Committee on Judiciary
Reference Paper
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SUBJECT: CONSTITUTIONALITY OF ADMINISTRATIVE ADJUDICATION

ELIMINATION OF JURY TRIALS

I. Federal

Section 2, Article III of the United States Constitution provides that "the trial of all crimes, except in cases of impeachment, shall be by jury." The Sixth Amendment provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury."

(Federal cases)

It is well established that certain minor offenses can be excepted by Congress and the legislatures from the provisions requiring a jury trial in criminal cases. In dictum in Callan v. Wilson, 127 US 540 (1887), the Court said:

> "According to many adjudged cases, arising under Constitutions which declare, generally, that the right of trial by jury shall remain inviolate, there are certain minor or petty offenses that may be proceeded against summarily, and without a jury; and, in respect to other offenses, the constitutional requirement is satisfied if the right to a trial by jury in an appellate court is accorded to the accused, Byers v. Commonwealth, 42 Pa 89, 94, affords an illustration of the first of the above classes. It was there held that while the founders of the Commonwealth of Pennsylvania brought with them to their new abode the right of trial by jury and while that mode of trial was considered the right of every Englishman, too sacred to be surrendered or taken away, summary convictions for petty offenses against statutes were always sustained and they were never supposed to be in conflict with the commonlaw right to trial by jury. So, in State v. Glenn, 54 Md 573, 600, 605, it was said that in England, notwithstanding the provision in the Magna Carta of King John, art. 46, and in that of 9 Hen. 3, chap. 29, which declares that no freeman shall be taken, imprisoned, or

> condemned but by lawful judgment of his peers, or by the law of the land, it has been the constant course of legislation in that kingdom, for centuries past, to confer summary jurisdiction upon justices of the peace for the trial and conviction of parties for minor and statutory police offenses . . . And when it is declared that the party is entitled to a speedy trial by an impartial jury, that must be understood as referring to such crimes and accusations as have, by the regular course of the law and the established modes of procedure, as theretofore practiced, been the subject of jury trial. It could never have been intended to embrace every species of accusation involving either criminal or penal consequences. So, also, in New Jersey, where the Constitution guaranteed that the right of trial by jury shall remain inviolate, the court said: Extensive and summary police powers are constantly exercised in all the States of the Union for the repression of breaches of the peace and petty offenses, and these statutes are not supposed to conflict with the Constitutional provisions securing to the citizen a trial by jury."

In Schick v. United States, 195 US 65 (1903), a case involving prosecution for violation of an oleomargarine statute with a penalty of $50, the Supreme Court said:

> "So small a penalty for violating a revenue statute indicates only a petty offense. It is not one necessarily involving any moral delinquency. The violation may have been the result of ignorance or thoughtlessness . . . . "

The Court cited with approval the reference made in the Callan case to the "many decisions of state courts, holding that the trial of petty offenses was not within any constitutional provision requiring a jury in the trial of crimes."

In a reckless driving case, the Supreme Court in District of Columbia v. Colts, 282 US 63 (1930), citing both Callan and Schick, said that the constitutional guarantee of jury trial of all crimes

> " . . . is to be interpreted in the light of the common law, according to which petty offenses might be proceeded against summarily before a magistrate sitting without a jury . . . that there may be

> many offenses called 'petty offenses' which do not rise to the degree of crimes within the meaning of Article III, and in respect of which Congress may dispense with a jury trial, is settled. Whether a given offense is to be classed as a crime, so as to require a jury trial, or as a petty offense, triable summarily without a jury, depends primarily upon the nature of the offense. The offense here charged is not merely malum prohibitum, but in its very nature is malum in se."

The Court cited with approval the distinction made by the New Jersey Court of Errors and Appeals in State v. Rodgers, 102 Atl 433 (NJ 1917), "between traffic offenses of a petty character, subject to summary proceedings without indictment and trial by jury, and those of a serious character, amounting to public nuisances indictable at common law."

The Court noted also that the defendant in Colts was "not charged merely with the comparatively slight offense of exceeding the 22 mile speed limit . . . or merely with driving recklessly . . . but with the grave offense of having driven at the forbidden rate of speed and recklessly, so as to endanger property and individuals . . . . " and held that such an offense is subject to the constitutional guaranty of trial by jury.

In District of Columbia v. Clawans, 300 US 617 (1937), the respondent was convicted of the statutory offense of engaging in a second-hand business without a license and sentenced to pay a fine of $300 and spend 60 days in jail. Under the statute, no jury trial was provided for such cases except where the fine could be more than $300 or imprisonment more than 90 days. The statute under which the respondent was convicted provided for a maximum penalty of $300

fine and 90 days in jail. The respondent had demanded and was refused a jury trial. The Court ruled that the demand for jury trial had been properly denied.

The Court cited its earlier opinions which had settled that the right of jury trial under the U. S. Constitution does not extend to every criminal proceeding. The opinion noted that at the time the Constitution was adopted numerous petty offenses were tried summarily without a jury by justices of the peace in England and by police magistrates or corresponding judicial officers in the Colonies and punished by jail, workhouse or house of correction, and said that were it not for the severity of the punishment, the offender could not, under the Court's decisions, claim a trial by jury as a matter of right. With respect to the issue of whether 90 days in jail is sufficient penalty to bring it within the class of major offenses for which a jury trial may be demanded, the Court stated:

> "If we look to the standard which prevailed at the time of the adoption of the Constitution, we find that confinement for a period of ninety days or more was not an unusual punishment for petty offenses, tried without a jury. Laying aside those for which the punishment was of a type no longer commonly employed, such as whipping, confinement in stocks and the like, and others, punished by commitment for an indefinite period, we know that there were petty offenses, triable summarily under English statutes, which carried possible sentences of imprisonment for periods from three to twelve months. At least sixteen statutes passed prior to the time of the American Revolution by the Colonies, or shortly after by the newly created States, authorized the summary punishment of petty offenses by imprisonment for three months or more. And at least eight others were punishable by imprisonment for sixth months.
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> "In the face of this history, we find it impossible to say that a ninety day penalty for a petty offense, meted out upon a trial without a jury, does not conform

> to standards which prevailed when the Constitution was adopted or was not then contemplated as appropriate notwithstanding the constitutional guaranty of a jury trial. This conclusion is unaffected by the fact that respondent is not entitled to an appeal as of right."

It can be seen, then, that as stated in these Supreme Court opinions, certain petty offenses not triable by jury at the time the Constitution was adopted may be tried in the same way under the authority of Congress and state legislatures, even where three months or more imprisonment is provided under summary convictions. Recent federal court cases have stressed the importance of the use of legislative authority in applying the rule. See, U.S. v. Martinelli, 240 F Supp 365 (1965); U.S. v. Great Eastern Lines, Inc., 89 F Supp 839 (1950); Smith v. U.S., 128 F2d 990 (5th Cir 1942).

Duncan v. Louisiana, 391 U.S. 145 (1968), and Baldwin v. New York, 399 U.S. 66 (1970), both deal with the right to a jury trial. In Duncan, the Supreme Court held that the states, even in certain misdemeanor cases, were bound to recognize an accused's right to a jury trial, and drew a distinction between "serious" and "petty" offenses, based on the severity of the possible punishment. Baldwin reaffirms the distinction between "petty" and "serious" as the basis for determining the right to a jury trial. The Court rejected the notion that a label such as "felony" or "misdemeanor" should control and noted that the most relevant criterion was the severity of the maximum authorized penalty. It concluded that "no offense can be deemed 'petty' for the purposes of the right to trial by jury where imprisonment for more than six months is authorized."

II. Oregon

Section 17 of Article I of the Oregon Constitution declares that "In all civil cases the right of Trial by Jury shall remain inviolate." Section 11 of Article I states "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed . . . . " Section 3 of Amended Article VII provides that "In actions at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . . " In addition, section 221, Chapter 836, Oregon Laws 1973, provides, in part, that "The defendant in all criminal prosecutions shall have the right to public trial by an impartial jury."

ORS 156.110 provides that "upon a plea other than a plea of guilty, if the defendant does not then demand a trial by jury, the justice shall proceed to try the issue." (This statute is made applicable to district court by ORS 156.610.)

ORS 221.349 (1): "In all prosecutions for any crime or offense defined and made punishable by any city charter or ordinance the defendant shall have the right of trial by jury, of six in number."

(Oregon cases)

In the early case of Wong v. City of Astoria, 13 Or 538, 11 P 295 (1886), the Supreme Court held that violation of a municipal ordinance was not considered a crime and constitutional guarantees, whether state or federal, applicable to criminal cases did not apply. Guarantees held to apply only to violations of state law.

The next case to consider a constitutional issue in regards to a municipal ordinance was Portland v. Erickson, 39 Or 6, 62 P 753 (1900). The Court held that where an accused is proceeded against by a complaint and warrant and the court is authorized to inflict the punishment of imprisonment, the proceeding is criminal in the sense that the accused cannot be jeopardized twice for the same offense, whether the proceeding be by the state or a municipality, saying:

> "This court held in Wong v. City of Astoria, 13 Or 538 (11 P 295), a case under a city ordinance, whereby the defendant was sentenced to pay a fine, and to be imprisoned in default of payment, that such an action was not a criminal prosecution within the meaning of the state constitution, Article I, section 11, which accords to the accused the right of trial by jury. The holding is, however, by no means decisive of the present controversy. That decision was based upon the idea, promulgated in some other jurisdictions, that the proceeding must be regarded as a civil action for the recovery of a fine, penalty, or forfeiture. While this may be proper and regular, yet where, under statute and ordinances, enforcement is sought by resort to proceedings authorized and carried on in all respects as criminal cases are prosecuted--by complaint and warrant--and where the court is empowered to inflict upon the accused not only a fine, which may be followed by imprisonment for its nonpayment, but also imprisonment aside from any pecuniary penalty or forfeiture, such proceeding becomes so far criminal in its nature, and the violation of the ordinance such an offense, that a person acquitted thereof cannot again be put in jeopardy."

However, in Stevenson v. Holzman, 254 Or 94, 102, 458 P2d 414 (1969), the Oregon Supreme Court held that an indigent person accused of violating a municipal ordinance has a constitutional right to the assistance of counsel at public expense. "We hold that no person may be deprived of his liberty who has been denied the assistance

of counsel as guaranteed by the Sixth Amendment. This holding is applicable to all criminal prosecutions, including prosecutions for violations of municipal ordinances. The denial of the assistance of counsel will preclude the imposition of a jail sentence."

State v. Mayes, 245 Or 179, 421 P2d 385 (1966), held that the statute making the order for dismissal of charge or action a bar to another prosecution for the same crime if it is a misdemeanor but not if it is a felony applies alike to city and state prosecutions whenever the case is dismissed in prosecution for offense carrying possibility of jail sentence and the same facts are alleged in both prosecutions. The opinion states:

> "This court recognized in 1900 that when 'the court is empowered to inflict upon the accused not only a fine, which may be followed by imprisonment for its nonpayment, but also imprisonment aside from any pecuniary penalty or forfeiture * * * , ' the proceeding is criminal in nature insofar as procedural due process is concerned (citing Portland v. Erickson). Despite inconsistent dicta in later cases, Erickson is still the law in this state." (At 184.)

The Oregon Court of Appeals recently said this about the Wong holding:

> " . . . that constitutional guarantees applicable to criminal cases do not apply to prosecutions for violations of a city ordinance having as a possible consequence loss of liberty can no longer be considered the law of Oregon." Miller v. Jordan, 3 Or App 134, 473 P2d 841 (1970).

Cornelison v. Seabold, et al, 254 Or 401, 460 P2d 1009 (1969), involved a case in which the plaintiff claimed that in a case brought under the Workmen's Compensation Act the trial court erred by not allowing a jury to try the issue raised by the supplemental answers.

The statute (ORS 656.595 (3)) provided: "A challenge to the right to bring such third party action shall be made by supplemental pleadings only, and such challenge shall be determined by the Court as a matter of law." The plaintiff contended that this statute must be construed to permit the use of a jury to try the factual aspects of the case; and, if not so construed would be contrary to Article VII, section 3 of the Oregon Constitution.

The Supreme Court affirmed, holding that whether the plaintiff's sole remedy was that provided by the Workmen's Compensation Act was for trial by the Court without a jury. In part, the Supreme Court said:

> "Article I, Section 17 and Article VII, Section 3 of the Oregon Constitution both preserve the right of jury trial. The language of these sections is not particularly helpful in determining their scope. We have held that both provisions 'assure trial by jury in the classes of cases wherein the right was customary at the time the Constitution was adopted,' Moore Mill & Lbr. Co. v. Foster, 216 Or 204, 225, 336 P2d 39, 337 P2d 810 (1959), or 'cases of like nature,' State v. 1920 Studebaker Touring Car, 120 Or 254, 263, 251 P 701, 50 ALR 81 (1927)." (At 404, 405.)

A number of previous similar cases and their holdings were reviewed in the opinion: A commitment for mental incompetency does not require a jury trial because the statute at the time of adoption of the Oregon Constitution did not so require. In re Idleman's Commitment, 146 Or 13, 27 P2d 305 (1934); the issue of whether a relative is responsible for welfare payments made to another relative does not require a jury trial because such an issue had no common law antecedent. Mallett v. Luihn, 206 Or 678, 294 P2d 871 (1956); the Oregon Constitution does not require that the issue of necessity

in a private condemnation proceeding be tried before a jury because a jury did not try this issue at common law. Moore Mill & Lbr. Co. v. Foster, supra.

The Court then noted that, "on the other hand, we held in State v. 1920 Studebaker Touring Car * * * that a statute authorizing a court to declare that an automobile be forfeit to the state was contrary to the Oregon constitutional guarantee of a right of trial by jury." The rationale in that holding was that a seizure of property as a penalty for the violation of a law was at common law triable by a jury and, therefore, in the statutory proceeding the Oregon Constitution preserved the right to trial by jury.

III. Summary and Conclusion

The U. S. Supreme Court has consistently held that certain petty offenses not triable by jury at the time the Constitution was adopted may be tried in the same manner either by Act of Congress or state statute. The Court has drawn a distinction between "serious" and "petty" offenses based on the severity of punishment imposed, and has held that no offense can be considered as being petty for the purposes of the right to a jury trial if more than six months imprisonment is authorized.

With respect to Article I, Section 17 and Article VII, Section 3 of the Oregon Constitution, the "civil case" jury trial provisions, the Oregon Supreme Court has held that both provisions assure trial by jury in the classes of cases wherein the right was customary under common law. Regarding Article I, Section 11, the "criminal

prosecution" jury trial provision, although the Oregon Supreme Court has not ruled directly on the question, its holdings relating to constitutional guarantees of right to counsel and protection against double jeopardy have been founded upon the principle that a proceeding is criminal in nature for the purposes of procedural due process if, as a consequence thereof, a person may be deprived of his liberty.

It would appear, therefore, that an "administrative adjudication" system that provided for a non-jury method of hearing traffic cases would violate neither the U. S. constitutional provisions relating to trial by jury nor those of the Oregon Constitution so long as the classification of the offenses or the penalties authorized thereunder did not include the possibility of imprisonment.