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

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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 Constitution 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 States and State v. Fisher, 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 jury trial.

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 struggle 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.e., to the defendant to produce it?) for proof that the accused has the right to "dictate the character of the trial." And 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..."
a right to require a trial by the court.

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:

"... 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 as we known in America, which the absence of a statute so providing, requires that such trial be not set aside merely on the choice of the accused."

"While it is true, as herein stated, that the right of jury trial is so conferred on the accused that it may not be taken from him without his consent, this is by no means saying that the State may not object to a trial before the court. A trial by the court is not, and never has been, within the protective provisions of the Bill of Rights as a shield to the accused. So long, therefore, as objection on the part of the prosecution does not attack the safeguard of trial by jury no constitutional right is jeopardized. Preservation of the instrumentalities of government is of sufficient interest to the people to give them a right to object to jury waiver. The protective provision of the constitution was not designed to enable the accused to say there shall be no jury trial, but, on the contrary, to enable him to say there shall be a trial. The right to a jury trial is not the right to be tried without a jury. The waiver of the accused is, as the term indicates, a relinquishment of the right, and is, in effect, a declaration that he is willing that the court try the issue of fact."

"... The long recognition by courts everywhere that a trial in a criminal case means a jury trial has clearly given to the people the right to object to a trial by the court on waiver of the accused. No case cited or which we can find holds a contrary view."

Now, it would have been consistent for the court to have held that trial by jury was in its origin forced upon an unwilling populace, with attention directed to the various techniques peine forte et dure to persuade a recalcitrant defendant to put himself upon the country. This might have been held precedent to support the contention that the State has a right to compel defendants to undergo trial by jury. But the court, as shown, interpreted the right in the light of the later historical developments taking place after the general acceptance of jury trial and leading to the constitutional guarantees. These guarantees are, it held, that the defendant and not the accused is to have a jury trial, the defendant and not the accused is to have a jury trial, the defendant and not the accused is to have a jury trial. The corollary of this is that if he does not want a jury trial, he need not be given one. State v. Scorznavech introduces another element which cannot be inferred from the above propositions. The court relies somewhat upon dicta in the Patton and other cases, to the effect that the trial judge or the state's attorney or both must consent to the defendant's waiver to make it effective. But a reading of the dicta in their contexts, shows very definitely that they were intended solely to insure the accused against a hasty or improperly advised surrender of his right to a jury trial. Thus the court states in Patton v. United States:

"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 has not been permitted to waive any right which was intended for his protection."

"... In this respect we fully agree with what was said by the Supreme Court of Wisconsin in Hack v. State, 141 Wis. 540. The advice was, that nothing was unquestionably founded upon the anxiety of the courts to see that no innocent man should be convicted."

This account 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. Now, 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? In 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 interest of an oppressive State) and thus succeeds in begging the question entirely, setting 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 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 established for centuries, whose purpose is protection of the accused, 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 is not, and never has been, within the protective provisions of the Bill of Rights as a shield to the accused.

6. Note the use and repetition of the word "dictate" indicating a hostile attitude with reference to the defendant's steering trial by court.

7. Court's opinion pp. 10-11.
The defense did, however, cite *Hoffman v. State,* \(^{11}\) 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 magis-
trate? 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 cer-
tain, 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 the rights of the People as represented in organized gov-
ernment to a jury trial when in the solemn judgment of their oath bound officers such a trial is necessary.”

Ten days after the *Scornavache* opinion was handed down, State’s Attorney Swanson of Cook County in an address before all the state’s attorneys of Illinois counties, hailed the decision as “a Christ-
mas present to the state’s attorneys.” “Previously,” he said, “we often had to see a guilty person escape our prosecution because he chose to appear before a friendly judge and opt for the judgment of the court rather than of a jury.”

That is one side of the factual set-up which must have influenced the court to some extent and may have been the dominating factor. It is conceivable, also, that the court may have been unconsciously motivated by the fact that one of the most sensational prosecu-
tions in Illinois, a case in the public eye for months, had just started, and that the defendants, very powerful politicians, had waived a jury trial and the prosecu-
tion had insisted, this time without success, upon trial by a jury.

Other less immediate but no less influential fac-
tors may be mentioned in order that the judgment in the *Scornavache* case may be appreciated. The cam-
paign 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 dispo-
sition 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 legisla-
tive 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 motiva-
tion of the court, and consequently much help in un-
derstanding its judgment from the following state-
ment in the closing lines of the decision:

“It is evident from a study of criminal jurisprudence, that safeguards more than sufficient to insure 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 considera-
tions enumerated above are actually potent, vital, dom-
inant forces in an otherwise intellectually serene ju-
dicial process then the interpretation and holding of the Illinois Supreme Court become understandable. If the right to waive the jury in felony cases is re-
dered in by the *Fisher* case, designed to expedite the ad-
ministration 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.

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11. Of more than usual importance in this connection is the case of *State v. Warden,* 60 Conn. 339, 33 Am. Rep. 27, and it is unfortu-
unate that it was not taken in spite of the fact that there was a statute in existence. For here the Connecticut court carefully ex-
amined not only the common (Blackstone’s) public policy argument against waiver but also the same consideration as that by the Illinois Court regarding the right of the public in the jury “as an instrumentality of government. The importance of the case is en-
hanced by the fact that the constitutions of both states are identical, so the following statement of the Connecticut court is particularly in point. It said:

“Claimed that the right of trial by jury covers not only the personal privilege of a single author or accused person, but also the interests of jurors, judges and all citizens, in beholding direct and public trial of public offices and public men.”

The interest, dignity and desire of judges and jurors as such we pass by, simply remarking that probably the framers of the Con-
sitution did not deem them of sufficient importance to make them even remotely or incidentally the subject of a constitutional provision. In respect to the interests of the public large it is quite different. Those interests might with propriety perhaps have been given more weight had the case been considered desirable. If such had been the intention we should expect that some statement in the Constitutional language adapted to that end. We should expect, too, that they would deal with that purpose directly, where it had been given. Hence it would be strange if not would it have been hidden in a provision apparently designed to secure the rights of individuals (see page 20 of the decision).

The prosecution cited *State v. Mood,* 4 Black, (Ind.) 309, 30 Am. Dec. 661, a case directly in point. But it must be said regarding that case that when the court in 1887, that it covered a case of an obvious practice and does not cite or refer to a single authority to support it; so that even to the *Scornavache* case that the right to a jury trial was derived from the Indiana Constitution.


