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The Right to a Jury Trial in West Virginia

L. C.
West Virginia University College of Law

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THE RIGHT TO TRIAL BY JURY IN WEST VIRGINIA.—The right to trial by jury in West Virginia is preserved by the Constitution in both civil and criminal cases. The thirteenth section of the Bill of Rights, relating to civil cases, reads 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; and in such suit before a justice a jury may consist of six persons. No fact tried by a jury shall be otherwise re-examined in any case than according to the rules of the common law."

It will be noted that the Constitution provides that the right shall be preserved "if required by either party." The most obvious interpretation of this language would be to the effect that, in any specific case, the right is guaranteed only in the event that a party "requires" a jury, or, in other words, affirmatively claims the right. If the Constitutional

provision were not supplemented by statute, but were permitted to be wholly self-executing, it would seem that, if a party passively submitted to a trial by the court without demanding a jury, he must be considered as having waived his right to a jury trial; that the right is one to be demanded, rather than one to be refused. But the legislature has not seen fit to trust to the language of the Constitution as defining the manner in which the right may be waived. Section 29 of chapter 116 of the Code reads as follows:

> "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; or by like consent, the jury may consist of seven, and in that case a verdict shall be as valid, and have the same effect as if it had been found by a jury of twelve."

Of course this statute could not undertake in any degree to subtract from the right conferred by the Constitution. To the extent that it did so, it would be unconstitutional. But it does not attempt to do so. The Constitution, in using the words "if required by either party," plainly implies that the right may be waived, if it does not impose on the party the burden of affirmatively demanding the right. The statute merely requires that the right shall be waived and prescribes the manner of the waiver, thus throwing additional safeguards around the right guaranteed by the Constitution. The Constitution preserves the right, subject to a condition; the statute prescribes the operative terms of the condition. Hence it will be seen that the question whether a jury has properly been waived in any specific case is a statutory question rather than a constitutional question, and it has so been recognized by the court.[1]

[1] It might be argued here, in accord with the reasoning of Judge Green in State *v.* Cottrill, *infra*, notes 12 and 13, that, notwithstanding the constitutional provision, a statute would be necessary, as a mere procedural matter, in order to confer jurisdiction on the court to try a case in lieu of a jury. It is believed, however, that such argument should not prevail. Judge Green's inferences are based on an entirely different constitutional provision, that relating to juries in criminal cases, from the language of which no implied power in the parties to waive can be deduced. Section 169 of chapter 50 of the Code, relating to the trial of appeal cases, provides that, where the sum in controversy exceeds twenty dollars, there shall be a trial by jury if "either party so require." This provision has been construed as dispensing with a jury unless one is demanded and hence as permitting a silent waiver. See Lambert *v.* Inter-Urban Motor Co., *infra*, 10. It will be noted that the constitutional provision relating to trials in civil cases quoted above, in substantially identical language, provides that there shall be a trial by jury, "if required by either party." Hence, in the trial of civil cases, the Constitution itself, independently of statute, may be construed as impliedly conferring jurisdiction on the court to act in lieu of a jury unless a jury is affirmatively demanded.

Although there are indications to the contrary in some of the earlier cases,[2] the effect of the statute, as finally construed by the court, seems to be that the right will not be considered as waived by mere failure to claim it provided the record evidences no positive acts which may be interpreted as an affirmative waiver. In *Lipscomb* v. *Condon,*[3] the court says:

> "Waiver of the right of trial by jury must be by consent entered of record. It cannot be merely inferred from the fact that the court tried the case without objection."

Although, as is further indicated in the opinion in *Lipscomb* v. *Condon,* no presumption of waiver can arise when the record is silent, still it is not required that the language of the record shall speak in express terms of waiver. In *King* v. *Burdett,*[4] the court says:

> "Where the record shows, 'that neither party required a jury, and the court is substituted in lieu of a jury to try the case,' and the case was tried by the court, this is 'consent entered of record' * * *."

A careful reading of the opinion in this case will indicate that the operative words of waiver upon which the court relied are the words "that neither party required a jury." The words "and the court is substituted in lieu of a jury to try the case" evidently are interpreted as merely indicating the action of the court in pursuance of the waiver, and not as evidencing acts of the parties contemplating a waiver.

Perhaps the latest views of the court as to what the record must show are expressed in the comparatively recent case of *Salzer* v. *Schwartz,*[5] where it is said:

> "The waiver need not be in express words; but if it appears from the record that such waiver was intended by conduct of the parties it is sufficient. But we repeat that this must be shown from the record. If the record be silent no waiver can be inferred."

The conclusion resulting from views expressed in the cases cited would seem to be that, while nothing can be inferred from mere silence—a silent record—as where the

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[2] See Phelps & Pound v. Smith & Co., 16 W. Va. 522 (1880).
[3] 56 W. Va. 416, 49 S. E. 392, 67 L. R. A. 670, 107 Am. St. Rep. 938 (1904).
[4] 12 W. Va. 688 (1878).
[5] 88 W. Va. 569, 107 S. E. 298 (1921).

parties merely go to trial without demanding a jury and the record is silent as to a waiver, yet where the record expressly shows positive acts from which an intention to waive may be inferred, such is sufficient, although the waiver be not expressly stated in the record. It is perhaps needless to suggest, however, that the safest practice in all cases will be to have the record state an express and positive waiver.

The statute quoted above requiring an express consent to be entered of record is the one usually referred to by the court as controlling the conditions of waiver. There is, however, another statute dealing with the matter of waiver. Section 7 of chapter 131 of the Code reads as follows:

> "The court, in an action at law, if neither party require a jury, or if the defendant has failed to appear, shall ascertain the amount the plaintiff is entitled to recover in the action, if any, and render judgment accordingly."

This section, it will be noted, more nearly conforms to the language of the Constitution, and, in the absence of the section first quoted, might be sufficient to dispense with the necessity of a positive waiver. It has not, however, been recognized as warranting any departure from the requirements of the section in chapter 116, but rather has been accepted as controlling the situation where the defendant has suffered a default. In *Salzer* v. *Schwartz*[6] the question arose whether this section refers to failure of the defendant to appear to the action or failure to make a physical appearance in court when the plaintiff asks for judgment. The defendant had appeared to the action and pleaded at rules, but he made no appearance in court when the case was called for trial. The plaintiff, relying on the section last quoted, waived a jury and submitted the case to the court. The Supreme Court of Appeals, reversing the judgment, held that the statute referred merely to failure to appear to the action, and that, since the defendant had appeared and pleaded at rules, a jury could have been dispensed with only in pursuance of section 29 of chapter 116 by consent of both parties entered of record.

The statutes quoted above deal with jury trials in courts of record; in other words, with common-law juries. A

[6] *Idem.*

jury in a trial before a justice of the peace is not a common-law jury[7] and hence does not come within the purview of of these statutes. The manner in which a party must assert, or may waive, his right to a jury trial before a justice of the peace is prescribed by chapter 50 of the Code.[8] The provisions of chapter 50 are very plain to the effect that, in a trial before a justice, where a party is entitled to a jury trial, the right will be waived unless affirmatively claimed before the justice enters upon a trial of the case. But in a trial *de novo* in a circuit court upon an appeal from a justice of the peace, the jury, if one is impaneled, is a common-law jury.[9] Hence it might be inferred that in such a trial the waiver of a jury would be controlled by the provisions of section 29 of chapter 116; in other words, that a jury could be waived only by consent of both parties entered of record; and in the absence of any additional statutory provision, it might be difficult to escape such a conclusion. However, as is indicated in the recent case of *Lambert* v. *Inter-Urban Motor Company*,[10] the conditions of the waiver in a trial on appeal are prescribed by still another statute. In this case, the justice of the peace rendered judgment for the plaintiff and the defendant appealed. The plaintiff, appellee, appeared in the circuit court and, in the absence of the defendant, waived a jury and submitted the case to the court in lieu of a jury. The defendant, relying on the authority of *Salzer* v. *Schwartz*,[11] argued that, since it had made an appearance to the action and an issue had been made up before the justice, a jury could not be waived in the circuit court without its consent entered of record. But the Supreme Court of Appeals calls attention to the fact that section 28 of article 8 of the Constitution provides that "appeals shall be allowed from judgments of justices of the peace in such manner as may be prescribed by law," and that section 169 of chapter 50 of the Code, relating to the trial of appeal cases, provides for a trial by jury only in the event that "either party so require." Hence the court reaches the conclusion that a jury in an appeal case is a privilege to be demanded rather than a right to be waived, and that since the defendant was not in court to demand a

[7] Richmond *v.* Henderson, 48 W. Va. 389, 37 S. E. 653 (1900).
[8] §§71-73.
[9] Lovings *v.* Norfolk & W. R. Co., 47 W. Va. 582, 35 S. E. 962 (1900).
[10] 99 W. Va. 135, 128 S. E. 81 (1925).
[11] *Supra*, n. 5.

jury, as it should have been, when the case was called for trial, it would not be heard to complain. *Salzer* v. *Schwartz* is distinguished on the ground that it was an action instituted in the circuit court, to which the provisions of section 29 of chapter 116 applied, and to which, of course, the provisions of section 169 of chapter 50 could not apply. While, in the absence of any specific statutory provision relating to appeal cases, it might be argued that the provisions of section 29 of chapter 116 should apply thereto, it would be difficult to maintain such an argument in view of the provisions of section 169 of chapter 50, unless the Constitution requires something in the way of waiver that the latter section does not require. But it has already been indicated that even in cases instituted in the circuit courts the requirement that the waiver be by consent entered of record is a statutory requirement and not a constitutional requirement. Moreover, the language of section 169 of chapter 50 more nearly conforms to the language of the Constitution than does the language of section 29 of chapter 116.

The right to trial by jury in criminal cases is guaranteed by the fourteenth section of the Bill of Rights, which reads as follows:

> "Trials of crimes, and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men, * * * ."

It will be noted that this provision of the Constitution does not seem merely to undertake to preserve a right or privilege which may be the subject of a waiver, as is done in the constitutions of a majority of the states,[12] but seems unequivocally to prescribe a positive and definite method of trial. Hence it might be doubted whether the legislature would have authority to enact a statute permitting waiver of a jury trial in any criminal case where there was an issue to be tried. It will be recalled, however, that section 29 of chapter 116 of the Code provdes that,

> "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

[12] See constitutional provisions of other states quoted by Judge Woods in his opinion in State *v.* Cottrill, 31 W. Va. 162, 6 S. E. 428 (1888), at pp. 183 *et seq.*

and fact shall be heard and determined, and judgment given by the court; * * *."

The question of the constitutionality of this statute, to the extent that it authorizes waiver of a jury in misdemeanor cases, first came up for decision in the case of *State* v. *Cottrill.*[13] Judges Johnson and Woods were strongly opposed to the constitutionality of the statute, so far as it applies to criminal cases, chiefly on the ground that the constitutional provision is not couched in terms of a right or privilege, but prescribes an unqualified and emphatic method of trial. On the other hand, Judges Snyder and Green were as strongly convinced of its constitutionality, and, the court being equally divided, the adjudication was in favor of the statute. Judges Snyder and Green refused to accept the literal construction placed on the language by their colleagues. Furthermore, they gave much weight to the fact that the bench and the bar had long acquiesced in the constitutionality of the statute and particularly emphasized the fact that the provision was perpetuated in the Constitution of 1872 in the light of this acquiescence. Judge Green explains that the courts of many states hold that, where a constitutional provision does not authorize the waiver of a jury, still, although the constitution does not prohibit a waiver, there could be no waiver unless a statute authorized it, because otherwise the trial court would not have jurisdiction to act in lieu of a jury, and he believed that such would be true in this state. The argument is that the Constitution undertakes merely to prevent the legislature from passing a statute dispensing with a jury trial without consent of the parties, but does not otherwise undertake to interfere with common-law methods of procedure. The common-law method of trial in criminal cases is by jury. Hence, since the parties, in the absence of a statute so authorizing, could not by consent substitute a method of trial contrary to the common-law method of trial by jury, any effort to do so would be an unauthorized attempt to bestow jurisdiction on the court. Viewed in this light, the question is not one of merely waiving a right, but of changing the method of procedure. The proposition that parties by agreement cannot substitute their own methods of procedure for established methods of practice is

[13] *Supra.*

generally sound and is recognized in other phases of trial precedure.[14] However, the very argument of Judges Johnson and Woods was to the effect that the Constitution intends to establish a definite and positive method of trial and so intends to prevent the legislature, through the medium of consent of the parties or otherwise, from bestowing jurisdiction on the court to act in lieu of a jury in criminal cases. In other words, the argument is that the Constitution deals with a matter of jurisdiction, and not with a matter of right or privilege.

The holding of Judges Snyder and Green, right or wrong, has been approved in subsequent cases.[15] In the light of their opinions, no reason is perceived, so far as the Constitution is concerned, why it is not within the power of the legislature to pass a statute permitting the waiver of a jury in a felony case. In fact, Judge Green indicates that such a waiver is permitted, either by constitutional provision or by statute, in some of the states, and suggests no obstacle to such a statutory waiver in this state, except certain procedural conditions prevailing in the earlier English practice which never prevailed in this state and no longer exist in England.[16] It would seem difficult to make any distinction between misdemeanors and felonies on the basis of our own constitutional provision.

The right to a jury in the trial of a criminal case before a justice of the peace is regulated by section 226 of chapter 50 of the Code, in the following language:

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[14] Baltimore & Ohio R. R. Co. *v.* Polly, Woods & Co., 14 Gratt. (Va.) 447, 471-477 (1858).

[15] State *v.* Griggs, 34 W. Va. 78, 11 S. E. 740 (1890); State *v.* Denoon, 34 W. Va. 139, 11 S. E. 1003 (1890); State *v.* Alderton, 50 W. Va. 101, 40 S. E. 350 (1901).

[16] "Now, from Bish. Crim. Pro., ch. 25, 'On the Doctrine of the Waiver of Rights,' it would appear that, as prisoners anciently accused in England of treason or felony were not allowed counsel to assist them in their defence before a jury, but it was deemed a part of the duty of the judge to assist them, and act as their counsel, there was in such cases but very limited room for the operation of this doctrine of the waiver of rights by the accused; for the waiver of a right by the accused, proceeding from the advice of the court, would be in its nature a judicial error, of which the accused ought to be allowed to avail himself. In this way it might happen that a particular right of such criminal could not be waived; and this having been established as law, though the reason on which it was based had ceased when the accused was permitted in every criminal case to have the aid of counsel, yet some courts would hold that such particular right could, after this change in the law, be waived; while others would still adhere to the ancient law, and hold that such particular right could not be waived. Accordingly, we find much conflict of authority as to whether now a person accused of felony can waive certain rights; and among the cases in which there is such conflict is the question whether a person accused of felony can effectually waive his constitutional right of trial by a jury even when permitted to do so by statute law. But it has never been anywhere questioned that his trial by jury might, if the court was authorized to try the case by consent of parties, be waived by the accused in a misdemeanor case; for in such case the accused was always permitted to appear by counsel, and always could have waived a right of trial by jury." Opinion of Judge Green in State *v.* Cottrill *supra*, n. 12, at p. 211.

"When the penalty authorized by law is a fine exceeding five dollars, or imprisonment, the accused shall be entitled to a trial by twelve jurors, or a less number if demanded, *under the regulations respecting such trials in civil suits before justices*; * * * ."

When a criminal case is appealed from a justice's court, section 230 of chapter 50 provides that "the court shall proceed to try the case as upon indictment or presentment."

It remains to discuss briefly the effect of the last sentence of the thirteenth section of the Bill of Rights, which reads as follows:

"No fact tried by a jury shall be otherwise re-examined in any case than according to the rules of the common law."

The jury mentioned in this provision has been construed to mean a common-law jury.[17] Hence, of course, it would apply to all common-law actions instituted in courts of record, and, as we have seen,[18] would apply to cases tried on appeal from justices of the peace. The effect of the provision, in general, is that a trial by a common-law jury must be reviewed by the common-law writ of error or by some of the extraordinary legal remedies. Otherwise, it could not be "re-examined * * * according to the rules of the common law." Under the earlier decisions,[19] it was conceived that this provision applied to a trial by a jury before a justice of the peace. Since a justice's court is not a court of record, such a trial could not be reviewed in a circuit court by writ of error, a writ of error being appropriate only for purposes of reviewing a judgment rendered by a court of record. Neither could there be a trial *de novo* in the circuit court on appeal, as has always been proper when a justice has tried a case without a jury, since such a re-examination would not be "according to the rules of the common law." Consequently, such cases were brought up to the circuit courts for review by a writ of certiorari.[20] But in the later case of *Richmond* v. *Henderson*,[21] the court, reversing the earlier decisions requiring a writ of certiorari in such cases, held that a jury in a case tried before a justice

[17] Richmond *v.* Henderson, *supra*, n. 7.
[18] Lovings *v.* Norfolk & W. R. Co., *supra*, n. 9.
[19] See cases cited in the syllabus of Richmond *v.* Henderson, *supra*.
[20] *Idem.*
[21] *Supra*, notes 7 and 17.

of the peace is not a common-law jury, and hence that there is no reason why such cases may not be appealed and tried *de novo* in the circuit courts like cases tried by a justice without a jury. Wherefore, a writ of certiorari is no longer allowed in such cases.

Since, when the amount in controversy, exclusive of interest and costs, is fifty dollars or less, an action cannot be brought in a circuit court, and a jury in a trial before a justice of the peace is held not to be a common-law jury, it might be conceived that both parties in such a case, where the amount in controversy, exclusive of interest and costs, exceeds twenty dollars, are deprived of the right to a common-law jury guaranteed by the Constitution. Likewise, since, when the amount in controversy, exclusive of interest and costs, is three hundred dollars or less, the plaintiff may sue before a justice of the peace, it might be thought that in such a case, where the amount in controversy, exclusive of interest and costs, exceeds twenty dollars, the defendant would be deprived of his constitutional right to a trial by a common-law jury. However, as Judge Brannon indicates in *Lovings* v. *Norfolk & W. R. Company*,[22] since either party, when the amount in controversy, exclusive of interest and costs, exceeds fifteen dollars, has an absolute right to appeal to the circuit court, where he may have a trial *de novo* by a common-law jury, the right to the common-law jury guaranteed by the constitution is not denied, but merely withheld until the trial *de novo* on appeal. It would seem that this consideration alone, if no other, would compel the court to hold that a jury in the trial of an appeal case must be a common-law jury. Wherefore, since a common-law jury is a jury composed of twelve men, it was held in *Lovings* v. *Norfolk & W. R. Company* that §169 of chapter 50 of the Code, so far as it undertakes to authorize a jury of six men in the trial of an appeal case, is unconstitutional.

—L. C.

[22] *Supra*, notes 9 and 18.