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Federal Procedure - Trial Practice - Not Reversible Error for Trial Judge to Summon Jury Sua Sponte After Waiver

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FEDERAL PROCEDURE—TRIAL PRACTICE—NOT REVERSIBLE ERROR FOR TRIAL JUDGE TO SUMMON JURY SUA SPONTE AFTER WAIVER—Plaintiff instituted this action for breach of contract and defendant counterclaimed. Neither party demanded a jury trial during the period in which it was claimable as of right. Subsequently defendant moved for a jury trial. The motion was denied and was never renewed. Seven months later, on the eve of the trial, the court issued an order *sua sponte* for a jury trial. Plaintiff's objection was overruled. The jury awarded damages to plaintiff in the same amount as the conceded counterclaim. On appeal, *held,* affirmed, one judge dissenting. Although the trial judge's action in calling a jury on his own motion may have been erroneous, it did not constitute reversible error.

United Press Associations v. Charles, (9th Cir. 1957) 245 F. (2d) 21, cert. den. 354 U.S. 925 (1957).

The Seventh Amendment to the Federal Constitution preserves the right to jury trial.[1] The Federal Rules of Civil Procedure, however, require positive action by the litigant if he is to enjoy that right.[2] Failure to make a timely demand for jury trial results in waiver of the right,[3] subject to the discretionary power of the court to relieve against the waiver upon motion.[4] Since the bar has gained familiarity with the rules, this discretionary power has been sparingly used.[5] The courts have respected the wish of the committee framing the rules to limit the use of the jury trial by requiring positive action to protect the right.[6] The principal case, however, involves more than ignoring a settled judicial policy in regard to the exercise of judicial discretion. Here, with no motion pending before it, the trial court ordered a jury trial *sua sponte.*[7] The federal rules imply that a court has no authority to issue such an order.[8] This interpretation is supported by the original drafts of the rules. These contain phraseology empowering the court to call a jury on its own motion.[9] However, amendments incorporated into the rules prior to their adoption permitted relief against waiver only upon motion by a party.[10] The commentators are

1 U.S. CONST., Amend VII. See also Rule 38(a), Fed. Rules Civ. Proc., 28 U.S.C. (1952).

2 Rule 38(b), Fed. Rules Civ. Proc., 28 U.S.C. (1952). See also Petsel v. Chicago, Burlington and Quincy Railroad, (S.D. Iowa 1951) 101 F. Supp. 1006.

3 Rule 38(d), Fed. Rules Civ. Proc., 28 U.S.C. (1952).

4 Rule 39(b), Fed. Rules Civ. Proc., 28 U.S.C. (1952).

5 See Krussman v. Omaha Woodmen Life Ins. Soc., (E.D. Idaho 1941) 2 F.R.D. 3; Arnold v. Chicago, Burlington and Quincy Railroad, (D.C. Neb. 1947) 7 F.R.D. 678; Canister Co. v. National Can Corp., (D.C. Del. 1948) 8 F.R.D. 408; Steiger v. Mullaney, (S.D. N.Y. 1948) 8 F.R.D. 486.

6 Quite naturally, fewer jury trials result when inaction results in waiver than when inaction results in injury adjudication. That this result was desired by the committee is evident from their citation, appearing in the Notes of the Advisory Committee on Rules following rule 38, of James, "Trial by Jury and the New Federal Rules of Procedure," 45 YALE L.J. 1022 (1937), where it was stated, at 1026: "The right of jury trial should not be expanded. This method of settling disputes is expensive and dilatory—perhaps anachronistic. Indeed, the number of jury trials should be cut down if this can be done so as not to jeopardize the attainment of other objectives." See also note 2 supra.

7 The order of the court read, "Ordered, *sua sponte,* under Rule 39, F.R.C.P., that the case be tried by a jury." Principal case at 30.

8 Most significant is the difference between rule 39(b), which authorizes the court to relieve against waiver ". . . in its discretion upon motion . . ." and rule 39(c), which empowers the court to summon an advisory jury ". . . upon motion or of its own initiative. . . ."

9 The counterpart of rule 39(b) in the May 1936 draft of the rules reads: "In all actions, the court may at any time in its discretion or upon motion by any party, order any issue or issues to be tried by jury, although no right to trial by jury exists . . . because . . . of waiver by the parties." Proposed Rule 46, lines 14-20. 5 MOORE, FEDERAL PRACTICE, 2d ed., §39.08, n. 7 (1951).

10 The April 1937 draft of rule 39(b)'s counterpart reads: ". . . the court in its discretion upon motion of that party may order any issue tried by a jury." The final report of November 1937 amended the clause to read as it now appears in rule 39(b). See 5 MOORE, FEDERAL PRACTICE, 2d ed., §39.08, n. 7 (1951).

nearly unanimous in denying the power of the court to order jury trial on its own motion.[11] The courts themselves have consistently declared that they have no such power, relying upon the above legislative history of rule 39[12] to support their decisions.[13] The action of the trial court cannot be upheld as properly summoning an advisory jury,[14] since the court failed to find the facts specially as is required in such an instance.[15] That the trial court erred in ordering a jury trial *sua sponte* is practically conceded by the appellate court. The primary question presented, therefore, is whether this error was prejudicial. The decision that it was not rests upon two grounds: first, that appellant waived his objection to the order by going to trial; second, that the error was harmless. The first theory is untenable. To require the plaintiff to stand on the procedural objection, as the majority demands if waiver is to be avoided, would have one of two results: if the appellate court determined the question against plaintiff after a dismissal for want of prosecution, he could never try the case on the merits;[16] if, on the other hand, plaintiff's contention was sustained, the proceedings would be materially extended on an already crowded court docket,[17] with a decision on the merits being no closer to final determination. To force these alternatives upon a plaintiff conflicts with the letter and policy of the rules.[18] Discussion of the second ground relied upon by the court must be postulated on the fact that the judge, the only officer qualified or authorized to determine issues of fact presented in this case never did so.[19] There are compelling reasons to regard this as substantial error. First, there are fundamental differences between the conduct of court and jury trials in the manner of presenting evidence, the psychological techniques used, and the complexity of evidence deemed presentable. For the court to announce a few days before the trial that a jury will determine the issues seriously impairs the rights of a plaintiff who has prepared for trial by court.[20]

11 See 5 MOORE, FEDERAL PRACTICE, 2d ed., §39.08 (1951); but see 3A OHLINGER, FEDERAL PROCEDURE, rev. ed., p. 25 (1948).

12 See notes 10 and 11 supra.

13 See Hargrove v. American Century Ins. Co., (10th Cir. 1942) 125 F. (2d) 225; Roth v. Hyer, (5th Cir. 1944) 142 F. (2d) 227; Pallant v. Sinatra, (S.D. N.Y. 1945) 7 F.R.D. 293; Firemen's Ins. Co. of Newark v. Smith, (8th Cir. 1950) 180 F. (2d) 371.

14 "In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury. . . ." Rule 39(c), Fed. Rules Civ. Proc., 28 U.S.C. (1952).

15 Rule 52(a), Fed. Rules Civ. Proc., 28 U.S.C. (1952). For the requirement that facts be specially found where an advisory jury is used, cf. Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310 (1940); Webster-Brinkley Co. v. Belfield, (9th Cir. 1948) 166 F. (2d) 814.

16 Rule 41(b), Fed. Rules Civ. Proc., 28 U.S.C. (1952).

17 For crowded state of the Alaska federal court dockets, cf. Beckstrom v. Coastwise Line, (D.C. Alaska 1953) 13 F.R.D. 480.

18 ". . . the entire purpose of the rules was to strike from judges and litigants useless shackles of procedure to the end that a fair trial of the essential questions could be had." Glaspell v. Davis, (D.C. Ore. 1942) 2 F.R.D. 301 at 304.

19 See Judge Pope's dissenting opinion, principal case at 29.

20 At least two instances of these disadvantages are apparent in the present case.

Second, the order resulted in a finding of facts which was not subject to the same kind of review on appeal to which a judicial fact determination would have been subject. Yet, the majority admits that the jury's verdict could be considered tenuous, and the minority flatly declares that it was unsupportable. Viewed in this light, depriving the appellant of an "equitable" review of fact determinations was a substantial impairment of his rights.[21] Third, the decision in the principal case opens the way for a judge to shirk his duty to determine factual issues whenever that duty is distasteful to him. When jury trial has been waived, the responsibility for determining the factual issues rests squarely upon the judge.[22] If precedent is established allowing him to avoid this responsibility without committing reversible error, there will be no way under the existing rules to force an assumption of this solemn task. Such a result is not calculated to strengthen the procedural or substantive aspects of the judicial system and therefore should not be allowed to gain the slightest foothold.

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Plaintiff introduced exceedingly complex evidence relative to the amount of damages, doubtless in the belief the court would adjudicate the issues. Also, plaintiff prepared much of the testimony of its officers, located at its headquarters in Ohio, by deposition, and was unable on short notice to arrange for personal testimony. See principal case at 24, 25, and 29.

21 "The court [in the event that jury trial is waived] has the responsibility of decision, and should make findings of fact and conclusions of law which are subject to the 'equity' type of review that is broader than the 'law' type of review for cases tried to a jury as of right. Failure to discharge this duty will normally lead to reversal, if appeal is taken, and remand to the trial court for performance of its duty. . . ." 5 MOORE, FEDERAL PRACTICE, 2d ed., §38.43, p. 338 (1951).

22 Ibid.