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Both the constitutional and policy reasons set forth above appear to warrant reversal by the United States Supreme Court.

HENRY J. VAN WAGENINGEN

## SIX-MEMBER CIVIL JURY ON THE FEDERAL LEVEL

After a federal district court judge scheduled this civil diversity case to be tried before a six-member jury, as required by the local rules of the United States District Court of Montana,<sup>1</sup> petitioner filed a writ of mandamus to direct the judge to impanel a jury of twelve. The United States Court of Appeals for the Ninth Circuit denied the writ.<sup>2</sup> On certiorari to the United States Supreme Court, *held*, affirmed: The local federal court rule providing for six-member juries in civil suits does not violate either the seventh amendment<sup>3</sup> or rule 48 of the Federal Rules of Civil Procedure.<sup>4</sup> *Colgrove v. Battin*, 93 S. Ct. 2448 (1973).

There has been much debate as to the interpretation of the words of the seventh amendment providing that "[i]n suits at common law . . . the right of trial by jury shall be preserved . . . according to the rules of the common law." One view would incorporate into the American jury trial system all the common law rules regarding jury trials. The Supreme Court in *Capital Traction Co. v. Hof*<sup>5</sup> found that the jury trial referred to in the Constitution is the same as it existed in England at the time the Constitution was adopted. Thus, it has been held that a constitutional jury requires twelve men, even though the number is not specified in the Constitution, and that with less than twelve there is no jury at all.<sup>6</sup> Twelve-member juries have also been given great support in other federal court decisions.<sup>7</sup>

A second interpretation of the seventh amendment is that the jury trial should be preserved in its most fundamental form without including

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prominent lay figures in the community. See A. BALK, *A FREE AND RESPONSIVE PRESS* (1973); *BACK TALK: PRESS COUNCILS IN AMERICA* (W. Rivers ed. 1972).

1. "A jury for the trial of civil cases shall consist of six persons . . ." U.S. DIST. CT. FOR DIST. OF MONT. (CIV.) R. 13(d)(1).

2. *Colgrove v. Battin*, 456 F.2d 1379 (9th Cir. 1972).

3. "In suits at common law . . . 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 the common law." U.S. CONST. amend. VII.

4. "The parties may stipulate that the jury shall consist of any number less than twelve . . ." FED. R. CIV. P. 48.

5. 174 U.S. 1 (1899).

6. *Patton v. United States*, 281 U.S. 276 (1930). This case discussed the "trial by jury" clause of the sixth amendment.

7. *E.g.*, *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211 (1916); *Thompson v. Utah*, 170 U.S. 343 (1898); *Diederich v. American News Co.*, 128 F.2d 144 (10th Cir. 1942).

all of the procedural details which existed at common law.<sup>8</sup> "Procedural," in this context, includes such rules as pertain to the size of the jury and the type of verdict rendered (unanimous v. majority). This is contrasted with the "substantive" right to a jury trial, which is determined by the type of case in question. It is in actions at law, as opposed to those in equity, that the right to a jury trial exists. Since the purpose of the amendment is to preserve for the jury questions of fact in common law actions,<sup>9</sup> it has been held that the clause was intended by the framers of the Constitution to differentiate between law and equity. Thus, only the substantive, and not the procedural right to a trial by jury is preserved in the seventh amendment.<sup>10</sup> In following the second view, the Court in *Colgrove* concluded

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.<sup>11</sup>

Having established the intent of the framers, the Court proceeded to determine the purpose of having a jury composed of a specific number of members and to test the significance of having twelve jurors as compared to six. Since the importance of jury size lies in preserving the purpose and function of a jury trial,<sup>12</sup>

the number should probably be large enough to promote group deliberation, free from outside [pressures] . . . , and to provide a fair possibility for obtaining a representative cross-section of the community.<sup>13</sup>

The significance of the number twelve has no relation to the jury functions. An example of why the number was chosen is that "the number of 12 is much respected in the Holy Writ, as 12 Apostles, 12 stones, 12 tribes, etc."<sup>14</sup> After discussing the origin of the number twelve, the Court in *Williams v. Florida* found,

that the jury at common law was composed of precisely 12 is a

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8. *Galloway v. United States*, 319 U.S. 372 (1943).

9. *Walker v. New Mexico & S.R.R.*, 165 U.S. 593 (1897).

10. *Cooley v. Strickland Transp. Co.*, 459 F.2d 779 (5th Cir. 1972). The dissent in this case supported the holding in *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899); *accord*, *Colgrove v. Battin*, 456 F.2d 1379, 1381 (9th Cir. 1972). The ninth circuit interpreted "as at common law" to mean "in those cases in which the right existed at common law." The court was referring to the distinction between cases at law and equity.

11. 93 S. Ct. at 2452.

12. For the purpose of having a jury trial, see *Baldwin v. New York*, 399 U.S. 66 (1970).

13. *Williams v. Florida*, 399 U.S. 78, 100 (1970).

14. Tamm, *The Five-Man Civil Jury: A Proposed Constitutional Amendment*, 51 GEO. L.J. 120 (1962), *citing* 1 E. COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 155 (1797). For other discussions on the origin of the number twelve, see Tamm, *A Proposal for Five-Member Juries in the Federal Courts*, 50 A.B.A.J. 162, 164 (1964).

historical accident, unnecessary to effect the purposes of the jury system and wholly without significance "except to mystics."<sup>15</sup>

One purpose of the jury is to bring together diverse viewpoints that exist in the community among various interest groups.<sup>16</sup> Any reduction in the number of jurors has been found by at least one court to be inconsistent with the desire to increase representation of minority groups.<sup>17</sup> However, in *Williams*, the Supreme Court said:

As long as arbitrary exclusions of a particular class from the jury rolls are forbidden, the concern that the cross-section will be significantly diminished if the jury is decreased in size from 12 to six seems an unrealistic one.<sup>18</sup>

It appears that the Court is saying that there can be just as much a representation of community interests with a jury of six as there is with one of twelve. Thus, the Supreme Court in *Colgrove* found no legal basis for having specifically twelve jurors.

There have been a number of studies made concerning the differences between twelve and six-member juries with respect to deliberation processes, verdicts and numbers of "hung" juries. These studies on civil cases show no significant variation between the types of verdicts rendered.<sup>19</sup>

The holding of the Supreme Court in *Williams* had a significant effect on the *Colgrove* decision. In *Williams* the Supreme Court held that six-member juries in state cases were not in violation of the sixth amendment,<sup>20</sup> made applicable to the states through the fourteenth amendment.<sup>21</sup> Even though *Williams* applied to criminal suits on the state level, the rationale used is similar to that in the *Colgrove* case, since interpretation of the sixth amendment right to jury trial<sup>22</sup> was used for the decision in the criminal case<sup>23</sup> and in *Colgrove*.

15. *Williams v. Florida*, 399 U.S. 78, 102 (1970) [hereinafter referred to as *Williams*].

16. Zeisel, *The Waning of the American Jury*, 58 A.B.A.J. 367 (1972).

17. *Winsby v. John Oster Mfg. Co.*, 336 F. Supp. 663 (W.D. Pa. 1972).

18. *Williams v. Florida*, 399 U.S. 78, 102 (1970). The Court also said that there is no guaranty that twelve will be representative of every viewpoint in society. For a statistical analysis of the differences between twelve and six member juries in terms of representing the community, see Zeisel, *The Waning of the American Jury*, 58 A.B.A.J. 367, 368 (1972).

19. For studies on verdict and hung jury variations, see Zeisel, *supra* note 16, at 368; Note, *Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results*, 6 U. MICH. J.L. REFORM 671 (1973); Bermant & Coppock, *Outcomes of Six- and Twelve-Member Jury Trials: An Analysis of 128 Civil Cases in the State of Washington*, 48 WASH. L. REV. 593 (1973). For a discussion of other studies and reasons why the results are unreliable, see Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710 (1971). This study found that the differences among the different sized juries were negligible only under a superficial scrutiny.

20. *Williams v. Florida*, 399 U.S. 78 (1970).

21. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

22. "In all criminal prosecutions, the accused shall enjoy the right [to trial by impartial jury] . . . ." U.S. Constr. amend. VI.

23. *Williams v. Florida*, 399 U.S. 78 (1970).

However, there are conflicting arguments as to whether the *Williams* decision, dealing as it did with a criminal case, should have been utilized in *Colgrove*, a civil case, as a basis for decision. In support of utilizing *Williams* is the position that if criminal juries can be less than twelve, so may civil juries.<sup>24</sup> Thus, it is contended that there should be a stronger argument for a twelve-member jury in criminal cases because the possibility exists in those actions for greater penalties, and there is a requirement of a higher standard of proof than in civil actions. A smaller jury in civil trials would inevitably be of less consequence.

The opposing argument is that the seventh amendment makes reference to the common law and the sixth amendment does not; therefore, the common law requirements should be maintained in civil actions, though not in criminal ones.<sup>25</sup> The *Colgrove* Court was not persuaded to "depart from the conclusion reached in *Williams*," and stated that if a jury of six satisfies the sixth amendment, then it satisfies the seventh amendment.<sup>26</sup>

Although the Court declared six-member juries not to be a violation of the seventh amendment, it was argued in *Colgrove* that they are in violation of rules 48 and 83 of the Federal Rules of Civil Procedure.<sup>27</sup> Rule 48 allows "the parties to stipulate that the jury shall consist of any number less than twelve."<sup>28</sup> According to rule 83, any district court may amend any rule provided such amendment is not inconsistent with the prevailing rules.<sup>29</sup> The United States District Court of Montana established a local rule providing for six-member juries in civil suits.<sup>30</sup> The Court considered whether this local rule was in violation of rules 48 and 83 of the Federal Rules of Civil Procedure, in that it precluded any stipulation by the parties for a jury of less than twelve but greater than six.

An examination of decisions interpreting rule 48 provides insight as to how the Supreme Court in *Colgrove* reconciled this apparent inconsistency. The lower court in *Colgrove* found that rule 48 does not require a twelve-man jury even though the rule was adopted prior to *Williams*, at a time when twelve was thought to be a constitutional requirement.<sup>31</sup> "[An] inference that Rule 48 now requires a jury of twelve absent a stipulation is . . . not a proper post-*Williams* interpretation of

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24. Powell, *Reducing the Size of Juries*, 5 U. MICH. J.L. REFORM 87 (1971) [hereinafter cited as Powell].

25. *Id.*

26. 93 S. Ct. at 2454.

27. The Supreme Court has the right to prescribe rules of procedure for the federal district courts in civil suits. 28 U.S.C. § 2072 (1970). Rules provided by the Supreme Court and courts established by acts of Congress must be consistent with the Federal Rules of Civil Procedure. 28 U.S.C. § 2071 (1970).

28. FED. R. CIV. P. 48.

29. FED. R. CIV. P. 83.

30. U.S. DIST. CT. FOR DIST. OF MONT. (CIV.) R. 13(d)(1).

31. *Colgrove v. Battin*, 456 F.2d 1379 (9th Cir. 1972).

the Rule.<sup>32</sup> In *Fox v. United States*, a case decided prior to *Williams*, the court held that rule 48 does guarantee a jury of twelve, unless a stipulation is made by the parties to have less.<sup>33</sup> The same court of appeals, two years later and subsequent to the *Williams* decision, in the case of *Cooley v. Strickland Transportation Co.*,<sup>34</sup> held that rule 48 does not guarantee a jury of twelve, because if that were the intention, it would have been so specified. The court also said that although rule 48 allows parties to stipulate as to a jury of less than twelve, nothing prohibits courts from making rules reducing the number of jurors.<sup>35</sup>

The Supreme Court in *Colgrove* agreed with the court in *Cooley v. Strickland Transp. Co.*,<sup>36</sup> holding that rule 48 does not prohibit federal courts from making their own rules reducing the size of civil juries.<sup>37</sup> In so doing, however, the Court did not establish any guidelines as to the minimum number of jurors required to compose a jury. The Court simply stated that the Montana rule was constitutional. The question remains as to whether a jury of five, four or even thirty would also be allowed.

Since the present suit was a civil action, the holding does not apply to criminal cases at the federal level.<sup>38</sup> Nevertheless, since *Williams* opened the door to the present decision, it appears only a matter of time before juries of less than twelve will be allowed at the federal level in criminal actions. The *Colgrove* decision has no effect on the state level. The seventh amendment is *not* applicable to the states through the fourteenth amendment.<sup>39</sup> Therefore, under a state statute or constitution state juries may consist of less than twelve.<sup>40</sup>

A problem in the decision lies in not establishing a guideline as to the minimum number of jurors required. As it stands now, a federal district court can apparently provide for a jury of three, and not be in violation of any law. *Colgrove* allowed six-member juries, but said nothing about a smaller jury. As a result of this omission, a further delineation may be required to determine the minimum number of jurors required to ensure that the function of a jury will not be impaired and that a fair trial will continue to be provided.

The question still remains, what effect will the six-member panel

32. *Id.* at 1381, citing Devitt, *The Six Man Jury in the Federal Court*, 53 F.R.D. 273, 274 n.1 (1971).

33. 417 F.2d 84 (5th Cir. 1969).

34. 459 F.2d 779 (5th Cir. 1972).

35. *Id.* For a list of federal district courts which have established local rules reducing the jury size, their applications and limitations, see Fisher, *The Seventh Amendment and the Common Law: No Magic in Numbers*, 56 F.R.D. 507, 535 (1973).

36. 459 F.2d 779 (5th Cir. 1972).

37. 93 S. Ct. at 2457.

38. Stipulation by the parties is necessary for a jury of less than twelve in criminal cases. FED. R. CRIM. P. 23(b).

39. *Winsby v. John Oster Mfg. Co.*, 336 F. Supp. 663 (W.D. Pa. 1972).

40. See, e.g., FLA. STAT. § 53.041 (1971). "In all civil actions when a jury is impaneled, a jury of six qualified jurors is sufficient."

have upon the trial system? There are distinct advantages to having a six-member jury; less time is needed to impanel juries, court costs are reduced, and possibly less time will be needed in deciding cases.<sup>41</sup> The time spent during the trial itself is shortened since, presumably, six persons can look at exhibits and make their exits and entries quicker than twelve persons. In addition, time spent in polling the jury will be lessened. Even though the time saved with each case will be negligible, when all cases are considered together, the time saved will be significant.<sup>42</sup>

The way appears clear for additional improvements, which may enable speedier and less expensive trials without affecting the "fairness" of a trial by jury. Since a majority of federal district courts have already passed local rules reducing the size of their juries, this decision serves to lend support to what has already been done.

DEBRA J. KOSSOW

## SECURITY INTERESTS: SELF-HELP STILL AN AVAILABLE METHOD OF REPOSSESSION

Plaintiff bought an automobile from defendant under a conditional sales agreement. The contract provided that in the event of default, defendant would have all the rights and remedies of a secured party under the Uniform Commercial Code as enacted in Florida. Upon default by plaintiff, defendant, without plaintiff's knowledge or consent, took possession of the car pursuant to section 9-503 of the Uniform Commercial Code.<sup>1</sup> Plaintiff brought suit for unlawful conversion and damages. The trial court, relying upon *Fuentes v. Shevin*,<sup>2</sup> granted plaintiff's motion for summary judgment, holding that section 9-503, as applied to the facts and circumstances of the instant case, violated plaintiff's procedural due process rights under the fourteenth amendment. On direct ap-

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41. Croake, *Memorandum on the Advisability and Constitutionality of Six Man Juries and 5/6 Verdicts in Civil Cases*, 44 N.Y. STATE B.J. 385 (1972). For an estimate as to how much money will be saved, see Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI L. REV. 710, 711 (1971). As for less time to impanel juries, it has been argued that attorneys may be more selective in their voir dire examinations when facing the prospect of a six-member jury. However, ethical considerations require attorneys to take great care in the selection of each juror, regardless of the prospective jury size. Powell, *supra* note 24, at 87.

42. Powell, *supra* note 24, at 87.

1. FLA. STAT. § 679.503 (1971) [hereinafter referred to as section 9-503].

2. 407 U.S. 67 (1972) [hereinafter referred to as *Fuentes*]. In *Fuentes*, the Supreme Court found Florida's prejudgment repossession statute and a similar Pennsylvania statute invalid under the fourteenth amendment. The Florida statute provided that upon posting a bond of double the value of the chattel sought to be seized, a creditor could interpose the sheriff between himself and the debtor in a repossession. FLA. STAT. §§ 78.01, .07, .08, .10, .13 (1971).