COMMENT ON RECENT DECISIONS

CONSTITUTIONAL LAW—RIGHT TO JURY TRIAL—WAIVER OF COUNSEL AND TRIAL BY JURY—[Federal].—Defendant was indicted for using the mails to defraud, in violation of federal statute, and a plea of "not guilty" was entered when he refused to plead to the indictment. Conducting his case without counsel, the defendant moved to have the case tried by the judge alone and submitted a written signed waiver of trial by jury. On consent of the Assistant United States Attorney an order approving the waiver was entered.[1] The trial resulted in a conviction and sentence to imprisonment. Defendant then retained an attorney, who brought a writ of habeas corpus to raise the question whether the judge had jurisdiction to try him.[2] The Circuit Court of Appeals, one judge dissenting, held that the judge had not had jurisdiction. On review by the Supreme Court, *held*, that the order of the Circuit Court of Appeals must be set aside. An accused, who is without counsel, has the privilege at his own instance to waive his right to trial by jury when indicted for felony. *Adams v. United States ex rel. McCann.*[3]

Historical records concerning the use of trial by jury confirm the fact that for centuries it has been the established method of trial in criminal cases.[4] Realizing this, the makers of the Constitution expressly guaranteed the right of one accused of crime to trial by jury.[5] It is not surprising therefore that both state[6] and federal courts have but reluctantly consented to the development of the doctrine of waiver[7] of that right. In *Thompson v.*

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1. Over the objection of the Court, the defendant had insisted repeatedly that he be permitted to represent himself. To inquiry, he replied that he was not a member of the bar, but had studied law, and that no attorney would be able to give him as competent representation as he would be able to give himself.

2. There was no claim that the defendant McCann had not had a fair trial before the judge.

3. (1942) 63 S. Ct. 236, Justices Douglas, Black and Murphy dissenting.

4. 1 Holdsworth, *History of English Law*, (3 ed. 1922) pp. 312-350. Excellent short historical sketches of development of trial by jury are included in the opinions handed down in People ex rel. Swanson v. Fisher (1930) 340 Ill. 250, 172 N. E. 722 and in People v. Scornavache (1931) 347 Ill. 403, 179 N. E. 909.

5. U. S. Const. Art. III, §2 and Amendment VI.

6. The waiver doctrine has had an especially stormy history in state courts. Constitutional and statutory provisions, and judicial interpretation, have settled in 15 states that a defendant may waive jury trial in some, though not all types of felony cases. There can be no waiver in felony cases in twenty-four states, including Missouri. R. S. Mo. 1939 §§4051, 4052 (statutory allowance of waiver in misdemeanor cases but definite prohibition in offenses of more serious grade). In the remaining states the law is doubtful. Grant, Waiver of Jury Trial in Felony Cases (1932) 20 Calif. L. Rev. 132; Moreland, Waiver of Jury Trial in Criminal Cases in Ky. (1932) 21 Ky. L. J. 1.

7. Where waiver of the right to jury trial has been effected and trial by court proceeds, the judge is vested with the powers of the jury. Callahan v. Patterson (1849) 4 Tex. 61.

Utah,[8] the Supreme Court implied that a waiver of jury trial could not be sustained in any criminal prosecution, and construed the constitutional provisions in respect to trial by jury as evidencing an intent to establish a tribunal with exclusive jurisdiction, which could not be waived. This doctrine persisted[9] until 1930, when the Supreme Court handed down its ruling in *Patton v. United States*,[10] which put aside the dictum of the *Thompson* case, and established that an accused *in the exercise of a free and intelligent choice*, may waive his constitutional right to trial by jury. While the *Patton* case did not actually turn upon the constitutionality of a non-jury trial, the accused having been convicted by a jury of eleven, this possible distinction was dismissed with the statement that "we . . . must treat both forms of waiver (i. e., complete waiver of a jury, and waiver of a full jury of twelve) as in substance amounting to the same thing."[11]

It is suggested that the Court, in its obedience to the ruling in *Patton v. United States*, failed adequately to consider the difference between waiver of jury trial with counsel, and waiver, as in the principal case, without counsel. The majority holding is determined by the ruling in the *Patton* case and by that in *Johnson v. Zerbst*,[12] which held that an accused may competently and intelligently waive his constitutional right to counsel. One feels, however, too much of a syllogistic pattern in the Court's piecing together these two rulings to support the contention that an accused may choose trial before a judge, even though in his decision to waive a jury, he relied on his own wisdom and not that of trained counsel. The question

8. (1898) 170 U. S. 343. This case held that a Utah statute reducing the size of a jury from twelve to eight jurymen could not be applied to offenses committed before its passage, such a construction making it an *ex post facto* law, and hence a violation of the United States Constitution. The opinion, written by Mr. Justice Harlan, included this significant dictum, "If one under trial for a felony, the punishment of which is confinement in a penitentiary, could not legally consent that the trial proceed in his absence, still less could he assent to be deprived of his liberty by a tribunal not authorized by law to determine his guilt."

9. Although Schick v. United States (1904) 195 U. S. 65, held that a waiver was valid in a prosecution for a misdemeanor, the dictum in the Thompson case seems to have been accepted as controlling down to 1930. Three Circuit Courts of Appeals accepted the dictum as decisive. Dickinson v. United States (C. C. A. 1, 1908) 159 Fed. 801; Low v. United States (C. C. A. 6, 1909) 169 Fed. 86; Coates v. United States (C. C. A. 4, 1923) 290 Fed. 134.

10. (1930) 281 U. S. 276. The defendants were indicted for the felony of conspiring to bribe a federal prohibition agent. During the trial, one of the jurors became ill, and was unable to continue. An agreement between counsel for the government and for the defendants to abide by the decision of the remaining eleven jurors was held valid.

11. Patton v. United States (1930) 281 U. S. 276, 290. Obviously, this was "obiter dictum." Mr. Justice Douglas points this out in his dissent in the principal case, saying, "The Patton case held that a defendant represented by counsel might waive under certain circumstances trial by jury of twelve and submit to trial by a jury of only eleven. In view of the strictness of the constitutional mandates I am by no means convinced that it follows that an entire jury may be waived."

12. (1938) 304 U. S. 458. See Comment 27 WASHINGTON U. LAW QUARTERLY 581.

in the principal case is essentially whether the defendant was competent to exercise an informed judgment, and whether he had the advice of counsel necessarily bears on the determination of that question. In view of this, the Court's decision seems regrettable.

The right to trial by jury is too fundamental to permit the Court to allow an accused to waive that right simply upon speculation as to his competency to judge for himself whether his interest would be served by such a waiver. The mail fraud statute[13] under which the defendant was indicted is of extreme complexity, guilt depending upon answers to questions of law raised in the application of the statute to facts.[14] It is difficult to conceive how one could do other than speculate on whether the defendant could have capably measured his chances as between judge and jury, without counsel.

Concededly, waiver of jury trial in criminal cases is a very practical issue today. It has been argued[15] that the delay associated with jury trial is a primary cause of widespread popular disrespect for the criminal courts. But if waiver is designed as an expedient to relieve congestion and inefficiency in criminal dockets, its advocates should be consistent. If there is a practical reason for waiver, there is an equally practical reason for ascertaining that the accused made his waiver intelligently.

Only careful determination by the Court in every case that this necessary condition precedent to waiver exists, will effectually insure that the guaranty of jury trial will not be sapped by judicial laxity in permitting waiver. It is suggested that the Court be bound by a standard in satisfying itself that the layman who waives jury trial fully understands the advantages and disadvantages of such a course. In absence of counsel, this standard would seem to permit in a situation like that of the principal case, the appointment of counsel, *amicus curiae*, and, if an accused were to decline this favor of the Court, the trial judge, in discharging his judicial responsibility, would be fully justified in refusing to permit waiver of jury trial.

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13. Criminal Code and Criminal Procedure (1909) 18 U. S. C. A. §338.

14. Mr. Justice Douglas says in his dissenting opinion, "The broad sweep of the statute has not been restricted by judicial construction. What might appear to a layman as a complete defense has commonly been denied by the Courts in keeping with the policy of Congress to draw tight the net around those who tax ingenuity in devising fraudulent schemes." To implement this point, he cites these cases in which an indictment or conviction was sustained though to the lay mind the defenses might have seemed airtight: United States v. Young (1914) 232 U. S. 155, (no intention to use the mails when the scheme was designed); Cowl v. United States (C. C. A. 8, 1929) 35 F. (2d) 794 (no one suffered any loss); Pandolfo v. United States (C. C. A. 7, 1922) 286 Fed. 8 (the defendant sincerely wished to benefit those who had been solicited).

15. Oppenheim, Waiver of Trial by Jury in Criminal Cases (1927) 25 Mich. L. Rev. 695.