed. If the right to jury trial is intended as a protection to the defendant, then it seems absurd to require that the accused take advantage of his "right" even though it may have become of dubious advantage to him. If the accused is a member of a minority group within the community, he may well expect greater justice at the hands of a deliberate judge than in the verdict of an impassioned jury. The crime of which he is accused may be of such a nature that the

¹⁹ TEX. CODE CRIM. PROC. (1925) art. 11 (as amended by Acts 1931, 42nd Leg., p. 65, c. 43, § 2).

²⁰ TEX. CODE CRIM. PROC. (1925) art. 10a (as amended by Acts 1931, 42nd Leg., p. 65, c. 43, § 2).

chance of a dispassionate verdict from a jury drawn from an aroused community is slight; again, of the defendant's criminal record is especially uninspiring, he might reasonably prefer to be tried by the jurge. And in other cases the personality and disposition of the judge or some small advantage in strategy which would inure from a trial by the court might evoke a decision to take the case from the jury. If in such cases society insists upon a trial by jury, this fundamental of justice may be converted in certain instances into an instrument of injustice.²¹ Less insignificant but nevertheless to be weighed is the further consideration that an immense amount of time and money is expended on seemingly needless jury trials which could be saved without forfeiting any of the protection available to the defendant in any case in which it may be desired.

One of the principal grounds of objection to statutes permitting waiver of a trial by jury has been, in effect, that society should protect the accused against the danger involved in placing in the hands of one person the trial of a cause upon which his life may depend. This objection has not been found compelling in Maryland, where for years it has been the practice to try even capital cases before a single judge.²² However, other jurisdictions have felt that a waiver of trial by jury in capital cases should necessitate the hearing of the case by three judges;²³ and some jurisdictions have refused to permit waiver of jury at all in capital cases.

Another objection which has been urged against waiver of trial by jury is that such a waiver defeats the jurisdiction of the court, an argument based upon the common-law view that the jury is an integral part of the court without which judicial business cannot

²¹ See Oppenheim, *Waiver of Trial by Jury in Criminal Cases* (1927) 25 MICH. L. REV. 695.

²² The present Maryland statute (MD. CODE (Flack, 1939) art. 75, § 109) permits removal of the cause upon filing of an affidavit by defendant that he believes the court is prejudiced.

²³ See AMERICAN LAW INSTITUTE, CODE OF CRIMINAL PROCEDURE (1930) § 266, nn. 1, 2.

be transacted.²⁴ The proponents of this view contend that waiver is not a personal right of the accused and cannot be allowed since an individual may not waive the jurisdiction of the court. However, the *Patton* case has put this controversy at rest by holding that the right does not go to the jurisdiction of the court but is a personal right or privilege which may be waived by the accused in a criminal case. This view has been followed in many state decisions.²⁵

A problem related to that of waiver of the entire jury arises when, as in the *Patton* case, a juror is unable to continue with the trial. Whether the defendant should be permitted to waive the presence of the missing juror and consent to trial by the remaining eleven. The problem raised by the waiver of one juror is hardly distinguishable from the problem raised by the waiver of twelve, yet when the court, the prosecutor and the defendant are all willing to proceed with the trial with fewer than twelve jurors, it is a waste of the taxpayer's money and the jury's time to prolong the defendant's jeopardy by requiring a new trial and a new jury. This is the view adopted by the Federal Rules of Criminal Procedure, and it might well be adopted in this state.

The position that the jury trial is a right that should not be waivable is without basis in either the Constitution of Texas or, in the light of the *Patton* case, in the Constitution of the United States. It seems clear that jury trial is not a constitutional necessity but a right reserved by those instruments to the defendant in a criminal action. The understandable reluctance of judges to assume the responsibility of condemning a man to death or to imprisonment offers the only cogent reason why a mutual desire of the prosecution and defense that the jury should be dispensed with should not be granted. As soon as the judges express a willingness to undertake such responsibility, it may be expected that the economies in time and money which should follow upon the adop-

²⁴ *Cancemi v. People*, 18 N. Y. 128 (1858); see Note (1927) 48 A. L. R. 767; Note (1929) 58 A. L. R. 1031; Oppenheim, *loc. cit. supra* note 21.

tion of a statute permitting waiver of jury in all cases will entitle the proposal to more serious consideration in Texas than it has received in the past.

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APPENDIX: PROVISIONS RELATING TO WAIVER OF JURY TRIAL

The following states have statutory provisions allowing waiver of trial by jury in both felony and misdemeanor cases:

- California, CAL. PEN. CODE (Deering, 1941) § 1435.
- Illinois, ILL. REV. STAT. (1945) c. 38, § 736.
- Indiana, IND. STAT. (Burns, 1933) § 9-1803.
- Maryland, MD. CODE (Flack, 1939) art. 75, § 109.
- Michigan, MICH. COMP. LAWS (1929) § 17131.
- Minnesota, MINN. STAT. (1945) § 631.01.
- North Dakota, N. D. REV. CODE (1943) § 29-1602.
- Rhode Island, R. I. GEN. LAWS (1938) c. 626, § 71.
- Wisconsin, WIS. STAT. (1941) § 357.01.

The following states have statutory provisions allowing waiver of trial by jury in both felony and misdemeanor cases, but provide for three judges in a capital case:

- Connecticut, CONN. GEN. STAT. (1930) § 6477.
- Ohio, OHIO CODE (Baldwin, 1940) §§ 13442-4, 13442-5.

The following states have statutory provisions allowing waiver of trial by jury in both felony and misdemeanor cases, except capital cases:

- Arkansas, ARK. STAT. (Pope, 1937) § 3912.
- Florida, FLA. STAT. (1941) § 912.01.
- Massachusetts, MASS. GEN. LAWS (1932) c. 263 § 6.
- New Jersey, N. J. REV. STAT. (1937) §§ 2:12-2, 2:13-1, 2:191-1.
- Pennsylvania, PA. STAT. (Purdon, 1936) § 19-786.
- Utah, UTAH CODE (1943) § 105-28-2.

The following states have constitutional provisions which have been construed to allow waiver of trial by jury in felony and misdemeanor cases:

- New Hampshire, NEW HAMP. CONST. (1793) ART. 16, except capital cases; see *State v. Almy*, 67 N. H. 274, 280 (1892).
- Oklahoma, OKLA. CONST. (1907) ART. VII, § 20; waiver in misdemeanors, see *Wise v. State*, 280 Okl. Cr. Rep. 324, 230 Pac. 930 (1924); waiver in felonies, see *Ex Parte King*, 42 Okla. Cr. Rep. 46, 274 Pac. 682 (1929).
- Oregon, ORE. CONST. (1859) ART. I, § 11.

The following state has statutory provisions allowing waiver of trial by jury except where the offense is punishable by death or imprisonment at hard labor:

- Louisiana, LA. CODE OF CRIM. PRO. (Dart, 1943) art. 342.

The following states have statutory provisions allowing waiver of trial by jury in felony cases on a plea of guilty:

- Colorado, COLO. STAT. (1935) c. 48, § 32.
- Delaware, DEL. CODE (1935) § 4315, except capital cases.
- Montana, MONT. REV. CODE (1935) §§ 11611, 11929.
- New Mexico, N. M. STAT. (1941) § 42-1108. But see *State v. Hernandez*, 46 N. M. 134, 123 P. (2d) 387 (1942).

South Dakota, S. D. CODE (1939) §§ 34-2903, 34-3108, 34-3301, 34-3403.
 Virginia, VA. CODE (1942) §§ 4900, 4927.
 Washington, WASH. REV. STAT. (Rem., 1931) § 2309.

The following state has a statutory provision allowing waiver of trial by jury only in misdemeanor cases, but by judicial decision the constitutional right of trial by jury has been held not to be denied when on a plea of guilty in a murder case, the accused was not afforded the right of trial by jury:

Nevada, NEV. COMP. LAWS (Hillyer, 1929) § 10919, § 10920; see *State v. Ceja*, 53 Nev. 272, 298 Pac. 658 (1931).

The following states have statutory provisions and/or judicial decisions and constitutional provisions allowing waiver of trial by jury in misdemeanor cases only:

Arizona, ARIZ. CODE (1939) § 44-1802, § 44-1807.
 Alabama, ALA. CODE (1940) tit. 15, § 32.
 Georgia, GA. CODE (1933) § 102-106, *Moore v. State*, 124 Ga. 30, 52 S. E. 81 (1905).
 Idaho, IDAHO CODE (1932) § 19-1802.
 Iowa, IOWA CODE (1946) § 762.12.
 Kansas, GEN. STAT. OF KAN. (Corrick, 1935) § 62-1401.
 Kentucky, KY. REV. STAT. (1943) § 26.400.
 Maine, REV. STAT. (1944) c. 94, § 17.
 Mississippi, MISS. CODE (1942) § 1836, § 1839.
 Nebraska, NEB. REV. STAT. (1943) § 29-603.
 New York, N. Y. CODE CRIM. PROC. (McKinney, 1930) § 702.
 North Carolina, N. C. GEN. STAT. (1943) § 15-157.
 South Carolina, S. C. CODE (1942) § 931, § 952, § 971.
 Tennessee, TENN. CODE (Williams, 1934) § 11493.
 Vermont, CONST. OF VT. (1924) ART. 10.
 West Virginia, W. VA. CODE (1931) c. 56, art. 6, § 11.
 Wyoming, WYO. REV. STAT. (1931) § 33-121.