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Waiver of Jury Trial in Criminal Cases in Kentucky

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There is a wide dissatisfaction both among lawyers and laymen with the administration of criminal law in the United States. The fact of the matter is that the situation has become so serious as to be a "disgrace to civilization". Much has been written upon the subject, many plans have been suggested looking toward the improvement of conditions. The suggested Model Code of Criminal Procedure of the American Law Institute is one of the most notable recent efforts of those interested in reform. Although many causes contribute to present conditions, it is believed that the archaic, cumbersome and ineffective system of criminal procedure that now obtains in a majority of the states is a principal factor.

The American Law Institute is not urging the adoption of the Model Code in toto in any state. It is felt that each state

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1 "Some years ago, the late William Howard Taft declared that the administration of the criminal law in the United States was a "disgrace to civilization". We recall the statement first, we believe, when Mr. Taft was Secretary of War in the cabinet of President Roosevelt, prior to which time he had been assistant prosecuting attorney of Hamilton County, Ohio, judge of the Superior Court of Cincinnati, solicitor general of the United States, judge of the United States Circuit Court, and dean of the Law Department of the University of Cincinnati. Mr. Taft repeated this criticism when President of the United States, and reiterated it several times after he became Chief Justice of the United States Supreme Court." 65 U. S. L. Rev. 528 (1931).

"The administration of criminal justice in the United States is a failure. This is an alarming fact. It is not a new condition. For years the failure has been patent to any careful observer, but it has taken the recent appalling increase in crime to make us realize it." William Draper Lewis, Annals of the American Academy of Political and Social Science, Vol. CXXV, No. 214, p. 85.
should decide for itself just what sections of the Code it desires to adopt. For that reason it is necessary that the Code be critically examined by the lawyers of the various states in order that they may make such recommendations for local adoption as seem desirable. With that in view the Institute has asked the bar association of each state to appoint a committee to consider the Model Code. Such a committee has been appointed in Kentucky. It made a preliminary report at the 1932 meeting of the Kentucky State Bar Association and asked to have an opportunity to continue its study with the expectation that it would make a final report at the 1933 meeting of the Association when it would make specific recommendations for the adoption of certain specific sections of the Code in Kentucky. It is expected that the members of the Association will discuss these recommendations at that time and that it will lend its influence towards the adoption of such sections of the Code as it approves by the 1934 General Assembly.

One of the sections of the Model Code which the committee has tentatively selected for local adoption is section 266 providing for waiver of jury trial in criminal cases. It is expected that those who favor or oppose the adoption of this section in Kentucky in its present or in a modified form will write to the Chairman of the Committee. It is with the expectation of drawing attention to this section that this paper has been prepared. It is hoped that those who care to discuss the adoption of this or other sections of the Model Code of the American Law Institute will use the pages of this journal for that purpose.

Mr. Wallace Muir, Lexington, Ky., is Chairman of the Committee.

The sections tentatively selected for adoption in Kentucky are as follows:

*Section 312. Trial where joint defendants.* When two or more defendants are jointly charged with any offense, whether felony or misdemeanor, they shall be tried jointly, unless the court in its discretion on the motion of the prosecuting attorney or any defendant orders separate trials. In ordering separate trials, the court may order that one or more defendants be each separately tried and the others jointly tried, or may order that several defendants be jointly tried in one trial and the others jointly tried in another trial or trials, or may order that each defendant be separately tried.

*Section 266. When trial by jury may be waived.* In all cases except where a sentence of death may be imposed trial by a jury may be waived by the defendant. Such waiver shall be made in open court and entered of record.

*Section 85. Contracts to indemnify sureties.* Every surety for the release of any person on bail, shall file with the under-
WAIVER OF JURY TRIAL IN CRIMINAL CASES

There can be no doubt that trial by jury is on trial in this country. While there are those who still continue to regard it with reverent awe as the bulwark of liberty, the safeguard of life and property, there are others who consider that it has outlived its usefulness, has become a sort of societal antique, and that it is partly responsible for the present breakdown in the administration of criminal justice in the United States.

A taking an affidavit stating whether or not he or any one for his use has been promised or has received any security or consideration for his undertaking, and if so, the nature and amount thereof, and the name of the person by whom such promise was made or from whom such security or consideration was received. Any wilful misstatement in such affidavit or any intentional omission to set forth in the affidavit all the security or consideration promised or given shall render the person making it subject to the same penalty as one who commits perjury. An action to enforce any indemnity agreement shall not lie in favor of the surety against such indemnitor, except with respect to agreements set forth in such affidavit. In an action by the indemnitor against the surety to recover any collateral or security given by the indemnitor, such surety shall have the right to retain only such security or collateral as is mentioned in the affidavit required above.

Section 102. Undertaking a lien. The undertaking shall be a lien on any real property described in the affidavit required by Section 79 from the time of the recording of such undertaking and affidavit in the county in which the property is situated. Upon the filing of an order with the ...................... of the county where the property is situated cancelling the undertaking the lien shall be discharged.

Section 112. Taking insufficient bail, accepting insufficient or unqualified sureties. Any official who takes bail which he knows to be insufficient, or accepts a surety in an undertaking knowing such surety not to possess the qualification or sufficiency required by law is guilty of a misdemeanor and shall be imprisoned not exceeding .................., or fined not exceeding .................., or both at the discretion of the court.

"Trial by jury has long been cherished as one of the greatest securities of human rights, as is shown whenever excessive tyranny has undertaken to trample the people under its feet. Venerable institution and friend of the common people, you have had a long and useful life! For more than a thousand years you have stood as a knight of honor, guarding the people's rights and redressing their wrongs. You have limited the power of rulers and modified the austerities of legislation! You have tempered justice with mercy and technicality with common sense. You have been the master of despots and the counselor of Legislatures. You have been the guardian and best friend of liberty through these thousands of years. Where you have existed, there liberty has survived the onslaught of its foes. Where you have not lived, there tyranny has ruled the people with an iron hand and trampled their rights in the dust of degradation. You have been the most valiant and successful defendant of the citadels of freedom." Dissenting opinion of Etheridge, J., in Talbot & Higgins Lumber Co. v. McLeod Lumber Co., 147 Miss. 186, 113 So. 433,440 (1927).

"What is the case in behalf of jury trial? There is none, save such as lies in the reverence we may have for a venerable institution. There are some few cases, as, for instance, foolish political prosecu-
third group, represented by such men as Dean Wigmore, assumes a middle ground, namely, that jury trial as at present administered is defective,⁶ but that properly reformed it would be on the whole superior to judge trial.⁷ This is probably the proper view of the matter.

tions, and witch-burners persecutions, in which the jury may save the law's face. But after all, it is usually the backbone of some fearless judge that does the saving in such cases, if there is any saving at all. We have enshrined jury trial along with other antiquated ideas about the administration of justice in our fundamental law, and worse still, in the hearts of our people. They lie there as dead as Hector, and everybody knows they are dead, but who dares touch them? Why make one's self foolish? Those 'true friends of the people' who traffic in trial by jury would want nothing better. 'Oh, yes, just as we thought, those corporation lawyers and highbrows, those foes of justice, are finally showing themselves in their true garb! They propose to rob the poor men of his one chance of justice, his security against tyranny, the people's jury! They would destroy this jewel of Magna Charta.¹ Thus they capitalize the tendency in all people to worship the phrases as well as the practices and memories of their ancestors. As a formula for administering justice trial by jury is merely a societal antique. But it typifies something back in the growth of society which has been gripped by man's emotions and they will not let it go. Its processes radiate a flavor of popular justice and a flourish of democracy. Those are still stout words. But the fact is that in the organism of society, as in the organisms of all life, there are structural parts which no longer serve useful functions. They reappear nevertheless in succeeding generations. They are sometimes removed from the physical organism by heroic surgery. To this the social organism seldom submits. Moreover, the intelligence that would do so in this instance would not stop with the jury's removal; it would demand more cutting." Leon Green, Dean, Northwestern Law School, in American Mercury, November, 1928.


¹ "The writer happens to be one who believes that jury trial, properly reformed, is on the whole superior to judge trial. Of course, jury trial, as is, works badly. Of course, jury trial, as now managed, is insufficient. Of course, it exudes an aroma of repellance to the citizen, of shame to the legal profession, and of doubt to the chambered student of political science... But what a sentimental and sufficient reason for abolishing trial by jury? No more than our mishandling of a once perfectly good watch is a reason for discarding the watch—or watches in general—if it or they can be mended. The true thing to be done about trial by jury is to MEND IT." John H. Wigmore, "A Program for the Trial of Jury Trial", The Journal of the American Judicature Society, April, 1929, Vol. XII, No. 6, pp. 166-172.
But it is not the purpose of this paper, as previously stated, to discuss the merits and demerits of trial by jury as contrasted with trial by a judge or judges in criminal cases. That is an altogether different question from the one to be discussed at this time. Whether or not an accused should be entitled to a trial by jury as a matter of right is not now in question. The specific question discussed heretofore is whether the accused is entitled to waive this right and be tried by the court or by a jury of less than twelve, if, of his own volition, he desires to do so. Section 266 of the Model Code\(^8\) of the American Law Institute gives him this privilege. It will be our purpose to discuss the constitutional problems involved in waiver of jury trial and to make specific recommendations for Kentucky as to the adoption in whole or in part of this section of the Model Code.

### A. CONSTITUTIONALITY OF WAIVER—IN GENERAL.

The constant reference in the decisions to constitutional and statutory provisions, suggests a classification of the cases on this basis. A few state constitutions specifically grant an opportunity to waive trial by jury\(^9\). The majority of them, however,

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\(^{8}\) "Section 266. When Trial by Jury May be Waived. In all cases except where a sentence of death may be imposed trial by a jury may be waived by the defendant. Such a waiver shall be made in open court and entered of record."

\(^{9}\) A. The constitutions of the following states expressly provide for waiver of jury trial.

I. In all cases:

- **Arkansas—Const., 1874, Art. II, Sec. 7,** "in all cases in the manner prescribed by law" Sec. 3086 of the Dig. of Stat., 1921, provides that the parties may by consent waive a jury in all cases of misdemeanors.

- **California—Const., 1879, Art. I, Sec. 7,** Amendment of Nov. 6, 1928. Previous to this it was allowed "in all criminal cases not amounting to the felony by the consent of both parties, expressed in open court" The present statute—Pen. Code, 1925, Sec. 1042—allows waiver only in misdemeanor cases.

- **Maryland—Const., 1857, Art. IV, Sec. 8.** "The parties to any cause may submit the same to the court for determination without the aid of a jury." In the Code, 1924, Art. 75, Sec. 109, it is provided: "The parties to any cause may submit the same to the court for determination without the aid of a jury."

- **Minnesota—Const., 1857, Art. I, Sec. 4,** "in all cases in the manner prescribed by law" No statute was found authorizing waiver of jury trial. Sec. 10705 provides: "Every issue of fact shall be tried by a jury of the county in which the indictment was found, unless the action shall have been removed."

- **North Carolina—Const., 1876, Art. IV, Sec. 13:** "In all issues of fact joined in any court, the parties may waive the right to
are silent on the question, so that whether there is a constitutional power to permit a waiver is a problem of construction in most states. Some of the leading decisions will be examined in order to determine how this problem has been met. For convenience, these cases will be considered as follows

(1) Cases which concede the constitutionality of waiver and reasons therefor.
(2) Cases which deny the constitutionality of waiver and reasons therefor.

(1) Cases which concede the constitutionality of waiver and reasons therefor

In *State v Worden* the defendant was indicted, tried, and convicted of the crime of rape upon a female ten years of age.

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." In Art. I, Sec. 13, the legislature is expressly given the power to "provide other means (than trial by jury) of trial for petit misdemeanors, with the right of appeal" Oklahoma—Const., 1907, Art. VII, Sec. 20, like North Carolina, Art. IV, Sec. 13.

Wisconsin—Const., 1848, Art. I, Sec. 5, "in all cases, in the manner prescribed by law" In the Stat., 1929, Sec. 357.01 (passed in 1925) provision is made for waiver of jury in all cases. Previous to this waiver of jury trial was allowed only in misdemeanor cases. Stat., 1911, Sec. 4687.

II. In cases below the grade of felony

Idaho—Const., 1890, Art. I, Sec. 7, "by the consent of both parties, expressed in open court" Sec. 8904 provides: "Issues of fact must be tried by jury, unless a trial by jury be waived, in criminal cases not amounting to felony, by the consent of both parties expressed in open court and entered in the minutes."

Montana—Const., 1876, Art. III, Sec. 23, "upon default of appearance or by consent of the parties expressed in such manner as the law may prescribe" Sec. 11929 is like Idaho, Sec. 8904, supra.

Vermont—Sess. Laws, 1921, p. 339, provides for a constitutional amendment allowing waiver by accused with consent of the prosecuting attorney. Passed by the voters in 1923. In Sec. 30 of the Const., 1793 and 1913, it is provided: "Trials of issues, proper for the cognizance of a jury, in the Supreme and County Courts, shall be by jury, except where parties otherwise agree." This has apparently never been considered as permitting waiver of jury trial in criminal cases.

Virginia—Const., 1902, Art. I, Sec. 8. Sec. 4927 of the Code of 1930 allows waiver in misdemeanor cases with the consent of the attorney for the commonwealth.


10 46 Conn. 349 (1878).
The trial, at the prisoner’s request, was by the court instead of the jury. The prisoner moved in arrest of judgment, partly on the ground that the statute authorizing him to elect to be tried by the court was unconstitutional and void. The motion was overruled and the defendant appealed.

The constitution provided, "The right of trial by jury shall remain inviolate." It was the contention of the defendant that the word "right" therein was more political than personal, that the interest of the state in its maintenance was so closely interwoven with the purely personal interest of the individual that its surrender was placed beyond the power of the individual.

The court denied the contention and sustained the statute, holding that the natural and obvious meaning of the constitutional provision was to secure the right of jury trial to individuals and that the public was not prejudiced. Said the court, "The natural and obvious meaning 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 interests of the body politic, can in any way be put in jeopardy by a waiver of that right."\(^\text{12}\)

In Com. v Rowe,\(^\text{13}\) the defendants were indicted in eleven counts for larcenies, which because of the different values involved, constituted both felonies and misdemeanors. In another indictment they were charged with a misdemeanor. They pleaded not guilty to both indictments and before trial signed and filed a waiver of trial by jury. The signature of each defendant was witnessed by his counsel. After evidence for the prosecution was in they attempted to withdraw the waivers. Such motions were denied and trial proceeded. It was held the motions were properly denied.

In a well-reasoned opinion the court held that the right to trial by jury guaranteed by the Massachusetts constitution is a privilege which the person may waive for reasons satisfactory

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\(^{11}\) The statute of 1874, which was in force when this case was tried, provided: "In all criminal causes, prosecutions and proceedings, the party accused may, if he shall so elect, when called upon to plead, be tried by the court, instead of by the jury; and in such cases the court shall have full power to hear and try such cause, and render judgment and sentence thereon."

\(^{12}\) 46 Conn. 349, 364 (1878)

\(^{13}\) 257 Mass. 172, 153 N. E. 537 (1926).
to himself. "Again and again", said the court, "as the cases referred to illustrate, this court has treated the right as a privilege sacredly regarded by the commonwealth and preserved to the individual against assault by the state, but a privilege which he could waive, and in certain circumstances, would be treated as waiving."

In *Patton v. U S.*, the leading case on waiver of jury trial, the defendants were charged with conspiring to bribe a federal prohibition officer, a felony. During the progress of the trial, one of the jurors, because of severe illness, became unable to serve further. Thereupon it was stipulated in open court, the defendants personally assenting thereto, that the trial should proceed with the remaining eleven jurors. The court consented to such stipulation and the trial proceeded resulting in a verdict of guilty. The question of the power of the defendants to waive their constitutional right to a trial by a jury of twelve persons was certified to the Supreme Court of the United States.

The Supreme Court first considered what is embraced by the constitutional phrase "trial by jury." The court concluded that it means a trial by jury as understood at common law and includes all essential elements as they were recognized in this country and England when the constitution was adopted. "Those elements were. (1) That the jury should consist of twelve men, neither more nor less, (2) That the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts, and (3) That the verdict should be unanimous." These elements the court considered to be embedded in the constitutional guaranty of trial by jury and beyond the authority of the legislative department to destroy or abridge. Consequently, it followed, said the court, that any distinction between the effect of a complete waiver of jury and consent to be tried by a less number than twelve must be rejected, since both forms of waiver amount, in substance, to the same thing.

With this position we are in accord. It has been suggested that by reducing the number of the jury to eleven or ten the infraction of the constitution is slight. Although that is true, it is apt to lead to an erroneous conclusion. The constitutional ques-

Waiver of Jury Trial in Criminal Cases

tion cannot be evaded by comparing the difference between serious infractions of the constitution with minor infractions.

"To uphold the voluntary reduction of a jury from twelve to eleven upon the ground that the reduction—though it destroys the jury of the constitution—is only a slight reduction, is not to interpret that instrument, but to disregard it."15 It is not the province of a court to measure the extent to which the constitution has been contravened and ignore the violation because it is not relatively as bad as it might have been.

It is true that various state courts have held that it is competent for a defendant to waive the continued presence of a single juror, while at the same time denying the validity of a waiver of a considerable number of jurors, or of a jury altogether.16 But there appears to be no substantial ground for the distinction and several state courts have joined with the Supreme Court in this conclusion.17

16 State v. Kaufman, 51 Ia. 578, 5 N. W. 275 (1879), with which compare State v. Williams, 195 Ia. 374, 191 N. W. 790 (1923), Com. ex rel. Boss v. Egan, 281 Pa. 341, 140 Atl. 483 (1924), with which compare Com. v. Hall, 291 Pa. 341, 140 Atl. 626 (1928). "In certain of the cases cited by the court below, the defendant had expressly allowed the trial to proceed with a jury of less than 12, and the reviewing tribunal discussed the matter as though there had been a waiver of the entire jury, suggesting that, logically, such wholesale relinquishment on the part of the defendant could as well be sustained in law as the waiver of the services of a single juror. 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." (Italics are ours.) Com. v. Hall, supra at 627. This argument is rather persuasive. Did the framers of the constitution with the historical incidents of oppression at the hands of the state and its judges in mind consciously intend to insist upon a fact finding tribunal which should come directly from the people? If the purpose of the enactment was merely to insure that a "slice of the community" found the facts in a criminal case rather than a judge, it is perfectly evident that a trial by a judge is altogether different from a trial by judge and jury, though the jury be less than the standard number of twelve. The framers of the constitution might well, under the above argument, have been willing to reduce the number of jurors to less than twelve although they were not at all willing to leave fact finding to a judge. A jury of less than twelve is still a "jury" In a class study of this problem approximately half of the class agreed with the conclusion in Com. v. Hall, rather than the conclusion in the Patton case.
17 State v. Baer, 103 Ohio St. 585, 134 N. E. 786 (1921), Jennings v. State, 134 Wis. 307, 114 N. W. 492 (1908). "It seems necessarily to follow that if a person on trial in a criminal case has no power to waive a jury he has no right to be tried by a less number than a common law jury of twelve, and when he puts himself on the county it requires a jury of twelve to comply with the demands of the Constitution." Jennings v. State, supra, in this note.
Having come to the conclusion that the problem before the court constituted one of waiver of jury trial, the court was forced to face fairly the question, "Can trial by jury be waived?"

The answer to this inquiry, the court considered, depended upon whether trial by jury is a part of the frame of government or only a guaranty to the accused of the right to such a trial. If the former, the possibility of waiver by the accused would be removed, since the public would have an interest in its maintenance prohibiting an opportunity to the accused to waive the right.

In an able discussion the court concluded that there was no evidence either in English and colonial jurisprudence antedating the constitution or in contemporaneous literature and debates on the constitution indicating that the right of trial by jury was intended other than primarily for the protection of the accused. A fortiori said the court he can waive the privilege. The argument of the court is most persuasive.

"The record of English and colonial jurisprudence antedating the constitution will be searched in vain for evidence that trial by jury in criminal cases was regarded as a part of the structure of government, as distinguished from a right or privilege of the accused. On the contrary, it uniformly was regarded as a valuable privilege bestowed upon the person accused of crime for the purpose of safeguarding him against the oppressive power of the King and the arbitrary or partial judgment of the court. Thus Blackstone, who held trial by jury both in civil and criminal cases in such esteem that he called it 'the glory of the English law', nevertheless looked upon it as a 'privilege', albeit 'the most transcendent privilege which any subject can enjoy' Book III, p. 379. And Judge Story, writing, at a time when the adoption of the constitution was still in the memory of men then living, speaking of trial by jury in criminal cases, said.

'When our more immediate ancestors removed to America, they brought this great privilege with them, as their birthright and inheritance, as a part of that admirable common law which had fenced round and imposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our state constitutions as a fundamental right, and the Constitution of the United States would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms.' 2 Story on the Constitution, Sec. 1779.

In the light of the foregoing it is reasonable to conclude that the framers of the constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused. If not, and their intention went beyond this and included the purpose of establishing the jury for the trial of crimes as an integral and inseparable part of the court, instead of one of its instrumentalities, it is strange that nothing to that effect appears in contemporaneous literature or in any of the debates or innumerable discussions of the time.
WAIVER OF JURY TRIAL IN CRIMINAL CASES

This is all the more remarkable when we recall the minute scrutiny to which every provision of the proposed constitution was subjected. The reasonable inference is that the concern of the framers of the constitution was to make clear that the right of trial by jury should remain inviolable, to which end no language was deemed too imperative."

Should there be a distinction between felonies and misdemeanors as to the power to waive trial by jury in the absence of statutory authority? Certain decisions so declare. But we are unable to find in the absence of a statute indicating a positive public policy to the contrary any good reason for differentiating in the matter of waiver between the two classes of crimes. The general principles underlying the power to waive trial by jury are the same in both felonies and misdemeanors.

The modern trend of opinion substantiates this conclusion. Illinois will illustrate. That state although permitting waiver of jury in misdemeanor cases refused to do so in the case of felonies. But in a recent decision, People v. Fisher, it was held that there may be a waiver of jury trial in all cases and a trial by the court. This case expressly overrules Harris v People, an earlier case, which held that in felony cases a waiver could not confer jurisdiction upon the court to try the case. Apparently, the United States Supreme Court once accepted the same differentiation but it was discarded in Patton v United States. The court, after reviewing the conflicting decisions, was unable to find any good reason for differentiating in the matter of waiver between the two classes of crimes. The court accepted as sound the following conclusion.

"The grounds upon which the decisions rest are, upon principle, applicable alike in cases of felonies and misdemeanors, although the

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19 These may be found collected in a note, 48 A. L. R. 768 et seq. "In some states a distinction is made between trials for felonies and trials for misdemeanors only. Tyre v. Com., 2 Metc. (Ky.) 1. State v. Borowsky, 11 Nev. 119; Dorst v. People, 51 Ill. 286, 2 Am. Rep. 301." State v. Ross, 47 S. D. 188, 197 N. W. 234 (1924).
20 "The constitutional provision which appellant claims is violated here applies equally to felonies and misdemeanors, and we think this case is ruled by the decision of this court in State v. Ross, supra. It is true that case involved a misdemeanor only, but it involved the same constitutional provision now before us. We are unable to see how it is possible to draw a distinction in this respect between felonies and misdemeanors, because the constitution does not recognize such distinction." State v. Tiedman, 49 S. D. 356, 207 N. W. 153 (1926). Accord, State v. Brownman, 191 Ia. 668, 122 N. W. 823 (1921).
22 128 Ill. 535, 21 N. E. 563 (1889).
23 281 U. S. 276 (1929).
consequences to the accused may be more evident as well as more serious in the former than in the latter cases."

These cases reach the proper logical result.\textsuperscript{23} The fact of
the matter is that the constitution guarantees the right of trial
by jury to the accused in the case of both felonies and misde-
meanors. Both are included in the usual constitutional pro-
vision providing that "trial by jury shall remain inviolate." It
follows that the power of the accused to waive is no more and
no less available in the one case than it is in the other, although
the consequences to him may be more evident as well as more
serious in the former than in the latter cases.

Assuming, therefore, that no distinction should be made
between felonies and misdemeanors in the power to waive the
constitutional guaranty of trial by jury, may a state differentiate
between them by statute? Let us suppose that a state has the
usual constitutional provision, "Trial by jury shall remain
inviolate." This, we have decided, should apply equally to
felonies and misdemeanors. But, in addition, let us suppose
that the state has a statutory provision, "Trial by jury may be
waived, except in felony cases." Under such a statute there
would be no power in the accused to waive trial by jury in a
felony case. Here it is not the constitutional provision which
denies the power but the statutory one. The state has passed
a statute which indicates a positive public policy to distinguish
between felonies and misdemeanors as to trial by jury and the
statute must be followed.

An instance of a state differentiating between felonies and
misdemeanors by statute on the ground of public policy is
furnished by Kansas in the case of State v. Wells.\textsuperscript{24} In that
case a statute provided.

\textsuperscript{23} Com. v. Egan, 231 Pa. 251, 126 Atl. 488 (1924). "It is difficult to
understand how there can be any distinction (as to waiver of
jury trial) between a prosecution for a felony, and a prosecution for
such a misdemeanor as at common law entitled the defendant to a
jury trial. It would seem in reason that if a jury cannot be waived
in one it cannot be waived in the other and that if it can be waived in
one it can be waived in the other. The grade of the crime should be
immaterial, provided it is such a crime as entitled the defendant to a
jury trial at common law, for, as we have seen, the constitutions guar-
ante the same right as existed at common law. If, therefore, a jury
trial cannot be waived in one case in which it was necessary at com-
mon law, it cannot, in reason, be waived in another." Clark's Crim,
Waiver of Jury Trial in Criminal Cases

"The defendant and prosecuting attorney, with the assent of the court, may submit the trial to the court, except in cases of felonies."

Here is a conscious attempt by the legislature to distinguish between felonies and misdemeanors. Burch, J., in his concurring opinion said.

"In misdemeanor cases the reaction of the state is much less violent, and the consequences of a conviction are much less serious. The interest of society is relaxed, and the will of the accused may be allowed to prevail. When high motives of public interest no longer require that a waiver be absolutely inhibited, the Legislature may define the policy of the state respecting the manner of trials."

Certainly, the legislature could not permit a waiver, even in the case of misdemeanors, in the face of the constitutional provision guaranteeing the right of trial by jury if there were no power in the accused to waive such right. But assuming that it is the better rule that the accused has the power to waive the right given under the constitutional provision, the legislature may limit the power as it sees fit as an exercise of its power to define the public policy of the state.

Although no distinction should be made between felonies and misdemeanors in the power to waive trial by jury, a valid distinction may be made between these two classes of crimes and petty offenses. Such a distinction is sustained upon the ground that the accused was not entitled, as of right, to a jury trial in the case of petty offenses at common law, consequently, when the provision relating to trial by jury was inserted in the constitution it was not intended that it should apply to them. Thus distinction, recognized in the cases, is thus stated by Clark.

"At common law a person accused of petit offenses, such as vagrancy, disorderly conduct, violation of a municipal ordinance, and trivial breaches of the peace, of which justices of the peace and police magistrates had jurisdiction, had no right to demand a trial by jury, and by the weight of authority he has no such right under the constitutional guaranty, for, as we have seen, it was only intended to guaranty the same right as had always existed at common law."

Having decided that so far as the question of constitutionality is concerned there should be no distinction between felonies and misdemeanors, we now return to our study of cases which concede the constitutionality of waiver of jury trial. Several cases involving felonies have been considered in detail. A case

24 69 Kan. 792, 77 Pac. 547 (1904).
25 Clark's Criminal Procedure, 2nd ed., 508, and cases there cited. See also 16 Iowa L. Rev. 20, 34, and cases cited.
Involving a misdemeanor will now be studied. In the commonly cited case of **State v. Woodling**, the defendant was arraigned before a municipal court for assault and battery, a misdemeanor. He pleaded not guilty and expressly waived a jury, whereupon the court tried the case and found him guilty. On appeal the defendant raised the question whether the court had jurisdiction to render judgment without the verdict of a jury. The case contains as valuable an analysis of the problem as may be found in the book. Mitchell, J., said:

"As to what constitutional rights may be waived by defendants in criminal cases, and particularly whether they can waive the right of trial by jury, is a subject upon which much has been written, and upon which there is much difference of opinion. Without going into any general discussion of the subject, we may say that it seems to us that perhaps the true criterion is whether the right is a privilege intended merely for the benefit of the defendant, or whether it is one which also affects the public, or goes to the jurisdiction of the court. If it belongs to the first class, we see no good reason why the accused may not waive it; but if it belongs to the latter, it would seem that no consent on his part could amount to a valid waiver; and the different views entertained as to the nature and object of constitutional provisions relating to the right of trial by jury in criminal cases will probably account for the conflict of decisions as to whether it can be waived. Those who construe the right as a matter in which the public has no interest, and which is not jurisdictional, but designed solely for the protection of the defendant, naturally hold that it may be waived; while those who take the view that it affects the public as well as the defendant, or that it relates to the constitution of the court, of which it is intended to make the jury an essential part, as naturally hold that it cannot be waived."

The court considered trial by jury a privilege accorded to the defendant which he could waive. Most of what the court said is probably pure dictum, since the question of whatever arose in the municipal court of Minneapolis, which had jurisdiction only of offenses cognizable before a justice of the peace, and consequently petty offenses, where trial by jury was not guaranteed under the constitutional provision providing for trial by jury, but the opinion is valuable for its persuasive reasoning.

To summarize, it would appear that those jurisdictions which concede the constitutionality of waiver of trial by jury do so largely on the theory that it is a privilege intended solely for the benefit of the accused and one which he may waive at his election. It should be pointed out that such a result permits a waiver without the necessity of constitutional amendment,—

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20 53 Minn. 142, 54 N. W. 1068 (1893).
even without the necessity of a statute, it would seem, although such an affirmative indication of the public policy of the state is advisable.\textsuperscript{27}

One further problem arising in jurisdictions permitting a waiver of jury trial deserves comment. If jury trial is a privilege which the accused may forego, it is not consistent to require the consent of the state or of the court, as a condition precedent to the exercise of the right. Although this was deemed necessary in the 	extit{Patton} case,\textsuperscript{28} it is at variance with the underlying conception of common law waiver. It is wise, perhaps, that the exercise of the right to waive be made by the defendant in open court but the consent of the court or of the state should not be necessary\textsuperscript{29}

Some decisions in jurisdictions which deny the constitutionality of waiver of trial by jury will now be examined and an attempt made to determine the reasons of these courts for such denial.

\textbf{(2) Cases which deny the constitutionality of waiver and reasons therefor}

\textit{Cancemi v. People}\textsuperscript{30} is the leading case holding that the right of trial by jury cannot be waived by the accused. In that case Cancemi was indicted for the crime of murder. After the jury had been impaneled and sworn, and the trial of the prisoner commenced, a stipulation made by the prisoner, his counsel, and the counsel on behalf of the people was presented to the court, and a juror was withdrawn by the express request and consent of the prisoner in pursuance of such stipulation. The remaining eleven jurors rendered a verdict of guilty. The New York Court of Appeals reversed the judgment upon the ground that the defendant did not have the right by his own act, though voluntary, to waive a jury of twelve because "the state, the public, has an interest in the preservation of the liberties and the lives of the citizens, and will not allow them to be taken away 'without due process of law'"

\textsuperscript{27} Such a result, the proper one, it is submitted, has been reached in some jurisdictions. See A. L. I. Code of Crim. Proc., commentaries, page 810.

\textsuperscript{28} 281 U. S. 276, 312 (1930).


\textsuperscript{30} 18 N. Y. 128 (1858).
Civil suits, the court pointed out, relate to and affect only individual rights and duties. Any departure from legal rules in the conduct of such suits with the consent of the defendants is therefore largely a voluntary relinquishment of what belongs to them. Hence, the law recognizes the propriety of waiver in such cases to a great extent. Criminal prosecutions, on the other hand, involve public wrongs, a breach and violation of public rights and duties, which affect the whole community in its social and aggregate capacity. It follows, the court argued, that the state has such an interest in the outcome of a criminal trial that it will not permit the defendant to have the opportunity to waive in his discretion the right to trial by jury.

The holding of the court in the Cancemi case that public policy forbids a person accused of a crime to waive trial by jury since the public as well as the defendant has an interest in the outcome of the trial has influenced subsequent decisions to a marked degree. Another reason, in addition to this one, was suggested in the case of State v. Mansfield,31 decided nine years later.

In that case the defendant was accused of having committed a felony. When the jury was called twelve men were selected and impaneled to try the case. On the next morning one of the jurors failed to answer and it was stated that he was sick. It was then agreed, the prisoner consenting thereto, that the trial should proceed with the remaining jurors, and accordingly eleven jurors heard the cause and rendered a verdict of guilty.

It was held that upon an indictment for a felony the defendant cannot waive his constitutional right to be tried by a jury of twelve men. In the first place the court considered, as did the court in the Cancemi case, which was cited, that no one has the right by his own voluntary act to surrender his life or part with his liberty, since the public generally is interested in their preservation. Another good and sufficient reason for the holding, said the court, was that a jury of twelve men is a positive requirement of the law, the accused has no power to consent to the creation of a new tribunal unknown to the law to try his offense.32 This argument is based upon the deduction that the

31 41 Mo. 470 (1867).
32 “Another good and sufficient reason, it occurs to us, is, that the prisoner's consent cannot change the law. His right to be tried by a
common law jury is an essential part of the tribunal without which the court has no jurisdiction of the subject matter. In other words, that the court is only organized and empowered to do business in the presence of a jury of twelve men. In the absence of such a jury it does not have jurisdiction to try the cause.

In some states the position is taken that because of the mandatory nature of the language used in the constitutional provision providing for trial by jury waiver is impossible. In State v. Cottrill the defendant was indicted for selling spirituous liquors without a license, a misdemeanor. Section 14 of the state bill of rights provided. "Trial of crimes and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men" Defendant, under a statute providing for a waiver in misdemeanor cases, elected to be tried by the court. The statute was held to be unconstitutional on appeal from a conviction. The court pointed out that the constitutional provision used language more mandatory in nature than is to be found in any state constitution, with the exception of North Carolina. This language the court considered to be so impera-

jury of twelve men is not a mere privilege; it is a positive requirement of the law. He can unquestionably, waive many of his legal rights or privileges. He may agree to certain facts and dispense with formal proofs; he may consent to the introduction of evidence not strictly legal, or forbear to interpose challenges to the jurors; but he has no power to consent to the creation of a new tribunal unknown to the law to try his offense. The law in its wisdom has declared what shall be a legal jury in the trial of criminal cases; that it shall be composed of twelve; and a defendant when he is upon trial cannot be permitted to change the law, and substitute another and a different tribunal to pass upon his guilt or innocence." State v. Mansfield, 41 Mo. 470, 478 (1867).

"A jury of twelve men being the only legally constituted tribunal for the trial of an indictment for a felony, it necessarily follows that the court or judge is not such tribunal, and that in the absence of a jury, he has by law no jurisdiction. There is no law which authorizes him to sit as a substitute for a jury and perform their functions in such cases, and if he attempts to do so, his act must be regarded as nugatory. Especially must this be true where the jury are not only the judges of the facts as at common law, but are also the judges of the law as provided by our statute." Harris v. State, 128 Ill. 585, 21 N. E. 563 (1889).

31 W. Va. 162, 6 S. E. 428 (1888).

34 "North Carolina—Const., Art. 1, Sec. 3. 'No person shall be convicted of any crime but by the verdict of a jury of good and lawful men in open court. The Legislature may, however, provide other means of trial for petty misdemeanors, with the right of appeal.' Under this provision the jury may not be waived. State v. Stewart, 89 N. Car. 563 (1883). This applies to ordinary misdemeanors as well as felonies.
tive in nature as to not merely grant a right to trial by jury but to forbid that any other tribunal than a jury should pass upon the issues of fact.

To summarize, it would appear that the refusal to permit waiver of jury trial in various jurisdictions is based largely upon the following reasons.

1. Public policy forbids that a person accused of a crime should have the right to waive trial by jury since the public as well as the defendant has an interest in the outcome of the trial.

2. A criminal court is only organized and empowered to do business in the presence of a jury of twelve men; in the absence of such a jury it is without jurisdiction to try the cause.

3. In some states the constitutional provisions providing for trial by jury are phrased in such imperative language as to indicate that trial by jury is compulsory.

It is submitted that there is a satisfactory answer to each of these objections.

The theory that waiver of jury trial is against public policy because the state has an interest in the preservation of the lives and liberties of its citizens and that it would be highly dangerous to permit such a practice, is without substantial basis. There is no practical danger that persons accused of crime will voluntarily waive a right to jury trial without due deliberation and a firm conviction that it will not be to their disadvantage.

Nor does the further suggestion that the state is interested in the punishment of crime and its prevention change this conclusion. A judge may be trusted to help preserve the law and punish offenders as much as the average jurymen. He too is a member of the community and interested in its welfare. Furthermore, his re-election depends upon the proper administration of his office.

It is the better view that a court has jurisdiction to try a case without a jury where the defendant has waived his right to


"Another ground relied upon for denying the power of a person accused of a felony to waive a trial by jury is that such a proceeding is against public policy, because the state, it is said, has an interest in the preservation of the lives and liberties of its citizens and it would be highly dangerous to permit such a practice. The theory has no substantial basis. There is no practical danger that accused persons will be so oblivious of the interest which the state has in their lives and liberties that they will voluntarily go to prison or suffer death ignominiously." People v. Fisher, 340 Ill. 250, 175 N. E. 722, 723 (1930). Accord, State v. Woodling, 53 Minn. 142, 54 N. W. 1068 (1893).
WAIVER OF JURY TRIAL IN CRIMINAL CASES

have one. Nor is legislative aid needed in order to achieve this result. The modern trend is toward this conclusion.

In *Patton v. U.S.* the question whether a jury of twelve is a constitutional prerequisite to the jurisdiction of the court in a criminal case was before the court. The problem is a particularly difficult one in the federal courts since the U. S. Code, Title 28, sec. 770 (1928), provides as follows:

"The trial of issues of fact in the district courts in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury."

It was held that where there is a valid consent to waive the jury the court has jurisdiction to try the cause. The reasoning of the court was as follows:

"By the Constitution, Article III, Section 1, the judicial power of the United States is vested in the Supreme Court and such inferior courts as Congress may from time to time . . . establish. In pursuance of that authority, Congress, at an early day, established the district and circuit courts, and by Section 24 of the Judicial Code (U. S. Code, Title 28, Sec. 41(2), the circuit courts having been abolished, expressly conferred upon the district courts jurisdiction of all crimes and offenses cognizable under the authority of the United States)." This is a broad and comprehensive grant, and gives the courts named power to try every criminal case cognizable under the authority of the United States, subject to the controlling provisions of the Constitution. In the absence of a valid consent the district court cannot proceed except with a jury, not because a jury is necessary to its jurisdiction, but because the accused is entitled by the terms of the Constitution to that mode of trial. 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. We are of opinion that the court has authority in the exercise of a sound discretion to accept the waiver, and, as a necessary corollary to proceed to the trial and determination of the case with a reduced number or without a jury; and that jurisdiction to that end is vested by the foregoing statutory provisions."

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37 281 U. S. 276 (1930).

38 *Id. at 298. See criticism of the case in 20 Cal. L. Rev. at page 153.*
The Supreme Court of Illinois came to the same conclusion in the case of People v. Fisher. In that case the matter of jurisdiction was faced squarely by the court. The court held that when, in a felony case, the defendant waived his right to a trial by jury, the court had jurisdiction to try the facts. The argument of the court was as follows:

"Before he (the defendant) appeared at the bar of the tribunal, it either was or was not vested with jurisdiction of the subject-matter of his cause. If the court possessed such jurisdiction, it was conferred by or pursuant to some provision of the Constitution, and not by the act or consent of the defendant."

The fact that the constitutional provisions relating to jury trial are framed in mandatory language does not necessarily indicate that trial by jury is compulsory. It may merely indicate that the framers of the constitution emphatically desired and provided that the right of jury trial should not be nullified by the state. To permit the defendant to waive the right does not conflict with its preservation for his use if he desires to take advantage of it.

This distinction is pointed out in the case of Com. v. Rowe. Article 12 of the constitution of Massachusetts declares

"And the Legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury."

This language is mandatory in character but the prohibition is placed, the court considered, upon the state rather than upon the individual. Nothing in the provision manifests, said the court, an intention to deprive the individual of power to refuse to assert his constitutional right to a trial by jury. It is submitted that this interpretation of the rather mandatory language in various constitutions is the proper one, notwithstanding that several states hold otherwise.

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349 Ill. 250, 172 N. E. 722 (1930).
It is believed that this interpretation would be proper even in the case of North Carolina where the language used is perhaps more mandatory than in any of the other constitutions. See note 34, supra. But the courts of that state have held otherwise. See the discussion and notes, Oppenheim, 25 Mich. L. Rev. 695, 719 et seq.
See, for example, the discussion of State v. Cottrill, supra, note 33.
A further question remains to be considered. Some courts have considered that a plea of guilty is, in legal effect, a waiver of the right to a trial by the legally constituted tribunal. If, it is argued, a waiver is permitted in this type of situation, it should be permitted in the analogous situation where the accused, while not desiring to plead guilty, does nevertheless desire to waive a jury trial. In short, it is urged that both situations are instances of waiver of jury trial. If permitted in the one case, it should be allowed in the other.

The attempted analogy, while persuasive, is fallacious. The problems raised in the two situations are by no means the same. The difference lies in the fact that a plea of guilty raises no question of fact to submit to a jury. Consequently no jury is needed. Where the accused, however, pleads not guilty a question of fact is raised and it is a real waiver of the right to be tried by a jury when the defendant under such circumstances voluntarily asks that the court find the facts.

**Summary.** The right of every person charged with crime to a trial by jury existed at common law. It is also guaranteed by our federal and state constitutions. This paper is a study of the power of the defendant to waive that right. A few state constitutions specifically grant an opportunity to waive jury trial. The majority of them, however, are silent on the question so that whether there is constitutional power to permit a waiver is a problem of construction in most states.

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44 "But it is said that the right to a trial by a jury is a right which the defendant may waive. This may be admitted, since every plea of guilty is, in legal effect, a waiver of the right to a trial by the legally constituted tribunal." *Harris v. State*, 128 Ill. 585, 21 N. E. 563, 564 (1889).

45 "It is certainly true the accused can plead guilty. The state does not interfere to protect the citizen in such a case. If he may plead guilty, why may he not elect to be tried by the court, instead of a jury. The innocent and fallible man would be just as likely to plead guilty as elect to be tried by the court." *State v. Carman*, 18 N. W. 691, 693 (1884).

46 See 21 Harv. L. Rev. 212. Contra, 25 Mich. L. Rev. 695, 716: "On this question, however, there is a conflict of opinion. A number of courts have urged that the constitutional guarantee of jury trial has no application when the accused admits his guilt. They argue that by such action he dispenses with a trial entirely; there is no question of fact to be determined; all that remains is a judgment upon the plea, after the submission of evidence bearing on the degree of guilt and the amount of punishment. It is a sufficient answer to these contentions to say that the waiver of the trial altogether—the whole—necessarily includes waiver of jury—the part."
Some jurisdictions concede the constitutionality of waiver; others deny it. It appears that those which concede it do so largely upon the theory that it is a privilege intended solely for the benefit of the accused and one which he may waive at his election. Those which deny it do so on the ground that public policy forbids it, that a court has no jurisdiction to try a case without a jury, or that the state constitutional provision is phrased in such imperative language as to make it mandatory. All of these objections, it is submitted, may be satisfactorily answered.

The modern trend is in the direction of allowing a waiver of jury trial. The two leading recent decisions, *Patton v. U S.*46 and *People v. Fisher*47 both permit it. Section 266 of the Model Code of the American Law Institute allows it. These cases and this Code provision represent, it is submitted, the better rule. Often a waiver of jury trial presents material advantages to the accused.48 It is not without its advantages to the state.49 Waiver of other valuable rights is permitted to the accused in his discretion.50 The historical importance of the jury based upon the fact that jury trial was regarded as a valuable privilege bestowed upon the person accused of crime for the purpose of safeguarding him against the oppressive power of the King51 is of no practical value in a republic, particularly where judges are elected rather than appointed. The jury should remain as the great fact-finding instrumentality of our legal system. But if one accused of crime desires to waive this instrumentality he should have the right to do so, particularly, since it is a privilege preserved primarily for his protection rather than as a part of the frame of government.

B. CONSTITUTIONALITY OF WAIVER—IN KENTUCKY

In the foregoing part of this paper the writer has dealt with the problem of waiver of trial by jury generally. Now, particular attention will be given to the situation in Kentucky

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47 340 Ill. 250, 172 N. E. 722 (1930), discussed supra.
48 16 Ia. L. Rev. 223.
49 16 Ia. L. Rev. 225 et seq.
51 Blackstone, Bk. IV, p. 349.
The Constitution of Kentucky contains three provisions relating to trial by jury. Section 7 guarantees: "The ancient mode of trial of jury shall be held sacred, and the right thereof remain inviolate subject to such modifications as may be authorized by this Constitution."  

Section 2 of the Constitution provides: "In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor. He cannot be compelled to give evidence against himself, nor can he be deprived of life, liberty, or property, unless by the judgment of his peers or the law of the land; and in prosecutions by indictment or information, he shall have a speedy public trial by an impartial jury of the vicinage, but the general assembly may provide by a general law for a change of venue in such prosecutions for both the defendant and the Commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained." (Italics are ours.) 

Section 248 of the Constitution provides: "A grand jury shall consist of twelve persons, nine of whom concurring may find an indictment. In civil and misdemeanor cases, in courts inferior to the circuit courts, a jury shall consist of six persons. The general assembly may provide that in any or all trials of civil actions in the circuit courts, three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel. But where a verdict is rendered by a less number than the whole jury, it shall be signed by all the jurors who agree to it." 

In contrast to these more or less general provisions in the Constitution, Kentucky Statutes, Section 2252 provides: "A petit jury in the circuit courts 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." (Italics are ours.) 

And Car. Codes, 1927, Crim. Prac., Sec. 180, contains this provision: "Issues of fact shall be tried by a jury. Issues of fact in prosecution for offenses of which the punishment is limited to a fine of sixteen dollars, shall be tried by the court. All other issues of fact shall be tried by a jury." 

The present Constitution was adopted in 1891. This section was copied verbatim from the Constitution of 1850, Art. XIII, Sec. 8. In the second Constitution of Kentucky, adopted in 1799, Art. X, Sec. 6 reads, "That the ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate." In the first Constitution, Art XII, Sec. 6 provided, "That trial by jury shall be as heretofore, and the right thereof remain inviolate." 

See Gregory's Ky. Crim. Law, Sec. 1023.
The ease law on waiver of trial by jury in Kentucky may be found in the following decisions: *Murphy v. Commonwealth*, *Tyra v. Commonwealth*, *Phipps v. Commonwealth*, *Branham v. Commonwealth*, *Jackson v. Commonwealth*, and *McPerkins v. State*.

In *Murphy v. Commonwealth*, the defendant was indicted for betting on an election, a misdemeanor involving a statutory penalty of one hundred dollars. After the jury was sworn, one of the jurors, by agreement of the parties, was withdrawn, and the case submitted to the remaining eleven jurors. The judgment rendered upon their verdict was held valid. The court considered that nothing more was involved in the issue of the case than is involved in the decision of civil actions since the only penalty provided under the statute was a money fine. Furthermore, the court stated, such an agreement was not inconsistent with any rule of law nor public policy. While the analogy to civil actions may be criticised, the result in the case is the proper one.

In *Tyra v. Commonwealth*, the defendant was indicted for malicious stabbing with intent to kill. Under such an indictment the defendant as provided by the Code could be found guilty, either of the felony as charged or of any lower degree of that offense. After the jury was sworn and had heard a portion of the testimony, one juror was waived by consent of all parties and the cause tried to the remaining eleven. They found the defendant guilty of one of the lower degrees of the felony charged, which was a misdemeanor. The court held the judgment binding, relying solely upon *Murphy v. Commonwealth*, supra. The case adds nothing to the rule of that case that a jury of twelve may be waived in a trial involving a misdemeanor. The rule was affirmed in the subsequent case of *Phipps v. Commonwealth*. In that case a jury of ten heard the evidence

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54 1 Metc. (Ky.) 365 (1858).
55 2 Metc. (Ky.) 1 (1859).
56 205 Ky. 332, 266 S. W. 651 (1924).
57 209 Ky. 734, 273 S. W. 489 (1925).
58 221 Ky. 823, 299 S. W. 988 (1922).
59 236 Ky. 528, 33 S. W. (2d) 622 (1930).
60 1 Metc. (Ky.) 365 (1858).
61 2 Metc. (Ky.) 1 (1859).
62 1 Metc. (Ky.) 365 (1858).
63 205 Ky. 332, 266 S. W. 651 (1924).
without objection by the defendant and it was held on appeal that it would be assumed that he waived his constitutional right to a jury of twelve. Under this decision it would appear that the defendant must affirmatively object to a jury of less than twelve. It is submitted that the better rule is that a defendant can only waive his constitutional right to jury trial by affirmative waiver made of record in open court.

Branham v Commonwealth was the first case to present a situation involving a felony. Branham was indicted, tried by agreement before a jury of seven and convicted. The Court of Appeals reversed the judgment and remanded the cause for a new trial. The court considered the decision of the question at issue, the power of a defendant charged with the commission of a felony to waive trial by jury, to be controlled by Section 7 of the Constitution and Section 2252, Kentucky Statutes. The Constitution, Section 7, preserves and guarantees to one charged with crime the ancient mode of trial by jury. Kentucky Statutes, Section 2252 permits the waiver of this right in all but felony cases. Consequently, Branham, who was charged with the commission of a felony, could not waive his constitutional right to a trial by jury.

The decision was affirmed two years later in the case of Jackson v Commonwealth. Jackson was indicted charged with the commission of a felony. He was tried and convicted by a jury consisting of eleven persons only. On appeal he contended that such a jury was not a constitutional jury for the trial of felony charges. The commonwealth insisted that he could not rely upon the fact that he was tried by less than the constitutional jury since he did not object at the time the jury was made up, nor rely on that fact in his motion for a new trial. The case does not present a situation of true waiver but the court in reaching a decision did so by affirming its position laid down in the Branham case that a defendant charged with a felony cannot waive his right to jury trial and then holding that "it necessarily follows that he may not do so indirectly by failing to object to a jury composed of a less or a greater number." In reaching this result the court relied upon the "mandatory mean-

\[\text{\textsuperscript{64}}\text{209 Ky. 734, 273 S. W. 489 (1925).}\]

\[\text{\textsuperscript{65}}\text{221 Ky. 823, 299 S. W. 983 (1922).}\]
The latest case to date on the subject of waiver of trial by jury in Kentucky is *McPerkins v. Commonwealth*, which simply says, citing *Jackson v. Commonwealth* and *Branham v. Commonwealth* without discussion, "Trial by jury in felony cases is a constitutional right that cannot be waived."

There seems to be little doubt as to the state of the law in regard to waiver of jury trial in Kentucky today. In a trial involving a misdemeanor the parties may waive a jury. This was so even before the enactment of Kentucky Statutes, Section 2252, which provides for waiver in crimes below the grade of felonies. The reasoning in the early misdemeanor cases is not satisfactory but the result reached is desirable. In prosecutions for offenses of which the punishment is limited to a fine of sixteen dollars, Car. Codes, 1927, Crim. Prac., Sec. 180, providing for trial by the court, is controlling.

Trial by jury cannot be waived in felony cases. Section 2252, Kentucky Statutes seems to be absolutely controlling. From the wording of the statute no other result seems possible. The interesting question presented is whether if Section 2252 were repealed or amended to modify the exception, waiver of jury trial in felony cases would be prohibited under Section 7 of the Constitution. It is our opinion that it would not. Apparently the court held in *Branham v. Commonwealth* that Section 7 preserves the "ancient mode of trial by jury". A waiver of this guaranteed right under the Constitution, the court considered, was impossible under the mandatory language used in Section 2252, Kentucky Statutes. The court did not have to, nor did it attempt to consider the effect of a waiver in the absence of statute. In the case of *McPerkins v. Commonwealth* the court said, "Trial by jury in felony cases is a constitutional right that cannot be waived." That is true but it is true because Section 2252, Kentucky Statutes, prohibits it. As authority for the statement the court cited *Jackson v. Common-
WAIVER OF JURY TRIAL IN CRIMINAL CASES

In each of these cases the court considered the decision to be controlled by Section 2252, Kentucky Statutes. Since the Court of Appeals of Kentucky is not bound by prior decision as to waiver of trial by jury in felony cases in the absence of statute, it could approach the question as one of original impression, if Section 2252 were repealed or amended to modify the exception. If given this opportunity, it is submitted, the court should not consider a waiver unconstitutional. Although there is conflict in the decisions as to whether waiver is unconstitutional in the absence of statute, the modern trend is toward this conclusion, as indicated supra in this paper. The historical basis for a contra conclusion is no longer of value; the defendant should be permitted to waive the personal privilege of jury trial if he so desires. The Kentucky Court of Appeals has reached this conclusion in the absence of statute as to misdemeanors, it should do the same with reference to felonies. The general principles underlying the power to waive is the same in both instances.

C. RECOMMENDATIONS FOR KENTUCKY

The following specific recommendations are made

1. Repeal Section 2252, Kentucky Statutes.
2. Enact the following new provision:

   "In all cases except where a sentence of death may be imposed trial by a jury may be waived by the defendant. Such waiver shall be made in open court and entered of record."

3. Amend the code provision on arraignment to provide that the defendant who pleads not guilty shall be reminded of his right to be tried either by a jury or by the court alone and shall be asked, which mode of trial he prefers.

The second recommendation is an exact copy of Section 266 of the Model Code of the American Law Institute. The recommendations as a whole embody the major conclusions in the body of this paper and represent the trend of modern opinion on waiver of trial by jury.

It is possible that a satisfactory result could be reached by amending Section 2252, Kentucky Statutes so as to modify the

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221 Ky. 822, 299 S. W. 983 (1922).
209 Ky. 734, 273 S. W. 459 (1925).
See 20 Cal. L. Rev. 132, 140, note 59, for a discussion of the effect of these decisions.

K. L. J.—3
exception as to felonies by limiting it to those where a sentence of death may be imposed. It is considered though that it is better to repeal the statute and substitute the exact provision suggested in the Model Code. This provision was adopted after a careful consideration of the whole problem. In construing it, the Court of Appeals would have the benefit of decisions in other states, since the section, as written, will be adopted in various jurisdictions.

There is considerable opposition to allowing waiver of jury trial in capital cases,—the proposed statute excepts them. If jury trial is a privilege which the accused may forego, it is not consistent to require the consent of the state or of the court, as a condition precedent to the exercise of the right. However, it is wise that the exercise of the right to waive be made in open court and formally entered of record in order that the court may see to it that the waiver is willingly and understandingly made.

It is quite commonly understood that the accused in a criminal case has the right to a trial by jury. The right to waive jury trial is not so commonly understood. Consequently, at the time of arraignment in all but capital cases, if the defendant pleads not guilty, he should have pointed out to him that he has an election as to the mode of trial. He should be asked at that time in open court whether he elects to be tried by a jury or by the court alone. This may be accomplished by amending the code provisions on arraignment. It is our opinion that such an amendment would be desirable.

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**Footnotes:**

76 For a discussion of this suggestion see 16 Ia. L. Rev. 20, 230.

77 Code provisions dealing with arraignment will be found in Car. Codes, 1927, Crim. Prac., Secs. 154 and 155.

78 The following articles will be found helpful in a study of Waiver of Jury Trial in Criminal Cases: