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HAS THE STATE A RIGHT TO TRIAL BY JURY IN CRIMINAL CASES?

Recent Decision of Illinois Supreme Court Answering This Question in the Affirmative Is No Less Interesting from a Traditional Professional Viewpoint Than from a Social and Political One, and Furnishes Rare Food for Analyst and Realist

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On December 17 of last year the Illinois Supreme Court decided (three justices dissenting) in the case of The People v. Scornavache, that the State has a right to trial by jury in a felony case. The defendant charged with murder, waived a jury trial and asked that his case be heard by the court. The Assistant State’s Attorney insisted that the case be tried before a jury, and was upheld by the trial judge. Upon trial by a jury, the defendant was convicted of manslaughter.

A single issue was presented for review: the right of the State to a jury trial in a felony case. Appellant contended that the Illinois constitution1 did not establish the jury as an integral part of the frame of government, but merely guaranteed the accused this right: the State argued that the constitutional provision operated equally on behalf of the State and of the accused. Each side turned to history and to the general law to support its position. Appellant emphasized the point that unless his view were adopted, the State could compel a defendant to stand trial by jury and thus nullify the recent, well considered decisions of Patton v. United States2 and State v. Fisher3, which held that one accused of a felony can waive the jury. The State contended that the cases decided merely that the defendant could waive his right but that this did not affect the right of the State, which could withhold its consent or waiver in any event. It pointed out further that the defendant’s waiver of his right to counsel did not limit the State in a like fashion; and that defendant’s waiver of his right to meet the witnesses face to face did not prevent the State from presenting witnesses. Likewise with respect to other constitutional guarantees such as the right to compel the attendance of witnesses and the right to a public trial. The rule in these situations, it was argued, should apply in similar fashion to the right to trial by jury. Defendant countered by contending that trial by jury was the exclusive right of the defendant; that the judge himself had power to determine the facts in a criminal case; and that, in Illinois, the State cannot have a change of venue, which from it followed that the law did not contemplate such a thing as a judge unacceptable to the State.

The decision of the Illinois Supreme Court, adopting the position of the prosecution (except in so far as it held that the general law and not the constitution was the source of the State’s right to a jury trial), and affirming the ruling of the trial judge, challenges attention on many sides. It is no less interesting from a traditional, professional viewpoint than from a social and political one. It is in short, rare food for analyst and realist alike.

The issues raised in this case are numerous and would require too minute an analysis to be adequately presented here. It is obvious enough that trial by jury is a privilege of the accused. Even if there were any doubts about this in the common law of England, the constitutional history of the United States resolves the question definitely in favor of the accused. Indeed the court not only admitted but roundly emphasized this point. It devoted almost half of the decision to demonstrate what was not disputed, namely that one accused of felony has a right to a jury trial. And it concluded this point by quoting Story’s resounding statement that:

"When our immediate ancestors removed to America they brought this great privilege with them as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power."

The court reaffirmed all of this and then simply said, in effect: What of it? What has all or any of this to do with the State’s right to a jury trial? In the language of the court after its review of the history of the jury: “it is evident that no one then had in mind the right of the accused to waive a jury, to say nothing of a right, as here claimed, to alone dictate that the cause shall be tried by the court.” The court emphasizes its point. It restates it immediately as follows:

"Nowhere are we advised that the accused was for the right to a jury trial if the accused wanted it and a trial by court if the accused so chose. In other words, there was no thought of a right of the accused to dictate the character of trial. The only thing sought was the right of jury trial. So unmixed was this blessing thought to be that nothing was thought of or done about a trial by the court. There is therefore no historical background indicating that the invariable right of jury trial preserved in the constitution was thought to include a trial that was not a jury trial at all but a trial by the court."

It is important to note the manner in which the court approaches the problem. It looks to history and law (i., to the defendant to produce it) for proof that the accused has the right to “dictate the character of the trial.” At the outset it stated the issue as follows: “Plaintiff in error contends that the right of trial by a jury guaranteed by the constitution is a right personal to the accused, and that upon a plea of not guilty he has the right to waive a jury and also

1. Ill. Const. Art. 2 §5. “The right of trial by jury as heretofore enjoyed, shall remain inviolate.” Art. 2 §9 (Rights of accused) “In all criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury of the country or district in which the offense is alleged to have been committed.”

3. 248 Ill. 299, 178 N. E. 739, August 9, 1929.

4. These statements appear (approximately) on pp. 750 of the opinion which has not yet been published.
a right to require a trial by the court.5

The method employed by the court with reference to the right of the accused to "dictate" the form of trial is, at best, a strict but unquestioning and mechanical application of the rule of stare decisis on its negative side.

The purpose of the whole historical movement culminating in the Bill of Rights was to guarantee the right to a jury trial to persons accused of crime. To this extent, admittedly, the accused may be said to have "dictated" the form of trial. As to trial by the court alone, since this was the very thing that the accused did not want, it is no; the least helpful to look for evidence supporting such a right in the history of the jury as a means to limit oppressive government. From the very nature of this struggle, it will be lacking, for opposition to the king included opposition to his judges (though it may be found in the much earlier struggle for "due process").

If there is not a single bit of historical data directly in point then upon what basis does the decision rest? It is stated by the court as follows:

4. ... There is, of course, nothing in the constitution conferring the right of jury trial on the State, but such has for centuries been the established mode of trial in criminal cases. The maintenance of a jury as a fact-finding body occupies that place in the constitution as it was in the common law as we know it in America, which is the absence of a statute so providing, requires that such trial be not set aside merely on the choice of the accused.

5. ... It may be conceded, at least generally, that under the rule of the common law the accused was not permitted to waive trial by jury as generally he was not permitted to waive any right which was intended for his protection.

6. ... In this respect we fully agree with what was said by the Supreme Court of Wisconsin in Hack v. State, 141 Wis. 346, 124 N. W. 30 (1910). The accused in that case was nothing was unquestionably founded upon the anxiety of the courts to see that no innocent man should be convicted.

This accounts for the age of the jury in so far as the State's interest in maintaining it is concerned. It shows that the State for some centuries did not have any adverse right or any separate legal interest in the jury apart from protection for the accused. How, then, could it have acquired a right to a jury trial independent of the right of the accused, which it can now set up adversely to his interests?

Postulating a right in the State upon the "long recognition by courts everywhere that trial in a criminal case means a jury trial," the court ignores the other all-important reason for its existence during all of this time (i.e., as a guard against and opposition to the interests of an oppressive State) and thus succeeds in begging the question entirely, settling it finally, by judicial fiat. Such reasoning is eminently fallacious. Yet it is a common enough process which began when earliest man identified natural phenomena with accidental concomitants in cause and effect relationships; a process, in truth, far removed from the sophisticated view of the modern physicist, but none the less sanctioned in every day affairs, and accordingly valid in law. Legal rights, when they are not created by legislatures (or "found to exist" by courts) grow out of mores and folkways, the original purposes of which are frequently forgotten. So much propriety may be said to inhere in the Court's interpretation.

The defendant's contention that there are many situations when an accused person prefers trial by a judge rather than by jury was met by the statement that the accused has a right to a change of venue. But this is certainly no comfort in a case where, because of the type of defendant, the nature of the crime, the publicity given it, or the complexity of the facts, the accused has every reason to prefer the judgment of an enlightened individual to that of any jury. It is irony indeed, that in such a situation, the tribunal enunciated for centuries as a part of the structure of government, can now under the Illinois decision be employed by the State to facilitate conviction.

The defense did not call attention to the practice in Illinois of securing a written waiver from the defendant and then proceeding to trial by court without asking the prosecution if it also waived a jury. It did not cite any case which specifically held that the State did not have a right to a jury

5. But nowhere in his Brief or his Petition for Rehearing does plaintiff in error make this contention, although, of course, trial by the court was natural as the defendant's waiver. The omission of the court seems to be related to "due process" which was not in issue. It is significant to note the subtle, apparently minor omission, especially in view of the decision in the Patton case. These were probably never intended in the Patton and Patton cases that the court "never has been regarded as a part of the structure of government" but does not point out any difference between "a part of the structure of government" and an "instrumentality of government.

6. Note the use and repetition of the word "dictate" indicating a hostile attitude with reference to the defendant's steering trial by court.
trials. The defense did, however, cite Hoffman v. State, where the defendant's right of waiver was in issue. The court there stated:

"Clearly, this right is for the benefit of the accused. If he regards it in a particular case as a burden, a hardship, a prejudice to fair trial, why in the name of reason, should he not be permitted to waive it and submit his cause to the magistrate? What was given to him generally as a shield should not be used as a sword in case he feels that a jury trial in such case would so result."

So much for the analytical side of the case. Of equal, if not greater importance, is the fact that certain, rather alarming implications must be drawn from the Scornavache case regarding the situation that gave rise to it. That is with reference to the entire question of the part of judge and jury in the administration of criminal justice. Clearly, the decision itself postulates certain revisions in contemporary, conventional views regarding the jury. Clearly those officials in a position to know best believe that in certain cases the chances for securing a conviction and adequate punishment are not good enough if a judge tries the cases. The prosecutor, in certain cases would rather take his chances with twelve good men and true. But we need not speculate about the attitude of the prosecutor, nor about the facts which have shaped his opinion about the jury, or perhaps one should say, about the judge. The State said in its Brief and Argument in the Scornavache case:

"The same considerations that may make a jury trial desirable for one man also make necessary for the protection of society, for the safety of the People of the State of Illinois, and also by a jury in a proper case. Our judges are hedged about by no divinity. Let us be under no illusions. We yield to none in our respect for and confidence in our judges. But after all, they are at times confronted by powerful and held in the public eye for months, had just started, and that the defendants, very powerful politicians, had waived a jury trial and the prosecution had insisted, this time without success, upon trial by a jury."

Other less immediate but no less influential factors may be mentioned in order that the judgment in the Scornavache case may be appreciated. The campaign of crime commissions, civic organizations and newspapers against crime in Illinois, in which judges who "paltered" with crime came in for much criticism, undoubtedly has had considerable influence. The Fisher case, which had a most interesting setting of its own, reversed precedents of many years' standing. Waiver of the jury in felony trials was designed to accelerate the disposition of cases. The new Public Defender has been lauded for his cooperation in this program. Shortly after the Fisher decision, the Illinois Court took another momentous step (again without legislative assistance) and held in the Bruner case that the jury could judge only the facts and not the law, a decision which set aside over a century of precedent and practice. All of these decisions within a year demonstrate the predilection of the Illinois Supreme Court in criminal cases. Now it appears that the waiver of the jury is not an unmixed blessing; and the Scornavache case results.

Finally, one secures much insight into the motivation of the court, and consequently much help in understanding its judgment from the following statement in the closing lines of the decision:

"It is evident from a study of criminal jurisprudence, that safeguards more than sufficient to assure justice to him have been thrown around the defendant in criminal cases."

It thus appears that in spite of the fact that the jury system is a cumbersome way of determining facts, we may be compelled to retain it simply because the only alternative that exists in our present machinery, namely trial by the court, is even a less satisfactory method, at least in certain situations. If the considerations enumerated above are actually potent, vital, dominant forces in an otherwise intellectually serene judicial process then the interpretation and holding of the Illinois Supreme Court become understandable. If the right to waive the jury in felony cases is denied in by the Fisher case, designed to expedite the administration of the criminal law, can be perverted by powerful and unscrupulous defendants, a court may be pardoned for taking "judicial notice," if, of course, it does not force too great a strain upon recognized legal mechanics.