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Criminal Law--Right to Waive Jury Trial over the Objection of the State's Attorney

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In the case of *Shaver v. Weddington, et al.*, 247 Ky. 248 (1932) the will provided: "Then I request that she divide any earnings she and I have accumulated during our marriage between her people and mine, either by gift or by will as she may deem proper". The court said in construing this passage, "We have a line of cases holding that, where property has been devised absolutely, any limitation sought to be imposed upon its disposition or provision repugnant to the fee, will be construed as void." This seems to be absolutely binding and should have formed the basis of a different result in the Williams case.

An exceedingly well written opinion and one which reviews most of the former cases is *Wells v. Jewell*, 232 Ky. 92, where the devisee is given unlimited power to dispose of property, it is generally placed in this class as being a devise in fee.

Consequently, from the above statements, it is almost impossible to see wherein the court found sufficient ground upon which to base the decision of the Williams case.

H. W. VINCENT.

CRIMINAL LAW—RIGHT TO WAIVE JURY TRIAL OVER THE OBJECTION OF THE STATE'S ATTORNEY.

In the recent case of *The People v. Scornavache*, 347 Ill. 403, 179 N. E. 909 (1931) the defendant pleaded not guilty to an indictment for murder and moved for a trial without a jury. The state's attorney objected to this motion and moved that the cause be tried by a jury. The court sustained the latter motion. Upon being convicted, the defendant appealed and claimed that the court erred in refusing to hear the case without a jury. The Supreme Court of Illinois affirmed the decision of the lower court and thereby refused to allow the accused to waive his constitutional right of trial by jury.

There are three very important problems raised by the case. (1) What is the effect of the motion by the accused to waive his right of trial by jury? (2) Must the state's attorney always agree that the jury be waived? (3) May the court use its own discretion in allowing the jury to be waived in criminal cases? These questions are discussed in the light of legislative silence and under a constitution which contains the usual wording that "The right of trial by jury shall remain inviolate".

It has become well established by a long line of decisions that the constitutional guarantee of the right of trial by jury may be waived by the accused at his election. *Murphy v. Commonwealth*, 1 Melcalf (Ky.) 365 (1858); *State v. Worden*, 46 Conn. 349 (1878); *Patton v. United States*, 281 U. S. 276, 74 L. Ed. 855 (1929); *People v. Fisher*, 340 Ill. 250, 172 N. E. 722 (1930). In all of these cases there was either an agreement between the accused and the prosecuting attorney to waive the jury or a statute allowing the same. The *Scornavache* case was decided on the theory that the right to waive a trial

by jury does not carry with it the right to demand the trial of a criminal case by the court. The emphasis in this instance should be placed on the distinction between the two phrases "right to waive" and "right to demand". On this point the case is sound and is supported by the following decisions: *State v. Meade*, 4 Blackf. (Ind.) 309 (1837); *Ickes v. State*, 63 Ohio St. 549, 59 N. E. 233 (1900); *Morrison v. State*, 31 Okla. Crim. Rep. 11, 236 Pac. 901 (1925); *Patton v. United States*, supra. Some writers contend that this doctrine is contrary to the idea that the right to a jury trial is a private right which the accused may forego at his election. 25 Michigan Law Review 695; 79 A. L. R. 553; 21 Kentucky Law Journal 1. But this contention is unsound in view of the distinction that was made above. It must be borne in mind that the state's attorney in objecting to a motion to waive the jury is not necessarily objecting on the grounds that the state has a right involved, but on the grounds that the accused cannot show a constitutional or statutory right to demand a trial by the court.

This apparent inconsistency is best explained by observing an analogy. In the case of *Edwards v. State*, 45 N. J. L. 419, the court held that the accused could waive the right to be first indicted by a grand jury. Would it be argued for a moment that by virtue of this decision the accused could demand that the indictment before a grand jury be dispensed with? This is virtually the situation in the *Scornavache* case.

Many states have passed statutes to take care of the problem involved here. They may be grouped as follows: (1) Statutes requiring an agreement between the accused, the state's attorney and the court. Indiana is a very good example of this. Burns, Ann. Stat., 1926, Sec. 2299. (2) In New Jersey the granting of the request to waive the jury is wholly within the discretion of the court. 2 Comp. Stat. p. 1824. (3) Only the consent of the accused is required in many states. Laws of Wisconsin, 1925, Chapter 124. The legislature in enacting any one of the various types of statutes is merely determining a question of public policy. Under the typical provision of the various state constitutions on the jury trial, all the different kinds of statutes referred to above have been upheld. *State v. Edwards*, supra; *Murphy v. State*, 97 Ind. 579 (1884); *State v. Worden*, supra.

Under the present condition in Kentucky the problem raised by the principle case could only arise in cases involving misdemeanors. Kentucky Statute 2252 allows the accused to waive the jury in misdemeanor cases but prohibits such a procedure in trials of persons charged with felonies. Therefore, all felony cases in Kentucky must be tried by a jury as long as the above statute is in force. *Branham v. Commonwealth*, 209 Ky. 734, 273 S. W. 489 (1924). If the Kentucky Court follows the majority rule on the question of the right to waive the jury where there is statutory sanction for such a procedure, it would hold in misdemeanor cases that a motion to waive the jury

trial would be obligatory upon the court. However, this question of the effect of the statute has never been before the court as the desire to waive the jury has always been mutual between the parties until the accused found that the judge had decided for the state.

In the absence of statute it must be concluded that the effect of the motion by the defendant to waive the jury is to place the burden upon the court to determine the expediency of such a procedure. However, no case has been found holding that the defendant is in a position to demand a trial by the court. Likewise, no case has been found where the court sustained the defendant's motion for a trial without a jury over the objection of the state's attorney. The following cases hold that the court is correct in sustaining the objection to the motion to waive: *Morrison v. State*, supra; *State v. Mead*, supra; *Ickes v. State*, supra. The cases generally agree that the court has the final word in determining the right to waive the jury trial in criminal cases. This is best expressed by the words of Justice Sutherland in the case of *Patton v. United States*, supra, at p. 312, "The duty of the trial court in determining a motion of waiver of jury is not discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departure from that mode of trial". This in its last analysis means that the judge must be certain that a trial by the court in the particular case will be just as expedient as a jury trial before the older method will be dispensed with.

H. C. SMITH.

CARRIERS—LIMITATION OF ACTIONS FOR RECOVERY OF OVERCHARGES IN KENTUCKY.

For the past few years the principal railroads of Kentucky have declined to pay *bona fide* claims for overcharges on Kentucky intrastate shipments unless such claims are presented within two years from the date of delivery of the shipments. Formerly these claims were paid if filed within five years. No recent decision of the courts or modification of the statutes has been cited in support of this change of position by the carriers. Numerous complaints have been voiced by shippers whose claims have been rejected on this ground, but thus far no action involving this point has been decided by the Court of Appeals.

As used herein the term "overcharges" is confined to charges in excess of rates lawfully established and filed with the Railroad Commission as provided by Section 201g-3 of the Kentucky Statutes. There appears to be no question but that the two year limitation period provided in Section 819 of the Statutes is applicable to actions brought under Sections 816 (extortion), 817 (discrimination), 818 (preference),