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Waiver of Trial by Jury; A Further Comment

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EDITORIAL NOTES

WAIVER OF TRIAL BY JURY; A FURTHER COMMENT

The local law dealing with this subject has already been reviewed by the writer in a former issue of this publication,[1] where an attempt has been made to analyze the constitutional provisions, the statutes and the decisions prescribing the method and limiting the conditions under which a valid waiver of trial by jury may be made. The present discussion is prompted by a recent decision[2] which has finally placed definite emphasis on an element in the situation which, although alluded to in a prior case, has generally been ignored. What is said here will apply only to actions in-

[1] Note (1927) 33 W. VA. L. Q. 183.
[2] Matheny v. Greider, 177 S. E. 769 (W. Va. 1934).

stituted in a court of record, and not to actions tried *de novo* on appeal or to cases tried before a justice of the peace, which are controlled by different statutory regulations. For purposes of a background, some repetition will be necessary; but the reader is referred to the former discussion for a more comprehensive statement of the various distinctions and arguments involved.

The specific question involved in the present discussion is this: When may a plaintiff, alone, without participation by the defendant, waive a trial by jury? The problem involved in answering this question, as presented by the decisions, is whether this power of the plaintiff to waive depends (1) upon the fact that the defendant has failed to demand a jury trial, or (2) upon the fact that, in the language of the statute,[3] "the defendant has failed to appear"; and, further, if the defendant's failure to appear is the condition upon which the plaintiff's power to waive depends, whether this means (a) failure to appear to the action, or rather (b) failure to appear personally in court when the case is called for trial. Since the right to a jury trial is regulated both by the Constitution and by statute, a solution of the problem involved will require consideration of both regulatory sources. The provision in the Constitution is as follows:

> "In suits at common law, where the value in controversy exceeds twenty dollars, exclusive of interest and costs, the *right* of trial by jury, *if required by either party,* shall be preserved."[4]

It will be noted that this provision does not impose a trial by jury upon either party. It merely *preserves* the *right,* and this only upon the condition that the right shall be required (demanded) by one of the parties. Unlike the statute, it does not deal with waiver, because, so far as the Constitution is concerned, there is

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[3] "The court in an action at law, if neither party require a jury, or if the defendant has failed to appear and the plaintiff do not require a jury, shall ascertain the amount the plaintiff is entitled to recover in the action, if any, and render judgment accordingly. In any case, except a case of felony, in which a trial by jury would be otherwise proper, the parties or their counsel, by consent entered of record, may waive the right to have a jury, and thereupon the whole matter of law and fact shall be heard and determined, and judgment given by the court . . . . ". W. VA. REV. CODE (1931) c. 56, art. 6, § 11.

This section is a combination of two sections appearing in the former Code. The terms appear to be somewhat contradictory in their purport, but the two former sections were construed together in Salzer v. Schwartz, *infra* n. 7, as requiring a waiver to be by consent entered of record and there is nothing resulting from the present combination which would justify a different construction.

[4] W. VA. CONST. art. 3, § 13. The italics have been supplied.

no right which could be the subject of a waiver unless a demand be made. Logically, any repudiation of the right that might come after a demand had been made would rather be in the nature of a retraction of the demand, than of a waiver of the right. If no demand for a jury is made, the provision leaves the status of jury trial precisely as established by the common law, and so subject to unlimited legislative regulation. Hence, in the absence of a demand, a statute might dispense absolutely with a jury trial or provide for any variety of waiver of the right. And even if a demand is made, this would not preclude any statutory regulation which would still preserve the right. Wherefore, a statute might provide absolutely that there must be a trial by jury in all cases.

The effect of the applicable statute is that there must be a trial by jury unless the right is affirmatively waived. Furthermore, the waiver must appear by "consent entered of record."[5] No demand is necessary. So far as demand is concerned, the statute itself, in effect, interposes a demand on behalf of both parties except in the case of a defendant who "has failed to appear". If the defendant has "appeared", both parties must waive; but "if the defendant has failed to appear", the plaintiff may waive.

As a consequence of the constitutional and statutory provisions, it will be noted, there are two situations under either of which the plaintiff acting alone would be unable to waive a jury trial. (1) If the defendant has demanded a jury, the Constitution prevents a waiver by the plaintiff, regardless of what any statute might provide. (2) If the defendant has "appeared", under the statute, regardless of whether he has demanded a jury, he is required to participate in the waiver.

In all cases where the defendant has "appeared", it would seem superfluous, as long as the statute continues in its present purport, to inquire whether he has made a demand for a trial by jury. Regardless of a demand, the statute requires a trial by jury until the right is repudiated by waiver. Consequently, the decisions have been primarily concerned, not with the question whether a proper demand has been made, but with the essentials and prerequisites of waiver;[6] and particularly, where the plaintiff acting alone has attempted to waive, with the meaning of the phrase, "if the defendant has failed to appear".

In the first case[7] in which this phrase was construed, the

[5] Note (1927) 33 W. VA. L. Q. 185-186.
[6] *Idem.*

defendant had appeared and, among other things, had pleaded the general issue. Later, when the case was called for trial, he failed to appear in the court room. The plaintiff, assuming that the defendant had "failed to appear" within the meaning of the statute, waived a jury and submitted his case to the court. A judgment for the plaintiff was reversed, the Supreme Court holding that the phrase means failure to appear to the action, and not merely failure to appear in court when the case is called for trial. The court emphasizes the fact that the defendant had pleaded the general issue and had "put himself upon the country," apparently denying the plaintiff's power to waive on the ground that the defendant had thus demanded a jury and so had called into operation the provision in the Constitution. On the other hand, allusion is made to the fact that the defendant, by pleading the general issue and other matters, had *appeared* and so, supposedly, had called into operation the terms of the statute which required his participation in the waiver. Wherefore, it is not clear what is intended to be the fundamental basis of the decision—whether *demand,* in terms of the Constitution or under some supposed requirement of the statute, or *appearance,* under the literal language of the statute. In the second case[8] decided, the general issue was also pleaded and the first case is cited as a precedent. Appearance by the defendant and the joinder of issue are referred to as the circumstances which prevented the plaintiff from making a waiver.

The third and final case[9] decided, citing the two earlier cases as precedents, definitely bases the inhibition on the plaintiff's power to waive upon assumption that the defendant, by pleading the general issue, had demanded a jury.

> "The filing of a plea of the general issue is tantamount to demanding trial of the action by jury."

In this case, again, it is not clear whether the court considers the demand as an operative element responding to the condition in the Constitution, or as a consequence that must result from appearance under the statute, but apparently the former.

Which of these two theories is correct? Are the two, in application, concurrent in effect, so that it is immaterial which one is applied, or will one solve problems involved in situations to which the other will not adequately respond?

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[7] Salzer v. Schwartz, 88 W. Va. 569, 107 S. E. 298 (1921).
[8] Shamblin v. Hall, 100 W. Va. 375, 130 S. E. 496 (1925).
[9] Matheny v. Greider, *supra* n. 2.

It may first be inquired whether it is necessary at all, in order to preserve the defendant's right, to resort to any theory to the effect that by filing a plea he has demanded a jury trial. Under the statute, the very fact that he has appeared precludes a waiver without his consent. It may very well be argued that the statute intends a general appearance—an appearance to the merits —although this is not demanded by its literal terms. But if it means something else or something more than at the least a general appearance, *e. g.*, a demand, then why does it not say so? It would have been just as easy to say "if the defendant fail to demand a trial by jury", and thus avoid all ambiguity, as to say "if the defendant fail to appear." To make the two phrases mean the same thing certainly places a heavy task on any process of inference. If the statute means anything, as construed in *Salzer v. Schwartz*,[10] it must apply at the least to any case in which the defendant pleads in bar, regardless of the conclusion of his plea. If so, then, under the statute, he must participate in the waiver, whether, under the Constitution, he has demanded a jury trial or not; and there is no necessity, in ordering to give operative effect to the statute, to translate appearance into terms of demand.

However, under *Matheny v. Greider*,[11] it is not the mere fact that the defendant pleaded in bar that receives emphasis, but also the fact that he pleaded the general issue and so "put himself upon the country", thus, supposedly, demanding a jury trial. Assuming, as seems the more logical conclusion, that the court looks upon this supposed demand as an affirmative, if not express, demand, it may be inferred that its effect is intended to arise from the provision in the Constitution rather than from the terms of the statute. Is it logical to conclude that the Constitution contemplates any such mechanism as a method of expressing the demand?

The function of the conclusion to a traverse, so far as it might be interpreted as a conscious demand for a trial by jury, has undergone great change in the course of history. This formal conclusion developed in days when the older methods of trial (by ordeal or by battle) were still more or less concurrent with trial by jury. Hence it served not only to differentiate a traverse from a special plea, but also to select the method of trial. When the older methods of trial became obsolete and the jury trial remained as the one common-law method of trial, the remaining practical significance of the conclusion was that it served, symbolically, to

[10] *Supra* n. 7.
[11] *Supra* n. 2.

distinguish a traverse from a special plea. Hence, in the modern law, a conclusion to the country or with a verification is generally (and always ought to be) considered a mere formal allegation, since the court (as the pleader must do before he knows what kind of conclusion to add) can determine from the subject matter of the pleading whether it is a traverse or a special pleading.[12] In these days, and particularly under the West Virginia statute, when a defendant traverses, it is not necessary for him to demand a jury trial. A jury trial is the only mode of trial which the common law has to offer him and the statute compels him to take it unless he waives it by consent entered of record if he has appeared. If his plea concludes to the country, it is because the nature of his plea formally demands that sort of conclusion. It is safe to say that, when either party adds the formal conclusion to a traverse, neither he nor his counsel will have any conscious idea that he is so demanding a trial by jury. What the pleader is consciously attempting to do is to plead to an issue so that the case may be tried. The method of trial, if it is thought of at all, is looked upon as something to come in the future and as something associated with trial practice and procedure, rather than with the formalities of pleading. In fact, the issues must be made up (which usually involves pleading the general issue) before the court can try a case in lieu of a jury,[13] and the plea will be present with its conclusion to the country, in spite of the fact that the parties may have known all along that a trial by jury would be waived.

In the cases adjudicated at this time, it would perhaps make no practical difference which theory is applied. The same results would be reached under either. But other situations may present problems not subject to alternative solutions. For instance, suppose that the defendant relies solely upon a special plea, which, of course, would not conclude to the country; that the plaintiff, by replication, traverses the plea, concluding to the country; that the defendant fails, as he may do under the statute,[14] to add a *similiter* putting himself likewise upon the country; and that the defendant is not present when the case is called for trial. Can the plaintiff under these circumstances waive a trial by jury? According to the test propounded in *Matheny v. Greider*,[15] yes, because the defendant has not put himself upon the country; according

[12] Carlin, *Common Law Pleas and Subsequent Pleadings in West Virginia* (1931) 38 W. VA. L. Q. 17.
[13] Western Maryland Ry. Co. v. Cross, 92 W. Va. 9, 114 S. E. 438 (1922).
[14] W. VA. REV. CODE, c. 56, art. 4, § 44.
[15] *Supra* n. 2.

to the words of the statute, no, because the defendant has *appeared* by pleading his special plea in bar, and therefore must participate in the waiver. The fact that the defendant is absent from the court room when he must know that his case will be called for trial would seem to indicate that he cares little about the case, and perhaps less about the mode of trial; a consideration which has always caused the writer to wonder whether the construction of the statute insisted upon by the plaintiff in *Salzer v. Schwartz*[16] was not the correct one. However, since the court in the latter case has decided that the defendant's absence from the court room at the time of trial has no significance, and that his failure to appear to the action is the real consideration, is there any practical reason why a trial by jury should be any less sacred or expedient for the defendant when the issue to be decided is the truth of the defendant's plea, than when the matter to be tried is the truth of the plaintiff's declaration?

The doctrine announced in *Matheny v. Greider* may carry embarrassing implications for those who might undertake to modify the present statute regulating the right to trial by jury. In many jurisdictions, neither under constitutions nor under statutes is a party entitled to a trial by jury unless the right is demanded. Such a limitation upon the right seems to have received the sanction of a majority of those interested in the reform of trial practice. Yet if a plea of the general issue constitutes a demand for a trial by jury, in most cases (since the general issue is usually pleaded), if the defendant should participate in the trial, it would be necessary, in spite of the statutory limitation, in order to conform to the requirement of the Constitution, to resort to some sort of waiver or retraction of the demand made by the plea, and so the purpose of the statute would be defeated. If the defendant should not be present at the trial, so as expressly or impliedly to retract the demand made by his plea, then the plaintiff would be compelled to submit to a trial by jury. Whether questions of constitutionality would arise if the statute should provide that under no circumstances should a plea have the effect of constituting a demand for a jury trial, or that participation in the trial without a jury and without a demand therefor at the inception of the trial should constitute a waiver or retraction of any prior demand, would remain to be seen.

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[16] *Supra* n. 7.