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CONSTITUTIONAL LAW - TRIAL BY JURY - RIGHT TO WAIVE PRESENCE OF TRIAL JUDGE

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CONSTITUTIONAL LAW — TRIAL BY JURY — RIGHT TO WAIVE PRESENCE OF TRIAL JUDGE — Defendant was tried for the crime of driving a car while intoxicated. After the jury was instructed and had retired, the judge who had supervised the trial up to that point announced that he was going to another town to sit for a judge who was in poor health, but that a second judge would be available to receive the jury's verdict. Defendant's counsel failed to object to these arrangements. After the judge who heard the cause had left, the jury desired further instructions. As defendant objected to this request, however, it was denied. The second judge received the unqualified verdict of the jury convicting defendant. On appeal, *held*, affirming the conviction, that defendant had waived his constitutional and statutory rights to have the same judge preside over the entire trial and to have that judge give further instructions to the jury. Having waived his rights, defendant must affirmatively show prejudice resulting from these irregularities in procedure to establish reversible error. *State v. Sereg*, (Iowa, 1941) 296 N. W. 231.

At common law, among the substantial elements of trial by jury were: (1) a jury of exactly twelve men, (2) presence of a supervising judge with powers to instruct and advise the jury on the law and facts, and (3) a unanimous jury verdict.[1] Most of the criminal cases involving waiver of the right to trial by jury have been concerned with the first essential. The leading case of *Patton v. United States*[2] held that under the Federal Constitution trial by jury is a right and privilege of the defendant in a criminal case, misdemeanor or felony, and that a jury of twelve men may be waived entirely by the defendant. Interpreting the specific language of applicable provisions of state constitutions[3] and statutes, most state courts have drawn distinctions, allowing waiver of a jury in trials for misdemeanors[4] but not for felonies,[5] or allowing waiver of

[1] Patton v. United States, 281 U. S. 276, 50 S. Ct. 253 (1929). The second essential was dealt with in Capital Traction Co. v. Hof, 174 U. S. 1, 19 S. Ct. 580 (1899). A superintending judge is not required merely to perform the functions of assembling the jury, administering oaths, entering judgment, and sentencing the defendant; he is to exercise the highly important functions of instructing the jury on the law, advising on the facts, and setting aside a verdict of guilty if against the law or evidence.

[2] 281 U. S. 276, 50 S. Ct. 253 (1929). The policy argument that the defendant should not be able to waive a jury trial because of the state's interest in preserving the liberties of its citizens seems specious in view of the fact that the defendant may ordinarily dispense with a jury trial by pleading guilty. 281 U. S. 276 at 308. Cf. also principal case, 296 N. W. 231 at 236.

[3] Typical of the provisions in state constitutions is that in the Iowa Constitution, Bill of Rights, art. I, § 9 (1857), providing: "The right of trial by jury shall remain inviolate. . . ." Section 10 provides that the "accused shall have a right to a speedy and public trial by an impartial jury. . . ." In State v. Hataway, 153 La. 751, 96 So. 556 (1923), it was held that defendant could not waive a constitutional provision requiring a jury of five, and consent to trial by a jury of twelve.

[4] 70 A. L. R. 279 at 288 (1931). Holding that a jury cannot be waived in trial for a misdemeanor is Cleghorn v. State, 22 Ala. App. 439, 116 So. 510 (1928). When trial by jury cannot be waived, the theory of the courts generally is that the constitutional or statutory requirements are jurisdictional. Cf. Commonwealth v. Rowe, 257 Mass. 172, 153 N. E. 537 (1926).

[5] 70 A. L. R. 279 at 282 (1931).

one juror [6] but not the entire jury.[7] As to the third element, unanimity in the jury's verdict, although there seems to be a paucity of cases on the point, it has been suggested that there is no apparent reason why the accused should not be allowed to waive this right.[8] Such a result would certainly be in accord with the breadth of the *Patton* decision, which seems to be determining the trend of state court holdings on the nature of the elements of trial by jury.[9] In the principal case, the second element of trial by jury was involved. Iowa had already held that the defendant could not waive a jury entirely in a criminal case; [10] but the court had ample precedent for holding that other statutory and constitutional rights and privileges can be waived.[11] A decision that a substituted judge may receive the verdict of the jury seems likewise to be in accord with the holding of the *Patton* case and holdings in various state jurisdictions.[12] Although the practice of substituting judges is not to be commended,[13] it would seem that in cases of necessity judges might be substituted, at least before trial has actually

[6] State v. Kaufman, 51 Iowa 578, 2 N. W. 275 (1879); Commonwealth ex rel. Ross v. Egan, 281 Pa. 251, 126 A. 488 (1924); State v. Sackett, 39 Minn. 69, 38 N. W. 773 (1888). *Contra*, Cancemi v. People, 18 N. Y. 128 (1858).

[7] State v. Carman, 63 Iowa 130, 18 N. W. 691 (1884); State v. Williams, 195 Iowa 374, 191 N. W. 790 (1923); Commonwealth v. Hall, 291 Pa. 341, 140 A. 626 (1928). Holding that a jury may be waived completely are State ex rel. Warner v. Baer, 103 Ohio St. 585, 134 N. E. 786 (1921); Jennings v. State, 134 Wis. 307, 114 N. W. 492 (1908).

[8] ROTTSCHAEFER, CONSTITUTIONAL LAW 789 (1939).

[9] State ex rel. Kortgaard v. Patterson, 66 N. D. 555, 267 N. W. 438 (1936). The effect of the Patton case in Illinois is seen in People ex rel. v. Fisher, 340 Ill. 250, 172 N. E. 722 (1930), overthrowing Harris v. People, 128 Ill. 585, 21 N. E. 563 (1889), and holding that a jury may be waived in a criminal case. Much of the weight of the Patton case is due to the holding that defendant's waiver of jury trial must be consented to by government's counsel and sanctioned by the court. 281 U. S. 276 at 312. Cf. State v. Sackett, 39 Minn. 69, 38 N. W. 773 (1888); People v. Scornavache, 347 Ill. 403, 179 N. E. 909 (1931); United States v. Dubrin, (C. C. A. 2d, 1937) 93 F. (2d) 499, noted in 26 GEO. L. J. 762 (1938).

[10] State v. Carman, 63 Iowa 130, 18 N. W. 691 (1884).

[11] In the principal case, the court cites Iowa cases which allowed defendant to waive: (1) the constitutional right of confrontation by witnesses, (2) the statutory right that jurors be able to read and write English, (3) the statutory requirement that only one grand juror should be drawn from any one township, (4) the statutory requirement of a certain number of grand jurors, (5) the statutory requirements relating to proper argument before a jury. 296 N. W. 231 at 236-237.

[12] Fuson v. Commonwealth, 11 Ky. L. Rep. 412, 12 S. W. 263 (1889); King v. People, 87 Colo. 11, 285 P. 157 (1930). In Freeman v. United States, (C. C. A. 2d, 1915) 227 F. 732 at 759, the court said that trial by jury in a criminal case means trial before a tribunal "consisting of at least one judge and twelve jurors, all of whom must remain identical from the beginning to the end," and that neither the defendant nor the government can consent to substitution of judge or jurors. The Patton case changes the complexion of this holding completely. In England, at common law, judgment could be entered or execution ordered only by the judge who tried the case. Commonwealth v. Thompson, 328 Pa. 27 at 30, 195 A. 115 (1937).

[13] State v. Sereg, (Iowa, 1941) 296 N. W. 231 at 238.

begun or after the jury has retired, without creating reversible error by such act alone.[14] If the integrity of the trial is preserved and the defendant is not actually prejudiced, he should not be entitled to secure a reversal on appeal, particularly when he does not object to the substitution. It is arguable that in the principal case prejudice to the defendant's cause should have been presumed because the jury did not receive the additional instructions it requested.[15] To hold, as the court does, that the defendant, by his objection, prevented return of the jury, and that the jury's request might have been inconsequential or the substitute judge's instructions relative thereto entirely adequate, is to ignore what defendant's position would have been had he refrained from objecting. But as the defendant did not object to the substitution of judges when the jury went out, it seems that the instant case reached a conclusion which is in accord with the recent trend of authorities to the effect that the elements of trial by jury are rights of the defendant which may be waived.

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[14] Commonwealth v. Thompson, 328 Pa. 27, 195 A. 115 (1937). In State v. McCray, 189 Iowa 1239, 179 N. W. 627 (1920), it was held that defendant might consent to a change of judges in the middle of the trial, where the second judge had familiarized himself with the record. Contra, Blend v. People, 41 N. Y. 604 (1870); Commonwealth v. Claney, 113 Pa. Super. 439, 173 A. 840 (1934). In King v. United States, (C. C. A. 6th, 1928) 25 F. (2d) 242, it was held that where the trial judge died after the verdict was received, his successor was competent to pass on a motion for new trial and allow a bill of exceptions. Cf. also People v. Kasem, 230 Mich. 278, 203 N. W. 135 (1925).

[15] In State v. Carman, 63 Iowa 130, 18 N. W. 691 (1884), the court's holding that defendant could not waive a jury entirely was based largely on a statutory provision of the criminal code that an "issue of fact must be tried by a jury of the county in which the indictment is found." In the instant case, the statutory provisions in question seem equally mandatory to the effect that if a jury desires information, it "must require" the officer in charge to reconduct it to the court and that there the "information required must be given as provided by law." Iowa Code (1939), § 13911.