Chicago-Kent Law Review

Volume 22 | Issue 2 Article 3

March 1944

Notes and Comments

William F. Zacharias

E O. Daw

H. Yorkmark

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

 Part of the Law Commons

Recommended Citation

William F. Zacharias, E O. Daw & H. Yorkmark, *Notes and Comments*, 22 Chi.-Kent L. Rev. 138 (1944).
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol22/iss2/3

This Notes is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.

NOTES AND COMMENTS

Waiver of Jury in Criminal Cases

While trial by jury in criminal cases is guaranteed both by the Federal and the great majority of state constitutions,[1] express treatment of the right to waive such method of trial is to be found in only eight of the fundamental laws of the American states. Three such provisions were drafted before the turn of the century,[2] but during the last two decades an accelerated movement toward constitutional revision on this point has been observed.

When Vermont changed its fundamental law in 1924, it permitted waiver of jury trial in cases "not punishable by death or imprisonment in the State prison" provided both parties consented thereto.[3] Virginia was the first to permit dispensation of jury trial in all criminal cases, but it made such waiver conditioned upon the consent of the parties and the concurrence of the trial court.[4] The California amendment of 1928, applying to all criminal cases, requires consent of both sides but is express only as to the manner of the accused's waiver of jury trial.[5] In 1934, Oregon provided that waiver was possible in all except capital cases, but required the trial judge rather than the prosecutor to consent thereto.[6] The latest expression on the subject is contained in the New York Constitution of 1938 which, like that of Oregon, limits the waiver

1 See analysis by Oppenheim, Waiver of Trial by Jury in Criminal Cases, 25 Mich. L. Rev. 695 (1927).

2 The Minn. Const. 1857, Art. I, §4, declares: "The right of trial by jury shall remain inviolate . . . but a jury trial may be waived by the parties in all cases in the manner prescribed by law. . . ." See Thorpe, American Charters, Constitutions and Organic Laws (Washington, 1909), IV, 1992. The Mont. Const. 1889, Art. III, §23, states: "The right of trial by jury shall be secured to all . . . but . . . in all criminal cases not amounting to felony . . . by consent of the parties expressed in such manner as the law may prescribe, a trial by jury may be waived. . . ." Thorpe, op. cit., IV, 2303. When Idaho adopted its constitution in 1890 it inserted in Art. I, §7, the words: "A trial by jury may be waived in all criminal cases not amounting to felony by the consent of both parties, expressed in open court. . . ." Thorpe, op. cit., II, 919.

3 Vt. Const. 1793, Ch. I, Art. 10, as amended March 4, 1924. Waiver is complete whenever ". . . the accused, with the consent of the prosecuting officer entered of record, may in open court or by a writing signed by him and filed with the court, waive his right to a jury trial and submit the issue of his guilt to determination and judgment of the court without a jury." See the most recent compilation, Constitutions of the States and United States, prepared for the New York State Constitutional Convention of 1938 by Mott and Hindman (Albany, 1938), p. 1567. For sake of brevity such work is hereafter cited: N.Y.S.C. p. —.

4 Va. Const. 1902, Art. I, §8, as amended June 19, 1928: N.Y.S.C. p. 1579.

5 Cal. Const. 1879, Art. I, §7, as amended November 6, 1928 (N.Y.S.C. p. 139), states: "A trial by jury may be waived . . . by the consent of both parties, expressed in open court by the defendant and his counsel. . . ." As originally written in 1879, waiver was limited to cases not amounting to a felony: Thorpe, op. cit., I, 413.

6 Ore. Const. 1859, Art. I, §11, as amended May 18, 1934: N.Y.S.C. p. 1299. The waiver must be in writing.

to non-capital cases and requires concurrence therein by the trial judge.[7] A ninth state, Louisiana, in direct contrast to the others, has moved in the direction of minimizing the use of jury trial by ordering trial by the court, or by a jury of less than twelve where the penalty is "not necessarily imprisonment at hard labor, or death."[8]

One rather unique fact stands out in all such treatment. Though the guarantee is usually worded so as to provide the accused with the privilege of trial by jury,[9] he is not permitted to waive such privilege by his own unilateral act, but must secure the consent of another, whether counsel, prosecutor, or trial judge, in order to part with the same.[10] Other constitutional safeguards such as the rights of confrontation, cross-examination, counsel, freedom from self-incrimination and the like may be parted with at will, but not so as to trial by jury. The fallacy in such position would seem to spring from a confused understanding of the true historical nature of the right to trial by jury.

Methods of trial in criminal cases have changed considerably in the course of the history of Anglo-American law. The earliest form seems to have involved a seizure on hue and cry, whereupon the hand-having thief or murderer, without being allowed one word in defense, was promptly and summarily hanged, beheaded or precipitated from the nearest cliff.[11] If not so seized, the offender was appealed by the victim or his nearest relative[12] and, upon submitting to the tribunal, was required to answer by oath-helpers.[13] If he proved contumacious, he was subjected to outlawry.[14] An accused person who failed in his oath had to go to one of the forms of ordeal,[15] though at a later time he might claim the right to trial by combat.[16] Certainly, in that period trial by jury was a thing unknown, although a body of accusation might be found on whose word the defendant might be compelled to exculpate himself by ordeal or compurgation.[17]

[7] N. Y. Const. 1938, Art. I, §2, in Thompson, Consol. Laws, I, xxxv. The waiver takes the form of "a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction" to try the offence.

[8] La. Const. 1921, Art. I, §9: N.Y.S.C. p. 568. For variations in the size of jury, depending on the nature of punishment, see Art. VII, §41 (N.Y.S.C. p. 614).

[9] See Oppenheim, op. cit., p. 701 et seq.

[10] The necessity for mutual consent is best illustrated by the language of Justice Sutherland, in Patton v. United States, 281 U. S. 276 at 312, 50 S. Ct. 253, 74 L. Ed. 854 at 870 (1930), who said: "In affirming the power of the defendant . . . to waive a trial by . . . jury . . . we do not mean to hold that the waiver must be put into effect at all events . . . Trial by jury is the normal and . . . preferable mode of disposing of issues of fact in criminal cases. . . . Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact-finding body . . . is of such importance . . . that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had. . . ."

[11] Pollock and Maitland, History of English Law (Cambridge, 1911), II, 579.

[12] Blackstone, Com. IV, 312; Glanville (Beams Trans.), Book XIV, ch. 3; Britton (Nichol's Trans.), I, *43b; Mirrour of Justices, ch. 2, §15.

[13] Pollock and Maitland, op. cit., I, 39.

[14] Ibid., II, 580 et seq. [15] Ibid., I, 39.

[16] Ibid., I, 39, 50 and 74. [17] Ibid., I, 142.

The idea of trial by jury, developing from the Norman "inquest," seems first to have been used by the king to relieve himself from the necessity of trial by battle or ordeal since it permitted him to rely on the verdict of the neighbors[18] rather than upon the uncouth methods utilized by the common people.[19] Older methods, used in connection with the private appeal, continued until much later,[20] so that it was not until well into the twelfth century that the royal jury became a definite part of the criminal tribunal. Even then, the defendant's right to choose between the newer and older methods required that his sanction be obtained before trial by jury was possible,[21] although the choice might be hastened in the right direction by the use of *peine et forte dure*.[22] It would seem, then, from its historical development, that trial by jury in a criminal case might well be regarded, at least originally, as a personal privilege.[23]

As the older methods gradually disappeared and the jury survived as the sole fact-finding body, it is but to be expected that ideas would change, so that, from a privileged method of ascertaining the truth, the jury eventually became regarded as a necessary and integral part of the trial body.[24] Impetus in that direction may have been added by Magna Carta which required that "No freeman shall be taken, or imprisoned . . . or any otherwise destroyed . . . save by lawful judgment of his peers or by the law of the land."[25] Certain it is that a later English court was led to say that every criminal case must be tried before a jury unless, for the newer statutory offenses, some other form of trial was directed.[26] Though not subjected to the restraints of a written constitution, the English courts have persisted in this view and insist upon the ingrained method of trying an accused before a jury unless, by plea of guilty, trial in any form is made unnecessary,[27] or, by acceptance of a plea of

18 Ibid., I, 141.

19 The common people might, however, purchase the right to an inquest by a jury. See, for example, Select Pleas of the Crown (A.D. 1200-1225), in 1 Selden Soc. 26, case 59, where one Bonefand offered the king a mark for an inquest. The practice led eventually to the provision in Magna Carta which commences "to none will we sell" right and justice.

20 The appeal was finally abolished in England by statute in 1819: see 59 Geo. III, c. 46. Maitland and Montague, A Sketch of English Legal History, p. 62, note the last attempt at its use. It never existed as a method of trial in the United States.

21 Thayer, A Preliminary Treatise on Evidence at the Common Law (Boston, 1898), pp. 26-7.

22 Thayer, op. cit., pp. 73-4, notes that the practice was sanctioned by 3 Edw. I, c. 12 (1275), for "notorious felons . . . who will not put themselves on inquests for felonies. . . ."

23 Even in the early period, however, certain cases were handled by summary procedure. See Pollock and Maitland, op. cit., II, 652.

24 Holt, K. B. 403, 90 Eng. Rep. 1122 (1698), contains the statement ". . . that it was the opinion of all the Judges of England, upon debate between them, that in all capital cases, a juror cannot be withdrawn, though the parties consent to it. . . ."

25 Blackstone, Com. IV, 424; Stubbs, Select Charters (Oxford, 1900), II, 301.

26 The Queen v. Sturney, 7 Mod. 99, 87 Eng. Rep. 1121 (1702); see also Halsbury's Laws of England, Vol. 9, p. 155.

27 Rex v. Ingleson, 1 K.B. [1915] 512.

nolo contendere, the accused places himself upon the mercy of the court.[28]

During the colonial period in this country, divergent views as to the necessity for trial by jury appear to have been followed. In theocratic New England the accused seems to have been given a choice between trial by bench or by jury. Records exist in that area of criminal trials being conducted by judge alone even as late as 1685 A.D.[29] The organic laws of the Pennsylvania colony,[30] as well as those of the two Jerseys,[31] however, specifically required trial by jury, while the charters of the other colonies forbade the adoption of any laws inconsistent with those of England.[32] Despite such early differences, the generally accepted criminal tribunal, by the time of the Revolution, had taken the common form of judge and jury. Efforts by England to substitute other forms or to transfer cases to the admiralty courts where juries, as such, were not utilized[33] led to colonial resistance culminating in the complaint, set forth in the Declaration of Independence, that the English monarch had given assent to ". . . pretended legislation . . . depriving us, in many cases, of the benefits of trial by jury." That trial by jury was a "benefit" went without saying, since it undoubtedly constituted a worthwhile protection against tyrannical judges sent from England. But it should be noticed that no claim was advanced that the accused must be tried by jury at all events.

It is not to be wondered, therefore, that following the Revolution the guarantee of trial by jury, both in civil and criminal cases, should be written into the federal and the state constitutions to insure that the benefits thereof should not be denied. The language of the Sixth Amendment to the United States Constitution appears to have served as a model for similar provisions in at least thirty-one of the state constitu-

[28] Regina v. Templeman, 1 Salk. 55, 91 Eng. Rep. 54 (1702). See also Hudson v. United States, 272 U. S. 451, 47 S. Ct. 127, 71 L. Ed. 347 (1926).

[29] See Griswold, The Historical Development of Waiver of Jury Trial in Criminal Cases, 20 Va. L. Rev. 655 (1934), particularly p. 663. The fundamental law of the New Haven (Connecticut) colony, adopted in 1643, seems to have contemplated trial by a bench composed of all the magistrates. See Thorpe, op. cit., I, 527.

[30] Frame of Government of Pennsylvania (1682), Art. VIII, provided: "That all trials shall be by twelve men, and as near as may be, peers or equals, and of the neighborhood. . . ." See Thorpe, op. cit., V, 3060. Griswold, op. cit., 666, however, notes instances of bench trials in Pennsylvania.

[31] The Fundamental Laws of West New Jersey (1676), Ch. XVII, declared: "That no Proprietor, freeholder or inhabitant . . . shall be deprived or condemned of life, limb, liberty . . . without a due tryal, and judgment passed by twelve good and lawful men of his neighborhood first had . . ." See Thorpe, op. cit., V, 2549. The language of that for East New Jersey (1683) follows closely the wording of Magna Carta. See Art. XIX thereof as quoted in Thorpe, op. cit., V, 2580.

[32] See, for example, the Second Charter of Virginia (1609), in Thorpe, op. cit., VII, 3801.

[33] See opinion by Stone, Ch. J., in People v. Scornavache, 347 Ill. 403 at 410, 179 N.E. 909 at 912 (1932).

tions although some modification in the language thereof is found.[34] It would seem from the phraseology, as well from the fact that such guarantee usually appears in the Bill of Rights, that the design of the framers thereof was to furnish the accused with a privilege to demand trial by jury rather than to create such method of trial as an integral part of the governmental framework. In contrast thereto, the language in some eight state constitutions would seem to require trial by jury in criminal cases for the statement is seemingly made in an imperative fashion,[35] but nowhere, except in Massachusetts,[36] is there any precise prohibition against legislative interference with the privilege.[37]

Except for those states where the constitutional language might be considered mandatory, or where waiver is expressly sanctioned, the fundamental position, then, would seem to place the accused person's right to trial by jury upon the same ground as the other privileges, i. e. one that is personal to himself, hence one which he may insist upon or dispense with as he chooses. It has, however, been argued that, unlike in civil actions where the only interests involved are those of private persons, the state has an interest in every criminal case to see that the rights of the defendant are preserved since the life and liberty of its citizens are in question.[38] Such an argument would tend to indicate that waiver of jury trial should be denied under any circumstance, but the pressure for prompt disposition of criminal cases requires some other solution to the problem.

Illinois, with a constitutional provision similar to that of the majority of states,[39] has striven toward a solution short of constitutional revision, but efforts toward that end appear to have been thwarted by the recent decision in *People* v. *Scott*.[40] It would be well first, however, to trace

[34] See the provisions of all state constitutions as printed in N.Y.S.C. except those for the states enumerated in notes 2 to 8, inclusive, ante, and in notes 35 and 36, post. The modifications referred to consist chiefly in substituting the words "the accused has [hath] a right" or "the accused shall have a [the] right" for the phrase "the accused shall enjoy the right" as it appears in the Sixth Amendment.

[35] See Ga. Const. 1877, Art. I, §1, para. v (N.Y.S.C. 358); N. H. Const. 1784, Bill of Rights, Art. 15 (N.Y.S.C. 1035); N. C. Const. 1876, Art. I, §13 (N.Y.S.C. 1137); N. D. Const. 1889, Art. I, §§7 and 13 (N.Y.S.C. 1155-6); Nev. Const. 1864, Art. I, §3 (N.Y.S.C. 1008); Tex. Const. 1876, Art. I, §10 (N.Y.S.C. 1490); W. Va. Const. 1872, Art. III, §14 (N.Y.S.C. 1659). See also note 36, post.

[36] Mass. Const. 1790, Dec. of Rights, Art. XII (N.Y.S.C. 768), states: "No subject shall be held to answer for any crimes or offence, until the same is fully . . . described to him . . . And the legislature shall not make any law that shall subject any person to a capital or infamous punishment . . . without trial by jury."

[37] The balance of the state constitutional provisions on the subject are considered ante, notes 2 to 8, inclusive.

[38] See the opinion of Strong, J., in Cancemi v. People, 18 N. Y. 128 (1858), particularly pp. 135-7.

[39] Ill. Const. 1870, Art. II, §§5 and 9, are substantially the same as Ill. Const. 1848, Art XIII, §§6 and 9, or the earlier provisions in Ill. Const. 1818, Art VIII, §§6 and 9.

[40] 383 Ill. 122, 48 N.E. (2d) 530 (1943).

briefly the stages of development that led to such decision. From statehood onward to 1930, criminal cases were tried with juries in the apparent belief that since the jury was judge of law and fact, no competent tribunal existed to try an accused unless it included twelve of his peers. Such view was reinforced by the decision in *Harris* v. *People*[41] where an attempted waiver of jury was nullified on the ground that jurisdiction could not be conferred by consent. The concept that jury trial in criminal cases was as much a part of the framework of government as, say, the separation of powers doctrine was thus stamped into Illinois law.

Subsequent thereto, the United States Supreme Court permitted trial by a jury of less than twelve with the defendant's consent.[42] Such decision raised the obvious corollary that, if the accused could waive part of a jury, what possible reason could exist to prevent him from waiving the entire panel. Answer to that question was given but recently by the federal Supreme Court through the decision in *Adams* v. *United States*[43] which approved waiver of a full jury provided the cautionary measures suggested in the Patton case[44] were observed, but in the meantime an assault upon the Harris decision had been made in Illinois.

In 1930, when deciding *People ex rel. Swanson* v. *Fisher*,[45] the Illinois Supreme Court concluded that the existence of a jury did not go to the jurisdictional constituents of a criminal tribunal, hence the same, being a matter of privilege, might be waived.[46] Had the matter remained on that plane, logic would have supported free waiver of the privilege by the accused at his option. Instead, the court, by the four-to-three decision in *People* v. *Scornavache*,[47] added the unsound requirement[48] that before a jury could be dispensed with the state, acting through the

41 128 Ill. 585, 21 N.E. 563 (1889).

42 Patton v. United States, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854 (1930).

43 317 U. S. 269, 63 S. Ct. 236, 87 L. Ed. (adv.) 209 (1942). The waiver was later held ineffective because not intelligently given. See United States v. Adams, — U. S. —, 64 S Ct. 14, 88 L. Ed. (adv.) 16 (1943).

44 Justice Sutherland there said: ". . . before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from the mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity." See 281 U. S. 276 at 312, 50 S. Ct. 253, 74 L. Ed. 854 at 870. The suggestion is reflected in proposed Rule 21(a) of Federal Rules of Criminal Procedure (Washingon, 1943), 110.

45 340 Ill. 250, 172 N.E. 722 (1930).

46 The absence of necessity for jury trial was made clearer by the decision in People v. Bruner, 343 Ill. 146, 175 N.E. 400 (1931), which declared unconstitutional that provision of the Criminal Code which purported to make the jury a judge of law as well as of fact. See Cahill Ill. Rev. Stat. 1931, Ch. 38, §764.

47 347 Ill. 403, 179 N.E. 909, 79 A. L. R. 553 (1931).

48 The requirement seems unsound since, if the privilege of trial by jury is truly a personal one, the accused alone should determine whether to demand it or not; if it is a jurisdictional requirement, neither side could waive it. See State v. Woodling, 53 Minn. 142, 54 N.W. 1068 (1893).

local prosecuting attorney, must concur therein. Such decision was predicated on the ground that both the state and the accused were entitled to trial by jury, hence both must concur in the waiver. Where the state procured such right is not apparent,[49] but, assuming it does exist, waiver on joint consent was to be permitted.

To effectuate such waiver, the Illinois legislature in 1941 passed a simple amendment to the Criminal Code which stated: ". . . provided, that in any case where the defendant pleads guilty or waives a jury, the cause shall be heard and determined by the court without a jury."[50] By it, the state announced its willingness to concur in advance with the request of any accused person who sought to waive his constitutional privilege to trial by jury. It was this statute which led the Illinois Supreme Court, in the Scott case, to assert that the legislature was improperly interfering with the exercise of the judicial power since a judge "would be handicapped or limited in the performance of his judicial duties."[51] In support of such view, the court indicated that cases might well arise where it would be improper for a judge to try the case himself, and yet be compelled to do so if the defendant would waive a jury and so require it.

No one would contend that the legislature possesses the power to interfere with the judicial department,[52] but just wherein would lie the suggested interference and impropriety is not clear. Supposing it to be that the trial judge was, in some way, interested or otherwise disqualified, the obvious answer would be to direct a change of venue or secure a re-assignment of the case. It could hardly be any more "improper" for a judge to hear and determine the facts in a criminal case than in a civil one,[53] so one is left to wonder just wherein the interference occurs. It might be that trial by the court would be "improper" because too much responsibility would be thrust on the court. True the burden would be greater than in the usual jury trial but would it be an undue one? Such argument was once answered by the words: "It is unnecessary to do more than remark that too much cannot be done to break down the false notion that our judges are mere umpires in a legal contest rather than active participants responsible for a criminal trial on the merits."[54]

[49] See dissent by DeYoung, J., concurred in by Dunn and Duncan, JJ., in which appears the statement: "The defendant's waiver of a jury trial cannot therefore 'deprive the prosecution' of that which it never possessed. . . ." See 347 Ill. 403 at 421, 179 N.E. 909 at 915.

[50] Laws 1941, I, 574; Ill. Rev. Stat. 1943, Ch. 38, §736.

[51] 383 Ill. 122 at 126, 48 N.E. (2d) 530 at 532.

[52] Ill. Const. 1870, Art. III.

[53] Such is the judicial duty when the private litigants fail to demand a jury trial. It is noteworthy that the court which decided the Scott case at the same time handed down the decision in Stephens v. Kasten, 383 Ill. 127, 48 N.E. (2d) 508 (1943), holding constitutional Section 64 of the Civil Practice Act, Ill. Rev. Stat. 1943, Ch. 110, §188, which deals with waiver of jury in civil cases. The court noted that Justice Gunn, who wrote the opinion in the Scott case, took no part in the consideration or decision of the Stephens case: 383 Ill. 127 at 135, 48 N.E. (2d) 508 at 512.

[54] Oppenheim, op. cit., 735.

Calling upon the judges to assume such burden hardly appears to be improper, and if it is, serious doubt is cast upon the validity of legislation dealing with waiver of jury in civil cases which, in effect, forces the trial judge to determine the facts as well as the law whether he likes it or not.

Since the Illinois Supreme Court is unlikely to reverse itself,[55] unless given a chance to pass on the question by the adoption of another statute more clearly setting forth the state's desire to dispense with trial by jury where such is also the choice of the defendant, the only alternative would seem to lie in the direction of an amendment to the state constitution. In that regard, it might be well to give serious consideration to a proposed section of a model state constitution drafted by the Committee on State Government of the National Municipal League. It reads in part: "The right of trial by jury in all criminal cases shall remain inviolate; but a jury trial may be waived by the accused in any criminal case . . . as may be prescribed by law."[56] Tacit therein is a clear recognition of the fact that trial by jury in criminal cases is purely a matter of personal privilege of the accused, though permitting legal regulation of the practice to insure an intelligent exercise thereof. If it be urged that an accused person, in ignorance and awe of the law, may unwittingly waive a valuable right, protection may be provided by directing that the trial judge expressly advise him of his right to trial by jury[57] and then accept such waiver only if it is freely and understandingly given.

W. F. ZACHARIAS

PRIORITY BETWEEN SUCCESSIVE TRUST RECEIPTS

A note appeared in a recent issue of the CHICAGO-KENT LAW REVIEW on the Appellate Court decision in the case of *Donn* v. *Auto Dealers Investment Company*.[1] Leave to appeal having been granted, the Supreme Court recently reversed the Appellate Court decision and affirmed the judgment of the trial court dismissing the suit[2] on the ground that the mere filing of a statement of intention to engage in trust receipt transactions is not enough to give the person filing the same an inchoate security interest but that no lien can be acquired until funds are actually advanced.

Attention was previously called to the fact that the analogies relied on by the Appellate Court were unsound, since a clear distinction existed between a mechanic under contract to improve property and an entruster who merely "expected" to advance money through a trust receipt

55 Boylan v. Chicago Title & Trust Co., 240 Ill. 413, 88 N.E. 981 (1909).

56 The model constitution is printed in an appendix to N.Y.S.C. 1815 et seq. The quoted portion appears on 1816.

57 See, for example, the manner of accepting a plea of guilty as laid down in Ill. Rev. Stat. 1943, Ch. 38, §732.

1 318 Ill. App. 95, 47 N. E. (2d) 568 (1943), noted in 22 CHICAGO-KENT LAW REVIEW 99.

2 Donn v. Auto Dealers Co., 385 Ill. 211, 52 N.E. (2d) 695 (1944).

transaction.[3] The Supreme Court, in its opinion, also rejected such analogies, pointing out that the security interest of the entruster does not arise until the trust receipt is actually given in exchange for funds then in fact advanced. Statements in the opinion of the Supreme Court would further tend to indicate that the entruster who has given a firm commitment to advance funds would be no better off than one who merely filed a statement of intention without being bound to extend credit. In that regard it would be well to note that the trust receipt, although a form of security device, is not a type of mortgage hence does not fall in the class of mortgages given to secure future advances.[4]

Hereafter, then, it must be understood that the filing of a statement of intention will serve only as a notice of the possibility that the rights of an entruster may exist, hence will require inquiry on the part of persons subsequently concerned in doing business with the trustee. In the same way, one who has filed such a statement will be obliged to investigate before entering into new transactions in order to ascertain if the trustee has, in the meantime, evinced a desire to do business with others. If so, warning is thereby given that further inquiry is necessary. The court intimates that inquiry of the trustee will suffice on the theory that he will truthfully divulge the facts regarding prior transactions, if any, under fear of penalty for a false statement.[5] In that way undue delay in the normal flow of business might be avoided and the purpose of trust-receipt financing be upheld. Financiers would be wise, however, to direct their inquiries elsewhere since a false statement by the trustee could hardly jeopardize the existing rights of one who had in fact made an earlier advance.[6]

E. O. DAW

CIVIL PRACTICE ACT CASES

PLEADING—REPLICATION OR REPLY—WHETHER OR NOT PLAINTIFF MAY, THROUGH A REPLY, SUPPLY OMISSIONS IN A COMPLAINT OR TAKE A POSITION INCONSISTENT WITH THE THEORY OF HIS EARLIER PLEADINGS—In *Spence* v. *Washington National Insurance Company*,[1] the plaintiff sued on an accident insurance policy which covered injury arising from the wrecking or disabling of any "private passenger type automobile" in which the insured might be riding, or driving, at the time of an accident. Plaintiff's complaint alleged that the insured was driving a "private passenger type automobile of the exclusively pleasure type" when injured. Defendant's answer, among other things, denied this allegation but did not set up any new matter. Plaintiff, nevertheless, filed a reply in which it was charged that, although the motor vehicle involved was one of the class commonly

3 22 CHICAGO-KENT LAW REVIEW 99, particularly p. 100.

4 Ill. Rev. Stat. 1943, Ch. 121½, §179, declares that the trust receipt shall not serve as protection against purchasers and creditors for "obligations of the trustee to be subsequently created."

5 Ill. Rev. Stat. 1943, Ch. 38, §254.

6 Only an estoppel, or an express agreement for subordination, could operate to destroy the prior right: Piot v. Davis, 241 Ill. 434, 89 N.E. 676 (1909).

1 320 Ill. App. 149, 50 N.E. (2d) 128 (1943).

known as a "pick-up" truck, still it was, as to the insured, a pleasure type vehicle and was so exclusively used by him. It was also alleged that all this was known to defendant's agent at the time the policy was issued. Defendant moved to strike such reply, but the trial court reserved its ruling thereon until after the hearing in the case and, at that time, denied the motion. On appeal from a judgment for plaintiff, it was claimed that the denial of such motion was error. Finding such action was erroneous, the court reversed the judgment without remanding the cause.[2]

In holding that the reply should have been stricken, the court predicated its decision on three grounds: first, that as no new matter appeared in the defendant's answer a reply was unnecessary;[3] second, that the reply was not filed in apt time as required by rule of court;[4] and third, the reply was defective because it deviated from the theory of the complaint. It is the last of these points which makes the case of interest for it presents the first clear expression on the subject since the adoption of the Civil Practice Act, though the holding might be regarded as unnecessary since either of the other grounds would have justified reversal.

Under the common-law system of pleading, a replication to a plea which was inconsistent with the theory of the declaration involved the fault of departure. Such fault was said to occur when the statement of matter in a subsequent pleading by a party was not "pursuant to his former" pleading and which did not "support and fortify it."[5] An Illinois court once said it arose when "a party quits or departs from the case or defense he has first made and has recourse to another. . . [as] where a replication contains matter not pursuant to the declaration and which does not support or fortify the declaration."[6] Condemnation of the fault was based on the fact that, if such shift in theory was permitted, the parties would never arrive at an issue.[7] To justify the use of a demurrer, though, the inconsistency had to be such that it changed the theory of the plaintiff's case, for a trivial variation was not enough to warrant so severe a penalty.[8]

The substitution of the reply in place of the replication, pursuant

[2] The reviewing court found that the car in question was not one of the type covered by the policy, recognizing a commercial as well as a statutory distinction between the two kinds. See Ill. Rev. Stat. 1943, Ch. 95½, §§2, 8, and 9, and the decision in Lloyd v. Columbus Mut. Life Ins. Co., 200 N. C. 722, 158 S.E. 386 (1931).

[3] Ill. Rev. Stat. 1943, Ch. 110, §156.

[4] Ill. Rev. Stat. 1943, Ch. 110, §259.8(3), requires that a reply be filed within twenty days after the last day allowed for filing the answer. In the instant case the reply was not filed until much later, and then without permission from the trial court.

[5] Richards v. Hodges, 2 Wms. Saund. 83 at 84, 85 Eng. Rep. 751 at 753 (1670).

[6] Weiss v. Sandoval Zinc Co., 165 Ill. App. 417 at 418 (1911). See also O'Brien v. Chicago City Ry. Co., 220 Ill. App. 107 (1920).

[7] Richards v. Hodges, 2 Wms. Saund. 83 at 84, 85 Eng. Rep. 751 at 753 (1670). Of course, if defendant pleaded to the replication he would be regarded as waiving the fault and agreeing to the change in theory: St. Paul Fire & Marine Ins. Co. v. Mountain Park Stock F. Co., 23 Okla. 79, 99 P. 647 (1909).

[8] Kennedy v. Flick, 164 Ill. App. 483 (1911). As to trivial variations, see Hellen v. Hellen, 170 Ill. App. 464 (1912).

to Section 32 of the Civil Practice Act,[9] has not, apparently, changed the former requirement that successive pleadings should conform to the theory of the case disclosed in the complaint. Though the simplified system has been likened to "notice" pleading,[10] it is still essentially designed to produce an issue between the parties.[11] Such idea must have motivated the court in the instant case, for though it never used the common-law term, it did say: "A reply can not supply omissions in a complaint, add new grounds of action, or permit the taking of a position inconsistent with that alleged in the complaint."[12] Such statement shows an appreciation of the former doctrine, and the cases relied on were decided under the former practice.[13]

It would seem then that the practitioner would do well to observe the former rules when drafting a reply, and, if he finds he has not stated a complete cause of action in the complaint or has made a mistake therein, he should take advantage of the liberal provision for amendment[14] rather than try to save his case through the use of a reply. Such is particularly the case where plaintiff desires to rely on a waiver or an estoppel,[15] for without such waiver, as in the instant case, he does not have a cause of action. Introduction of that element by way of reply would clearly consitute bad pleading and subject that instrument to a motion to strike. That pleading should be utilized only when new matter has been pleaded in the answer by way of affirmative defense or counterclaim.

H. YORMARK

9 Ill. Rev. Stat. 1943, Ch. 110, §156.

10 Clark, Handbook on Code Pleading (St. Paul, 1928), 29. See also note to Section 33 of the Civil Practice Act in Illinois Civil Practice Act Annotated (Chicago, 1933), particularly p. 67.

11 Ill. Rev. Stat. 1943, Ch. 110, §164, requires that each subsequent pleading "shall contain an explicit admission or denial" of the earlier allegations and regards a failure to deny as an admission thereof. It also permits a trial on the issue of damages alone. 12 320 Ill. App. 149 at 153, 50 N.E. (2d) 128 at 130.

13 Pressley v. Bloomington & Normal Ry. & Light Co., 271 Ill. 622, 111 N.E. 511 (1916); McConnel v. Kibbe, 29 Ill. 483 (1852). 14 Ill. Rev. Stat. 1943, Ch. 110, §170.

15 Moore v. National Fire Ins. Co., 275 Ill. App. 1 (1934).