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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

Comments

EFFECTS OF THE CIVIL CODE UPON PLEADINGS AND METHODS OF TRIAL IN "CIVIL ACTION" FOR INJUNCTION AND DAMAGES

When the lawyer prepares a case in which his client seeks to obtain an injunction and damages, he is faced with historical, theoretical, and practical difficulties both in the framing of his pleadings and in the trial of the case. Should the petition contain only one count, or should separate counts be set forth for the injunction and the damages sought? Whatever may be the answer to that question, there will remain the possibility that, if the injunction is denied, the

defendant may insist that there is a constitutional right that the issue of damages be tried by a jury rather than by the court. Faced with these problems, just how should the lawyer proceed? It is important to remember that the question is not whether one may obtain both an injunction and damages in the same action, but is rather what is the safest and best mode of proceeding?

Whatever rule might have prevailed in England,¹ or in other of the United States,² and whatever rule might have developed in Missouri had a code of civil procedure not been enacted, the plain fact is that the courts of Missouri, in what they have considered to be appropriate cases, have awarded damages in addition to injunctions³ and damages in lieu of injunctions.⁴ When faced with petitions for such relief, our appellate courts consistently: (1) have insisted that, though there is now only *one form* of action, the substantive distinctions between law and equity remain as clear as they ever were; and (2) have relied upon the principle of "the totality of jurisdiction" of equity to sustain the awarding of damages in addition to injunctive relief.

What effect does this distinction between "law" and "equity" have on the problem of drafting the petition? Once the petition is properly drafted, the serious problem remaining is that of trial procedure, resulting from this same distinction and from the constitutional provision guaranteeing the right of trial by jury.⁵

The principle of "totality of jurisdiction" as applied in the Missouri courts may be briefly stated as follows. If a plaintiff alleges and proves facts entitling him to an injunction, the court, as a court of equity, will not only grant the injunction, but will retain the case and award in addition such damages as the plaintiff proves.⁶ Further, if an injunction is denied because of impossibility or futility which is not the fault of the plaintiff, the court, still as a court of equity, will retain the case to award damages as a substitute for the injunction.⁷ On the

1. Discussions may be found in ADAMS, *THE DOCTRINE OF EQUITY*, Bk. II, c. VI (4th Am. ed. 1859); and in 2 STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE* c. 23 (5th ed. 1849).

2. See POMEROY, *EQUITY JURISPRUDENCE* §§ 236, 237 (1907).

3. *Ware v. Johnson*, 55 Mo. 500 (1874) (trespass); *Paddock v. Somes*, 102 Mo. 226, 14 S.W. 746 (1890) (nuisance); *Downing v. Dinwiddie*, 132 Mo. 92, 33 S.W. 470 (1895) (nuisance); *Whipple v. McIntyre*, 69 Mo. App. 397 (1897) (nuisance); *Baker v. McDaniel*, 178 Mo. 447, 77 S.W. 531 (1903) (nuisance); *Scheurich v. Southwest Mo. Light Co.*, 109 Mo. App. 406, 84 S.W. 1003 (1905) (nuisance); *Geltz v. Amsden*, 125 Mo. App. 592, 102 S.W. 1037 (1907) (nuisance); *Schopp v. Schopp*, 162 Mo. App. 558, 142 S.W. 740 (1912) (waste); *Chicago, R.I. & P. Ry. v. State Highway Commission*, 322 Mo. 419, 17 S.W. 2d 535 (1929) (nuisance); *St. Louis Smelting & Refining Co. v. Hoban*, 209 S.W. 2d 119 (Mo. 1948) (trespass and conversion).

4. *Sanders v. Dixon*, 114 Mo. App. 229, 89 S.W. 577 (1905) (nuisance); *Supreme Lodge K. P. v. Dalzell*, 205 Mo. App. 207, 223 S.W. 786 (1920) (violation of trust). 1948).

5. MO. CONST. ART. I, § 22; MO. REV. STAT. ANN § 847.98 (Supp. 1948).

6. Cases cited in note 1, *supra*, especially *Downing v. Dinwiddie*.

7. Note 2, *supra*.

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other hand, the repeatedly pronounced rule is that if the plaintiff fails to prove himself entitled to an injunction, the court no longer has any jurisdiction as a court of equity and so may not award damages.⁸ (It will be remembered that when law and equity were administered by separate courts or were treated as separate systems, a refusal of an injunction normally resulted in the dismissal of the cause by the court of equity). The claim for damages is then held to be a legal claim, and one may not proceed in an equitable action to enforce a legal demand;⁹ to do so would deprive the defendant of his right to trial by jury.¹⁰

It is thus readily apparent that there is in this connection no serious problem if one is certain of proving beyond doubt his right to the injunction, as, for example, when the existence of a nuisance has been established in a previous action.¹¹

But it is also clear that very serious problems arise when one is not sure of being able to prove his right to the injunction. There are two overlapping objectives: (1) a plaintiff in this position will want to assure himself of a hearing on his claim for damages. (2) As far as possible, a plaintiff will want to be sure of getting the entire dispute settled in one action.¹² The lawyer's first problem is to draft a petition best designed to secure these results. Following that is the problem of planning the most effective and economical mode of trial in the face of the constitutional right of trial by jury.¹³ We shall first consider the problem of drafting the petition.

We have found no Missouri cases on the point decided prior to the original code of procedure, but it seems clear that it would then have been permissible

8. *Baker v. McDaniel*, *Geltz v. Amsden*, *Schopp v. Schopp*, Chicago, R.I. & P. Ry. v. State Highway Commission, *supra*, note 1; *Krummenacher v. Western Auto Supply Co.*, 206 S.W. 2d 991 (Mo. App. 1948); reversed. 217 S.W. 2d 473 (Mo. 1949); *Casanover v. Villanova Realty Co.*, 209 S.W. 2d 556 (Mo. App. 1948); *Yellow Mfg. Acceptance Corp. v. American Taxicabs*, 344 Mo. 1200, 130 S.W. 2d 601 (1939); *Real Estate Inv. Co. v. Winn*, 233 Mo. App. 26, 116 S.W. 2d 550 (1938).

9. Note, for example, the statement by supreme court in the *Krummenacher* case, *supra*, note 8, "In ruling this case the St. Louis Court of Appeals held that a court of equity does not have jurisdiction to render a judgment for a plaintiff on legal issues in the absence of a finding that some equitable right of the plaintiff has also been violated. We approve that holding. It is supported by the decisions of this court." (Citing: *Miller v. St. Louis & K.C. Ry.*, 162 Mo. 424, 63 S.W. 85 (1901); *Chicago R.I. & P. Ry. v. State Highway Commission*, 322 Mo. 419, 17 S.W. 2d 535 (1929); and *Yellow Mfg. Acceptance Corp. v. American Taxicabs*, 344 Mo. 1200, 130 S.W. 2d 601 (1939).)

10. Continuing the remarks quoted in note 9, the court said, "To hold otherwise would permit a plaintiff to ambush a defendant in that a plaintiff could plead a cause of action in equity and also seek legal damages and then fail to prove that he was entitled to any equitable relief. He would thereby deprive defendant of a trial by a jury."

11. *Paddock v. Somes*, *supra*, note 3; the court says, "The question of nuisance has been established at law, and where this has been done, the courts will grant an injunction as a matter of course, where, as here, such nuisance is of a continuous, or constantly recurring, character." But see note 15, *infra*, and the text there referred to.

12. Mo. REV. STAT. ANN. § 847.37 (Supp. 1948).

13. Mo. CONST. Art. I, § 22. See Mo. REV. STAT. ANN. § 847.98 (Supp. 1948).

to proceed in two separate and successive actions. A plaintiff might have sued first in equity for an injunction only and then, upon the termination, either favorably or unfavorably, of that suit, might have filed his suit at law for damages. The reverse would have been possible and perhaps required. Having found no cases, we cannot say whether or not a plaintiff would have been required to establish the existence of the ground for injunction in an action at law before filing his bill for the injunction in equity. There seems no reason for doubt, however, that he would have been permitted to do so.

This approach appears to have been permissible also under the former procedural statutes,¹⁴ and is probably still permissible. There is at least a possibility, however, that the rule of *res judicata* will be applied. If one may ask for both an injunction and damages in the same action, isn't he bound to do so? Isn't it possible that a decision on one or the other will be held to operate as an adjudication of the entire dispute?¹⁵ In any event, this approach requires two actions, which, for reasons of time and costs, is one of the things one should be most anxious to avoid.

Before adoption of the Civil Code of Missouri in 1943, the surest and safest plan clearly was to draft the petition in two counts, the first stating a claim, "formerly equitable," for an injunction, and the second stating a claim, "formerly legal," for damages. In deciding a case in 1933 the Missouri Supreme Court expressly referred to this method of pleading as the correct one.¹⁶ Further, in a recent case, decided since adoption of the 1943 code, the Kansas City Court of Appeals held that such a petition got before the court both claims, that plaintiff had a right to be heard on both claims, and that it was therefore error to dismiss the separate count for damages even though no right to an injunction under the first count was established.¹⁷ It would appear safe to reverse the order of the counts, if that is de-

14. See note 11, *supra*.

15. Experience in New York, for example, indicates the possibility of this result. *Hahl v. Sugo*, 169 N.Y. 109, 62 N.E. 135 (1901); *City of Syracuse v. Hogan*, 243 N.Y. 457, 138 N.E. 406 (1923). These cases are cited and discussed in WALSH, *EQUITY* p. 113 (1930). See also CLARK, *CODE PLEADING* pp. 475-476 (2d ed. 1947), citing many authorities. But *cf.* under the former procedural statutes in Missouri, *Real Estate Inv. Co. v. Winn*, and *Yellow Mfg. Acceptance Corp. v. American Taxicabs*, *supra*, note 8, in which were cited *Chicago, R.I. & P. Ry. v. State Highway Commission*, *supra*, note 1; *Ebel v. Roller*, 21 S.W. 2d 214 (Mo. App. 1929); *Modern Woodmen of America v. Cummins*, 216 Mo. App. 404, 268 S.W. 383 (1925). See also, *Rose v. Houser* (1947), note 17, *infra*.

16. In *Minor v. Burton*, 228 Mo. 558, 128 S.W. 946 (1910), the petition was drawn in three counts, one for quiet title, one in trespass for damages, and one in equity for an injunction. The court in *Wolfersberger v. Hoppenjon*, 333 Mo. 817, 68 S.W. 2d 814 (1933), said that the petition in *Minor v. Burton* was an example of the correct practice.

17. *Rose v. Houser*, 206 S.W. 2d 571 (Mo. App. 1947), "It is manifest that the portion of the judgment disposing of the plaintiffs' claim for damages was unauthorized. The fact that they were not entitled to equitable relief does not deprive them of the right to pursue any legal remedy that might be available." Plaintiff had asked in one count for an injunction to restrain the further maintenance of a nuisance, and in count two for damages on account of the nuisance. Trial court had denied the injunction and dismissed the entire petition.

sired, setting forth in the first the claim for damages and in the second the claim for an injunction, though we have found no cases in which this was done. Such a petition, again, will surely get both claims before the court and the defendant.¹⁸ Whichever order is selected, it seems clear that the two-count petition, getting both claims before the court, will assure the plaintiff of a hearing on his claim for damages and, so far as that may be done by pleadings, get the entire dispute settled in one action.

Our courts, however, have continued to talk of "law" and of equity," the theory of the two-count petition evidently being that it joined two causes of action, one "legal" and one "equitable."¹⁹

What then is the theory of the petition drawn in one count, asking for both an injunction and damages? Prior to the adoption in 1943 of the Civil Code of Missouri, our courts consistently treated such a petition as stating only one cause of action. Usually the courts said that the distinctions between law and equity were to be preserved and that the one-count petition therefore stated a cause of action in equity.²⁰ On this theory it was, of course, simply the modern equivalent of a bill in equity, and was treated as such. This theory has also been followed in some cases decided since the new code went into effect.²¹

In other cases before the new code, such one-count petitions were treated as presenting civil actions for damages, with added prayers for injunctions.²² Some reliance was placed on the statutory provision for a temporary injunction in a civil

18. But would not this practice tend to make a decree of injunction less likely than otherwise? Would not the court incline to award or deny the injunction in accord with the verdict on the issue of damages?

19. One should be sure, of course, that each count sets out all elements of a cause of action; this was imperative under MO. REV. STAT. § 917 (1939), expressly requiring that the causes of action which were joined be separately stated. This provision was interpreted to require a separate count for each cause. In *Terry v. Michalak*, 319 Mo. 290, 3 S.W. 2d 701 (1928), count one asked specific performance of a contract, and count two asked damages in the form of rents and profits which plaintiff claimed to have lost because of defendant's wrongful withholding of the use and possession of the property. Upon holding that the contract was too indefinite to be enforced specifically, the court dismissed the entire petition, saying that the second count, as drawn, was merely incidental to and dependent on the first. In other words, count two did not state a cause of action. MO. REV. STAT. ANN. § 847.98 (Supp. 1948) contains no such requirement for separate statement. *Quaere* what will be the effects of this change?

20. Examples of cases in which the petition was regarded as stating one cause "in equity" are *Downing v. Dinwiddie*, *Baker v. McDaniel*, *Geltz v. Amsden*, and *Schopp v. Schopp*, *supra*, note 3; and *Supreme Lodge K. P. v. Dalzell* *supra*, note 4.

21. See *St. Louis Smelting & Refining Co. v. Hoban*, *supra*, note 3, and the St. Louis Court of Appeals decision in *Krummenacher v. Western Auto Supply Co.*, *supra*, note 8.

22. Examples of the few cases in which such petitions were regarded as stating "actions for damages with added prayers for injunctions" are *Ware v. Johnson*, *Whipple v. McIntyre*, and *Scheurich v. Southwest Mo. Light Co.* *supra*, note 3.

action.²³ It is not entirely clear whether the interpretation of this statutory provision limited it to temporary injunctions; at any rate, it appears that a temporary injunction issued in such an action could later be made permanent if the facts warranted doing so.²⁴ We have found no recent cases adopting this theory of the petition.

In still other cases, the one-count petition for injunction and damages appears to have been treated simply as stating claims properly enforceable in a civil action, with no issue being made of the so-called distinctions between law and equity.²⁵ Again, we have found no recent cases adopting this treatment of the petition. In those cases in which it was adopted, the basis appears to have been the procedure followed in the trial court, in all of them trial having been had to both the court and a jury.

If the one-count petition is treated as the equivalent of a bill in equity, the claim for damages is before the court only if the right to the injunction is established.²⁶ On the other hand, if it is treated as stating a civil action for damages with an added request for an injunction, or as stating claims enforceable in a civil action without regard to distinctions between law and equity, the object of getting both claims before the court has been accomplished.

Interesting developments are presented by two recent decisions treating one-count petitions as joining two causes of action, one in "equity" and one at "law." In the first,²⁷ plaintiff sought an injunction to restrain defendant from further permitting surface water and silt to overflow plaintiff's land, damages for the injury caused by the flow of water and silt, and damages for an alleged trespass committed by defendant in running graders upon plaintiff's land in the process of leveling and improving that of defendant. The parties, the trial court, and the St. Louis Court of Appeals all treated the petition as combining two causes of action. Interestingly enough, however, the St. Louis Court of Appeals said that had the allegations of trespass not been in the petition, the one count would have set out only one cause of action "in equity," so that a denial of the injunction would have precluded the award of damages. Damages were awarded only for injury caused by the trespass. The second of these decisions²⁸ seems to go one step further. Plaintiff alleged in one count that defendant maintained a parking lot in connection with its automobile supply business and that the continuous traffic in and out of the lot caused such noise and dust as to amount to a nuisance to plaintiff, who owned and occupied a residence across the alley from the lot, and, further, that plaintiff's fence was con-

23. Mo. REV. STAT. § 1664 (1939).

24. Paddock v. Somes, *supra*, note 3.

25. In Rankin v. Charles, 19 Mo. 490 (1854), and Paddock v. Somes, *supra*, note 3, the court seemed unconcerned about whether the petitions stated causes "at law" or causes "in equity."

26. See notes 8, 9, and 10, *supra*.

27. Casanover v. Villanova Realty Co., *supra*, note 8.

28. That of the supreme court in Krummenacher v. Western Auto Supply Co., *supra*, note 8.

tinually being damaged by automobiles running into it. The St. Louis Court of Appeals treated the petition as stating only one cause of action, the traditional one "in equity," and ruled that upon denying the injunction the trial court lost jurisdiction. Thereafter the case was transferred to the supreme court,²⁹ which reversed the decision of the court of appeals and held that the petition joined two causes of action, one at equity and one at law, which is permissible under Section 37 of the new Code of Civil Procedure.

We submit that these recent cases represent an appreciable advancement in the theory and practical treatment of the pleadings. They appear to lead to this result: whatever theory of pleading is thought to be appropriate, and whether a plaintiff drafts his petition in one count or in separate counts, he gets his claim for an injunction and his claim for damages both before the court and is assured of being heard on them both in the same action. There may remain, however, important differences in the problems of trial procedure, as we shall consider later.

We suggest also that it would be advisable to take a further step. It is notable that our courts are still talking in terms of "law" and "equity." It is also evident that the theory of the pleadings entertained by our courts is, apparently, based on the old distinctions between law and equity. In other words, a petition is looked upon as stating a cause of action at law, or a cause in equity, or as joining such causes of action.³⁰ This now appears true whether the petition is in one count or in separate counts. What we suggest is that under our modern codes, this theory should be abandoned and that a petition be regarded simply as stating the facts on which the claims are based, and the relief to which plaintiff believes himself entitled. In other words, we believe that one of the functions of a petition is to inform the defendant of the claims being made against him and of the facts on which they are based.³¹ So, if plaintiff requests an injunction and alleges facts which entitle him to an injunction, what purpose is to be served by saying that he has stated a cause of action in equity? Or if he alleges facts indicating a right to recover damages, is anything gained by saying that he has filed an action at law? According to the code he is in either case maintaining a civil action, and in either case he is informing the court and the defendant of his claim and the grounds for it. And why is not the same true if the plaintiff in his petition asks for both an injunction and damages and alleges facts entitling him to both?³² If all necessary facts are alleged,

29. Because it was thought to be one of first impression since the adoption of the new code in 1943, to involve a vital question of procedure, and so to be of general interest in the state.

30. See again *Rose v. Houser*, *supra*, note 17, and cases cited in notes 21, 27 and 28.

31. For a recent discussion of the functions of pleading, see Blume, *Theory of Pleading A Survey Including the Federal Rules*, 47 MICH. L. REV. 297 (1949). The discussion is largely historical, but some emphasis is accorded the "notice-function" of pleading.

32. See MO. REV. STAT. ANN. § 847.98 (Supp. 1948). Note also that § 37 of the code refers to joinder of claims; it says nothing about "causes of action." See also CLARK, CODE PLEADING p. 445, n. 35 (2d ed. 1947) and text referred to.

and request for both injunction and damages is made, the defendant will be sufficiently informed, and talking about joinder of causes and distinctions between law and equity will serve only to confuse all concerned. Why should we not say simply that plaintiff is still maintaining a civil action, recognizing that he is stating facts and asking for all the relief to which those facts entitle him.³³ That relief may take the form of an injunction, plus or minus damages, or of damages, alone. That would take care of the theory of the pleadings and leave us only the problem of effective and economical trial procedure, in which the main difficulty will arise from the constitutional provision preserving the right of trial by jury.³⁴

In what ways, then, might the trial of such an action be handled? If the petition is in two counts, the first obvious possibility is to hold separate and successive trials of the two counts. So a first hearing might be had on the count for an injunction, which would be to the court and much like an old suit in equity. Then, upon the termination of that hearing, and whatever judgment resulted from it, a jury might be called, the evidence presented anew, and a verdict taken on the count for damages.³⁵ This procedure, of course, would get the entire dispute settled, but would hardly be the shortest or most economical available.

Secondly, no sound objection appears to trying both counts at the same time. Thus, a jury might be called at the outset, and all the evidence on the issues of both counts presented in one hearing. The verdict of the jury could then be taken on the issue of damages, the court could decide the issue of injunction, and the judgment would be for either or both depending on the facts proved. It would also seem that the parties might waive the right to trial by jury and agree to try the issues of both counts to the court alone at the same time. With or without the jury this procedure would probably require the agreement of both parties at the outset.³⁶ Certainly if that agreement could be reached, it would be shorter and less expensive than trying the two counts separately.

If the petition asks for the injunction and damages in one count, there are again several possibilities. First, it would appear to be still permissible to proceed initially with trial to the court, just as formerly would have been done in equity. If this is done and if plaintiff proves his right to the injunction, the court has jurisdiction "in equity" and may dispose of all aspects of the dispute, including the awarding of damages.³⁷ There is thus a chance of obtaining the maximum results with the minimum expenditure of time. If proof of the right to an injunction fails,

33. Sections 4, 36, 37, 38 and 42, Civil Code of Missouri, seem entirely consistent with the views we have suggested.

34. MO. CONST. Art I, § 22.

35. *Rose v. Houser*, *supra*, note 17.

36. At the trial of *Rose v. Houser*, evidence was offered to show damages sustained as a result of the alleged nuisance. It was excluded on objection that the claim for damages was not being tried at the time.

37. The latest decisions we have found—*Casanover v. Villanova Realty Co.*, and *Krummenacher v. Western Auto Supply Co.*, *supra*, note 8, appear to leave this possibility intact.

all is not lost. Prior to the supreme court's decision in the *Krummenacher* case, the court, on denying the injunction, would dismiss the entire action; but the right to file a new action for damages would remain.³⁸ Since that decision, the plaintiff, on failing to obtain his injunction, could probably insist that a jury be called and the trial of the issue of damages proceed without the filing of a new action. This result is indicated by the decision in that case that the one-count petition stated two causes of action.

Secondly, such a one-count petition might be tried to both the court and a jury.³⁹ The court could then try the issue of injunction, take the verdict of the jury on the issue of damages, and give judgment appropriate to the finding on both of them. On the surface this method of trial looks like a convenient solution of the problem. True, it involves the expense, time and risks incident to calling a jury, but it does result in a hearing on the whole dispute and the disposal of all issues in a single proceeding. When actions have been tried in this way, the correctness of the proceeding has not been questioned;⁴⁰ indeed, it logically could not be. "Equitable" issues are thus tried as they traditionally have been; the "legal" issues are tried by a jury, and no one's rights are violated. It appears, however, that trial in this manner must be with the assent of all concerned. It has been held error for a trial court to refuse to try an action as in equity rather than as at law when plaintiff sought equitable relief.⁴¹ In other words, a party has a right not to have an "equitable" action tried to a jury. This right was noted again in the

38. But see note 15, *supra*.

39. Perhaps some assistance might also be found in Civil Code of Missouri §§ 108, 109 and 110, providing, briefly, that the court may direct issues and have them tried by a jury. And see § 97 of the Code, providing that the court may order separate trials. For a general discussion of trial procedure when "legal" and "equitable" issues are presented in the same action, see CLARK, CODE PLEADING, pp. 106-111, 163 (2d ed. 1947).

40. Rankin v. Charless, *supra*, note 25; Ware v. Johnson, Paddock v. Somes, Scheurich v. Southwest Mo. Light Co., *supra*, note 3.

41. Wolfersberger v. Hoppenjon, *supra*, note 16. Plaintiff alleged that deeds were invalid because of fraud, and in one count asked for quiet title and damages. Defendants moved "to transfer the case to the equity docket," but the motion was overruled and the cause tried to a jury. Judgment for plaintiff for title, possession and damages was reversed, the court holding that it was error to refuse the defendants' motion.

The result reached in *Wolfersberger v. Hoppenjon* may have been required by Section 1, Article VI of the Constitution of 1875, which vested the judicial power of the state in specified courts, "as to matters of law and equity." Under that provision, it would seem that "matters of equity" would have been required to be tried to the court as a matter of constitutional right. The corresponding provision of the Constitution of 1945, Article V, Section 1, however, merely states that, "The judicial power of the state shall be vested in," certain named courts. It mentions neither "matters of law" nor "matters of equity." Has this change, which has eliminated all reference to "matters of equity," made it possible for jury trials to be either permitted or required in the so-called "equity" cases which were formerly triable by the court alone? For results in other states, see CLARK, CODE PLEADING, 2d ed. 1947, Section 16, at footnotes 70 and 71.

supreme court's decision in the *Krummenacher* case.⁴² In that case, as we have noted, the petition in one count asked for an injunction and damages. Both parties and the trial court proceeded as if trying a cause in equity, but the trial court awarded damages after denying the injunction. On appeal, plaintiff argued that the defendant waived his right to jury trial by not demanding a jury. But the court said that, since the proceeding had been treated as being one in equity for an injunction, defendant had no right to trial by jury, and a request for it would have been overruled if made.

When the one-count petition is regarded as joining two causes of action, as it could be treated since the developments of the *Villanova Realty Co.* case and the *Krummenacher* case, it has in effect only one substantial difference from the standard two-count petition. The difference is that, if there is no agreement to the contrary, the initial proceeding will be like a trial in equity, and the court, if it awards the injunction, will also settle the issue of damages as a chancellor would have done, and the "second cause" will simply vanish. Apart from the possibility of this total result, the possible modes of trial when a one-count petition presents two causes of action are the same as when a two-count petition does so.

If it is desired to try these "two causes of action" simultaneously, an agreement to that effect will most likely be necessary. An express waiver of the right of jury trial appears sufficient to show such agreement.⁴³ Proceeding to trial before the court without objection does not amount to agreement to try both claims at once.⁴⁴ Again in this connection the *Krummenacher* case is interesting. The supreme court held: (1) the one-count petition stated two causes of action, one "at law" and one "in equity." (2) The proceeding which was had was on the cause "in equity," and there was therefore no right to trial by jury and hence no waiver. We believe that the true explanation of this apparent inconsistency is that, since there was no agreement on any other procedure, the two causes of action were to be tried separately and successively. Thus the trial was on the first cause of action; that is, the one for an injunction, and the denial of the injunction precluded the court from awarding damages in the trial of that "cause of action." The next step, of course, would have been a jury trial on the action for damages, and that is just what the supreme court remanded the cause for.

Following these latest decisions, the soundest procedure would seem to be to file the petition in one count for both the injunction and damages; and then, if the right to an injunction is certain of proof, insist on beginning trial to the court alone as a chancellor. Or, if proof of the right to the injunction is not certain, one should seek an agreement upon a simultaneous trial of the issues of injunction and damages. The cautious lawyer may still wish to use the two-count petition, though it no longer seems to have any advantage after the decision of the *Krummenacher*

42. *Supra*, note 8.

43. *Casanover v. Villanova Realty Co.*, *supra*, note 8.

44. *Krummenacher v. Western Auto Supply Co.*, *supra*, note 8.

case, unless plaintiff wants to be certain of a jury trial on his claim for damages.⁴⁵

If the "notice" theory of the petition, which we have suggested, were adopted, one further step could logically be taken in connection with the trial procedure. If we regarded the petition as stating claims enforceable in a civil action, we would envision only one trial even though there might be more than one claim based on the pleaded facts. One of those claims (that for damages) being of a type traditionally triable to a jury, the constitutional guarantee of jury trial would apply. But, the action being a *civil action* under the code, the provisions for waiver of jury trial would also apply.⁴⁶ Thus either party could insist upon a jury at the outset, and if both proceeded to trial to the court without demanding a jury, the right to a jury would be waived and the court could dispose of all issues.

We submit that this change would be a desirable one. It would make certain the disposition of both the claim for an injunction and the claim for damages in one action in all cases of this type. It would, moreover, deprive no one of his constitutional right of jury trial, but would simply require him to assert that right if he wanted to take advantage of it. No other way presents itself to us of making the mode of procedure certain and at the same time keeping costs as low as practicable and keeping the consumption of the courts' and litigants' time to a minimum.

The problems presented by these types of cases illustrate the fact that, no matter how much advance may be sought or made by the so-called "fusion" of law and equity under our modern codes, questions as to pleading and as to jury trial will always be with us. The pleading is a relatively simple one. The problem of jury trial, which is based upon a constitutional requirement, is not so easily solved, but is far from being insoluble.

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45. Notes 40 and 41, *supra*, and text there referred to. And see McCLINTOCK, *EQUITY* p. 123, n. 14 (2d ed. 1948) and text referred to. If a defendant has a right to a trial to the court without a jury when plaintiff asks for equitable relief, it would seem that the only way a plaintiff can be reasonably sure of having the issue of damages tried by a jury (and he may want a jury trial, in some instances, on the idea that a jury may award higher damages) is to have his claim for damages treated as a cause separate from his claim for an injunction. The claim for damages being one traditionally triable to a jury, he may then rely on the constitutional guarantee.

46. In addition to the former provisions (MO. REV. STAT. § 1101 (1939), MO. REV. STAT. ANN. § 847.98 (Supp. 1948) provides that a jury shall be deemed waived if the parties enter upon trial before the court without objection. If the theory which we suggest is not correct, the following anomalous situation exists: If an action presents only claims which were formerly triable to a jury, the right to jury trial is waived if a jury is requested; while if an action consists only in part of claims formerly triable to a jury, there is no such implied waiver. See CLARK, *CODE PLEADING* § 17 (2d ed. 1947) for a discussion of waiver of jury trial under modern codes. Consider again Civil Code of Missouri §§ 4, 36, 37, 38, 42 and 97.

THE HABITUAL CRIMINAL ACT AND GRADED FELONIES

Under the so-called Habitual Criminal Act of Missouri,¹ certain definite problems of statutory construction have arisen in respect to mixed or graded felonies, that is, offenses punishable either by imprisonment in the penitentiary or by confinement in jail and/or fine. There are three possible situations which might arise in connection with graded felonies, *viz.*, where the prior crime committed was the graded offense, where the subsequent, or principal, crime was the graded offense, and where both the prior and subsequent offenses were graded. The first of these situations arose in the cases of *State v. Brinkley*² and *State v. Marshall*.³ The second situation arose first in the case of *State v. Ward*⁴ and, more recently, in the case of *State v. Updegraff*.⁵ The third situation has not arisen, although a recent case has covered an almost identical situation so far as the Habitual Criminal Act is concerned.⁶

The statute, insofar as applicable to this discussion, provides: "If any person convicted of any offense *punishable* by imprisonment in the penitentiary. . . shall be discharged, either upon pardon or upon compliance with the sentence, and shall subsequently be convicted of any offense committed after such pardon or discharge, he shall be punished as follows: . . .second, if such subsequent offense be such that, upon a first conviction, the offender would be *punished* by imprisonment for a limited term of years, then such person shall be punished by imprisonment in the penitentiary for the longest term prescribed upon a conviction for such first offense; . . ." (Italics added.)

Where the prior offense was of the graded nature, it should make no difference whether the offender was actually punished by imprisonment in the penitentiary, so long as the offense was one for which the offender *could* have been punished by such imprisonment. This is merely the natural meaning of the word "punishable," as was well pointed out in the *Marshall* case.

In the *Updegraff* case and in the case of *State v. Hacker*,⁷ however, it would appear that considerable violence has been done in interpreting the wording of the statute, because, to make the statute applicable to the graded subsequent offense, it was necessary to interpret the word "punished" in clause "second" as being "punishable." The *Ward* case went even further, as in it the court did not indulge in any discussion of the matter, but merely held that the statute applied to the situation, upon the basis of the authority of the *Brinkley* and *Marshall* cases. Since there was a distinction between the two situations, these latter cases

1. Mo. Rev. Stat. § 4854 (1939).

2. 354 Mo. 337, 189 S.W. 2d 314 (1945).

3. 326 Mo. 1141, 34 S.W. 2d 29 (1930).

4. 356 Mo. 499, 202 S.W. 2d 46 (1947).

5. 214 S.W. 2d 22 (Mo. 1948).

6. *State v. Hacker*, 214 S.W. 2d 413 (Mo. 1948), wherein the prior offense was actually punished by confinement in the Intermediate Reformatory for Young Men.

7. See note 6, *supra*.

would not seem to be authority for such a holding. The court, in the *Brinkley* case, did mention the situation of the subsequent offense being graded, and said, ". . . Sec. 4854, in clause 'second' thereof does use the word 'punished' instead of the word 'punishable,' which appears everywhere else in the section. But this evidently was an inadvertence."⁸ This slight mention must be considered as *obiter dictum* because the subsequent offense in the case was not graded.

The first true discussion by the court of the interpretation of the statute as applied to the subsequent offense being the graded offense, came in the *Updegraff* case. The defendant had previously been convicted of two felonies, grand larceny and assault with intent to kill with malice. The subsequent offense for which he was being tried under the Habitual Criminal Act was a violation of the Liquor Control Act,⁹ which was a graded offense. Counsel for defendant argued that the Habitual Criminal Act was not applicable because the subsequent offense was not one for which "the offender would be *punished*" by imprisonment for a term of years. (Italics added.) The court overruled this contention, saying the word "punished" was put in the bill, instead of the word "punishable," due to an inadvertence.

Originally, clause "second" read "punishable," but in 1895 the statute was amended so as to eliminate therefrom the offense of petit larceny, and the enrolled bill of the amending statute used the word "punished" in clause "second."¹⁰ By referring to the House and Senate Journals, the court decided that there was no intent to amend the statute in any way other than to eliminate petit larceny and, therefore, the statute was not amended in any other way; that the word "punished" was merely a clerical error, which did not defeat the legislative intent.

In saying that the amending statute did not amend the original statute in any way other than to eliminate petit larceny, the court referred to *Corpus Juris*.¹¹ This section does not seem to fit into the pattern of the court's reasoning. American Jurisprudence seems to make a pertinent point as to whether or not the original statute was thus amended.¹²

8. 354 Mo. 337, 375, 189 S.W. 2d 314, 335 (1945). It is interesting to note that, although clause "third" of the Habitual Criminal Act does use the word "punishable," the clause refers to punishment for attempts, and in view of clauses "fourth" and "fifth" of the Attempts statute, punishment for attempts to commit graded felonies cannot extend to imprisonment in the penitentiary. Mo. REV. STAT. § 4835 (1939).

9. Mo. REV. STAT. § 4900 (g) (1939).

10. Mo. Laws 1895, p. 153.

11. 59 C.J., *Statutes* § 66, p. 557. "What Constitutes Amendment. The striking out or addition of a word, which does not operate to change the law in the slightest or which makes no material change, does not amount to an amendment, although it is stricken or added by what may be termed an amendment. . . ." It would seem the 1895 bill did change the law materially.

12. 50 AM. JUR. § 468, p. 482 (1944). "Unless a contrary intent is clearly indicated, the amended statute is regarded as if the original statute had been repealed, and the whole statute re-enacted with the amendment."

Although it may be proper to refer to outside sources for information to aid in interpreting some statutes, it seems at least questionable whether it should have been done in this particular situation. It should be noted that the use of "punished" does not render the statute ambiguous; the statute makes perfect sense with "punished" every bit as clearly as if "punishable" had been used. Since the statute is clear and unambiguous as it reads, there should be no room for going outside the statute itself in order to interpret it—a point which has been recognized by the court *en banc*.¹³ Resort may be had to intention of the legislature where the statute is ambiguous, but where the act is clear the court cannot give effect to such intent against the express provision of the statute.¹⁴ The exception to this is where the literal meaning of the statute is absurd.¹⁵ In view of the use of the word "punishable" being used in the other clauses of the statute, some doubt might arise from the use of "punished" in clause "second," but such use hardly seems absurd. Also, the court has recognized that a preamble can be resorted to only when the language of the enacting clauses is obscure or ambiguous.¹⁶ Since it is not permissible to refer to even the preamble when the statute is unambiguous, *a fortiori*, it should not be permissible to refer to documents entirely outside the statute, there being no question raised about the legality of the statute. Horack, in his recent treatise on statutory construction has also pointed out that courts generally refuse to substitute one word for another where the statute is unambiguous, and also where there is an ambiguity which affects the essence of the act.¹⁷

Even if the statute were considered to be ambiguous, the decision of the *Updegraff* case should have been opposite. Statutes which operate to restrain liberty are to be construed cautiously and strictly;¹⁸ criminal statutes are to be construed liberally in favor of a defendant and strictly against the state.¹⁹ It is noted that this doctrine of strict construction has long been a corollary of the principle of legality applied to criminal law.²⁰ The court has previously recognized that the Habitual Criminal Act is highly penal and said that it should not be extended in its application to cases which do not by the *strictest* construction come under its provisions.²¹

It is generally recognized that the purpose of habitual criminal acts is to relieve society, for as long a time as possible, of those persons who have proved themselves to be incapable of living alongside law-abiding people. In view of this

13. *Cf. State ex rel. Jacobsmeyer v. Thatcher*, 338 Mo. 622, 92 S.W. 2d 640 (1936).

14. *Cf. State ex rel. Attorney General v. Gammon*, 73 Mo. 421 (1881).

15. *Cf. State ex rel. Liggett & Meyers Tobacco Co. v. Gehner*, 316 Mo. 1075, 292 S.W. 1028 (1927); *State ex rel. American Mfg. Co. v. Koeln*, 278 Mo. 28, 211 S.W. 31 (1919).

16. *Cf. Lackland v. Walker*, 151 Mo. 210, 52 S.W. 414 (1899).

17. 2 SUTHERLAND, STATUTORY CONSTRUCTION § 4925 (3d ed. 1943).

18. 1 WHARTON, CRIMINAL LAW 55 (12th ed. 1932).

19. *Cf. State v. Bartley*, 304 Mo. 58, 263 S.W. 95 (1924); *State v. Light*, 189 S.W. 2d 162 (Mo. App. 1945).

20. HALL, PRINCIPLES OF CRIMINAL LAW 36 (1947).

21. *Cf. State v. Young*, 345 Mo. 407, 133 S.W. 2d 404 (1939).

and in view of the seriousness of some graded felonies, such as assault with intent to kill, assault with intent to commit robbery, and assault with intent to commit rape, very probably the court reached a decision which carries out the intent of the legislature. But the fact remains that the statute has been on the books in its present form for more than fifty years and one cannot be certain what the legislature did intend. And, since a defendant in a criminal case is to receive the benefit of any doubt, it would seem that the court has gone too far, even though it may have thought its holding was a necessary one, because the court has previously said it is not justified in departing from the natural and unambiguous meaning of a statute by any consideration of consequences or public policy.²²

As interpreted in the *Updegraff* case, the statute applies to all graded felonies, and application of the statute to some of the less serious types of offenses might well be defeating the purpose of the statute as a whole. Consequently, it seems that the legislature should again consider the statute and possibly give the trial court some discretion in affixing the punishment of a person convicted under the Act.

GARRETT R. CROUCH

INSURER'S LIABILITY FOR PUNITIVE DAMAGES

There exists among our courts a wide diversity of opinion as to what constitute punitive damages. Coupled with this diversity, and dependent upon it, is the vexed problem of whether an insurance company should be held liable upon an insurance contract for punitive damages. This problem may be further subdivided into common law punitive damages, for which insurer is liable, and statutory punitive damages, for which most cases hold insurer is not liable, but for which, in arguing from analogy on the basis of the case of *Huntington v. Attrill*,¹ insurer should be liable.

The writer of a comparatively recent law review comment² said that, "Although a liability insurance policy may properly encompass damages resulting from the violation of a criminal statute by the insured, the general holding is that injuries inflicted intentionally or through wanton conduct are not within liability insurance coverage. Yet a few courts, emphasizing the protection afforded to the injured members of the public, impose liability upon the insurer even where the injury was wantonly or intentionally inflicted."

Most states have not enacted legislation governing the problem of enforcement against insurers of the claim of a victim of another's recklessness, although they seem to have declared by judicial decision that punitive damages may be assessed against the insurer. For example, in Missouri, when injuries are caused

22. Cf. *Betz v. Kansas City Southern Ry.*, 314 Mo. 390, 284 S.W. 455 (1926); *Lauck v. Reis*, 310 Mo. 184, 274 S.W. 827 (1925).

1. 146 U.S. 657 (1892).

2. 40 MICH. L. REV. 128 (1941).

by negligence of an aggravated form, or are "attended by such circumstances as to be wanton and reckless in character, punitive damages (against the tortfeasor) are authorized,"³ but it is still left up to the courts to say whether such damages are within the indemnification coverage of the tortfeasor's insurance policy.

In 1941 the Connecticut Supreme Court of Errors decided the case of *Tedesco v. Maryland Casualty Co.*⁴ in which a tortfeasor driver was using a car with permission of the named insured. The policy applied while the car was being driven under such circumstances and the insurer paid compensatory damages of \$1744 awarded the injured person. The law of that state permitted the court to award double or treble damages where the injury inflicted was the result of a violation of specific statutory rules of the road, and the injury involved was a result of such a violation. Under the terms of the policy the insurance company became obligated to pay "all sums which the assured shall become obligated to pay by reason of liability imposed upon him by law for damages . . . because of bodily injury." Insurer demurred to plaintiff's complaint for indemnification as to the additional statutory damages on the ground that the sum sought to be recovered was awarded as a penalty, or a reward, and not as damages for bodily injury. The court sustained the demurrer but not without some difficulty. Chief Justice Maltbie conceded that the insurer would be responsible for punitive damages assessed against the insured in view of the holding in *Ohio Casualty Insurance Co. v. Welfare Finance Co.*,⁵ but said that these statutory additional damages were in the nature of a penalty and Connecticut frowns on penalties, saying, "The recovery sought in this action is not one based upon a judgment for punitive damages, but upon the imposition of a penalty." It is questionable whether the line of demarcation between a penalty and punitive damages is pronounced enough to make such a distinction.

The court, however, admitted it had in a previous case said that,

"A statute may partake of the nature of both a penal and remedial statute, and . . . that this statute, in so far as it permitted an individual to recover damages, was remedial, but that, while not strictly penal, it was so far of that nature that it should be construed with reasonable strictness."

Chief Justice Maltbie felt confident that the assessment was a punishment because the obligation of defendant to pay compensatory damages to plaintiff for injuries was first fixed, then this award was added to that. I refer to these remarks because they are all part of the rationalization the court carried on to justify its intended result of tossing the life line to the insurance company. In the end the court fell back upon the old standby public policy argument. "A policy which permitted an insured to recover from the insurer fines (or penalties) im-

3. *Ohio Casualty Insurance Co. v. Welfare Finance Co.*, 75 F. 2d 58 (C.C.A. 8th 1934). Matter in parentheses inserted by this writer.

4. 127 Conn. 533, 18 A. 2d 357 (1941).

5. *Supra*, note 3.

posed for a violation of a criminal law (or public wrong) would certainly be against public policy,"⁶ said the learned Justice, and where ". . . the language of the policy is reasonably open to two constructions, one of which would avoid such a result, that should be adopted."

There are those who believe that whether the award be in the form of a penalty, or punitive damages, the same public policy ought to apply to both; that "Insurance against the punishment intended would defeat the purpose of the law of punitive damages."⁷ There are harsh words in a day when almost every act of a driver is covered by some sort of a statute. A driver is necessarily constantly faced with penal damages for violating criminal statutes because of the minutest of infractions. Moreover, criminal intent is not usually an element of traffic crimes. Assessments for such violations may be large or small, and are often awarded to the injured person.⁸ If the law did not tend in the direction of protecting the insured against these penalties for violating criminal statutes then certainly indemnity would decrease until it was of little value. Allowing protection to injured persons for criminal violation by insured will not tend to smooth the path of the criminally inclined as insurance does not protect the tortfeasor from punishment for his crimes. Yet this must be the reason for the belief that "insurance against fines and penalties imposed by the criminal would contravene public policy."⁹

There are those who also believe that "damages which are more than compensatory . . . are not necessary for the protection of the injured person."¹⁰ It can well be asked of them, if punitive damages are those beyond which, by hypothesis, heal the injury, how are we to judge where the line is to be drawn between compensatory and punitive damages? Perhaps vacillation on this problem at common law led to awarding punitive damages by statute to the injured person. United States Circuit Judge Herbert F. Goodrich says that penal damages "might be taken to indicate anything that a defendant is compelled by law to pay a plaintiff other than what is necessary to compensate him for a legal damage done by the defendant,"¹¹ and Professor A. V. Dicey, an English contemporary of Judge Goodrich's in the field of Conflict of Laws, adds that:

" . . . a law . . . is not a penal law merely because it imposes an extraordinary liability on a wrongdoer, in favour of the person wronged, which is not limited to the damages suffered by him; and an action for enforcing such liability, by the recovery of the penalty due to the person wronged, is not a penal action: the essential characteristic . . . is that it should be an action on behalf of the government or the community, and not an action for remedying a wrong done to an individual."¹²

6. Matter in parentheses inserted by this writer.

7. *Op. cit. supra*, note 2.

8. A punitive assessment in the form of the authorization for recovery by an injured party might well be treated as compensatory damages, as was done in *Huntington v. Attrill*, 146 U.S. 657 (1892).

9. *Op. cit. supra*, note 2.

10. *Ibid.*

11. GOODRICH, *CONFLICT OF LAWS* pp. 213-214 (5th ed. 1932).

12. DICEY, *CONFLICT OF LAWS* pp. 213-214 (5th ed. 1932).

If a law imposing the liability is not a penal law and the action for enforcing the liability is not a penal action, then it necessarily follows that the damages assessed are not penal in nature, and were not so regarded at common law, and therefore come within the coverage of the policy.

In the case of *Minnie L. Adams, Admx. v. Fitchburg Railroad Co.*,¹³ the intestate was killed while riding as a passenger on defendant's railroad in Massachusetts. A Massachusetts statute provided in effect that when a person is killed by a railroad corporation in the operation of its railroad, the corporation shall be liable in damages to the amount of not less than five hundred dollars nor more than five thousand dollars, which amount is to be assessed with reference to the culpability of the corporation and to be recoverable in an action by the administrator or executor of the deceased person for the benefit of the widow and next of kin.¹⁴ Mr. Justice Munson, speaking for a unanimous Supreme Court of Vermont noted that the ascertainment of the amount of damages was in the nature of an assessment. Still he labored with the idea that perhaps if this recovery was to go to the widow or children, the statute might conceivably be considered remedial, but fearing the potential amount involved might permit its falling into the hands of more distant relatives, he finally telescoped his opinion, which held the insurer not liable for the punitive damages assessed against the insured, into two very important sentences, which represent one line of thought as to whether damages are punitive or not.

"The fact that it (referring to the assessment) is given to persons whom the law would have entitled to share in the estate of deceased cannot control the construction. A statute may be penal although the entire amount recovered be given directly to the party injured."¹⁵

In the famous case of *Huntington v. Attrill*,¹⁶ the United States Supreme Court expressed a view in conflict with that of Mr. Justice Munson, and the British Privy Council, on appeal from the Supreme Court of Ontario, followed the view of the United States Supreme Court on the same facts.¹⁷ Attrill, a resident of Ontario, knowingly signed a fraudulent certificate stating the whole of the capital stock of a New York corporation, of which he was director, has been paid up. In so doing he became liable by New York statute for all debts of the company contracted which included a claim of Huntington. Huntington had loaned the corporation money prior to Attrill's making this certificate and secured a judgment against him in the state of New York for same. Huntington then sued Attrill in

13. 67 Vt. 76, 30 Atl. 687 (1894).

14. The personal representative of deceased brought this wrongful death action in Vermont where jurisdiction over the person of defendant could be procured. Had this action been brought on a Massachusetts judgment, which was based on a similar act as here, it might well have been enforced by Vermont court under the "full faith and credit clause" of the 14th Amendment to the Constitution of the United States.

15. Matter in parentheses inserted by this writer.

16. *Supra*, note 1.

17. [1893] A.C. 150.

Maryland to set aside a transfer of stock in the Equitable Gas Light Company of Baltimore made by Attrill in fraud of his creditors, and to charge that stock with payment of his New York judgment. Maryland refused to entertain this bill because it was a judgment of another state based on a "penalty" and opposed to the public policy of Maryland. The case came before the Supreme Court of the United States under the "full faith and credit clause" of the Fourteenth Amendment of the Constitution of the United States. Mr. Justice Gray in the majority opinion¹⁸ said that whether a statute of a state was penal and therefore unenforceable in a sister state,

"depends upon question whether its purpose is to punish an offense against public justice of the State, or to afford a private remedy to a person injured by a wrongful act.¹⁹ . . . The test is not by what name the statute is called by the legislature or the courts of the State in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person."²⁰

The case indicates one of the ways a court can judicially skin the cat when there is much complaining about the non-enforcibility of obligations because they fall by name within a certain classification. This decision indicates that a penal obligation by another name, as the rose of adage, can smell just as sweet.

Judge Goodrich in speaking of the *Huntington v. Attrill* cases said,

". . . where the action is brought in a second state on the claim arising in the first, when the claim is alleged to be penal and not reduced to judgment, can the state court avoid the authority of *Huntington v. Attrill*. And, even though state courts are not obliged to follow it, the rule of law thus announced by the two highest courts of the common law world is of persuasive if not conclusive authority."²¹

No matter how much the courts look with disfavor on this view and despite George Bernard Shaw's pronouncing that the United States and England are two countries separated by the same language, certainly we have here the leading courts of these countries not at all separated by the same language. This language might well be interpreted by the insurance companies as a warning as to the limits of their liability should the case ever come before them or courts which are prone to listen to them.

I have in mind such courts, as the United States Circuit Court of Appeals of the 8th Judicial Circuit. In *Ohio Casualty Insurance Company v. Welfare Finance Company*,²² Justice Stone was not of the same opinion as Justice Maltbie was in the *Tedesco* case.²³ In speaking for a unanimous court he permitted the injured plaintiff to recover under a policy worded like the *Tedesco* case. In this case insured's servant was backing a truck out of a garage without sufficient clearance

18. Justice Fuller dissented on other grounds.

19. *Supra*, note 1, 146 U.S. at p. 673.

20. *Supra*, note 1, 146 U.S. at p. 683.

21. *Op. cit.*, *supra*, note 11, Sec. 9.

22. *Supra*, note 3.

23. *Supra*, note 4.

on the side upon which Florence Dauster was standing on the running board. This caused her to be thrown to the ground. \$25,000 actual damages and \$25,000 punitive damages were sought. \$5,500 actual damages and \$10,000 punitive damages were recovered. The policy involved had a \$10,000 limit. So the judgment was settled for \$9,000 and costs. The whole case evolved around the insured trying to recover his judgment obtained for compensatory and punitive damages because of such injury inflicted by its servant. The court said that the so-called punitive damages were awarded under Missouri law "not to punish defendant for his offense but to compensate the plaintiff for his injuries." The insured said it was not liable for punitive damages as the policy insured only against "accidentally sustained" injuries, and even should the policy have included punitive damages it would be against public policy. The court was not easily persuaded by the insurance company. It stated the contention of the insurance company that punitive damages were not within the meaning and language of the policy was "not well taken." It said,

"The policy insured 'Against loss by reason of liability imposed by law upon the assured for damages on account of bodily injuries . . . accidentally sustained. . . .' The basis of the Dauster action was negligence and nothing more than negligence. Obviously, negligence is covered in the term of the policy 'Accidentally sustained.' The assessment of punitive damages was a 'liability imposed by law upon the assured' in connection with and because of the bodily injuries and the aggravated conduct of the servant in causing such injuries. . . . Since this policy clearly covers bodily damage through negligence and since these punitive damages are not imposed because of the aggravated circumstances or form of this negligence, such punitive damages must be regarded as coming within the meaning of the policy."²⁴

The court was progressing nicely until it suddenly remembered the public policy argument, as did Justice Maltbie, only the latter used it to substantiate his holding. The insurer contended here that to permit the insured to be covered for punitive damages is like a person having been tried for a crime, convicted, and sentenced to confinement in a penitentiary substituting another in his stead. "If this provision in the policy must be construed as having. . . (this). . . effect, it should be held invalid,"²⁵ said the court. But the court knew that it was the one which did the construing, and translating into public policy, so it dismissed the public policy argument by saying the policy was in general terms and "on its face imports no protection from illegal acts."

The courts seem to be constantly in fear of being thought of as protectors of the insured from responsibility for his illegal acts. A comment in the *Cornell Law Quarterly*²⁶ indicated that Justice Cardozo contended in *Messersmith v. American Fidelity Co.* that liability must be for negligence and not wilfulness because of the

24. *Supra*, note 3, at p. 59.

25. *Supra*, note 3. Matter in parentheses inserted by this writer.

26. 22 CORN. L. Q. 590 (1937). (*Messersmith v. American Fidelity Co.*, 232 N.Y. 161, 133 N.E. 432 (1921).

principle that no one shall be permitted to take advantage of his own wrong.²⁷ However, as I noted earlier, the general analysis of opinion at this date is that just because the insurer is ultimately liable to indemnify, the insuring itself does not protect the tortfeasor from responsibility for his crimes. The idea that insurance is a device to compensate the injured rather than relieve the insured of financial liability connected with his wrongful acts, seems to be becoming the accepted view.²⁸

Some "host statutes" relating to auto accidents limit recovery to injuries arising from intentional accidents. Such recovery raises the question whether the insurer has to answer for the host's misconduct, and, if the contract containing the words "wilful and wanton" does make the insurer liable for the insured's action, is the contract valid? This is taking the problem of indemnification to its other extreme. Some courts perplexed with the problem neatly distinguish between wilful and wanton misconduct. In such cases they contend that wilful misconduct means "an intention to injure," as distinguished "from 'wanton misconduct' which is defined as an utter indifference to the right of others, the intention to harm being absent."²⁹ By such definition, insurance against wilful misconduct would be void under the principle stated above that no one shall be permitted to take advantage of his own wrong. Some courts hold wilful and wanton misconduct is no more than gross negligence, or that the two names mean the same thing, and therefore an insurance policy worded against such consequences could be held valid.³⁰

Such was in effect the holding in the case of *American Fidelity & Casualty Company v. Werfel*.³¹ Graham, while carrying passengers for hire in his cab on the public streets of Montgomery, Alabama was involved in an accident because of which a passenger sues for personal injuries. The policy was issued to Graham in pursuance of a city ordinance requiring it as a condition precedent to a license to operate his cab within the city limits. The policy, among other things, provided that ". . . Assured shall not voluntarily assume any liability." The taxicab operator was assessed punitive damages for the injuries and the court held that such assessment was within the coverage of his policy which indemnified him against loss from liabilities for injuries imposed by law upon operators of taxicabs used in the city. The insurer contended such damages were not within the contemplation of the parties when they entered into this insurance contract, that it had only agreed to indemnify against loss from liability imposed by law upon the assured, arising or resulting from claims upon the assured for damages, by reason of the ownership and use of any of the automobiles described in the policy. Insurer further contended that ". . . complainant's judgment was for willful or wanton conduct, and included punitive damages, and that such damages would not be 'on account of bodily injury' or death within the meaning of the . . . Code."³² The bill alleges

27. *Id.* at p. 593.

28. *Id.* at p. 595.

29. *Id.* at p. 594 (*American Casualty Co. v. Brinsky*, 51 Ohio App. 298 (1934)).

30. *Id.*

31. 230 Ala. 552, 162 So. 103 (1935).

32. *Id.* at p. 556.

that judgment was based on a pleading claiming personal injury damages. The court said:

"A recovery for a willful or wanton act may be had only where a personal injury is sustained. The policy, being broad enough to cover a personal injury or death as a result of an accident occurring while the policy was in force, was therefore broad enough to cover liability for death, . . . This recovery would have been for punitive damages purely. It may not be successfully contended that the policy did not protect against punitive damages (as well as compensatory damages) for bodily injuries so inflicted. That is, under the statutes the injured party assumes the place of the assured, acquires a 'vested interest' in the nature of an hypothecation of the right, . . ."³³

Justice William H. Thomas, in the *Werfel* case, said, in reference to the case of *George v. Employers Assur. Corp., Ltd.*,³⁴ that the result of letting an injured person sue the insurer directly was within reason because "assured, after having had rendered against him and paying a judgment for personal injuries, which included punitive damage. . . (could then). . . have had a recovery from the defendant casualty company upon the policy."³⁵

It is worth noting in passing that in *New Amsterdam Casualty Co. v. Jones*,³⁶ Federal Circuit Judge Thomas F. McAllister of the 6th Judicial Circuit, in speaking for a unanimous court, affirmed a decision of Federal District Judge Frank A. Picard. In this case one Jones took out liability insurance to cover injuries received by anyone while on his property. He later intentionally shot a man coming on his property because he mistook him for someone else. The court permitted the injured person to recover from the insurance company saying,

"The vague possibility of benefit to Jones—that some time in the distant future, when he may have accumulated a sum of money equal to the amount of the damages assessed against him, he will be saved from payment of Martin's judgment against him—is too remote, and uncertain to require that a court hold that such nebulous consequences . . . are sufficient to void the insurance contract on grounds of public policy because of a wrongdoer's chance of thus profiting by his own unlawful act."³⁷

Here the insurer became bound to pay for all damages assessed against insured while the "intent" element was present in the insured. The very reason for punitive damages is the presence of such an intent element whether it be constructive or expressed. It seems that although a man cannot recover if he takes out a policy, he can take out a policy without intention of injuring anyone and may so intentionally injure him later and the insurer will be liable for indemnification. This court, if put to the test, should logically grant indemnification for punitive damages as a result of such act.

33. *Ibid.* Matter in parentheses inserted by this writer.

34. 219 Ala. 307, 122 So. 175 (1929).

35. Matter in parentheses inserted by this writer.

36. 135 F. 2d 191 (C.C.A. 6th 1943), *affirming* 45 F. Supp. 887 (1942).

37. 135 F. 2d at p. 195.

A hindsight view of the cases indicates that it is pretty hard to determine in advance whether punitive damages are within the coverage of accident liability policies. If one were to look for the solution in mathematical computation, he would find as a general rule the insurer is liable for common law punitive damages and not liable for statutory punitive damages. But there is a definite tendency in the direction of liability on the part of the insurer for statutory punitive damages. Courts are not all in agreement because they must depend upon their relative feelings in respect to the whole picture of the insurance kingdom and its liabilities in rendering a decision in such a contest rather than stereotyped law. So, as the law is today, one cannot find the proper solution. The slightest variance in the facts gives a court cause to follow its personal convictions. An example would be a set of facts where,

“ . . . for the guest to recover, the injury must arise from . . . ‘reckless disregard of the rights of others’ . . . most courts . . . will find that such injuries are ‘accidental’ . . . Where, however, the statute requires that the accident be intentional before the guest has a cause of action . . . resulting injuries would not be ‘accidental’ within the meaning of policy . . . ”³⁸

However, even though subject to personalities, where a state has a statute assessing double or treble damages against a tortfeasor, as in the *Tedesco* case,³⁹ which damages are then awarded to the injured party or assessed on the decree of culpability of the tortfeasor and given the injured party as in the *Adams* case,⁴⁰ and the court rendering the decision is prone to follow the “persuasive authority” of the dictum in *Huntington v. Attrill*⁴¹ and interpret damages to the injured as in effect being compensatory, the expected result is not a dubious one.

It is quite possible also, that where the injured person is required to procure a final judgment against the insured before proceeding against the insurer, because of an express clause in the policy against absolute liability of the insurer, that his suit on a final judgment when brought against the insurer in its home state, which will be a state well protected by “insurer” controlled legislation, will reduce to a domestic decree his judgment for punitive damages and thereby enforce it within the maginot lines of the lobbyist covered utopias, as was done in *Huntington v. Attrill*. Even if the court in the home state of the insurer, doesn’t choose to follow *Huntington v. Attrill* and enforce a judgment of a foreign state because it is based on punitive damages, the United States Supreme Court to which the insured can appeal, will do so. The problem won’t be that of a state enforcing the penal laws of a foreign state since the Supreme Court of the United States said in *Huntington v. Attrill*, as I noted earlier, that,

“The test is not by what name the statute is called by the legislature or the courts of the State in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential

38. *Supra*, note 26 at p. 597.

39. *Supra*, note 4.

40. *Supra*, note 13.

41. *Supra*, note 1.

character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person."⁴²

The result suggested above should be reached despite the belief of Professor

William R. Vance that,

"The terms excepting from the operation of the policy injuries intentionally inflicted by another are valid, but they will exempt the insurer only when the injury is not more extensive than the intent with which it was inflicted."⁴³

It seems that within the space of ninety years the law has been constantly in a state of flux in this field. It should be remembered that the court cannot extract the individual case from the whole picture. Such liability for the insurer has two very serious effects. It is undesirable for the insured to become aware that he is completely covered for punitive, as well as compensatory damages, for he will quite naturally use a less degree of care in associating among his fellow men. Very important too is the number of people related to and dependent upon the insurance world. The business of insurance is one of the world's largest and most profitable businesses. It is a business intimately associated with the common good and the economic structure of a country. Subject insurers to punitive liability and a prosperous insurance executive of a small insurance firm might very well be reduced to a "Donegal peddler" over night, if he suddenly finds that his company's liabilities have increased to limits beyond its capital assets. He may be fortunate in representing a larger business, which because of its capital assets is permitted to suffer a little longer before being liquidated into an infinitesimal speck on a potentially much bespecked judicial scutcheon. However, even if the insurance business is able to withstand the burden of punitive damages, the social structure is still affected for the cost of insurance is directly dependent upon the liability of the company. These are some of the very important factors running through the mind of the court when considering the problem of the insurer's liability for penal damages.

However, whether it be social, political, or economic forces at play, it cannot be denied that the foregoing representative decisions have made quite an inroad into the now often quoted and over-worked maxim used by Lord Campbell in *Thompson v. Hopper*⁴⁴ that ". . . the assured cannot seek indemnity for a loss produced by their own wrongful act." It seems they can, or at least stand in a very favorable position in attempting to do so.

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42. *Supra*, note 20.

43. VANCE, *INSURANCE*, § 267 (2d ed. 1930).

44. 119 Eng. Rep. 828, 836 (1856).

WAIVER OF JURY TRIAL IN CRIMINAL CASES

Article I, Section 22 of the 1945 Constitution of Missouri represents a significant change from the comparable section¹ in the Constitution of 1875 which prevailed up until the adoption of the new constitution. It reads in part as follows:

“. . . and that in every criminal case any defendant may, with the assent of the court, waive a jury trial and submit the trial of such case to the court, whose findings shall have the force and effect of a verdict of a jury.”²

No express provision for waiver by the accused of trial by jury existed in any of the previous Missouri constitutions.³ In reference to Article I, Section 22 of the 1945 Constitution, the Advisory Committee of the Supreme Court of Missouri has adopted the following rule in the proposed Rules of Criminal Procedure:

“The defendant and the prosecuting attorney, with the assent of the Court may waive trial by jury and submit the trial of any criminal cause to the Court, whose findings on all such offenses shall have the force and effect of the verdict of a jury. Such waiver and assent shall be in writing, signed by the parties and the judge, and filed of record.”⁴

Some provision for waiver of jury trial has long been advocated by many authorities.⁵ The ability of the accused to waive trial by jury is desirable from several points of view. The accused may feel, in certain instances, that he will get a fairer trial before a judge than before “twelve men good and true.” Also, trial by the court would relieve a great deal of the congestion found in many of the criminal dockets. In some of the larger urban areas such congestion has become a real problem. Delay in the trial of criminal cases has necessarily had the effect of impeding civil litigation.

The ability of the accused to waive trial by jury is not as revolutionary as it sounds at first blush. At least one of the early American colonies recognized such a right in the codification of their law.⁶ In a plea of guilty, the accused, for all practical purposes, waives the right of trial by jury. It has never been contended

1. Mo. CONST. Art. II, § 28 (1875).

2. Mo. CONST. Art. I, § 22.

3. Mo. CONST. Art. XIII, § 8 (1820), Mo. CONST. Art. I, § 17 (1865), Mo. CONST. Art. II, § 28 (1875).

4. Rules of Criminal Procedure for Courts of Missouri for adoption by the Supreme Court of Missouri, Rule 26.01 (b) (June 30, 1948).

5. “Waiver has been more frequently and more strongly recommended than almost any other reform in criminal procedure. It was one of the four chief points in the criminal law program of the American Bar Association in 1934.” ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 391-392 (1947).

6. “In all actions at law, it shall be the liberty of the plaintiff and defendant, by mutual consent, to choose whether they shall be tried by the bench or by a jury. . . . The like liberty shall be granted to all persons in criminal cases.” Massachusetts Body of Liberties of 1641, Art. 29.

that such procedure was improper or unconstitutional.⁷ Many jurisdictions, whose constitutions contain no express provision for waiver of trial by jury, have held by judicial determination that the accused, even in a felony case, may waive trial by jury.⁸ These jurisdictions, in so holding, have done so upon the theory that the constitutional provision which guarantees trial by jury in criminal proceedings is a privilege conferred upon the accused; being a privilege, the accused may waive it if he sees fit. On the other hand, jurisdictions operating under similar constitutional provisions have held that the accused in a felony case may not waive the right to trial by jury. The conclusion of these courts is usually predicated upon one of two theories. One such theory is based upon public policy⁹ while the other is based upon the proposition that without a jury the court lacks jurisdiction to try the matter.¹⁰

Section 4052 of the Revised Statutes of Missouri¹¹ provides that the accused in a misdemeanor case may waive trial by jury. Prior to the adoption of the 1945 Constitution, the law in Missouri was otherwise in respect to felony cases.¹² A survey of these Missouri cases brings one to the conclusion that the basis for denying the accused in a felony case the right to waive trial by jury has not been too clearly enunciated. In *State v. Mansfield*,¹³ decided in 1867, the court talks in terms of lack of jurisdiction and also in terms of public policy. The real reason behind the Missouri decisions first comes to light in the case of *State v. Talken*,¹⁴ decided in 1927. Although the court there referred to the language of *State v. Mansfield*,¹⁵ in addition it cited Section 4005 of the Revised Statutes of Missouri (1919) which read:

"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."

7. *Hallinger v. Davis*, 146 U.S. 314 (1892); *Bugg v. United States*, 140 F. 2d 848 (C.C.A. 8th 1944); *Hood v. United States*, 152 F. 2d 431 (C.C.A. 8th 1946); *State v. Kellar*, 332 Mo. 62, 55 S.W. 2d 969 (1932).

8. *Patton v. United States*, 281 U.S. 276 (1930); *State ex rel. Warner v. Baer*, 103 Ohio St. 585, 134 N.E. 786 (1921); *Commonwealth ex rel. Ross v. Egan*, 281 Pa. 251, 126 Atl. 488 (1924); *People v. Fisher*, 340 Ill. 250, 172 N.E. 722 (1930).

9. *Cancemi v. People*, 18 N.Y. 128 (1858).

10. *Territory v. Ah Wah and Ah Yen*, 4 Mont. 149, 47 Am. Rep. 341 (1881).

11. "But the defendant and prosecuting attorney, with the assent of the court, may submit the trial of misdemeanors to the court, whose finding in all such offenses shall have the force and effect of the verdict of a jury." Mo. REV. STAT. § 4052 (1939).

12. *Neales v. State*, 10 Mo. 498 (1847); *Cousineau v. State*, 10 Mo. 501 (1847); *State v. Moody*, 24 Mo. 560 (1857); *State v. Mansfield*, 41 Mo. 470 (1867) (felony case and the accused consented to be tried by a jury of eleven); *State v. Sanders*, 243 S.W. 771 (Mo. 1922); *State v. Talken*, 316 Mo. 596, 292 S.W. 32 (1927); *State v. Bresse*, 326 Mo. 885, 33 S.W. 2d 919 (1930).

13. "His right to be tried by a jury of twelve men is not a mere privilege; it is a positive requirement of the law. . . . Aside from the illegality of such a procedure, public policy condemns it." *State v. Mansfield*, 41 Mo. 470, 478 (1867).

14. *Supra*, note 12.

15. *Supra*, note 13.

Similar statutory provisions have been a part of the codified law of Missouri from 1834 up to the present date.¹⁶ It seems proper to regard such a provision as excluding the jurisdiction of the court, without a jury, to try such issues. While the earlier Missouri cases make no reference to similar statutes,¹⁷ their decisions become more reconcilable by knowledge of the existence of such statutes.

The adoption of the rule that the accused may waive trial by jury raises certain other problems. First, may the accused in a felony case consent to be tried by a jury of less than twelve? In other words, does the ability of the accused to waive trial by jury altogether likewise confer upon him the right to consent to a trial by a jury composed of less than twelve men? The courts have long held that the constitutional provision which guarantees trial by jury means a jury by twelve men.¹⁸ Notwithstanding, many courts have held that the accused, even in a felony case, may consent to be tried by a jury of less than twelve. The Supreme Court of Iowa, which has denied the accused in a felony case the right to waive trial by jury,¹⁹ has nevertheless allowed the accused to consent to be tried by a jury of less than twelve and held the conviction valid.²⁰ The Iowa court points out in *State v. Kaufman*²¹ that there may be instances where it is desirable for the accused to consent to be tried by a jury of less than twelve. One such instance is where the accused may feel that his witnesses may not be available if the trial is delayed. Other jurisdictions,²² in allowing the accused in a felony case to consent to be tried by a jury of less than twelve, have done so upon a different theory. These courts reason that if the accused is permitted to completely waive trial by jury, then it necessarily follows that he should be able to consent to a trial by less than twelve jurors. Essentially, the two are the same. In *People v. Scuderi*, the Supreme Court of Illinois said:

"It must follow that, if the laws of this state permit a defendant in a criminal case to stipulate a waiver of his right to be tried by an entire jury, he may also with equal effect waive one or more jurors, and enter into a stipulation with the people, whereby he and the people and the trial court agree and consent to the trial proceeding with a jury composed of less than twelve men."²³

16. MO. REV. STAT. Art. VI, § 1 (1834-35), MO. REV. STAT. c. 138, § 1 (1845), MO. REV. STAT. c. 127, Art. VI, § 1 (1855), MO. GEN. STAT. c. 213 § 1 (1866), MO. REV. STAT. § 1889 (1879), MO. REV. STAT. § 4189 (1889), MO. REV. STAT. § 2608 (1899), MO. REV. STAT. § 5212 (1909), MO. REV. STAT. § 4005 (1919), MO. REV. STAT. § 3662 (1929), MO. REV. STAT. § 4051 (1939).

17. *Supra*, note 16.

18. *Thompson v. Utah*, 170 U.S. 343 (1898).

19. *State v. Carman*, 63 Iowa, 130, 18 N.W. 691 (1884).

20. *State v. Kaufman*, 51 Iowa, 578, 2 N.W. 275 (1879); *State v. Grossheim*, 79 Iowa 75, 44 N.W. 541 (1890); *State v. Browman*, 191 Iowa 608, 182 N.W. 823 (1921).

21. *Supra*, note 20.

22. *Patton v. United States*, 281 U.S. 276 (1930); *People v. Scuderi*, 363 Ill. 84, 1 N.E. 2d 225 (1936); *Ex parte Kortgaard*, 267 N.W. 438 (N.D. 1936); *State v. Sackett*, 39 Minn. 69, 38 N.W. 773 (1888); *Attorney General ex rel. O'Hara v. Montgomery*, 275 Mich. 504, 267 N.W. 550 (1936).

23. *People v. Scuderi*, 363 Ill. 84, at 87, 1 N.E. 2d 225, at 227 (1936).

This statement is particularly applicable to the situation as it exists in Missouri. It could be argued that under the constitutional provision²⁴ the accused's consent to trial by a jury of less than twelve in a felony case is invalid. As an alternative to trial by jury it is provided that the accused may consent to trial by the court. At common law a jury was composed of twelve men.²⁵ The provision is silent as to consent to trial by the jury of less than twelve. Strictly construed, the provision seems to grant an accused two alternatives: trial by jury or trial by the court. However, upon the reasoning of the cases previously cited,²⁶ this argument should be rejected. In *State v. Mansfield*²⁷ the Supreme Court of Missouri seems to indicate that waiver of trial by jury and consent to be tried by a jury of less than twelve are, for all practical reasons, alike.

In any analysis of this question with respect to Missouri law, mention also should be made of the first part of Article I, Section 22 of the 1945 Constitution.²⁸ The part referred to grants to the state legislature the authority to prescribe by legislative enactment that a jury of less than twelve shall meet the requirements of a constitutionally composed jury, in courts not of record. The logical interpretation of this section would seem to be that it is a limitation upon the power of the legislature to change the constitutionally accepted number of jurors, except in cases cognizable in courts not of record. It does not follow that, since the legislature is prohibited from changing the size of the traditional jury, the accused himself may not consent to a jury of less than twelve. In short, while the provision places a limitation upon legislative power, it in no way indicates that a jury of less than twelve, if consented to by the accused, could not render a valid verdict.

Rule 23 (B) of the Federal Rules of Criminal Procedure expressly states that the parties may consent to a jury of less than twelve.

A second problem concerns consent of the state to a waiver. Rule 26.01 (b) of the proposed Rules of Criminal Procedure²⁹ reads in part as follows:

"The defendant and the prosecuting attorney, with the assent of the Court may waive trial by jury . . ."

By way of anticipation, does this mean that the state may withhold its consent to the accused's waiver of trial by jury? In other words, does the state have the right to demand trial by jury? Certainly the constitutional provision³⁰ with reference to which the rule was promulgated gives no hint or indication of such a right vested in the state. The problem anticipated here confronted the

24. Mo. CONST. Art. I, § 22.

25. *Supra*, note 18.

26. *Supra*, note 22.

27. *Supra*, note 12.

28. "That the right of trial by jury as heretofore enjoyed shall remain inviolate; provided that a jury for the trial of criminal and civil cases in courts not of record may consist of less than twelve citizens as may be prescribed by law, . . ." Mo. CONST. Art. I, § 22.

29. *Supra*, note 4.

30. Mo. CONST. Art. I, § 22.

Supreme Court of Illinois in the case of *People v. Scornavache*.³¹ The majority of the court held that the accused could not waive trial by jury over the objection of the state attorney. Justice DeYoung entered a vigorous dissenting opinion, stating in part:

"The power of a person accused of a criminal offense to waive his right to a jury trial is conceded in the opinion. To declare, as the majority does, that the prosecution's consent is necessary to make such a waiver effective is inconsistent with the defendant's acknowledged power, enables the state to nullify his act and reduces his power to waive a jury trial to a shadow."³²

It is not difficult to visualize situations where the accused may well prefer to lay his case before a deliberate and cool headed judge rather than before an impassioned jury. Such a situation may arise where the accused is a member of a minority political, racial, or religious group, or where the case contains intricate questions of fact. Is it just to foreclose the accused from choosing to have his case tried by a judge, rather than by a jury, by virtue of the fact that the state refused to give its consent to a waiver of trial by jury? If such be true, the jury becomes a tool of conviction rather than a safeguard to the accused.³³ It seems appropriate to point out in this connection that the American Law Institute's proposed Code of Criminal Procedure makes not even the slightest suggestion that the state's consent is required before the accused may effectively waive trial by jury.³⁴ Rule 23 (A) of the Federal Rules of Criminal Procedure³⁵ is similar to proposed Missouri Rule 26.01 (b). Unquestionably the Federal Rule was based on a dictum of the Supreme Court of the United States in *Patton v. United States*.³⁶ It should be pointed out that the *Patton* case is not binding on the courts of Missouri in respect to this particular procedural question.

31. *People v. Scornavache*, 347 Ill. 403, 179 N.E. 909 (1931).

32. *Supra*, note 31, at 915.

33. Hall, *Has the State a Right to Trial by Jury in Criminal Cases?* 18 A.B. A.J. 226, 227 (1932), commenting on *People v. Scornavache*, *supra*, note 31, "The defendant's contention that there are many situations where an accused person prefers trial by a judge rather than by jury was met by the statement that the accused has a right to a change of venue. But this is certainly no comfort in a case where, because of the type of defendant, the nature of the crime, the publicity given it, or the complexity of the facts, the accused has every reason to prefer the judgment of an enlightened individual to that of any jury. It is irony indeed, that in such a situation, the tribunal which for centuries was regarded as the safeguard and protection of the accused, can now under the Illinois decision be employed by the State to facilitate conviction."

34. CODE OF CRIMINAL PROCEDURE (American Law Institute, 1930), Sec. 266: "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." (Committee also suggests that if provisions are made for more than one judge sitting on the trial, then waiver should be allowed even in cases where penalty of death may be imposed.)

35. FEDERAL RULE OF CRIMINAL PROCEDURE, Rule 23 (A): "Cases requiring to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."

36. *Supra*, note 8.

If consent of the state is necessary to effect a valid waiver on the part of the accused, just what is required of the state in this respect? Two interesting cases in connection with this point arose in California. The California State Constitution provided that trial by jury might be waived in all criminal cases by the consent of both parties.³⁷ In *People v. Thompson*³⁸ the accused on appeal contended that there had been no effective waiver of trial by jury, by reason of the fact that the state had not waived such, and that the trial by the court was error. The court held that since the defendant himself was willing to waive a jury, he could not be deemed to be prejudiced by the failure of the prosecuting attorney to join in such waiver, and any error in relation thereto could not be urged by the defendant. In *People v. Rumsey*³⁹ the California court said that they would imply a waiver on the part of the state from the silent presence of the state at the time the accused consented to trial by the court.

The wording of Article I, Section 22 of the Missouri Constitution⁴⁰ and Rule 26.01 (b) of the proposed Rules of Criminal Procedure⁴¹ clearly state that the court must give its consent before any waiver by the accused becomes effective. That is as it should be. Imposed upon the trial judge is the duty to see that the trial is conducted in such a manner as to preserve for the accused the safeguards the law gives him. An essential safeguard is the right to trial by jury. This safeguard should be zealously guarded. The Supreme Court of the United States in *Patton v. United States*⁴² emphasizes the solemn duty resting on the trial judge when confronted with the problem of whether or not to accept an accused's waiver of trial by jury.

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37. "A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by defendant and his counsel . . ." CALIF. CONST. ART. I, § 7.

38. *People v. Thompson*, 41 Cal. App. 2d 965, 108 Pac. 2d 105 (1940).

39. *People v. Rumsey*, 127 Cal. App. 272, 15 Pac. 2d 780 (1932).

40. MO. CONST. ART. I, § 22.

41. *Supra*, note 4.

42. *Supra*, note 8.