

0391448

KFH421.5  
L35  
A25  
56-2  
C.2

JURY FEES  
IN CIVIL CASES

by  
Kenneth K. Lau  
Research Associate

Report No. 2  
1956

LEGISLATIVE REFERENCE BUREAU

JAN 15 1957

TERRITORY OF HAWAII

Robert M. Kamins, Director  
Legislative Reference Bureau  
University of Hawaii  
Honolulu 14, Hawaii

## SUMMARY OF FINDINGS

The extensive use of juries in the trial of civil cases has been blamed for the calendar congestion in the courts of the more populous states, and for the mounting costs in the administration of justice. This study reviews these problems and reports on the legislation of the various states that impose some form of jury fee or trial fee.

Some states require the payment of a moderate fee before trial by the party demanding a jury. These fees range from \$3 to \$25. Hawaii requires a fee of \$5.

Some states require the payment at the end of the trial of a moderate fee by the party who loses the case. These fees range from \$4 to \$12.

A few states require the payment of a substantial fee by the losing party at the end of the trial in an amount determined by the court. It is usually based upon the total per diem compensation paid to the jurors engaged in the trial; in one state, the mileage allowance is included.

A few states require a substantial deposit by the party demanding a jury trial, before the trial begins, and a deposit at the beginning of each day during the progress of the trial. These deposits are usually measured by the per diem compensation of the jurors. They range in amounts from \$36 to \$72.

Pennsylvania has provided for compulsory arbitration where the amount in controversy does not exceed \$1,000. A party may appeal the decision of the arbitrators, but he must first reimburse the county for the amount of the arbitrators' compensation.

Hawaii can increase its fee, or enact legislation along some of the foregoing lines, or, alternatively authorize its Supreme Court to promulgate rules to achieve the same purposes, within broad limits set down by statute.

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION . . . . .	1
II. THE PROBLEMS . . . . .	3
A. Time Consumption and Delay . . . . .	3
B. Monetary Costs Compared to Amount of Recovery . . . . .	5
III. STATE LEGISLATION . . . . .	11
A. Payment of Moderate Jury Fee <u>Before</u> Trial .	12
Connecticut	
Michigan	
Utah	
Washington	
Wyoming	
Alaska	
Hawaii	
B. Payment of Moderate Jury Fee <u>After</u> Trial .	14
Colorado	
Indiana	
Iowa	
Kentucky	
Missouri	
Nebraska	
North Carolina	
West Virginia	
C. Payment of Fee Determined After Trial . . .	15
Arizona	
Arkansas	
Louisiana	

	<u>Page</u>
D. Substantial Deposits in Advance of and During Trial . . . . .	17
California	
Nevada	
New Mexico	
E. Compulsory Arbitration . . . . .	26
Pennsylvania	
IV. CONSTITUTIONALITY . . . . .	35
V. CONCLUSIONS . . . . .	40

APPENDICES

Appendix

1 States Imposing Some Form of Jury Fee or Trial Fee . . . . .	44
2. Juror Fees in Civil Actions in Courts of Record . . . . .	46
3 Per Diem Compensation of Jurors in Civil Actions in Courts of Record . . .	49
4 California Code of Civil Procedure (Deering's 1953), Section 631 . . . . .	50
5 New Mexico Statutes 1941, Section 19-101(38)	52

## I. INTRODUCTION

In a civil action in the nature of a suit at common law in the Circuit Courts of the Territory of Hawaii, any party has the right to demand a trial by jury of the facts at issue in the case. This is a constitutional right.<sup>1</sup>

In Hawaii, as throughout the United States, it is common practice for litigants in civil actions to avail themselves of this right and cause their cases to be conducted before juries. The reasons for demanding a jury trial vary. It may be that the party so demanding feels that it would result in an advantage to him. For instance, it has been stated that "jury trials are often demanded for purposes of delay, to force settlement, or to provide an outside chance for a result which the litigant knows he could not possibly obtain in the facts of the case from an experienced judge without a jury."<sup>2</sup> Again, "it is highly doubtful that most of the litigants involved in these cases have a genuine preference for trial by jury over trial by the court. It is probable that jury trials are perfunctorily claimed in the generality of cases by counsel who see in a jury trial either a hope of getting the emotional maximum from the case, or as a means of deferring having to try it for a protracted period of time."<sup>3</sup>

Phrased differently, the demands for jury trial in civil cases are said frequently to be made to serve the tactical purposes of counsel rather than to protect the constitutional rights of the parties. This view appears to be held by most writers on the subject and is developed further in the latter part of this study in the discussion of constitutionality.

## FOOTNOTES

1. U. S. Constitution, Amendment VII; Revised Laws of Hawaii 1945, sec. 10106; Hawaii Rules of Civil Procedure, Rule 38 (Effective June 14, 1954).
2. Letter dated June 20, 1955, from H. R. Hewitt, Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, to Governor Samuel Wilder King.
3. Report of the Massachusetts Judicial Survey Commission, as incorporated in communication dated February 20, 1956, from Governor Christian A. Herter of Massachusetts to the Senate and House of Representatives of Massachusetts, as reported in House No. 2620 (February, 1956), hereinafter cited as Report of the Massachusetts Judicial Survey Commission, p. 92.

## II. THE PROBLEMS

From the point of view of the administration of justice, jury trials in civil actions present two major problems. The first is the amount of time consumed in the trial of cases before juries; the second is the monetary cost of conducting the trial. Jury costs are usually borne by the appropriate governmental unit (state, territorial, or county) as part of the administrative expenses of the courts. The amount so expended in a given civil action often exceeds in a disproportionate manner the amount the prevailing party recovers in the trial.

The purpose of this study is to report on these problems and to see what the various states are doing, particularly by way of having the litigants in civil actions bear a part of the burden of the costs in jury trials.

### A. TIME CONSUMPTION AND DELAY

That jury trials are time consuming and constitute a major cause of the congestion in most court calendars is generally agreed. It has been estimated that it takes about three times the amount of time to try a case before a jury that it does to try the same case before a judge.<sup>1</sup>

This observation is confirmed by an experienced jurist in New York, who states that "the average jury trial takes between three and four days--three times as long as a trial before a judge without a jury. That simple statistic is the measure of court delay."<sup>2</sup> This jurist goes on to say:

The multiple of three does not tell the whole story, however, of the time lost and multiple time expended in the process of jury trials. The fact is--as amazing as it appears upon analysis--that it takes 108 jurors over any period of time to do what one judge could do in the same time. That is the ratio or coef-

ficient of jurors' time to a judge's time in any case.

The mathematics of the matter have been proved by records kept. First, there is the base of twelve jurors to one judge. Then there are two additional multiples of three which must enter into the equation. As observed, it takes three times as long to try a case with a jury as without a jury, meaning that in the actual trial process the time of thirty-six jurors is taken to do what a single judge could do.

But, preliminarily, in the process of assembling jurors, keeping them available in sufficient numbers for possible need, and in examining them and accepting or rejecting them for actual service, two-thirds of a jury panel's time is lost, or, to put it another way, only a third of a panel's time is actually employed in the trial of cases.<sup>3</sup>

Jury-waived trials in criminal cases likewise result in speedier conclusions. While this study is concerned with the problem of jury trials in civil actions, the experience of one jurisdiction in the criminal field is noteworthy. In the state of Maryland, as a result of historical circumstances, most criminal trials are held without a jury. This is particularly true in Baltimore City, where in one year, 98 per cent of the defendants in criminal cases who pleaded not guilty waived a jury trial. Consequently, "the vast majority of criminal cases in Baltimore are tried within three of four weeks after arrest.... There is a direct relationship between the system of court trials and prompt justice."<sup>4</sup>

In England, there is relatively little delay in judicial proceedings. A noted American jurist who spent some time observing the English courts in operation was impressed by the expeditious handling of cases in both criminal and civil proceedings, and at both trial and appellate levels, because of the limited use of jury trials.



In England today most civil cases are tried without a jury. The only types of cases that are generally tried with a jury are actions for libel and slander. Surprising as it may seem, personal injury cases are tried by the court alone. Necessarily, this course leads to shorter trials.

The trial of an average personal injury suit takes less than a day. This is easily understood. It is my experience, for instance, that I can try an ordinary personal injury action against the United States under the Federal Tort Claims Act, which prescribes trials without a jury, in less than a day; whereas if the same action were brought against a private person, the trial would probably last twice as long.

\* \* \*

I was informed by one of the judges that in London the lapse of time between the date on which a case is at issue and the trial is now about six months. He added that the lapse of time had been a year, that this was deemed too long an interval and that during the past few years the lag had been reduced to six months. It may well be that the large number of cases tried without a jury, thereby resulting in shorter trials, has helped to bring about this desirable result.<sup>5</sup>

#### B. MONETARY COSTS COMPARED TO AMOUNT OF RECOVERY

The problem of monetary costs has also received serious consideration. The various items of expense incurred in the conduct of a jury trial combine to make a substantial outlay by the appropriate governmental unit, whether it be county, municipality, territory, state or federal government. In addition to the direct disbursements to jurors, such as per diem compensation and mileage, the proportionate amounts expended towards salaries of court personnel, such as judges, reporters, clerks, secretaries and bailiffs, are increased because of the greater length of time required to try a case before a jury. The total amount spent upon a trial often exceeds in a disproportionate manner the amount

recovered by the plaintiff in the lawsuit. It is this disproportion of expense to resulting monetary recovery which has caused questioning of the appropriateness of jury trials in civil actions.

For instance, in a civil case tried before a jury in 1955 in the circuit court of the First Judicial Circuit in the Territory of Hawaii, the cost of the trial to the Territory far exceeded the amount of the recovery to the plaintiff.

In a case recently concluded in this Court, plaintiffs sued for damages of \$2500 for the unauthorized cutting of some kiawe trees and haole koa [trees], and \$2500 for loss of feed therefrom for his pigs. A jury was demanded. The plaintiff had hardly gotten settled into the witness box when he stated that the pigs did not belong to him, but to his son, who was not before the Court. This left a total claim for \$2500.

Forty-two jurors were called in before a jury was secured. One full day was taken in securing a jury; one half a day in visiting the premises; one half day in settling instructions, and one full day (until 11:45 p.m.) in argument and the jury's deliberations.

The trial consumed eight full days, morning and afternoon, and involved the following expense to the taxpayers:

Jurors' fees .....	\$	504.00
Jurors' mileage .....		62.40
Jurors' lunch and dinner .....		84.00
Salaries of the judge, reporter, clerk, secretary and bailiff (based on a 25 working day month)		<u>756.72</u>
Total cost to the taxpayers .....	\$	<u>1,407.12</u>

The jury awarded plaintiffs damages in the sum of \$175.00.

Had the case been tried jury-waived, it would have been concluded in three days at the very most, and the cost to the taxpayers would have been \$283.77.<sup>6</sup>

It thus took eight days to conclude a case at a cost of \$1,407.12 to the Territory in which the plaintiff was awarded \$175.00.

In New York, it has been estimated that the cost of a jury trial is \$750 per courtroom-day. In addition, the other costs involved in a lawsuit are compounded.

The cost of jury trials, in dollars as well as in delay, is much higher than anyone would think. The cost for court facilities, clerks, attendants, judge and jury in the Supreme Court of New York County is \$750 a courtroom a day. The average jury trial of four days thus costs the taxpayers \$3,000—more than the amount involved in many cases. The dollar figures in other cities may be less, but the costs are relatively as high. Lawyers must be paid for the long time spent in court and in waiting for trials to come up. The plaintiff's lawyer will receive from one-third to one-half of any amount won by verdict. A huge bill is paid in insurance premiums for the defense of lawsuits as well as for the payment of judgments. Altogether the cost of a jury trial to everyone is likely to be several times the amount the plaintiff retains out of any recovery.<sup>7</sup>

The inter-related problems of court congestion and of excessive expenses in proportion to the amount of recovery have been acute in at least one mainland jurisdiction. In the Commonwealth of Massachusetts, the congestion in some of the Superior Courts of the counties is said to be the worst in the United States. Furthermore, in a majority of the civil jury cases tried through to a verdict in both of

the years ended June 30, 1954 and June 30, 1955, the cost to the public exceeded the recovery to the prevailing party.<sup>8</sup> The Massachusetts Judicial Survey Commission<sup>9</sup> discusses various aspects of the problem and its report states in part as follows:

Much more could be written about the actual conditions of congestion in the Superior Court, where in Worcester County in May, 1955, it took a litigant no less than forty-six months to obtain a jury trial for his cause, the worst condition in courts of this jurisdiction in the entire United States.... The time factor is, of course, of real importance in the administration of justice. Excessive delay may well result in a denial of justice. (p. 95)

\* \* \*

.... It costs the taxpayers of the Commonwealth at least \$500 to try a case in the Superior Court with a jury. To try the case without jury, whether in the district court or in the Superior Court, would obviously be much cheaper, particularly since a good judge can try several cases without jury in the time it takes to try a single case with a jury. (pp. 96-97)

\* \* \*

We have recommended a moderate jury fee of \$15. This proposal points in two directions. To some degree it would help head the congested traffic toward the district courts. To a greater degree, perhaps, it would steer litigants toward jury-waived trial in the Superior Court. (p. 98)

## FOOTNOTES

1. Hewitt to King, loc. cit., referring to Botein, "Trial Judge."

2. David W. Peck, Presiding Justice of the Appellate Division of the New York State Supreme Court, First Department, in an article entitled "Do Juries Delay Justice?" 18 Federal Rules Decisions 455 (April, 1956).

3. Ibid., pp. 456-457.

4. Joseph Sherbow, Associate Judge of the Supreme Bench of Baltimore City, "Waiver of Jury Speeds Criminal Trials in Baltimore Courts," 34 Journal of the American Judicature Society, 150 (February, 1951).

5. Alexander Holtzoff, Judge of the U. S. District Court for the District of Columbia, "A Visit to the London Courts: The Administration of Justice in England," 42 American Bar Association Journal, 29 at p. 32, (January, 1956).

6. Hewitt to King, loc. cit.

7. David W. Peck, op. cit., at p. 457.

8. "In the year ending June 30, 1954, 1,730 civil jury cases were tried through to a verdict. Of these, the plaintiff received nothing in 822 cases, less than \$200 in 95 cases, and varying amounts of not more than \$500 in 169 others, a total of 1,086, or more than half of the 1,730 cases tried at a public cost of more than \$500 per day.

"In the year ending June 30, 1955, 1,620 civil jury cases were tried (not including 149 land damage cases which must be brought in the Superior Court). Of these 1,620 jury trials, the plaintiff received nothing in 777 cases, less than \$200 in 84 cases, and varying amounts not more than \$500 in 132 cases, a total of 993, or more than half of the 1,620 cases tried at a public cost of more than \$500 per day." Report of the Massachusetts Judicial Survey Commission, p. 111.

9. The Judicial Survey Commission was appointed by Governor Christian Herter at the request of the Massachusetts Bar Association. "Recognizing that the administration of justice is not within the exclusive proprietorship of the bench and bar, the Governor included on this 21-man commission civil leaders from business, labor, the press, and the clergy.... The stature of its members and the thoroughness of their deliberations assure their recommendations of the respectful attention of the public, the legislature, and the courts themselves." Richard H. Field, Professor of Law, Harvard Law School, in 1955 Annual Survey of Massachusetts Law, Chapter 23, "Administration of Justice," in galley proof furnished the author.

### III. STATE LEGISLATION

The Massachusetts Judicial Survey Commission and Governor Christian Herter recommended that the legislature amend the appropriate statutory provision to require the payment of a jury trial fee of \$15 by the party "filing a claim for jury trial or a motion to frame issues in the superior court for jury trial...."<sup>1</sup> The 1956 session of the Massachusetts legislature did not enact into law the recommendation of the Judicial Survey Commission. However, a suggested compromise providing that a \$15 jury fee be payable just before a jury is impanelled rather than at the time of the entry of the case appeared to have legislative support and the Judicial Survey Commission may go on record in favor of it.<sup>2</sup> The final legislative outcome is not known at this writing.

Although the recommendation of the Massachusetts Judicial Survey Commission is meeting some resistance in that state, many other states have statutes providing for the imposition of some sort of jury fee. They are of several types. In most instances the fee imposed is moderate in amount, ranging from \$3 to \$25. In a few instances the exact amount is left to the court to determine at the end of the trial. In at least three jurisdictions the deposit of a substantial fee is required on a daily basis. In one jurisdiction compulsory arbitration is provided for claims of less than \$1,000, thus obviating the cost of a jury trial.

The most common type of statute provides for a jury fee, sometimes also referred to as a trial fee, of a stated sum in a moderate amount. This fee may be imposed at the outset, payable by the party demanding a jury trial, or it may be imposed at the end of the trial against the party losing the suit. In the former situation, the amount of the fee may be taxed as costs in favor of the party winning the suit in the event he has made a prepayment; in the latter event, it may be taxed as costs to be paid to the county treasury. In most instances the fees bear no relation to the per diem compensation of the jurors. Most of these statutes have been in existence for many years.

In the following discussion, the reference is to jury trials in courts of record, of general jurisdiction comparable to the circuit courts of the Territory of Hawaii. They are variously called circuit courts, superior courts, district courts, or courts of common pleas.<sup>3</sup>

The statutes considered are presented as illustrative examples. It has been aptly said that "those familiar with statutes will know that it is almost impossible to tell just how significant a statute is, particularly outside the particular jurisdiction, merely by reading the statute."<sup>4</sup> This caution would seem to apply with especial force in the field of procedural law where historical circumstances and local practices play important roles in determining how the statutes are applied.

#### A. PAYMENT OF MODERATE JURY FEE BEFORE TRIAL

Among the jurisdictions that require the payment of a moderate jury or trial fee before trial are Connecticut, Michigan, Utah, Washington and Wyoming, and Hawaii and Alaska. In each of these jurisdictions, the party requesting a jury trial pays a certain sum of money to the clerk of the court. In most instances, he may recover the amount of the payment as part of his costs if he prevails in the lawsuit.

**CONNECTICUT** In Connecticut, there is imposed a jury fee of \$10 for a jury of six persons and \$25 for a jury of twelve. This fee is to be paid by the party who requests a jury trial at the time the case is claimed for the jury. The amount is taxed as costs in favor of the party paying it if final judgment is rendered in his favor.<sup>5</sup> In other words, a party who claims a jury trial pays a certain fee which he recovers from the other party if he prevails in the lawsuit, but whether he wins or loses the amount of the fee already paid remains with the court.

Other pertinent statutory provisions specify that where a party requests a jury trial, "such request shall be deemed to be a request for a jury of six unless it expressly calls for a full jury of twelve."<sup>6</sup>



MICHIGAN Similarly, in Michigan, the party demanding a jury trial pays a jury fee of \$3 to the clerk of the court before the impanelling of the jury. This amount will be taxed in his favor if he recovers a judgment for his costs.<sup>7</sup>

UTAH In Utah, if any party to a civil case desires a jury trial, he is required to deposit \$5 with the clerk at the time he gives notice. The clerk deposits the amount with the county treasurer.<sup>8</sup>

WASHINGTON In Washington, a party to a civil action may elect to have the case tried by jury by serving upon the opposite party or attorney and filing with the clerk of the court a statement of such election. At the time of filing the statement the party must also deposit \$12 with the clerk. If the case is settled out of court before it is called for trial, the deposit is returned. If the case is tried and the party making the deposit prevails, the amount of the deposit becomes part of the taxable costs in the action. If the parties fail to file such statement and make such deposit, they are deemed to waive trial by jury.<sup>9</sup>

WYOMING In Wyoming, a party desiring a jury trial is required to file a demand in writing, accompanied with a deposit of \$12. Failure to make such demand and deposit is deemed a waiver of trial by jury. If the party making the deposit is successful, he can recover the amount from the opposite party as part of his costs in the case.<sup>10</sup>

ALASKA In Alaska, the pertinent statute expressly states that "parties to a judicial proceeding are required to contribute toward the expense of maintaining courts of justice, or a particular action or proceeding therein, by the payment of certain sums of money, ... denominated trial fees."<sup>11</sup> The amounts of the trial fee in the territorial District Court are: for every trial by jury, \$12; for every trial by court, \$6; for every judgment without trial, \$3. The trial fee is to be paid by the plaintiff, appellant, or moving party before he is entitled to proceed. If he prevails in the action and is entitled to recover costs, the fee

is taxed against the adverse party. However, if it appears to the satisfaction of the court that the party cannot pay the trial fee, he may be allowed to proceed without prepayment.<sup>12</sup>

**HAWAII** In Hawaii, the person making a demand for jury trial in any civil suit or proceeding where issue has been joined is required to pay to the clerk of the circuit court, "as further costs of court," the sum of \$5.<sup>13</sup>

#### B. PAYMENT OF MODERATE JURY FEE AFTER TRIAL

Several jurisdictions provide that a jury fee of a moderate amount shall be taxed as costs at the conclusion of the trial against the unsuccessful party in the suit. In most instances the amount so taxed goes into the county treasury. These jurisdictions include the states of Colorado, Indiana, Iowa, Kentucky, Missouri, Nebraska, North Carolina, and West Virginia.

**COLORADO** In Colorado a jury fee of \$5 is taxed as part of the costs of the suit in each case tried by jury. When the fee is collected, the clerk pays it into the county treasury.<sup>14</sup>

**INDIANA** In Indiana, when cases are tried by a jury, a jury fee of \$3 is taxed as costs in favor of the county, but where a case is tried by a jury in a city court, the jury fee is taxed in favor of the city.<sup>15</sup>

**IOWA** In Iowa, a jury fee of \$10 is taxed in every case tried by a jury in a court of record; when collected it is paid by the clerk into the county treasury.<sup>16</sup>

**KENTUCKY** In Kentucky, the procedure is somewhat more complex. In the circuit courts, a jury fee of \$4 is initially paid by the successful party in the following situations: (a) upon the return of a verdict into court by the jury, or (b) upon a dismissal or non-suit. Upon the withdrawal of a jury by consent after it has been sworn, the jury fee is paid by the plaintiff. The jury fee is paid to the clerk of court. No execution can issue on a judgment until

the fee is paid. If the successful party fails or refuses to pay the fee, the other party may pay it, and get credit for it. In each of the above situations, the jury fee is taxed as costs against the unsuccessful party.

In the lower courts, the situation appears simpler. The jury fee is paid by the demanding party and taxed as costs against the unsuccessful party.<sup>17</sup>

**MISSOURI** In Missouri, a jury fee of \$12 is taxed as costs against the unsuccessful party in civil cases where a jury has served. This amount, when collected, is paid into the county treasury.<sup>18</sup>

**NEBRASKA** In Nebraska, a jury fee of \$10 is taxed in the bill of costs against the party against whom verdict is rendered. In addition, the unsuccessful party also has to pay a trial fee of \$5 whether the case is tried by the court or a jury. The amounts, when collected, are paid into the county treasury.<sup>19</sup>

**NORTH CAROLINA** In North Carolina, in a civil action in a court of record in which a jury has been impanelled, the party adjudged to pay costs must pay a "tax" of \$5. This "tax fee" is charged by the clerk and collected by the sheriff and paid into the county treasury. The fund raised in this manner is set apart for the payment of jurors attending the courts of the county.<sup>20</sup>

**WEST VIRGINIA** In West Virginia, the sum of "eight dollars for jury costs" is taxed in the costs against a person against whom a judgment on the verdict of a jury is rendered, and against a person on whose motion the verdict of a jury is set aside and a new trial granted. This amount, when collected, is paid into the county treasury.<sup>21</sup>

### C. PAYMENT OF FEE DETERMINED AFTER TRIAL

In at least two jurisdictions, Arizona and Louisiana, the total amount of the jury fee is determined by the court at the conclusion of the trial and taxed as part of the costs.

In Arkansas, the statute provides that jurors' compensation is to be taxed as costs against the unsuccessful party.

ARIZONA In Arizona, a jury fee based on the total per diem compensation of the jurors is fixed by the court at the time of the rendition of judgment. It is taxed as costs, and is included in the judgment, along with other allowable costs, such as fees of officers, witnesses, compensation of referees, and costs of taking depositions and certified copies of papers. The jury fee is paid to the clerk of court who pays it to the county treasurer. The court may at any time for good cause shown relieve any person from the payment of the jury fee when the court believes such relief proper.<sup>22</sup> "The purpose of the provision as to jury fees, ... is to reimburse the county, and the provision is within the power of the legislature to adopt."<sup>23</sup>

Juror's fees are \$8 for each juror for each day's attendance. Mileage is determined by the judge, but is not to exceed twenty cents per mile for one trip one way only.<sup>24</sup> Therefore, with a twelve-man jury, the cost per day would be \$96, plus whatever allowable mileage the jurors might claim.<sup>25</sup>

ARKANSAS In Arkansas, according to the statutory provisions, the compensation of jurors is taxed as cost and paid by the unsuccessful party.<sup>26</sup> Per diem compensation is \$5 for each juror.<sup>27</sup> In addition to this per diem payment, jurors are allowed the sums necessarily paid out for crossing any ferry or toll bridge in going between their homes and the court.<sup>28</sup> Any person who is summoned as a juror but is not accepted is allowed the same per diem for each day's attendance until excused; in addition, such unaccepted juror is allowed five cents per mile, from and to his home.<sup>29</sup> All mileage is also taxed as cost.<sup>30</sup> (Certain counties of the state are excepted from these provisions, and presumably governed by a similar provision of an older statute.<sup>31</sup>)

For a jury trial that lasts several days, the total amount of the fees taxable as costs against the unsuccessful party could theoretically become quite substantial. In practice, however, most courts of Arkansas apparently do not tax the cost of the jury against the unsuccessful party; in

most counties the jury cost is paid by the county, but the losing party is usually taxed a small amount, approximately \$2, as jury fee.<sup>32</sup>

LOUISIANA In Louisiana, there is a combination of a fixed deposit at the outset, together with an additional sum to be determined at the conclusion. The party requesting a jury deposits \$12 as jury costs, and in addition gives a bond for such amount as may be determined by the judge to cover the additional cost of the jury. The party making the deposit has a right to have these amounts taxed as costs against the other party if he should prevail. A jury will not be ordered in a civil case unless the deposit is made and the bond given. In case the judge should order a jury on his own initiative, the plaintiff must advance the deposit of \$12, which will be taxed as costs against the unsuccessful party. If the plaintiff fails to make the deposit within certain specified periods of time, his suit will be dismissed.<sup>33</sup>

Compensation of jurors is \$4 for each day's attendance, and five cents for each mile necessarily traveled in going to and returning from the court house, to be charged once only.<sup>34</sup> The per diem compensation of \$4 for each juror constitutes the basis upon which the additional cost of the jury is determined.<sup>35</sup>

Different provisions apply to Orleans Parish, wherein compensation of jurors in civil cases sitting in the City of New Orleans are entitled to \$1 for every case in which they find a verdict. This amount is to be charged among the costs, and must be advanced by the party praying for a jury trial when he files his petition or answer; otherwise his prayer is disregarded and the case tried by the court.<sup>36</sup>

#### D. SUBSTANTIAL DEPOSITS IN ADVANCE OF AND DURING TRIAL

In the foregoing examples the jury or trial fees imposed by most of the states appear to be nominal in amount, and bear little relation to the cost to the government of providing a

jury trial. Exceptions are Louisiana and Arizona, where the amounts are determined at the conclusion of the trial, and are related to the compensation of the jurors.

California, Nevada and New Mexico have taken a somewhat different approach to the problem of jury fees. These states require a substantial deposit by the party demanding a jury trial, and a deposit at the beginning of each day during the progress of the trial. In California and New Mexico, failure to make such deposits constitute a waiver of trial by jury. The statutory provisions of these two states are of sufficient interest to warrant more extensive treatment.

**CALIFORNIA** The development of this portion of the law in the state of California has been based on the concept that the right to a jury trial in a civil suit is protected by the state constitution, but it is also in the nature of a privilege that can be waived. Thus:

Even though a jury trial is undeniably a significant right and one that is constitutionally preserved it is nevertheless settled law in this jurisdiction that the right to a jury trial is not part of the framework of government but that it is a privilege that may be waived by the parties to the action. A waiver by one party, however, does not deprive the other of a right to have the issues of fact submitted to a jury.

The Constitution of California expressly provides that the legislature has the power of declaring what shall constitute a waiver of trial by jury, and although the legislature may not in the guise of procedural regulation attempt to abridge the right of jury trial as it existed at common law at the time the constitution was adopted, it can make reasonable regulations prescribing the mode of waiver of a jury trial.<sup>37</sup>

The California Code of Civil Procedure provides that trial by jury may be waived in a number of ways. In addition

to the more common provisions found in many statutes, such as by failing to appear at the trial, by written consent filed with the clerk or judge, by oral consent in open court, and by failing to announce that a jury is required at the time the cause is first set upon the trial calendar, or within five days after notice of setting if set without notice or stipulation, the code also provides that failure to make certain deposits seasonably constitutes waiver of trial by jury. For instance:

5. By failing to deposit...a sum equal to the amount of one day's jury fees...10 days prior to the date set for trial.

6. By failing to deposit...promptly after the impanelment of the jury, a sum equal to the mileage or transportation...of the jury accrued up to that time.

7. By failing to deposit...at the beginning of the second and each succeeding day's session a sum equal to one day's fees of the jury, and the mileage or transportation, if any there be.<sup>38</sup>

The Code also provides that the court may, in its discretion, allow a trial by jury although there has been a waiver of such a trial.

Wide discretion appears to be given to the court by the language of the code. However, "the requirements are strictly construed and a failure to comply with the terms of the statute will result in a waiver of the right."<sup>39</sup> A number of California cases have held the right to jury trial to have been lost through non-compliance with some of these requirements.

In one case involving subdivision 5 of the section just quoted, the California court held that there was no denial of due process when the trial court denied a litigant's demand for a jury trial where the litigant did not deposit the jury fees on time. The court summarized the case as follows:

Appellant contends that she was denied due process by the denial of her demand for a jury trial. The record discloses that on November 9, 1943, appellant filed her written demand for a trial by jury. On December 20, 1943, the cause was set for trial before a jury on January 3, 1944, and written notice was served on appellant on the same day. On the day set for trial the appellant deposited the jury fees and thereupon demanded a trial by jury which was denied. Section 631 of the Code of Civil Procedure provides that a trial by jury is waived by failing to deposit with the clerk ten days prior to the date set for trial, a sum equal to one day's jury fees. Having failed to deposit the necessary sum at the prescribed time, appellant cannot now assert that she was denied a jury trial by any error of the trial court.<sup>40</sup>

A further question might be raised as to what would be the effect if a party complied with all the earlier requirements and a jury trial was underway, but on the second or some later day, the party failed to make a satisfactory deposit in compliance with subdivision 7 of the Code. Presumably, the court could proceed to try the case without a jury. In one case, however, where the plaintiff who had demanded a jury trial had paid the first day's fee but failed to pay the second day's fee according to subdivision 7, except by a check which the clerk would not accept, the court, on the defendant's motion, dismissed the case for want of prosecution instead of going on with a court trial. On appeal, this was held not to be an abuse of discretion.<sup>41</sup> Against the appellant's contention that the trial court abused its discretion in dismissing the action rather than dismissing the jury and setting the case for trial by the court without a jury, the appellate court said:

.... In our opinion it cannot be said that the trial court abused its discretion in dismissing the action. A jury had been demanded by plaintiff and he was insisting upon a jury trial



without paying the jury fees required by law and without making any request for a trial by the court. As a matter of law he had waived his right to a trial by jury by a failure to deposit the jury fees at the time specified (Code Civ. Proc. sec. 631, subd. 7), and the delay resulting from the granting of his request for time within which to produce the fees obstructed the orderly and expeditious handling of the business of the court. If appellant had desired to have the jury dismissed and the cause set for trial before the court sitting without a jury, he should have made such a request. The trial court might well have granted such request upon condition that appellant pay the jury fees incurred for the second day of trial before the time set for the trial by the court. In the absence of such request we believe that the trial court properly dismissed the action.<sup>42</sup>

A waiver once made can only be withdrawn at the discretion of the trial court:

A waiver of jury trial, voluntarily and regularly made, continues for the duration of the trial and cannot afterward be withdrawn except in the discretion of the court ....<sup>43</sup>

However, the fact that it is always within the discretion of the court to relieve a litigant from the operative effect of a prior waiver of jury trial adds an ameliorating influence to the administration of the rule that once the right to jury trial is gone it is gone forever unless there is a complete new trial ....<sup>44</sup>

It is not clear from a reading of the California statute whether the amounts paid by the party demanding jury trial may be recovered by the paying party against the adverse party

if the paying party should prevail. One section of the statute provides that when a party has deposited jury fees and the case is settled or a continuance is granted on motion of the party depositing the fees, the money will not be refunded if the court finds that there has not been sufficient time to notify the jurors.<sup>45</sup> Another section provides that the prevailing party in a civil action, including a defendant in favor of whom the action is dismissed, is entitled, as costs, to expenses incurred for food and lodging or other reasonable necessities of the jury.<sup>46</sup> The statute appears silent on the express subject of recovery by the depositing party of the amounts deposited toward the per diem and mileage expenses of the jurors in the event the depositing party should prevail in the case.

In practice, the operation of the statute in relation to the deposit of jury fees appears to vary in the different counties. The per diem compensation is from \$3 to \$5 for each juror, as provided in the state's Government Code. In general, at the conclusion of the trial, the prevailing party may recover as costs from the losing party in the action the items of jury expense (per diem compensation, mileage, meals) paid out on behalf of the jury.<sup>47</sup>

NEVADA In civil cases in the state of Nevada, the party who demands a jury trial must pay in advance each day to the clerk of the court the per diem of each juror engaged in the trial of the case. If the party who pays the fees prevails in the lawsuit, he can recover the fees so paid from the losing party. Furthermore, if the jury is discharged without finding a verdict in a civil action, and the party who demands the jury and pays the fees obtains a judgment, he can also recover the fee so paid from the losing party.<sup>48</sup>

The amount of per diem compensation of each juror in attendance is \$6. Mileage allowance is fifteen cents a mile for each mile, one way only.<sup>49</sup>

In practice, the party demanding a jury trial may be called upon to deposit a rather substantial amount of money

if the trial should last over a period of time. During the selection of the jurymen from the members of the venire, the expenses of the members of the venire are paid by the county. When the jury is selected, the party who demanded the jury must pay the sum of \$72 for each day of the trial. If a demanding party should make the initial deposit and the trial commenced, but fail to make the required deposit on the second day, or on some other later date, on motion of the opposing counsel the action would be dismissed by the court, without prejudice. There is no statutory provision for relieving a party of the necessity of making the required deposit because of financial hardship or for any other reason, and the court has no discretion on the matter.<sup>50</sup>

NEW MEXICO New Mexico is another state which has statutory provisions providing that a party demanding a jury trial shall be required to deposit a sum of money before trial begins, and to make a deposit on each subsequent day.<sup>51</sup> The statute provides that "in all civil cases the fees of the jury actually engaged in the trial ... shall be taxed as part of the costs ... against the party losing the same ... and whenever either party shall ... demand a jury ... the party so demanding ... shall be required to deposit the sum of thirty-six dollars ... on the day before ... trial, and thirty-dollars ... additional for each subsequent day ...." However, when there are sufficient court funds on hand to pay all costs of the jury during the term, such deposits shall not be required.<sup>52</sup>

Furthermore, in an approach similar to that of the California statute, the New Mexico law also provides that failure to comply with the requirements of the statute shall constitute a waiver of the right to a trial by jury. It states that "whenever a party demanding a jury ... shall fail upon being so ordered by the court, to advance the jury fees ... or any part thereof ... such party shall be deemed to have waived a jury ... and the case shall then be ... tried by the court."<sup>53</sup>

The statutory compiler's notes state that the foregoing sections have been superseded by Rule 38 of the Rules of

Civil Procedure for the District Courts of the state of New Mexico.<sup>54</sup> This statement is probably based upon the fact that New Mexico is a state where complete rule-making power is vested in the Supreme Court.<sup>55</sup> The compiler has apparently accepted the view that judicial rule-making "envisages the promulgation of rules of practice to supersede existing statutory or code provisions."<sup>56</sup>

The New Mexico rules are patterned after the Federal Rules of Civil Procedure. Subdivision (b) of Rule 38 of the Federal Rules provides as follows:

Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.<sup>57</sup>

However, subdivision (b) of Rule 38 of the New Mexico Rules has been recast to provide that either party may file a notice that he desires to try the case without a jury. Whereupon the opposite party must elect within 10 days whether he demands a jury trial. "In event the opposite party shall elect to try said cause to a jury, he shall, within five (5) days of making said election, deposit with the clerk of the court the sum of thirty-six (\$36.00) dollars for and on account of jury fees .... Failure to deposit said jury fees shall be ... waiver of trial by jury .... Provided, ... where definite dates are fixed ... so as to require the parties to elect ... at ... the calling of the docket, any party desiring a jury trial must so announce at that time and deposit a jury fee of thirty-six (\$36.00) dollars. Failing ... he will be deemed to have waived a jury trial."

This rule does not provide for a determination by the court as to whether there are court funds sufficient for the trial of all causes during the term, as does the statutory

provision. It appears to make the deposit mandatory. On the other hand, it is silent as to the necessity for additional deposits for each subsequent day of trial.

The amount of the required deposit of \$36 appears to be based on the former rate of jurors' per diem of \$3.58. In 1949 the per diem rate was increased to \$5, and the mileage from five cents a mile to seven cents a mile.<sup>59</sup> The required deposit, however, has not been increased commensurately. Another provision of the statute provides that whenever jury fees are advanced by a party demanding trial by jury, "the amount so advanced shall be paid to the jury ... and shall be deducted from the amount per diem that the jury would otherwise receive ...."<sup>60</sup> As it stands, it appears that the state of New Mexico would bear the difference in per diem to the extent of \$2 per juror.

The provisions of the New Mexico rules governing waiver of jury trial, contained in subdivisions (b) and (d) of Rule 38 have been described as awkward by a member of the New Mexico Bar. In comparing the New Mexico provisions with the corresponding provision of the Federal Rules,<sup>61</sup> which were adopted in large measure by New Mexico, it was said:

The excellent federal rule concerning the waiver of jury trial has not been adopted. Under the New Mexico rule, either party to an action in which the right of trial by jury exists may file and serve a notice that he waives a jury trial and requires his opponent to make his own election within ten days. If the other party desires a jury trial, he must file and serve his written demand within that time and make an initial deposit of \$36 for jury fees. The rule also permits the use of another method whereby the trial court may establish definite dates for calling the docket so as to require litigants to elect at that time whether they desire jury trials. The writer has never heard any good reason given for retaining the comparatively awkward New Mexico practice.<sup>62</sup>

Without familiarity with the practice and procedure of the New Mexico courts, one might hesitatingly surmise that a probable reason for the comparative awkwardness of the New Mexico provisions lies in the attempt of the statutory draftsman to accomplish several purposes under the doctrine of "waiver": to cause an early election of jury trial, to insure the advance deposit of juror fees, and to avoid the danger of having the statutory provisions declared unconstitutional. Some of the phraseology of the California statute can also be termed "comparatively awkward" as it attempts to accomplish these multiple objectives.

### E. COMPULSORY ARBITRATION

**PENNSYLVANIA** The state of Pennsylvania has taken a different approach to the problem in its attempt to speed up the trial of cases involving small amounts and relieve the cost of such trials to the state.

In 1951 it passed a law providing for arbitration of cases where the amount in controversy is \$1,000 or less. A board of three arbitrators is appointed from among the members of the bar. The appointment is made within 10 days after the case is at issue, and the board renders its award within 20 days after hearing. The compensation of the members of the board of arbitrators is determined by the court and paid by the county. Either party may appeal from an award, but any party appealing must first repay to the county the compensation of the arbitrators. Such payments are not taxed as costs and cannot be recovered from the adverse party.<sup>63</sup>

The constitutionality of the procedure adopted by Pennsylvania has been upheld by the Supreme Court of Pennsylvania against the challenge that it violated the fourteenth Amendment of the Constitution of the United States and the Pennsylvania constitutional guarantee of jury trial.<sup>64</sup> The Pennsylvania Supreme Court was divided on the decision, the majority holding that a reasonable condition could be imposed on a litigant's right to a regular court trial, and that the requirement that the county be reimbursed for

arbitrators' fees, even though the payment to the county was not thereafter recoverable as costs, was not per se an unreasonable condition.

In the specifics of its operation, the Pennsylvania statute provides that the Court of Common Pleas of any of the Pennsylvania counties may, by rule, require that all civil cases upon coming to issue, wherein the amount in controversy is \$1,000 or less (except those involving title to realty) be submitted to arbitration by three members of the county's bar.<sup>65</sup> In one county the rules provided for fees of \$25 for each of the three arbitrators in each case. In another county the rules fixed the arbitrators' fees at \$30 for each arbitrator for each case, but in a particular instance, on petition to the court, the fees can be increased in an involved case, or decreased to prevent injustice; the required repayment to the county can also be reduced by the court in a particular case to prevent injustice or hardship.<sup>66</sup>

From the effective time of the statute in January, 1952 to May, 1955, some 40 of a total of 67 counties in Pennsylvania had adopted rules implementing the statute.<sup>67</sup>

The results realized from the New system in Pennsylvania have been reported as gratifying. From the point of view of speeding up the administration of justice, in one county where previously a waiting period of some three or four years was necessary before civil cases could be reached for jury trial, trial can now be reached within a year. In another county, after one year's experience, the new method for handling the small cases had so reduced the backlog in the court of Common Pleas that the larger suits are coming to trial very rapidly, and in the April 1955 term the calendar was so nearly current that it included one case filed after the first of the year, whereas previously there was a waiting period of at least a year. From the point of view of the reduction of expenses in fees paid to jurors and in jurors' meals and mileage, it was reported that the net saving in one county was \$72,000 a year.<sup>68</sup>

A leader of the Pennsylvania bar who headed the committee to investigate compulsory arbitration for a county of

400,000 population with a bar of 215 lawyers writes about it after a year of operation:

We are now enthusiastic about compulsory arbitration and its operation. The judges of Montgomery County have adopted it, effective May 1, 1955, making it applicable to pending cases.

\* \* \*

As of May 1, 1956, compulsory arbitration has been in effect in Montgomery County for one year. The favorable results in operation have exceeded our expectations. Hearings were held even during the summer months. Four hundred fifty-eight cases have been set for arbitration and for the most part finally disposed of. This is a very large number of trials for a county of our size.

We are now up to date with arbitration cases. Our backlog has disappeared.

\* \* \*

Sixty days is the proven limit from the time suit is brought until final judgment, if no appeal is taken. Only one case is scheduled for an appointed time and place. This is a great advantage to both lawyer and client who do not have to wait around court until their case is reached and then perhaps have it continued. They go to a hearing immediately. The actual hearings consume from one and a half to two and a half hours, about one third to one half of the time required for jury trials.

All hearings have been scheduled in courtrooms, and the arbitrators occupy the Bench. They



conduct dignified and thorough trials with the result that the litigants realize that they have had a real trial of their dispute. The rules of evidence are observed, but without too much formality. The arbitrators can eliminate incompetent evidence in their determination, much as in equity cases. The arbitrators render their verdict at the conclusion of the hearing or hold the matter under advisement. They must file their award within twenty days from the hearing.

\* \* \*

The operation of compulsory arbitration has met with the general approval and commendation of the judges, lawyers and litigants. There have been practically no complaints.<sup>69</sup>

LEGISLATIVE REFERENCE BUREAU

JAN 15 1957

TERRITORY OF HAWAII

## FOOTNOTES

1. Report of the Massachusetts Judicial Survey Commission, "An Act Establishing A Moderate Jury Fee," p. 10.
2. Richard H. Field, Professor of Law, Harvard Law School, in a letter dated May 17, 1956 to the author.
3. A listing of the names of the various courts in the different states is found in State Court Systems (revised 1953), published by the Council of State Governments.
4. University of Michigan Law School, Current Trends in State Legislation, 1952, p. xii.
5. Connecticut General Statutes 1949, 1953 Supplement, sec. 1496c.
6. Ibid., sec. 2387c. See also secs. 2388c (issues of fact in equitable action), 2390c (hearing in damages), and 2333c (civil actions being transferred from municipal court).
7. Michigan Compiled Laws 1948, sec. 618.22.
8. Utah Code Annotated 1943, sec. 28-5-12.
9. Washington Revised Code, secs. 4.44.100 and 4.44.110.
10. Wyoming Compiled Statutes 1945, sec. 3-2422.
11. Alaska Compiled Laws 1949, sec. 55-11-86.
12. Ibid., secs. 55-11-81, 82 and 84.
13. Revised Laws of Hawaii 1945, sec. 9745.
14. Colorado Statutes Annotated 1935, c. 95, sec. 65.
15. Indiana Statutes Annotated 1933 (Burns, 1946 Replacement), 1955 Cumulative Supplement, sec. 4-3319.
16. Iowa Code 1954. sec. 625.8.

17. Kentucky Revised Statutes 1955, sec. 29.410.
18. Missouri Revised Statutes 1949, sec. 494.160.
19. Nebraska Revised Statutes 1943, Reissue of 1952, sec. 33-143.
20. North Carolina General Statutes 1943, 1947 Cumulative Supplement, sec. 6-5.
21. West Virginia Code 1955, sec. 5281.
22. Arizona Code Annotated 1939, sec. 34-125.
23. Ibid., Notes to Decisions.
24. Arizona Session Laws of 1956, c. 91.
25. Letter dated August 20, 1956, from the Legislative Council, State of Arizona, to the Director, Legislative Reference Bureau, Territory of Hawaii.
26. Arkansas Statutes 1947, sec. 39-302.
27. Ibid., sec. 39-301.
28. Ibid., sec. 39-302.
29. Ibid., secs. 39-302, 39-303.
30. Ibid., sec. 39-305.
31. Ibid., sec. 39-306.
32. Letter dated September 10, 1956, from the Legislative Council, State of Arkansas, to the author.
33. Louisiana Revised Statutes 1950, sec. 3050.
34. Ibid., 1952 Cumulative Supplement, sec. 3049.

35. Letter dated September 10, 1956, from the Special Counsel, Department of Justice, State of Louisiana, to the author.
36. Louisiana Revised Statutes 1950, sec. 3105.
37. Newell John Gardner, "Jury Trial In California Civil Actions," 2 U.C.L.A. Law Review 370, 373-4, (April, 1955).
38. California Code of Civil Procedure (Deering's 1953), ~~sec.~~ 631.
39. Newell John Gardner, op. cit., at 374.
40. Py v. Pleitner, 70 Cal. App. 2d 576, 161 P. 2d 393 (1945).
41. Rose v. Subway Terminal Corp., 139 Cal. App. 67, 33 P. 2d 76 (1934).
42. Ibid., 67, 69.
43. Newell John Gardner, op. cit., at 375.
44. Ibid., at 377.
45. California Code of Civil Procedure (Deering's 1953), sec. 631.3.
46. Ibid., sec. 1032.5.
47. Letter dated August 21, 1956, from the Judicial Council of the State of California to the author.
48. Nevada Compiled Laws 1929, secs. 8490, 8491, as amended by Statutes 1953, c. 127.
49. Ibid.
50. Letter dated August 13, 1956, from the Legislative Counsel Bureau, State of Nevada to the author.

51. New Mexico Statutes 1941, sec. 19-814.

52. "The court shall, in its discretion, decide whether or not the court funds are sufficient for the trial of all causes during the term and whether or not parties demanding juries shall deposit funds...." Ibid.

53. Ibid., sec. 19-816.

54. Ibid., sec. 19-101 (38).

55. Arthur T. Vanderbilt, ed. Minimum Standards of Judicial Administration, (1949), p. 118.

56. American Bar Association, Handbook on the Improvement of the Administration of Justice, (1949-50), p. 11.

57. By way of comparison, subdivision (b) of Rule 38 of the Hawaii Rules of Civil Procedure, which are patterned after the Federal Rules, provides as follows:

Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party. Where by statute a jury trial is allowed on appeal to the circuit court from the prior determination of any court or administrative body, a trial by jury may be had if demanded in the notice of appeal, and if not demanded in the notice, the appellee may have a trial by jury by filing a demand within 10 days after the case is docketed in the circuit court.

58. New Mexico Statutes 1941, sec. 30-137.

59. Ibid., 1951 Cumulative Pocket Supplement, sec. 30-137.

60. Ibid., sec. 19-815.
61. Federal Rules of Civil Procedure, Rule 38 (d), "Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties." Rule 38 (d) of the Hawaii Rules of Civil Procedure reads identically.
62. George W. Robertson, New Mexico Rules of Civil Procedure for the District Courts, 16 Federal Rules Decisions 489, 492 (March, 1955).
63. Session Laws of Pennsylvania 1951, Act 590.
64. Application of Smith, 381 Pa. 223, 112 A.2d 625 (1955).
65. Session Laws of Pennsylvania 1951, Act 590.
66. Howard C. Westwood, "The Law's Delay and the Pennsylvania Arbitration Plan," 39 Journal of the American Judicature Society 50, 51-52 (1955).
67. Ibid., p. 52.
68. Ibid., p. 53.
69. Aaron S. Swartz, Jr., "Compulsory Arbitration: An Experiment in Pennsylvania," 42 American Bar Association Journal 513, 514-515 (June, 1956).

#### IV. CONSTITUTIONALITY

The constitutionality of statutes requiring a deposit of a fee as a condition of the exercise of the right to a jury trial has been upheld. The general rule has been summarized as follows:

According to the great weight of authority, legislation may, without denying or encroaching upon the right to jury trial, impose, as a condition of the exercise of the right to demand a trial by jury, a requirement for the prepayment or deposit in court of jury fees, provided the fees imposed are reasonable and the statutes are uniform in operation throughout the state, where such uniformity is required. Such a condition may properly be required by rule of court. In support of this view, it is said that the right of trial by jury does not include the services of a jury without cost, but that such right is of the same nature as the right to have official services performed by public officers.<sup>1</sup>

Furthermore, it appears to be settled law that a party may waive the right to a trial by jury. Thus:

A constitutional or statutory guaranty of a right to jury trial in a civil case is, as a general rule, regarded as a mere privilege which a party litigant may at his option voluntarily waive by consenting to, or entering into, a stipulation or agreement for the submission of the trial of the case or issues therein to the court, and this regardless of whether there is any legislative provision for waiving a jury.<sup>2</sup>

In practice, the fact that a jury trial is usually demanded for tactical reasons of counsel appears to be accepted by most observers and writers on the subject. The Massachusetts Judicial Survey Commission is outspoken on this aspect and points out the difference between the constitutional right of the litigant and the tactics of his counsel:

It is an uncontested fact that many times counsel will claim a jury trial for reasons which are irrelevant to the constitutional right of trial by jury. Such reasons may include the desire to set up a favorable trading situation to secure a settlement without trial, or merely to postpone the need for careful preparation of the case for a considerable period. Claim for jury trial may often be of a most perfunctory character. To the extent that these practices can be cut down by a moderate jury fee, congestion will be relieved without any jeopardy to constitutional rights. There is a difference between the constitutional rights of a citizen and the tactical practices of his counsel.<sup>3</sup>

A jurist of New York is of the same opinion, and feels that jury trials in civil cases are largely matters of historical hangover and the habitual practices of lawyers. He further points out that civil cases in "equity," which often involve extremely important matters, are tried without a jury. Indeed, the federal constitutional guarantee covers only "suits at common law."<sup>4</sup> The writer states:

The constitutional guarantee that a man may not be deprived of liberty without a judgment of a representative body of the community is a safety factor of first importance.

The same considerations do not apply, however, or at least not to the same extent, to civil cases--ordinary commercial disputes or personal injury cases. Indeed, ours is the only country



in the world which any longer attempts to handle civil litigation within the jury frame, and coincidentally it is the only country which has court delay. England, the cradle of the common law and of the jury system, abandoned juries in most civil cases long ago.

Jury trials in civil cases are only a matter of habit and history. The most important civil cases, although the least numerous, are tried without a jury. Cases for an injunction or to compel the performance of a contract, cases for a marital separation or involving the custody of children—in fact nearly all cases except claims for damages—are tried without a jury because those actions happened to grow up in a compartment of the law, known as "equity," outside of the jury sphere.

There is no reason for jury trials in the one area and not in the other. The same reasons for or against jury trials apply equally to both. We are thus controlled by tradition rather than by reason in the division of cases which may or may not be tried before a jury.<sup>5</sup>

A federal District Court judge also feels that, short of amending the Seventh Amendment to the Constitution, it would be desirable to discourage the use of jury trials in civil suits in the federal courts by the imposition of jury costs to be paid by the parties:

In criminal actions the present situation is unlikely to be changed, because of the content of Article III, Sec. 2, Clause 3 of the Constitution, providing for trial of all crimes by jury, and by the Sixth Amendment. Likewise, without an amendment changing the Seventh Amendment, relating to suits at common law, there is no likelihood of any change which

would deprive a party, against his will, of a jury to which he would now be entitled. But experience indicates that the business of the courts would be expedited to a considerable degree if there were more cases tried either without a jury or under a law making a majority verdict acceptable. Practically speaking, neither procedure would interfere with the administration of justice. Even if majority verdicts be sanctioned in civil cases, why should we not encourage the parties to waive their rights to demand a jury in favor of the trial before the judge alone? Perhaps the most practical means of such encouragement would be to modify the policy now in effect regarding the payment of the costs of the juries—per diem payments and subsistence.

Why should Uncle Sam always pay these costs, especially in civil suits? In earlier times in this country, it was permissible to tax jury fees as costs under statutory provisions, as is the case generally in the state courts at the present time.<sup>6</sup>

The foregoing views represent the predominant opinion on the subject. Dissenting views are centered around the following ideas: those that advocate doing away with the use of the juries in civil cases do not claim that juries lack competence or fail to promote the interests of justice; that twelve persons drawn from a cross section of the community can more adequately arrive at a conclusion concerning a fact situation than a single judge; that the right to a jury trial, as a constitutional right, should not be sacrificed for reasons of economy; and that the proper way to relieve court calendar congestion is to provide for more courtrooms and judges.<sup>7</sup>

To a practicing attorney "the way to relieve congestion in courts is to make legislators understand that everything has doubled since World War II except the number of judges and courtrooms."<sup>8</sup>

## FOOTNOTES

1. 31 American Jurisprudence 581-2.
2. Ibid., at 583.
3. Report of the Massachusetts Judicial Survey Commission, p. 98.
4. "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." United States Constitution, Amendment VII.
5. David W. Peck, op. cit., at 459-460.
6. J. Frank McLaughlin, Judge, U. S. District Court, District of Hawaii, 16 Federal Rules Decisions 481, 487 (March, 1955).
7. Walter R. Hart, Justice, Supreme Court, State of New York, "Shall the Jury System be Sacrificed on the Altar of Economy?", New York State Bar Bulletin, April, 1956, p. 146.
8. Sigmund L. Miller, Attorney from Hartford, Connecticut, in an address to members of the National Association of Claimants' Compensation Attorneys in Honolulu on August 11, 1956, as reported in the Honolulu Star-Bulletin, August 13, 1956, p. 6, col. 1.

## V. CONCLUSIONS

The following alternative courses of action are open to the Territory of Hawaii if it should desire to impose some sort of jury fee to accomplish in some measure the objectives of lessening the number of jury trials in civil cases, thus speeding up the court calendar and reducing costs, and of having the private litigants in civil suits bear a portion of the costs of the jury in cases involving jury trial:

1. Enact legislation increasing the present fee of \$5 to a larger amount. As indicated above, the states that have such a fee range from a low of \$3 to a high of \$25. Amounts of \$10 and \$12 appear to be in force in several states. The Judicial Survey Commission of Massachusetts recommended a fee of \$15 for that state; or
2. Enact legislation imposing a single fee in an amount which bears some relationship to minimum juror costs.<sup>1</sup> For instance, a single fee of \$48 could be imposed as a minimum, on the basis of one day's per diem compensation of \$4 per juror for 12 jurors. Or a single fee of \$96 might be imposed on the basis that a jury trial is seldom concluded in less than two days' time. In the latter event, a provision for a partial refund in case the trial does not go beyond the first day could be included; or
3. Enact legislation imposing a substantial deposit before trial by the party demanding a jury trial, together with an additional deposit on each subsequent day. This legislation could combine the main features of the California and New Mexico provisions (set forth in Appendices 4 and 5). The amount of

each deposit could be measured by the total per diem cost of the jurors' compensation. Accrued mileage allowances might also be included; or

4. Enact legislation setting forth certain broad requirements as to amount of deposit and method, and authorizing the Supreme Court of the Territory of Hawaii to adopt and promulgate such rules of court as it may determine appropriate to implement the legislation, within broad limitations as to amounts and method.<sup>2</sup>
5. In addition to the foregoing, the Territory could also enact legislation providing for compulsory arbitration of civil cases in which the amount in controversy is below a certain sum, similar to the Pennsylvania statute which sets the amount at \$1,000.

Under any of these alternatives, discretion could be given to the trial court to grant relief in cases of impecunious litigants and to avoid injustice or real hardship.<sup>3</sup> Provision could also be made for the recovery of these deposits from the adverse party as part of the taxable costs of the lawsuit in the event the party who had demanded a jury trial and made the deposits should prevail in the case.

To remain within the limits of the constitutional doctrines, legislation and rules of court which impose substantial advance deposits as a prerequisite to jury trial would have to be cast under the theory that failure to make the requisite deposits would constitute waiver of the right to trial by jury.

## FOOTNOTES

1. "The pay of jurors in courts of record shall be, for actual attendance at court, four dollars a day during such attendance, and twenty cents for each mile actually and necessarily traveled, in going only. Jurors residing ten miles or more from the court shall be paid four dollars for each day that they shall report in person to the clerk of the court, in addition to the mileage fees hereinabove provided. Jurors residing upon an island other than that upon which the court is holding session shall be paid six dollars for each day that they shall report in person to the clerk of the court, in addition to the mileage fees hereinabove provided." Revised Laws of Hawaii 1945, sec. 9797, as amended by Session Laws of Hawaii 1945, c. 62, sec. 1.

2. The Supreme Court of the Territory of Hawaii has power to prescribe by general rules the practice and procedure in civil actions and in criminal proceedings, and such rules "have the force and effect of law and shall supersede any statute in conflict therewith." (Revised Laws of Hawaii 1945, secs. 9614 and 9617 as to civil procedure and Session Laws of Hawaii 1949, Act 380, secs. 9618.01 and 9618.04 as to criminal procedure.) This is known as full rule-making power. Furthermore, the Supreme Court has power to revise, amend, add or eliminate items of the statutory costs and fees and to prescribe new costs and fees and their advance payment. (Revised Laws of Hawaii 1945, sec. 9741) However, it would appear that express statutory authorization would be required to effect the imposition of specific trial fees or juror fees of substantial amounts, particularly if the failure to deposit such fees were to constitute a waiver of trial by jury.

3. At present, judges and magistrates of all courts of the Territory have discretion to waive prepayment, or to reduce or remit costs, in special or extraordinary cases where such costs appear onerous. (Revised Laws of Hawaii 1945, sec. 9743)

## APPENDICES

## Appendix I

STATES IMPOSING SOME FORM OF JURY FEE OR TRIAL FEEA. States Requiring Payment of Moderate Jury Fee, Before Trial, By Party Requesting Jury

<u>State</u>	<u>Amount of Fee</u>	<u>Taxable as Cost Against Adverse Party if Depositor Prevails?</u>
CONNECTICUT	\$10.00 for jury of six 25.00 for jury of twelve	Yes
MICHIGAN	3.00	Yes
UTAH	5.00	Probably yes, although statute not specific.
WASHINGTON	12.00	Yes
WYOMING	12.00	Yes
ALASKA	12.00 trial by jury in district court 6.00 trial by court in district court.	Yes
<u>HAWAII</u>	5.00	Yes

B. States Requiring Payment of Moderate Jury Fee, After Trial, By Unsuccessful Party

<u>State</u>	<u>Amount of Fee</u>	<u>Taxable as Cost in Favor of County?</u>
COLORADO	\$ 5.00	Yes, clerk collects, pays to county treasury.
INDIANA	5.00	Yes, but where case tried in city court, fee goes to city.
IOWA	10.00	Yes, clerk collects, pays to county treasury.
KENTUCKY	4.00	Yes, but initial payment is made by successful party to clerk.
MISSOURI	12.00	Yes
NEBRASKA	10.00 jury fee 5.00 trial fee whether trial by court or jury	Yes
NORTH CAROLINA	5.00	Yes, collected by sheriff.
WEST VIRGINIA	8.00	Yes



## Appendix I (Cont'd)

C. Payment of Fee Determined After Trial

<u>State</u>	<u>Amount</u>	<u>Payable by</u>	<u>Taxable as Costs Against Losing Party?</u>
LOUISIANA	\$12.00 advance deposit by demanding party, who also gives bond for additional costs. 48.00 additional cost for each day of trial.	Demanding party	Yes, if paying party prevails.
ARIZONA	96.00 for each day of trial, plus mileage up to maximum of 20¢ per mile for a one way trip.	Losing party	Yes, paid to clerk who pays over to county treasurer.
ARKANSAS	60.00 for each day of trial, according to statute. 2.00 jury fee usually collected in most counties	---- Losing party	Not enforced in most counties. Yes

D. Payment of Substantial Deposit in Advance of And During Trial

<u>State</u>	<u>Amount</u>	<u>Payable by</u>	<u>Taxable as Costs Against Losing Party?</u>
CALIFORNIA	\$36.00 to \$60.00 per day (varies with counties)	Demanding party	Yes
NEW MEXICO	36.00 per day	Demanding party	Yes
NEVADA	72.00 per day	Demanding party	Yes

E. Compulsory Arbitration

<u>State</u>	<u>Jurisdictional Amount</u>	<u>Arbitrators' Fees Payable by</u>	<u>Taxable as Costs Against Losing Party?</u>
PENNSYLVANIA	\$1,000 maximum	County, but party who appeals decision of arbitrators must reimburse county their compensation, usually amounting to \$75.00 to \$90.00 for three arbitrators.	No

SOURCES: Statutes and other materials cited in footnotes to chapter III of this study. It is probable that a number of other states require payment of some form of jury fee, particularly of moderate amount, which is prescribed by local practice or in rules of court or statutory provisions so situated that it would take substantially more time to determine than the purposes of this study would justify.

## Appendix 2

JUROR FEES IN CIVIL ACTIONS IN COURTS OF RECORD

<u>State</u>	<u>Per Diem</u>	<u>Mileage</u>
ALABAMA <sup>a</sup>	\$3.00	\$.05 going & returning plus ferrriage & toll
ARIZONA <sup>b</sup>	8.00	.20 maximum one way
ARKANSAS <sup>c</sup>	5.00	.05 plus ferrriage & toll
CALIFORNIA <sup>d</sup>	3.00-5.00, varies with counties	.15 going only
COLORADO <sup>e</sup>	3.00 for first 2 weeks, 4.50 thereafter	.15 from residence to court
CONNECTICUT <sup>f</sup>	8.00	.10 from residence to court
DELAWARE <sup>g</sup>	10.00	.06 going & returning
FLORIDA <sup>h</sup>	5.00	.05 going & returning
GEORGIA <sup>i</sup>	2.00-12.00, varies with counties	---
HAWAII <sup>j</sup>	4.00; 6.00 if trial on different island	.20 going only
IDAHO <sup>k</sup>	4.00	.15 one way
ILLINOIS <sup>l</sup>	4.00-5.00, varies with counties; 7.50 maximum	.05 each way
INDIANA <sup>m</sup>	5.00	.05 to & from court
IOWA <sup>n</sup>	5.00	.10 from residence to court
KANSAS <sup>o</sup>	5.00	.07 to & returning
KENTUCKY <sup>p</sup>	5.00	---
LOUISIANA <sup>q</sup>	4.00	.05
MAINE <sup>r</sup>	10.00	.10 out & home once a week
MARYLAND <sup>s</sup>	5.00-7.50, varies with counties	.15 going & returning
MASSACHUSETTS <sup>t</sup>	10.00	.05 out & home
MICHIGAN <sup>u</sup>	8.00 per day 4.00 half-day	.06 going & returning
MINNESOTA <sup>v</sup>	6.00	.075 to & from court
MISSISSIPPI <sup>w</sup>	5.00	.05 going & returning plus ferrriage & toll
MISSOURI <sup>x</sup>	3.00	.05 from residence & return
MONTANA <sup>y</sup>	6.00	.05 each way
NEBRASKA <sup>z</sup>	4.00	.05 each mile necessarily travelled
NEVADA <sup>aa</sup>	6.00	.15 one way only
NEW HAMPSHIRE <sup>bb</sup>	6.00	.07 to & from court each day
NEW JERSEY <sup>cc</sup>	5.00, but may be reduced	.02 to & from court
NEW MEXICO <sup>dd</sup>	5.00	.07 to & from court

## Appendix 2 (Cont'd)

State	Per Diem	Mileage
NEW YORK <sup>ee</sup>	\$6.00, but may be reduced	\$.05 going & returning
NORTH CAROLINA <sup>ff</sup>	2.00-5.00, varies with counties	.05 coming & returning
NORTH DAKOTA <sup>gg</sup>	4.00	.05 each way
OHIO <sup>hh</sup>	5.00 maximum, fixed by court	.05 from residence & return
OKLAHOMA <sup>ii</sup>	5.00	.05 going & returning
OREGON <sup>jj</sup>	7.50	.08 going & returning
PENNSYLVANIA <sup>kk</sup>	7.00	.07 going & returning
RHODE ISLAND <sup>ll</sup>	10.00	.10 to & from court for first day .03 each subsequent day
SOUTH CAROLINA <sup>mm</sup>	1.50-6.00, varies with counties	.05 going & returning
SOUTH DAKOTA <sup>nn</sup>	5.00	.05 each mile necessarily travelled
TENNESSEE <sup>oo</sup>	4.00	.10 going & returning plus ferrriage & toll
TEXAS <sup>pp</sup>	4.00-5.00, varies with counties	---
UTAH <sup>qq</sup>	8.00	.20 one way each day
VERMONT <sup>rr</sup>	7.00	.06 each way
VIRGINIA <sup>ss</sup>	3.50	.10 going & returning; 4.00 maximum
WASHINGTON <sup>tt</sup>	5.00	.10 each way
WEST VIRGINIA <sup>uu</sup>	2.00-5.00, fixed by court	.05 going & returning
WISCONSIN <sup>vv</sup>	4.00-8.00, fixed by board	.10 going & returning
WYOMING <sup>ww</sup>	5.00 per day 3.00 half-day 6.00 for person 5 miles or more from county seat	.10 each mile actually travelled .15 for person more than 25 miles from a railroad

a Ala. Code 1940, Title 11, sec. 98.

b Ariz. Code Ann. 1939, secs. 34-125, 34-130; Ariz. Laws 1956, c. 91.

c Ark. Stat. 1947, secs. 39-301, 39-302.

d Cal. Code Civ. Proc., (Deering's 1953) sec. 196.

e Colo. Stat. Ann. 1935, c. 66, sec. 45.

f Conn. Gen. Stat. 1949, 1953 Supp., secs. 1496c, 1898c.

g Del. Code Ann. 1953, Title 10, sec. 8901.

h Fla. Stat. 1953, secs. 40.24, 40.30.

i Ga. Code 1933, sec. 59-120, as amended by Laws 1955, No. 131.

j Haw. Rev. Laws 1945, sec. 9797, as amended by Sess. Laws 1945, c. 62.

## Appendix 2 (Cont'd)

- k Idaho Laws Ann. 1947, sec. 2601.
- l Ill. Rev. Stat. 1953, c. 37, sec. 351 and c. 53, sec. 62.
- m Ind. Stat. Ann. 1933 (Burns, 1946 Replacement), 1955 Cum. Supp., sec. 4-3319.
- n Iowa Code 1954, sec. 607.5.
- o Kan. Gen. Stat. Ann. 1949, sec. 28.122.
- p Ky. Rev. Stat. 1955, sec. 29.390.
- q La. Rev. Stat. 1950, 1952 Cum. Supp., sec. 3049.
- r Me. Rev. Stat. 1944, c. 103, sec. 6, as amended by Laws 1953, c. 148, and Laws 1955, c. 412.
- s Md. Ann. Code 1951, 1956 Cum. Supp., Article 51, sec. 22.
- t Mass. Ann. Laws 1956, c. 262, sec. 25.
- u Mich. Comp. Laws 1948, 1954 Cum. Supp., sec. 602.147.
- v Minn. Stat. 1949, sec. 357.26, as amended by Sess. Laws 1953, c. 478.
- w Miss. Code Ann. 1942, sec. 3953; 1952 Cum. Supp., sec. 3959.
- x Me. Rev. Stat. 1949, sec. 494.100.
- y Mont. Rev. Codes 1947, sec. 25-401.
- z Neb. Rev. Stat. 1943, Reissue of 1952, secs. 33-138, 33-140.
- aa Nev. Comp. Laws 1929, secs. 8490, 8491, as amended by Statutes 1953, c. 127.
- bb N. H. Rev. Stat. Ann. 1955, sec. 500-28.
- cc N. J. Rev. Stat. 1937, 1953-54 Cum. Supp., 22A1-1.
- dd N. M. Stat. 1941, 1951 Cum. Supp., sec. 30-137.
- ee N. Y. Judiciary Law, (Con. Laws Serv.), sec. 749-a.
- ff N. C. Gen. Stat. 1943, sec. 9-5, as amended by Laws 1947, c. 1015.
- gg N. D. Rev. Code 1943, sec. 27-0905.
- hh Ohio Rev. Code Ann. (Baldwin's 1953), sec. 2313.34.
- ii Okla. Stat. 1951, Title 28, sec. 86.
- jj Ore. Rev. Stat., secs. 10.060, 10.070, 10.340.
- kk Pa. Stat. (Purdon's 1936), Title 16, secs. 350, 352 and Title 17, secs. 1121a, as amended by Laws 1951, Act 12.
- ll R. I. Gen. Laws 1938, c. 633, sec. 8, as amended by Rev. Laws 1951, c. 2707.
- mm S. C. Code 1952, secs. 38-301 through 38-309 (Per letter dated December 12, 1956 from Legislative Council of South Carolina to the author).
- nn S. D. Code 1939, sec. 32.1021, as amended by Laws 1947, c. 150.
- oo Tenn. Code (Nichie's 1938), sec. 10042, as amended by Pub. Acts 1949, c. 129.
- pp Tex. Stat. (Vernon's 1948), Article 2122, as amended by Laws 1953, c. 379.
- qq Utah Code Ann. 1943, secs. 28-5-1, 28-5-12; and sec. 48-0-5, as amended by Laws 1949, c. 59.
- rr Vt. Stat. Rev. 1947, secs. 599 and 10,504, as amended by Pub. Acts 1951, No. 233.
- ss Va. Code 1950, sec. 8-204, as amended by Acts 1954, c. 709.
- tt Wash. Rev. Code, secs. 2.36.150, 36.01.060.
- uu W. Va. Code 1955, sec. 5281.
- vv Wis. Stat. 1951, secs. 255.30, 255.31.
- ww Wyo. Comp. Stat. 1945, secs. 12-302, 12-303

## Appendix 3

PER DIEM COMPENSATION OF JURORS IN CIVIL ACTIONS IN COURTS OF RECORD

<u>Amount</u>	<u>State</u>
\$1.50	SOUTH CAROLINA, varies to maximum of \$6.00 in some counties.
\$2.00	GEORGIA, but \$12.00 maximum in certain counties. NORTH CAROLINA, but \$5.00 maximum. WEST VIRGINIA, but \$5.00 maximum.
\$3.00	ALABAMA CALIFORNIA, but \$5.00 in some counties. COLORADO, for 1st two weeks, then \$4.50. MISSOURI
\$3.50	VIRGINIA
\$4.00	HAWAII, but \$6.00 when serves on different island. IDAHO ILLINOIS, but \$7.50 maximum. LOUISIANA NEBRASKA NORTH DAKOTA TENNESSEE TEXAS WISCONSIN, but \$8.00 maximum.
\$5.00	ARKANSAS FLORIDA INDIANA IOWA KANSAS KENTUCKY MARYLAND, but \$7.50 maximum. MISSISSIPPI NEW JERSEY, but may be reduced by county board of freeholders. NEW MEXICO OHIO, maximum, fixed by court. OKLAHOMA SOUTH DAKOTA WASHINGTON WYOMING, but \$6.00 for person more than five miles from county seat.
\$6.00	MINNESOTA MONTANA NEVADA NEW HAMPSHIRE NEW YORK, but may be reduced by council or board of supervisors.
\$7.00	PENNSYLVANIA VERMONT
\$7.50	OREGON
\$8.00	ARIZONA CONNECTICUT MICHIGAN UTAH
\$10.00	DELAWARE MAINE MASSACHUSETTS RHODE ISLAND

Source: State statutes, as cited in Appendix 2.

CALIFORNIA CODE OF CIVIL PROCEDURE  
(DEERING'S, 1953), SECTION 631

Sec. 631. [Waiver of jury trial: Manner of waiver.]  
Trial by jury may be waived by the several parties to an issue of fact in manner following:

1. By failing to appear at the trial;
2. By written consent filed with the clerk or judge;
3. By oral consent, in open court, entered in the minutes or docket;
4. By failing to announce that a jury is required, at the time the cause is first set upon the trial calendar if it be set upon notice or stipulation, or within five days after notice of setting if it be set without notice or stipulation; provided, that in justice courts such waiver may be made by failure of either party to demand a jury within two days after service upon him of the notice provided for in Section 594 of this code; provided further, that in any superior court action if a jury is demanded by either party in the memorandum to set cause for trial and such party thereafter by announcement or by operation of law waives a trial by jury, then in said event any and all adverse party or parties shall be given 10 days' written notice by the clerk of the court of such waiver, whereupon, notwithstanding any rule of the court to the contrary, such adverse party or parties shall have not exceeding five days immediately following the receipt of such notice of waiver, within which to file and serve a demand for a trial by jury and deposit advance jury fees for the first day's trial whenever such deposit is required by rule of court, and if it is impossible for the clerk of the court to give such 10 days'

notice by reason of the trial date, or if for any cause said notice is not given, the trial of said action shall be continued by the court for a sufficient length of time to enable the giving of such notice by the clerk of the court to such adverse party.

Regardless of anything contained in the foregoing to the contrary, the court may in its discretion, upon such terms as may be just, allow a trial by jury to be had, although there has been a waiver of such a trial.

5. By failing to deposit with the clerk, or judge, a sum equal to the amount of one day's jury fees payable under the law, as provided herein. In justice courts such deposit must be made two days prior to the date set for trial or prior to the date to which the trial has been postponed because of the demand for a jury trial; in other courts such deposit must be made 10 days prior to the date set for trial.
6. By failing to deposit with the clerk or judge, promptly after the impanelment of the jury, a sum equal to the mileage or transportation (if any be allowed by law) of the jury accrued up to that time;
7. By failing to deposit with the clerk or judge, at the beginning of the second and each succeeding day's session a sum equal to one day's fees of the jury, and the mileage or transportation, if any there be.

The court may, in its discretion upon such terms as may be just, allow a trial by jury to be had although there has been a waiver of such a trial. Enacted 1872; Am. Stats. 1933, p. 1875; Stats. 1941, ch. 1191, sec. 1; Stats. 1951, ch. 1737, sec. 91; Operative January 1, 1952.]

NEW MEXICO STATUTES 1941, SECTION 19-101(38)Rule 38. Jury Trial of Right. [Sec. 19-101(38)]

- (a) Right Preserved. The right of trial by jury, as declared by section 12 of article II of the Constitution of the state of New Mexico, shall be preserved to the parties inviolate.
- (b) Notice of Jury Trial and Trial Docket.
- (1) At any time after issue, in any cause where the parties are entitled to a jury trial, as a matter of right, and where either party desires to try said cause to the court without a jury, such party may file in the office of the clerk and serve upon the attorney for the opposite party a written notice to that effect and within ten (10) days thereafter, the opposite party shall be required to elect whether he demands a jury trial or is willing to try said cause before the court without a jury, filing a copy of such election in the office of the clerk of the district court and serving a copy upon the attorney for the opposite party. In event the opposite party so served with notice shall elect to waive trial by jury, the case shall thereupon stand for trial upon the nonjury docket to be thereafter called up for trial in due course. In event the opposite party shall elect to try said cause to a jury, he shall, within five (5) days of making said election, deposit with the clerk of the court the sum of thirty-six (\$36.00) dollars for and on account of jury fees, and the case shall thereupon be, by the clerk, placed upon the jury trial docket for trial at the next succeeding term of court. Failure to deposit said jury fees shall be held to be a waiver of trial by jury. Provided, that where definite dates are fixed by the trial court for the calling of the docket so as to require parties to elect whether or not they



desire jury trials at the time of the calling of the docket, any party desiring a jury trial must so announce at the time and deposit a jury fee of thirty-six (\$36.00) dollars. Failing to do so, he will be deemed to have waived a jury trial.

- (2) Whenever the issues in a case requiring a trial by jury are made up during a regular term of court or within five (5) days prior thereto, the court may, upon application of either party, unless trial by jury be waived, place such cause on the jury trial docket, and the same may be tried at that term of court, unless it is made to appear that such trial will work a prejudice to the opposite party. In all cases referred to in this paragraph, where jury trial can not be had at the impending term, the case shall be governed by the provisions of subparagraph (1) of this rule.
- (c) Same—Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.
- (d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties. Provided, however, that if a demand for jury is made by either party and thereafter one jury term is passed, the party demanding a jury may, provided he give notice to the other party, withdraw his demand for a jury and upon such withdrawal of such demand the deposit so made by such party shall be refunded to him and thereafter the parties shall be in the same situation, having the same right to demand a jury trial under the provisions of this rule as if no such demand and withdrawal had been made.