

WOULD A STATUTE PROVIDING FOR THE WAIVER OF  
A JURY IN FELONY CASES BE CONSTITUTIONAL IN  
MISSOURI?

BY ROBERT L. ARONSON

In criminal prosecutions the accused shall have the right to appear and defend, in person or by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy, public trial by an impartial jury of the county.<sup>1</sup>

The right of trial by jury, as heretofore enjoyed, shall remain inviolate; etc.<sup>2</sup>

These two sections of the Constitution of 1875 comprise the sole restrictions in this state upon the power of the General Assembly to legislate concerning the status of the jury in criminal procedure. Taking the words at their ordinary and obvious meaning, there can be no doubt or hesitancy in saying that they forbid the enactment of any statute denying to an accused the right to be tried by a jury when he desires to be so tried. But the statute suggested in the subject of this thesis would not go to this extent, but rather would confer upon the accused the right of choice, the option, between having the question of his guilt or innocence determined by a jury of his peers and having it decided by the judge presiding over the court. Certainly it can not be said of such a statute that it conflicts clearly and indubitably with the existent constitutional provisions, unless these constitutional provisions are given a stronger interpretation and a greater significance than their bare language would seem to indicate.

Before attempting to consider the precise question here involved, it seems proper to examine the existing situation in Missouri, in the absence of a statute authorizing waiver in felony prosecutions. The constitutional provisions above quoted are supplemented and reinforced by the statutory declaration that<sup>3</sup>

---

<sup>1</sup> Const. Mo., Art. II, Sec. 22.

<sup>2</sup> Const. Mo., Art. II, Sec. 28.

<sup>3</sup> R. S. Mo., 1919, Sec. 4005.

"All issues of fact in any criminal cause shall be tried by a jury, to be selected, summoned and returned in a manner prescribed by law." However, this peremptory and mandatory requirement as to criminal procedure is made less stringent as to misdemeanor cases by the succeeding provision:<sup>4</sup> "But the defendant and prosecution attorney, with the consent of the court, may submit the trial of misdemeanors to the court, whose findings in all such offenses shall have the force and effect of the verdict of a jury." Under this state of the constitutional and statutory law the decisions have held that, while waiver in misdemeanor cases was invalid prior to the enactment of the statute,<sup>5</sup> because of such statute the waiver of the right to trial by jury is valid and effectual,<sup>6</sup> the constitutionality of the statute not being very seriously questioned; and as to felony cases it has been uniformly held that the defendant has not the right to waive jury trial.<sup>7</sup> The cases involving felonies have not been in entire agreement as to the reasons for this holding, and some of the cases contain statements of a general nature which tend to confuse the decision of this question if improperly interpreted.

It has been the general rule throughout the United States, in the absence of an authorizing statute, that one accused of having committed a felony and pleading not guilty to the charge cannot waive trial by jury. The reasons for this rule have not been harmonious from state to state, and it is now purposed to examine all the grounds upon which these decisions have been rested. In the light of these cases, the holdings and statements in the Missouri cases can perhaps be more accurately evaluated. If it can be demonstrated in the course of the examination of these decisions that none of the various reasons underlying them would under Missouri constitutional provisions necessitate the holding that a statute authorizing the substitution of judge for jury as a fact-finding agency (for this is the practical effect of

---

<sup>4</sup> R. S. Mo., 1919, Sec. 4006.

<sup>5</sup> Neales v. State, 10 Mo. 498; Cousineau v. State, 10 Mo. 501 (1847).

<sup>6</sup> State v. Moody, 24 Mo. 560 (1857); State v. Larger, 45 Mo. 510 (1870); State v. Wiley, 82 Mo. A. 61 (1899); State v. Bockstruck, 136 Mo. 335, 38 S. W. 317 (1896); State v. Finley, 162 Mo. A. 134, 144 S. W. 120 (1912).

<sup>7</sup> State v. Mansfield, 41 Mo. 470 (1867); State v. Meyers, 68 Mo. 266 (1878); State v. Sanders, 243 S. W. 771 (1922), Mo. Sup. Div. 2; State v. Talken, 292 S. W. 32 (1927), Mo. Div. 2.

waiver) is unconstitutional, it follows that none of the decisions of our courts, whatsoever their basis in reason may be, compel by their dicta a holding of unconstitutionality.

Some cases have denied the right of waiver because of the imperative or mandatory language of the constitutional provisions governing these cases. Thus the federal constitution reads as follows:<sup>8</sup> "The trial of all crimes, except in cases of impeachment, shall be by jury." Accordingly it has been held that "the constitutional provision is mandatory. It cannot be waived in any case to which it is applicable."<sup>9</sup> A few state constitutions are also in terms peremptory in demanding the jury, and as a consequence waiver is not permissible.<sup>10</sup> But these cases are of practically no value as authority in Missouri, for our organic law differs radically from the mandatory language of these constitutions.

It should be noted, somewhat parenthetically, that these requirements of the federal constitution do not affect criminal procedure in Missouri, nor limit the state's rights to adjust such matters itself. The Sixth Amendment, of course, does not relate to state action, but only imposes limitations upon the federal government;<sup>11</sup> and section 2 of article 3 of the federal constitution also relates only to offenses against federal laws.<sup>12</sup> Reforms of procedure in trials for state offenses do not conflict with the Fourteenth Amendment of the federal constitution either as abridging the privileges and immunities of citizens of the United States<sup>13</sup> or as taking life, liberty, or property without

---

<sup>8</sup> Const. U. S., Art. III, Sec. 2, Par. 3; in addition to this clause, there is in the Sixth Amendment language much like that in Const. Mo., Art. II, Sec. 22, *supra*.

<sup>9</sup> *Coates v. U. S.*, 290 Fed. 134 (1923); also, *In re Virch*, 5 Alaska 500 (1916); *Queenan v. Territory*, 11 Okla. 261, 71 Pac. 218 (1901)—affirmed, 190 U. S. 548, 47 L. Ed. 1175; *Freeman v. U. S.*, 227 Fed. 732; *Low v. U. S.*, 169 Fed. 86; *Dickinson v. U. S.* 159 Fed. 801.

<sup>10</sup> *State v. Stewart*, 89 N. C. 563; *State v. Holt*, 90 N. C. 749, 47 Am. Rep. 544; *State v. Pulliam*, 184 N. C. 681, 114 S. E. 394 (1922); *State v. Cottrill*, 31 W. Va. 162, 6 S. E. 428 decision by an equally divided court.

<sup>11</sup> *Barron v. Baltimore*, 7 Pet. 243.

<sup>12</sup> *Eilenbecker v. Dist. Ct.*, 134 U. S. 31, 33 L. Ed. 801; *Cook v. U. S.*, 138 U. S. 157, 34 L. Ed. 906.

<sup>13</sup> *Maxwell v. Dow*, 176 U. S. 581, 44 L. Ed. 597; *Twining v. New Jersey*, 211 U. S. 78.

due process of law.<sup>14</sup> A state is free to adopt any type of procedure it wishes.<sup>15</sup> In the case of *Hallinger v. Davis*,<sup>16</sup> it was specifically held that a statute of New Jersey authorizing waiver of trial by jury did not violate the Constitution of the United States.

Another ground that is sometimes given as the basis of a decision that jury trial cannot be waived is the fact that there exists a mandatory statute requiring that the determination of facts be by a jury.<sup>17</sup> Such a statute now exists in this state as regards felonies,<sup>18</sup> and has so existed since before the earliest case on the right to waive the jury in a felony prosecution arose;<sup>19</sup> therefore, it is believed that this statute alone has always been sufficient to justify the decisions not allowing waiver. But disregarding this possibility, it must be patent that such a statute will no longer operate to render waiver invalid after the enactment of another statute permitting waiver, since the former statute making the jury trial mandatory must be repealed by the subsequent one either expressly or by implication.

Closely related to this reason for not permitting the jury trial to be waived by one accused of crime, is the theory that no waiver or action by the defendant can give to the trial judge power to decide the facts. Only the jury has this power, and jurisdiction cannot be vested in a judge alone by the mere consent of the defendant. This jurisdictional argument has been thus stated by the Supreme Court of Nebraska:<sup>20</sup> "If, then, the only tribunal provided by the Constitution and laws of the state of Nebraska for the trial of one charged with a felony is a court and jury, it follows that the parties cannot by agreement constitute some other tribunal for this purpose. Consent of parties can waive jurisdiction of the person, but the law alone confers

---

<sup>14</sup> *Hurtado v. California*, 110 U. S. 516; *Twining v. New Jersey*, *supra*.

<sup>15</sup> *Missouri v. Lewis*, 101 U. S. 22.

<sup>16</sup> 146 U. S. 314; 36 L. Ed. 986 (1892).

<sup>17</sup> *Comm. v. Rowe*, 257 Mass. 172, 153 N. E. 537 (1926); *Jackson v. Comm.*, 221 Ky. 823, 299 S. W. 983 (1927); *In re McQuown*, 19 Okla. 347, 91 Pac. 689, 11 L. R. A. (N. S.) 1136 (1907); *State v. Battey*, 32 R. I. 475, 80 Atl. 10 (1911); *Wartner v. State*, 102 Ind. 51, 1, N. E. 65 (1885); *Arnold v. State* 38 Nebr. 752, 57 N. W. 378 (1894).

<sup>18</sup> Sec. 4005, *supra*.

<sup>19</sup> See Mo. Gen. St., (1865), Ch. 213, Sec. 1.

<sup>20</sup> *Michaelson v. Beemer*, 72 Neb. 761, 101 N. W. 1007 (1904).

jurisdiction of the subject-matter." And the leading case of *People v. Harris*,<sup>21</sup> expresses the doctrine in these words: "A jury of 12 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. \* \* \* 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. But while a defendant may waive his right to a jury trial, he cannot by such waiver confer jurisdiction to try him upon a tribunal which has no such jurisdiction by law. Jurisdiction of the subject-matter must always be derived from the law and not from the consent of the parties."

As was seen to be the case above in connection with the mandatory statutory provisions, this obstacle to valid and effective waiver can also be removed by legislative enactment, and will be overcome by a statute providing for waiver, since such a statute would contain in addition to an authorization of the waiver of a jury, the complementary provision empowering the court to determine the facts, as is shown by the Missouri waiver statute for misdemeanors, quoted above.<sup>22</sup> Indeed the cases cited recognize that the interposition of a statute giving the defendant power to dispense with a jury trial will render this argument against permitting waiver wholly nugatory.<sup>23</sup> In *Commonwealth v. Rowe*<sup>24</sup> the statement is made that "the legislature, which imposed the

---

<sup>21</sup> 128 Ill. 585, 21 N. E. 563, 15 Am. St. R. 153 (1889); see, also, Note, 21 Cent. L. J. 1. c. 231; *State v. Smith*, 184 Wis. 664, 200 N. W. 638 (1924); and all cases cited in footnote 17; as holding *contra*, see *State ex rel. Warner v. Baer*, 103 Oh. St. 585, 134 N. E. 786 (1921), which states: "The court had full and complete jurisdiction of the subject-matter of the trial. The provisions regarding jury trial refer only to the form and manner of the trial, and are in no sense jurisdictional in character. If a person has a right to jury trial, and is deprived of such right, it is an irregularity which constitutes error but does not present a jurisdictional question."

<sup>22</sup> R. S. Mo. 1919, Sec. 4006.

<sup>23</sup> Cases footnote 21.

<sup>24</sup> 257 Mass. 172, 153 N. E. 537 (1926).

limitation (upon the judge's power), can remove it. In so doing, it will be acting within its constitutional powers, as the right of the accused to a jury trial will not be lessened."

The courts of a few states, notably Wisconsin,<sup>25</sup> base their refusal to sanction the waiver of a trial by jury to some extent upon the public policy of the state. For example, in the recent Pennsylvania case of *Commonwealth v. Hall*,<sup>26</sup> Chief Justice von Moschzisker writes as follows: "Where we find a uniform practice, continuously pursued from the beginning of the commonwealth, and recognized in our organic law, of trying indictable offenses, on a plea of not guilty, before a judge and jury, does this not establish the practice as a public policy of the state to such an extent that the situation should be viewed as though the law-making body had limited the legal capacity of the courts accordingly?"

This public policy theory is another ground for not allowing waiver of jury trial which cannot stand after the passage of a law authorizing such waiver. For, "generally speaking, the Legislature is the body to declare the public policy of a state, and to ordain changes therein."<sup>27</sup> Public policy is never contrary to an express legislative enactment.<sup>28</sup> One author expresses the principle so: "In the last analysis, it is for the legislature to determine whether any jury or a jury of twelve is essential in every case to safeguard the interests of the accused and to maintain public confidence in the judicial system."<sup>29</sup> And perhaps the finest and most lucid statement of the weakness of this theory in the presence of a statute was made by the Supreme Court of Wisconsin, the outstanding proponents of the theory in the absence of statute, in the case of *In re Staff*,<sup>30</sup> as follows: "But when the legislature says that he may have it (the right of waiver), and

---

<sup>25</sup> *State v. Lockwood*, 43 Wis. 403; *Jennings v. State*, 134 Wis. 307, 114 N. W. 492 (1908); *Oborn v. State*, 143 Wis. 249, 126 N. W. 737, 31 L. R. A. (N. S.), 966 (1910); *State v. Smith*, 184 Wis. 664, 200 N. W. 638 (1924); *Michaelson v. Beemer*, 72 Neb. 761, 101 N. W. 1007 (1904).

<sup>26</sup> 140 Atl. 626 (1928).

<sup>27</sup> *Comm. v. Hall*, *supra*; also, *State v. Worden*, 46 Conn. 349, 33 Am. Rep. 27 (1878); *State v. Woodling*, 53 Minn. 142, 54 N. W. 1068.

<sup>28</sup> *Belt v. U. S.*, 4 App. D. C. 25 (1894).

<sup>29</sup> S. Chesterfield Oppenheim, "Waiver of Trial by Jury in Criminal Cases," 25 Mich. L. Rev. 695, l. c. 712.

<sup>30</sup> 63 Wis. 285, 23 N. W. 587, 53 Am. R. 285 (1885).

thus establishes a different public policy, what constitutional rule is violated? Public policy is to some extent a creation of the legislature. The statutes embody much of the public policy of the state, and that policy may be one thing today and the opposite tomorrow, as the legislature in its wisdom may enact. It was the public policy of the state to deny to persons about to be tried for crime the power effectually to waive a jury. It is now its policy to permit such waiver in the municipal court for Rock County, and in some other courts, and perhaps hereafter the same policy may be extended to all trial courts in the state. We cannot perceive wherein such legislation infringes the Constitution."

Only one argument against the validity of a waiver authorized by statutes remains to be considered—the argument that the constitutional guarantee of the right of trial by jury establishes an invariable principle of government and makes of the jury an institution which inheres in the very nature of criminal procedure. No argument short of this could effectively maintain the proposition flowing therefrom, that the statute authorizing waiver of the right to trial by jury is unconstitutional. This proposition has, of course, much deeper significance than the ordinary public policy argument last discussed. It does not suggest the usual question which is presented to the courts in cases of attempted waiver without statutory authorization, viz., did the framers of the constitution intend the right of jury trial as a personal privilege or security of the accused, or did they intend it also as a protection to the state. Here the question rather is, did the framers intend the right of trial by jury to be something less than an indispensable feature of lawful criminal procedure, or did they intend it to be such an absolutely necessary element in the determination of guilt.

It is believed that the language of the Missouri Constitution will not support the proposition here under consideration. The expressions, 'the accused shall have the right to a trial by jury' and 'the right of trial by jury shall remain inviolate,' cannot, under any ordinary construction of the words, be said to imperatively order trial by jury, nor to prescribe it as the exclusive

mode of trial of all crimes.<sup>31</sup> It guarantees the right when claimed, but does not provide that it *must* be exercised. "This language imports merely a grant or guaranty of a right to the accused for his own protection, and seems \* \* \* never to have been intended to prescribe the organization or the court, or to make the jury an essential part of it."<sup>32</sup> These words merely prevent the state from compelling a non-consenting individual to trial without a jury; the constitutional language does not exclude or deny the power of the legislature to provide for a mode of trial, at the option of the accused, without the intervention of a jury. The case of *State v. Worden*<sup>33</sup> is particularly instructive in this connection. Under constitutional provisions practically identical with the sections of the Missouri Constitution *supra*, the legislature enacted a law authorizing waiver in all criminal prosecutions. Defendant, convicted of a felony by the judge trying the case alone after the jury was waived, appealed on the ground that the statute violated the constitutional requirement that "the right of trial by jury shall remain inviolate."<sup>34</sup> The Supreme Court of Connecticut said: "No one by simply reading this section would suppose that the framers of the Constitution intended by it to secure a principle of government, or the political rights of the people collectively or individually. 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." It was further held that the Constitution if intended to protect the general public, would have used language so showing and would have acted directly, rather than concealing such intent in a provision apparently intended to secure personal individual rights. Moreover, "constitutional provisions are very seldom self-executing."<sup>35</sup>

---

<sup>31</sup> *State v. White*, 33 La. Ann. 1218 (1881); *State v. Robinson*, 43 La. Ann. 388, 8 So. 937 (1891).

<sup>32</sup> *State v. Woodling*, 53 Minn. 142, 54 N. W. 1068 (1893); *State v. Shearer*, 27 Ariz. 311, 232 Pac. 893 (1925).

<sup>33</sup> 46 Conn. 349, 33 Am. Rep. 27 (1878); followed in *State v. Rankin*, 102 Conn. 46, 127 Atl. 916 (1925).

<sup>34</sup> Const. Conn., Sec. 21.

<sup>35</sup> *State ex rel. Warner v. Baer*, 103 Oh. St. 585, 134 N. E. 786 (1921).



Of course, in the several jurisdictions which hold the right of trial by jury to be a mere personal privilege,<sup>36</sup> the proposition that the constitutional guarantee establishes an indispensable element of criminal procedure clearly is not maintainable. And even in the states which do not consider the right to be waivable,<sup>37</sup> whether because of mandatory statute, or state public policy, it is believed that the proposition is unacceptable. It seeks to read into the unambiguous language of the Constitution a signification that is not present; it seeks to imply limitations upon the legislative power that do not exist. Consequently among all the jurisdictions having constitutions identical with or similar to our organic law, there is not a single case holding that a statute authorizing waiver is unconstitutional, but several which hold that such statutes are consistent with the fundamental law.<sup>38</sup> One court has said: "We have no difficulty whatever in holding that the public policy which stood in the way of an effectual waiver is not so inherent in the form and framework of our government as to place it beyond the reach of legislative interference, but that it is the subject of legislative control."<sup>39</sup>

The distinction between the type of provisions concerning the jury in the Missouri Constitution and the mandatory language of the federal constitution and others of its type has been noted. Despite the verbal difference, and the consequent basis for supporting the proposition that jury trial is fundamental and unalterably necessary in criminal prosecutions under the imperative type of constitutional provision, it is interesting to note that even here it has not uniformly been held that a statute authorizing waiver is invalid. The case of *In re Virch*<sup>40</sup> did so hold, but it is opposed by two cases which greatly outweigh it in the cog-

---

<sup>36</sup> *Comm. v. Rowe*, 257 Mass. 172, 153 N. E. 537 (1926); *State v. Stevens*, 84 N. J. L. 561, 87 Atl. 118 (1913); *People v. Harris*, 302 Ill. 590, 135 N. E. 75 (1922); *State ex rel. Warner v. Baer*, *supra*.

<sup>37</sup> The leading case here is *Cancemi v. People*, 18 N. Y. 128.

<sup>38</sup> *Murphy v. State*, 97 Ind. 579, 584; *In re Staff*, *supra*; cases in footnotes 32, 33, and 34. Cf. the unusual views of *State v. Stevens*, *supra*, which under a holding that jury trial can be waived in felony cases without statute states that if defendant could not waive trial by jury, no legislation could give him that power.

<sup>39</sup> *In re Staff*, *supra*; approved in *State v. Jennings*, *supra*.

<sup>40</sup> 5 Alaska 500.

ency of their reasoning.<sup>41</sup> In *Belt v. U. S.*,<sup>42</sup> the court noted the verbal difference between the peremptorily-phrased paragraph in section 2 of article 3 and the unemphatic provision of the Sixth Amendment, but held that the difference in wording meant nothing, both clauses having the common object of serving public policy by perpetuating the old system of trial. The statute authorizing waiver was accordingly upheld. These views are concurred in by the author quoted above who also believes that the employment of mandatory language in article 3, section 2, ought not to be held to change the nature of the right conferred from a personal privilege to a right in which the public has an interest, but should be construed merely as granting the right more emphatically.<sup>43</sup>

One fact which makes it difficult to hold the right of trial by jury to be fundamental and not subject to legislative regulation is that this right is usually granted in the same clause or paragraph with other rights, all of which are held to be strictly personal privileges, and waivable without statutory authorization. Thus Art. II, Sec. 22, of the Missouri Constitution, quoted *supra*, confers several privileges upon the accused. If these are regarded as privileges and can be waived,<sup>44</sup> why is the right to trial by jury placed upon a different plane?<sup>45</sup> And even if it be conceded that from public policy or on the jurisdictional argument, jury trial cannot be waived, still there is no such difference between the two sections of the same granting clause that one is above legislative alteration, while the other is subject thereto.

Another fallacy in the indispensable principle of government theory lies in the fact that defendants are everywhere permitted by pleas of guilty to waive jury trial and all trial.<sup>46</sup> This prac-

---

<sup>41</sup> *Belt v. U. S.*, 4 App. D. C. 25 (1894), affirmed as *In re Belt*, Petitioner, 159 U. S. 95, 40 L. Ed. 88; *Ex parte Dunlap*, 5 Alaska 521.

<sup>42</sup> See footnote 41.

<sup>43</sup> *S. Chesterfield Oppenheim*, in 25 Mich. L. Rev. 695.

<sup>44</sup> *State v. Lynn*, 169 Mo. 664, 70 S. W. 127 right to trial in county where crime is alleged to have been committed; *State v. Wagner*, 78 Mo. 644, 47 Am. Rep. 131 confrontation of witnesses; *State v. Thronson*, 191 N. W. 628 (N. D.), right to have counsel and the procurement of witnesses.

<sup>45</sup> *In re Staff*, *supra*; *State ex rel. Warner v. Baer*, *supra*; *State v. Kaufman*, 51 Iowa 578, 2 N. W. 275; 25 Mich. L. Rev. 695.

<sup>46</sup> *Ex parte Dawson*, 20 Idaho 178, 117 Pac. 696 (1911); *State v. Thronson*, *supra*, *Howington v. State*, 235 Pac. 931 (Okla. Cr. Ct., 1925); *In re Staff*, *supra*; *State v. Harris*, *supra*.

tice shows that trial by jury under any interpretation of the constitutions is not the sole method of determining guilt or innocence. Courts do not refuse to entertain the plea of guilty, despite the fact that logically it is a relinquishment of a trial by jury. This exception to the main proposition is inconsistent with it, and further demonstrates its untenability.

Thus far in this consideration of the right of waiver the attempt has been made to demonstrate that under none of all the various grounds upon which have been based the decisions denying the right to waive jury trial in the absence of a statute providing for waiver, would a statute making such provision be unconstitutional, with the possible exception of cases where there is a mandatory constitutional provision. If this shall have been proved, it follows as a necessary conclusion that in Missouri, having the constitutional provisions that it has, a statute authorizing waiver of the jury in felony prosecutions must be valid. And it is believed that there is nothing in the Missouri cases on the subject of waiver which would lead to a contrary conclusion. The true basis of the Missouri cases, although the courts do not expressly so state, appears to be the public policy theory. Thus in *State v. Mansfield*,<sup>47</sup> the leading Missouri case, it was said that public policy condemns a choice by an accused for "the prisoner is not in a condition to exercise a free and independent choice without often creating prejudice against him." This statement was repeated in the recent case of *State v. Talken*.<sup>48</sup> Every statement in the cases, no matter how far-reaching, is reconcilable to and consistent with a desire on the part of the judges merely to preserve what the public policy of the state then demanded. For instance, in *State v. Sanders*<sup>49</sup> it is said that "the right \* \* \* is not one which the accused can waive, but must be accorded to him to afford him such a trial as is contemplated by the Constitution." Considered abstractly this expression might seem to indicate the adoption of the view that decision by a jury is indispensable to trial as being a principle of government. But its true significance is believed to be merely a statement, in perhaps unnecessarily broad terms, that the Con-

---

<sup>47</sup> 41 Mo. 470 (1867).

<sup>48</sup> 292 S. W. 32 (1927) Mo. Sup. Div. 2.

<sup>49</sup> 243 S. W. 771 (1922) Mo. Sup. Div. 2.

stitution establishes an ordinary, not an unalterable, public policy; this public policy implied from the Constitution is not so profound as to be beyond legislative reformation, but rather is implied into existence in default of a legislative declaration on the subject. In this connection little significance should be attached to the fact that the authority chiefly relied upon in *State v. Mansfield* was *Cancemi v. People*,<sup>50</sup> the foundation-stone of the doctrine of profound public interest in a strict adherence to a policy of trial by jury.

The very strongest argument in favor of the constitutionality of the proposed waiver statute for felony cases is the fact that a similar statute relating to misdemeanors has been upheld by the courts of this state,<sup>51</sup> although before this statute it had been held in *Neales v. State*<sup>52</sup> that there could be no waiver in misdemeanor cases. The Constitution makes absolutely no distinction in respect of waiver between felonies and misdemeanors, speaking only of "criminal prosecutions." Such a distinction cannot be extracted from the words "as heretofore enjoyed" merely by reason of the fact that the statutes existing when the Constitution of 1875 was adopted, permitted waiver of jury in misdemeanor cases and not in felony cases. It would be absurd to import existing statutory law into the Constitution and raise it to the dignity of organic law on the basis of these three words. The true right "heretofore enjoyed," it would seem, was such that both felony and misdemeanor waiver statutes might have been constitutionally enacted, but only the latter actually had been enacted. The cases from other states hold that felonies and misdemeanors are on the same footing as regards the right to waive jury trial, or the validity of a statute providing for such waiver, because the constitutions make no distinction.<sup>53</sup> Nor can a technical difference in profound, inherent public policy be found between the two grades of crimes. "It surely cannot be true that the public is interested in the protection of the accused

---

<sup>50</sup> 18 N. Y. 128.

<sup>51</sup> Cases in footnote 6.

<sup>52</sup> 10 Mo. 498 (1847).

<sup>53</sup> *State v. Tiedeman*, 207 N. W. 153 (S. D., 1926); *State v. Worden*, *supra*; *State v. Woodling*, *supra*; *State v. Battey*, *supra*; *In re McQuown*, *supra*, quoting Clark on Criminal Procedure, p. 434.

in proportion to the magnitude of his offending—that its solicitude goes out to the great offender but not to the small—that there is a difference in point of sacredness between constitutional rights when asserted by one charged with a grave crime and when asserted by one charged with a lesser one.”<sup>54</sup>

There remains but one additional argument to complete the demonstration of the constitutionality of a statute providing for the waiver of a jury in felony cases in Missouri. It must be apparent to all that he who voluntarily relinquishes a right is not deprived of it. Under a constitution guaranteeing that an accused shall have the right to a jury trial, or that the right shall remain inviolate, “it seems manifest that the state does not violate the right when it offers the prisoner a freely exercised option of trial by jury or by judges only. To those defendants who elect the jury, the right remains. It is not denied to those who choose without constraint to give it up.”<sup>55</sup> Constitutional right is not violated by an agreement to submit the issue to the court, entered into by the free will of the accused and because he regarded it as advantageous so to do.

No better summation of the question has been found than the following statement of the Court of Appeals of the District of Columbia in the case of *Belt v. U. S.*:<sup>56</sup>

We do not think that the immunity intended to be guaranteed by the Constitution, the right of trial by jury, should be forced upon a person against his will, when no public purpose is to be subserved by the restraint, and when, on the contrary, there is an avowed and openly expressed public policy to be subserved by the acceptance of the waiver. \* \* \* However valuable may be the system of trial by jury, and however essential its preservation may be deemed to the perpetuation of our free institutions, it would be the merest mockery of the freedom which it is sought to perpetuate, if an accused person should be denied the use of that very freedom when he desires to exercise it in his choice of a tribunal, and the State, by its legislature,

---

<sup>54</sup> *Comm. v. Beard*, 48 Super. Ct. Pa. 319, as quoted in 25 Mich. L. Rev. 695; see, also, 21 Cent. L. J. 1. c. 231.

<sup>55</sup> *S. Chesterfield Oppenheim* in 25 Mich. L. Rev. 695, 702; also, *State v. Worden*, *supra*; *Murphy v. State*, 97 Ind. 579.

<sup>56</sup> 4 App. D. C. 25; also, *State ex rel. Warner v. Baer*, *supra*.

voicing the sentiment of the people, authorizes the choice. This would be to enforce freedom by the denial of freedom. We cannot think that this was the intention of the founders of the Constitution, and we must therefore affirm the constitutionality of the statute in question.

It is believed that the statute contemplated in the subject of this thesis would be constitutional in this state.