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CONSTITUTIONAL LAW-TRIAL BY JURY-CONDITIONS OF VALID WAIVER

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CONSTITUTIONAL LAW — TRIAL BY JURY — CONDITIONS OF VALID WAIVER — Until the rendition of the Supreme Court's lengthy opinion in *Patton v. United States*[1] the consequence of a defendant's waiver of his constitutional right to trial by jury in criminal cases, and his resultant trial without a jury of twelve persons, was matter for vigorous disputation. The decisions from various jurisdictions are conflicting and confused. Some courts have declared flatly that the right cannot be validly waived and that conviction following an attempted waiver is a nullity. But their reasons for so holding are widely variant.

In *Dickinson v. United States*[2] a conviction was set aside on the ground that

> ". . . the tribunal authorized to proceed against persons accused of crimes like that before us, includes equally the court, the judge and the jury, and the number composing the jury. Has any one other than the makers of the Constitution, or those authorized to amend it, the power to substitute for what is thus declared? No one has ever conceived an affirmative answer as to the court or

[1] 281 U. S. 276, 50 S. Ct. 253 (1930).
[2] (C. C. A. 1st, 1908) 159 F. 801 at 807.

judge; and the apparent answer as to the jury would also be in the negative."

A quite different reason for a similar conclusion was suggested by the New York Court of Appeals in *Cancemi v. People*.[3] Here the objection to waiver stressed less the character of the tribunal than an assumption that the provision for trial by jury was put into the constitution as an assurance to the public, as well as to the defendant, that facts would be properly decided, and that the defendant could not by his own waiver surrender the public's interest.[4]

Some courts have conceded, at least for the avoidance of argument, that nothing in the constitution itself would necessarily preclude trial without a jury should the defendant consent, but have nevertheless held such trials ineffective on the ground that there was nothing in the statutes to authorize trial by any tribunal except one comprising a jury. Thus in *Paulsen v. People*[5] the Illinois court said,

> "Our General Assembly has never adopted a statute authorizing the elimination of a jury from any tribunal authorized to try any criminal offenses other than the act of June 17, 1893 . . . which authorized waiver of a jury in cases where a 'fine or a money judgment' only may be assessed. It follows, then, that as to all other criminal offenses trial by jury, as enjoyed prior to and at the time of the adoption of the constitution of 1870, is the only legal mode of adjudicating the guilt or innocence of one accused of a criminal offense."[6]

An occasional court has made a distinction between trial by a "jury" of less than twelve and trial without any jury at all.

> ". . . It should," said the Pennsylvania court, "be evident to everyone that trial by a judge without any jurors is quite a different thing from trial by a judge and jurors, though the latter be less than the standard number. The system of trial by jury brings, and is intended to bring, the private citizen into the administration of justice; if there be only one juror, he represents

[3] 18 N. Y. 128 (1858).

[4] This decision was followed by Territory v. Ah Wah and Ah Yen, 4 Mont. 149 (1881). In People ex rel. Battista v. Christian, 249 N. Y. 314 at 319, 164 N. E. 111 (1928), the court in approving the reasoning of the Cancemi decision said, "The State has an interest in the lives and liberties of all within its boundaries even though some may be criminal. Accordingly, prosecutions must be conducted in substance and without essential change as the Constitution commands."

[5] 195 Ill. 507 at 515-516, 63 N. E. 144 (1902).

[6] See also State v. Ellis, 22 Wash. 129, 60 P. 136 (1900); In re McQuown, 19 Okla. 347, 91 P. 689 (1907); Michaelson v. Beemer, 72 Neb. 761, 101 N. W. 1007 (1904); Commonwealth v. Rowe, 257 Mass. 172, 153 N. E. 537 (1926).

the lay point of view, of which defendant gains the benefit, at least to that extent."[7]

In conflict with most of these negative decisions, other courts have said specifically that the defendant's constitutional right is a personal privilege which he may waive if he so desires, and a conviction under such circumstances will stand, at least if that form of trial is permitted by statute,[8] and even in the absence of statute.[9]

Some state constitutions specifically authorize trial without a jury if the defendant consents thereto.[10]

It was upon this welter of variant opinion that the decision in *Patton v. United States* cast its light. In the opinion the various arguments against the effectiveness of a waiver were considered. In the first place it repudiated the contention that trial by eleven jurors was trial in legal effect by jury.

". . . we must reject *in limine* the distinction sought to be made between the effect of a complete waiver of a jury and consent to be tried by a less number than twelve, and must treat both forms of waiver as in substance amounting to the same thing.

"We are not unmindful of the decisions of some of the state courts holding that it is competent for the defendant to waive the continued presence of a single juror who has become unable to serve, while at the same time denying or doubting the validity of a waiver of a considerable number of jurors, or of a jury altogether . . . But in none of these cases are we able to find any persuasive ground for the distinction."[11]

The Supreme Court took cognizance also of the difference in phraseology between the Sixth Amendment, which provides that the "accused shall enjoy the right" to trial by a jury, and Article III, section 2, which declares that "the trial of all crimes . . . shall be by jury." The mandatory form of the latter was recognized, but, without here repeating the reasoning, was treated as not intended to be absolute; it

[7] Commonwealth v. Hall, 291 Pa. 341 at 345, 140 A. 626 (1927). There is a similar suggestion in the recent case of United States ex rel. McCann v. Adams, (C. C. A. 2d, 1942) 126 F. (2d) 774, which is hereinafter discussed.

[8] State v. Worden, 46 Conn. 349 (1878); Murphy v. State, 97 Ind. 579 (1884).

[9] State v. Baer, 103 Ohio St. 585, 134 N. E. 786 (1922).

[10] These constitutional provisions and the whole subject of criminal trials without a jury prior to Patton v. United States are discussed in an excellent article by Oppenheim, "Waiver of Trial by Jury in Criminal Cases," 25 MICH. L. REV. 695 (1927). See also Grant, "Waiver of Jury Trial in Felony Cases," 20 CAL. L. REV. 132 (1931); Durgan and Galey, "Waiver of Jury Trial in Felony Cases," 10 ORE. L. REV. 366 (1931).

[11] United States v. Patton, 281 U. S. 276 at 290-291, 50 S. Ct. 253 (1930).

"is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election."[12]

The discussion makes no sharp distinction between the proposition that the jury is so integral a part of a court that without a jury there is no court, and the argument that the federal statutes had created no tribunal authorized to try criminal cases without the use of a jury. But neither possibility was conceded. The absence of *statutory* authority for determination of facts by a judge instead of a jury, which had been held in so many state courts to block the effectiveness of waiver, was virtually ignored. The Supreme Court said only, "the question remains whether the court is empowered to try the case without a jury; that is to say, whether Congress has vested jurisdiction to that end. We think it has, although some of the state, as well as some of the federal, decisions suggest a different conclusion."[13] In support of its conclusion it quoted from *Schick v. United States*,[14] "There is no act of Congress requiring that the trial of all offenses shall be by jury, and a court is fully organized and competent for the transaction of business without the presence of a jury."[15]

Of the manifold utilitarian reasons which have at times been asserted as necessarily precluding the effectivness of a waiver, the Court said flatly, "The view that power to waive a trial by jury in criminal cases should be denied on grounds of public policy must be rejected as unsound."[16] So too the contention that the state itself has an interest in trial by jury of which it cannot be deprived merely by the defendant's consent, the Court answered by saying:

> "In affirming the power of the defendant in any criminal case to waive a trial by a constitutional jury . . . we do not mean that the waiver must be put into effect at all events. . . . the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion . . . ."[17]

This suggestion by the Supreme Court that the recognized effectiveness of a waiver did not give the defendant an absolute right to

[12] Id., 281 U. S. at 298.
[13] Id.
[14] 195 U. S. 65 at 70-71, 24 S. Ct. 826 (1904).
[15] Quoted in Patton v. United States, 281 U. S. 276 at 299, 50 S. Ct. 253 (1930).
[16] Id., 281 U. S. at 308.
[17] Id., 281 U. S. at 312.

waive and to be tried as he wished was followed by the Circuit Court of Appeals for the Second Circuit, which held that there was no error in the refusal of the trial judge to permit trial without a jury in the absence of consent thereto by the prosecution.[18]

Unhappily the smoother current of decision which followed this case has again been disturbed by a recent decision of that same second circuit, which indicates such suspicion of the wisdom of trial without a jury as to suggest that limitations in addition to the one it imposed may eventually be urged and perhaps adopted. In the *Patton* case the Supreme Court assumed an ability in the trial judge to exercise "sound and advised discretion" in permitting or refusing the waiver, and, in repudiating the argument that public policy precluded waiver, the opinion necessarily demonstrated a confidence in the judge's ability to determine fairly when trial without a jury should be permitted. The circuit court of appeals, in *United States ex rel. McCann v. Adams*[19] appears to doubt both. The defendant, accused of fraudulent use of the mails, had been convicted by trial before a judge without a jury. Before trial and again when the case came on for trial he was advised by the court to retain an attorney but replied that he had himself studied law, though he had not been admitted to the bar, and wished to defend himself, "which he could do better than any attorney could do for him." In the words of the circuit court, "He then moved to have the case tried by the judge without a jury, and signed a consent in the following words: 'I do hereby waive a trial by jury in the above entitled case, having been advised by the Court of my constitutional rights.'"[20] Following his conviction by the judge, he was duly sentenced to the penitentiary and while confined therein sought release through habeas corpus proceedings. The upper court, in determining the propriety of release, specifically conceded that the trial had been fair and that the judgment was warranted by the evidence: "there is reason to suppose that in fact he did not suffer by submitting his guilt to a judge rather than to a jury."[21] Nevertheless the court ordered him released.

The circuit court dodged the effect of *Patton v. United States* by evolving its own idea of meaning from the Supreme Court's remark,

[18] United States v. Dubrin, (C. C. A. 2d, 1937) 93 F. (2d) 499.

[19] (C. C. A. 2d, 1942) 126 F. (2d) 774, opinion by L. Hand, Swan concurring, Chase dissenting. Certiorari was granted Adams v. United States ex rel. McCann, (U. S. 1942) 62 S. Ct. 1048. The case is noted in 55 HARV. L. REV. 1209 (1942).

[20] Id., 126 F. (2d) at 775.

[21] Id. The similarity of eventual results in nearly 4,000 trials, regardless of the use of waiver of a jury, is pointed out by Goldberg, "Waiver of Jury in Felony Trials," 28 MICH. L. REV. 163 (1929).

quoted above, that jury trial is of such importance that its nonuse must be with consent of the court and government as well as of the accused, and that the court should use "sound and advised discretion" in permitting it. Of this the circuit opinion says,

> ". . . They meant [the defendant's] consent to be jealously scrutinized; they did not mean to impose on him the same responsibility for his choice as rests upon him in ordinary affairs. It appears to us that we should treat it as a critical circumstance—at least when the accused surrenders his right to any jury whatever —that he shall have the advice and protection of counsel in making that choice."[22]

Accordingly the court held that no matter how carefully the trial court may have scrutinized the circumstances of the waiver; no matter how wisely it may have exercised that "sound and advised discretion" suggested by the Supreme Court in granting the waiver; the waiver and the judicial consent thereto are ineffective to confer jurisdiction upon the judge unless the defendant had the advice of counsel in that particular respect. The accused, said the court, may elect to waive a jury trial by pleading guilty, without the advice of counsel; he may, if he chooses, without the advice of counsel "take his chances as to the general conduct of the trial—if he suffers his misfortune is on his own head." But he cannot validly choose to be tried without a jury "except upon the advice of an attorney, retained by him or assigned to him, even though this advice extends to no more than that particular choice."[23]

This conclusion that the advice of counsel is peculiarly *necessary* in determining what sort of a trial shall be held and how the trial shall be conducted, the court deduces by somewhat inenubilous logic from the Supreme Court's recent decisions that he is constitutionally *privileged* to have counsel if he so desires.[24] Possibly the circuit court might have been less firmly persuaded to its decision that he must have counsel had the Supreme Court's opinion in *Betts v. Brady*[25] then been known—to the effect that the due process clause of the Federal Constitution does not require that counsel be appointed for indigent defendants in state courts, and that "in the great majority of the states, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental

[22] 126 F. (2d) at 776.

[23] Id.

[24] Citing Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019 (1938); Glasser v. United States, 315 U. S. 60, 62 S. Ct. 457 (1942), noted 41 MICH. L. REV. 321 (1942).

[25] (U. S. 1942) 62 S. Ct. 1252 at 1261.

right, essential to a fair trial." If this be a correct presentation of prevalent opinion, it seems probable that in the many states which now permit a defendant to waive trial by jury, the circuit court's assertion that, though he is privileged to take all the risks of trial without aid of counsel, he is not privileged to decide by himself what kind of trial it shall be, will not be accepted.

Moreover, the second circuit's obvious skepticism of the wisdom of trial without a jury, and its doubt of the trial judge's discretionary ability in permitting or refusing it, is scarcely consistent with the action of the American Bar Association's House of Delegates:

> "Resolved: That to expedite the trial of causes and conserve manpower during the war period, it is earnestly recommended to the bench and bar of the country . . . that, when practicable, jury trial be waived and issues of fact as well as of law be heard by the trial judge."[26]

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[26] Mimeographed bulletin of the Special Committee on Improving the Administration of Justice, Vol. 3, no. 1, Oct. 14, 1942.