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THE RESOLUTION OF MINOR DISPUTES AND THE SEVENTH AMENDMENT

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In recent years it has become apparent that, despite our concern about prompt and less expensive methods of handling litigation and about court reform in general, there is in fact a large number of disputes for which our judicial system provides little, if any, opportunity for adjudicatory relief.

The point may be made by an illustration. An individual buys a chest in Illinois for \$200 and has it shipped by air to Wisconsin. The chest has been prepared for shipment by the vendor. On its arrival in Wisconsin, the purchaser claims it at the airport, takes it home and uncrates it. The chest collapses and the purchaser is forced to have it repaired by a cabinet maker at a cost of \$250.

The purchaser has obviously suffered legal damages for which she, or he, should be compensated. Yet quite apart from the question of whether it is the vendor or the carrier who is liable, a very practical, economic question must be faced. How can the purchaser assert the claim?

It is my view that on this state of facts, the purchaser generally cannot afford to undertake existing legal remedies to assert the claim, the defendant or defendants cannot afford to defend it if it is asserted and the judicial system cannot afford to make a customary courtroom, judge, bailiff, clerk, process servers and the like available for its assertion and prosecution. Finally, lawyers cannot afford to represent any party to the dispute

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with the expectation of charging a fee that bears any reasonable relationship to the amount in controversy.

Although my illustration involves a commercial transaction, it might just as easily have been presented as a nuisance complaint between neighbors, minor tort or a landlord-tenant dispute.

Obviously such disputes may be extremely important in the eyes of the parties themselves. I will characterize them as minor for the purposes of this paper, on the grounds that the claim is uneconomic to assert regardless of the financial condition of the parties, and involves no constitutionally protected right, no important precedent and no significant statutory interpretation.

Society's chief interest in such disputes is to see that they are resolved. The fact that our system of justice does not provide some prompt and inexpensive method for their resolution points up a great weakness in our system. Surely there are thousands of such disputes for every assertable antitrust claim. If there is no effective means provided for their formal resolution, there is bound to result continuing and increasing frustration on the part of large numbers of our citizens. This can, in turn, give rise to widespread cynicism, and the strength of our democracy is to that extent weakened.

Therefore, it seems to me that we must, as a society, correct the existing deficiency.

I propose tonight to discuss one method for doing so and then to consider constitutional and legislative problems which are necessarily presented in any action that is to be undertaken.

First, perhaps, I should say it is likely, if not certain, that any resolution which is provided cannot, in the nature of things, be financially self-sustaining. To some extent, therefore, the cost will have to have some subsidy through taxation, but I can think of few costs which would be more legitimate for the public to bear.

Next, I am aware of the existence and the development of small claims courts and of the use of voluntary arbitration. My suggestion could, I suppose, be considered as a proposal for changes in the structure and procedures of small claims courts, although I do not offer it in that way. I seek rather a fresh start. In no event, however, should it be considered as a recommendation for the abandonment of voluntary arbitration.

I propose that there be established, wherever the need justifies their creation, so-called minor dispute resolution tribunals. They could be presided over by a single judge or a legally trained person who, in either case, would have had special training to preside over such a tribunal. As an alternative, there might be three persons sitting on the tribunal and one or two of them might be laymen.

The tribunals would sit not simply in the downtown centers of our cities, but in the neighborhoods where people live. If demand required it, they could sit at night and on weekends.

Lawyers would not be permitted to represent clients in these tribunals, and they could not be present during proceedings to give advice.¹

The judge, or judges, would not serve merely as neutral arbiters, but would assist the parties in the development of their cases and in demonstrating their weakness. As a practical matter, the tribunals would seek an accord between the parties, but they would be empowered to render judgments.

Jurisdiction would be limited by the amount in controversy. In some areas of the country this might be \$1000 and in others less, or possibly more.

The limitations on service of process would be the constitutional limitations developed in case law.

There would be no appeals allowed from the judgments of the tribunals except where it appeared that (a) a constitutionally protected right was in controversy or (b) a novel question of law was presented or (c) it was claimed that the tribunal had acted arbitrarily. When an appeal was proper it would be taken to whatever court in the system is designated by statute.²

1. Although the point deserves further attention, existing federal case law suggests that the constitutional right to counsel as applied to the states through the fourteenth amendment would not be violated by prohibiting counsel in such state civil tribunals. *Cf. Argersinger v. Hamlin*, 407 U.S. 25, 48 (1972) (Powell, J., concurring in result); *James v. Headley*, 410 F.2d 325, 334 (5th Cir. 1969). *But see Prudential Ins. Co. v. Small Claims Court*, 76 Cal. App. 2d 379, 173 P.2d 38 (1946); *Payne v. Superior Court*, 17 Cal. 3d 908, 553 P.2d 565, 132 Cal. Rptr. 405 (1976).

2. Denying altogether a right of appeal from such tribunals would not offend the due process requirement of the Federal Constitution except, possibly, to preserve the right to jury trial. *Ross v. Moffitt*, 417 U.S. 600, 607 (1974). However, many states, either by statute or constitutional provision, do provide an appeal as of right. *See, e.g., ILL. CONST. art. VI, § 6*. Therefore, were appeals sought to be modified in the manner I suggest, statutory or constitutional changes might well be required in the various states.

The tribunal would have power to enforce its judgments through contempt actions.

My own proposal is not substantially different than the scheme recently adopted in Minnesota.³ However, I do not offer it as *the* proposal, but only as one against which to lay constitutional and statutory considerations.

It is likely that in most states the judiciary would lack the power to create by court rule a system such as I propose. This means that legislation would be required, and that poses a formidable, though not an impossible task. After all, many states have established, by legislative act, small claims courts, and some have moved in the direction here advocated.

The constitutional question is at once more difficult and more complex. It is more difficult because a constitutional change, if required, is more difficult to bring about than a mere legislative change. It is more complex because there exist possibilities of accommodation even if constitutional change is not accomplished.

The seventh amendment to the federal Constitution provides:

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 reexamined in any Court of the United States, than according to the rules of common law.

It is true that the seventh amendment guarantee of a civil jury trial has, to date at least, not been considered one of the Bill of Rights which, under the fourteenth amendment, is imposed on the several states.⁴ In fact, however, the state constitutions generally imitate the basic feature of the federal guarantee, which is to "preserve the right of jury trial as it existed in English history at some past time, either in 1791 when the Seventh Amendment was adopted, or, in the case of the states, at the date of the first state constitution."⁵ The federal law has so influenced the interpretation of the state guarantees as to give them, in the view of Fleming James, "essentially uniform

3. MINN. STAT. § 487.30 (Supp. 1977). See, e.g., HENNEPIN COUNTY, MINN., SPECIAL RULES OF PROC. § V. Conciliation Court.

4. Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co., 284 U.S. 151, 158 (1931); see Colgrove v. Battin, 413 U.S. 149, 169 n. 4 (1973) (Marshall, J., dissenting).

5. F. JAMES, CIVIL PROCEDURE § 8.1 at 337 (1965).

effect.”⁶ The state constitutions use language such as “securing” the right of jury trial, or preserving it “inviolable” or “as it heretofore existed.”

The language of preservation in the seventh amendment is intrinsically backward-looking, and what is known of the legislative history confirms the Supreme Court’s conclusion that in principle the seventh amendment “in effect adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791.”⁷

The historical origins of the seventh amendment can be briefly summarized. The federal constitutional convention of 1789 defeated a floor motion to insert a guarantee of civil jury trial for the federal courts in article III, not on account of hostility to the civil jury, but for fear that the civil jury right could not be formulated in a fashion acceptable in all the states. There was already marked diversity among the states in the scope and detail of civil jury practice. Madison’s diary summarized the remarks of the influential constitutional draftsman Nathaniel Gorham of Massachusetts in the debate leading to the rejection of the proposed civil jury guarantee: “The constitution of Juries is different in different states and the trial itself is *usual* in different cases in different states.”⁸

In the ratification debates that took place in the thirteen states over the following two years, the want of a civil jury guarantee was a prominent ground of anti-Federalist opposition to the Constitution. Like much of the rest of the Bill of Rights, the seventh amendment was promulgated by the First Congress to satisfy undertakings given in the state debates in order to secure ratification of the Constitution.⁹ Yet the difficulty that had led the Framers to omit a federal civil jury guarantee from article III persisted when it came time to draft the amendment: jury entitlement and jury practice differed widely among the several states. The seventh amendment, therefore, was drafted with calculated ambiguity, in a dozen or

6. *Id. Cf. Annot.*, 47 A.L.R.3d 895 (1973).

7. *Dimick v. Schiedt*, 293 U.S. 474, 487 (1935). See generally Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966) [hereinafter cited as Henderson]; Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973) [hereinafter cited as Wolfram].

8. Quoted in Henderson, *supra* note 7, at 294. The Henderson article canvasses the case law of the period to corroborate this point; cf. Wolfram, *supra* note 7, at 665.

9. See Henderson, *supra* note 7, at 295-99.

so operative words, in order to avoid facing the problem. And like so many compromise documents of all ages, it achieved consensus for the moment by buying trouble for the future.

Since the issues before minor dispute resolutional tribunals will in general fall squarely within the seventh amendment category of "suits at common law," how can the elimination of jury trial be effected?

The most straightforward approach would be to amend the Constitution, either to engraft minor dispute exceptions, or in the form of outright civil jury repeal. There would be definitional difficulties with exceptions; and at least for so long as our systems of judicial selection are as political as they are, there will be wide resistance to repeal of the jury guarantees even among those who fully appreciate the disadvantages of civil jury trial. The proponents of constitutional amendments would have a difficult and laborious path to tread under the best of circumstances.

An indirect route to what amounts to abrogation is found in the so-called "dynamic" or "functional" interpretation of the phrase "suits at common law." The idea is to rid ourselves of the historic test by viewing the common law as a process, indeed a "process characterized by occasional flexibility and capacity for growth . . ."¹⁰ By this device the common law of the 1970's could conveniently "outgrow" jury procedure. The difficulty, of course, is that this theory makes the seventh amendment a nullity; it is transparently manipulative and contradicts two centuries of defensible precedent. The courts cannot be expected to tolerate it.

If neither of these routes is acceptable, then it seems to me there remain for consideration: (1) seeking a waiver of the right to trial by jury from all parties before a minor dispute tribunal; (2) providing for an appeal with a trial *de novo*; and (3) utilizing no less than a three person tribunal in the expectation that this would satisfy the requirements of a "jury."

Obtaining a waiver from all parties would, of course, render the use of the tribunal optional, but public dissatisfaction with the alternatives might guarantee its success. For example, in Cincinnati a local court rule directs that all cases in which the amount in controversy is less than \$10,000 be referred to a

10. Wolfram, *supra* note 7, at 736.

panel for compulsory, but non-binding arbitration. Despite the fact that the parties are entitled to reject the arbitrated decision and return to court, in eighty-five percent of the cases that decision is accepted and the case is never brought to trial. Similar programs have been undertaken in other cities including Philadelphia, Cleveland, Rochester and the Bronx, New York.¹¹

With respect to the effect of providing a non-jury adjudication and a right of appeal with a trial de novo, *Capital Traction Co. v. Hof*¹² clearly indicates that such a procedure would satisfy the requirements of the seventh amendment.

The *Hof* case involved a civil claim tried in a District of Columbia justice of the peace court and retried de novo on appeal before a jury, the appellant being required to post a bond for payment of the judgment on appeal. The Supreme Court held that the seventh amendment (directly applicable in this case since it arose in the District of Columbia) did not require a trial by jury before the justice of the peace, and that the right to trial by jury was satisfied by the availability of a jury trial de novo on appeal. The Court stated that:

The authority of the legislature, consistently with the constitutional provisions securing the right to trial by jury, to provide, in civil proceedings for the recovery of money, that the trial by jury should not be had in the tribunal of first instance, but in an appellate court only, is supported by unanimous judgments of this court in two earlier cases¹³

Thus the *Hof* case has blessed a system of second tier tribunals which are constitutionally inferior to the first tier common law courts and thereby not subject to requirements such as the right to trial by jury.

In reaching its holding, the *Hof* Court reviewed in detail both the English and the Colonial pre-1791 practices with respect to the trial of small claims, and concluded that the second tier justice of the peace tribunals with access to jury trial only in a trial de novo in the common law courts was in fact the predominant pattern existing at the time of the adoption

11. HAMILTON COUNTY, OHIO, COURT OF COMMON PLEAS RULES OF LOCAL PRAC., R. 24; see Fall, *The Role of Arbitration in the Judicial Process*, 1973 REPORT OF THE JUDICIAL COUNCIL OF CALIFORNIA TO THE GOVERNOR AND LEGISLATURE 60, 67, 70, 75.

12. 174 U.S. 1 (1899).

13. *Id.* at 19.

of the seventh amendment. Thus the two tier concept and the trial de novo on appeal with jury may be read into the seventh amendment under the historical test and not be considered a modern day device for evasion of the strict historical interpretation of the amendment.

The analogy between the justice of the peace court so conceived and a second tier informal tribunal, such as we are discussing, seems clear. A potentially wide range of quasi-judicial second tier tribunals might pass constitutional muster under this theory. Indeed the doctrine was used this past year by the Supreme Court in dealing with due process claims concerning the disposition of minor criminal offenses before a non-lawyer police court judge.¹⁴

In order to sustain the notion that the jury requirements of the seventh amendment would be satisfied by a three- or five-member tribunal, reliance would have to be placed on an expansion of the decision of the Supreme Court in *Colgrove v. Battin*.¹⁵

Colgrove arose as a federal diversity suit in the United States District Court for Montana, whose local rule called for a jury of six in civil jury cases.¹⁶

The jury demandant insisted on a jury of twelve, invoking both the seventh amendment and 28 U.S.C. section 2072, which requires the court rules "shall preserve the right of trial by jury at common law and as declared by the Seventh Amendment" The Supreme Court sustained the six-man jury by a five to four vote. Two of the four dissenters rested their opposition exclusively on 28 U.S.C. section 2072, rather than the seventh amendment, believing that the statutory language implied the retention of the twelve-person common law jury.

The reasoning of Mr. Justice Brennan for the majority in *Colgrove* was strongly influenced by *Williams v. Florida*,¹⁷ which had held that the sixth amendment did not prevent the states from using six-man juries in criminal cases:

The pertinent words of the Seventh Amendment are: "In Suits at common law . . . the right of trial by jury shall be

14. *North v. Russell*, 96 S. Ct. 2709 (1976).

15. 413 U.S. 149 (1973).

16. The Supreme Court noted that 54 other federal district courts had a similar rule, "at least as to some civil cases." *Id.* at 150 n.1.

17. 399 U.S. 78 (1970).

preserved. . . .” On its face, this language is not directed to jury characteristics, such as size, but rather defines the kind of cases for which jury trial is preserved, namely, “suits at common law.” . . . We can only conclude, therefore, that by referring to the “common law,” the Framers of the Seventh Amendment were concerned with preserving the *right* of trial by jury in civil cases where it existed at common law, rather than the various incidents of trial by jury. In short, what was said in *Williams* with respect to the criminal jury is equally applicable here: constitutional history reveals no intention on the part of the Framers “to equate the constitutional and common-law characteristics of the jury.”¹⁸

The Supreme Court in *Colgrove* specifically left open the question “whether any number less than six would suffice,”¹⁹ and from the perspective of minor dispute court reform that may pose a crucial question.

In lieu of a number the Court supplied a formula: “What is required for a ‘jury’ is a number large enough to facilitate group deliberation combined with a likelihood of obtaining a representative cross section of the community.”²⁰ The two components of this formula, collective group decision-making and representatives, could be designed into a variety of structures. The formula might, for example, permit experimentation with combinations of laymen and professional judges, such as the mixed courts that accelerate the procedure in criminal matters in a number of Continental countries.²¹

The *Colgrove* case leaves us therefore with the prospect that for cases in which the right to jury trial is not waived we might devise modes of lay participation in minor dispute adjudication that are significantly more rapid and correspondingly less costly than the classical civil jury. The Supreme Court in *Colgrove* saw fit to recall the words of Justice Brandeis: “New devices may be used to adapt the ancient institution of civil

18. 413 U.S. at 155-56, quoting *Williams v. Florida*, 399 U.S. at 99.

19. *Id.* at 160.

20. *Id.* at 160 n. 16.

21. In the West German *Schoffengericht* (literally, the jury court), perhaps the best known of the European institutions, two laymen join with one professional judge in cases of lesser crime. They sit and deliberate together as a single panel and convict or acquit by majority vote. These courts operate rapidly, with evidentiary rules at a minimum and with judicial “instructions” to the laymen occurring informally when and if necessary. See generally, Casper & Zeisel, *Lay Judges in the German Criminal Courts*, 1 J. LEGAL STUDIES 135 (1972).

trial by jury to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right."²²

Thus, while *Colgrove* leaves standing the holding of the *Hof* case as to when the right to trial by jury exists, however jury may be defined, it moves away from the historical standard and toward a functional or dynamic standard of interpretation of the seventh amendment. As I pointed out before, under this functional standard, "[w]hat is required for a 'jury' is a number large enough to facilitate group deliberation combined with a likelihood of obtaining a representative cross-section of the community."²³

My own approach to the creation of minor dispute resolution tribunals would be the direct one of constitutional change because I see a great need and a forthright way to deal with it. However, as in most human affairs, the direct way may not be the most effective, or at least not the route to be first followed.

Whatever may be the approach, it is my hope that this presentation may spark more refined consideration of the problem and additional action by our states. It is clear to me that action is greatly needed.

22. 413 U.S. at 161 n. 17, quoting *Ex parte Peterson*, 253 U.S. 300, 309-10 (1920).

23. 413 U.S. at 160 n.16.