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Judicial Organization and Procedure

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Felony Trials Without a Jury. Recent crime surveys have shown that the majority of contested felony cases are never tried in open court, being settled instead by the striking of a "bargain" between the defendant and the prosecuting officer. Administrative discretion has thus largely supplanted judge and jury alike. The practice has been severely criticized by Professor Moley, who characterizes it as "psychologically more akin to a game of poker than to a process of justice," being "an attempt to get as much as possible from an unwilling giver" rather than "a search for truth." In view of the technicalities and delay that were permitted to develop in connection with jury trials, the utilization of some such avenue of escape would seem to have been inevitable. The practice may be expected to develop still further unless judicial procedure is improved to a point where a trial becomes an efficient means of disposing of contested criminal cases.

In most jurisdictions, the only alternative to such a compromise agreement has been a jury trial. Trial by a judge alone, the right to a jury being waived, has been regarded as of doubtful constitutionality. Recent decisions of the federal Supreme Court and of the supreme court of Illinois, sustaining such non-jury trials even in the absence of statutory authorization, have gone far toward dispelling this doubt.

1 Raymond Moley, Politics and Criminal Prosecution (1929), p. 189. Chapters 7 and 8 contain an excellent discussion of this phase of the subject, which is beyond the scope of the present note. The recent Al Capone fiasco in the federal district court sitting in Chicago shows the methods employed, and also illustrates the manner in which such compromise agreements occasionally fall through because the judge refuses to cooperate with the prosecution. See infra, pp. 8, 10.

2 Patton v. United States (1930), 281 U.S. 276, 50 S. Ct. 253. Although this was not a true waiver case, the facts having been found by a jury of eleven men, the opinion states that we "must treat both forms of waiver as in substance amounting to the same thing." But cf. Commonwealth v. Hall (1928), 291 Pa. 341, 140 A. 626, 58 A. L. R. 1023. I discuss this conflict of opinion, together with the other constitutional and statutory problems involved in the non-jury trial of felony cases, in an article which is to appear in the California Law Review for January, 1932.


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and warrant an examination of the practical working of the waiver plan in those jurisdictions where it has been given a trial. In seven states the practice of allowing such a waiver is of sufficient maturity to justify drawing rather definite conclusions, and the developments thus far in the courts of the federal government and of seven other states which have adopted the practice within the last five years furnish evidence of what may be expected in the future.

Frequency of Waiver: State Courts. There is the greatest divergence as to the frequency with which advantage is taken of the right to dispense with a jury trial upon a plea of "not guilty" of felony. In Connecticut, Maryland, and Wisconsin, trial by the court has be-

* Connecticut (1921), Acts 1921, c. 267, s. 2; Indiana (1905), Burns' Anno. Stat. 1926, s. 2299; Maryland (1852), Code 1924, art. xxvii, s. 549; New Jersey (1898), Comp. Stat. 1910, s. 13; Oklahoma (1911), Cowden v. State, 5 Okl. Cr. 71, reversing In re McQuown (1907), 19 Okl. 347, 91 P. 681, and holding that art. vii, s. 20 of the constitution of 1907 applies to criminal as well as civil cases; Washington (Territorial Act), Remington's Comp. Stat., 1922, s. 2144; Wisconsin (1925), Laws 1925, c. 124, s. 1. Special acts authorizing waiver in various Wisconsin counties, except in capital cases, date from 1881. For the Maryland practice of waiving a jury at common law, see Carroll T. Bond, "The Maryland Practice of Trying Criminal Cases by Judges Alone, Without Juries," in 11 Amer. Bar Assoc. Jour. 699 (1925), and Judicial Council of Massachusetts, First Report (1925), p. 97. Only the Washington law excepts capital cases. Connecticut, Acts 1927, c. 107, provides that such cases shall be tried by a bench of three judges. In Oklahoma, the prosecuting attorney, and in Indiana the court as well, must consent to such a waiver before it can become effective.

* California (1928), Constitution, art. 1, s. 7; Illinois (1930), People v. Fisher, op. cit., supra note 2; Massachusetts (1929), Gen. Laws, c. 263, s. 6; Michigan (1927), Acts 1927, pp. 284, 318; Ohio (1929), Code 1930, ss. 13442-4, 13442-5; Rhode Island (1929), Gen. Laws, c. 407, s. 78; Virginia (1928), Constitution, art. i, s. 8. Massachusetts excepts capital cases. In Rhode Island the consent of the court, and in Virginia of the prosecuting attorney as well, is required.

* Lucius P. Fuller, clerk of the superior court for Hartford county, writes that "the jury is waived in probably more than three-fourths of the cases which are tried." Letter dated May 12, 1931. From Waterbury comes news that "nearly half of our cases are now tried by the court."

* Letter from Mr. George H. Freeman, clerk of the Superior Court, dated May 6, 1931. In Bridgeport, 21 cases, ranging in seriousness from assault with intent to murder, to lascivious carriage, were tried by the Superior Court without a jury between September, 1929, and July, 1930. Letter from Mr. Michael J. Flanagan, clerk, dated May 9, 1931. Mr. Richard H. Phillips, reporter of the Supreme Court of Errors, and until recently secretary of the Judicial Council, summarizing the situation for the state as a whole, says that "very few criminal cases are tried to the jury, the accused almost always preferring to be tried to the court." The distinction between felonies and mis-
come the general rule, while in Oklahoma\textsuperscript{9} and Washington\textsuperscript{10} the statutes have been virtually ignored. Indiana and New Jersey, the
demeanors has been abolished in Connecticut; hence no separate figures are avail-
able as to felonies and the major misdemeanors. (Only the more serious criminal
prosecutions are tried in the Superior Court.) The belief seems to be general that
there is little difference, so far as waiver is concerned, as between what other juris-
dictions would denominate felonies and misdemeanors, respectively, the controlling
factors being other than the seriousness of the penalty that follows conviction.

\textsuperscript{7}In the Supreme Bench of Baltimore, which tries all felonies as well as the
major misdemeanors, the non-jury criminal trials have consistently averaged 95
per cent. In 1927, 4,558 cases were tried to the court, while only 229 were tried
court for Washington county, Hagerstown, where approximately 25 per cent of the
contested felony cases are tried without a jury. Letter from Mr. Edward Oswald,
clerk, dated May 20, 1931.

\textsuperscript{8} ‘In 1929, there were 1,852 cases brought before the Municipal Court, thirteen
of which were pending on January 1st, 1929. Seven of these cases were pending on
January 1st, 1930, which made a total of 1,845 cases disposed of during the year.
The total of cases, nolled, dismissed, transferred to the Circuit Court, cases in
which the defendants were adjudicated insane before trial and committed, and so
forth, amounted to 76. Deducting this figure from the 1,845 cases disposed of
leaves a balance of 1,769. Deducting 988 pleas of guilty, leaves a balance of 781
cases that were contested; 104 of these were jury trials, and 677 were tried on
waivers. This amounts to approximately 13 per cent jury trials and 87 per cent
waivers of jury. In 1930, there were 2,053 cases before the court, eight of which
were pending on January 1st, 1931. This left a balance of 2,045 cases disposed of.
Eighty-eight of these cases were disposed of by being nolled and dismissed, and
by transfer to the Circuit Court, others by reason of the defendants being adjudi-
cated insane before the trial and committed, and so forth. This left a total of 1,957
cases. Of these, 1,045 were disposed of on pleas of guilty, leaving a balance of
912 contested cases. There were 130 jury issues and 782 waivers. This amounts to
approximately 14 per cent juries and 86 per cent waivers of juries.’ Letter from
Hon. George A. Shaughnessy, judge of the Municipal Court of Milwaukee, dated
May 25, 1931. This court tries felony cases exclusively. It will be noted that the
proportion of cases disposed of other than by actual trial is exceptionally low.
\textit{Cf. Illinois Crime Survey} (1929), p. 102. Milwaukee authorities attribute this in
part to the advantages accruing from the non-jury trial.

\textsuperscript{9} Mr. Phil K. Oldham, county attorney of Muskogee county, writes: ‘I have
been in this office for almost six years and have never tried a defendant before
the court without a jury. . . . I am sure that you will find this situation all over
the state.’ Letter dated June 22, 1931. Mr. W. L. Coffey, county attorney of Tulsa
county, writes that ‘it is very seldom that defendants in this state waive their
right of trial by jury.’ In his own county, such waivers average less than two a
year. Letter dated June 24, 1931. Mr. Lewis R. Morris, county attorney of Okla-
ahoma county, the most populous in the state, reports two non-jury trials during the
first six months of the year. In twelve years’ practice of criminal law, his firm
two remaining states in which the legality of the practice is of comparatively long standing, occupy a middle ground. The same is true of the new converts to the rule. In Virginia, the judge has definitely gained a monopoly; Illinois and California appear to be tending never handled a case in which the defendant pled not guilty and waived a jury trial. Letter dated July 13, 1931.

Mr. Benjamin T. Hart, chief deputy to the clerk of the Superior Court of King county (Seattle), writes that "waivers come so infrequently," in misdemeanor as well as felony cases, that neither he nor any one in the office of the presiding judge can recall such a waiver in recent months. Letter dated April 30, 1931. Mr. Charles W. Greenough, prosecuting attorney for Spokane county, states that during his eight years' incumbency "we have had but one case which was submitted to the court." Letter dated May 6, 1931. From Tacoma comes word that "To my knowledge no defendant in Pierce county during the past seven years has taken advantage of [the statute] authorizing a waiver of trial by jury. . . . Inquiry has been made of other members of this office and of the judges, and no case has been recalled by any of them. Letter from Prosecuting Attorney Bertil E. Johnson, dated May 8, 1931. The same news comes from the rural sections. "In the eight years that I have been in this office," writes Mr. Charles E. Vetter, clerk of the superior court of Yakima county, "there have been but two instances where [a jury was waived]. One was a case of driving while drunk, and the other was a liquor case under the felony penalty." Letter dated May 4, 1931. Mr. Archie B. Stewart, county clerk of Whatcom county, cannot recall a single instance of such a waiver. Letter dated May 2, 1931.

11See S. C. Oppenheim, "Waiver of Trial by Jury in Criminal Cases" (1927), 25 Mich. L. Rev. 695. In both states, waiver in misdemeanor cases is the general rule, although the proportion is much lower in offenses of the more serious grade. In Passaic county (Paterson), of the 855 trials on indictments during 1930 not more than 5 per cent were by jury. (The figures include both misdemeanors and "high misdemeanors." The word "felony" is not used in New Jersey). Letter from Mr. Lloyd B. Marsh, county clerk, dated May 29, 1931. Non-jury trials became so frequent that in 1926 the New Jersey legislature created a special system of criminal district courts to try only those cases where indictment and trial by jury are waived.

12"In the two and one-half years that this provision has been in effect we have not had a single case of a felony jury of less than the former number of 12, but . . . probably 70 per cent of the pleas of not guilty are now tried by the court without a jury. Letter from Mr. Thomas R. Miller, deputy clerk, Hustings Court, Richmond, dated May 16, 1931. (The Virginia statute authorizes a complete waiver, or an agreement upon any number of jurors less than 12. Doubtless the real purpose of the latter is to validate a conviction following the forced dismissal of a juror).

13Since the decision in People v. Fisher (1930), op. cit., supra note 13, "juries have been waived in two-thirds of the cases tried in the Criminal Court" of Chicago, and a like proportion in the other courts. Judicial Advisory Council of Cook
in that direction. A recent survey of felony prosecutions in Detroit revealed that for a nine months' period the cases tried to a jury numbered 1,271, while in 1,593 cases a jury was waived. On the other hand, news comes from Lansing that in Ingham county, Michigan, there has been but one waiver of a jury trial in the course of the last year. In Boston, approximately 11 per cent of the felony trials are without a jury; in Cleveland, only 45 waivers have been recorded out of a list of 1,544 indictments. And in Rhode Island, the Judicial Council, after a vigorous and successful battle for the passage of a waiver statute, is protesting that thus far the act has been virtually a dead letter.

County, First Report (1931), p. 27. Hon. Denis E. Sullivan, judge of the Superior Court and a member of the Council, writes: "I am not thoroughly advised as to the percentage of jury waivers between felonies and misdemeanors, but understand that there is no difference. In fact, 68 per cent of such waivers relate to our Criminal Court, which tries only felonies in so far as the first count of the indictment is concerned." Letter dated May 18, 1931. See also Judicial Advisory Council of Illinois, First Report (1930), p. 26.

For the year ending June 30, 1930, 659 of the 2,270 contested felony cases were tried to the court. This is 29 per cent. For the four metropolitan counties, Alameda (Berkeley, Oakland), Los Angeles, San Diego, and San Francisco, the proportions were 18.4, 43.6, 23.2, and 11.0 per cent, respectively. In comparison, of the 223 misdemeanor cases tried in the Superior Court, which handles all felony cases, the proportion of waivers to total cases tried was 42.6 per cent for the state at large, and 41.7, 57.7, 15.5, and 28.6 per cent, respectively, for the four metropolitan counties. It will be noted that in the Los Angeles courts, which handle approximately 46 per cent of all the cases, non-jury trials are far more frequent than in the balance of the state. The Judicial Council, in its Third Report (1931), p. 35, states: "During the fiscal year ending June 30, 1929, out of a total of 867 contested criminal trials, 241, or slightly more than 27 per cent, were heard without a jury. In the following year this ratio had increased quite considerably, with the result that approximately 44 per cent of all the defendants tried waived a jury." It is hard to say what figures those cited for 1928-29 represent; Appendix B clearly shows that 1,254 persons were convicted of felony in that year. The statement regarding 1929-30 was apparently taken from an estimate in the Second Report (1929), p. 45; but this prediction failed to materialize. I have prepared my figures from Appendices B and C of the Council's Third Report.


Letter from Miss Flora G. Dewey, deputy county clerk, dated May 27, 1931.

Letter from Mr. John R. Campbell, clerk of the criminal court, dated May 11, 1931. Waiver is most frequent in morals cases.


Frequency of Waiver: Federal Courts. After the advent of national prohibition and the consequent deluge of federal liquor prosecutions, the apparent necessity that all criminal trials in the district courts, for misdemeanors as well as felonies, be by jury was a constant source of complaint on the part of all who wished to see these tribunals given at least a Chinaman's chance to keep up with their dockets. However, at least one federal district judge doubted that trial by jury was necessary, even in the absence of further legislation. Hon. Albert W. Johnson, sitting for the Middle District of Pennsylvania, as long ago as 1926 adopted the practice of permitting the defense and the prosecution to waive a jury in any criminal case. That the show but five instances of non-jury criminal trials, including misdemeanors as well as felonies, in the courts of general jurisdiction during a year's time. In fact, as the Council bitterly complained in its First Report (1927), p. 23, 'of the civil trials only some 2 or 3 per cent are without jury.'

"It is probable that [in 1929] more persons were prosecuted in the federal court for violations of the prohibition laws than were prosecuted in the state courts for all criminal offenses." Judicial Council of Idaho, First Report (1930), p. 12.

That such was the law was accepted as settled by the decisions in Thompson v. Utah (1897), 170 U.S. 343, 345, 18 S. Ct. 620 (dictum); Dickinson v. U.S. (C.C.A. 1908), 159 F. 801; Low v. U.S. (C.C.A. 1909), 169 F. 86; and Coates v. U.S. (C.C.A. 1923), 290 F. 134. The opinions even threw a cloud of doubt upon the power of Congress to authorize criminal trials without a jury, or with one of less than 12 men, the defendant consenting. Only 'petty offenses' were excepted —Schick v. U.S. (1903), 195 U.S. 65, 24 S.Ct. 826—and no one appeared ready to champion the doctrine that a violation of the 'law of all laws' was a petty offense, at least under the existing provisions of the Volstead Act. See the article cited supra, note 2.


Letter from Hon. A. W. Johnson, dated May 25, 1931. Judge Johnson explains: "As you understand, until ... April 14, 1930 [the date of the Patton case, op. cit., supra note 1], the legality of the waiver of jury trials was questioned, but notwithstanding this doubt on account of the large number of cases I permitted [it]. I do not know of any other district in which such procedure prevailed." Nor does the present writer know of any such practice elsewhere. But see infra, note 47. It seems a little strange that this practice should have been first followed by a judge sitting in the state of Pennsylvania, who, immediately preceding his appointment to the federal bench, had for ten years been a judge of the state court of common pleas, Pennsylvania being one of the states in which a belief in the illegality of a waiver of jury trial at common law has been most
procedure was acceptable to all concerned is shown not only by the frequency with which it was followed, but likewise by the fact that it was not attacked in the appellate courts.

In this district, of course, the sole effect of the Patton decision has been to enable the court and the United States attorney’s office to breathe a little more freely while following out their old practice. "Today," writes Judge Johnson, "at least 90 per cent of all our criminal cases [in this district] are tried to the court without a jury by . . . agreement of counsel. The court does not urge or even encourage this . . . but the lawyers desire to try their criminal cases in this way. . . . In difficult and serious cases I much prefer to have a jury dispose of the facts than to dispose of them myself." Nevertheless, the fact remains that trial by jury, in felony as well as misdemeanor cases, now occupies a very secondary place in this jurisdiction.

Outside of the Middle District of Pennsylvania, there appear to be few instances in which the practice of trial by judge alone has as yet struck root, and none in which it has gained such a preëminent position. From Philadelphia comes word that "we have never had in this district a waiver of the right to a jury in any criminal case," which is duplicated in letters from federal courts sitting in the states of Arizona, Connecticut, Illinois (Northern District), Maine, constantly respected. See Commonwealth v. Hall (1928), 219 Pa. 341, 140 A. 626, where Mr. Chief Justice Moschzisker, who was unusually well informed upon trial courts in general, and jury trial in particular, stated (p. 354) that the case at bar appeared to be the first instance where a Pennsylvania judge, on a plea of not guilty, had undertaken to try an indictable offense without a jury. Had the practice first arisen in Maryland, it would have been less surprising. See the article by Mr. Chief Justice Bond, op. cit., supra note 4.

* "We have, however, had a few cases in which the defendant has stipulated to be tried by a jury of less than twelve, but those cases are rare indeed. This applies both to felony and misdemeanor actions." Letter from Judge F. C. Jacobs, dated May 22, 1931.
* "During my eighteen years' experience on the bench I do not recall any case where the defendant in a criminal action waived a jury. That procedure is common in Connecticut state courts, but it has never been adopted in this federal district. This is true of both felony and misdemeanor prosecutions." Letter from Judge Edwin S. Thomas, dated May 25, 1931.
Massachusetts,\textsuperscript{31} Minnesota,\textsuperscript{32} Nebraska,\textsuperscript{33} New Jersey,\textsuperscript{34} New York (Eastern and Southern Districts),\textsuperscript{35} North Carolina (Middle District),\textsuperscript{36} Ohio (Northern District),\textsuperscript{37} Rhode Island,\textsuperscript{38} South Dakota,\textsuperscript{39} Washington (Eastern District),\textsuperscript{40} West Virginia (Northern District),\textsuperscript{41}

\textsuperscript{29} Judge George A. Carpenter, states that he "'never accepts a waiver of a jury in a criminal case.'" Letter dated May 20, 1931.

\textsuperscript{30} 'We have had no such trials here either before or since the [Patton case], and I think we are not likely to have many. They [the defendants] rather think the jury is their only hope. Even in misdemeanor cases, they go to a jury, so you can put this district down as being strong for the jury trial so far as defendants in criminal cases are concerned.'" Letter from Judge John A. Peters, dated May 25, 1931.

\textsuperscript{31} 'I have been a judge of the federal district court for Massachusetts for eight years. During that time I have never known a jury trial in a criminal case to have been waived.'" Letter from Hon. James A. Lowell, dated May 26, 1931.

\textsuperscript{32} Hon. William A. Cant, letter dated May 27, 1931. Judge Cant feels that waivers may be expected in the future, "'but not many for a considerable time to come.'"

\textsuperscript{33} 'There has been no instance of a waiver ... in any criminal case.'" Letter from Judge Thomas C. Munger, dated May 23, 1931.

\textsuperscript{34} Judge William Clark states: '"In six years' experience I have never known the waiver of jury trials.'" Judge John B. Avis recalls a recent case where '"the defendant's counsel offered to go to trial without a jury, but the United States attorney objected, and the case was submitted to a jury.'" Letters dated May 25, 1931.

\textsuperscript{35} Hon. Grover M. Moscowitz, Eastern District of New York, states: '"No non-jury trials, either felonies or misdemeanors, have been tried before me, or any other judge of the court so far as I have known.'" Letter dated May 18, 1931. Judge Bondy, New York City, writes to the same effect, concerning the Southern District. Letter dated May 22, 1931.

\textsuperscript{36} Judge Johnson J. Haynes states that in prosecutions growing out of the prohibition law, the Mann Act, and the Dyer Act, defendants frequently offer to try the case to the court, but since he believes that '"where the facts are in dispute the jury should determine the matter'" such offers are rejected. Letter dated May 25, 1931.

\textsuperscript{37} '"We have had no requests for waivers of juries in the trials of criminal cases.'" Letter from Mr. Lawrence Lennon, secretary to the judges, Northern District of Ohio, dated May 27, 1931.

\textsuperscript{38} No offers to waive juries have been made. Letter from Miss Alice E. Richards, secretary to Judge Letts, dated May 25, 1931.

\textsuperscript{39} '"I am aware of the decision [Patton v. U.S.] that you refer to, but not a single defendant has taken advantage of that privilege in this district.'" Letter from Judge James D. Elliott, dated May 25, 1931.

\textsuperscript{40} '"I am familiar with Patton v. United States, decided in April, 1930, but notwithstanding this decision, no criminal cases, either felonies or misdemeanors, in
and Wisconsin (Eastern District).\textsuperscript{42} Hon. Frank H. Kerrigan, district judge for the Northern District of California, writes that "there have been but two . . . criminal cases tried in this district wherein a jury trial was waived . . . . Needless to say, the proportion of these cases to the total number of criminal cases tried is negligible.\textsuperscript{43} In the Northern District of Texas, juries are waived in two or three cases per term, but these are generally misdemeanor rather than felony actions.\textsuperscript{44} However, in the Southern District of California,\textsuperscript{45} the District of Maryland,\textsuperscript{46} and the Western District of North Carolina,\textsuperscript{47} the non-jury trial

my district, are tried to the court without a jury. I do not feel that under the Patton case the trial of criminal cases without a jury is to be pursued as a practice. I think the rule is intended to be applied with circumspection in special circumstances." Letter from Judge J. Stanley Webster, dated June 10, 1931.

"I have had no such waiver either in felony or misdemeanor cases in my court. About 98 per cent of the criminal cases instituted in this court are on confessions. The others are tried by jury." Letter from Judge W. E. Baker, dated May 19, 1931.

\textsuperscript{45} Letter from Judge F. A. Geiger, dated May 18, 1931.

"Since April 14, 1930 [the date of the Patton case] . . . the records of this court disclose that 16 defendants have elected to waive a jury. These were all cases under the national prohibition act, seven of them being brought under provisions of that act relating to offenses which constituted misdemeanors, and nine under provisions constituting felonies." Letter from Judge William C. Coleman dated May 19, 1931. In view of the practice in the state courts, one would have expected a much larger number of non-jury trials. See supra note 14 and infra note 45.

"Since April 14, 1930 [the date of the Patton case] . . . the records of this court disclose that 16 defendants have elected to waive a jury. These were all cases under the national prohibition act, seven of them being brought under provisions of that act relating to offenses which constituted misdemeanors, and nine under provisions constituting felonies." Letter from Judge William C. Coleman dated May 19, 1931. In view of the practice in the state courts, one would have expected a much larger number of non-jury trials. See supra note 14 and infra note 45.

"I estimate that during the past two years in my jurisdiction 85 to 90 per cent of the cases tried in my court were disposed of on pleas of guilty. Five to ten per cent of the other cases are submitted to me to pass upon the evidence . . . and not over five per cent are contested before a jury." Letter from Judge Edwin Yates Webb, dated May 28, 1931. Prior to the Patton case, non-jury trials were secured through an agreement to plead guilty if the judge found that the evi-
has taken definite root, and has already shown signs of becoming, in time, the rule rather than the exception.

In the District of Columbia, to which the rule of the Patton case would seem equally applicable, "there have been only four felony cases out of approximately two hundred set down for trial (during the current court year, which began in October, 1930) in which the defendant has waived a jury and stood trial before the court." None of the cases was important, and only one of the five defendants involved was convicted. The practice of waiving a jury in misdemeanor cases is of long standing in the District of Columbia, having been sanctioned by act of Congress since 1892.

Of course it is true that "the time which has elapsed since the announcement of the decision in Patton v. United States . . . has not been sufficiently long to develop the possibilities which that decision carries with it." Judge Atwell feels that "the bar is generally of the opinion—I mean those gentlemen who practice criminal law—that a jury cannot be waived in a felony case. They do not appear to be generally aware of the Patton case." In the course of time, as the practice becomes less novel and the antipathy of the Federal bench toward accepting the additional duties involved decreases in intensity, it is to be expected that it will be more generally utilized. But

dence sustained the charge. Otherwise, the district attorney agreed to nol. pros. the case. Such a procedure is in use today in many jurisdictions where a waiver is illegal. In some courts, including the Municipal Court of Milwaukee, even legitimate pleas of guilty are handled in this manner, as experience has shown that occasionally defendants plead guilty of charges of which they are innocent.

* * *

The wide scope and intensity of this feeling is evident from the general tenor of the letters received. Few question the legality of waiver under the Patton case (op. cit., supra note 2), but many apparently doubt the desirability of the practice as applied to their court.

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* Letter from Hon. Leo A. Rover, United States attorney, District of Columbia, dated May 27, 1931.
* Ibid.
* Code of the District of Columbia 1929, Title 18, s. 165, p. 167, sustained in Belt v. United States (1894), 4 App. D.C. 25, 22 Wash. Law Rep. 447. The Supreme Court refusing to review the case, In re Belt (1895), 159 U.S. 95, 15 S. Ct. 987, the decision of the Court of Appeals of the District has stood unchallenged since that date. See the article cited supra note 2.
any belief that the present lack of waivers is due entirely, or even largely, to the newness of the rule should be rudely dispelled by the experiences of Washington,56 Oklahoma,57 and Rhode Island.58 What doubt remains should be disposed of by the experiences of Alabama and Delaware in misdemeanor prosecutions. In the former state, a jury may be had only if the defendant, in advance of trial demands it.59 Such a demand is almost always made; in fact, "it is a rare thing, practically unknown, for a defendant to consent to trial by the court without a jury."60 And in Delaware, although the statutes authorize a defendant in a misdemeanor case to waive a jury and have his case tried to a bench of from one to three judges,61 the attorney-general estimates that this is done in "less than one per cent" of the cases.62

Types of Cases where a Jury is Waived.63 Few definite tendencies to waive a jury in particular types of cases, while refraining from doing so in others, are discernible. The most that can be said is that in certain "morals" actions, more particularly offenses against women and young girls, and, in some jurisdictions, liquor cases, defendants appear anxious to evade a jury. In other jurisdictions, the situation is the reverse, defense counsel apparently feeling that their greatest chance of success lies with the "twelve good men and true" in the jury box. Thus in the District of Columbia, in misdemeanor actions, 95 per cent of all prohibition and gaming prosecutions are tried by jury, the defendants waiving a jury in only one case in twenty; for the balance of the offenses the proportion is just the reverse.64 Obviously, the controlling factors are not so much the particular charge or the possible penalty involved, but rather what defense counsel considers "good psychology" in the case at hand. The former are important only in so far as they influence the latter. And "good psychology" involves the matter of personalities, including those of the judge, the probable jurors, and the lawyers themselves.

59 Code 1923, s. 4647. Of course a different rule prevails as to "petty offenses."
60 Letter from Hon. Walter B. Jones, Montgomery, Alabama, dated April 28, 1931. Judge Jones is speaking of the general practice in the entire state.
61 Laws, 1927, c. 233 S.I.
63 Because of requests from many who furnished information for this section, fewer statements as to sources are given.
If the defense is technical, or involves fine-spun distinctions between "fact" and "law," and more particularly if the evidence is limited and none too clear, there seems to be a tendency to regard the trained mind of the judge as more certain to render a favorable verdict than would be true should the case go to a jury. On the contrary, where counsel is pretty certain of his client's guilt, but has a few misleading incidents, he prefers a jury, figuring that he may get one or two to go off on a tangent and thus get a compromise verdict, if not an acquittal or a hung jury.

Two of the four instances of felony waivers in the District of Columbia are cases in point. In one case, two defendants were accused of grand larceny. Both had rather lengthy records, but wished to take the stand in their own defense. Feeling that the prosecution's case was not a strong one, but that their chances of acquittal might be jeopardized the moment the jury was informed, on cross examination, of their prior convictions, their attorney chose to try the case to the court. Subsequently, one was convicted and the other acquitted. The second instance was a narcotics action in which the prosecution had a strong case, the principal defense being that most of the evidence had been secured through an illegal search, and hence was inadmissible. Doubting that ability of a jury to overlook such evidence once it had been brought to its attention—and it is extremely difficult to prevent all (legally speaking) irrelevant facts from reaching the ears of the jury—counsel chose to present the case to the court, and, winning his point, secured the acquittal of his client.

The latter case illustrates one of the least satisfactory features of our present rules of procedure—and a possible solution. "Instructions" from the judge to "disregard" the facts are no solution at all. It takes a mind "learned in the law," and understanding, or at least believing to understand, "the reason of the rule," to apply it in all its pristine purity.

Another element that tends to influence the choice of a non-jury trial is the fear of the effect of popular feeling upon the minds of the jurors in certain types of cases of a revolting nature. This is particularly true where the defendant's past record is not of the highest.

66 "The existence of a jury makes of the distinction between law and facts an essential principle of the procedure, while one of the main features of the common law is precisely its failure to distinguish facts and law!" Pierre Lepaulle, "Jury, Democracy, and Efficiency," Forum, July, 1928, p. 52.
Justice often demands that we "protect those coming into court from the heart, the nerves, the obscure instincts and passions of the crowd and the mob... It requires not only great intelligence and character, but also professional training, to resist the pressure of public opinion and judge a case on the actual evidence." The judge, not alone because of this training, but likewise because of this less sentimental attitude, may come closer to doing this than would the laymen on the jury. Trained to detect the weak links in a chain of circumstantial evidence, to look beyond mere race prejudice to the actual fait accompli, and bound by the code of ethics of his profession, he may often be the one beacon of hope in a sea of despair. But let us not wax too eloquent on the subject! The present writer has just visited a locality where "trial by newspaper" is as common in a non-jury as in a jury trial; where the judge banks upon sensationalism as his greatest friend; and where assignment to the criminal branch is looked upon as a no less sure stepping stone to higher offices "in the gift of the people" than are positions in the office of the prosecuting attorney.

Like many another question, that of the effect of delay upon the waiver of jury trial has at least two sides. Many federal judges doubt that any general practice of waiver can develop while their courts are as hopelessly swamped with litigation as they are at the present time. As long as over eight-ninths of all convictions in prohibition cases are on pleas of guilty—a large proportion of them entered on "bargain days"—this doubt would seem to be well founded. Since the prosecution cannot possibly press for trial more than a very small percentage of the cases where the defendant stands upon his right to be considered innocent until convicted "in due course of law," it would seem to be the height of irrationality to exchange the advantages of the bargain sale of sentences for those of the non-jury trial. On the other hand, the poor litigant who is unable to make bail, and must stay in jail to await a trial by jury, is more apt to prefer a prompt trial before the judge alone.

Benefits and Detriments of Waiver: To the State. Aside from the possibility of more accurate decisions, at least in certain types of cases or under certain sets of circumstances, the non-jury trial has


certain definite advantages as a time and money saver, and as a restorative of more business-like methods in criminal trials. Chief Justice Bond estimates that in Maryland the non-jury trial of a given case requires not more than a third of the time which would be required to try the same case with a jury, and the experiences of other jurisdictions appear to support this as a general rule. In many instances a case could have been tried and disposed of by a judge in less time than it has taken to impanel the jury. The financial saving, in view of the fact that a jury trial costs the state, speaking conservatively, in the neighborhood of from $150 to $200 per day—and for a short day—is evident. But one may question the argument of dollars and cents when applied to felony trials. If economy be our object, we might better start with the civil jury. At least in the field of criminal law, the true advantages of speedier justice lie elsewhere.

Of as great importance as the saving in time is the greater security against error, and consequently the greater certainty of finality. Non-jury trials are less technical, more business-like, and surer footed. "Appoint a keen, critical, and trained mind to pass upon the facts and you will eliminate more worthless material than by all the rules of evidence;" for lawyers do not like to make fools of themselves. That paradox of legal science, the judge’s charge to the jury, is, of legal necessity, often prepared to pass muster before an appellate court rather than to enlighten the jury. Even so, error creeps in; and the concomitant of error is further litigation, and possibly a new trial. Not the least of the advantages of the non-jury trial is the elimination of a new trial.

In short, "If more speedy, less costly, and more dignified trials, arriving at more accurate results, are a desirable goal in the administration of justice, then the trial of criminal cases without a jury," the defendant willing, is a step in the right direction. If it be alleged that this places too great a burden upon the shoulders of the judge, it is replied that the burden is placed where it logically belongs. If in certain types of cases it be too great a burden for a single man, then why not copy the Maryland practice, as old as the state itself, of giving him the moral and mental support of one or two of his colleagues?


10 The Judicial Council of Rhode Island sets the figure at $185 for the principal trial courts of that state. First Report (1927), p. 10.


Although but little evidence is available, such statistics as exist would seem to indicate that the extensive use of the non-jury trial tends to increase the proportion of actual trials at the expense of the *nolle prosequi* and the "bargain" plea of guilty. In Milwaukee, where over 85 per cent of all felony trials are by a judge alone, only two per cent of the pleas of guilty are of an offense other than that charged in the original indictment or information. In Chicago, however, during the period when all trials were by jury, 79 per cent of such pleas were of a lesser offense. Although it was impossible to isolate the contributing factors, those who conducted the Illinois Crime Survey were led to believe that the method of trial was of controlling importance. Professor Moley has found such a tendency at work in other jurisdictions, notably Connecticut. Further data, however, is necessary before reliable conclusions can be drawn.

**Benefits and Detriments of Waiver: To the Accused.** This question has already been largely answered in our consideration of the causes of waiver. Suffice it to say that there are cases where it is a positive injustice to deny the defendant the right to waive a jury; where the right to refuse to be "tried by one's country" is as valuable a right as that to trial by jury itself. These facts would seem to invalidate much of the *dicta* of the reports that such a procedure is "contrary to public policy," and "cannot be tolerated," and to relegate them to the category of Lord Coke's equally famous *dictum* that the common law forced the defendant to stand mute before the altar of justice, like the lamb before the altar of its God, without counsel, without process to secure witnesses in his favor, because of "that tenderness and humanity to prisoners, for which our English laws are justly famous;" or that equally absurd statement by his illustrious compatriot, Sir William Blackstone, that the common law condemned women to be burned alive at the stake because English gallantry could not bear to see them maimed and exposed to the public view upon the common gallows.

On one point, however, a protest must be recorded. However valuable the right to waive a jury trial may be, to bring pressure to bear


Ibid., pp. 16, 102.


*Coke's* Littleton, s. 1586.

*Blackstone's Commentaries*, Bk. IV, p. 93.
to force a defendant to exercise that privilege is to convert it from a right to a weapon of abuse. It should not be necessary to bargain with the prosecuting attorney or accept trial by the court in order to secure a prompt disposition of one’s case. It would seem that a people who have elevated the language of the Great Charter, “to no man will I deny justice, to no man will I delay it,” to the position of a constitutional mandate should ponder well the condition of the docket of many of our criminal courts. No man should be denied equality before the law because he cannot put up bond. However, other things being equal, the waiver of jury trial by others should increase the speed of the wheels of justice and decrease the waiting period for those who are thus unfortunate.

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