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United States v. Tull: A Polluter's Right To A Jury Trial

I. Introduction

In *United States v. Tull*,¹ the Supreme Court held that the Seventh Amendment requires a jury trial to determine liability in suits brought by the government pursuant to the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act).² The Court further held that a jury determination of the amount of the penalty to be assessed was not guaranteed by the Seventh Amendment.³ *Tull* reversed the decision of the Court of Appeals for the Fourth Circuit which had denied the defendant's timely demand for a jury trial, on the grounds that the government was asking the District Court to "exercise statutorily conferred equitable power in determining the amount of the fine,"⁴ rather than asking for a "penalty analogous to a remedy at law."⁵ The Fourth Circuit affirmed the holding of the United States District Court for the Eastern District of Virginia which ordered injunctive relief as well as payment of \$75,000 in civil penalties by Tull.⁶

This note analyzes the right to a jury trial of one accused of violating the Clean Water Act based on an interpretation of the Seventh Amendment which the Supreme Court has developed and refined over the years. Part II provides a brief review of the background of the right to a jury trial. Part III discusses the facts of *Tull* and the lower court decisions. Part IV analyzes the Supreme Court's treatment of the right to a civil jury trial in cases involving both legal and equitable

1. 107 S. Ct. 1831 (1987).

2. 33 U.S.C. §§ 1251-1376 (1982 & Supp. III 1985).

3. *Tull*, 107 S. Ct. at 1840.

4. 769 F.2d 182, 187 (4th Cir. 1985).

5. *Id.*

6. 615 F. Supp. 610, 626-27 (E.D. Va. 1983). For a breakdown of the penalty allocation, see *infra* note 44.

claims. Part V provides an analysis of *Tull* in light of that background, and Part VI concludes that this decision represents the Supreme Court's continued strict construction of the Seventh Amendment, and contends that the Court should have allowed the jury to determine the amount of the civil penalty.

II. Background

Over two centuries ago, William Blackstone described the civil jury trial as "the glory of the English law."⁷ While the precise origin of the civil jury trial remains somewhat of a mystery, legal scholars estimate that the modern version of this judicial entity took form by the year 1408.⁸ Realizing the importance of the civil jury trial in the English system, that right was written into the United States Constitution by the framers.⁹

The Seventh Amendment 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 the common law.¹⁰

The Seventh Amendment right has been strictly upheld throughout U.S. judicial history. As Justice Sutherland so accurately explained in *Dimick v. Schiedt*,¹¹ "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scru-

7. 3 W. Blackstone, *Commentaries on the Laws of England* 379 (Bell ed. 1972).

8. D. Nasmith, *The Institutes of English Public Law* 141 (1980).

9. U.S. Const. amend. VII (1791). See generally Higginbotham, *Continuing The Dialogue: Civil Jury Trials and The Allocation Of Judicial Power*, 56 Tex. L. Rev. 47 (1977). Even prior to the adoption of the Constitution, there is evidence that the jury trial right was preserved in the United States; the original settlers incorporated it into the Jamestown charter. *In re U.S. Financial Securities Litigation*, 609 F.2d 411, 420 (9th Cir. 1979).

10. U.S. Const. amend. VII.

11. 293 U.S. 474 (1934).

tinized with the utmost care.”¹² In *Jacob v. City of New York*,¹³ the Supreme Court noted that “[a] right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.”¹⁴

The Seventh Amendment only requires a jury trial for “suits at common law.”¹⁵ Thus, while such actions have historically been granted a jury trial,¹⁶ suits in equity¹⁷ have been tried to the court.¹⁸ The phrase “Suits at common law” was first defined by the Supreme Court in *Parsons v. Bedford*,¹⁹ in which Justice Story stated that such actions were “not merely suits which the *common law* recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable

12. *Id.* at 486; see also *United States v. Regan*, 232 U.S. 37 (1914) (holding that in civil actions, juries are to decide factual issues by a reasonable preponderance of the evidence).

13. 315 U.S. 752 (1942).

14. *Id.* at 752-53.

15. Under Fed. R. Civ. P. 38(d) this right may be waived. Furthermore, the right is not automatic, but must be affirmatively demanded by one of the parties to the action. Fed. R. Civ. P. 38(b).

16. James, *Right To A Jury Trial In Civil Actions*, 72 Yale L.J. 655 (1963).

17. At common law, a citizen of England could, in some instances, take his case into the Court of Chancery to seek equitable remedies. The equity courts evolved into a parallel system of justice, existing side by side with the courts of law. The chancery system developed its own system of principles and rules.

In the United States, the federal government, as well as most of the states, has merged law and equity into one system. As in England, though, equity remains an “extraordinary” remedy. One may seek equity only if there is not an adequate remedy at law. Although the same courts now administer both legal and equitable relief, equity jurisdiction requires that its own principles be applied. 30 C.J.S. *Equity* §§ 1-10, 18-21 (1965). See also, *Infusaidd Corp. v. Intermedics Infusaidd, Inc.*, 739 F.2d 661, 668 (1st Cir. 1984) (“[T]he general rule is that if there is an adequate remedy at law, equitable relief is unavailable.”); *Suchan v. Rutherford*, 90 Ida. 288, 295, 410 P.2d 434, 438 (1966) (“[E]quity will not intervene where the aggrieved party has a plain, speedy, adequate, and complete remedy at law.”); *Smith v. Hauser* 262 N.C. 697, 701, 138 S.E.2d 501, 504 (1964) (“[E]quity is intended to supplement, and not usurp the functions of the courts of law”).

18. In the United States, the distinction between law and equity has become somewhat blurred since the two systems - separate and distinct at English common law - have been merged into one. See James, *supra* note 16.

19. 28 U.S. (3 Pet.) 433 (1830).

remedies were administered.”²⁰ Justice Story went on to explain that the Seventh Amendment may be “construed to embrace all suits which are not of equity and admiralty jurisdiction.”²¹

Of course, new causes of action encompassing newly created rights and remedies have been enacted at legislative sessions. Many of these could never have been foreseen by the framers at the time the Seventh Amendment was adopted. It is difficult to determine whether some of these new causes of action are legal or equitable in the Seventh Amendment context. This difficulty is compounded by the fact that many complex statutes provide for both legal and equitable remedies.²² When the legislature is silent on the jury trial issue in a statute, the courts determine its closest historical analogy to decide how the case should be tried.²³ The Clean Water Act²⁴ falls clearly into this category. The Supreme Court addressed the right to a jury trial under this statute in *United States v. Tull*.²⁵

III. Facts of *Tull* and the Lower Court Decisions

In 1981, the government sued Edward Tull pursuant to the Clean Water Act in the United States District Court for the Eastern District of Virginia.²⁶ The government charged

20. *Id.* at 447.

21. *Id.* See also *Insurance Company v. Comstock*, 83 U.S. (16 Wall.) 258, 269 (1872).

22. See, e.g., Racketeer Influenced and Corrupt Organizations (RICO) Act 18 U.S.C. §§ 1961-68 (1982 & Supp. IV 1986).

23. James, *supra* note 16, at 656.

24. 33 U.S.C. §§ 1251-1376 (1982 & Supp. III 1985).

25. 107 S. Ct. 1831 (1987).

26. *United States v. Tull*, 615 F. Supp. 610, 622 (E.D. Va. 1983). The purpose of the Clean Water Act is to enhance the federal government's power to prohibit private parties from obstructing the navigable waters of the United States. *Id.* at 622; *United States v. Logan & Craig Charter Service, Inc.*, 676 F.2d 1216, 1218 (8th Cir. 1982). The Act was established to “restore and maintain the chemical, physical, and biological integrity of the Nation's waters.” 33 U.S.C. § 1251(a). 33 U.S.C. § 1319(b) authorizes suits for injunctive relief against violators of the Clean Water Act, and 33 U.S.C. § 1319(d) provided for civil penalties of up to \$10,000 per day. The legislative history of the Clean Water Act illustrates that Congress intended that the need for “retribution,” “deterrence,” and “restitution” should all be considered when civil penalties

Tull with discharging fill and other pollutants²⁷ into "wetlands adjacent to navigable waterways" without a permit from the United States Army Corps of Engineers.²⁸ This activity, according to the government, continued for eight years throughout three locations in eastern Virginia: Ocean Breeze Mobile Home Sites, Mire Pond Properties, and Eel Creek.²⁹

The Act unambiguously requires a permit if a developer wishes to discharge "dredged"³⁰ or "fill"³¹ materials into the

are imposed. 123 Cong Rec. 39191 (1977) (Sen. Muskie commenting).

33 U.S.C. § 1319(d) was amended in 1987 by the Water Quality Control Act. This statute allows for the imposition of civil penalties of up to \$25,000 per day for each violation.

In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

Id.

27. 33 U.S.C. § 1362(6) (1982) ("Pollutant" is defined as "[any] dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste, discarded into water.").

28. Under the Act, the Secretary of the Army is charged with issuing permits for such discharges. *Tull v. United States*, 769 F.2d 182, 183 (4th Cir. 1985). The Secretary has, in turn, delegated this task to the Corps of Engineers. 33 C.F.R. § 325.8 (1987).

29. *Tull*, 769 F.2d at 184.

30. "Dredged material" is defined as any material which is "excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(c) (1987). "Discharge of dredged material" is defined as

any addition of dredged material into the waters of the United States. The term includes, without limitation, the addition of dredged material to a specified discharge site located in waters of the United States and the runoff or overflow from a contained land or water disposal area . . . The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products. The term does not include *de minimus*, incidental soil movement occurring during normal dredging operations.

Id. at § 323.2(d).

31. "Fill material" is defined as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of [a] waterbody." 33 C.F.R. § 323.2(e) (1987). "Discharge of fill material" is defined as the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: placement of fill that is necessary for the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock,

navigable waters of the United States.³² "Navigable waters" include all "waters of the United States, including the territorial seas."³³ Indeed, Congress intended to give the term a very broad reading;³⁴ nevertheless, regulations have been more explicit.³⁵ "Wetlands"³⁶ adjacent³⁷ to navigable waters of the United States are within the jurisdiction of the Corps.³⁸

sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs.

33 C.F.R. § 323.2(f) (1987).

32. 33 U.S.C. §§ 1311(a), 1344(a).

33. 33 U.S.C. § 1362(7). "The limit of jurisdiction in the territorial seas is measured from the baseline in a seaward direction a distance of three nautical miles." 33 C.F.R. § 328.4(a) (1987). "Generally, where the shore directly contacts the open sea, the line on the shore reached by the ordinary low tides comprises the baseline from which the distance of three geographic miles is measured." 33 C.F.R. § 329.12(a)(1) (1987).

34. *Deltona Corp. v. United States*, 657 F.2d 1184, 1186 (Ct.Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982); *United States v. Oxford Royal Mushroom Products*, 487 F. Supp. 852, 854-55 (E.D. Pa. 1980) (The waters need not be navigable in fact, but only potentially navigable.).

35. *United States v. Tull*, 615 F. Supp. 610, 623 (E.D. Va. 1983) (quoting 33 C.F.R. § 323.2(b) (1981)) "Navigable waters of the United States" has been defined to mean: "Those waters that are subject to the ebb and flow of the tide shoreward to the mean high water mark and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce." The term "high water mark" is defined as

that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

33 C.F.R. § 328.3(e) (1987).

36. "Wetlands" include areas that are "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." *Id.* (quoting 33 C.F.R. § 323.2(c) (1981)).

37. "Adjacent" means bordering, contiguous, or neighboring. *Id.* at 33 C.F.R. § 323.2(d).

38. *See United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 455 (1985) ("The evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term

The District Court denied Tull's timely demand for a jury trial and heard the case over his objection.³⁹ The court found that Tull had violated the Clean Water Act by placing fill on Ocean Breeze (1975), Mire Pond (1978), and Eel Creek (1980).⁴⁰ Furthermore, the court found that no permit was ever issued (or even applied for) for this disposal.⁴¹

The court rejected Tull's contention that no permit was required for the dumping because the aforementioned properties did not fall within the definition of "wetlands."⁴² Twelve government expert witnesses, as well as a court-appointed expert witness, unequivocally rebutted Tull's claim.⁴³ The court assessed a total of \$75,000⁴⁴ in fines against Tull for violating the Act. In addition, the court issued an injunction requiring Tull to clean up all three properties.⁴⁵ The Court of Appeals affirmed the District Court's order and held that Tull had no right to a jury trial because the remedies sought were "equitable" rather than "legal."⁴⁶

IV. The Test Determining Right to Jury Trial Under the Seventh Amendment

Given the facts of *Tull*, it is necessary to apply the test which the Supreme Court has developed to determine whether a jury trial is appropriate. The determinative inquiry is whether the suit in question would have been litigated in

'waters' to encompass wetlands adjacent to waters as more conventionally defined.')

39. *Tull*, 769 F.2d 183 (4th Cir. 1985).

40. *Id.* at 184.

41. *Id.*

42. *Id.*

43. *Id.* at 184-85. The District Court found that Tull's properties contained peat, *Spartina alterniflora* and *Spartina patens*. All of these are wetland species. *United States v. Tull*, 615 F. Supp. 610, 618-19.

44. *Id.* at 185. This amount was only a fraction of the almost \$23,000,000 the government sued for. A breakdown of the \$75,000 fine is as follows: Ocean Breeze Mobile Home Cites (\$35,000), Mire Pond Properties (\$35,000), and Eel Creek (\$5,000). *United States v. Tull*, 615 F. Supp. 610, 626 (E.D. Va. 1983).

45. *Tull*, 769 F.2d at 185. Tull was also ordered to pay fines and restore other properties for violating the Rivers and Harbors Appropriation Act. 33 U.S.C. §§ 401-467 (1982 & Supp. III 1985).

46. *Tull*, 769 F.2d at 188.

the courts of law or courts of equity in 1791,⁴⁷ the year the Seventh Amendment was adopted. "Because the Seventh Amendment demands preservation of the jury trial right, our cases have uniformly held that the content of the right must be judged by historical standards."⁴⁸ In other words, "[i]f a jury would have been impanelled in a particular kind of case in 1791, then the Seventh Amendment requires a jury trial today, if either party so desires."⁴⁹

The Seventh Amendment has been interpreted to require a jury trial in actions "unheard of at common law" so long as the "rights and remedies" involved are legal rather than equitable in nature.⁵⁰

A. *Development of the Test*

The Supreme Court developed and refined this analysis in a series of cases beginning in 1959 with *Beacon Theaters v. Westover*.⁵¹ All of the cases in this series involved situations in which both legal and equitable issues arose in the same action. In *Beacon Theatres*, Fox West Coast Theatres, Inc. brought an action for declaratory relief arising out of alleged

47. See generally Clements, *The Right To Jury Trial Under The Clean Water Act - The Jury Is Still Out*, 41 U. Miami L. Rev. 665, 685 (1987). That article provides a detailed analysis of the lower court holdings in *Tull*. This note primarily addresses the problems raised by the Supreme Court's decision and analysis.

48. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 344 (1979) (Rehnquist, J. dissenting).

49. *Id.* at 345; *Dimick v. Scheidt*, 293 U.S. 474, 476. "In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791." *Id.*

A good example of the application of this test is *NSC International Corp. v. Ryan*, 531 F. Supp. 362, 363 (N.D. Ill. 1981). The court held that the plaintiff's action for treble damages under RICO, a statute that provides for legal and equitable relief, most closely resembled an action for tortious interference with economic relations. Therefore, since the closest historical analogy was legal rather than equitable, the court granted plaintiff's demand for a jury trial. *Id.*

50. *Pernell v. Southall Realty*, 416 U.S. 363 (1974). "The Seventh Amendment requires trial by jury in actions unheard of at common law so long" as the rights and remedies at issue were traditionally enforced in actions at law, rather than in equity or admiralty. *Id.* at 375.

51. 359 U.S. 500 (1959).

violations of federal antitrust laws.⁵² Fox's complaint prayed for a declaration that Beacon Theatres had violated the aforementioned acts, as well as for an injunction to prevent Beacon Theatres from instituting any actions of its own during the proceeding.⁵³ Beacon Theatres answered and counter-claimed⁵⁴ for treble damages.⁵⁵ Beacon Theatres also demanded a jury trial on the counter-claim.⁵⁶ Reversing the lower courts, the Supreme Court held that Beacon Theatres was entitled to a jury trial on its counter-claim.⁵⁷ Since money damages constitute a "legal" remedy, a claim for treble damages would normally get a jury trial.⁵⁸ Beacon Theatres could not be deprived of that right simply because Fox sued first.⁵⁹ Under the Federal Rules of Civil Procedure, legal and equitable issues may be tried in the same case.⁶⁰ "[O]nly under the most imperative circumstances . . . which . . . we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."⁶¹ Therefore, the legal issues must be tried first in such cases.⁶² This often has critical implications with regard to the doctrines of *res judicata* and collateral estoppel, since the factual issues, once determined by the jury on the legal claims are applied to the court's decision on the equitable claims.⁶³

The second case in this landmark series of decisions is *Dairy Queen, Inc. v. Wood*.⁶⁴ In *Dairy Queen*, the owners of

52. *Id.* at 502.

53. *Id.* at 502-03.

54. Counter-claims are filed pursuant to Fed. R. Civ. P. 13.

55. *Beacon Theatres*, 359 U.S. at 503.

56. *Id.*

57. *Id.* at 508.

58. *Id.* at 503.

59. *Id.*

60. Fed. R. Civ. P. 18(a) allows for joinder of claims.

61. *Beacon Theatres*, 359 U.S. at 510-11. *See also*, *Guajardo v. Estelle*, 580 F.2d 748, 752 (5th Cir. 1978) (holding that the "jury-generating" aspect of a legal claim is not lost by joinder with equitable claims).

62. 5 J. Moore, J. Lucas, G. Grotheer, *Moore's Federal Practice* ¶ 38.16(2) (2d ed. 1987).

63. For a discussion on the *res judicata* issue, *see Parklane Hosiery Co. v. Shore* 439 U.S. 322 (1979).

64. 369 U.S. 469 (1962).

the "DAIRY QUEEN" trademark had contracted with the defendant for the exclusive use of the trademark in parts of Pennsylvania. When a dispute arose concerning its use, the owners of the trademark sued for breach of contract and trademark infringement.⁶⁵ The plaintiff sought an injunction to prevent the defendant from continuing to use the trademark and for an accounting to determine the amount owed for the initial use.⁶⁶ The defendant demanded a jury trial.⁶⁷ The plaintiff-respondent argued that the claim was purely equitable because it prayed for an accounting rather than actual money damages.⁶⁸ The Supreme Court reversed the District Court's holding (which the Court of Appeals had affirmed)⁶⁹ and, citing *Beacon Theatres*, held that where both legal and equitable issues arise in a single case, all legal issues are entitled to a jury trial on the facts.⁷⁰ Moreover, the accounting claim is not rendered equitable by the choice of words used in the pleading.⁷¹ Such a cause of action is cognizable at law and provides for a legal remedy.⁷² The *Dairy Queen* Court clarified the holding in *Beacon Theatres* by stating: "*Beacon Theatres* requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury."⁷³ The *Dairy Queen* Court added, however, that the rule of *Beacon Theatres* applies even when the trial judge classifies the legal issues as incidental to the equitable ones.⁷⁴

*Ross v. Bernhard*⁷⁵ is the third pertinent case in this line. In *Ross*, a group of plaintiffs brought a stockholders' deriva-

65. *Id.* at 473.

66. *Id.*

67. *Id.* at 476.

68. *Id.* at 477.

69. 194 F. Supp. 686 (E.D. Pa.), *aff'd.*, 290 F.2d 87 (3d Cir. 1961).

70. *Dairy Queen*, 369 U.S. at 472-73.

71. *Id.* at 477-78.

72. *Id.* at 478-79. Historically, a suit in equity could be brought only where there was an inadequate remedy at law. The *Dairy Queen* court reasoned that a court of law is perfectly able to determine an accounting. It is not so complex that it requires an equitable determination. *Id.*

73. *Id.* at 473.

74. *Id.*

75. 396 U.S. 531 (1970).

tive suit against the directors of Lebanon Corporation, a closed-end investment company, accusing them of unlawfully converting corporate assets and "gross abuse of trust."⁷⁶ As in *Beacon Theatres* and *Dairy Queen*, the *Ross* complaint involved equitable as well as legal issues.⁷⁷ The Supreme Court reversed the decision of the Court of Appeals,⁷⁸ which reasoned that a derivative action of this sort was purely equitable, and held that the right to a jury trial on the legal claim for damages "is not forfeited merely because the stockholder's right to sue must first be adjudicated as an equitable issue triable to the court."⁷⁹ In *Ross*, Justice White explained that the "Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action."⁸⁰ The Court continued this analysis by listing three factors that must be considered when determining the Seventh Amendment right: first, the "nature" of the issue in light of the pre-merger custom; second, the remedy sought; and third, the "practical abilities and limitations of juries."⁸¹

76. *Id.* at 531.

77. *Id.* at 537-38. The equitable issue involved the right of the stockholders to sue on behalf of the corporation. The legal issue was the claim for money damages by the corporation against its directors. *Id.* at 538.

78. *Ross v. Bernhard*, 403 F.2d 909 (2d Cir. 1968).

79. *Ross*, 396 U.S. at 539.

80. *Id.* at 538. *See also*, *Simler v. Conner*, 372 U.S. 221 (1963) (holding that an action by a lawyer to recover fees from a client is legal in character and should be granted a jury trial).

81. *Ross*, 396 U.S. 538 n.10. When the *Ross* decision was handed down, footnote 10 attracted a great deal of controversy. It left open the question of whether courts must take into account the practical abilities and limitations of juries in resolving the Seventh Amendment question. It is generally held, however, that such factors should not be taken into consideration. *In re U.S. Financial Securities Litigation*, 609 F.2d 411, 425 (9th Cir. 1979).

Concerning footnote 10 of *Ross*, it has been suggested that it is "so cursory, conclusory and devoid of cited authority or reasoned analysis that it is difficult to believe it could have been intended to reject such established historical practice or Supreme Court precedent." Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 Nw. U.L. Rev. 486, 526 (1975). *See generally*, Devlin, *Jury Trial In Complex Cases: English Practice At The Time Of The Seventh Amendment*, 80 Colum. L. Rev. 43 (1980); Arnold, *A Historical Inquiry Into The Right To Trial By Jury In Complex Civil Litigation*, 128 U. Pa. L. Rev. 829 (1980).

In *Curtis v. Loether*,⁸² the fourth case in this series, the Supreme Court unambiguously reaffirmed its position on the jury trial issue:

[W]hen Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law.⁸³

The *Curtis* court, however, reminds us that if improprieties arise in the jury trial, the trial judge retains the power to hand down a directed verdict, judgment n.o.v., or, if the situation requires, a new trial may be granted at the judge's discretion.⁸⁴

A number of recent federal court decisions have reiterated the point that where both legal and equitable claims appear in the same case, issues of fact common to both must be decided by a jury if one is demanded, and the legal claims must be decided prior to those which are deemed to be equitable.⁸⁵

Procedurally, the *Tull* case is similar to *Beacon Theatres*, *Dairy Queen*, *Ross*, and *Curtis*. The government's complaint gives rise to legal as well as equitable issues. A claim for civil penalties is, by its nature, legal, while a claim for injunctive relief is equitable in nature. Therefore, under the *Beacon Theatres* line of cases, Edward Tull was deprived of his Seventh Amendment right to a jury trial as to the facts relating to the legal claim.

82. 415 U.S. 189 (1974).

83. *Id.* at 195. The right to a jury trial on the facts has explicitly been upheld when the U.S. Government is bringing suit to collect civil penalties, even if the statute is silent on the jury trial issue. *United States v. J.B. Williams Co.*, 498 F.2d 414, 422 (2d Cir. 1974).

84. *Curtis*, 415 U.S. at 198.

85. *Turner v. Kaiser Aluminum & Chemical Co.*, 602 F. Supp. 519, 525 (M.D. La. 1984); *Roscello v. Southwest Airlines, Co.*, 726 F.2d 217, 221, *reh'g denied*, 732 F.2d 941 (5th Cir. 1984) (en banc); *Tull v. United States*, 107 S. Ct. 1831, 1835 n.3 (1987).

V. The Supreme Court Decision

A. *The Majority Decision*

The Supreme Court first addressed the preliminary issue of whether a construction of the Clean Water Act is "fairly possible by which the [constitutional] question may be avoided."⁸⁶ The Court concluded that nothing in either the statute itself, or its legislative history, "implies any congressional intent to grant defendants the right of a jury trial during the liability or penalty phase of the civil suit proceeding."⁸⁷ Therefore, the Court concluded that it must answer the constitutional question.

In *Tull*, the Supreme Court held that the defendant was entitled to a jury trial on the issue of liability, but that the amount of damages was a matter of judicial discretion.⁸⁸ The Court reasoned that since the government sought civil penalties as well as injunctive relief, the suit was more analogous to a common law action in debt than a traditional equitable action.⁸⁹ The Court rejected Tull's claim that a better historical analogy was to a public nuisance action, which was historically equitable.⁹⁰ The government's final contention, that the instant case is similar to an action for disgorgement of improper profits (traditionally equitable) is a poor analogy. That cause of action, the Court said, provides for a restitutionary remedy,

86. *Tull*, 107 S. Ct. at 1835 n.3.

87. *Id.*

88. *Id.* at 1839-40.

89. *Id.* at 1836. See *Regan*, 232 U.S. 37 (1914).

90. *Tull*, 107 S. Ct. at 1837. The Court held, however, that the issue need not be decided because both analogies are appropriate. The purpose of an action for public nuisance was to provide a civil remedy to redress "a miscellaneous and diversified group of minor criminal offenses, based on some interference with the interests of the community, or the comfort or convenience of the general public." *Id.* (quoting W. Prosser, *Handbook on the Law of Torts* 583-85 (4th ed. 1971)). Some examples of public nuisance included:

interferences with the public health, as in the case of a hogpen, the keeping of diseased animals, or a malarial pond; with public safety, as in the case of the storage of explosives . . . with public morals; . . . with public comfort, as in the case of bad odors, smoke, dust; . . . with public convenience, as by obstructing a highway or a navigable stream.

Tull, 107 S. Ct. at 1837 n.5 (quoting Prosser, *Law of Torts* at 583-85).

which is a more limited remedy than a civil fine.⁹¹

The second part of the Court's holding denied *Tull* a jury trial as to the amount of the penalty.⁹² Writing for the majority, Justice Brennan explained that such a decision does not involve the "substance of a common-law right to a jury trial,"⁹³ nor does it involve a "fundamental element of a jury trial."⁹⁴ Congress may delegate such a determination to the trial judges.⁹⁵ In addition, the Court asserted that "highly discretionary calculations that take into account multiple factors"⁹⁶ are normally performed by judges.⁹⁷ Citing *Colgrove v. Battin*,⁹⁸ the Supreme Court reasoned that the inquiry depends on whether "the jury must shoulder this responsibility as necessary to preserve the 'substance of the common-law right of trial by jury.'"⁹⁹ The *Tull* Court concluded that this is not the jury's purpose.¹⁰⁰

B. *The Dissenting Opinion*

Justice Scalia, joined only by Justice Stevens, dissented from the last part of the majority's opinion — that a determination concerning the amount of damages should not have gone to the jury.¹⁰¹ These Justices criticize the majority's

91. *Id.* at 1839. It is the government's contention that if the Seventh Amendment right is to attach, the cause of action, as well as the remedy sought, must both be legal in nature. The government's amended complaint divides the statute's action for civil penalties into a cause of action and a remedy, and "analyzes each component as if the other were irrelevant." *Id.* at 1837 n.6. The Court flatly rejected this approach stating; "[o]ur search is for a single historical analogue, taking into consideration the nature of the cause of action and the remedy as two important factors." *Id.* at 1840.

92. Justice Scalia and Justice Stevens dissented from this section of the opinion. *Id.* at 1840-41.

93. *Id.*

94. *Id.*

95. *Id.*

96. The Court concluded that the statute's legislative history indicated that judges should perform such calculations. *Id.* at 1839 (citing 123 Cong. Rec. 39190-39191).

97. *Tull*, 107 S. Ct. at 1840.

98. 413 U.S. 149 (1973).

99. *Tull*, 107 S. Ct. at 1840 (quoting *Colgrove*, 413 U.S. at 157).

100. *Id.*

101. *Id.* at 1840-41 (1987) (Scalia, J. dissenting).

opinion as creating a new “form of civil adjudication.” The dissenters assert that since the Court drew an analogy between the case at bar and a common law debt action, a jury should determine damages (as they did in common law debt cases).¹⁰² However, it is noteworthy that the dissenters do not cite any authority for their position.

C. Analysis

What makes the *Tull* decision disturbing is the majority’s misreading of *Colgrove v. Battin*.¹⁰³ The Court in *Colgrove* stated that the Supreme Court has historically defined the jury trial right preserved in cases covered by the Seventh Amendment as “the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure”¹⁰⁴ Procedural matters in civil cases such as jury size¹⁰⁵ and unanimity¹⁰⁶ may vary, depending on the jurisdiction.¹⁰⁷ The majority erred in failing to categorize the determination of civil penalties as part of the “substance of the common-law right”¹⁰⁸ of the jury trial under the Seventh Amendment.

The dissenters in *Tull* assert that by splitting the issues of liability and assessment of civil penalties between the judge and jury, the majority creates “a new form of civil adjudication.”¹⁰⁹ *Tull* leaves open some questions regarding the role of

102. *Id.*

103. 413 U.S. 149 (1973).

104. *Id.* at 156; *Baltimore and Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935); see also Scott, *Trial By Jury And The Reform Of Civil Procedure*, 31 Harv. L. Rev. 669 (1918).

105. *Colgrove*, 413 U.S. at 160; see also *Cooley v. Strickland Transportation Co.*, 459 F.2d 779 (5th Cir. 1972), *cert. denied*, 413 U.S. 923 (1973), *reh’g denied* 414 U.S. 882 (1973) (holding that Federal District Courts may make local rules that allow only a six member jury in civil cases rather than twelve); *Fletcher v. McCreary Tire and Rubber Co.*, 773 F.2d 666 (5th Cir. 1985); *Calhoun v. United States*, 591 F.2d 1243 (9th Cir. 1978), *cert. denied*, 439 U.S. 1118 (1979) (holding that in a taxpayer’s action seeking a federal income tax refund, the taxpayer is not entitled to a twelve member jury). See also *Milliron v. Baker*, 352 F. Supp. 495 (W.D. Pa. 1973).

106. Scott, *supra* note 104, 31 Harv. L. Rev. at 674 (1918).

107. *Galloway v. United States*, 319 U.S. 372, 390 (1942).

108. *Tull*, 107 S. Ct. at 1840.

109. *Id.* at 1841.

the jury in fixing remedies.

1. *Assessment of Damages*

While the Supreme Court has not yet ruled on this precise issue, the Circuit Courts have settled the point that when the issue of liability is submitted to a jury, the task of determining damages is also submitted. In *Hawkes v. Ayers*,¹¹⁰ the Fifth Circuit stated that “[a] fundamental principle of American jurisprudence is that the fact-finder determines the quantum of damages in civil cases.”¹¹¹ In *Borough v. Duluth, Missabe & Iron Range Ry. Co.*,¹¹² the Eighth Circuit clearly articulated the principle that the “calculation of damages” is a question “of fact and peculiarly within the province of the jury.”¹¹³ Other circuits have also accepted this position.¹¹⁴ In these cases, the Supreme Court has consistently denied certiorari and let the Circuit Court decisions stand. Therefore, when a jury has been chosen to decide a civil case, that entity should also determine the amount of damages to be awarded, since it is clearly a question of fact.

2. *Assessment of Civil Penalties*

While damages can be either compensatory or punitive in nature, penalties are mainly punitive.¹¹⁵ The jury’s role in the determination of damages has been well settled in the law for some time,¹¹⁶ but its role in the determination of civil penalties is much less clear, and has been the subject of a considerable amount of debate. This is particularly true in complex civil litigation. Periodically, it has been argued that there

110. 537 F.2d 836 (5th Cir. 1976).

111. *Id.* at 837.

112. 762 F.2d 66 (8th Cir. 1985).

113. *Id.* at 69. *See also* Herold v. Burlington Northern, Inc., 761 F.2d 1241, 1248 (8th Cir.), *cert. denied*, 106 S. Ct. 208 (1985) (“The assessment of damages lies within the sound discretion of the jury.”).

114. *See* Rosen v. LTV Recreational Development, Inc., 569 F.2d 1117 (10th Cir. 1978) (holding that the fixing of damages is the peculiar function of the jury, or of the trial judge if there is no jury).

115. D. Dobbs, *Handbook On The Law Of Remedies* 135, 204-05 (1973).

116. *See supra* notes 112, and *infra* notes 118-20 and accompanying text.

should be a general exception to the jury trial rule for complex cases.¹¹⁷ However, attempts to advance this argument have been rejected by the courts.¹¹⁸ It would be difficult, if not impossible, to develop a workable test to determine which cases are "complex" and which ones are not.¹¹⁹ In addition, juries have consistently shown, albeit with some exceptions, that they are capable of unraveling complex factual issues.¹²⁰ Products liability, medical malpractice, and securities cases are frequently cited examples of cases presenting complex issues.¹²¹

Should the issue of statutory civil penalties be decided by the jury in suits brought under the Clean Water Act? Clearly, the greatest advantage that would result from not submitting the civil penalty issue to the jury is the promotion of judicial economy. As the federal court dockets have become overwhelmed with pending litigation, this is an immediate concern. Another advantage that would result from making penalties a matter for judicial determination is the elimination of juror prejudice. However, the benefits that would be derived therefrom undermine the historical, pervasive faith that has been placed in the jury system. Any legal or political system must have the support of the citizenry it is designed to serve. Without such support, the system loses the very credibility that is so crucial to its longevity.

Based on the foregoing analysis, it is this author's contention that, despite the frequent objections to the use of the jury in determining complex factual issues, the balance must tilt in its favor. Prospectively, it appears that the Supreme Court's decision in *Tull* will create further uncertainty in this area, not only with regard to complex environmental statutes, but with complex statutes in many areas of the law.

117. See *In re U.S. Financial Securities*, 609 F.2d 411, 427 (9th Cir. 1979).

118. *Id.* at 427-31.

119. *Id.* at 431.

120. *Id.*

121. *Id.*

VI. Conclusion

The Supreme Court's decision in *Tull* represents that Court's refusal to narrow the scope of the Seventh Amendment right which is guaranteed to parties litigating in the federal courts. The Circuit Court of Appeals was clearly misguided in its handling of the issues presented to it.

Tull clearly falls within the line of cases beginning with *Beacon Theatres* insofar as it gives rise to both legal and equitable claims. Thus, in following the doctrine of *stare decisis*, the Supreme Court took a major step in clarifying and reaffirming its commitment to its past holdings on the Seventh Amendment issue. The Court did, however, create further uncertainty regarding the role of the civil jury in the determination of statutory civil penalties. Under the Seventh Amendment, the Federal Rules of Civil Procedure, and the case law since *Beacon Theatres v. Westover*, Edward Tull should have been granted a jury trial on the facts of all the legal claims, including the issue of the amount of the penalty.

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