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Alfred A. Naff

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JURY TRIAL, WAIVER THEREOF AND THE ALTERNATE JUROR*

I. SHALL THE JURY SYSTEM BE ABOLISHED?

The day has come when no institution, no matter how traditional, honored, venerable or even worthwhile, is beyond the pale of criticism. Of recent and fervent character has been an avalanche of censure towards the jury as a part of our legal system.

"The day is upon us when tradition bows to practical efficiency and no mere reverence for historical usage may long impede an innovation of accredited merit. But it is meet that radical reform affecting such a fundamental institution as trial by jury should move deliberately." ¹

The criticism made of the jury has been in complaints that in a great majority of cases, whether caused by qualifications of jurors being too low and the essential obtuseness of uneducated minds, or the capricious and wayward humors which sway them, the result is little less than a lottery and even indirect bribery is frequently suspected to operate in some of the cases, especially in those which unscrupulous attorneys conduct.

Upon trial of such an institution, however, "its history must be allowed; the lamp of experience must not be dimmed." ²

Jury trial has been defined as a mode of trial by which a few citizens selected for the purpose are constituted the judges of the truth, of the facts in suits between parties and compelled to discharge this duty on the sanctity of their oaths, but in subordination to a higher judge, who has distinct functions of control. Various theories have been adopted as to the origin and development of this characteristic feature of the administration of justice through the jury trial. Jury trial does not owe its existence to any positive statute but has grown up insensibly and has become inextricably interwoven with the people's habits. It was generally supposed, until recently, that our Anglo-Saxon ancestors had the credit of having nursed the germ of this vigor-

*This is one of a series of notes on "Waiver of Jury Trial In Criminal Cases."

ous plant of liberty, and most papers concerning its origin embody this popular belief. Recent researches have, however, shown that jury trial, as now known and practiced, did not exist in those times though it has been the natural development and sequence of other rudimentary forms of trial then prevailing.

However, the jury trial was an institution prominent in the Anglo-Saxon resistance to oppression. The principle that a freeman cannot be deprived of liberty or property except by the lawful judgment of his equals was stated by Magna Charter in 1215. The purpose of the jury was to resist oppression of king or state. The force of query therefore is, has the state become so perfect as to cease to threaten the rights and liberties of the individual?

Mr. Corbin says, concerning the jury trial in criminal cases, "it has stood and always will stand as the only bulwark between the security of the individual and the oppressive use of power by the state."

Judge Gregory in his Kentucky Criminal Law, cites the quotation, "that the common judgment of twelve men of the average of the community, with their varied experiences, is more to be trusted on such questions of fact than the conclusions of a single judge, however learned."

It is submitted that the raison d'être of jury trial is found in human nature itself and that it in some phase or other, has been detected in almost every form of civilization, its essence being a reference of disputed facts to the impartial judgment of a few men of average understanding and of nearly the same stage of life as the litigant or the defendant, as the case may be. Further, that one great advantage of the jury trial over and above the essential fairness of the principle on which it is founded, is the experience and knowledge as well as the love of fair play, which are thereby acquired by the people who take part in it. And further, that the chief reason why the jury trial has so long stood and still stands so high in public favor is that not withstanding all its glaring and familiar defects, no

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4 Supra 1.

other machinery has ever been devised which is not open to similar or greater criticism.

It is finally submitted that the jury has a permanent and necessary function and place in our system of justice and for the reasons given should not be abolished.

However, it is admitted that our system of justice is not without its defects, chief among which are the cost, delay, and trouble in furnishing a jury for every trial, and the real purpose of this paper is to discuss a problem arising from such defects, i.e., may one have the right to waive a trial by jury and be tried by the court alone if he so desires? This problem is not easy of solution. The primary difficulty is in its constitutionality.

II. CONSTITUTIONALITY OF WAIVER OF JURY.

A constitution is supposed to embody the fundamental, organic law or principles of government of a society, nation or state. In this country it was conceived not only with the purpose of becoming the embodiment of the principles of the organic structure of our government, but also with the fervent and predominant design of preserving to the people certain safeguards against oppression and guarantees of sacred rights and liberties. The constitutions of the States have in the main been propagated with the same purposes and generally modeled after our Federal document.

Since the constitutions have been written with the view of maintaining rights against the possible oppression of the state, it was only natural that the jury trial, the purpose of which was to protect the individual against the king or state, according to Blackstone, would receive the attention of the framers.

Such was the subject matter of our Federal Constitution in Article 3, section 2, clause 3, and also in the sixth Amendment. The State Constitutions have all "followed suit" with like stipulations. The provisions in the various state constitutions generally follow similar phraseology, i.e., "the right of trial by jury shall remain inviolate" or "shall remain," some adding

†Blackstone's Com. Book IV, p. 349.
‡These will be discussed at more length, infra.
the phrase "heretofore" or "as heretofore enjoyed." It is believed with frankness that the majority of constitutions can be said to have no more expressive or mandatory provisions than those indicated and that all are equivalent to a similar interpretation. It is submitted that this proposition will not be controverted.

Lord Coke has said that common law is common sense. This saying, while perhaps lacking much truth, is fortified with a great deal of merit. In the light of such reasoning and the facts heretofore given, the proposition is, what interpretation should be placed upon the constitutional provisions concerning jury trial and the possibility of waiver thereof?

With few exceptions most of the state constitutions are silent as to waiver. As to whether there is a constitutional power to provide for trials without jury becomes a matter of construction in most cases.

Let us consider therefore, the various interpretations placed on the matter by the courts of our land.

In the case of State v. Baer the question was raised directly as to whether the right of trial by jury as guaranteed by Sections 5 and 10 of the State Bill of Rights could be waived. The provisions in the State Bill of Rights were typical: "The right of trial by jury shall remain inviolate; in any trial in any court, the party accused shall be allowed . . . a speedy public trial by an impartial jury . . . ."

The court answered the question in the affirmative, denying the appellant's objection to his voluntary waiver of a part of his jury.

The case of State v. Worden held, in declaring a statute authorizing waiver constitutional, that "the natural and obvious meaning (of the constitutional provision) is to secure to suitors and persons accused of crime, as individuals, the right and privilege of having their causes heard and determined by a jury; and it is difficult to see how the principles of liberty and self government, or the interest of the body politic can in any way be put in jeopardy by a waiver of that right." And further, that while the legislature could not abridge the right of jury trial, it could improve it, and "adapt it from time to time to the

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9 103 Ohio St. 585, 134 N. E. 786 (1921).
10 46 Conn. 349 (1878).
ever changing phases of human affairs." The provision in the Connecticut Bill of Rights is, "the right of trial by jury shall remain inviolate."

Ten years later an Indiana statute similar to that of Connecticut, except that capital offenses were expressly excluded, was declared constitutional in Murphy v. State.11

In the case of State v. Woodling,12 it was held that trial by jury was for the protection of the defendant and might be waived in trials for minor offenses. Two cases in Kentucky,13 Murphy v. Commonwealth,14 and Phipps v. Commonwealth,15 resulted in similar holdings under a statute authorizing less than twelve in a trial for a misdemeanor.

In nearly every case concerning waiver of jury, the question involved has not been an interpretation of the constitutional provision but rather of statutory enactments construed as making jury trial mandatory. The decision that would be rendered in a majority of our state courts if the constitutional provision was the sole criterion of whether one could voluntarily waive his right to a jury or not, would be hard to guess. There has generally been legislation of some kind, either authorizing or forbidding a waiver.

In Harris v. People,16 there was no legislation and the court said that "while a defendant may waive his right to jury trial, he cannot by such waiver confer jurisdiction to try him upon a tribunal which has no such jurisdiction by law." This case maintains the view that the jury goes to the jurisdiction of the court, which is based on the reasoning that consent cannot confer jurisdiction. This view, while not wholly sound if the jury trial is considered as a privilege as we have tried to reason it should be, as the support of Cooley and others, and might be considered fairly reasonable. The obvious remedy is to provide legislation authorizing waiver in all cases.

Many of our states have statutes authorizing waiver in misdemeanor cases but not in felony cases. The reason for such a distinction is not clear. Six states have legislation authorizing

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11 97 Ind. 579, (1884) 15 Minn. Law Review.
12 63 Minn. 142, 54 N. W. 1068 (1893).
13 Will be discussed more fully infra.
14 1 Metcalf (Ky.) 365 (1858).
15 205 Ky. 832, 266 S. W. 651 (1924).
16 128 Ill. 585, 21 N. E. 563 (1889).
waiver of jury in both cases. Some of these, however, do not permit waiver in capital offense cases. This perhaps is a valid exception, as so much more is at stake and so much responsibility should not be placed upon one man, even at the request of the one in jeopardy.

However, in such a case, the defendant may plead guilty and in most jurisdictions under such a plea, the court would fix the penalty. This raises the still further entertaining and complicated question concerning this matter as to whether a plea of guilty is equivalent to a waiver of jury. There are adherents to both views on this proposition.

For those who answer in the negative it is said that the jury is a fact finding body, that under a plea of guilty the facts are admitted and therefore no trial is necessary and there is no waiver.

On the other hand, Oppenheim who represents the affirmative, says "there seems to be no escape from the logic of the conclusion that a plea of guilty is a relinquishment of the right to a jury trial. Indeed it waives not only the jury but the other constitutional guarantees which are incidents of the criminal trial."

In reply to the argument of those upholding the negative of the proposition, who say there is not trial on a plea of guilty, it is urged that the waiver of the trial altogether, which constitutes the whole, necessarily includes waiver of jury, a constituent part. A plea of guilty allowed seems also to refute the contention that jury trial is guaranteed because of the public interest involved. Under such reasoning, one should never be permitted to jeopardize his safety by submitting to a verdict by the court.

"If the public have an interest in the liberties of the individual to the extent of making a jury trial mandatory, is that interest less important when the accused elects to avoid any trial?"

It is submitted by the writer that the court's duty on a plea of guilty is not entirely different from a jury's duty under a plea of not guilty. While the facts as they exist in bareness are

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28 Oppenheim, yes; Perkins, no; 25 Mich. Law Rev. 695, 16 Iowa Law Rev. 20.
29 See 18, supra.
30 See note 19, supra.
admitted under a guilty plea, yet the function of a criminal jury and also of the court in rendering a verdict determining a penalty, lies not entirely in the determination of what facts exist, but in the interpretation of the facts given. A court does not merely say when the defendant pleads guilty, that the facts herein admitted constitute X situation which calls for B penalty, from which there can be no deviation. The court interprets the facts as to the circumstances from which they arise and as to the nature, motive, and mentality of the defendant with regard to the seriousness of cause and consequence before meting out a penalty. There have been many cases in which one accused of a crime has, when completely aware of the facts, which perhaps were highly persuasive of his guilt even though he might be innocent, preferred to place an interpretation of those facts before the court under a plea of guilty, relying on a keener understanding than found in any jury. This reasoning, it is believed, indicates that a plea of guilty is closely related to, if not actually, a waiver of jury.

In support of the view that a mandatory constitutional provision providing for a trial by jury is merely mandatory in that it provides for a right of which the defendant cannot be deprived, is urged a comparison of similar mandatory provisions concerning other equally vital rights of the accused. For example, the right to a trial in the county in which the offense was committed, the right to a speedy trial, the right to unprejudiced jurors, the right to an exclusion of improper testimony, the right to be confronted by the witnesses against him, and the right to be represented by counsel. All these rights, guaranteed in most constitutions in just as strong language as jury trial, have been held subject to waiver in one way or another as by change of venue, continuance, failure to challenge, allowing admission of improper testimony, use of deposition and affidavit, and refusal of counsel. It appears that the amount of public policy and interest therein involved does not vary greatly.

Another interesting complication is the problem arising as to whether waiver of a part of the jury constitutes a waiver of the whole as far as the constitutionality is concerned. While some courts have reasoned that the problem is not the same, the more logical and better reasoned argument sustains the proposition that the same question is involved. This appears to be
beyond doubt, for there can be no such valid dividing line drawn as to the number of jurors which might be waived without doing violence to principles of reason.

A case of vital importance on the problem of waiver of jury, of recent decision and worthy of special comment, is Patton v. United States,\(^{21}\) decided by the Supreme Court.

The Constitution of the United States provides in Article 3, section 2, clause 3: "The trial of all crimes except in cases of impeachment shall be tried by jury and such trial shall be held in the state where the said crime shall have been committed," etc.

The Sixth Amendment says: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed," etc.

Until the Patton case the general opinion was that a waiver of trial by jury would not be held constitutional under our Federal Constitution. There was strong and persuasive language leading to this belief in Thompson v. Utah,\(^{22}\) and other federal cases. Certainly the language of our federal document is mandatory.

The facts in the Patton case were, briefly, that the accused was tried for bribing an official and during the course of the trial a juror became ill, whereby the defendant agreed to the remainder of the case being submitted to the eleven remaining jurors. The case was appealed after conviction of the defendant on the ground that he did not have the constitutional right to waive a jury trial.

The court held in refuting this contention (1) that the guarantee of trial by jury was a privilege of the defendant; (2) that waiver of one juror constituted and involved the same problem as waiver of the entire body and submission to the court; (3) that the constitutional provision was not jurisdictional but was meant to confer a right upon the accused which he might forego at his election and that to deny his power to do so is to convert a privilege into an imperative requirement, and (4) that the consent of the court and prosecuting attorney must be

\(^{21}\) 281 U. S. 276 (1929).
\(^{22}\) 170 U. S. 343 (1897).
had in addition to the defendant’s consent before a waiver should be permitted.

It is to be observed that the holding of this case plainly states that the right to trial by jury may be waived and that there should be no distinction between misdemeanors and felonies. But the case adds the proviso that the consent of the court and prosecuting attorney must be had in addition to the consent of the defendant when waiver is desired.

The case stipulates that waiver by the accused must not be put into effect at all events but the trial court must exercise discretion to avoid unreasonable departures with caution increasing with the gravity of the offense.

It is submitted that this limitation placed on the right constitutes an inconsistency in the reasoning of the case. The court goes at great length to enunciate that the right to jury trial was mandatory in form only and that its real purpose was to perpetrate the sacred privilege for the benefit of accused.

Then to require consent of both court and prosecuting attorney is strongly indicative of the public interest theory and could by virtue of its practice become transformed whenever desired into a practical nullification of the rule with a resulting destruction of the accused’s privilege. This exception in the case certainly weakens its worth; nevertheless, the case by virtue of announcing the privilege theory as the test of the supreme court, has been of great encouragement to the upholders of constitutional waiver.

In summarizing we find:

(1) That the right to a jury trial is a privilege of the accused.
(2) That constitutional provisions in general are mandatory only as to the preservation of that privilege.
(3) That waiver has been denied in most cases, not because of the constitutional provision, but because of statutes construed as making jury trial mandatory.
(4) That waiver of part of jury or of entire jury has been upheld in absence of statutory sanction in misdemeanor.
(5) That no distinction should be made between misdemeanors and felonies.
(6) That a plea of guilty constitutes a waiver.
(7) That, in general, consistent with the prevailing constitutional limitations relating to trial by jury, and in the absence of legislation to the contrary, the accused should have the power in criminal prosecution to voluntarily submit his cause to the court and thereby consent to a determination of guilt or innocence without a jury.

(8) That it is more desirable to have legislation enacted in addition to the constitutional provisions providing for waiver in all cases, with the exception perhaps of capital offense cases.

(9) That waiver should be made in open court in writing by the accused; but that the consent of court and prosecuting attorney should not be required.

III. WAIVER OF JURY TRIAL IN KENTUCKY.

a. Present Situation.

b. Specific Recommendations.

a. The present situation concerning waiver of jury in Kentucky is clear. The reasons for it are also obvious. The constitutional provisions relating to the matter are not unlike those of states permitting waiver.

Section 7 of the Bill of Rights provides: “The ancient mode of trial by jury shall be held sacred and the right thereof remain inviolate subject to such modification as may be authorized by this constitution.”

Section 11 stipulates: “In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury of the vicinage.”

It seems that there is nothing in these two provisions which would force a court to deny waiver in the absence of legislation. A case on this precise point has not been decided in this state. Instead the legislature of the state at one time made very evident its attitude as to how the problem should be handled by enacting statute 2252, which reads: “A petit jury in the circuit court shall consist of twelve persons and in all trials held in courts inferior to the circuit court or by any county, police, or city judge or justice of the peace, a jury shall consist of six persons; but the parties to any action or prosecution except for felony may agree to a trial by a less number of persons than is provided for in this section.”
The interpretation is obvious. It says what it means. Waiver is permissible in misdemeanor cases but not in felony trials. However, the Kentucky courts in rendering their decision on this matter, while in the last analysis pinning the result to Section 2252 of the statute, have given strong and persuasive dicta to the effect that in the absence of statute, the constitutional provisions demand a jury of twelve men to try every felony case.23

In *Phipps v. Commonwealth*,24 a misdemeanor case since the statute, waiver was permitted.

In repetition, whatever the constitutional provision, the statute is reliable for all decisions since its passage.

Historically, the present constitution is Kentucky's fourth. It was adopted in 1891. The constitutional provisions for jury trial are traceable to the constitution of 1850, Article 13, Section 8. Section 2252 of the statutes was enacted in 1893.

It is difficult to say what the court would hold in absence of that statute, as dicta in several cases point strongly to a denial of waiver.

In the case of *Tyra v. Commonwealth*,25 decided in 1859 under the 1850 constitution, after the jury were sworn and had heard a portion of the testimony and adjourned until the next morning, one of them failed to attend. Then by consent of the attorney for the commonwealth and the prisoner they agreed to proceed with the trial with the eleven remaining jurors, and the court held such trial proper. The remarkable feature of the case, however, is the fact that the offense was punishable both as a felony and misdemeanor. The jury fixed the penalty as for a misdemeanor, but the court pointedly said, "But, if as contended, the record presents a case of felony, and not of misdemeanor, it follows that according to section 334 of the Criminal Code, the error complained of is not such as to authorize the court to reverse the judgment of conviction. . . . . ."

This seems to the writer to be highly persuasive of the belief

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24 205 Ky. 832, 266 S. W. 651 (1924).
25 59 Ky. 1.
that in absence of statute forbidding waiver, it might be allowed even in a felony case.

There is no doubt that as to misdemeanors in Kentucky, the defendant has always had the right to waive his right to a jury trial even in the absence of statutory enactment.\textsuperscript{26} The present situation, therefore, is that under statute 2252 (1) waiver of jury may be had in any misdemeanor case but (2) in all felony trials it is forbidden.

It is submitted that the cases in Kentucky decided adverse to waiver are based on statutory grounds rather than on the constitutional provisions themselves.

B. Specific Recommendations.

The obvious necessity in obtaining waiver in this state is the repeal of statute 2252. The constitutional provision, i.e., Section 7 of the Bill of Rights, states that the right shall remain inviolate subject to such modifications authorized by this constitution.

The most desirable thing would be an amendment to said provision which would authorize waiver. The next desirable feature would be to enact under our present provision, a statute authorizing waiver. The least desirable but apparently reasonable construction is that in the absence of all legislation, the constitutional provisions themselves should be interpreted so as to permit waiver.

It is believed that either of these latter two methods is possible without a constitutional amendment and that some solution should be reached immediately for the benefit of the citizenry of the state in perpetrating the work of justice in a much more satisfactory and quicker way.

It is contended by those who maintain that waiver of jury trial in this state is unconstitutional in any light without a constitutional amendment, that certain code sections\textsuperscript{27} plus the constitutional provision, 248 have an important bearing on the issue. In refutation of the code section argument, it may be said that our code does not consist of substantive law but only of rules for the government of court machinery. As to provision 248 of the Constitution, the evident content relates to the qualifications of jurors and the grand jury. There is noth-

\textsuperscript{26} Murphy v. Commonwealth, 55 Ky. 365 (1858).
\textsuperscript{27} Kentucky Criminal Code, Secs. 180, 181, 182.
ing that would indicate whether a trial by jury is mandatory or not.

It is urged finally that Kentucky is among those states whose constitutions are silent as to waiver but which have special legislation forbidding it, and that as this legislation (in Kentucky) might have been indicative of the public policy at the time it was enacted (1893), it looks antiquated in the light of present day conditions and should be abolished. Instead we should have the addition of an amendment to our present constitution specifically authorizing the privilege of waiver.

IV. THE ALTERNATE JUROR

The alternate or thirteenth juror is a new step towards the alleviation of needless trials in criminal procedure. This need for such a substitute occurs more often than one would suspect. A mistrial in the Gastonia murder case at Charlotte, N. C., because one of the jurors, after the trial had proceeded many days, became violently insane, illustrates the point. Several states have adopted this creditable plan.

The same oath is administered to the alternate juror, where the practice prevails, as to the regular members. The alternate juror is to remain near the regular jury with equal facilities and opportunity for observing and hearing the evidence and an equal duty to obey the orders of the court. If the twelve regular jurymen survive without illness or mishap until the end of a case, then the extra jurymen is dismissed and only the twelve deliberate.

The alternate juror plan has been attacked on constitutional grounds but has survived the siege.

It is submitted that the plan is a valuable one and should be adopted in all states to allow the court at its discretion to provide for an alternate juror in a case which promises great length and delay.

There is no provision for an alternate juror in Kentucky. If, after a jury has been selected and the trial begun, a juror becomes sick and unable to continue as a juror, the jury must be discharged and the cause tried again.28

The code of this state also provides that if an accepted juror

becomes too sick to continue with his duties, before the jury has been completed, the court may excuse him and complete the jury as if he had not been accepted.29

If sickness occur after the jury has retired for the purpose of reaching a verdict, the jury may be discharged, or if the sickness be only temporary the court may allow the sick juror to be segregated from the others and be placed in charge of an officer, at the discretion of the court, the deliberations to be resumed on recovery of the ailing member.30

These provisions are of only slight benefit and in no way measure up to the need of procedure in perpetrating speedy determination of the Court's work.

It is urged that as an additional recommendation, it would be highly beneficial to the state to incorporate into the system of trial by jury a plan whereby an alternate or substitute juror would be present in those cases which promise to be of great expense and delay, if there be a mistrial.

Alfred A. Naff
Attorney-at-Law,
Lexington, Ky.