Montana Law Review

Volume 10
Issue 1 *Spring 1949*

Article 5

January 1949

Jury Trial in Civil Cases

Glen W. Clark
University of Montana School of Law

Follow this and additional works at: https://scholarship.law.umt.edu/mlr

Part of the Law Commons

Recommended Citation
Glen W. Clark, *Jury Trial in Civil Cases*, 10 Mont. L. Rev. (1949).
Available at: https://scholarship.law.umt.edu/mlr/vol10/iss1/5

This Comment is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized editor of The Scholarly Forum @ Montana Law.

JURY TRIAL IN CIVIL CASES

The Montana Constitution provides as follows:[1]

> "The right of trial by jury shall be secured to all, and remain inviolate. . . ."

In general our Supreme Court has construed this provision as having preserved, for jury trial purposes, the distinction between actions at law and suits in equity that existed at the time the Constitution was adopted. Jury trial is granted as a matter of right in legal actions, denied in equitable ones. Though simple enough on its face, application of this principle has sometimes been difficult, particularly so where a single action has involved both legal and equitable phases.

In 1875 the United States Supreme Court said in *Basey* v. *Gallagher*[2] upholding a decision of the Montana territorial court:

> "Sometimes in the same action both legal and equitable relief may be sought, as, for example, where damages are claimed for a past diversion of water, and an injunction prayed against its diversion in the future. Upon the question of damages, a jury would be required, but upon the propriety of an injunction, the action of the court alone could be invoked."

This was *obiter dictum,* and it was written with reference to the Federal Constitution,[3] but it was intended as a guide for cases arising in the territory. Note that the court seemed to contemplate both legal and equitable issues arising in a single trial, some being given to the jury and others not.

[1]Art. III, §23: "The right of trial by jury shall be secured to all, and remain inviolate, but in all civil cases and in all criminal cases not amounting to felony, upon default of appearance, or by consent of the parties expressed in such manner as the law may prescribe, a trial by jury may be waived, or a trial had by any less number of jurors than the number provided by law. A jury in a justice's court, both in civil cases and in cases of criminal misdemeanor, shall consist of not more than six persons. In all civil actions and in all criminal cases not amounting to felony, two-thirds in number of the jury may render a verdict, and such verdict so rendered shall have the same force and effect as if all of such jury concurred therein."

[2](1875), 87 U.S. (20 Wall.) 452, 22 L.Ed........

[3]*U.S. Const.* Amend. 7: "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."

This provision relates only to trials in federal courts and does not require jury trial in state cases. Walker v. Sauvinet (1875), 92 U.S. 90, 23 L.Ed. 678. It did apply in Montana as a territory, however, and thus it determined the Montana law at the time of the adoption of the State Constitution.

The territorial court had occasion to consider this advice nine years later in *Clark* v. *Baker*[4] in which suit was brought to foreclose a mortgage and to recover possession of a chattel in a single action, as authorized by statute. The court recognized that if the answer raised issues on the legal phase of the case, a jury trial would be required and went into detail in order to show that no legal issues were raised.

In 1902 the case of *Montana Ore Purchasing Company* v. *Butte and Consolidated Copper and Silver Mining Company*[5] was decided. This being the first case subsequent to adoption of the Montana Constitution in which the point was squarely before the court, it is of particular interest. The battleground was over the application of Section 1310, Code of Civil Procedure, 1895, which allowed a plaintiff to quiet title to premises in controversy and restrain defendant from further trespasses in the same suit. This, in case plaintiff was in possession, as he was in the principle case, was a new action, unknown to the common law, and since it was one sounding in equity, a jury trial was not considered necessary. But the court went on to point out that if the plaintiff had not been in possession, which he need not have been under the statute, the action would have been no different than ejectment, and a jury trial would then have been required. It was further observed that if the defendant, being out of possession, made an affirmative defense asking possession, a jury trial would be required on the issues thereby raised. The court said:

> "If the plaintiff is in possession, and the defendant raise a purely legal issue upon the right to the possession, founded on an assertion of legal title, this issue is triable by a jury as a matter of right."

This statement appears in the opinion on rehearing, and it should be contrasted with the following language in the original opinion:

> "It may be stated, as a general proposition, that it is not an objection to the jurisdiction of a court in equity that legal questions are presented for consideration which might also arise in a court of law. If the controversy be one in which a court of equity only can afford the relief prayed for, its jurisdiction is unaffected by the questions involved. . . . If it took jurisdiction for any purpose, it took jurisdiction for all purposes, and determined all

[4](1884), 6 Mont. 153, 9 P. 911.
[5]27 Mont. 288, 70 P. 1114; modified in 27 Mont. 536.

questions involved, whether legal or equitable, and that, too, without the intervention of a jury, except at the discretion of the chancellor."

Both the opinion on rehearing and the original opinion denied the right of jury trial and purported to apply the same reasoning, yet the variation noted exists. At least one subsequent case[6] has relied heavily on the language quoted from the original opinion.

In *Chessman* v. *Hale*,[7] decided in 1905, a jury trial was allowed on the legal question of damages for maintenance of a nuisance by defendant, where plaintiff asked for an injunction in the same action. The case is significant. Notice in particular the following quotation from the United States Supreme Court:[8]

> "The seventh amendment, indeed, does not attempt to regulate matters of pleading or practice, or to determine in what way issues shall be formed by which questions of fact are to be submitted to a jury. Its aim is not to preserve mere matters of form and procedure, but substance of right. This requires that questions of fact in Common Law actions shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative."

Again, quoting from a California case,[9] the opinion reads:

> "It has long since been held that under our system a legal and an equitable remedy may be sought in the same action, and each remedy must be governed by the same law that would apply to it if the other remedy had not also been asked for."

The court seems to have recognized in these cases that, whether the legal and the equitable phases became intermingled by virtue of the plaintiff having asked both kinds of relief in his complaint, or whether it resulted from an affirmative legal defense or counterclaim having been interposed to a complaint stating an equitable cause of action, or *vice versa*, the right to jury trial on the legal phase is guaranteed. Except for *Chessman* v. *Hale*, however, they are weak as authority for that proposition, because in the final analysis none of them presented legal issues along with the equitable.

Cases involving equitable defenses to legal claims have not

[6]Moore v. Capitol Gas Company (1945), 117 Mont. 148, 158 P. (2d) 302.
[7]31 Mont. 577, 79 P. 254, 68 L.R.A. 410, 3 Ann. Cas. 1038.
[8]Walker v. New Mexico and Southern Pacific R.R. Company (1897), 165 U.S. 593, 17 Sup. Ct. 421, 41 L.Ed. 837.
[9]Hughes v. Dunlap (1891), 91 Cal. 386, 27 P. 642.

proved difficult. The court merely withholds the equitable phase from the jury.[10]

The case of the *Merchants' Fire Assurance Corporation of New York* v. *Watson*,[11] decided in 1937, states the rule on legal counterclaims in equitable suits. This was an action by an insurance company to foreclose a lien securing defendant's note for premiums on hail insurance. Defendant counterclaimed for damages to the crop by hail, claiming benefits under the policy. The Court held against defendant's claim of a right to jury trial, treating the case as wholly one in equity. The Court said that issues of fact brought into the suit by pleadings other than the complaint, would not deprive the Court of equitable jurisdiction taken by virtue of an equitable cause having been stated in the complaint. When equity took jurisdiction, the Court said, its jurisdiction was full and complete, and neither a legal defense nor a cross-complaint or counterclaim presenting legal issues would divest such jurisdiction.

Mr. Justice Angstman dissented on the ground that the only controverted issues were those relating to the counterclaim, which obviously presented facts incident to an action at law rather than one in equity.

In a later case,[12] involving a legal counterclaim to a suit to foreclose a mortgage, the Court, Mr. Justice Angstman this time writing the majority opinion, thought that defendant might have had a right to jury trial, but avoided overruling a lower court decision denying one on the theory that defendant was not harmed inasmuch as the evidence produced was insufficient to have taken the issue to the jury had there been one.

The implication in this latter case that the Court might be varying from the rule of the *Watson* case is overcome by the language used in *Butler Brothers Development Co.* v. *Butler*,[13] decided one year later. Mr. Justice Angstman again wrote the majority opinion. Jury trial was denied on a legal defense to a foreclosure suit because the legal phase of the case was not pressed. The opinion does not state that no legal issues were raised, only that they were not pressed. Mr. Justice Angstman explained his dissent in the *Watson* case as follows:

[10]Stanford v. Gates (1898), 21 Mont. 277, 53 P. 749.
[11]104 Mont. 1, 64 P. (2d) 617.
[12]The Federal Land Bank of Spokane v. Myhre (1940), 110 Mont. 416, 101 P. (2d) 1017.
[13](1941), 111 Mont. 329, 108 P. (2d) 1041.

> "The writer of this opinion dissented in that case, but only because in that case the equitable issues stood admitted. That is not true here."

Mr. Justice Angstman's view appears to be that the dominant issues developed by the pleadings as a whole should determine whether the case is one at law or in equity and thus whether or not a jury trial can be had as a matter of right. The rule of the *Watson* case, on the other hand, would put the emphasis on the complaint; if the facts set out there comprise an action at law, there will be a jury trial, otherwise not—and this regardless of what may be developed by the subsequent pleadings.[14]

As for the cases wherein both legal and equitable phases are presented by the complaint, *Chessman* v. *Hale* is still the law, but it has been subjected to certain limitations. Some of the later cases suggest that whichever phase dominates the complaint will characterize the whole case for jury trial purposes, and thus seem to reject the possibility of trying one phase to a jury and the other to the court in a single trial. For example, in *Benson-Stabeck Company v. Farmers Elevator Company*[15] the court said:

> "The grafting of the foreclosure proceeding . . . alone upon the strictly legal issues between plaintiff and the other defendants as makers and guarantors of the notes in suit, respectively—the primary purpose for which this action was brought—cannot deprive them of the right to a trial by jury."

The case of the *Truzzalino Food Products Company* v. *F. W. Woolworth Company*[16] held that "while it is true that the complaint asks for equitable relief, yet the specification of injury and the claim for damages are for legal relief, and it was not error to proceed upon the legal remedy and try the cause before the jury."[17]

[14]Consider the effect of such a rule: If defendant omits to set up a counterclaim where a cause of action arises in his favor out of a contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, "neither he nor his assignee can afterwards maintain an action against the plaintiff therefore." R.C.M. 1935, §§9144, 9138(1). Thus, where defendant's cause of action is legal and plaintiff brings the suit against him, the denial of jury trial on his claim is absolute. But if defendant had brought the action instead of plaintiff, jury trial would have been allowed as a matter of right.

[15](1923), 66 Mont. 395, 214 P. 600.

[16](1939), 108 Mont. 408, 91 P. (2d) 415.

[17]See also State v. District Court (1941), 112 Mont. 458, 117 P. (2d) 494, in which it was held that the fact an accounting was asked for in the complaint did not "convert" the action into one in equity.

Probably the most important decision affecting the doctrine of *Chessman* v. *Hale* is *Moore* v. *Capitol Gas Corporation*,[18] decided in 1945. There a jury trial was denied the defendant in an action to foreclose the mortgage securing a note, even though the equitable phase of the case was eliminated by a finding that the mortgage had been lost and there was therefore no possibility of granting the foreclosure. The court proceeded to give a judgment on the debt without a jury trial. The result at first seems to be a complete reversal of *Chessman* v. *Hale*, but the court finds a basis for distinction as follows:

> "Some cases can be found holding, or intimating, as defendant contends, but they seem to be based partly upon a confusion between an exclusive equity jurisdiction, and a merely concurrent equity jurisdiction. Pomeroy's Equity Jurisprudence, 5th Ed., sections 231, 232, ff. That is true of Chessman v. Hale, upon which defendant relies. There the plaintiff sought two unrelated remedies; damages, which was a purely legal remedy, and an injunction, which was purely equitable. It was the presence of the latter which gave the equity court concurrent jurisdiction over the demand for an award of damages, which however was not a necessary prerequisite to the equitable relief demanded. Moreover, here the resort to the equity court was not a subterfuge; both parties in good faith asked it to determine questions which only an equity court could determine—namely, whether the mortgage was valid, and whether foreclosure of the lien could be had."

Three propositions are suggested by the cases: *First*, as already noted, the early cases apparently recognized the possibility of trying a case by the *issue*, the legal issues to a jury and the equitable to the court, whereas the later cases reject this possibility and seek instead to characterize a case as wholly legal or wholly equitable for trial purposes. *Second*, the trend has been to limit the number of situations in which jury trial is allowed as a matter of right.[19] And, *third*, the premise upon which the court has consistently relied to justify this result is the often quoted rule that equity once assuming jurisdiction of a

[18]Note 5, *supra*.

[19]Numerous Law Review articles reflect the current dissatisfaction with jury trial in civil cases. See: Snyder, *Trial by Jury is Obsolete*, 1 AM. LAWYER 18 (1937); Wilcox, *Trial by Jury*, 25 *Marq.* L. REV. 66 (1941); Coffin, *Jury Trial, Tragic But Not Entirely Hopeless*, 25 J. AM. JUD. SOC. 13 (1941); Stone, *Decline of Jury Trial and the Law of Evidence*, 3 RES JUDICATAE 144 (1947).

But such dissatisfaction is no justification for avoidance of the constitutional guarantee. Most of the current comments take the view that defects in the jury system can be corrected.

cause will retain it to grant complete relief, legal as well as equitable.

Before proceeding to evaluate these propositions, a word should be said about the term "issue." Insofar as the discussion herein uses that term, the reference is to issues of fact and not to issues of law, the jury not being concerned with the latter. The term is defined in Section 9236, R. C. M. 1935. Allegations set out in the complaint or by way of affirmative defense or counterclaim in the answer, and *denied* by the other party, raise issues of fact; they are determined by the pleadings as a whole. Whether an issue is legal or equitable depends upon the allegation; and an allegation is characterized as legal or equitable according to the subject matter, on the one hand, whether historically legal or equitable, and according to the relief asked, on the other. Thus an issue concerning trusts would be equitable by virtue of the subject matter, one concerning a trespass might be either legal or equitable depending upon what relief was asked—damages or an injunction.

The natural inference of the words of both the State and the Federal Constitutional provisions is that there is preserved the right to jury trial as it existed at the time of adoption of the constitution concerned.[20]

Two factors determined the right to jury trial at the time of adoption of the Federal Constitution. They were: (1) the issue to be tried, and (2) the manner of trial. These same two factors constitute the background against which the State Constitution must be construed, since the Federal Constitution determined the law in Montana at the time of adoption of the State Constitution.

A jury trial of a legal issue might have been granted or denied according to whether it arose at law or in equity, and a jury trial would have been denied where a legal issue arose in equity in connection with a matter over which equity already

[20]The fusion of law and equity occurred in Montana before our Constitution was adopted. Organic Act of the Territory of Montana, §9, (1894): ". . . the said supreme and district courts respectively shall possess chancery as well as common law jurisdiction."

That the implications of such fusion may not have been fully realized before the State Constitution was adopted should be of no consequence. The State constitutional provision should be taken to have preserved the rights of individuals then existing, though they were only potential rights under the then state of the law and had not received complete recognition. The problem today is to ascertain just what those rights were, and that involves a study of the effects of the merger of law and equity.

had acquired jurisdiction.[21] The reason is clear: law and equity were then administered by separate courts, and, for convenience, equity once acquiring jurisdiction of a matter would grant complete relief rather than require a separate trial on the legal issues.

It would seem to follow that what the constitutional provisions preserved was jury trial on legal issues when tried by law courts but not when tried in the courts of equity, since the method of bringing an issue to trial was a major consideration prior to the adoption of the constitutional provisions.

But law and equity are no longer separate. In 1848, with the adoption of the first Code of Civil Procedure in New York, law and equity were fused. This is true in Montana.[22] The manner of bringing issues of fact to trial has changed, and it no longer has any logical significance on the question of jury trial. Although the distinction between law and equity cannot be entirely eliminated while the constitutional provision under discussion remains in effect, it is submitted that the only distinction remaining is one between issues to be tried.

If the forgoing analysis is correct, then the rule so often quoted by the Montana Supreme Court and listed as proposition number three above, that equity once assuming jurisdiction of a cause will retain it for complete relief, has no longer any application except insofar as it had so influenced the right to jury trial before the State Constitution was adopted, that the merger of law and equity was unable to undo it. *Moore* v. *The Capital Gas Company*[23] illustrates that situation.

It follows that the right to jury trial should be determined by the particular issue, and not by the character of the case as a whole. Such an approach has been adopted with success by several jurisdictions, and, though certain technical difficulties are presented, there is no question of its practicability.[24]

One troublesome particular should be noted in passing. Cases arise wherein a single issue of fact has both legal and equitable aspects. If the two phases cannot be separated, then,

[21]Stephens v. McCargo (1824), 22 U.S. 502, 9 Wheat. 502, 6 L.Ed. 145; Cathcart v. Robinson (1831), 30 U.S. 264, 5 Pet. 264, 8 L.Ed. 120; Alexander v. Hillman (1935), 56 S. Ct. 204, 296 U.S. 222, 80 L.Ed. 192.
[22]*Mont. Const.* Art. VIII, §28; R.C.M. 1935, §9008.
[23]Note 5, *supra.*
[24]Ford v. C. E. Wilson & Co. (D. Conn. 1939) 30 F. Supp. 163; Maskasky v. Warner Brothers Pictures (E.D.N.Y. 1942), 2 F.R.D. 380; and citations listed in n. 59, CLARK, CODE PLEADING (2d ed. 1947) §16, p. 98.

since jury trial on the legal aspect is affirmatively guaranteed, such issues should be tried before a jury, with leave to the court to disregard the findings insofar as the equitable phase may later become separable. Thus, in a case where plaintiff asks both damages for past trespasses and an injunction against future ones, the question of whether there has been a trespass will have significance as to both types of relief asked. It is submitted that the issue should be tried before a jury, because of the affirmative guarantee applicable to the legal aspect of the case.

Had the Court followed the broad suggestions of the early cases, Montana might today have a rule similar to the one recommended here; as it is, the rule may still be adopted. The cases in which the point has been raised are not so numerous that the doctrine to be adopted can be said to be firmly fixed in our law. The time is at hand for a thorough examination of the whole question.

Glen W. Clark.

OLEOMARGARINE AND THE CONSTITUTION

The recent case of *Brackman* v. *Kruse, Com'r. of Agriculture, et al.* (*Westlake et al, interveners*),[1] brought the Montana Supreme Court to grips with the oleomargarine problem for the second time. Over a third of a century ago, in *State* v. *Hammond Packing Co.*,[2] the Montana Court upheld the constitutionality of a statute which imposed a one cent per pound tax on oleomargarine. Its decision was affirmed by the Supreme Court of the United States.[3] Today's Court, however, declared unconstitutional and void so much of Section 2620.45 R.C.M. 1935, as imposes license fees of $250 per quarter upon wholesale dealers in oleomargarine and $100 per quarter upon retail dealers in that product.

The statute was attacked by the proprietor of two retail grocery stores. He alleged, in substance, that oleomargarine is a healthful and nutritious product; that the license fees were designed to discourage or prohibit the sale of oleomargarine in aid of the dairy industry; that the fees were so excessive and unreasonable as to prohibit plaintiff and more than 92% of the other grocery stores operating in Montana from selling the

[1](1948) ......Mont....... 199 P.(2) 671.
[2](1912) 56 Mont. 343, 123 P. 407.
[3](1914) 233 U.S. 331, 34 S.Ct. 596, 58 L.Ed. 985.