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I
CRIMINAL TRIALS WITHOUT A JURY IN CONNECTICUT

WILLIAM M. MALTBIE*

In 1921, the legislature of Connecticut passed a law, the second section of which provides as follows:

“In all criminal causes, prosecutions and proceedings the party accused may, if he so elect when called upon to plead, be tried by the court instead of by the jury; and in such cases the court shall have jurisdiction to hear and try such cause and render judgment and sentence thereon.”³

Aside from the fact that Connecticut thereby became one of the few states which permit those accused of crime of whatever degree to waive the customary trial by jury and to elect a trial to the court, somewhat of interest is added by reason of the circumstance that Connecticut once before tried the experiment of such a law, and quickly repealed it. In 1874, with little debate or comment, the legislature passed a statute in terms similar to that of 1921 quoted above, but in 1878, with considerable debate and some little feeling, repealed it.⁴ The burden of attack upon the law was borne by Hon. Charles B. Andrews, who was then a member of the House of Representatives, but who the next year was elected governor of the state, and upon the conclusion of two terms in that office, was appointed to the bench of the Superior Court, and subsequently to that of the Supreme Court of Errors, where he served as chief justice from 1889 to 1901. That in his argument he spoke the minds of the judges there is every reason to believe, both from his position and associations and from certain contemporaneous circumstances. There was then pending a notorious prosecution against three men who in an attempt to escape from the State Prison had killed a watchman, and of whom two had elected trial by the court and one trial by the jury. The trial of the latter had been commenced about the time the repeal bill came before the legislature for action, and a mistrial had come about due to the misconduct of one of the jurors. According to the practice then existing, two judges had presided at the trial, one of whom was Judge Carpenter;

*Justice of the Supreme Court of Errors, Hartford, Conn.

³Public Acts of 1921, Chap. 267.

⁴Enacted, Public Acts of 1874, Chap. LVI; repealed, Public Acts of 1878, Chap. LXII.

and several others had been called into consultation on the case, so that it is highly probable that the situation growing out of the choice of different modes of trial by the accused, and the possibility of varying results, was canvassed. Moreover, in *State v. Worden*, 46 Conn. 349, which came to the Supreme Court after the repeal of the law, but had been tried under it, and so involved its constitutionality, Judge Carpenter wrote the opinion. In the course of it, he said: "That the law is impolitic and unwise, especially in its application to capital cases and felonies generally, we are ready to concede to the fullest extent. We cannot believe that it is wise or expedient to place the life or liberty of any person accused of crime, even by his own consent, at the disposal of any one man or two men, so long as man is a fallible being. But that is a question for the legislature, and the legislature has reconsidered the matter, and very properly repealed the obnoxious law."

Judge Andrews' argument against the law, as it appears in a brief but apparently accurate report in the Hartford Courant of the next morning, was that it was probably unconstitutional; that it was designed to aid criminals and fathered by those interested in helping their escape from punishment; that a "most unseemly spectacle" might come about from varying results where two jointly accused of crime elected trial by differing methods; that after all, judges are not as sound triers of the issues of fact presented in criminal cases as are juries, and are apt "to be led away from strict justice by some subtle technicality of law raised by counsel for the accused"; and, "in closing he spoke of the tragedy at the State Prison resulting in the death of a watchman and said that the chief opposition to the (repealing) bill came from the counsel for the murderers." One suspects that he closed with a decided *argumentum ad hominem*, and that portion of his argument may be disregarded. So, too, the constitutionality of the law has been established for Connecticut, and it is not the purpose of the present article to discuss it.⁵ Judge Andrews' other arguments do

⁵*State v. Rankin*, 102 Conn. 46, 127 Atl. 916, following *State v. Worden*, 46 Conn. 349. To the same effect, *Edwards v. State*, 45 N. J. L. 419; *State v. Stevens*, 84 N. J. L. 561, 87 Atl. 118; *Wartner v. State*, 102 Ind. 51, 1 N. E. 65; and see the very interesting arguments of F. W. Grinnell, VIII Mass. Law Quar. 7, and IX *id.* 53 and 61, and a note, XXI Harvard Law Rev. 212. It must be confessed that the weight of authority is decidedly opposed to the right of an accused to waive a jury at least in cases more serious than misdemeanors. *Freeman v. United States*, (C. C. A.) 227 Fed. 732; *Coates v. United States*, (C. C. A.) 290 Fed. 134; *Paulsen v. People*, 195 Ill. 507, 63 N. E. 144; *State v. Williams*, 195 Iowa 374, 191 N. W. 790, following *State v. Carman*, 63 Iowa 130, 18 N. W. 691; *State v. Hataway*, 153 La. 751, 96 So. 556; *Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635; *Michaelson v. Beemer*, 72 Neb. 761, 101 N. W. 1007; *People v. Cosmo*, 205 N. Y. 91, 98 N. E. 408; *State v. Pulliam*, 184 N. C. 681, 114 S. E. 394; *State v. Smith*, 184 Wis. 664, 200 N. W. 638. In Maryland the practice of

afford a starting point from which to consider the working of the present law during the four years it has been in effect. There is, of course, no way by which any accurate tests may be applied, and so, aside from determining the relative percentages of verdicts of guilty in cases tried to the court and those tried to the jury, the method adopted was to send a questionnaire to the judges of the courts where the law is being used, to prosecutors and public defenders in those courts, and to a considerable number of attorneys who either practice in the criminal courts or might be supposed to be interested in and informed as to the actual operation of the law.

Before taking up Judge Andrews' arguments, however, it is perhaps best to follow the practice of the newspaper reporter, who sums up his story in his opening paragraph. The last question asked was: Would you favor a continuance of the system established by the law in question? To that the answers were surprising in their approach to unanimity. Of the judges, all favored a continuance of the system, although five would prefer that capital cases should be excepted, and one would also except most cases of felony. Of the prosecutors, eight were unqualifiedly favorable to the new order, two favored its continuance until it had had a more thorough trial, and two were opposed to it. Of the public defenders, all favored a continuance of the system, although one suggested a limitation to offenses where the penalty fixed by statute did not exceed five years. Of the attorneys, seventy-nine favored the new order, three thought it ought to be modified as regards trials for murder, and three were opposed to it; of the latter, however, two may properly be said to have an unusual bent for and leaning toward trials before juries in both civil and criminal cases.

To return to Judge Andrews' argument against the law, he stated that it was designed to favor the accused. Some indication of the soundness of that statement may be found in a comparison of the results of criminal trials with and without a jury. During the period since the law went into effect, the statistics at hand show with substantial accuracy that in 316 trials with a jury, there were 242 convictions, or 76 per cent, and in the same period and in the same courts, in 483 trials without a jury, there were 357 convictions, or 74 per cent. In only one court did the percentage of convictions in the latter class of cases fall substantially below that where trials were had with a jury and there the state's attorney is remarkably successful in jury trials, whether in civil or criminal cases. As the effect of the law is

waiving juries is very old and antedated statutory authority. See interesting articles by the Honorable Carroll I. Bond, Annapolis, Maryland, VI Mass. Law Quar. 89 and XI Amer. Bar Assn. Journal 699.

to give the accused an option as to the nature of the tribunal which will try him, it would seem almost self-evident that the law was, if not unduly advantageous, at least advantageous, to him, yet five of those who replied to the questionnaire denied this. The rest, however, with great unanimity, asserted its advantage to the accused, and many specified the particular kinds of cases in which that was peculiarly so, although, sooth to say, after reading over the various kinds of offenses named, one cannot but wonder a little if there was not approximate accuracy in the reply of those who said that they could not distinguish any class of cases in which the system had peculiar value. However, as would be expected; many felt that there was a great gain to the accused in a trial without a jury in cases where the nature or circumstances of the offense, or a series of offenses of one kind, had aroused public clamor and been given much newspaper publicity; or where the crime alleged was such as to cause an instinctive revolt in the minds of the jury, as sexual offenses against young girls; or where there was something in the past life, reputation or appearance of the accused calculated to cause prejudice against him in the minds of the jury. Many, again, specified cases where the issue was one rather of law than fact, or where the accused was seeking the advantage of a technical defense, or where fine distinctions had to be drawn, as between civil and criminal negligence, or between the different degrees of a crime, or as regards two or more accused who were jointly charged but unequally guilty, or in statutory offenses where conviction ought to follow only upon proof of all the elements specified in the law. So, too, others pointed to the advantage which must come where the issues or evidence were complicated, and the charge to a jury would necessarily be long and involved, pointing to the extreme unlikelihood that a jury of laymen could follow, understand and apply a lengthy and involved charge. Many felt that juries did not properly apply the presumption of innocence and the test of proof beyond a reasonable doubt, and several thought that the submission of the issue to the judge overcame the advantage which the prosecutor often has from the popular assumption that he only arraigns those whom he has himself tried and found guilty, and from his acquaintance with former jurors and the subservience of the "professional juror" to him. Advantages to the accused not so apparent were found in the opportunity afforded him, even where conviction was sure, to present in a trial to the court all the facts which might influence the final disposition of the case without the disfavor which would come from putting the state to the expense and trouble of a trial to the jury, and in the lessening

of the pressure upon the attorney for the defense to secure a plea of guilty as the best way out, where the accused feels that he is not guilty but where the chances of conviction are great and by going to trial he will encounter the same disfavor.⁶ The general scope of these considerations becomes apparent when among the specific offenses named as most likely to go to the court are violations of the motor vehicle law and of the prohibition laws; criminal negligence; assault where the issue is self-defense or several are concerned; nonsupport; fraud; false pretenses; embezzlement; breach of trust; conspiracy; forgery; arson; rape; carnal knowledge of minor females⁷; and manslaughter by automobiles.

Much of the information just summarized was secured in answer to a question as to the determining factors which led to a choice of the court as the tribunal to try the accused. Certain other answers given to this question are of interest. Of course, the ultimate question is, in which tribunal will the accused stand the best chance of acquittal, but in answering it many things are considered, those already suggested and others. Apparently it is in most instances counsel who determine the question and his own predilections enter largely into it, as his natural preference for trying cases to the jury or the court, and the like. In making his decision, generally the attorney considers also the reputation and personality of the judge, asking whether he inclines to leniency or severity, hews fast to the law or is open to the influence of sympathy or pity, and what his attitude is supposed to be toward the particular offense, or toward the prosecutor or counsel. So the per-

⁶One of the directors at the State Prison has told the writer that the hardest prisoners they have to deal with are those who plead guilty under these circumstances because of a rankling sense of injustice which preys upon their minds and causes them to feel that they have been cheated wrongfully of their liberty.

⁷One attorney says: "There is one class of criminal cases wherein the system has a peculiar value, that is, cases involving offenses against women. After seventeen years of experience in the trial of criminal cases of all kinds, and from my observation of the trial of cases tried by other lawyers, I think the greatest injustice in the administration of our criminal law has been done by juries in this peculiar class of cases, but since the advent of the new system, I find that the hysteria of sympathy which usually exists with the jury in favor of the complaining witness is absent in cases tried to the court, and that the judges weight the evidence and test the evidence of the complaining witness the same as the testimony of other witnesses and apply the same standards of judging the truthfulness of her story."

Another attorney writes: "The story of abuse coming from a lisping child witness, whose ribboned hair comes to the top of the witness box, will sweep the ordinary jury to a verdict of guilty at the conclusion of its recital and if the State's Attorney has a torn undergarment, marked Exhibit A, to wave before the jurors' eyes, no further evidence is necessary and a protest of innocence by the accused and all of the evidence, tending to prove innocence goes for naught. Such a case should be tried to a court."

sonnel of the jury or its record for the term may determine the choice. In general, if the accused has a strong case or the state a weak one, he prefers a trial to the court; but if he considers his chances of escape are slim, he prefers the jury, hoping that at least one or two may hold out for acquittal. The same considerations which lead to a choice of the judge where there is prejudice against him point to choice of the jury when he, or she, can count on sympathy or when there are extenuating circumstances not cognizable by a strict adherence to the rules of law.⁸

If there are advantages in the system for the accused, several answers to the questionnaire point out those which come to the state, in the greater expedition of business, the less time required in the trial of cases, with the consequent saving of expense, and the smaller number of appeals and reversals;⁹ and suggest the particular gain which comes in the disposition of the more trivial cases in this way. So in the case

⁸Judge Bond, in the article upon the Maryland practice already referred to, VI Mass. Law Quar. 89, thus deals with this matter: "As to the reasons which move defendants and their counsel to elect trial by the court, a judge is not the best possible informant; he is not often taken into the confidence of the defense on such points. Some of the commoner reasons are quite obvious, however. The possibility that the jury in a particular case may be unfavorably disposed toward the accused is probably the most frequent ground of the election. When, for instance, the crime has aroused much anger in the community from which the jury is chosen, or when the prisoner himself is at a disadvantage by reason of a known record, or otherwise, trial before the court alone is usually preferred. Recently a group of automobile bandits who had robbed a county bank and incidentally killed one of the officers, a crime which naturally stirred the neighborhood deeply, elected trial before the court on the charge of murder; they were all but one found guilty of murder in the first degree. Colored prisoners, who make up a large proportion of the defendants in the courts of this State, commonly prefer this sort of trial in order to avoid the possibility of racial prejudice in the jury box. Colored men charged with crimes against women nearly always elect trial by the court, I should say. . . . Trial before the court alone is often preferred when a defense is based mainly on a point of law, for the reason that in Maryland juries are judges of questions of law, as well as of questions of fact, uncontrolled by instructions from the court, and a decision on a pure question of law cannot well be obtained except by submission of the whole case to the court—once the stage of demurrer or special plea has been passed. At times I have thought the election of a court trial was made with the idea that the judge with his greater experience would penetrate a weak spot in the prosecution, or see strength in a peculiar defense, better than a jury would. . . . The judges as they go along ask questions to clear up matters for themselves. They may, without inconvenience interrupt a trial and hold it open for days until other witnesses they might like to hear are hunted up. They may hold it under advisement for days, after all the evidence is in, to reflect upon it. Sometimes the examination of witnesses suggests the existence of additional evidence which may go right to the point of final difficulty in the judge's mind and where the evidence may be on the side of the accused the judge is especially careful to bring it into the case. I have seen great benefit come to the accused from a long suspension to get such additional evidence."

⁹One attorney sums it up in this way: "If more speedy, less costly, and more dignified trials, arriving at more accurate results, are a desirable goal in the administration of justice, then the trial of criminal cases without a jury is a long step in the right direction."

of offenses of an immoral nature, the court can better curb the attendance of the morbidly curious, and avoid some unwholesome publicity. Of the prosecutors who replied only two felt that the system placed the prosecution under a handicap,¹⁰ and one placed this largely upon the ground of the difficulties which would arise should one of two jointly charged choose the jury and the other the court;¹¹ while bench and bar were almost unanimous in the view that the system did not unduly burden the state and, several were emphatic that it was a positive benefit.

Judge Andrews' argument that judges are not sound triers of the issues of fact in criminal cases finds some support in the answers to the questionnaire. The predominating feeling among the prosecutors is that juries, on the whole, reach as accurate results as do the judges. On the other hand, most of the judges feel, perhaps not unnaturally, that they can determine the question of guilt or innocence more accurately than can the jury, and of the lawyers a very large proportion, some eighty per cent, support that view. Nor is it considered by judges, prosecutors or counsel, with a few exceptions, that the system imposes an undue burden upon the judiciary, although several, including five of the judges, consider it inadvisable to ask a single judge to determine charges involving the death penalty,¹² some suggesting that at least two or three judges should preside in such cases; and a few think that others of the more serious offenses ought not to be left to the decision of one man.

¹⁰One of the most experienced prosecutors replied that the law did not burden the prosecution; "on the contrary, the expense is less and the work of trial and preparation is easier and the result is more speedily obtained."

¹¹Again quoting Judge Bond as to the practice in Maryland: "There is some difficulty in the situation which results from a difference in the elections of two or more persons jointly indicted, and who should be tried jointly. I am informed that in one of the judicial circuits of the State it has been held that both must take a jury trial if one elects it, but this is, I believe, at odds with the practice elsewhere. In the other counties it has apparently been the practice in that situation to try the prisoners separately, holding two trials; the difference in elections has been treated as compelling a severance. In Baltimore City it has been the practice, for some years, at least, to hold the joint trial unaffected by the difference; the judge and the jury have been hearing the evidence of the witnesses once for all, and while the jury has been out, instructed to confine its verdict to defendants who have elected a jury trial, the judge has rendered his verdict as to the remainder. Recently the Court of Appeals has held this city practice not permissible."

¹²I am not aware that as yet any charge of first degree murder has been tried without a jury. In that respect, the law has not had a fair trial. One wonders whether there might not develop an unfortunate situation should some notorious murder trial such as the Loeb-Leopold case in Chicago, come before a single judge for decision. On the other hand, we have had ever since 1846 a law which permits one charged with murder to plead guilty, and this makes it the duty of the judge to determine the degree of the crime, and, while it has been invoked, not rarely, there has been no substantial criticism of its operation.

To conclude in a word: The replies to the questionnaire were sufficient in number and the experience of the writers under the law so varied, that they may be taken as fairly representative of the judgment of the bench and bar of Connecticut. In the light of that judgment, there can be no doubt that the law has worked successfully and there is no reason to believe that it will not continue to do so, except, perhaps, in cases involving capital punishment.