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Waiver of Jury Trial in Felony Cases

Although "many causes contribute to the result that approximately 75% of those apprehended and prosecuted for major crimes escape the minimum punishment provided by law," wrote the Committee on Criminal Procedure and Judicial Administration of the National Crime Commission in presenting its proposed Code of Criminal Procedure to the public, "the archaic, cumbersome and ineffective system of criminal procedure that now obtains in a majority of our states," due in part to the needless frequency of jury trials, is one of the principal factors. Hence it included in its code the provision that "the defendant, in any case except where the death penalty may be imposed, may waive a trial by jury and have the case tried by the court." The adoption of such a law, in the course of the last five years, by six states, and its consideration by the legislatures of at least five others, together with the attention given the subject by various Judicial Councils, the American Law Institute, and other similar bodies, attest to the current interest in this proposal.

It is not to be assumed that the suggestion is either new or radical. Indeed, I have heard a very important judge defend it as a return to the rule of the early common law, when the idea did not occur to any-

2 Ibid. 693, §13. See also Report of the Sub-Committee on the Relation of the Police and the Courts to the Crime Problem (1928) 51 N. J. L. Jour. 169, 172.
3 California, Massachusetts, Michigan, Ohio, Rhode Island and Virginia. Aside from that of Massachusetts, which excepts capital cases, the provisions allow a waiver in any case whatsoever.
4 Iowa, New York, North Carolina, Oregon, and Pennsylvania. The Iowa bill was drafted by the Iowa Bar Association at its June, 1930, meeting. Unfortunately it came to be regarded as a "dry" measure, and so was dropped. In New York the proposed constitutional amendment was officially supported by the Baumes Committee, the predecessor of the New York Crime Commission, the commission itself, and the New York State Association of District Attorneys. Although passing the session of 1926, the resolution failed to pass the next session, as required, and has also failed of passage in every succeeding session. The Oregon bill, which was drafted by the Judicial Council, was abandoned by the legislature because of fear lest such a statute be held unconstitutional, and a resolution to amend the constitution was adopted in its stead. This resolution will be voted upon at the next general election. The Pennsylvania bill, which failed of adoption, was drafted by the Judicial Conference and supported by the Crime Commission. See infra note 76.
6 See the Institute's Code of Criminal Procedure (1931) §266.
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one of trying the accused by jury without his consent.\(^7\) The analogy, of course, is a very inept one, as all analogies between the thirteenth and the twentieth centuries are apt to be; but it may well serve as a warning against too meticulous an application of English common law rulings regarding "public policy" to 1931 facts. Limiting our discussion to the American precedents, we find that article 29 of the Massachusetts Body of Liberties of 1641\(^8\) might well have been taken as a model for the National Crime Commission's draft act, except that the latter is less inclusive than the former. No such statutory authorization of the trial of criminal cases by the judge alone appears to have existed in Maryland, yet "there seems to have been no interruption of the practice since the founding of the colony in the early seventeenth century."

"The records of the Baltimore County Court of 1693 and 1694, show trials without juries, at the election of the accused. The usual entry was that John Gamble or George Mattox . . . 'Plead not guilty and put himself upon the court.' And the court found him guilty or not guilty."

When the practice was finally recognized by statute it was in the form of a limitation, an act of 1793\(^11\) providing that the waiver of a trial by jury should be so far an admission of guilt as to render the defendant liable for the costs of the prosecution. Sixteen years later, "in view of the great saving in time and expense" resulting from the waiver of trial by jury, the act of 1793 was repealed and the former practice restored.\(^12\)

Prior to 1832, submission of criminal cases to the court seems to have been resorted to chiefly in minor cases, but in that year a jury was waived in an important and hard fought conspiracy prosecution.\(^13\) The frequency of such waivers increased, and finally the legislature, by an act of 1852, definitely set at rest any doubts as to the scope of the

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\(^7\) The choice was between trial 'by God' (by ordeal) and 'by my country' (by jury). When the former method of trial disappeared as a result of an edict of the Lateran Council in 1215 forbidding the clergy to participate in it, the defendant was still considered to have an inalienable right to refuse to be tried by a jury. The ensuing difficulties gave rise to our first form of the "third degree," which was legitimized by giving it a French name. See Bouvier's Law Dictionary, "Peine forte et dure."

\(^8\) "In all actions at law, it shall be the liberty of the plaintiff and defendant, by mutual consent, to choose whether they will be tried by the bench or by a jury. . . . The like liberty shall be granted to all persons in criminal cases."

\(^9\) Letter from Chief Justice Carroll T. Bond of the Maryland Court of Appeals, dated May 5, 1931.


\(^11\) November Session, c. 57.

\(^12\) Acts (1809) November Session, c. 144.

privilege by declaring it applicable in capital cases.\textsuperscript{14} Except for a change in phraseology in the revision and codification of the statute law in 1860, this statute has remained unchanged to the present day.\textsuperscript{16}

At no time does the constitutionality of the Maryland practice appear to have been questioned, although the state constitution contained the usual guarantees respecting trial by jury.\textsuperscript{16} Instead "it seems to Maryland lawyers to be fully as natural a feature of the administration of criminal justice as does the jury trial. They have been quite unaware that there was anything extraordinary in it, and are always surprised when they learn that in other jurisdictions an accused cannot have a trial without jury if he wishes it."\textsuperscript{17} However, outside of Maryland the practice of waiver, if it ever existed to a very great extent, soon died out, and in keeping with the temper of the times the jury was elevated to a much higher position than it had occupied in England, being not only required to pass upon pleas of guilty, but being quite generally made judge of the law as well as of the facts. So established did its position become that all later attempts to expand the rights of the accused by allowing him to have his case tried to a judge, rather than to a judge and jury, have been forced to run the gauntlet of judicial review as to their constitutionality.\textsuperscript{18} Consequently the problem of waiver involves not only the practical question of the desirability, or the reverse, of providing for such a privilege, but likewise its legality under the existing constitutional provisions.

In a recent article\textsuperscript{19} I have discussed the extent to which advantage is taken of this privilege, where available, together with the results accruing therefrom. Hence the scope of the present article is limited to a discussion of the existing law regarding the waiver of jury trial, including the constitutional, statutory, and common law problems involved. In general the scope of the discussion is restricted to felony cases, although the growing tendency to regard the constitutional and common law questions as identical in all criminal actions above the

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\textsuperscript{14} Acts (1852) c. 344.
\textsuperscript{15} Md. Ann. Code (1924) Article 27, §549. "Any person presented or indicted may, instead of traversing the same before a jury, traverse the same before the court, who shall thereupon try the law and the facts."
\textsuperscript{16} See Md. Const. (1776) Declaration of Rights, Articles V, XXI, XXIII.
\textsuperscript{18} The cases have gone so far that in Hallinger v. Davis (1892) 146 U. S. 314, 13 Sup. Ct. 103, a state statute dispensing with a jury upon a plea of guilty to the charge of murder, and providing that the judge should determine the degree of crime, was attacked as a violation of the due process clause of the Fourteenth Amendment. Of course counsel could have saved the time and money of their client by reading Walker v. Sauvinet (1876) 92 U. S. 90.
\textsuperscript{19} Grant, Felony Trials Without a Jury (1931) 25 Am. Pol. Sci. Rev. 980.
grade of "petty offenses" renders numerous references to misdemeanor cases both necessary and instructive.

Constitutions Expressly Providing for Waiver

In a surprisingly small number of states the constitutional provisions relating to trial by jury in criminal cases are so definite as to exclude all possibility of disagreement. Thus those of California\(^{20}\) and Virginia,\(^{21}\) as amended in 1928, authorize a waiver in any criminal case. Prior to this date they just as definitely prohibited a waiver in felony cases, while authorizing it in offenses of a lesser grade,\(^{22}\) as do the present constitutions of Idaho,\(^{23}\) Montana,\(^{24}\) and Vermont.\(^{25}\) The moment we pass beyond these five states, the problem of interpretation enters.

The commentary accompanying the American Law Institute's Code of Criminal Procedure lists the constitutions of Arkansas, Maryland, Minnesota, North Carolina, Oklahoma, and Wisconsin as falling within this classification, in which case they would allow a waiver in felonies as well as misdemeanors. However, it would be entirely logical to construe these provisions as applicable only to civil cases, as has been definitely held in Wisconsin, and as the decisions in Maryland, Minnesota, and North Carolina would seem to imply.\(^{26}\) Hence, as is pointed out below,\(^{27}\) the provision adds an additional obstacle, rather than an aid, to waiver. The Oklahoma court, however, has construed the provision as applicable to criminal cases,\(^{28}\) thus definitely settling the law in that state.

Constitutions Providing for "The Right of Trial by Jury"

In 27 states\(^{29}\) the constitution merely provides that "the accused shall have the right to a speedy and public trial, by an impartial jury,"

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20 Article 1, §7.
21 Article 1, §8.
23 Article 1, §7.
24 Article 3, §23.
25 Article 1, §10.
26 See infra note 79 et seq.
27 Ibid.
29 Alabama, Article 1, §§ 6, 11; Colorado, Article 2, §§ 16, 23; Connecticut, Article 1, §§ 9, 21; Delaware, Article 1, §§ 4, 7; Florida, Declaration of Rights, §§ 3, 11; Illinois, Article 2, §§ 5, 9; Indiana, Article 1, § 13; Iowa, Article 1, §§ 9, 10; Kansas, Bill of Rights, §§ 5, 10; Louisiana, Article 1, § 9; Maine, Article 1, § 6; Michigan, Article 2, §§ 13, 19; Mississippi, Article 3, §§ 26, 31; Missouri, Article 2, §§ 22, 28; Nebraska, Article 1, §§ 6, 11; New Jersey, Article 1, §§ 7, 8; New Mexico, Article 2, §§ 12, 14; North Dakota, Article 1, §§ 7, 13; Ohio, Article 1,
or words essentially similar. To these should be added Maryland, whose constitution was in this form at the time that the practice of allowing a waiver developed. In seven of these the privilege of waiving a jury in felony cases is definitely provided for by statute, while in eight states statutes allowing a waiver in misdemeanor cases just as definitely prohibit it in offenses of the more serious grade. Louisiana must be placed in a class by itself, the statutes authorizing waiver except when punishment is necessarily imprisonment at hard labor or death. In six others the statutes provide that in criminal cases "issues of fact shall be tried by a jury," but further litigation will be necessary to determine whether or not these statutes are mandatory, or merely directory. In the six remaining

§§ 5, 10; Oregon, Article 1, § 11; Rhode Island, Article 1, §§ 10, 15; South Carolina, Article 1, §§ 18, 25; South Dakota, Article 6, §§ 5, 7, 9; Article 6, §§ 14; Texas, Article 1, §§ 10, 15; Utah, Article 1, § 12; Wyoming, Article 1, §§ 9, 10. Tennessee might well be classified in a special category, but for purposes of simplification it has been included here. See infra note 40.

30 supra note 16.


33 La. Code Crim. Proc. (1929) Articles 259, 342. The issue of insanity is also excepted. Ibid. Article 260. Together with the fact that many offenses are punishable by imprisonment for a term of years at other than hard labor, this authorizes a waiver in many cases that other jurisdictions would denominate as felonies.


35 In Iowa it has been definitely ruled that the statute prohibits a waiver, while in South Dakota it has been just as definitely held that the prosecution and defendant can waive a full panel and accept a jury of eleven. The question of a complete waiver has not yet arisen. See State v. Doughiss (1895) 96 Iowa 208, 55 N. W. 151, and cases cited; State v. Ross (1924) 47 S. D. 188, 197 N. W. 234; State v. Tiedeman (1928) 49 S. D. 356, 207 N. W. 153. In State v. Kaufman (1879) 51 Iowa 578, 2 N. W. 275, it was held that the prosecution and defendant, in a felony case, can agree upon a jury of eleven. The opinion failed to mention the above statute, and proceeded upon the theory that a jury may be waived at common law. The Nebraska
states the statutes appear to be silent upon the question of jury trial. In two of them, Illinois and Mississippi, the law has been clarified by judicial decisions, the latter holding that a jury may not be waived in the absence of an express statutory authorization, and a recent decision in the former state overruling a long line of precedents and holding exactly the reverse. The Oregon court has intimated that such a waiver would be sustained, even in a felony case, but the Tennessee court, while sustaining a waiver in a misdemeanor case, expressed a doubt as to the legality of such a procedure, in the absence of statutory authorization, in a felony case. The South Carolina court, in refusing to sustain an

cases are in disagreement. Michaelson v. Beemer (1904) 72 Neb. 761, 101 N. W. 1007, construed the statute as mandatory in felony cases, but Miller v. State (1928) 116 Neb. 702, 218 N. W. 743, expressed doubt as to the correctness of this view, and expressly overruled it as to minor misdemeanors. Whatever the proper view at common law, it is difficult to see how the same statute can be construed in different ways depending upon the nature of the offense involved. However, it is not at all clear from the opinion that the court in the latter case realized the existence of this statute, or that the former decision had been based upon it rather than upon common law doctrines. The same may be said of the other cases intimating that a jury may be waived, even in a felony case: State v. Priebsch (1884) 16 Neb. 131, 19 N. W. 628; McCarty v. Hopkins (1901) 61 Neb. 550, 85 N. W. 540, and Marino v. State (1924) 111 Neb. 623, 197 N. W. 396. Arnold v. State (1894) 38 Neb. 752, 57 N. W. 378, is not in point, a special statute applying to the case. In the other states no cases appear to have arisen. In no state in this group has the practice of waiving a jury trial been established.

Colorado, Illinois, Mississippi, Oregon, South Carolina, and Tennessee. The Illinois law provides that "all trials for criminal offenses shall be conducted according to the course of the common law, except when this act points out a different mode." Ill. Rev. Stat. (Cahill, 1929) c. 38, § 761.

People v. Fisher (1930) 340 Ill. 250, 172 N. E. 722, and cases cited.

State v. Harvey (1926) 117 Ore. 466, 242 Pac. 440.

Metzner v. State (1913) 128 Tenn. 45, 157 S. W. 69. In view of the growing body of opinion that the rule must be the same in both felony and misdemeanor cases, a strong case could be made for the application of the Metzner rule to felonies. However, as Article 6, § 14 of the Tennessee constitution provides, that "No fine shall be laid on any citizen of this state that shall exceed fifty dollars, unless it shall be assessed by a jury,... " the question is merely of academic interest, and it is not to be expected that one accused of a felony or, for that matter, of a serious misdemeanor, would accept trial by a judge alone and thereby surrender the possibility of a fine rather than imprisonment in case of conviction. However, this provision does weaken the strength of the dictum that a jury cannot be waived at common law in felony cases, since it would seem to be a constitutional expression of public policy opposed to the trial of any but the most petty offenses by a judge alone. In fact, had the court set aside the sentence of six months' imprisonment imposed in the Metzner case and granted a new trial, instead of merely reducing the fine to $50.00, the ruling could scarcely have been available as a precedent in any other state. Its frequent citation as authority for the rule that a jury cannot be waived in a felony case is thus evidence of the very lax manner in which the doctrine of stare decisis is applied.
agreement upon a jury of less than twelve, expressly declined to pass
upon the legality of a complete waiver. In Colorado there appears to
be no case in point. In none of the states in this constitutional group
does a statutory provision for waiver appear to have been held uncon-
stitutional, or its validity even seriously questioned. And such is
undoubtedly the sound view, for the phraseology of the constitution
itself supports the traditional attitude that the right to trial by jury is
a personal privilege of the accused, intended to protect him from possible
governmental oppression. The cases being in unanimous agreement that
the other constitutional rights generally found in the same or adjoining
sections, such as the right to trial in the district wherein the offense
was committed, to be confronted with the witnesses against him, and to
refrain from giving evidence against himself, can be waived, it would
seem but reasonable to apply the same rule in the case of trial by jury.
If it be alleged that the latter is more fundamental than the former
because the public has an interest in maintaining the liberties of the
individual even against himself, one can not only reply that this should
equally prohibit the waiver of the foregoing rights, and most certainly
should prohibit a plea of guilty, but that sound public policy today
may often require that one accused of crime be allowed to refuse that
his case be presented to a jury. And however appropriate the argument
as a statement of the common law, its application in the face of a
positive statute to the contrary would certainly be of doubtful validity.
A more definite constitutional provision should be required to change
such a question of “public policy” from one of fact to one of law.

The only disagreement, under constitutional provisions of this type,
appears to be as to the legality of a waiver in the absence of any
statutory provision on the subject. And here the present status of the
decisions is such as to forbid classification into majority and minority

42 In none of these latter states (Colorado, Oregon, South Carolina, Tennessee)
has the practice of waiving a jury trial developed either in felony or misdemeanor
cases, there being a general belief that the appellate courts would not sustain a
conviction.
43 State v. Talken (1927) 316 Mo. 596, 292 S. W. 32, frequently cited as such
a case, must be narrowly upon its facts to holding that a jury cannot be waived
in the face of an express statutory provision requiring that the trial be by jury.
The statement in State v. Breese (Mo. 1930) 33 S. W. (2d) 919, 922, is even less
in point. In neither case can the statement be dignified by the title of a dictum that
statutory waiver would be unconstitutional. And see State v. Moody (1857) 24 Mo.
Wiest, in a concurring opinion, expressed some doubt as to the constitutionality of
the Michigan statute except as applied to “petty offenses.”
44 See Cancemi v. People (1858) 18 N. Y. 128. This case, as the opinion was
careful to point out, arose under an entirely different type of constitutional provision.
45 Grant, op. cit. supra note 19.
views. Apparently only one state has definitely refused to sustain such a waiver, whereas two states hold to the contrary view. The Tennessee and South Carolina courts have straddled. If the greater frequency of dicta to the effect that such a waiver cannot be sustained be felt to balance the extra holding on the other side, then the scales are even. Nor is the lone example of Illinois' reversal of its former stand prohibiting such a waiver sufficient evidence of any decided tendency of the day.

CONSTITUTIONS PROVIDING THAT CRIMINAL TRIALS “SHALL BE BY JURY”

The constitutions of Georgia, Kentucky, and West Virginia, like Article III of the United States Constitution, specify that criminal trials shall be by jury. Except for two judges in an early

40 Mississippi; but note that the statements may be regarded as dicta. Supra note 37.

47 New Jersey and Illinois. State v. Stevens (1913) 84 N. J. Law 561, 87 Atl. 118; People v. Fisher (1930) 340 Ill. 250, 172 N. E. 722. The New Jersey court held that the fact that a statute providing for waiver in felony cases was not applicable to the court involved in a misdemeanor case was immaterial, for “if a defendant cannot waive a trial by jury, no legislation could confer upon him that power.” 84 N. J. Law at 563, 87 Atl. at 119. The case thus approximates the rule that the legislature could not deny to the accused his common law right, under the constitution, to waive a jury. Many courts would have ruled that the existence of the statute was proof of a valid legislative determination that in all other cases, including the one in question, a jury might not be waived. See People v. Smith (1861) 9 Mich. 193. Cf. Schick v. United States (1905) 195 U. S. 65, 71, 24 Sup. Ct. 826; Logan v. State (1890) 86 Ga. 266, 12 S. E. 406; State v. Woodling (1893) 53 Minn. 142, 54 N. W. 1068.

48 Supra note 40.

49 Supra note 41.

50 See, among many, State v. Maine (1858) 27 Conn. 281; State v. Worden (1878) 46 Conn. 349, 33 Am. Rep. 27; Murphy v. State (1884) 97 Ind. 579, 585; Wartner v. State (1885) 102 Ind. 51, 1 N. E. 65; State v. Douglass (1895) 96 Iowa 308, 65 N. W. 151; State v. Simons (1900) 61 Kan. 752, 60 Pac. 1052; People v. Smith (1861) 9 Mich. 193; State v. Warren (1899) 122 Mich. 504, 81 N. W. 369, 80 Am. St. Rep. 582; Dillingham v. State (1855) 5 Ohio St. 280. For the contrary view see State v. Baer (1921) 103 Ohio St. 385, 134 N. E. 786; State v. Harvey (1926) 117 Ore. 466, 242 Pac. 440.

If the dicta in states whose constitutions would seem to be much more explicit than those of this group, be added, this supposed “weight of authority” tends to disappear. See infra notes 56, 59, 63, 64, 94, 96.

51 Article 1, § 1: “Every person charged with an offense against the laws of this state . . . shall have a trial by an impartial jury . . .” Cf Article 6, § 18: “The right of trial by jury . . . shall remain inviolate.”

52 Bill of Rights, §11: “Accused has the right . . . he shall have a speedy public trial by an impartial jury . . .” Cf. § 7: “The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate . . .”

53 Article 3, § 14: “Trials of crimes, and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men . . . and in the county where the alleged offense was committed, unless upon petition of the accused . . . it is removed to some other county.”

54 The United States Constitution and cases are discussed infra pp 147 ff.
West Virginia case, the decisions ignore this difference. The Georgia court construed a provision of the code to authorize a waiver in a misdemeanor case, and, as thus construed, not only upheld it, but went so far as to doubt its necessity. A Kentucky act of 1893, prohibiting the waiver of a full panel in felony cases but allowing it in misdemeanors, was not mentioned in the opinions of that court prior to 1925, the court holding that such an agreement might be made without statutory authorization. The West Virginia cases warrant more detailed consideration.

West Virginia inherited a statutory provision allowing the waiver of a jury in misdemeanor cases. When its constitutionality was attacked in 1888, the Attorney General protested that it had been in constant use for over forty years, during which time its validity had never been questioned. Justices Snyder and Green, citing numerous "authorities" from states whose constitutional provisions regarding jury trial were quite different than that in the fundamental law of their own state, concluded that there can be no doubt about the constitutionality of a waiver statute applying to misdemeanors, and that apparently an act applying to felonies would also be valid. Justices Johnson and Woods, citing the West Virginia constitution, insisted that the language differs from that of any of the documents involved in the cases relied upon by the other members of the court, and that it was clearly mandatory. The court being equally divided, the decision below was sustained. The dissenting judges conveniently leaving the court at this time, the holding

55 Justices Johnson and Woods in State v. Cottrill (1888) 31 W. Va. 162, 6 S. E. 428. This case is discussed infra p. 140.
58 Branham v. Commonwealth (1925) 209 Ky. 734, 273 S. W. 489. See also Jackson v. Commonwealth (1927) 221 Ky. 823, 299 S. W. 983; McPerkin v. Commonwealth (1930) 236 Ky. 528, 33 S. W. (2d) 622, which follow the Branham case without mentioning the statute.
59 Murphy v. Commonwealth (1858) 58 Ky. 365; Tyra v. Commonwealth (1859) 59 Ky. 1; Phipps v. Commonwealth (1924) 205 Ky. 832, 266 S. W. 651. In the Tyra case the defendant was tried for murder, although convicted of a misdemeanor. The Phipps case, without mentioning the statute, held that a full panel cannot be waived in a felony case. Whether the court wished to distinguish between felonies and misdemeanors as to common law waiver, or was influenced in its decision by the statute, is open to question. The same may be said of Jackson v. Commonwealth, and McPerkin v. Commonwealth, supra note 58. In any case, in view of the statute such statements cannot be regarded as more than dicta.
60 State v. Cottrill (1888) 31 W. Va. 162, 6 S. E. 428.
61 (1888) 31 W. Va. at 165, 6 S. E. at 430.
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was promptly made unanimous two years later, and appears never to have been questioned since.

Thus statutory provisions for the waiver of jury trial have not only been sustained in all three states, but one has expressly held that statutory authorization is not necessary, and a second has intimated as much.

CONSTITUTIONS PROVIDING FOR THE WAIVER OF JURY TRIAL IN CIVIL ACTIONS

A fourth type of constitutional provision, presenting peculiar problems of its own, is encountered when either of the last two types discussed above (those providing for a right to jury trial, or that criminal cases shall be tried by jury) is combined with an express constitutional provision that a jury may be waived in civil cases. The constitutions of Arizona, Nevada, New York, North Carolina, Pennsylvania,

62 State v. Griggs (1890) 34 W. Va. 78, 11 S. E. 740; State v. Denoon (1890) 34 W. Va. 139, 11 S. E. 1003.
63 See supra note 59. Although the cases only involved the waiver of a full panel, the opinions stated that the defendant might waive a jury. Such has become the established custom of the trial courts. In the Fayette County (Lexington) Court, two-thirds of all misdemeanor cases are tried by a judge without a jury. Letter from H. H. Mitchell, Clerk of Court, dated May 7, 1931.
64 See supra note 56. Attorney General Lee of West Virginia, in an off-hand opinion, has expressed the belief that a statute authorizing waiver in felony cases would be unconstitutional in that state. Letter dated May 1, 1931. In view of the fact that the constitution provides that "trials of crimes, and misdemeanors ... shall be by jury," it is difficult to see how such a conclusion could be reached except by reversing the long-established rule of the state, since even such specious reasoning as is involved in the argument that misdemeanors are not crimes within the purview of the constitution would not suffice to enable a distinction to be made in this state.
65 Article 2, § 23: "The right of trial by jury shall remain inviolate, but provision may be made by law ... for waiving of a jury in civil cases where the consent of the parties interested is given thereto." Cf. § 24: "In criminal prosecutions, the accused shall have the right ... to have a ... trial by ... jury."
66 Article 1, § 3: "The right of trial by jury shall be secured to all, and remain inviolate forever; but a jury trial may be waived by the parties in all civil cases, in the manner to be prescribed by law."
67 Article 1, § 2: "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law."
68 Article 1, § 13: "No person shall be convicted of any crime but by the unanimous verdict of a jury ... The Legislature may, however, provide other means of trial for petty misdemeanors with the right of appeal." Article 4, § 13: "In all issues of fact, joined in any court, the parties may waive the right to have the same determined by a jury, in which case the finding of the judge upon the facts shall have the force and effect of a verdict by a jury."
I have included North Carolina in this group because of the special phraseology employed in Article 1, § 13. Possibly I have been influenced in this decision more by the opinions of the court than by the logic of the words themselves, and it should fall with the next group of states, where the applicability of the waiver clause to criminal cases is a debatable question.
69 Article 1, § 6: "Trial by jury shall be as heretofore, and the right thereof
and Washington clearly fall within this group.

The North Carolina court has consistently refused to sustain either a waiver of a jury or the acceptance of less than a complete panel. No case in point has arisen as yet in New York, but the dicta in two decisions have been accepted as definitely closing the gate against such a procedure. The Nevada court, in sustaining a conviction based upon a jury of only eleven men, intimated that a complete waiver would not only violate the statutes of the state, but would likewise violate the constitution. However, the constitutionality of a statute passed just four years later, allowing a waiver in all but felony cases, appears never to have been attacked in the court of last resort. A similar statute in Arizona has been definitely sustained, and the Pennsylvania court, remain inviolate. Article 1, § 9: "In all criminal prosecutions the accused hath a right to...trial by...jury..." Article 5, § 27: "The parties, by agreement filed, may in any civil case dispense with trial by jury, and submit the decision of such case to the court."

Article 1, § 21: "The right of trial by jury shall remain inviolate, but the legislature may provide...for waiving of the jury in civil cases where the consent of the parties interested is given thereto." Article 1, § 22: "Accused shall have the right to...have a speedy public trial by an impartial jury..."

See State v. Pulliam (1922) 184 N. C. 681, 114 S. E. 394; State v. Hartsfield (1924) 188 N. C. 357, 124 S. E. 629; State v. Rouse (1926) 194 N. C. 318, 135 S. E. 641; State v. Crawford (1929) 197 N. C. 513, 149 S. E. 729; State v. Straughn (1929) 197 N. C. 691, 150 S. E. 330. Many earlier cases, too numerous to mention, are cited in these decisions. By a somewhat strained construction of the special wording of the constitution, the court has gone so far as to hold that a jury cannot be waived even in a petty case, unless it is tried in an inferior court. State v. Pulliam, supra. On the other hand, the general tenor of the opinions in the above cases, except State v. Pulliam, would seem to imply that if it were not for the special features of the North Carolina constitutional provisions the court would sustain a waiver in any criminal case, even in the absence of statutory authorization.

Cancemi v. People (1858) 18 N. Y. 128; People v. Cosmo (1912) 205 N. Y. 91, 98 N. E. 408. In the latter case the court, through Mr. Justice Werner, wrote: "It is further ordained that 'a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law.' (Art. 1, § 2). The inevitable implication of this language is that the citizen is not only entitled to the trial by jury...but that in criminal cases in which it has been heretofore used it cannot be waived by either party." 205 N. Y. at 96, 98 N. E. at 409. The Cancemi case placed less emphasis upon the peculiar wording of the New York constitution, and more upon "public policy." It is to be noted that in neither case was a statutory authorization of waiver involved, no such act ever appearing to have been adopted in New York. See supra note 4.

State v. Borowsky (1876) 11 Nev. 119. The opinion is rambling, jumbled, and very illogical. The conclusion that the verdict of a jury of eleven cannot be set aside apparently rests upon a dual basis: (1) that a jury of eleven is still a true jury, (2) that the defendant, having consented to the procedure, is estopped from raising the point on appeal. The court clearly feels that neither argument is sound, but that the two together make a perfect case. The opinion abounds with the citation of inappropriate cases.


while refusing to sustain a waiver not authorized by law, has stated that the constitutionality of such a statute must be regarded as an open question.\textsuperscript{76}

Washington presents a special case, as the territorial laws in existence at the time of the adoption of the constitution authorized the waiver of a jury in any case not capital.\textsuperscript{77} From this it might be logically argued that, no desire to change the existing rule being evident, the constitution should be construed as authorizing a continuance of the practice. At any rate the validity of the statute, which is still in force in its original form, has been attacked but once in an appellate court; and then, peculiarly enough, the contention was not made that it violated the state, but rather the United States Constitution.\textsuperscript{78}

In another group of five states\textsuperscript{79} it is a debatable question whether the constitutional provisions should fall in this class, or should be

\textsuperscript{76} Commonwealth v. Hall (1928) 291 Pa. 341, 140 Atl. 626. The lucid opinion of Chief Justice Moschzisker distinguished between a complete waiver, as in the case at bar, and the acceptance of a jury of eleven, which in keeping with a previous dictum in Commonwealth v. Egan (1924) 281 Pa. 251, 126 Atl. 488, was ruled to be allowable even in the absence of statutory authorization. See infra note 136. Two months later the Judicial Conference, called and presided over by the Chief Justice, and attended by most of the trial court judges who are engaged, in whole or in part, in the trial of criminal cases, and by all seven members of the supreme court who had decided the Hall case, recommended the passage of a statute authorizing the waiver of a jury in all but "the higher felonies." Although supported by the Crime Commission, the bill failed of passage, and has since been abandoned. See the references supra note 5.

\textsuperscript{77} Wash. Comp. Stat. (Remington, 1922) § 2144.

\textsuperscript{78} State v. Ellis (1900) 22 Wash. 129, 60 Pac. 136. The appellant reasoned that, having been unconstitutional during the territorial period, the act had never become a law of the state. The case involved the validity of a verdict by a jury of eleven. The court refused to discuss the question, ruling that in any case, the defendant having been tried neither by a jury nor by a judge alone, his conviction should be set aside.

I had felt that possibly a feeling that waiver is unconstitutional was responsible for the failure of the Washington courts to make more extensive use of trial by the court, but numerous letters from judges and officials have dispelled this assumption. The validity of the practice seems to be taken for granted, and the statute having existed since before the days of statehood, it would now seem to be too late to raise the issue of its legality.

\textsuperscript{79} Arkansas, Article 2, § 7: "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." Article 2, § 10: "Accused shall enjoy the right to a speedy and public trial by an impartial jury."

Maryland, Declaration of Rights, Article 5: "That the inhabitants of Maryland are entitled to the Common Law of England, and trial by Jury according to the course of that law...." Article 4, § 8: "The parties to any cause may submit the same to the Court for determination without the aid of a Jury."

Minnesota, Article 1, § 4: "The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy, but a jury trial may be waived by the parties in all cases in the manner prescribed by law."
construed as expressly authorizing waiver in any criminal case whatsoever. The choice, then, is between listing with the class in which the constitutionality of waiver is beyond question, and that in which it is most doubtful. Of course the fact that the right to trial by jury in criminal cases is elsewhere dealt with in these constitutions should not create too strong a presumption in favor of construing the waiver clause as applicable only to civil cases, as instances of duplicate, and even triplicate, guarantees are extremely common in our fundamental laws. The courts in these states are thus equally free to reach either conclusion that they may choose; in fact, some have followed one road, some the other, and some neither.

The Oklahoma court has expressly held that the waiver provision is applicable to criminal and civil cases alike;\(^{80}\) Maryland\(^{81}\) and Wisconsin\(^{82}\) have held the reverse. But in Maryland the practice of allowing a waiver, in felonies as well as misdemeanors, was so definitely established at the time of the adoption of the constitution of 1864, in which this clause appeared for the first time, that no question of the legality of the practice was ever raised. The Wisconsin courts, paying no attention whatsoever to this constitutional provision, except to point out that it does not apply to criminal cases, have sustained every waiver act passed by the legislature, including the act of 1925,\(^{83}\) and have inti-

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Article 2, § 6: "In all criminal prosecutions the accused shall enjoy the right to a speedy, public trial, by an impartial jury."

Oklahoma, Article 2, § 19: "The right of trial by jury shall be and remain inviolate." Article 2, § 20: "Accused shall have the right to a speedy and public trial by an impartial jury." Article 7, § 20: "In all issues of fact joined in any court, all parties may waive the right to have the same determined by a jury."

Wisconsin, Article 1, § 5: "The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law." Article 1, § 7: "In all criminal prosecutions, the accused shall enjoy the right to be heard... and in prosecutions by indictment, or information, to a speedy public trial by impartial jury... ."

\(^{80}\) Supra note 28. The case is the stronger in that a provision in the territorial laws in effect at the time of the adoption of the constitution, and accepted and applied as the law of the state as recently as 1907, expressly required that all criminal trials be by jury. See In re McQuown (1907) 19 Okla. 347, 91 Pac. 689.

\(^{81}\) The constitutional provision requires the consent of both parties to the waiver of a jury. The Maryland practice has always denied to the prosecution any right to insist upon a jury trial when the defendant chooses to have his case tried to a judge alone. See the article by Chief Justice Bond, supra note 10 at 103, and cases cited. And see supra note 31.

\(^{82}\) State v. Smith (1924) 184 Wis. 664, 200 N. W. 638.

\(^{83}\) Wis. Laws (1925) c. 124, § 1, authorizes a waiver in any criminal case whatsoever, in any court. In 1881 waiver in all but murder cases had been authorized in Rock County, and similar acts adopted at later dates made like provision for other counties. By reason of the population involved, the Milwaukee act of 1895 was the most important.
mated that, were it not for an 1877 decision of the court to the contrary, they would even sustain a waiver in a felony case in the absence of such a statute. The Arkansas court, without mentioning the constitutional provision regarding waiver, sustained a statute authorizing such a procedure in misdemeanor cases. The statute expressly prohibiting waiver in felony cases, the constitutionality of such a procedure has never arisen. In Minnesota, where the constitutional provision is not self-executing, and where the statutes expressly provide that in criminal cases "every issue of fact shall be tried by a jury," the court has consistently sustained waiver of a jury in misdemeanor actions, and has intimated a willingness to do so in felony cases.

This completes a survey of all the states save two, whose constitutions do not fall into any of the above categories. The Massachusetts provision is that "the legislature shall not make any law that shall subject any person to a capital or infamous punishment, . . . without trial by jury." Prior to 1929 the statutes provided that all felonies must be tried by jury, but an amendment adopted in that year allows a jury to be waived in all but capital cases. In view of the decisions under the prior law, the constitutionality of this act will undoubtedly be sustained, if contested. In New Hampshire, under an

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84 State v. Lockwood (1877) 43 Wis. 403. 85 In re Staff (1885) 63 Wis. 285, 23 N. W. 587; Jennings v. State (1908) 134 Wis. 307, 114 N. W. 492, 14 L. R. A. (N.s.) 862; State v. Smith (1924) 184 Wis. 664, 200 N. W. 638. 86 Bradley v. State (1878) 32 Ark. 722. 87 As the constitutional waiver clause is not self-executing, there can be no doubt, even if it be held to apply to criminal cases, that waiver cannot be sustained unless there is a statute authorizing it. 88 Minn. Stat. (Mason, 1927) § 10705. 89 State v. Sackett (1888) 39 Minn. 69, 72, 35 N. W. 773, 775; State v. Woodling (1893) 53 Minn. 142, 54 N. W. 1068; State v. Bannock (1893) 53 Minn. 119, 55 N. W. 558; State v. Graves (1925) 161 Minn. 422, 201 N. W. 933. 90 See the dicta in the cases supra note 89. No practice of waiving a jury in felony cases has ever developed in this state. Prior to the amendment of 1924, expressly authorizing a waiver of a jury in all cases except felonies, the Vermont constitutional provision also fell in this category. In setting aside a conviction by a judge without a jury because a statutory provision prohibited waiver, the court intimated that, were it not for this statute, the legality of a waiver would be an open question. State v. Hirsch (1917) 91 Vt. 330, 100 Atl. 877. 91 Part 1, Article 12. 92 Mass. Gen. Laws (1921) c. 278, § 2. The act dates from 1836. 93 Mass. Acts (1929) c. 185. 94 See especially Commonwealth v. Kemp (1926) 254 Mass. 190, 150 N. E. 172, and cases cited; Commonwealth v. Rowe (1926) 257 Mass. 172, 153 N. E. 537, 48 A. L. R. 762. The latter case intimates that a waiver is valid in any case unless prohibited by statute.
identical constitutional provision,95 nothing is known save what can be implied from an 1892 decision on an entirely different point.96

To summarize: Under the present status of the constitutions, statutes, and judicial decisions it would seem to be definitely settled in fifteen states that a jury may be waived in certain, if not all, types of felony cases and the facts tried to the court;97 in twenty-four states it would seem to be as definitely settled that this cannot be done.98 The most that can be said for the other nine99 is that the law is doubtful. The particular phraseology of a given constitutional provision would seem to have but little bearing upon the attitude of the courts, either as to the construction of statutes or of the common law. In fact, it may not be too much to say that we have substituted a case law constitution for our written documents, and that the construction of that constitution by the different courts is more diverse than their construction of the common law itself.

Most of the decisions adverse to waiver are founded not upon a constitutional prohibition, but upon a statutory provision construed to forbid waiver, or a lack of legislation authorizing the court to try the case. Disregarding the innumerable dicta upon the question, the fact remains that, at least since the opening of the twentieth century, not one reported case has actually set aside a conviction because of the lack of a jury trial where a statute authorized such a waiver.100 And it would

95 Part I, Article 16. Cf., Article 15, regarding the early construction of which see Grant, The "Higher Law" Background of the Law of Eminent Domain (1931) 6 Wis. L. Rev. 67, 81 et seq.

96 State v. Almy (1892) N. H. 274, 28 Atl. 372, 22 L. R. A. 744. In sustaining a statute providing that the judge, rather than a jury, shall determine the degree of the offense, the court intimated a willingness to sustain a waiver in any case where such a procedure was not prohibited by law. No practice of allowing a waiver ever appears to have developed in the state, and hence no test case has ever arisen.


99 Colorado, Georgia, Minnesota, Nebraska, New Hampshire, Oregon, South Carolina, South Dakota, Tennessee.

100 I am not overlooking Sturges & Burn Manufacturing Co. v. Pastel (1922) 301 Ill. 253, 133 N. E. 762, a civil case, but holding unconstitutional a waiver statute which was likewise applicable to certain types of criminal actions. The constitutionality of the act had not only been sustained as to criminal cases, but its scope had been stretched beyond the obvious limitations of its language. See Brewster v. People (1899) 183 Ill. 143, 55 N. E. 640, with which compare Paulsen v. People (1902) 195 Ill. 507, 515-516, 63 N. E. 144. The provision was held unconstitutional in the Sturges case on the ground that, in civil causes, it violated the guarantee of equal protection of the laws. And see People v. Fisher (1930) 340 Ill. 250, 172 N. E. 722.
seem that the closest the reports come to yielding such a precedent for a good many years prior to 1900 is an 1888 decision in the state of West Virginia, where the statute was saved only by dint of an equally divided court. The only real clash on the part of actual holdings is as to the validity of a waiver at common law, in the absence of a statutory rule one way or the other. And here the divergence is so sharp and so fundamental as to warrant special consideration. Fortunately, due to the recent opinion in Patton v. United States, the question can be discussed while pointing out the various angles involved in the waiver of trial by jury in the federal and territorial courts.

**WAIVER IN FEDERAL COURTS**

The Constitution of the United States, like those of Georgia, Kentucky, and West Virginia, provides that “the trial of all crimes . . . shall be by jury.” However, apart from the fact that the later provision in the Sixth Amendment merely provides that “the accused shall enjoy the right to a . . . trial by . . . jury,” the decisions under these state constitutions might lead one to believe that the special phraseology of Article III would be considered as of slight importance. And such has been the case. Nor should this cause the least surprise, the numerous instances in which the logic of the context itself, in both statutes and constitutions, requires that “shall” be construed to mean “may,” and “may” to mean “shall,” having established the doctrine beyond the point of contestability. As in the overwhelming majority of the states, the problem has therefore been dealt with as one of statutory and common law construction.

Since the passage of the Judiciary Act of 1789 creating a system of federal trial courts, the statutes have provided that in these courts “the trial of issues of fact . . . , in all causes except cases in equity and

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101 See supra pp. 14 ff.
103 See supra notes 51, 52, 53.
104 Article III, §2.
106 See supra pp. 13 ff.
cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury."\textsuperscript{107} In 1865, due to the numerous decisions of the Supreme Court adverse to waiver in civil cases,\textsuperscript{108} the statute was amended to authorize such a procedure.\textsuperscript{109} Five years later, in creating a police court for the District of Columbia with jurisdiction over all misdemeanor prosecutions, it was provided that all trials in such court should be by a judge alone, but that a trial \textit{de novo} before a jury might be had by an appeal to the supreme court (the principal trial court) of the District.\textsuperscript{110} The act being held unconstitutional,\textsuperscript{111} it was superceded by the present statute authorizing the defendant, in any case tried in the police court, to waive a jury.\textsuperscript{112} There appear to be no other statutes on the question applicable either to the regular federal courts or to those of the District of Columbia, although waiver acts covering criminal cases have been passed by various territorial legislatures.\textsuperscript{113}

\textsuperscript{107} U. S. Code (1928) Title 28, § 770. Except for changes due to the abolition of the circuit courts and the expansion of the jurisdiction of the district courts, the phraseology has remained unchanged from 1789 to the present writing. See (1789) Stat. 76, §§ 9, 80.


\textsuperscript{109} "Issues of fact in civil cases in any district court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury." U. S. Code (1928) Title 28, §773; (1865) Stat. 501, §4. In its original form the act read "circuit" rather than "district" courts. Prior special acts had authorized waiver in the federal courts for Louisiana, Oregon, and California. (1824) Stat. 62; (1864) Stat. 4.

\textsuperscript{110} (1870) 16 Stat. 153, c. 133, § 3.

\textsuperscript{111} Callan v. Wilson (1888) 127 U. S. 540, 8 Sup. Ct. 1301.

\textsuperscript{112} "In all prosecutions within the jurisdiction of said court in which, according to the Constitution... the accused would be entitled to a jury trial, the trial shall be by jury, unless the accused shall in open court expressly waive such trial by jury and request to be tried by the judge... In all cases where the accused would not by force of the Constitution... be entitled to a trial by jury, the trial shall be by the court without a jury, unless in cases wherein the fine penalty may be $50.00 or more, or imprisonment... may be 30 days or more, the accused shall demand a trial by jury." Code of the District of Columbia (1929) Title 18, 167, §165; (1892) 27 Stat. 261, c. 236. At this time the police court appears to have had jurisdiction over cases that would now be denominated felonies. See Belt v. United States (1894) 4 App. D. C. 25, sustaining a conviction by a judge alone where the penalty was one to three year's imprisonment at labor.

\textsuperscript{113} Washington (1854), Kansas (1859), and Utah. The acts may be found in Wash. Code Stat. (Remington, 1922) § 2144; Kansas Code of Criminal Procedure (1859) §175; and Thompson v. Utah (1898) 170 U. S. 343, 18 Sup. Ct. 620. The Utah act applied only to misdemeanors, but the other two covered all felonies not capital. In no case does their constitutionality appear to have been contested in a court of last resort. These laws were encountered incidentally in the course of examining the federal and state cases; doubtless a search of the territorial statutes, unavailable here, would reveal still others.
In 1894 the constitutionality of the District of Columbia waiver act was attacked in the Court of Appeals of the District. Aside from a dictum in an 1892 decision of the Supreme Court, the resulting opinion appears to be the first authoritative statement construing the Federal Constitution. In a logical and convincing opinion unanimously sustaining the validity of the law, the court, through Mr. Justice Morris, concluded:

"To hold that the statute before us is unconstitutional would be, in our opinion, to set the hands backward on the dial of time, and needlessly to overthrow an important branch of the administration of the criminal law of this District. . . . We do not think that . . . the right of trial by jury, should be forced upon a person against his will, when no public purpose is to be subserved by the restraint, and when, on the contrary, there is an avowed and openly expressed public policy to be subserved by the acceptance of the waiver. Cases are not wanting, indeed they are unfortunately too numerous, where innocence accused of crime has stood in serious danger from an embittered and unreflecting local sentiment, and has only been saved from disaster by a trial by the court, upon waiver of a jury."

The Supreme Court refusing to review the decision on a writ of habeas corpus, as it had done in the previous case arising under the statute of 1870, although at the same time intimating that per-

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117 In re Belt (1895) 159 U. S. 95, 15 Sup. Ct. 987.
118 Callan v. Wilson (1888) 159 U. S. 95, 15 Sup. Ct. 987. The cases are not on all fours. The Callan case was an appeal from a conviction by the police court sitting without a jury. In the Belt case, Belt had been convicted of larceny by the same court, a jury being waived, and had served his sentence of one year's imprisonment at labor. He was subsequently convicted by the supreme court, sitting with a jury, of a second offense of larceny, and sentenced under an habitual criminal provision to three year's imprisonment at labor. From this sentence he appealed, alleging that the first conviction had been obtained before a tribunal with no jurisdiction to try the case, and hence that sentence in the instant case should have been under the first offender clause of the larceny act. Nevertheless the explanation of the Court, through Mr. Chief Justice Fuller, for refusing the writ in the Belt case, that the court has jurisdiction to decide upon the constitutionality of the waiver statute, and that the writ of habeas corpus will not lie to a District of Columbia court, would seem to be squarely contra to its action in the Callan case, for there the writ was granted to the very court involved in the Belt case, and the trial court was necessarily required to rule upon the constitutionality of the statute regulating jury trials. The case comes dangerously close to ruling that jurisdiction to decide whether or not one has jurisdiction, where the latter turns upon the validity of a statute, is sufficient to render a writ of habeas corpus unavailable. This is the more remarkable in view of the doubt expressed as to the existence of any other remedy so far as the criminal courts of the District are concerned. Can it be that the Court hesitated to pass upon the questions involved in the Belt case, i.e., the validity of a statute authorizing the waiver of a jury in criminal cases?

119 (1870) 16 Stat. 153, c. 133, §3.
haps no other writ would lie to the District Courts in a criminal case, left the decision of the Court of Appeals standing as the authoritative declaration of the law of the District; and thus it remained down to the time of the remarkable opinion in Patton v. United States. As the opinion of Mr. Justice Morris distinctly stated that "in the absence of express statutory authority no accused person can waive the right of trial by jury in a criminal case," no practice of waiving a jury in the supreme court, which tries all felony actions, arose prior to 1930.

In the regular federal courts the doctrine of waiver has had a more hectic career. Mr. Justice Harlan's majority opinion in Thompson v. Utah, although the question was not involved in the case, clearly intimated that a waiver could not be sustained in any criminal action, at least in the absence of statutory authorization, Schick v. United States, which sustained a waiver in a "petty offense," the maximum penalty being a fine of $50, just as clearly intimated the reverse. The opinion was written by Mr. Justice Brewer, who had dissented in the former case; and Mr. Justice Harlan just as promptly dissented in the instant one. Reasoning that since "there is no act of Congress requiring that the trial of all offenses shall be by jury," and a court is fully organized and competent for the transaction of business without the presence of a jury," he proceeded to show that public policy, the only remaining hurdle, does not require statutory authorization for such a procedure in minor cases. There followed the gratuitous information that doubtless the same rule would apply in the case of the more serious misdemeanors, and of felonies Mr. Justice Harlan dissented

120 See supra note 118.
121 (1894) 4 App. D. C. 25.
123 (1894) 4 App. D. C. 25, 32.
124 But see supra note 112.
125 (1897) 170 U. S. 343, 18 Sup. Ct. 620. This case held that a state statute reducing the size of the jury from 12 to 8 could not be applied to offenses committed before its passage, such a construction making it an ex post facto law and hence a violation of Article I, §10 of the United States Constitution.
126 (1903) 195 U. S. 65, 24 Sup. Ct. 826.
127 Had the learned Justice turned to the Code rather than to the reports for evidence as to the contents of the former he might have been convinced of his error. See supra notes 107, 109. Such occurrences as this illustrate how truly our jurisprudential system is one of case law rather than code law. See infra note 151.
129 Ibid. He considered the existence of an express statutory authorization of waiver in misdemeanor cases in the District of Columbia as further evidence of the proper rule as to "public policy" in the regular federal courts. Cf. supra note 47 and cases cited.
130 Ibid. The cases cited were not in point. This was particularly true of the sole reference as to felonies, State v. Worden (1878) 46 Conn. 349, 33 Am. Rep. 27, in which the opinion not only based its entire line of reasoning upon the state statute
on every point, making it clear that in *Thompson v. Utah* he had meant just what he had said.

Thus in 1903 the honors between Justices Brewer and Harlan would appear to have been even. Aside from the question of logic, any advantage there may have been must be said to have rested with the former, for in the *Schick* case the discussion of the validity of a waiver was at least germane to the issue. Yet, strangely enough the isolated dictum in the *Thompson* case was to play a far more important part in the period immediately following than was the more detailed discussion of Mr. Justice Brewer in the rival decision. The former was accepted by three Circuit Courts of Appeals as decisive of the federal rule, whereas the latter was narrowed on its facts to “petty offenses.” Such was the status when the Supreme Court received the *Patton* case, in which Mr. Justice Brewer’s opinion returned to its own and that of Mr. Justice Harlan was swept aside as “not authoritative,” but a mere “obiter dictum.”

authorizing waiver, but clearly shows the effects of being the work of an outstanding opponent of the bill and a leader in the successful movement for its repeal. See the references *supra* note 31.

131 “The Constitution expressly requires that the trial of all crimes, except impeachment, shall be by jury; and I assert, with confidence, that no precedent can be found at common law for the trial by the court, without a jury, of any crimes except those described in adjudged cases and by elementary authorities as minor or petty offenses . . . , and those could be tried summarily by some court or officer without the intervention of a jury only when thereunto authorized by an act of Parliament.” *Schick v. United States* (1903) 195 U. S. 65, 80, 24 Sup. Ct. 826, 831. “Nor is it necessary,” he continued, “to express any final judgment upon the question whether the particular crime here involved might, by statute, be placed in that class and tried without a jury. It is enough to say that . . . Congress . . . has not done so.” 195 U. S. at 97, 24 Sup. Ct. at 838. He clinched his argument by pointing out that in *Thompson v. Utah* (1897) 170 U. S. 343, 18 Sup. Ct. 620, the Court had “ruled” that a jury trial might not be waived; and by using italics in quoting from his opinion in that case he showed how definite this “ruling” had been. 195 U. S. at 84, 24 Sup. Ct. at 833. His characterization of this statement in the *Thompson* case is an illustration of the tendency to overlook the distinction between dicta and the rule of the case, except where the former proves embarrassing. See *Grant, The Natural Law Background of Due Process* (1931) 31 Col. L. Rev. 56, for further examples.

132 *Supra* note 131.

133 *Dickinson v. United States* (C. C. A. 1st. 1908) 159 Fed. 801; *Low v. United States* (C. C. A. 6th 1909) 169 Fed. 86; *Coates v. United States* (C. C. A. 4th 1923) 290 Fed. 134. Both the Low and Coates cases involved a true waiver, whereas the Dickinson case was tried by a jury of ten, the other two having been excused in the course of the trial. The Dickinson case is weakened as a precedent by the vigorous dissenting opinion of Mr. Justice Aldrich, and by the admission of the majority that “in view of the fact that it is beyond our power to enter a judgment which involves finality, and it is also of little consequence what judicial results are reached until we have a determination of the Supreme Court directly on the issue, it will be of no avail for us to do more than cite two or three of the leading authorities, and explain our conclusions as briefly as we can.” 159 Fed. at 806.

Patton v. United States,\textsuperscript{135} strictly speaking, did not involve the legality of a non-jury trial, the appellant having been convicted by a jury of eleven. But sweeping aside the distinction with the statement that "we ... must treat both forms of waiver as in substance amounting to the same thing,"\textsuperscript{138} the opinion, written by Mr. Justice Sutherland, proceeded to a consideration of the principal question; can a jury be waived in a federal court in a felony case, under the existing constitutional and statutory provisions? The affirmative answer is given only after the presentation of a somewhat detailed and, at first blush, convincing line of argument; to which are appended the characteristic post scripts:

Mr. Justice Holmes, Mr. Justice Brandeis, and Mr. Justice Stone concur in the result.

The Chief Justice took no part in the consideration or decision of this case.

Mr. Justice Sanford participated in the consideration and agreed to a disposition of the case in accordance with the opinion.

Obviously the Court is not of one mind.

Raising the question, "is the effect of the constitutional provisions in respect of trial by jury\textsuperscript{137} to establish a tribunal as a part of the frame of government, or only to guarantee to the accused the right to

\textsuperscript{135} Ibid. Prior to this decision three recent attempts to raise the issue in the Supreme Court on writs of certiorari, mandamus, and habeas corpus, respectively, had been made in United States v. Dickinson (1909) 213 U. S. 92, 29 Sup. Ct. 485; Ex parte Riddle (1921) 255 U. S. 450, 41 Sup. Ct. 370, and Riddle v. Dyche (1923) 262 U. S. 333, 43 Sup. Ct. 555. In each case the reply had been that the proper way to bring the question before the court was by writ of error. The Patton case came up from the Circuit Court of Appeals for the Eighth Circuit on a certificate of division of opinion. Either the Low or the Coates case would have presented a true case of waiver, which was not so in the Patton case.

\textsuperscript{136} (1930) 281 U. S. 276, 290, 50 Sup. Ct. 253, 255. The opinion does not ignore the numerous state precedents to the contrary, but expressly rejects them. The leading case on the question is the Pennsylvania decision in Commonwealth v. Hall (1928) 291 Pa. 341, 140 Atl. 626. In holding that a conviction by a judge alone could not be sustained, at least in the absence of a waiver statute, Mr. Chief Justice Moschzisker wrote: "It should, however, be evident to everyone that trial by a judge without any jurors is quite a different thing from trial by judge and jurors, though the latter be less than the standard number. The system of trial by jury brings without any jurors is quite a different thing from trial by judge and jurors, though the latter be less than the standard number. The system of trial by jury brings, and is intended to bring, the private citizen into the administration of justice; if there be only one juror, he represents the lay point of view, of which defendant gains the benefit, at least to that extent. ... The force of this distinction between some jurors and no jurors cannot be diminished by any technical argument ... A judicial ruling which permits the reduction of a jury below twelve, by consent of the defendant, is a variation of the system of trial by jury; whereas trial by a judge without a jury is abolition of the system as applied to the case in hand. There is a distinct difference between the two." 291 Pa. at 345-346, 140 Atl. at 627-8. See also note 78 supra. Mr. Justice Sutherland's dictum that the distinction is of no consequence does not seem to adequately dispose of the question, nor is it at all certain that this very distinction will not ultimately be called upon to justify the holding in the case.

\textsuperscript{137} Article III, §2, and Amendment 6.
such a trial? the opinion proceeds to an examination of the authorities. The dictum in Thompson v. Utah is disposed of with the curt comment: "this statement, though positive in form, is not authoritative.

The federal circuit court cases which had relied upon it are dismissed with the statement that the "scholarly and thoughtful dissenting opinion" of Mr. Justice Aldrich in the earliest of the three is the more convincing. On the other hand, the leading commentators, including Blackstone and Story, have construed the "right" of trial by jury as a "privilege;" and finally, since "the first ten amendments and the original Constitution were substantially contemporaneous and should be construed in pari materia, . . . the latter provision fairly may be regarded as reflecting the meaning of the former." Hence the conclusion "that Article III, Section 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election." This may all be true enough; but still the question remains whether the court is empowered to try the case without a jury; that is to say, whether Congress has vested jurisdiction to that end?

This second question—Has Congress vested jurisdiction to that end?—is answered with surprisingly little attention being paid to Congress or to its brain-child, the United States Code. We are first told that "since, however, the right to a jury trial may be waived, it would be unreasonable to leave the court powerless to give effect to the waiver and itself dispose of the case;" which may or may not be true, depending upon whether or not one feels that there can be no twilight zone where neither the Constitution forbids nor the judge-made law allows. A quotation from the Schick case to the effect that "there is no act of Congress requiring that the trial of all offenses shall be by jury" then raises a presumption that the provision in the

138 (1930) 281 U. S. 276, 293, 50 Sup. Ct. 253, 256.
139 (1897) 170 U. S. 343, 18 Sup. Ct. 620.
Supra note 138.
140 Supra note 133.
141 Supra note 133.
142 (1930) 281 U. S. 276, 294, 50 Sup. Ct. 253, 256.
147 Ibid.
148 Ibid.
150 (1930) 195 U. S. 65, 24 Sup. Ct. 826.
151 Op. cit. supra note 149. Cf. supra note 127. Four pages earlier he had quoted the dissenting opinion of Mr. Justice Aldrich in Dickinson v. United States (C. C. A. 1st, 1903) 159 Fed. 801, 820, to the effect that "it is probable" that the records of the Constitutional Convention would be found to agree with the opinions of the Court.
Judicial Code\textsuperscript{152} does not mean what it says, so that it is easily disposed of. And here the learned Justice plays his ace of trumps: Prior to the act of 1865\textsuperscript{153} there had been but one statutory provision for criminal and civil cases alike. "But this court has always held, beginning at an early day, that, notwithstanding the imperative language of the statute, it was competent for the parties to waive a trial by jury" in a civil case.\textsuperscript{154} It is added that the "cases are collected"\textsuperscript{155} in a footnote to Kearney v. Case,\textsuperscript{156} from which the opinion quotes a brief paragraph.

Had the learned Justice quoted more fully from this decision the result would have been as disastrous as it would have been illuminating. The syllabus reads:

"2. Prior to the act of March 3d, 1865, parties to an action at law could submit the issues of fact to be tried by the court without a jury, but they were bound by the judgment of the court, and could not have a review on error of any ruling of the court on such trial.

"3. To enable parties to have such a review and to enable them to make a valid agreement to waive a jury the act above mentioned was passed, . . ."\textsuperscript{156}

Of course syllabi are generally not prepared by the court, and hence are not a part of the opinion. But looking into the body of the opinion we find not only confirmation but also the following interesting doctrine:

"As stated in . . . Flanders v. Tweed,\textsuperscript{157} the main purpose of the act undoubtedly was to enable the parties who were willing to waive a jury to have the case reviewed on writ of error when tried by the court alone. This was rendered necessary, as shown by Mr. Justice Nelson in the opinion in that case, by the former decisions, based on the idea that in such cases the court did not sit as a court of law, but as quasi arbitrators."\textsuperscript{158}

And in Campbell v. Boyreau,\textsuperscript{159} one of the cases cited in the footnote to which our attention has been called, Mr. Chief Justice Taney wrote:

"The findings of issues in fact by the court upon the evidence is altogether unknown to a common law court, and cannot be recognized as a judicial act. Such questions are exclusively within the province of the

Although they would appear to be silent on the question, such presumptions are highly dangerous. Compare the decision in Coyle v. Smith (1911) 221 U. S. 559, 31 Sup Ct. 688, with the debate and vote in the federal convention on August 29, 1787, as reported by JAMES MADISON, FORMATION OF THE UNION (1927) 638-639.

\textsuperscript{152} U. S. CODE (1928) Title 28, § 770.

\textsuperscript{153} Supra note 109.

\textsuperscript{154} (1930) 281 U. S. 276, 301, 50 Sup. Ct. 253, 259. The opinion does not state that these are all civil cases, but such are the facts.

\textsuperscript{155} (1870) 79 U. S. 275.

\textsuperscript{156} Italics have been added.

\textsuperscript{157} (1869) 76 U. S. 425.

\textsuperscript{158} (1870) 79 U. S. 275, 282-283. The italics have been added.

\textsuperscript{159} (1858) 62 U. S. 223, 226-227. The italics have been added.
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Query: Does the Court propose that we should arbitrate felony cases?

Having thus ingeniously surmounted the only real hurdle involved, the opinion continues in a lighter vein, and there is little with which many will disagree except that they may feel that, in view of the present status of the Judicial Code, the arguments would be more appropriate in a legislative hall than in a judicial opinion. The "public policy" dictum of the New York court is disposed of by a tri-partite argument: (1) "This would have been much more convincing and satisfactory if we had been informed why it would be 'highly dangerous' to allow a waiver, 'and should 'not be tolerated';' (2) "It is difficult to see why the fact . . . that the accused may plead guilty and thus dispense with a trial altogether, does not effectively disclose the fallacy of the public policy contention;" and (3) "the rule of the common law . . . was justified by conditions which no longer exist; . . . 'cessante ratione legis, cessat ipsa lex'."

In conclusion, the opinion raises the question: Do the above arguments apply in the case of felonies, or only in that of offenses of a lesser grade? The learned Justice then finds that Mr. Justice Harlan, in his dissenting opinion in the Schick case, had insisted that "the grounds upon which the decisions rest are, upon principle, applicable alike in cases of felonies and misdemeanors." Thus is the argument that a waiver cannot be sustained even in the trial of a "petty misdemeanor" utilized to sustain such a waiver in any case whatsoever, even though it be a capital offense. And all this in the face of a statute which would seem to prohibit the procedure.

161 Supra note 72.
166 (1903) 195 U. S. 65, 83, 24 Sup. Ct. 826, 833.
168 Supra notes 107, 109.
Is the theory of the case sound? The answer seems obvious. Will it stand? This is at least questionable. There is always the possibility that it will be narrowed on its facts: a waiver of one or two jurors, and not a waiver of jury trial. The distinction between the two, as made by Chief Justice Moschzisker, \(^{169}\) seems both sensible and logical; and common sense has an uncanny habit of creeping into judicial decisions. Certainly the other possibility, that the rule of the civil cases be applied to felony trials, is unthinkable. "It is suggested without deciding" that the wise course would be for Congress to definitely put the matter at rest by the adoption of an express statutory provision.

Regardless of the deficiencies of the opinion, it has already left its mark upon the decisions in other jurisdictions. The most important and most interesting of these is People v. Fisher, \(^{170}\) which reversed a long line of opinions to the contrary in order to sustain a waiver. This case merits brief consideration because, while purporting to follow the \textit{Patton} case, it departs from the opinion in that case in at least one important particular; and also because it appears to be the only decision in an American court of last resort which has actually sustained a conviction by a judge sitting alone in a felony case in the absence of statutory authorization.

\textbf{WAIVER IN ILLINOIS: PEOPLE V. FISHER} \(^{171}\)

As pointed out above, \(^{172}\) the Illinois statutes applicable to the criminal courts in general merely provide that "all trials for criminal offenses shall be conducted according to the course of the common law." \(^{173}\) It is also decreed that "juries in all criminal cases shall be judges of the law and the fact." \(^{174}\) Under these statutes it was early held, with virtually no discussion of the question, that in a misdemeanor case a jury might be waived and the facts tried to the court. \(^{175}\) But

\(^{169}\) Supra notes 76, 136. The stress placed upon the necessity of the consent of both the prosecution and the trial judge to a waiver ((1930) 281 U. S. 276, 312, 50 Sup. Ct. 253, 263) adds to this possibility.

\(^{170}\) (1930) 340 Ill. 250, 172 N. E. 722.

\(^{171}\) Ibid.

\(^{172}\) Supra note 36.

\(^{173}\) Ill. Rev. Stat. (Cahill, 1921) c. 38, §761.

\(^{174}\) Ibid. §764.

\(^{175}\) Zarresseller v. People (1855) 17 Ill. 101, 104; "The issue [selling liquor without a license] was tried by the court, by agreement of the parties in open court, and this is also assigned for error. We do not doubt the right of the defendant, in cases of misdemeanors, to waive a jury and put himself upon the court for trial. He may waive his right in this respect, and, having done so, can not assign for error that the court tried the issue. People v. Scates (Ill. 1842) 3 Scam. 351." Darst v. People (1869) 51 Ill. 286, 288, 2 Am. Rep. 301: "It is urged that a jury could not be waived, but we know of no reason why it may not be in trials for misdemeanors." This is all that was said in either case on the question of waiver. The Scates case was scarcely in point, involving a change in venue rather than the waiver of a jury trial.
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when the court was presented with its first felony case it reversed the
conviction, pointing out that the lack of a statute on the question was
fatal. "The trial of an indictment for a felony by a judge without a
jury," the court explained, "was a proceeding wholly unknown to the
common law. . . . While a defendant may waive his right to a jury trial,
he cannot by such waiver confer jurisdiction to try him upon a tribunal
which has no such jurisdiction by law."176 At this point the court
appears to have become uneasy; for could not the same arguments be
made against a common law waiver in misdemeanor actions?

Fortunately for the court's peace of mind, it was only four years
until the legislature passed a statute "To provide a trial by jury in all
cases where a judgment may be satisfied by imprisonment."177 Eagerly
the justices seized upon this act as the basis for sustaining the convic-
tion in their next misdemeanor case.178 Although Brewster had been
tried for false imprisonment, the possible penalty for which was a fine
of $500 or one year in jail, the actual sentence imposed by the judge
who, in the absence of a jury, had tried the facts of the case, was a fine
only. Hence the court concluded: "The act of 1893 . . . provides for
the waiver of a jury trial in cases where a fine is imposed, and also
provides that imprisonment may follow where the fine so imposed is
not paid. It, therefore, authorizes the waiver of a trial by jury in
prosecutions for misdemeanors. The act only applies where a fine is
imposed, or a money judgment is rendered. It has no application to
criminal prosecutions for felonies."179

Waiving the fact that the obvious purpose of the statute appears to
have been to grant a right to jury trial in cases where no such right had
previously existed, the logic of this last sentence is by no means self-
evident. If the decisive factor be that only a fine was imposed, then
why would it not apply in a felony case, only a fine being imposed? If
the difficulty be that in the latter case a sentence of imprisonment could
be given, the same difficulty, of course, was involved in the Brewster
case itself. Apparently appreciating this, the court, when it was faced

177 Ill. Laws (1893) 96; Ill. Rev. Stat. (Cahill, 1929) c. 38, §780: "No person
shall be imprisoned for non-payment of a fine or a judgment in any civil, criminal,
quasi-criminal or qui tam action, except upon conviction by a jury; Provided, that
the defendant or defendants in any such action may waive a jury trial by executing
a formal waiver in writing: . . . when such waiver of jury is made, imprisonment
may follow judgment."
178 Brewster v. People (1899) 183 Ill. 143, 55 N. E. 640.
179 (1899) 183 Ill. 143, 153, 55 N. E. 643, 642. Not only did the opinion
expressly state that a waiver could only be sustained when authorized by statute, but
it appears to have doubted the constitutional power of the legislature to provide for
a waiver in a felony case.
with the question three years later, ruled that "the act of 1893 . . . authorized waiver of a jury in cases where a 'fine or a money judgment' only may be assessed. It follows, then, that as to all other criminal offenses trial by jury, as enjoyed prior to and at the time of the adoption of the constitution of 1870, is the only legal mode of adjudicating the guilt or innocence of one accused of a criminal offense."\(^{180}\)

Of course this vitiated the reasoning of the court in its prior decision. However, Mr. Justice McGruder's opinion in that case had hinted at another possibility: at common law one was entitled to a jury trial only in cases prosecuted on indictment.\(^{181}\) Accepting this as the real basis of the decision, Mr. Justice Boggs concluded: "In all criminal accusations which can only be prosecuted upon indictment a jury is an essential part of the court," whereas "in the cases . . . in which it was held in this court that criminal accusations might be lawfully prosecuted without the intervention of a jury, the offenses were such as might be prosecuted otherwise than by indictment . . . ."\(^{182}\)

What, one may ask, was the status of the law at this point? In *Brewster v. People*\(^{183}\) the reasoning of the court had been expressly based upon a statute which had now been held inapplicable to the facts of the case. Taken together, do the two decisions,\(^{184}\) in spite of the strong dicta to the contrary, constitute a holding that in misdemeanor actions a jury may be waived at common law? Here another fortunate occurrence took place, through which the now embarrassing statute of 1893 dropped entirely out of the law;\(^{185}\) and just one year later the

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\(^{180}\) Paulsen v. People (1902) 195 Ill. 507, 515-516, 63 N. E. 144, 147. Indicted for violation of the banking act, punishable by fine or by a penitentiary sentence, Paulsen had waived a jury and the prosecution had opened its case to the judge. Subsequently the action was dropped and he was reindicted and brought to trial before a judge and jury. His appeal, alleging a former jeopardy, was based on the argument that since the judge had power to impose a sentence of a fine only, in which case the Brewster case should be controlling, the possibility of a prison sentence should be regarded as immaterial.

\(^{181}\) (1899) 183 Ill. 143, 150, 55 N. E. 640, 641. If this be true it is difficult to perceive why a case prosecuted other than by indictment should even be tried by a jury, the defendant demanding: for did not the statute provide that "all trials for criminal offenses shall be conducted according to the course of the common law?" Ill. Rev. Stat. (Cahill, 1921) c. 38, §761. Instead, we are informed on the very next page that in such cases a jury can only be waived if an express statute makes provision for such action.

\(^{182}\) (1902) 195 Ill. 507, 516, 63 N. E. 144, 147. In actual fact, both Zarresseller v. People (1855) 17 Ill. 101, and Brewster v. People (1899) 183 Ill. 143, 55 N. E. 640, were cases in which the prosecutions were tried on indictments. See infra note 186.

\(^{183}\) Supra note 178.

\(^{184}\) Brewster v. People, supra note 178; Paulsen v. People, supra note 180.

\(^{185}\) It was held unconstitutional as a violation of the "equal protection of the laws" clause. Supra note 100.
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court returned to its original doctrine that one charged with a mis-
demeanor may waive a jury at common law.186 But when the court
again received a case187 in which a waiver statute188 was applicable it
returned to its old argument,189 and thus once more cast a shadow
of doubt upon the validity of a common law waiver.

When the Judicial Advisory Council was created in January, 1929,
by the Cook County Board of Commissioners,190 one of its first steps
was to submit a draft bill191 for the waiver of jury trial in criminal
cases to the legislature, which was then in session. This bill passed the
Senate, and in the latter part of the session passed the House with some
slight amendments. It failed, however, to be returned to the Senate in
time for the latter's concurrence in the House amendments, and so was
lost in the rush which accompanies the closing days of the session.

This step having failed, the Council was moved by the opinion in
the Patton case192 to arrange a renewed test of the same question under
the existing statutory provisions. The result was its victory in People v.
Fisher.193

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186 People v. Swarkowski (1923) 307 Ill. 524, 139 N. E. 34, a case of petit
larceny. The fact that the prosecution was by indictment was held immaterial
since, had it been brought in any other than the Criminal Court of Cook County,
it could have been presented on information. See supra note 182.
188 Ill. Rev. Stat. (1927) c. 37, §318 (§119, County Court Act of 1874). To
enable a defendant to be tried without waiting for the opening of the next law
term, the act provided that "the court may receive the plea of guilty and pass
judgment, or, if the accused will waive a jury and be tried by the court without
a jury, the court may, upon notice being given to the State's attorney, try the
case and pass judgment as well at a probate as a law term of said court."
189 "When authorized by statute the right of trial by jury under an information
for a misdemeanor may be waived by the accused without violating" the consti-
tution. (1927) 326 Ill. 197, 199, 157 N. E. 233, 234.
190 Its members are Hon. Frederic R. DeYoung, Associate Justice of the State
Supreme Court; Hon. Dennis E. Sullivan, Judge of the Superior Court; Hon. Harry
M. Fisher, Judge of the Circuit Court, and Messrs. Amos C. Miller and John J.
Healey of the Chicago bar. Its January conferences were also participated in by
State Attorney Swanson, Frank J. Loesch, then his first assistant and shortly there-
after appointed by President Hoover to membership on the National Commission
on Law Observance and Enforcement, Chief Justice John J. Sullivan of the
Criminal Court and Chief Justice Harry Olson of the Municipal Court of Chicago.
Since the creation of the Judicial Advisory Council of Illinois on the following
August the two have cooperated, and in January, 1931, issued a joint report.
193 (1930) 340 Ill. 250, 172 N. E. 722. Mr. Justice DeYoung taking no part,
arrangements were made with State Attorney Swanson for a defendant charged with a
felony (rape) to waive a jury trial in Mr. Justice Fisher's court. He was subsequent-
ly found not guilty, and the State Attorney's office instituted a mandamus action to
compel Mr. Justice Fisher to expunge his finding from the record.
Aside from its decisions in the Harris and Morgan cases, the proposition presented to the Illinois court was much less complicated than that faced by the federal court, for not only was the special language of Article III lacking in the state constitution, which merely provides for "the right" of trial by jury, but the difficult hurdles furnished by the federal statutes were also lacking. Being a true waiver case, neither distinctions nor parallels needed to be drawn between trial by juries of eleven men and non-jury trials. There was thus but one question for decision: in the absence of any legislative declaration of policy, can a defendant waive a jury in a felony action and have his case tried to the judge? Available holdings to the effect that this could be done in misdemeanor cases still further narrowed the question: Is there any sound reason why the rule should differ, at common law, depending upon the degree of the crime charged? The reply that there are no sound reasons for such a distinction, coupled with the affirmative answer of a unanimous court to the major proposition, may well mark the turning point in the attitude of both bench and bar toward the subject of waiver.

The opinion itself need not be gone into in detail. Suffice it to say that Mr. Justice DeYoung uses most of the standard arguments: historically the jury has been regarded as a protection for the accused, and not for the state; the constitution creates a right rather than a tribunal; no distinction between felonies and misdemeanors is to be found in the language of the constitution; the argument of "public policy" is an outworn shibboleth. And finally, "The State owes to a person charged with crime a fair and impartial trial, including a strict compliance with every constitutional guaranty, but it is not obliged to force upon him the acceptance of rights and privileges in the face of his desire, informed and expressed, to waive them."

One omission from the opinion deserves comment. In the Patton case, which the opinion purports to follow, Mr. Justice Sutherland closed his argument with the comment: "In affirming the power of the defendant in any criminal case to waive a trial by a constitutional jury and submit to trial by a jury of less than twelve persons, or by the court, we do not mean to hold that the waiver must be put into effect at all events. . . . Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of

195 (1891) 136 Ill. 161, 26 N. E. 651.
197 Article 2, §§ 5, 9.
198 This is likewise true of all of the Illinois cases cited supra.
199 Supra notes 175, 186.
the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, 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.” 201 Of course the facts of the instant case, as known to the author of the opinion, covered more than mere consent, but the fact remains that “judges see only with judicial eyes,” and the record was silent upon these questions. In addition, the state “insisted in the Supreme Court at the time of the argument of this case that neither the State’s Attorney nor the Judge should have anything to say as to whether or not the defendant might waive a jury trial; that if a jury trial was a right, the defendant had the power to waive it, regardless of whether or not the State’s Attorney or the Judge consented.” 202 The dismissal of the subject with the brief direction that “Upon the trial court is imposed the duty to see that an accused person’s election to forego such a trial is not only expressly but also understandingly made,” 203 must be taken as an acceptance of this view.

The federal rule is out of keeping with the underlying conception of common law waiver. If jury trial is a privilege which the accused may forego, it is scarcely consistent to require the consent of the state or of the court as a condition precedent to the exercise of such a right. Which may be considered as further evidence that the Patton case 204 is not a true waiver case, but should be more narrowly limited on its facts. If any “crying evil” result from the Illinois rule, there will still be the statute book as a weapon of defense.

It is scarcely to be expected that People v. Fisher 205 will so commend itself to the profession as to result in any deluge of common law waiver cases. There is much to commend the reasoning which holds that any such fundamental change should be made by statute rather than by judicial decision. But it is to be hoped that it will aid in clearing the boards of much of the doubt that has arisen from the ill considered dicta of the cases, and allow the problem to be dealt with as the question which it really is: that of the elementary justice and expediency of the waiver plan. 206

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201 (1930) 281 U. S. 276, 312, 50 Sup. Ct. 253, 263.
202 Letter from Hon. Denis E. Sullivan dated May 18, 1931.
205 (1930) 340 Ill. 250, 172 N. E. 722.
206 This phase of the question is discussed in Grant, Felony Trials Without a Jury (1931) 25 Am. Pol. Sci. Rev. 980.