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Constitutional Law--Criminal Law--Constitutional Provision Permitting Waiver of Jury Trial in Felony Cases Held Self-Executing (People v. Carroll, 3 N.Y.2d 686 (1958))

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late Division supplied the standard omitted by the legislature. They held that the "implied limitation of reasonableness" [20] was a sufficient restriction. This conflicts with precedent which insists that the legislature promulgate a standard in order to determine whether or not the Administrator is acting ultra vires.[21] This is a necessary corollary of the rule that courts may not invade the field of discretion conferred by law upon an administrative officer.[22] Nor may the courts usurp the legislative function of creating a standard.[23] Of course, necessity may demand that the legislature set standards in general terms,[24] but these must be capable of reasonable application or the grant is invalid.[25] Thus, the question is not merely are the rules reasonable; but simply are they part of a valid grant. The "implied limitation of reasonableness" does not meet such a test.

CONSTITUTIONAL LAW — CRIMINAL LAW — CONSTITUTIONAL PROVISION PERMITTING WAIVER OF JURY TRIAL IN FELONY CASES HELD SELF-EXECUTING. — Defendant, indicted for grand larceny,

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[20] People v. Malmud, 4 A.D.2d 681, 164 N.Y.S.2d 204 (2d Dep't 1957).

[21] See, *e.g.*, Hampton Co. v. United States, 276 U.S. 394 (1928); Wichita R.R. v. Public Util. Comm'n, 260 U.S. 48 (1922); United States v. Grimaud, 220 U.S. 506 (1911); Field v. Clark, 143 U.S. 649 (1892); Noyes v. Erie & Wyoming Farmers Co-op., 170 Misc. 42, 10 N.Y.S.2d 114 (Sup. Ct.), *aff'd*, 281 N.Y. 187, 22 N.E.2d 334 (1939); New York Good Humor, Inc. v. Morgan, 171 Misc. 899, 14 N.Y.S.2d 7 (Sup. Ct. 1939).

[22] Small v. Moss, 279 N.Y. 288, 299, 18 N.E.2d 281, 284 (1938) (dictum). ". . . [T]o prevent its being a pure delegation of legislative power, [the legislature] must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. *It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show substantial compliance therewith to give validity to its action.*" Wichita R.R. v. Public Util. Comm'n, 260 U.S. 48, 58 (1922) (emphasis added).

[23] "We [the courts] do not read the limits on any powers." Small v. Moss, 279 N.Y. 288, 299, 18 N.E.2d 281, 284 (1938).

[24] See, *e.g.*, Sunshine Coal Co. v. Adkins, 310 U.S. 381 (1940) (authority to fix prices only when they have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of the act); Field v. Clark, note 21 *supra* (authority to suspend tariffs on administrative finding that the duties imposed by a foreign state are unequal and unreasonable); New York Cent. Securities Co. v. United States, 287 U.S. 12, 24-25 (1932) (the power to approve consolidations in the public interest); National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (the power to regulate radio stations engaged in chain broadcasting as public interest, convenience, or necessity requires); Federal Trade Comm'n v. Keppel & Bro's, 291 U.S. 304 (1933) (the power to prohibit unfair methods of competition).

[25] Small v. Moss, 279 N.Y. 288, 299, 18 N.E.2d 281, 284 (1938) (dictum); Little v. Young, 274 App. Div. 1005, 85 N.Y.S.2d 41 (2d Dep't 1948) (per curiam); *cf.* Yakus v. United States, 321 U.S. 414 (1944); Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126 (1941).

waived trial by jury pursuant to Article I, Section 2 of the New York State Constitution.[1] He was then tried by the court without a jury and acquitted. A second indictment was filed which the defendant moved to dismiss on the ground of double jeopardy. The prosecution contended that the constitutional provision permitting a waiver was not self-executing and consequently the previous trial was a nullity. The Court of Appeals upheld the Appellate Division's affirmance of the trial court's dismissal of the second indictment *holding* the constitutional provision to be self-executing.[2] *People v. Carroll,* 3 N.Y.2d 686, 148 N.E.2d — (1958).

The early English view strongly disapproved any waiver by an accused of his rights in criminal trials. The sovereign would not allow his subjects to forfeit their lives or liberties.[3] But in the federal courts, a defendant has been permitted to make "intelligent waiver" of personal rights meant solely for his protection.[4] Similarly, a state may regulate the rights of an accused with respect to trial by jury. Where this right is granted, it may not be denied to any individual.[5] However, a state may abolish trial by jury without violating the fourteenth amendment.[6] State statutes expressly providing for jury trial waivers have also been declared constitutional.[7]

In the federal courts, a defendant's right to waive trial by jury was settled by the Supreme Court in *Patton v. United States.*[8] Waiver of this sixth amendment safeguard was permitted, absent any express authorization therefor, on the reasoning that the jury

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[1] ". . . [A] jury trial may be waived . . . in all criminal cases [except murder or treason] by a written instrument signed by the defendant in person in open court . . . with the approval of [the] judge. . . . The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument. . . ." N.Y. CONST. art. I, § 2.

[2] See 1 COOLEY'S CONSTITUTIONAL LIMITATIONS 165-72 (8th ed. 1927). "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced, and it is not self-executing when it merely indicates principles, without laying down rules by means of which 'those principles may be given the force of law. . . .' A constitutional provision does not lose its self-executing quality merely because it provides that the legislature shall by appropriate legislation provide for carrying it into effect." *Id.* at 167-70.

[3] See Lord Darces's Case, Kel. J. 56, 84 Eng. Rep. 1080 (K.B. 1708); 1 BLACKSTONE COMMENTARIES 133 (1765).

[4] See Johnson v. Zerbst, 304 U.S. 458, 468 (1938); Patton v. United States, 281 U.S. 276, 312 (1930).

[5] See Norris v. Alabama, 294 U.S. 587 (1935); Neal v. Delaware, 103 U.S. 370 (1880); Strauder v. West Virginia, 100 U.S. 303 (1879); *Ex parte* Virginia, 100 U.S. 339 (1879); *cf.* American Publishing Co. v. Fisher, 166 U.S. 464, 468 (1897).

[6] See Maxwell v. Dow, 176 U.S. 581 (1900). See also Herbert v. Louisiana, 272 U.S. 312, 316 (1926); *cf.* Walker v. Sauvinet, 92 U.S. 90 (1875).

[7] See, *e.g.,* Hallinger v. Davis, 146 U.S. 314 (1892).

[8] 281 U.S. 276 (1930). This case concerned waiver of one juror by the accused, but the Court held such to be substantially the same as waiver of the entire panel. *Id.* at 290.

was intended only as a *personal* bulwark against possible governmental tyranny and not as an integral or jurisdictional requirement of a felony trial. Particular emphasis was placed on the fact that an accused, by a plea of guilty, may dispense with a trial altogether; therefore, a jury is not in all events an essential ingredient of criminal justice.[9]

In *Cancemi v. People*,[10] the New York constitutional grant of the right of trial by jury was construed to the contrary. At that time, the constitution expressly provided for waiver of a jury in civil cases only.[11] It was held that an accused must be tried under the state constitution and laws which prescribed trial by jury in criminal cases. Furthermore, the English reasoning was applied: not only was a court without power to try a non-jury felony case, but since the right to trial by jury was not purely personal, it could not be waived.[12]

As a result of efforts to change the effect of the *Cancemi* decision,[13] a constitutional amendment was adopted in 1938 providing for waiver in criminal cases "in the manner to be prescribed by law." [14] This addition was clearly not self-executing.[15] A further amendment, effective in 1939,[16] laid down definite rules for waiver and made the section read as it does today. Since 1939, two judicial decisions have alluded to this new provision and presumed it to be self-executing.[17] However, according to all available information, no non-jury trials were held in the state of New York prior to the present case.[18]

Despite the new amendment, the Code of Criminal Procedure still provides that "an issue of fact must be tried by a jury." [19] In almost every year since 1939, the Judicial Council has proposed an

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[9] Patton v. United States, 281 U.S. 276, 305-06 (1930).

[10] 18 N.Y. 128 (1858).

[11] N.Y. CONST. art. I, § 2 (1846).

[12] Cancemi v. People, 18 N.Y. 128, 137 (1858).

[13] See 1926 LEG. DOC. No. 84, REPORT, N.Y. CRIME COMMISSION 18 (1926); 1928 LEG. DOC. No. 23, REPORT, N.Y. CRIME COMMISSION 20 (1928); 1928 LEG. DOC. No. 92, REPORT, N.Y. CRIME COMMISSION 48 (1928); 1929 LEG. DOC. No. 99, REPORT, N.Y. CRIME COMMISSION 57, 98, 105-106 (1929); 1930 LEG. DOC. No. 98, REPORT, N.Y. CRIME COMMISSION 23, 27, 71-73 (1930); 1931 LEG. DOC. No. 114, REPORT, N.Y. CRIME COMMISSION 30-31 (1931); 1935 LEG. DOC. No. 20, REPORT, N.Y. ATTORNEY GENERAL 26 (1935); 1936 LEG. DOC. No. 48(c), REPORT, N.Y. JUDICIAL COUNCIL (1936); 1936 LEG. DOC. No. 57, SPECIAL MESSAGE OF GOVERNOR TO LEGISLATURE 20 (1936).

[14] Laws of N.Y. 1937, p. 2095. Approved by the People Nov. 8, 1937.

[15] See 1936 LEG. DOC. No. 48, REPORT, N.Y. JUDICIAL COUNCIL 97 (1936).

[16] See II REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF 1938, 1273-86.

[17] See United Press Ass'ns v. Valente, 281 App. Div. 395, 401, 120 N.Y.S.2d 174, 181 (1st Dep't 1953), *aff'd*, 308 N.Y. 71, 181 N.E.2d 365 (1954); Newmann v. Kurek, 175 Misc. 238, 240, 22 N.Y.S.2d 950, 952 (Sup. Ct. 1940).

[18] See Brief for Appellants, p. 16, People v. Carroll, 3 N.Y.2d 686, 148 N.E. 2d — (1958).

[19] N.Y. CODE CRIM. PROC. § 355. See also N.Y. CODE CRIM. PROC. § 462.

amendment to this provision.[20] An additional recommendation providing further procedural machinery would include an express authorization for trial "by the court instead of by the jury." [21] In the federal courts, even though waiver has been judicially permitted without statutory authorization, express authority to try a case without a jury is now given by the Federal Rules of Criminal Procedure.[22] There is authority for the proposition that a state court will lose jurisdiction to try a defendant where he waives a jury trial and the court proceeds *alone* without any legislative authorization.[23]

With this background, the Court of Appeals, in a case of first impression, has now declared the constitutional provision as to waiver to be self-executing. The Court points principally to the language used in the provision, considered conjunctively with the debates at the 1938 Constitutional Convention and a general presumption that constitutional provisions are self-executing, to reach its decision. A mere permissive authorization for further supplementary legislation does not negative an intent to make the amendment self-executing where sufficient "operational details" are provided. However, the Court failed to mention the provision of the Code of Criminal Procedure which dictates jury trials as to all issues of fact.

After almost twenty years, a change in the common law of New York has been confirmed which highlights the availability of waiver in non-capital felony cases. Yet a further determination may well be needed to close the matter in New York. Since historically, the court has not been competent to try both the law and the facts, the constitutional provision is subject to two interpretations. If a non-jury forum is now created, the court, operating alone under a waiver, is empowered to hold a *valid* trial though the waiver be successfully attacked as defective. Of course, a defendant can still assign an allegedly invalid waiver as prejudicial error. If, on the other hand, there is still only one type of trial, *i.e.,* trial by jury with special provision for waiver, an invalid waiver would constitute a jurisdictional defect. Under this theory, an attack on the form of the waiver may well be available to

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[20] 1939 LEG. DOC. No. 48, REPORT, N.Y. JUDICIAL COUNCIL 155 (1939); 1940 LEG. DOC. No. 48, REPORT, N.Y. JUDICIAL COUNCIL 53 (1940); 1941 LEG. DOC. No. 23, REPORT, N.Y. JUDICIAL COUNCIL 53 (1941); 1942 LEG. DOC. No. 16, REPORT, N.Y. JUDICIAL COUNCIL 59 (1942); 1943 LEG. DOC. No. 20, REPORT, N.Y. JUDICIAL COUNCIL 60 (1943); 1944 LEG. DOC. No. 15, REPORT, N.Y. JUDICIAL COUNCIL 56 (1944); 1945 LEG. DOC. No. 15, REPORT, N.Y. JUDICIAL COUNCIL 55 (1945); 1946 LEG. DOC. No. 17, REPORT, N.Y. JUDICIAL COUNCIL 54 (1946); 1947 LEG. DOC. No. 19, REPORT, N.Y. JUDICIAL COUNCIL 54 (1947); 1948 LEG. DOC. No. 18, REPORT, N.Y. JUDICIAL COUNCIL 72 (1948); 1949 LEG. DOC. No. 18, REPORT, N.Y. JUDICIAL COUNCIL 87 (1949).

[21] See, *e.g.,* 1939 LEG. DOC. No. 48, REPORT, N.Y. JUDICIAL COUNCIL 156 (1939).

[22] FED. R. CRIM. P. 38(c).

[23] See Commonwealth v. Rowe, 257 Mass. 172, 153 N.E. 537, 540 (1926).

both sides, so that even the prosecution would not be barred from disregarding the judgment and filing a new indictment.[24]

It is submitted that the provisions of the Code of Criminal Procedure [25] requiring a jury where a question of fact is present should be amended. Furthermore, an express authorization by the legislature for the court to proceed without a jury would seem helpful.*

CONSTITUTIONAL LAW — CRIMINAL LAW — CONVICTION OF HIGHER OFFENSE AFTER REVERSAL OF CONVICTION OF LOWER OFFENSE HELD DOUBLE JEOPARDY.—Defendant was indicted in the District of Columbia for first degree felony murder [1] but was convicted of second degree murder.[2] The verdict was silent as to the greater offense. On appeal this conviction was reversed for lack of evidence, but on remand, petitioner was tried again and convicted of first degree murder. The Supreme Court of the United States, reversing this conviction, *held* that conviction of a lesser degree of the crime under an indictment for a higher degree was an acquittal of the higher degree and thus further trial for the latter was double jeopardy, a violation of the fifth amendment. *Green v. United States,* 355 U.S. 184 (1957).

At common law, a second trial for the same offense was prohibited whether the former trial resulted in an acquittal or a con-

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[24] For example, *D* is indicted, waives his right of jury trial, and is acquitted by the court alone. The waiver is defective because not "signed by the defendant in person in open court." (N.Y. CONST. art. I, § 2.) *D* is constitutionally entitled to trial by jury and the court was without power to decide a case alone unless there has been a waiver as prescribed by law. Therefore, the trial held was a nullity and a new indictment is still possible.

[25] See note 19 *supra.*

* [Editor's Note] The recent case of Scott v. McCaffrey, 139 N.Y.L.J. No. 63, p. 1, col. 8 (Sup. Ct. March 25, 1958), dealt with the problem of whether a defendant in a criminal case has the *absolute* right to waive a jury trial. Defendant who was indicted with five co-defendants was not allowed to waive, apparently on the grounds that it would bring about a severance. In a proceeding in the nature of prohibition and mandamus, the New York Supreme Court held that the state constitutional requirement of "court approval" concerns only the *intelligence* of the waiver. Where an intelligent waiver is found, it must be allowed by the trial judge. Thus, a defendant in a non-capital felony case may, by an intelligent waiver, indirectly obtain a severance which is solely in the discretion of the trial judge.

[1] "The punishment of murder in the first degree shall be death by electrocution." D.C. CODE ANN. § 22-2404 (1951).

[2] "The punishment of murder in the second degree shall be imprisonment for life, or for not less than twenty years." *Ibid.*