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Waiver of Trial by Jury in Montana Civil Cases under the Montana Rules of Civil Procedure

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NOTES

WAIVER OF TRIAL BY JURY IN MONTANA CIVIL CASES UNDER THE MONTANA RULES OF CIVIL PROCEDURE

The Montana Rules of Civil Procedure,[1] in effect since January 1, 1962, present the following questions with respect to waiver of jury trials in district court civil cases:

(1) Whether Rule 38(d), which provides that the right to a jury trial is waived by failure to demand it, is consistent with the Montana Constitution.

(2) Whether an amendment of a pleading, changing the action from equity to law, revives the right to jury trial once waived under Rule 38(d).

(3) Whether Rule 39(c) gives the trial court discretion to call an advisory jury in cases where the right of trial by jury has been waived under Rule 38(d).

CONSTITUTIONALITY OF WAIVER OF JURY BY FAILURE TO DEMAND IT

Under article III, section 23 of the Montana Constitution, a jury trial in district court civil cases may be waived "upon default of appearance, or by consent of the parties expressed in such manner as the law may prescribe."

Under Rule 38(d) of the Montana Rules, "the failure of a party to serve a demand . . . constitutes a waiver by him of trial by jury."[2]

It can be seen that Rule 38(d) provides for automatic waiver of the right unless a demand for a jury is made. The question is whether this provision for waiver by failure to demand is consistent with the constitutional provision, quoted above, that a jury may be waived by "consent." Waiver is "the intentional relinquishment of a known right."[3] Can one, through *inaction,* be said to have expressed his *consent* to relinquish his right of jury trial? The writer, for reasons hereinafter developed, believes that the waiver provisions of Rule 38(d) are constitutional and should be upheld. There are, however, constitutional issues peculiar to Montana that pose serious questions concerning the validity of such waiver provisions.

[1]REVISED CODES OF MONTANA, 1947, §§ 93-2701-1 to 93-2711-7. Hereinafter, REVISED CODES OF MONTANA will be cited R.C.M., and the Montana Rules of Civil Procedure will be referred to as the Montana Rules.

[2]The waiver provisions of Rule 38(d) supersede the waiver statute under the former code practice. That waiver statute, R.C.M. 1947, § 93-5301, provides:

> Trial by jury may be waived by the several parties to an issue of fact in actions arising on contract, or for the recovery of specific real or personal property, with or without damages, and with the assent of the court in other actions, in manner following:
>
> 1. By failing to appear at the trial;
> 2. By written consent, in person or by attorney, filed with the clerk;
> 3. By oral consent, in open court, entered in the minutes.

[3]Mundt v. Mallon, 106 Mont. 242, 248, 76 P.2d 326 (1938).

Federal Law

In the federal courts, where the federal constitution's seventh amendment guarantees jury trial in civil cases, waiver by failure to demand under Rule 38(d) of the Federal Rules of Civil Procedure has been uniformly upheld.[4] The provision of the Federal Rule, for waiver by failing to demand, is identical to the Montana Rule.

With respect to jury trial, however, federal law does not control the states. The seventh amendment guaranty of jury trial in civil cases is applicable only to federal courts. Morever, the fourteenth amendment guaranties of "due process" and "equal protection" do not restrict the control of the individual states over jury trial in state courts. The federal constitution does not limit the power of state governments to modify, alter, or even abolish trial by jury.[5]

Thus, the constitutional question here presented is one of Montana constitutional law only, and one on which the decision of the Montana Supreme Court will be final.

Other States Generally

Most state constitutions make no specific provisions for waiver of jury trial. Most have only broad provisions for preservation of the jury system. For example, Iowa's constitution provides: "The right of trial by jury shall remain inviolate."[6] In *Schloemer v. Uhlenhopp*,[7] plaintiff failed to file written demand for a jury as required by the Iowa Rules of Civil Procedure. Plaintiff contended that the requirement for a demand was repugnant to the Iowa Constitution. The Iowa Supreme Court upheld the waiver, however, saying:[8]

> There seems no doubt of the proposition that the legislature may make reasonable regulations as to the practice and procedure in civil cases so long as the right to a jury trial is not materially impaired. . . . It may provide that to entitle a party to a jury trial he must make a demand therefor. . . . We think the reasonable regulation or procedure prescribed by the rules does not abridge or limit or modify the right which the constitution says shall remain inviolate. It merely prescribes an orderly procedure by which the litigant may exercise his right.

Other states, with similar constitutional provisions, have reached similar conclusions.[9]

[4]See, *e.g.*, Wilson v. Corning Glass Works, 195 F.2d 825 (9th Cir. 1952). Hereinafter, the Federal Rules of Civil Procedure will be referred to as the Federal Rules.
[5]31 AM. JUR. *Jury* §§ 9 and 10.
[6]IOWA CONST. art. I, § 9.
[7]237 Iowa 279, 21 N.W.2d 457 (1946).
[8]*Id.* at 282, 21 N.W.2d at 458.
[9]See, *e.g.*, Stephens v. Kasten, 383 Ill. 127, 48 N.E.2d 508 (1943).

FOUR STATES WITH CONSTITUTIONAL PROVISIONS FOR WAIVER SIMILAR TO THAT OF MONTANA

Washington

The Washington Constitution provides that "the legislature may provide . . . for waiving of the jury in civil cases where the *consent* of the parties interested is *given* thereto."[10]

In *State ex rel. Clark v. Neterer*,[11] plaintiff failed to file a written demand for a jury as required by statute. He contended that the statute was repugnant to the constitutional requirement that waiver must be by "consent . . . given," and that this meant an *express* giving of consent. The Washington court, however, upheld the waiver, holding that the phrase "consent . . . given" included both *express* consent and *implied* consent, and that the constitution permitted the legislature to make a reasonable definition of what would constitute the giving of implied consent.

In the *Clark* case, the Washington court took the position that the nature of the constitutional right of jury trial was linked to the extent of the right under the established law and practice of Washington Territory at the time the state consitution was adopted. The territorial statute provided these three methods of waiver:[12]

(1) By failing to appear at the trial.
(2) By written consent in person or by attorney, filed with the clerk.
(3) By oral consent in open court entered in the minutes.

Subdivision (1) of this statute would permit waiver without the express consent of the defaulting party. The court in the *Clark* case said:[13]

> We think it was not intended by the Constitution that there should be any radical change in the established practice, but that the words "consent . . . given" were used in their broadest sense. The Legislature, therefore, may define what act shall constitute consent given.

The Washington Supreme Court has recently reaffirmed this position.[14]

The three methods of waiver under Washington's territorial statute, quoted above, are the same as those under both Montana's territorial statute and Montana's now superseded state statute. Unless the difference in the state *constitutions* is material, the Washington holding is persuasive authority for sustaining Montana Rule 38(d).

Arizona

The Arizona Constitution provides that "provision may be made by law . . . for waiving of a jury in civil cases where the *consent* of the parties interested is *given* thereto."[15]

[10]WASH. CONST. art. I, § 21. (Emphasis added.)
[11]33 Wash. 535, 74 Pac. 668 (1903).
[12]WASH. CODE, 1881, § 245.
[13]74 Pac. at 670.
[14]Hoye v. Century Builders, Inc., 52 Wash. 2d 830, 329 P.2d 474 (1958).
[15]ARIZ. CONST. art. II, § 23. (Emphasis added.)

In *Jenkins v. Skelton*,[16] the court was concerned with a statute which provided that failure to demand a jury would be regarded as a waiver. The Arizona Supreme Court held this statute to be consistent with the constitutional requirement of "consent . . . given." The court said:[17]

> The provisions . . . [of the statute] concerning the waiving of trial by jury, were in existence as paragraph 1389, Civil Code of 1901, at the time of the adoption of our Constitution, and the rules of construction would require us to give to the expressions in the Constitution about "waiver" the meaning contained in the territorial statutes prior to statehood, as the Constitution only undertakes to preserve the right of trial by jury as it existed at the time of its adoption.

The Arizona constitutional language, "where the consent of the parties interested is given thereto," is the same as Washington's. Although the Arizona court came to the same result as the Washington court, the theory was actually different. The Arizona court upheld the state waiver statute because it was the same as the territorial statute. The Washington court upheld the state waiver statute even though its provision for waiver by failing to demand was completely unknown to the territorial practice. The reasoning of the Arizona court is not applicable to Montana because Montana's territorial statute, like Washington's, had no provision for waiver by failing to demand.

California

The California Constitution provides for waiver of jury trial in civil actions "by the *consent* of the parties, *signified* in such manner as may be prescribed by law."[18]

In *City of Los Angeles v. Zeller*,[19] a special statute applicable to street opening cases was considered. This statute required a demand for a jury. The California Supreme Court ruled that the legislature could constitutionally predicate "consent" for waiver on failure to make a demand.

In *Bennett v. Hillman*,[20] an ordinary action at law, California's general waiver statute[21] was involved. The statute provided for waiver of a jury by failing to make a demand. Defendant argued that the constitutional requirement of consent, which will amount to a waiver, means *express* consent and that it will not do for the legislature to predicate waiver upon a *failure* of a party to demand a jury. The California district court of appeal, however, held that the supreme court's reasoning in the *Zeller* case required upholding the statute as "a proper exercise by the legislature of the power to prescribe the manner in which the right of trial by jury may be waived."[22] The California Supreme Court denied a rehearing of this case.[23]

[16]21 Ariz. 663, 192 Pac. 249 (1920).
[17]192 Pac. at 252.
[18]CAL. CONST. art. I, § 7. (Emphasis added.)
[19]176 Cal. 194, 167 Pac. 849 (1917).
[20]37 Cal. App. 586, 174 Pac. 362 (1918), *rehearing denied* by California Supreme Court, 174 Pac. 362 (1918).
[21]CAL. CODE CIV. PROC. § 631.
[22]174 Pac. at 363.
[23]174 Pac. 362 (1918).

In *Glogau v. Hagan*,[24] a California district court of appeal again upheld the enforcement of waiver, saying:[25]

> The Constitution vested the legislature with power to determine such acts or omissions as shall deprive a litigant in a civil action of a jury trial. This was done by enactment of the statute. Code Civ. Proc. section 631. . . .

In contrast to the civil cases discussed above, the California Supreme Court has forbidden waiver of a jury in criminal cases except by consent *expressed in words*,[26] because the state constitution provides that waiver in criminal cases must be "by *consent* of both parties *expressed in open court by defendant and his counsel.*"[27] from this it may appear that the California courts have placed different construction on "consent . . . signified" than on "consent . . . expressed," but this is not the result of the California cases. These cases have simply recognized that "expressed in open court by defendant and his counsel" leaves no room for waiver by implication.

Idaho

The Idaho Constitution provides for waiver in civil cases "by the *consent* of the parties, *signified* in such manner as may be prescribed by law."[28]

Until 1958, Idaho's waiver statute was similar to Montana's section 93-5301,[29] the waiver statute now superseded by Rule 38(d). In 1958, Idaho adopted rules of civil procedure, and Idaho Rule 38(d) is the same as Montana Rule 38(d). To date, the Idaho Supreme Court has not had occasion to rule on whether failure to demand can be deemed a "consent" for waiver. The Idaho constitutional provision, however, uses exactly the same language as the California Constitution; for this reason, the Idaho court may be expected to uphold the waiver provision of Idaho Rule 38(d).

MONTANA

Introduction

With ample authority from the federal courts and from sister states sustaining waiver for failure to demand, it may seem inexorable that Montana should follow suit, and, it is submitted, Montana *should* do just that. Admittedly, however, the prevailing view of other jurisdictions does not necessarily apply in Montana because the constitutional provisions in the other jurisdictions are not the same as Montana's. Article III, section 23 of the Montana Constitution provides for waiver "upon *default of appearance,* or by *consent* of the parties *expressed* in such manner as the law may prescribe." (Emphasis added.) There are arguments for holding that this renders invalid the provision for implied waiver as contained in Rule 38(d).

[24]107 Cal. App. 2d 313, 237 P.2d 329 (1951).
[25]237 P.2d at 332.
[26]People v. Holmes, 54 Cal. 2d 442, 353 P.2d 583 (1960).
[27]CAL. CONST. art. I, § 7. (Emphasis added.)
[28]IDAHO CONST. art. I, § 7. (Emphasis added.)
[29]*Supra* note 2.

First, the Montana Constitution specifically provides for one type of implied waiver: *i.e.*, upon default of appearance. Second, as to other methods of waiver, the Montana Constitution uses the words "consent . . . *expressed*" rather than ". . . *given*" or ". . . *signified.*" Arguably, the constitution meant to restrict implied waiver to defaults and to require affirmative acts for any other waiver.

Certainly, Montana's constitutional provisions on waiver use language different from those of other states. Whether the framers of the Montana Constitution intended any different construction is the question. The answer requires looking at the background—the practice in Montana at the time the constitution was adopted.

Waiver under Montana territorial practice

The fundamental law of the Montana territory was the federal constitution, and the right of jury trial in civil cases was governed by the seventh amendment:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

Federal law made no provision for waiver, but a Montana territorial statute provided for waiver in three ways:[20]

(1) By failing to appear at the trial.
(2) By written consent, in person or by attorney, filed with the clerk.
(3) By oral consent, in open court, entered in the minutes.

These are the same methods as conatined in the now superseded state statute, section 93-5301,[21] and none involve waiver by failing to demand as provided by Montana Rule 38(d).

Montana Constitution

When the Montana constitutional convention met in 1889, the territorial statute controlled the practice on waiver of jury trial. This fact is important in determining the meaning of the constitutional provision because, as the Montana Supreme Court has often said, the territorial practice may be looked to for determining the meaning of the constitution.[22]

At the constitutional convention, William Wirt Dixon, a delegate from Silver Bow County, and a lawyer, proposed what became article III, section 23.[23] Although the convention debated parts of his proposed section, the

[20]Comp. Stat. of Mont., 15th Session, First Div. ch. VII § 279 (1887).
[21]*Supra* note 2.
[22]See, *e.g.*, Bull v. Butte Elec. Ry., 69 Mont. 529, 532, 223 Pac. 514 (1924).
[23]PROCEEDINGS AND DEBATES OF THE MONTANA CONSTITUTIONAL CONVENTION 125 (1889). On July 18, 1889, the convention had resolved itself into the "Committee of the Whole" to debate the proposed bill of rights. *Supra* at 107. During these proceedings, the following section, prepared by the convention's Judiciary Committee, was submitted to the delegates:

> The right of trial by jury shall remain inviolate in criminal cases, but a jury in

waiver provisions were not even discussed. The official report of the convention's proceedings does not disclose what Mr. Dixon may have had in mind when he proposed that a jury could be waived "upon default of appearance, or by consent of the patries expressed in such manner as the law may prescribe." He may have had a reason for using that particular language, but he did not explain his reasons to the convention and no inquiry was made of him.

Montana cases

The Montana Supreme Court has often considered the constitutional right of jury trial, though the court has never had presented to it the constitutionality of a waiver provision such as contained in Rule 38(d).

One of the early cases was *State ex rel. Jackson v. Kennie.*[84] In a justice's court porceeding, relator had been jailed for failure to post bond to keep the peace. He contended that the proceeding was unconstitutional in not providing him with a jury trial. The supreme court disagreed, pointing out that this proceeding was one for the prevention, rather than punishment, of crime; that the rules of constitutional construction require construing the constitution in view of the conditions existing at the time of its adoption; that the right of trial by jury guaranteed under the constitution was "the right as it then existed, and not one created or extended, except by express terms, by the instrument itself";[85] and that when the constitution was adopted in 1889, the right of trial by jury did not exist under the territorial statutes for the *prevention* of public offenses. Since the territorial statutes did not grant a jury in that kind of case no *constitutional* right to a jury exists. The result of this case is that there is no constitutional right to a jury except in cases where the right was recognized under territorial practice.[86]

In *Montana Ore Purchasing Co. v. Boston & Montana Consolidated Copper & Silver Mining Co.*,[87] the court upheld the denial of a jury in a quiet title action. This was a suit in equity, and since juries were not claimable in suits in equity under the territorial practice, there is no right to a jury under the constitution.

Chessman v. Hale[88] was an action for damages for a private nuisance, and for an injunction. At the trial, the judge announced that he would treat the whole case as one in equity; neither party objected. On appeal, however, plaintiff contended that the trial court had improperly failed to submit to a jury questions on existence of the nuisance and on damages.

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civil cases in all courts or in criminal courts not of the grade of felony, may consist of less than twelve men, as may be prescribed by law.

Then, Mr. Dixon announced that he had a substitute for this section which he desired to offer. His substitute, so far as waiver is concerned, was worded exactly as article III, section 23 is now.

[84]24 Mont. 45, 60 Pac. 589 (1900).

[85]24 Mont. at 56, 60 Pac. at 593.

[86]But new statutory remedies, though unknown to the territorial practice, may be classed as actions at law and thus include a constitutional right to a jury. Solberg v. Sunburst Oil & Gas Co., 70 Mont. 177, 225 Pac. 612 (1924) (statutory action to compel the release of an oil and gas lease of record and for damages held to be an action at law).

[87]27 Mont. 288, 70 Pac. 1114 (1902).

[88]31 Mont. 577, 79 Pac. 254 (1905).

The supreme court sustained this contention, holding that plaintiff's silence could not be construed as waiving a jury. The court, speaking through Mr. Commissioner Poorman, said:[39]

> This provision of the Constitution that a jury may be waived in the manner prescribed by the law—that is, by written law—is mandatory and prohibitory. (Section 29, Article III.)[40] It is the duty of the court to grant to litigants the rights given them by this constitutional provision. The Constitution, in effect, *commands* that a jury trial, if waived, shall be waived in a certain manner, and *prohibits* its being waived in any other manner. The only manner *prescribed* by law for waiving a jury to a civil action is found in Section 1110, Code of Civil Procedure [of 1895][41] . . . .
>
> The plaintiff was under no obligation to demand a trial by jury, for that right was given him by the Constitution; nor was he required to submit to the court the question as to whether he had a right to a jury trial, for that right was also granted to him by the Constitution. . . . The right of trial by jury may be waived only in the manner provided by law. It cannot be taken away.

Commissioner Poorman here uses strong language that a litigant is not required to *demand* a jury, "for that right was given him by the Constitution." Nevertheless, this case is not authority for holding unconstitutional the waiver provisions of Rule 38(d). All the *Chessman* case said was that the constitutional provision, "consent of the parties expressed in such manner *as the law may prescribe,*" made the *statutory* methods *exclusive,* and forbade waiver in any manner other than those prescribed by statute. The *Chessman* case did not say that the waiver statute in existence when the constitution was adopted was fixed for all time and that the legislature was powerless to adopt other methods of waiver. The result of *Chessman,* then, is to forbid non-statutory methods of waiver; it does not forbid implied waiver when a statute specifically provides for such waiver.

Chief Justice Brantly dissented in the *Chessman* case.[42] He disagreed with Commissioner Poorman's opinion that a jury could be waived only by observance of the formalities prescribed by statute. The Chief Justice thought that in this case the plaintiff, in not objecting at the trial, was *estopped* to say he was denied his constitutional right to a jury. Interestingly, fifteen years later, in *Blackfoot Land Development Co. v. Burks,*[43] Commissioner Poorman had occasion to say:[44]

> We may remark, however, that neither in the case of *Chessman v. Hale* . . . ,nor in any other case, has this court ever held that a party may not by his course of conduct bar himself from the right of raising the question that he was not granted a trial by jury in a civil action.

[39] *Id.* at 590-91, 79 Pac. at 258.
[40] MONT. CONST. art. III, § 29 reads: "The provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."
[41] Section 1110 of the 1895 Code of Civil Procedure is the same as R.C.M. 1947, § 93-5301, *supra* note 2, the statute now superseded by Rule 38(d).
[42] 31 Mont. at 593, 79 Pac. at 259.
[43] 60 Mont. 544, 199 Pac. 685 (1921).
[44] *Id.* at 552, 199 Pac. at 687-88.

Perhaps Commissioner Poorman was attempting to mitigate the force of his own opinion in the *Chessman* case.

From the Montana cases discussed above, and from others,[45] it is clear that the Montana court has never had before it the question of the constitutionality of a general statute, applicable to actions at law, providing for waiver of a jury for failure to demand it. The court has always assumed, however, that article III, section 23 of the constitution did not change the basic, constitutional right of jury trial as it was known under territorial practice. Further, the court has never held that article III, section 23 rendered the territorial methods of waiver unchangeable.

Conclusion

It is submitted that the Montana constitutional provisions for waiver do not prohibit waiver by failure to demand, as provided for by Rule 38(d).

We have no reason to attach peculiar significance to the wording of article III, section 23. The language was not the result of either committee study or convention debate. We have no reason, therefore, to think that the framers of the Montana Constitution intended to restrict the methods of waiver to the precise ones known to the territorial practice.[46]

The Montana cases purporting to construe the waiver provisions of article III, section 23 cannot be cited as authority that the waiver provisions of Rule 38(d) are unconstitutional, because no case has ever drawn into question the constitutionality of the statutory methods of waiver applicable to actions at law.

The reasoning behind the federal and sister state decisions should be persuasive in upholding the waiver provisions of Rule 38(d). Even with waiver for failure to demand, the right of jury trial is still preserved in its basic elements. The *purpose* of waiver for failure to demand is not to trick a litigant into overlooking his right to a jury; the purpose is to further judicial administration by settling the mode of trial, jury or nonjury, well in advance of trial. This is particularly important in a system of fused law and equity where legal claims for relief may be joined with equitable claims and where legal defenses may be joined with equitable defenses and where, in one litigation, several parties may present many different claims and defenses, some legal and some equitable. In our modern system, to uphold the requirement of affirmative demand for a jury is to strengthen our judicial system.

[45]See, *e.g.*, Consolidated Gold & Sapphire Mining Co. v. Struthers, 41 Mont. 565, 111 Pac. 152 (1910) (power of trial court to direct a verdict is same as under territorial practice); *In re* McLure's Estate, 68 Mont. 556, 220 Pac. 527 (1923) (statute, requiring demand for jury in probate matters, is constitutional because there was no right to a jury in probate proceedings under the territorial practice); Application of Banschbach, 133 Mont. 312, 323 P.2d 1112 (1958) (supreme court assumed, without deciding, that a demand for a jury was necessary in juvenile proceedings).

[46]The framers actually made some drastic changes in the right of jury trial. Under territorial practice, juries had to be composed of 12 jurors, and verdicts had to be unanimous. This was the practice in all civil cases and all criminal cases. Under the Montana Constitution, article III, section 23, justice court juries consist of not more than six jurors; the parties to all civil cases and to criminal misdemeanor cases may agree to a jury of less than 12; and in all civil cases and in criminal misdemeanor cases, two-thirds in number of the jury may render a verdict. These changes were the subject of lengthy debate by the convention. See PROCEEDINGS AND DEBATES OF THE MONTANA CONSTITUTIONAL CONVENTION 264 (1889).

Finally, as a basic rule of statutory construction, courts strive to save the constitutionality of a statute. A statute is *prima facie* presumed to be constitutional, and all doubts should be resolved in favor of its validity. The invalidity of a statute must be shown beyond a reasonable doubt before the court will declare it unconstitutional. And a statute will not be held unconstitutional unless its violation of the fundamental law is clear and palpable.[47] The waiver provisions of Rule 38(d) are, therefore, presumptively valid; the Montana court should sustain these provisions unless they are clearly repugnant to the constitution.

THE EFFECT OF AMENDMENT OF PLEADINGS ON WAIVER

Montana Rule 38(d), in addition to making failure to demand a jury a waiver, provides:

> A waiver of trial by jury is not revoked by an amendment of a pleading asserting only a claim or defense arising out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

In May 1954, this sentence was proposed by the Federal Advisory Committee for inclusion in Federal Rule 38(d),[48] but it was never incorporated in the Federal Rule. By this sentence, the Committee meant to make clear that where the basic facts are the same, the amendment of a pleading merely changing the *legal theory* will not revive a right of trial by jury once waived.[49] The Committee meant the provision to apply not only where the pleader amends a pleading in an *action at law* without changing the legal nature of the issue, but also where the pleader changes his *legal theory* from "equity" to "law."[50]

Constitutional issue

Under the Montana Constitution, a jury may be waived by "consent of the parties expressed in such manner as the law may prescribe."[51] Where an action as originally pleaded is exclusively equitable, no jury is claimable of right by either plaintiff or defendant. Therefore, in suits exclusively equitable, even the pleader who *wants* a jury may omit demanding one because he knows he has no right to a jury. In such a case, however, suppose the pleadings are later amended to present *legal issues, i.e.*, issues to which the constitutional right of jury trial applies. Arguably, either party then has a *constitutional* right to a jury by making seasonable demand after the

[47] See State *ex rel.* City of Missoula v. Holmes, 100 Mont. 256, 273-74, 47 P.2d 624 (1935) (citing many cases).

[48] PRELIMINARY DRAFT OF PROPOSED AMENDMENTS 39-40 (May 1954). The text of the Committee note is quoted in 2B BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 36 n.52.1 (Rules ed., Wright rev. 1961).

[49] Diversity of views had developed in the Federal courts. See the Committee's note in the Preliminary Draft referred to *supra* note 48, citing, *inter alia*, Bereslavsky v. Caffey, 161 F.2d 499 (2d Cir. 1947), *cert. denied*, Caffey v. Bereslavsky, 332 U.S. 770, granting a jury demand after amendment of a pleading; and Gulbenkian v. Gulbenkian, 147 F.2d 173 (2d Cir. 1945), refusing a jury demand after amendment of a pleading.

[50] Mason, *The Montana Rules of Civil Procedure*, 23 MONT. L. REV. 1, 53 (1961).

[51] MONT. CONST. art. III, § 23.

pleading is amended. Nevertheless, under the second sentence of Montana Rule 38(d), quoted above, no such right exists.[52]

How, under the constitution, can a party be said to have expressed his "consent" to waive a jury before he has actually had a *right* to a jury trial? As discussed earlier in this Note, waiver of the *right* to a jury trial by failure to demand it should be held constitutional in Montana. But to say that one has *expressed his consent* to waive a jury in situations where he has *never* had a right to a jury may be stretching too far the constitutional requirement of consent for waiver.

Professor Mason has suggested, however, that notice of a *potential* claim for relief may be said to afford a basis for choice, and such notice may be said to result from a statement of the "conduct, transaction, or occurrence" in the pleading, regardless of the relief demanded.[53] Certainly, it must be remembered that the non-revocation of waiver provision in Rule 38(d) applies only where the pleading amendment asserts a claim or defense arising out of the facts as *originally* pleaded; the provision is not applicable where the pleading amendment sets forth facts different from those originally pleaded. Therefore, in every case where the non-revocation of waiver provision applies, the parties have been "put on guard," so to speak, by a statement of the facts in the original pleading.

The non-amending party

A more serious question of constitutionality may arise when the provision for non-revocation of waiver is applied against the non-amending party than when applied against the amending party. In terms, the non-revocation provision of Rule 38(d) applies to both.

The difference is this. It may be reasonable to impose non-revocation of waiver on one who, having originally pleaded certain facts and based his claim or defense on them, later amends to introduce *new issues* based on the *same facts*. Having originally set forth those facts to support his position, he has had reasonable notice of what issues, legal or equitable, they may present.

It does not follow, though, that the non-amending party, who has done nothing to change the nature of the issues, can reasonably have non-revocation of waiver imposed on *him*. He may have no information about the facts pleaded by his opponent and may have assumed from his opponent's original claim or defense that no jury issues were present and that none would arise. In this event, it cannot be said that the *non-amending* party has had notice of a potential claim for relief merely because *his opponent* has had such notice.

One thing is certain, however. Until the supreme court has ruled on the constitutional problems in Rule 38(d), the careful practitioner will demand a jury in *all* cases in which he wants a jury, whether or not at that time a jury is claimable of right. Where a general and timely demand for a jury has once been made, no new demand for a jury is necessary even

[52] By the Rule's own terms, however, the right would exist if the claim or defense presented by the amended pleading arose out of facts *different* from those originally pleaded.
[53] Mason, *supra* note 50, at 54.

though the pleading amendment raises new issues, because a general demand embraces all issues in an action that are triable to a jury.[54]

USE OF AN ADVISORY JURY WHERE JURY TRIAL OF RIGHT HAS BEEN WAIVED

The Montana Rules make provision for relief from waiver of jury trial and also give the trial court the power to call advisory juries. Montana Rule 39(b) provides:

> Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court upon motion or of its own initiative may on ten days' notice to the parties order a trial by a jury of any or all issues.[55]

Montana Rule 39(c) provides:

> 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 or, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.[56]

Suppose in an action at law, where a jury is claimable of right, the parties waive their right to a jury by not making timely demand. May the court then call an *advisory jury* under Rule 39(c)? Or is Rule 39(c) inapplicable to actions at law where the right to a jury has been waived? If the court may call an advisory jury, may the court, under the last clause of Rule 39(c), make the jury verdict *conclusive* and not merely advisory?

Rule 39(c), in referring to actions "not triable of right by a jury," is referring literally to *equitable* actions; these are the cases in which, traditionally, a jury is not claimable of right. But in a law action—where juries are claimable of right—if a party has, under Rule 38(d), *waived* his right to a jury by not demanding it, the action then becomes, at least in a sense, an action "not triable of right by a jury." In such a situation, the constitutional and statutory *right* to a jury has been waived and all the litigant has is the possibility of getting a jury under Rule 39(b) or Rule 39(c), in either case pursuant only to the judge's discretion and not of right.

[54] 5 MOORE, FEDERAL PRACTICE ¶ 38.41, at 325-26 (2d ed. 1951).

[55] The last clause, "upon motion or of its own initiative may on ten days' notice to the parties order a trial by a jury of any or all issues" has been substituted for the clause of the Federal Rule, "in its discretion upon motion may order a trial by jury of any or all issues." According to the Montana Civil Rules Commission, this change was made to remove any doubt as to the court's power to call a jury in its own discretion, whether or not a motion has been made, and at the same time provide the parties with advance notice that there will be a jury trial despite waiver. See Commission Note to Proposed Rule 39, MONTANA RULES OF CIVIL PROCEDURE 71 (West Pub. Co. 1961).

[56] This subdivision is identical with the Federal Rule, except for the omission of the clause, "except in actions against the United States when a statute of the United States provides for trial without a jury."

In all respects material to the present discussion, Federal Rule 39(c) is the same as Montana Rule 39(c).[57] The federal cases have disagreed on whether the court may, under May 39(c), call an advisory jury after the parties to an action at law have waived their right to a jury.

In *(American) Lumbermens Mutual Casualty Co. of Illinois v. Timms & Howard, Inc.*,[58] the court of appeals upheld the trial court's calling an advisory jury after the parties had waived their right to a jury, saying:[59]

> . . . there seems no reason why the parties, with the approval of the judge, should not agree that an advisory verdict be taken as in equity and with the same weight as such a verdict had in equity.

In *Hargrove v. American Central Insurance Co.*,[60] the parties had waived their right to a jury. The court, with the acquiescence of both parties, called a jury whose verdict was to be given only the weight of an advisory jury in equity. The court of appeals disapproved of this procedure, saying:[61]

> . . . The issues tendered were basically legal in their nature, and the case was triable as of right by jury. . . . It follows that the court was not authorized of its own initiative to call a jury in an advisory capacity, when a jury was waived in the absence of a motion by one of the party litigants.

The trial court was not reversed for calling the advisory jury, however, because the trial court had, in fact, wholly disregarded the verdict of the jury and had made its independent findings and conclusions on which it based its judgment.[62] The court of appeals, in disapproving but not reversing, took the position that not only had the parties *consented* to calling the advisory jury, but also they were *not prejudiced,* because the trial court had actually disregarded the jury's findings.

Professor Moore agrees with the *(American) Lumbermens* case, upholding the use of advisory juries in jury-waived cases:[63]

> If there is any merit for the trial court's use of a jury in an advisory capacity for the trial of equitable issues . . . , there must be similar merit in using the advisory jury for the trial of legal issues, where there was a constitutional or statutory right but the parties have waived it. In fact it is on the last type of issue, rather than on the equitable issue, that a jury is likely to be most helpful.

The reasoning of the *Hargrove* case was that, if the parties *want* a *court trial,* the court should not be permitted to *impose* a *jury trial* on them. But Moore criticizes the *Hargrove* rationale on this point. The trial court would not be imposing on the parties a *common law jury, i.e., conclusive*

[57] See *supra* note 56.
[58] 108 F.2d 497 (2d Cir. 1939).
[59] *Id.* at 500.
[60] 125 F.2d 225 (10th Cir. 1942).
[61] *Id.* at 228-29.
[62] *Id.* at 229.
[63] 5 MOORE, FEDERAL PRACTICE ¶ 39.10, at 722 (2d ed. 1951).

jury trial. An advisory jury is called only to "enlighten the court's conscience,"[64] and the judge must make his own findings of fact.

Professor Wright likewise feels that the more reasonable view is to allow the court full discretion regardless of a waiver by the parties. The responsibility for finding the facts still rests with the judge, but if he wishes the help of an advisory jury, there is no reason why the parties, by waiving jury trial, should be permitted to deny him such help.[65]

The reasoning of Moore and Wright is persuasive. In Montana, there is another reason for permitting the trial court to call an advisory jury in jury-waived cases. Under Montana Rule 39(b), the trial court has the power *of its own initiative* to order a *conclusive* trial by jury, even in jury-waived cases. Federal Rule 39(b) permits the court to call a jury in waiver cases only *upon motion* of one of the parties.[66] Since a Montana trial court has the power under Rule 39(b) to call a *common law* jury whose verdict will be conclusive, there is no reason to deny the court the power under Rule 39(c) to call an advisory jury to "enlighten the court's conscience." The parties could not complain, as the *Hargrove* case said they might, that the court had imposed a jury on them despite their intentional waiver. The reasoning of the *Hargrove* case, therefore, simply does not apply in Montana where the Rule itself gives the court the power to impose a jury on the parties despite their wish for a court trial.

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[64]Vosburg Co. v. Watts, 221 Fed. 402, 408 (4th Cir. 1915), cited by (American) Lumbermens Mut. Cas. Co. v. Timms & Howard, Inc., 108 F.2d at 500.
[65]2B BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 891, at 64 (Rules ed., Wright rev. 1961).
[66]See *supra* note 55.