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WHY NOT USE THE SPECIAL JURY?*

By Jeannette E. Thatcher**

"The right of trial by jury shall be preserved . . ."

This theme, with slight verbal variations, appears in the constitutions of forty-six¹ of the United States and in the federal constitution. Jury trial in America is intimately associated with the actuating causes of the American Revolution,² and has a deep emotional appeal quite aside from its intrinsic merits as a legal institution. No other part of the judicial system has taken so prominent a part in popular and professional discussions, nor evoked such extravagant praise on the one hand and such abundant criticism on the other.

The jury system has received evaluations ranging from "outworn relic"³ and "sentimental fetich"⁴ to "the crowning masterpiece of our jurisprudence."⁵ The great bulk of the citizenry is fundamentally satisfied with juries as they exist today, to the extent that proffered substitutes for jury trial have received scant consideration. Yet even ardent eulogizers of the jury system have conceded that it has imperfections, and for generations⁶ various proposed reforms have been earnestly and voluminously debated. The consensus of opinion nevertheless appears to be that, despite minor defects in its present application, the principle of a fact-finding body whose lay members are freshly chosen for the purpose of each dispute, lending both spontaneity and common sense to

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¹Colorado and Louisiana excepted. For a list of the provisions appearing in the constitutions of the various states, see 2 Thompson, Trials (2d ed.) Sec. 2226, p. 1478, or Note, (1899) 43 L. R. A. 33, 36.

²Among grievances listed in the Declaration of Independence were the "acts of pretended legislation. . . . For depriving us in many cases, of the benefits of trial by jury."


⁶For an early example, see Juries, (1870) 5 L. J. 109, commenting upon a bill for reform of the English jury system.
technical rules of law, is superior to any system of professional jurors ever devised, or to the principle of judge trial.7

Among the pragmatic lapses most often berated are the low intellectual calibre of jurymen, particularly in metropolitan areas, and the unsuitability of jurors with only general experience to try particular cases involving specialized fields. The latter inaptitude is made especially evident upon the embarrassing occasions when groups of experts parade conflicting opinions for the supposed edification of the ordinary jury.

Various suggestions have been made looking toward the correction of the demerits of the present jury system, such as the creation of a class of professional jurors, trained in the law of evidence and experienced in analyzing facts;8 greater voluntary jury service by businessmen;9 and the elimination of virtually all exemptions from jury duty, with improved listing and drawing methods to insure for every citizen uniform jury service of limited duration and infrequent recurrence. Surprisingly little attention, however, has been given to the possibilities of the common-law institution of the special jury.

The jury ordinarily used today in America, a body of twelve persons drawn by lot from panels taken at hazard from the list of voters or taxpayers, is properly known as the "common jury" and

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7The following quotations illustrate a general preference for settlement of fact questions by juries rather than by judges:

1 Holdsworth, A History of English Law, (6th ed., rev. 1938), p. 349: "... if a clever man is left to decide by himself disputed questions of fact he is usually not content simply to decide each case as it arises. He constructs theories for the decision of analogous cases. These theories are discussed, doubted, or developed by other clever men when such cases come before them. The interest is apt to center, not in the dry task of deciding the case before the court, but rather in the construction of new theories, the reconciliation of conflicting cases, the demolition and criticism of older views. The result is a series of carefully constructed, and periodically considered rules, which merely retard the attainment of a conclusion without assisting in its formation. ... The jury system has for some hundreds of years been constantly bringing the rules of law to the touchstone of contemporary common sense."

Mr. Justice Miller, quoted in 2 Va. L. Reg. (N.S.) 873-874, said: "... I am willing to give the benefit of my observation (in the conference room of the Supreme Court of the United States) ... that judges are not preeminently fitted over other men of good judgment in business affairs to decide upon mere questions of disputed fact."

Chalmers, 7 L. Q. Rev. 19, speaking of chancery courts working without juries: "One finds oneself in a rarefied atmosphere of morality and respectability in which life is hardly possible. Look at the equitable doctrines of constructive notice and constructive fraud. Look at the impossible standard of duty laid down for trustees."


differs considerably from the “special jury.” The latter is a body of twelve men believed to possess better qualifications as triers of fact in certain types of cases, superiority of the individual jurors being demonstrated by the nature of their respective trades or businesses, or in England by their fulfillment of property qualifications higher than those of common jurors. To form a special jury (in its simple original form), from a list containing the names of twenty-four men so qualified, and unexceptionable on grounds of actual bias, the parties are permitted alternately to strike names until the number is reduced to twelve. The twelve jurors thus selected constitute the jury impaneled for trial of the case, such a jury being also denominated a “struck jury” because of the manner of selection.

It is the purpose of this article: (1) to trace the historical origins and development of the special jury, with special emphasis on its form at the time American legal institutions were adapted from their English counterparts; (2) to evaluate the common-law special jury, comparing the comments of those who have known this institution in operation; (3) to examine the legal basis for use of special juries in American courts; (4) to survey contemporary American use of the special jury as a part of the legal systems of the states; and, finally (5) to consider the extent to which current use of the special jury may be a partial correction of today’s jury system.

I. Historical Origins and Development of the Special Jury.

Development of Special Jury in England.

The special jury is so very old that even in 1696 its origins were lost in antiquity. In the oldest case\(^9\) cited by Tidd’s work on King’s Bench practice,\(^1\) a standard practice book at the turn of the nineteenth century, the court described its issuance of a rule for the formation of a special jury as “according to the ancient course.”

Again in Rex v. Edmonds\(^1\) in 1821 a King’s Bench court observed that it had not “hitherto been ascertained at what time the practice of appointing special juries for trials at nisi prius first began.” The earliest example known of the use of a special jury

\(^9\)Anonymous, (1696) 1 Salk. 405, Trinity Term, 8 William III.
\(^1\)Tidd, The Practice of the Court of King’s Bench in Personal Actions (1st Amer. Ed. 1807), p. 72.
was a London jury of cooks and fishmongers who in 1351 were called where the defendant was accused of selling bad food.13 In 1450 a special jury was impaneled for a murder case.14 And in 1645 in a case between two merchants "touching merchants' affairs" the Court of King's Bench granted a motion for a jury of merchants to try the issue.15

Apparently this institution fell into disuse for a time for in 1730 it was felt necessary to enact a statute confirming the right to trial by special jury. The statute, 3 Geo. II, c. 25,16 expressly "authorized and required" the courts to form special juries in both criminal17 and civil cases "in such manner as special Juries have been, and are usually struck in such Courts respectively." The practice was to strike from a panel of twenty-four names prepared by the prothonotary, until the panel was reduced to twelve jurors.

Three years later, toward the expiration of the statute 3 Geo. II, duration of which had been limited to three years, the statute 6 Geo. II, c. 37,18 was enacted to continue and to make perpetual the former statute and several others, largely on unrelated subjects.19 The 1733 statute also extended the right to certain other counties in England, not expressly included in the earlier statute.

15Lil. Pract. Reg. 154. A case similarly involving merchants decided about the same time was Pickering v. Barkley, (1649) Styles 132, 82 Eng. Rep. 587. In an Action upon the covenant of a charter-party which was virtually a contract of insurance, the question arose whether the seizure of a merchant ship by unknown pirates was within an exception in the charter-party of "dangers of the sea." The court, holding that the contract was to be interpreted according to the custom of merchants, ordered that merchants be brought into court to decide the matter. The merchants having apparently agreed that taking by pirates was a peril of the sea, judgment was given for plaintiff nil capiat per billam.
16Hawkins, Stat. at L. (1734). The statute, entitled "An Act for the better Regulation of Juries," recited in the preamble that "... some doubt hath been conceived touching the Power of his Majesty's Courts of Law at Westminster, to appoint Juries to be struck before the ... proper Officer of such respective Courts."
17Felonies were excepted, doubtless to assure such defendants the greater advantage of twenty peremptory challenges permitted in felony cases tried before common juries. Thompson & Merriam on Juries (1882) Sec. 161, state: "A struck jury was never granted at common law for the trial at bar of a capital case, and the reason in one case was stated to be, 'for then the prisoner would lose his challenges.'" (Citing Rex v. Duncomb, 12 Mod. 224.)
19Included among these was 4 Geo. II, c. 7, an act amending 3 Geo. II, c. 25, insofar as it applied to Middlesex County with respect to services and qualifications of jurors.
A slight modification in the mode of handling costs of special juries was added by 24 Geo. II, c. 19 in 1751, placing the burden of the fees for striking the jury and other fees caused by use of the special jury upon the person requesting its use. The judge, however, had power to certify that the cause was a proper one for use of a special jury, thus permitting assessment of costs against the loser as usual. The statute also limited the fees to be received by special jurors.

Subsequent legislation on the subject of special juries was embodied in the consolidation statute known as the County Juries Act, 6 Geo. IV, c. 50 (1825),20 Sections 30 to 35 of which dealt with special juries. Under this act there was no change in the nature of occasions for the use of special juries, or in the procedure for obtaining a court order that a special jury be impaneled in particular causes. There was an increase in the number of nominations of jurors from twenty-four to forty-eight, and a substantial modification in the method of nominating from selection by choice to selection partially by hazard. The procedure for reduction of the jury by striking from the list of forty-eight names remained unchanged. An interesting sidelight on the jury system as a whole is furnished by Section 60 of the same act, which abolished the already disused writ of attainder, formerly employed to punish jurors for verdicts at variance with those of subsequent juries retrying the same cases.

In 1852 the Common Law Procedure Act, 15 & 16 Vict., c. 76, Section 108 to 113,21 established a method whereby in the courts of assize, the striking procedure might be dispensed with and special jurors be balloted for and called in the order in which they were drawn, or in the same manner as common jurors. A proviso retained the earlier practice of striking, making it discretionary with the judge which method should be employed in a given assize case.22 In 1870 a similar provision was adopted with respect to special juries in London and Middlesex counties,23 expressly making uniform the practice in all of the counties.

The final step in the legislative development of English special juries took place in 1922 when the practice of striking special

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22A year later in 1853, Hilary Term, Rule 44 of the general court rules provided that applications for special juries should be accompanied by affidavit either stating that no notice for trial had been given or naming a date of notice for trial not less than six days later. (R. G. H. T. 44.)
23Lely, op. cit., p. 36, Juries Act, 1870, 33 & 34 Vict., c. 77, Secs. 16-18.
juries was abolished, and such juries were in all cases balloted for in the same manner as common juries. The chief difference between special and common juries in England today is the higher qualifications of special jurors. It is to be noted that the 1922 Juries Act, though modifying the manner of listing jurors to the extent of eliminating the necessity for statement of the "addition" or title and degree of each juror, still requires that "the profession, calling or business of the juror" shall be set out.

The Operation of the Special Jury circa 1776.

At common law the procedure for obtaining a special jury was initiated by motion of the party desiring that type of jury. Granting of the motion before 1751 rested in the sound discretion of the court, but after enactment of 24 Geo. II, c. 18, Section 1, was matter of course. Thereafter, upon presentation of a written motion over counsel's signature, the clerk of rules automatically drew up a rule for a special jury. An appointment for nomination of the special jury panel was then made with the master, prothonotary, or other subordinate official charged with the duty of nominating, the time for the appointment being endorsed upon the rule. A copy of the rule and endorsement was served upon the adverse party and upon the under-sheriff. The latter, as the custodian of the jury book, was required to attend the master at the appointed time and place, bringing the jury book for use of the master. Then in the presence of both parties or their respective counsel (or in the presence of one party if the other did not choose to attend) the master compiled from the jury book a list of forty-eight names, selecting the names in his discretion, giving consideration to the occupation and general reputation of the juror.

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24 Aggs, Chitty's Annual Statutes of 1922, title, Jury, p. 678, Juries Act, 1922, 12 & 13 Geo. V, c. 11, Sec. 5.
25 One class of cases was expressly excepted, those cases involving trial of a question of disputed compensation under the Lands Clauses Consolidation Act, 1845, in which the manner of striking a special jury remained unchanged. Aggs, loc. cit.; 6 Halsbury, Laws of England (Hailsham Ed. 1932), pp. 115-116, title Compulsory Purchase of Land.
26 The procedure here detailed is based upon Archbold, King's Bench Practice (1st Ed. 1820) and 2 Tidd, Practice of the Court of King's Bench in Personal Actions (1st Amer. Ed. 1807).
27 In Rex v. Edmonds, (1821) 4 B. & Ald. 471, 106 Eng. Rep. 1009, the defendant obtained a rule nisi for new trial because of the disallowance of his challenge to the array on the grounds, inter alia, of "unindifferency" of the master and of the master's personal selection of the names of jurors rather than the choice of names by hazard. The rule was discharged on other grounds (see footnote 29) but the court indicated in dictum that these grounds of challenge were untenable.

Later, however, personal selection of the names by the master was elimi-
As each oral nomination was made, either party had the right to object to the proposed juror for cause, and if the ground of incapacity was established to the satisfaction of the official, the objectionable name was set aside and a different name was proposed. When all forty-eight names had been selected, the official compiled a list of the names for each of the parties and appointed a new time and place for the striking.

At the later date appointed, each party was entitled to strike from the list twelve names without indicating any cause, the parties taking alternate strikes, beginning with the plaintiff. If either of the parties failed or refused to attend, the master struck twelve names in his behalf. The twenty-four jurors remaining were summoned for the date of trial by issuance of "special jury process." On trial the parties had a right to challenge the array for defect in the nomination or striking procedure and a right to challenge the polls for cause. There was no right of peremptory challenge at the trial, the right of striking being considered an analogous privilege. Where there was no successful challenge to the array, the first twelve jurors in the box against whom no cause for challenge to the polls was established, comprised the jury for trial of the case.

Ordinarily a special jury could be organized on the basis just outlined, but there were collateral rules to deal with other sets of circumstances which occasionally arose before actual trial could be begun. Where in a special jury cause jurors whose names were on the struck panel appeared in insufficient number to try the cause, the court upon the request of plaintiff could order the

nated and an element of chance in selection of the names was provided by the County Juries Act of 1825, which required use of a numbered list of special jurors, with a box of corresponding numbers written on small cards or pieces of parchment, the numbers being drawn from the box at random. If an objection for cause was interposed to any juror whose name was drawn, a new number was taken from the box.


Rex v. Edmonds, supra, footnote 27. The Court of King's Bench in a criminal action for conspiracy dismissed a rule nisi for new trial, holding that challenges to the array and to the polls were premature and irregular where made before twelve of the original panel had appeared.

Thompson & Merriam on Juries (1882), Sec. 161: "A statute granting peremptory challenges has no application in special jury causes. The right of peremptory challenge is considered to have been exercised in striking the jury." See also Creed v. Fisher, (1854) 23 L. J. Ex. 143, 15 Eng. Rul. Cas. 54, an action for assault and battery, in which the trial court refused to permit a peremptory challenge on trial because it was a special jury case. A rule nisi for new trial based on this refusal was discharged, the court holding that, although it was a common practice not to call a special juror who was objected to, it was not a matter of right except where there was cause.
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summoning of talesmen to fill the jury, even without consent of the defendant. Where a rule for special jury was obtained upon motion of the defendant, and the jury had been struck but no special jury process had been issued, the cause could not be tried by a common jury. In such a case, it was advisable for the plaintiff to sue out the special jury process himself to avoid intentional delay of trial by a recalcitrant defendant. Although special juries were sometimes applied for by defendants purely for purposes of delay, since the special jury cases ordinarily were not brought to trial until after the regular term, the courts easily devised means of controlling defendants and thereby preventing injustice to plaintiffs.

II. EVALUATION OF THE COMMON-LAW SPECIAL JURY.

The comments of historians and reformers who have studied and compared the common and the special jury are, for the most part, favorable to the special jury. Holdsworth, renowned English legal historian, had nothing but praise for the jury system as a whole. Comparing special and common juries, he found the former superior, and commented:

"Though a good special jury is admitted to be a very competent

...Litigants are generally contented with the measure of justice
tribunal, the common jury may be composed of persons who have neither the desire nor the capacity to weigh the evidence, or to arrive at a conclusion upon the facts in issue."

Maximus A. Lesser\(^\text{37}\) held a similar view, taking the attitude that common juries were so little reliable that special juries were preferable, especially in cases of length and importance. Lord Justice Bramwell in an address in the 1870's to the grand jury\(^\text{38}\) complained bitterly that special juries or special jurors were not used in important criminal cases, exclaiming: "It is outrageous . . . that you should take the best men and leave them out of a jury who are to try a man for his life, and try a trumpery running down case, or an action on a bill of exchange for 50 l., with picked men." Mark Thompson\(^\text{39}\) contemporary historian, felt that, following the enactment of 3 Geo. II, c. 25 in 1730, special juries under Lord Mansfield had played an important part in the development of commercial law.

The only acrimonious thrust against special juries which has been found was made by Jeremy Bentham, who disapproved of the jury system as a whole. In about 1809 Bentham wrote a book criticizing the jury system, which he entitled "Elements of the Art of Packing as Applied to Juries." His thesis was that jurors could be and were selected improperly and used, especially in libel cases, as instruments of injustice to enable the government to secure convictions for political purposes. The caustic reformer devoted an

\begin{itemize}
  \item \textit{...The jury itself is educated by the part which it is required to take in the administration of justice. The jury system teaches the members of the jury to cultivate a judicial habit of mind. It helps to create in them a respect for law and order. . . . The effects of the jury system upon the law are no less remarkable and no less beneficial. It tends to make the law intelligible by keeping it in touch with the common facts of life. . . . The jury is to the inside technical world of our common law system a representative of that outside sense, and outside animation."\textsuperscript{36}}
\end{itemize}


\textsuperscript{37}Lesser, \textit{The Historical Development of the Jury System} (Lawyers Co-op. Publ. Co. 1894), Ch. XII, pp. 217-218, footnote 59.

\textsuperscript{38}Justice Bramwell's address was reported in an editorial, \textit{Special Jurors in Criminal Trials}, (1878) 13 L. J. 227. In his address Bramwell pointed out that undersheriffs in England and Wales persistently misinterpreted clearly worded acts of Parliament, with the result that special jurors were exempted from common jury duty, contrary, Bramwell contended, to the express will of Parliament. The editor commented: "This state of things has gone on so long that society takes it as a matter of course that criminals should be tried by a panel of common jurors."

\textsuperscript{39}Thompson, \textit{A Constitutional History of England, 1642 to 1801} (London 1938), Part IV, \textit{The Age of Conservatism} (1720-1801), Ch. XI, Justice, pp. 411-420.
entire chapter\textsuperscript{40} to “Special Juries, a Special Engine of Corruption.” Although Bentham has a notable reputation as a legal reformer and was probably responsible for some beneficial changes in the English judicial system, it is difficult to believe that his attitude with respect to juries was justifiable.

The circumstances of publication of Bentham’s criticism of the jury system are significant, indicating strongly that his attitude was neither typical nor contemporaneously acceptable. When Bentham had his book ready for publication, the bookseller to whom he offered it hesitated to publish it because of the extremely forceful criticisms it contained. Bentham’s friend Sir Samuel Romilly wrote the author a letter dated January 31, 1810 urging him not to publish the book on the ground that Bentham would undoubtedly be subjected to criminal prosecution for libel, together with the bookseller who had the audacity to publish the vitriolic work. Romilly was convinced that Attorney General Vicary Gibbs, then in office, would be certain to prosecute Bentham.\textsuperscript{41} A biographer remarked: “... indeed the Chief Justice and his fellows were assailed in such terms that conviction would have been as certain as prosecution.”\textsuperscript{42} Probably as a result of his friends’ importunity, Bentham delayed publication for over ten years, the book being first printed in 1821, or the year after the death of Attorney General Gibbs.

Thompson makes it plain that he disagrees with Bentham’s views on special juries.\textsuperscript{43} In the footnote appended to a guarded reference to Bentham’s assertions with respect to improper conduct of libel cases, Thompson remarked: “How much truth there was in this allegation I cannot say. Juries did not always find the defendant guilty, and this is evidence of their independence.”

Folwell, Minnesota historian,\textsuperscript{44} describing the experiment with special juries in Minnesota from 1864 to 1897, was almost completely neutral in his evaluation of the merits or demerits of special juries. He reviewed the history of the adoption and repeal of this “curiosity in legislation” and commented:

“No evidence has been found of any general dissatisfaction with struck juries and it is probable that the general public did not much concern itself about them. There is reason to believe that lit-
gants who had had some experience with them at heavy costs had not found them better than the ordinary jury. Lawyers generally found few or no advantages in them. . . . There has been no demand for its revival."

Several sources have been found to be critical of the special jury in its use as between wealthy and poor litigants. An editorial of 1871 in an English legal journal expressed this criticism and stated that "the main object of the present article is to inaugurate, if possible, a movement for the purpose of doing away with the present system by which causes are tried by special juries at the option of either party." The author felt that a rich defendant might at his option impose upon a poor plaintiff against his will "a class of tribunal which by its instincts would be prejudiced in favour of the former." He suggested that the court in such cases should be empowered in its discretion to impanel any available jurors. A similar criticism was made recently by an English author. The latter author, who evinced an attitude favoring improvement of the jury system as a whole but did not appear to support any particular reform proposal, nevertheless demonstrated that he believed special juries to be superior to common juries, stating:

"A special jury is likely to be composed, partly at least, of men who would fail in their business if they were not fairly accurate in their estimate of credibility. In cases involving fraud such juries may be far better than the judge. A common jury may or may not have any particular ability."

In summation of the value of the special jury it may be remarked that the institution of the special jury endured in England virtually unchanged for not less than five centuries. The special jury is still in use in England, performing a valuable function, with the selection procedure modified, but the principle unchanged. These facts significantly indicate that the special jury has much to contribute to the Anglo-American judicial system.

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46Editorial, Trial by Special and by Common Jury, 51 L. T. 43, 44 (1871).
47R. M. Jackson, Jury Trial Today, (1938) 6 Camb. L. J. 367, 378: "Questions of money can only be settled by talking about figures. To send a jury away with the idea that if they find for the plaintiff they are to give 'substantial damages' means very little. Some jurymen feel that £100 is substantial, whilst others plunge for £25,000. The wealthier jurymen naturally think in larger amounts. In personal injury cases special juries are apt to give bigger amounts. In pre-War days the London General Omnibus Company and the Railway Companies ceased applying for special juries because on the average they [common juries] awarded lower damages."
48(1938) 6 Camb. L. J. 367, 373.
III. Legal Basis for Trial by Special Jury in the United States.

The Seventh Amendment of the United States Constitution preserves "the right of trial by jury" without making any attempt to define that phrase. It has been universally understood, however, that this clause was intended to protect the right of jury trial as it existed at common law.49

Although the state constitutions use somewhat variant language, e.g., that the right of jury trial "shall remain,"50 shall "be preserved,"51 "ought to be held sacred,"52 "ought to remain sacred and inviolate,"53 shall be "as heretofore,"54 or "shall remain inviolate,"55 the import of all of the phrases is substantially identical with that of the federal constitution and with each other. Occasionally these differences in wording do result in different interpretations of the meaning of the constitutional provision in question. Most state courts have held that their respective constitutional provisions preserved the mode of jury trial existing at common law.56 Several states, however, have held that the constitutional provision secured in those states the right of jury trial as it existed at the time of the adoption of the state constitution,57 or as it had become known to the "previous jurisprudence of the state."58

The question arises whether the special jury was such a part of the common-law institution of trial by jury as to fall within the guarantees of the federal and state constitutions. The American decisions abound in statements which seem to bear upon this

50Michigan Constitution, Art. VI, Sec. 27.
51West Virginia Constitution, Art. III, Sec. 13.
54Delaware Constitution, Art. I, Sec. 4; Illinois Constitution, Art. II, Sec. 5; Missouri Constitution, Art. II, Sec. 28; and Pennsylvania Constitution, Art. I, Sec. 6.
55This, the most frequently used phrase, is found in the constitutions of 30 states.
question, but the issue has been squarely presented only a few times.

In Fowler v. State the defendants in a criminal prosecution for conspiring against the election laws brought a writ of error following their conviction in the lower court. They contended that the use of a struck jury in their trial was unconstitutional and urged that the constitutional provision that "the right of trial by jury shall remain inviolate" required use of an ordinary jury, not a special jury. The New Jersey Supreme Court overruled the objection and affirmed the conviction, stating:

"The obvious answer to this objection is that the trial by a struck jury was part of the system of legal procedure derived by the people of this state from the English law, and that it was confirmed and regulated by legislation in this commonwealth as early as the year 1797 (Pol. Laws), which was 47 years before the constitution of 1844 was established. The constitutional mandate referred to, therefore, did nothing more than to ratify and perpetuate the right of trial by jury as, in substance, it then existed."

The decision of the intermediate appellate court was later taken to the New Jersey court of last resort, where the Court of Errors and Appeals unanimously affirmed the judgment per curiam "for the reasons given by the supreme court."

Substantially the same question was again presented to the New Jersey Court of Errors and Appeals in Brown v. State where the court was asked to hold invalid a New Jersey statute of 1898 providing for struck juries. The court held the statute was constitutional, observing that the act had descended from a New Jersey statute of 1797 which embodied the original English statute, 3 Geo. II, c. 25. The case was then taken to the United States Supreme Court, under the name Brown v. New Jersey, where it was contended that the statute was invalid as a violation of the Fourteenth Amendment. The contention was rejected, the court holding that there was no violation of the due process clause because the state constitution, as interpreted by the state court, authorized the statute providing for trial by struck jury. It was held further that it was not a violation of the equal protection clause that the defendant was not given the same number of challenges to which he would have been entitled before an ordinary jury, because the requirement of the equal protection clause was

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59 (1896) 58 N. J. Law 423, 34 Atl. 682.
60 Id. at 423, 34 Atl. at 682.
61 (1896) 59 N. J. L. 585, 39 Atl. 1113.
63 (1899) 175 U. S. 172, 20 S. Ct. 77, 44 L. Ed. 119.
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fulfilled where the same number of challenges is allowed in all special jury cases.

In the Fowler and Brown Cases, supra, it was held that no constitutional right had been violated where special juries were used. In the Missouri case of State ex rel. St. L. K. & N. W. Ry. Co. v. Withrow, the denial of a special jury was complained of as a deprivation of a constitutional right. The defendant had applied for a special jury in a condemnation proceeding instituted by the railway company, but the court denied the application except as modified by court rules setting up a novel system which destroyed the characteristics of a special jury. Both parties had refused to proceed further under the court rules so imposed and the trial judge had refused to permit withdrawal of the application for special jury. Both parties then became relators in a proceeding to obtain a writ of prohibition restraining the judge from acting in excess of his jurisdiction, the relators stating that the cause was one of great moment, involving valuable property and large damages. The appellate court awarded prohibition, holding the lower court's rule invalid as an infringement of the constitutional right of plaintiffs to have a special jury. There was a dissent in which the position was taken that the right to have a special jury was not an essential feature of a trial by jury at common law and was not preserved by the Missouri Constitution. The majority stated:

"... Special juries, it need scarcely be said, were familiar adjuncts and auxiliaries in the administration of justice from the earliest period of the common law."

"... Our legislature, by adopting as it did, the term 'special jury' must be presumed to have done so, with a full understanding of the meaning, force and effect which that expression had acquired during its long sojourn at common law. And Section 28 of the bill of rights declares that 'the right of trial by jury, as heretofore enjoyed, shall remain inviolate,' which means that all the substantial incidents and consequences which pertained to the right of trial by jury are beyond the reach of hostile legislation, and are preserved in their ancient substantial extent as existing at common law."

Later in the same year another Missouri railway company sought to require the use of a special jury by applying for writ of prohibition to prevent the drawing of a petit jury to try a case then pending against the relator. State ex rel. Kansas City & S. E. Ry. Co. v. Slover was in effect a direct attack upon the consti-

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64 (1896) 133 Mo. 500, 34 S. W. 245, 36 S. W. 43.
65 Id. at 519, 36 S. W. at 46.
66 Id. at 519, 36 S. W. at 48.
67 (1896) 134 Mo. 607, 36 S. W. 50.
tutionality of an 1891 statute providing for petit juries, the relator charging that the act was a denial of the right to special jury guaranteed by the Missouri Constitution. The court denied the writ, holding that the act was constitutional whether the statute was construed "... as abolishing all distinction between common and special juries, or as conferring upon a party the right to a jury different from the regular panel and special only in that sense, or as prescribing the qualifications and method of selecting a special jury when allowed by the court in its discretion ..."

On the constitutional status of the special jury the court, by reasoning detailed in the margin, concluded:

"The historical twelve was an absolute legal right. It was this 'right,' which our constitution secures, but a special venire was not a legal right but rested in the discretion of the court and hence has not passed into a constitutional right, and in the absence of a limitation upon the people in their legislative capacity, they can abolish the right to a special jury altogether."

Missouri citizens were apparently not satisfied with this state of the law, for in 1899 a statute was enacted which permitted use of special juries in cities over 100,000 population. The constitutionality of this statute was challenged in a personal injury case, *Eckrich v. St. Louis Transit Co.*, by the plaintiff, a common laborer. The court, in upholding the constitutionality of the act, used language broad enough to intimate that a special jury was demandable as a constitutional right, although it had refused to take that position seven years earlier in the *Slover Case*.

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68*Id.* at 612, 36 S. W. at 51: "... no reason can be given why the people in their sovereign capacity may not improve the method of selecting a jury by excluding from the list those unfit by crime or immorality, or by repealing the freehold qualification of the common law, or any property qualification. Nor can we perceive how the impartiality of the jury can be lessened by the fact that the duty of selection is no longer confided in one man, the sheriff or coroner, but a list of all qualified citizens is placed in a box or wheel, well mixed and the panel drawn therefrom by the clerk in the presence of the court or judge."

69*Id.* at 614, 36 S. W. at 52.

70*(1903)* 176 Mo. 621, 75 S. W. 759, 62 L. R. A. 911.

71*Id.* at 651, 75 S. W. at 764: "... no intimation can be gleaned from the act of Congress or from these territorial laws that any other kind of a jury than such a jury as was known at common law was intended. That was the only kind of a jury the fathers of our country knew or had any respect for. Therefore, when the act of 1816 was passed, adopting the common law of England and the statutes of England passed prior to the fourth year of James I as part of the law of Missouri, the common-law juries, regular and special, were adopted, and became a part of the system of our laws and of the machinery of our courts. This being true, they were the kinds of juries that the Constitution of 1820 guaranteed [sic]. There were no Missouri juries, as distinguished from common-law juries, prior to the adoption of the Constitution of 1820."
General statements are often found to the effect that the constitution does not guarantee the ancient forms of the common law, or that, so long as the substantive right to jury trial is preserved, the process by which the jury is selected is wholly within the discretion of the legislature and may be regulated by statute. Such statements, however, are of little value in the present problem as they are not specifically related to special juries. Nor are those cases helpful which attempt to relate the "right of trial by jury" back to the Magna Charta.

As no case interpreting the effect of the federal constitution has been found, and as the state authorities are inconclusive, it will be necessary to develop both aspects of the question under discussion in order to determine the prospective usefulness of the special jury. It will be first assumed that the special jury was included within the guarantees of both the federal and state constitutions.

If the "Right of Trial by Jury" Includes Special Juries.

It is a well-established rule that the Seventh Amendment of the United States Constitution has application only to trials in federal courts, and not to trials in state courts. It is equally well settled that the Seventh Amendment’s guarantee of trial by jury applies to the territories. Accordingly, it seems clear that in all

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24State v. Chase, (1923) 106 Or. 263, 270, 211 Pac. 920; “The not infrequent remark that by using the words ‘trial by jury’ is meant a common-law jury, is inaccurate, to say the least. It is safe to say that in a majority of the states one or more of the qualifications of a common-law juror are ignored by the statutes. . . . "The common-sense view of the whole matter is that the intention of the framers of the Constitution was to insure to a defendant the right guaranteed by the Magna Charta, namely, a trial by an impartial jury of his peers, leaving details as to competency and method of selection to the legislature. . . .” Italics supplied. The not-uncommon belief that the Magna Charta guaranteed trial by jury as we know it has been proved incorrect. Hatcher, Magna Charta and the Jury System, (1935) 42 W. Va. Q. 1, explaining why the Magna Charta has no relation to trial by jury.
places in the United States outside of the original thirteen states wherever territorial status existed, the local practice must have included trial by jury as secured by the federal constitution. Thereupon, as each territory attained statehood and adopted a constitution guaranteeing jury trial, the local practice then current must have been continued and preserved as an unalterable feature of the state judicial system. It follows that, in the absence of specific constitutional change, the jury trial guaranteed by the constitutions of all states in which territorial government preceded statehood, is the same as jury trial at common law, the characteristics thereof having been indirectly controlled by the United States Constitution.

In the case of states which were formed without passing through territorial status, it is purely a historical question as to what the practice with respect to special juries was in those states at the time of the adoption of the local constitutional provisions guaranteeing jury trial.\(^7\) Jury trial in the original thirteen states, which adopted their state constitutions at about the time of the adoption of the federal constitution, would seem to have been based directly upon the common-law system of jury trial then in force. Accordingly, if the right of jury trial guaranteed by the federal constitution does include a right to use of the common-law special jury, it is difficult to escape the conclusion that a special jury would be demandable as of right in most if not all states, irrespective of legislation on the subject of special juries.

If the "Right of Trial by Jury" Does Not Include Special Juries.

On the other hand, even if the special jury is not a part of the jury trial guaranteed by the Seventh Amendment of the United States Constitution, nor of similar state constitutional provisions, nevertheless the special jury is consonant with the spirit of American judicial administration and is not objectionable on constitutional grounds.

The constitutionality of a Minnesota statute\(^8\) authorizing use of special juries was very carefully considered in *Lommen v. Minneapolis Gaslight Co.*\(^9\) Two provisions of the Minnesota Con-

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\(^{77}\)This historical question has not been pursued here. A further matter of historical investigation which has not been undertaken in this study is the ascertainment of the dates of inclusion in each state constitution of the particular phrases guaranteeing jury trial.

\(^{78}\)Minn. Laws 1895, c. 328, a re-enactment of Minn. Laws 1864, c. 31 (G.S. 1878, c. 71, secs. 50-19), which had been repealed by Minn. Laws 1891, c. 84.

\(^{79}\)(1896) 65 Minn. 196, 68 N. W. 53.
stitution were urged as barring the special jury statute: (1) the clause providing that "the right of trial by jury shall remain inviolate," and (2) the clause providing that everyone "ought to obtain justice freely and without purchase." The court summarily disposed of the arguments based upon the second clause, explaining that it had a well-known historical meaning, and was "aimed against the corrupt practice of taking bribes and exacting illegal fees in the administration of justice, and never meant that a litigant should have the right to conduct his suit in court without cost."\(^{80}\)

The Minnesota court held further that the act did not violate the constitutional provision guaranteeing jury trial. To answer the question, which was stated to be "an historical one," the court looked to the practice with respect to jury trial "as known at common law and as it existed in the territory of Minnesota at the time of the adoption of the constitution. . . ."\(^{81}\) After reviewing the common-law history of the special jury and surveying the use of special juries in the early history of other states, the court stated at 214:

"The courts and the bar everywhere seem to have assumed that the constitutionality of such laws was beyond question. . . . Struck or special juries, and the present mode of selecting them, had been known to and recognized by the law, as being in accordance with the common-law right of trial by jury, for ages before the adoption of the constitution of this state. It is rather late in this day to discover the unconstitutionality of such acts; and it would certainly require great temerity for courts now to assume to have discovered some new ground on which to hold them invalid."

And at 216:

"In view of such a consensus of opinion on the part of the legislatures, and impliedly of the courts and bar, of the country, that statutes of this kind do not impair the common-law right of trial by jury as known and understood in American constitutional law, we would not be warranted in holding this act unconstitutional."

Upon analysis of the elements of the guarantee of jury trial the court concluded that the special jury was unexceptionable. The objection was urged that the element of lot or fortuity found in the common jury had been eliminated by the Minnesota statute under attack, but the court overruled the objection, observing at 210:

"As already suggested these [the element of fortuity and the right of peremptory challenge] are not essential or substantive elements

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\(^{80}\) Id. at 208, 68 N. W. at 54.

\(^{81}\) Id. at 209, 68 N. W. at 54.
of a jury trial, but merely means of securing one of those elements, viz. impartiality. Fortuity in the selection of a jury was unknown at common law, the panel being selected by the sheriff from his list of freeholders."

It was further urged that the exercise of a one-man power in the selection of a special jury was fraught with hazard, but the court met the complaint by saying, at 214:

"...we do not see why the act does not provide a method of selection sufficient to secure impartiality. If the sheriff does not stand impartial between the parties, the judge may (shall) appoint some judicious and disinterested party to make the list; and, if a showing was made that furnished any reasonable ground for believing that the sheriff was not entirely impartial, it would be error for the court to refuse to appoint some one else to act in his stead. Moreover, if the sheriff selected a partial or unfair list . . . we have no doubt of the power, as well as the duty, of the court to set aside the list, on motion analogous to the old motion to quash the array."

In *Whitehead v. State* the conviction of an Ohio prisoner was reversed because of the refusal of the trial court to grant a struck jury when duly demanded. Under the Ohio statute either the state or the defendant accused of crime was entitled to have a struck jury as of right, except in certain types of cases in which a larger number of peremptories was allowable in trial by common jury. The right to have a struck jury might be waived.

The compatibility of the New Jersey struck jury act with the state constitution was affirmed in 1896 in *Fouler v. State*. The same statute was further tested in *Brown v. New Jersey* where the United States Supreme Court held that the statute satisfied both the due process and the equal protection clauses of the Fourteenth Amendment. The court stated:

"A struck jury . . . gives the defendant a reasonable opportunity to ascertain the qualifications of proposed jurors, and to protect himself against any supposed prejudices in the mind of any particular individual called as a juror. Whether better or no than any other method, it is certainly a fair and reasonable way of securing an impartial jury, was provided for by the laws of the state, and that is all that due process in this respect requires."

In view of the specific holdings in the cases just reviewed, and in view of the unquestioned acceptance and use of special juries in

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82(1859) 10 Ohio State 449.
84Cited supra, footnotes 59 and 61.
85Cited supra, footnote 63.
86(1899) 175 U. S. 172, 176, 20 Sup. Ct. 77, 79, 44 L. Ed. 119, 121.
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various other states, it seems clear that, even if it be true that the special jury is not an integral part of the constitutional right of the trial by jury, the enactment of statutes providing for the use of a form of the special jury is clearly within the province of state legislatures.

IV. USE OF THE SPECIAL JURY IN THE UNITED STATES

The special jury has seen considerable use as a trial device in America, not less than sixteen states having at some time in their developments enacted statutes expressly providing for a form of special jury, and at least two states having used a special jury without express legislative authorization. Some of the sixteen states, e.g. Minnesota, have repealed their special jury statutes, in some the special jury is infrequently used, and in some states special juries have been heavily used and are still used today. In Georgia the only kind of trial jury extant is a special jury in a form slightly modified from the common law.

Litigation Suited for the Special Jury.

The intrinsic merits of the special jury as a trial device may perhaps be best judged by review and study of the types of cases

87 See Part IV of this article.
88 Folwell, Minnesota historian, intimates that special juries may have been demandable as a constitutional right, remarking, op. cit., footnote 44, supra, at 228: "Early Minnesota legislatures appear to have assumed that struck juries would need statutory authority."
89 Alabama Code, Sec. 8663; Arkansas, Sand. & H. Dig. Sec. 4303; Delaware, Rev. Code of 1935, Ch. 131, Secs. 25-27; Georgia Code, Secs. 59-106 through 59-110, Sec. 59-701 et seq. and Sec. 59-801 et seq.; Indiana, Baldwin's Code 1934, Sec. 335; Louisiana Rev. St., Sec. 2125, 2153; Maryland Code, Art. 50, Secs. 9, 13; Michigan, 21 Mich. Stat. Ann., Secs. 27.1023 through 27.1029; Minnesota, Gen. Laws 1864, c. 31 and Gen. Laws 1895, c. 328; Missouri, Wag. Stat., p. 1102, Sec. 7; New Jersey Rev. Stat. 1937, Sec. 2-93-1 et seq.; New York, Judic. Sec. 749a; Ohio, Swan's Rev. St. p. 492; Pennsylvania; Virginia Code of 1942, Sec. 6005; West Virginia Code of 1943, Sec. 5647.
90 New Jersey. In Denn, Lessee of Inskeep v. Lecony, (1790) 1 N. J. Law 46, a special jury was used in an ejectment action and on appeal counsel, in arguing to the appellate court, cited 3 Bl. Com. 357, and 3 Bac. Abr. 740 but no New Jersey statutes. There can be no doubt that the old common-law system was then being used, although New Jersey later did adopt a statute on special juries. Oregon. See Strickler v. Portland R., L. & P. Co., (1916) 79 Or. 526, 144 Pac. 1193, 155 Pac. 1195.
91 The Minnesota statute, enacted in 1864, was repealed in 1891, re-enacted in 1895, then repealed again in 1897. Folwell, op. cit. footnote 44, at 228, 230, states that the reason for the repeal in 1891 "remains to be discovered," and describes the re-enactment in 1895 as "equally mysterious." The ultimate repeal in 1897 he explains as induced by the demands of "shyster" lawyers prosecuting personal injury claims against corporations, on the theory that the ordinary panel was more sympathetic with injured clients.
92 Alabama, New Jersey, New York.
in which such juries have been used. Undoubtedly special juries have been used in some cases where common juries might well have proved equally advantageous. Nevertheless it is worthy of note that the special jury has been used with success in cases of extraordinary intricacy.

In *Matter of Amos F. Eno* the proponent of a will applied for a special jury under the New York statute permitting use of such juries in the discretion of the judge in "intricate and important" cases. The court found that the history of the case brought it within the statute and justified granting the application. The estate of the decedent whose alleged will was under contest amounted to more than $6,000,000.00 in personal property and involved real property of an assessed valuation of $4,792,500.00. The testator had disposed of $4,600,000.00 of his estate to his living descendants, then had given legacies to the American Museum of Natural History, New York University, and four other charitable institutions. Columbia University was named as residuary legatee. On the first trial over one hundred thirty-five witnesses had testified, and a mass of documentary evidence had been introduced. The case had then been appealed, reversed for errors occurring at the trial and remanded for retrial of the issue of testamentary capacity. Appearing before the Surrogate's Court on the second trial were fifteen parties, each represented by one or more counsel or law firms, including among them the eminent lawyers Rufus Choate and William M. Evarts.

A special jury was used in 1943 in the Maryland case, *Alexander v. R. D. Grier & Sons Co.* The plaintiff was the statutory liquidator of a Pennsylvania reciprocal insurance exchange, who had been ordered by the Pennsylvania court having jurisdiction of the liquidation to collect assessments decreed to be due and owing from policy holders. This was an action brought by the liquidator to collect assessments from a Maryland corporation which held twenty-two policies on which assessments were due under the Pennsylvania decree.

In *Industrial & General Trust, Ltd. v. Tod* the plaintiff, a bondholder, had pursuant to agreement deposited bonds with the members of a committee engaged in an endeavor to reorganize the railroad upon the property of which the bonds were a charge. Plain-

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93 (N.Y. 1922) 118 Misc. 431.
94 (1921) 196 App. Div. 131.
95 (Md. 1943) 30 Atl. (2d) 757.
96 (1905) 46 Misc. 492, 95 N. Y. Supp. 44.
tiff having brought action for damages for breach of the agreement, the defendants moved for a special jury under the New York statute. The court granted the motion, explaining the necessity for a special jury as follows:

"Through their departure from the terms of the agreement under which the plaintiff deposited its bonds, for the purposes of the reorganization, the defendants have incurred a liability the measure of which depends upon the jury's estimate of the actual value of this railroad 'as a going railroad, 119 miles long, with land, depots, rolling stock, wharves, and appurtenances, * * * and it was for the jury to estimate the value of the bonded property according to their sound judgment, and draw the proper inference as to the proportionate amount that the plaintiff should recover in order to make good the loss it had sustained."

"... If the finding of damage is to be based upon inference, rather than surmise and conjecture, the jury's equipment of intelligence and of practical business experience should be of the best which any established method of selection may secure in the interests of substantial justice. Indeed, to grasp the facts and make a fairly intelligent estimate of the values involved, each juror should have much of the capacity for financial analysis which a successful reorganizer of railroad properties may be deemed to possess; and, without prolonging the discussion, it is obvious that the extraordinary, rather than the ordinary, procedure available for the choice of a jury will tend to provide the more adequate equipment of the tribunal of fact."

One of the most striking pieces of litigation in which the special jury has figured was the series of New York cases entitled People v. Tweed. At least twelve reported cases bearing that name alone arose from this set of facts: public officials high in the government of the municipal corporation of New York City conspired to defraud the city of public funds. The officials included, besides defendant Tweed, who was the president of the board of supervisors, the mayor and the city comptroller. Together these men conspired to have fraudulent claims set up, allowed and paid, the officials obtaining and converting the money to their own use. The amounts thus mulcted from the City of New York over a period of many years totaled several million dollars. One of the cases involving $6,198,957.00 was popularly known as "the six-million suit," and another involving over one million dollars was popu-
larly known as "the one-million case." The action brought against Tweed, who was held on bail of one million dollars, was once discontinued when the court held the people had no right to sue in these circumstances. To cure the defect the state legislature in 1875 passed an act specifically authorizing prosecution of the suit in the name of the people, and the litigation was resumed. The famous lawyers David Dudley Field and Elihu Root represented Tweed, but he was duly convicted by a special jury, the conviction being affirmed in 1877.101

Special juries have been used frequently in litigation involving stocks and bonds or banking institutions. In Arkansas a struck jury was used in a controversy relating to the sale and purchase of the capital stock of a bank. Plaintiff in the action, Myers v. Martin,102 had purchased some of the stock from defendant and had sued to recover damages for fraudulent misrepresentations as to the value of the stock. A Minnesota case, Branch v. Dawson,103 used such a jury in an action to recover from the defendant banking-house a deposit allegedly made by plaintiff's husband in her name before his death. In the course of the trial it became necessary to introduce in evidence the account-books of the bank. Again, in Lockhart v. State104 a special jury was used in a Maryland criminal prosecution of members of a firm of stock and bond brokers for conspiracy to defraud firm customers.

There is a variation in the practice of the several states with respect to the use of special juries in criminal cases. Some of the states have held that the local statute relating to special juries does not apply in criminal cases.105 In other states the use of special juries has been specifically authorized by statute.106

Where, as in Virginia and New York, the grant or refusal of a special jury rests in the sound discretion of the court, and such juries are awarded only in cases of intricacy or importance, several

100 People v. Tweed, (1876) 50 How. Prac. (N.Y.) 280.
102 (1925) 168 Ark. 1028, 272 S. W. 856.
103 (1886) 36 Minn. 193, 30 N. W. 545.
104 (1924) 145 Md. 602, 125 Atl. 829.
105 State v. Miller, (1873) 6 W. Va. 600; State v. Pearis, (W. Va. 1891) 13 S. E. 1006; In re Calling Jurors, (1886) 1 Pa. Co. Ct. R. 644. In the case last cited the court gave its oral opinion that the Pennsylvania act of 1885 was not intended for use in criminal cases because the effect would be to reduce the defendant from twenty peremptory challenges to four strikes. In civil cases by common jury only four peremptories were allowable, so use of a special jury in civil cases would make no difference in this respect.106 Alabama (made necessary by Turney v. State, (1910) 168 Ala. 128, 52 So. 910, which held the previous special jury statute did not apply to criminal cases); New Jersey; and New York.
principles are well settled. The mere fact that the parties in a case
are powerful or important does not make the case itself important
so as to justify grant of a special jury.\textsuperscript{107} Nor does the importance
of the case sufficient to warrant use of a special jury necessarily
follow because a large sum of money is involved.\textsuperscript{108}

In \textit{Atl. & D. R. Co. v. Peake},\textsuperscript{109} the Virginia court approved
the denial of a motion for special jury on the ground that the case
was "not one in its nature of exceptional difficulty or importance."
The action was one brought against a railroad company for damages
resulting from an overflow of water upon plaintiff's land following
construction of the railroad upon adjacent lands, allegedly without
sufficient provision for drainage. In libel cases even the most
prominent of public officials cannot expect to use a special jury
unless the libel is made against him in his official capacity.\textsuperscript{110} The
rule allowing special juries in such cases, where the libel relates
to conduct as a public official, was well settled in New York as early
as 1809. Then in \textit{Thomas v. Rumsey}\textsuperscript{111} the court, relying on prece-
dent, allowed a special jury in an action based on libelous statements
of and concerning plaintiff, a representative in the United States
Congress, relating to his official conduct.\textsuperscript{112}

Where a cause affects the public a special jury will be granted.
A special jury was granted for this reason in \textit{New-Windsor Turn-
pike Co. v. Ellison}\textsuperscript{113} in which plaintiff company brought an
action for defrauding it of its tolls. The defendant had removed a
fence near the turnpike gate and had made a highway across his
land whereby he and others could avoid the turnpike. It was urged
by the defendant that his acts were for his private accommodation.
A motion for special jury was granted because "this kind of ques-
tion affects the public and is important in its consequences."

\textsuperscript{107}(1890) 87 Va. 130, 12 S. E. 348.
\textsuperscript{108}In Livingston v. Smith, (1806) 1 Johns. (N.Y.) 141, a special jury
was allowed in a consolidated cause involving total loss on two insurance
policies of $10,000 and $18,000 respectively. However, in Anonymous, (1806)
(N.Y.) 211, special juries were refused where the only basis urged was the
money sum involved ($1,000.00 and $27,500.00, respectively).
\textsuperscript{109}(1890) 87 Va. 130, 12 S. E. 348.
\textsuperscript{110}Van Vechten v. Hopkins, (1807) 2 Johns. (N.Y.) 373. Rule for special
jury refused because the libel was not made against plaintiff in his official
character.
\textsuperscript{111}(1809) 4 Johns. (N.Y.) 186.
\textsuperscript{112}Accord: Livingston v. Cheetham, (1806) 1 Johns. (N.Y.) 61;
(1907) 108 N. Y. S. 1156; Coler v. Brooklyn Daily Eagle, (1909) 117
N. Y. S. 273.
\textsuperscript{113}(1806) 1 Johns. (N.Y.) 141.
In *People ex rel. Stemmler v. McGuire* a special jury was sought in a case in the nature of quo warranto to try the title to the office of justice of the district court in New York City. It was held that the controversy was not such as to excite the attention or provoke the prejudices of the population, since the office and election were merely local and did not even extend to the whole city. The court stated that "a struck jury will not be granted except in extreme cases" and quoted from another case: "Parties deceive themselves in the estimate of the extent of interest which the public at large take in their controversies."  

Other cases in which special juries have been ordered include: an action for damages in which there had been two mistrials and one verdict set aside, the special jury being granted to avoid local prejudices; a criminal prosecution for assault with intent to kill in which a regular jury in term had disagreed, the special jury being granted to obviate the necessity of awaiting the next term, thus assuring speedy trial; and a pre-Civil War action to recover damages for the death of a slave brought against the overseer who had killed the slave.  

*American Decisions on Special Jury Procedure.*  
Among states having statutes governing selection and use of special juries, there is some difference of opinion as to the correct spirit of interpretation of those statutes. At least two courts have held that the terms of the respective statutes involved were mandatory, and that departures from the terms of the statute resulted in reversible error.  

*Gulf, etc. Railway Co. v. Shane* held the 1890 Act of the Territory of Oklahoma relating to trial by struck jury to be mandatory and reversed the case because the lower court had devised and used a system radically different from that provided by the statute. Again, in *Republic Min. & Mfg. Co. v. Elrod* the lower court put into a box twenty-one names of qualified jurors where the Arkansas statute required the use of twenty-four names from which eighteen were to be drawn by lot. It was held that the court had committed reversible error as the provisions of the special jury statute were "mandatory and unambiguous."
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On the other hand, the Alabama court vehemently refused to class the local statute as mandatory in Brown v. State.\(^{121}\) The court held there was no error in selection of a panel by only one judge where the statute directed the use of two judges, stating that otherwise the statute would be a "cog in the wheels of justice" and "a monstrous piece of folly" on the part of the legislature.

The question of the mandatory or directory character of the jury selection statute may be settled easily in states\(^{122}\) which have enacted legislation abolishing the common-law challenge to the array. In such states the statute ipso facto becomes directory, as minor discrepancies in the formation of the panel cannot be reached, although the rights of litigants are protected where prejudicial error occurs.\(^{123}\)

The challenge to the array may indeed have a deeper significance in the problem under discussion. In McDermott v. Hoffman,\(^{124}\) an ejectment action in which trial by struck jury had been ordered, one of the defendants appealed urging an objection to the method of summoning the jury. The court affirmed judgment against the defendant on the ground that defendants did not challenge the array "which was the only proper mode of raising the objection," and stated further that "At all events, the exception should have been taken before the jury were sworn."

And in the Oregon case of Strickler v. Portland Ry., L. & P. Co., where the appellant complained that the cause had been tried by special jury, the court held, despite the fact that Oregon has no special jury statute, that the Oregon statute prohibiting challenge to the panel precluded consideration of the objection. The court stated:

"No objection to any particular juror or to the jury is contained in the record. Sec. 117, L. O. L., provides that no challenge shall be made or allowed to a panel. None of the jurors having been challenged, we cannot consider this matter."\(^{125}\)

A matter of proper method in special jury cases which has several times been adjudicated is the question of the mechanics of the selection of a jury where two or more persons are joined as

\(^{122}\) E. g., California, Idaho, Iowa, Michigan, New York, Oregon and Washington.
\(^{124}\) (1870) 70 Pa. St. 31.
\(^{125}\) (1916) 79 Or. 526, 531, 155 Pac. 1195, 1196.
defendants in a single action. Each defendant sometimes demands a separate panel and separate strikes. In Richmond & Danville R. R. Co. v. Greenwood\textsuperscript{126} each of two defendants demanded a struck jury. The case was an action for personal injuries sustained in a collision between trains owned by the two defending railroads. The lower Alabama court refused to allow a separate panel for each defendant. On appeal the court held this refusal was not error, but reversed the case for errors occurring in instructing the jury.

Similarly in Montgomery & Enfaula Railway Co. v. Thompson,\textsuperscript{127} a personal injury case, the plaintiff demanded a struck jury. The defendants objected that a struck jury was improper because there were several defendants and two distinct defenses, with the argument that the defendants would be unable to agree on strikes. The Alabama court allowed a special jury, the defendants to strike in rotation when disagreement as to the strikes arose. The appellate court approved these rulings, reversing the case on other grounds.

The Maryland court has twice followed the same view. In Diamond State Telephone Co. v. Blake\textsuperscript{128} two defendants were required to join in striking. The court, in denying defendants a right to have the full number of strikes for each defendant, used a reductio ad absurdum argument: if there were five plaintiffs and one defendant, or six parties, all of the panel could be struck, leaving no jurors to try the case, under the rule contended for by defendants. An earlier decision, Hamlin v. State,\textsuperscript{129} had announced the same ruling in a criminal prosecution involving two defendants.

Two separate actions against one defendant were consolidated in Sloss-Sheffield Steel & Iron Co. v. Willingham\textsuperscript{130} and an order for special jury was obtained. The defendant claimed it was entitled to a double panel of jurors from which to strike. The court held that only one panel with the usual twenty-four jurors was allowable. In Louisville & Nashville R. R. Co. v. Ratliffe,\textsuperscript{131} a demand for special jury came too late when organization of a common jury to try the case had already been started.

All jurors on the special jury panel must be unexceptionable

\textsuperscript{126} (1892) 99 Ala. 501, 14 So. 495.
\textsuperscript{127} (1884) 77 Ala. 448.
\textsuperscript{128} (1907) 105 Md. 570, 66 Atl. 631.
\textsuperscript{129} (1887) 67 Md. 542, 10 Atl. 214.
\textsuperscript{130} (1942) 240 Ala. 333, 199 So. 711.
\textsuperscript{131} (1909) 164 Ala. 147, 51 So. 335.
for cause\textsuperscript{132} before the parties begin striking.\textsuperscript{133} In \textit{K. C. M. & B. R. R. Co. v. Ferguson, Adms.}\textsuperscript{134} it was stated that the proper practice is for the judge to interrogate jurors, rather than the parties, with the view that otherwise the examination might “degenerate into a mere fishing procedure, wearying jurors, and needlessly consuming the public time.” Likewise, in \textit{State v. Welsh}\textsuperscript{135} the lower court’s action was approved when it refused to permit the plaintiff-appellant to examine the panel to discover how to exercise his strikes, the court stating that parties are entitled to examine the panel only to ascertain causes for disqualification. But where the court improperly overrules a challenge for cause and the challenging party strikes the name of that particular juror from the panel, on appeal he is not precluded from urging the improper ruling as error.\textsuperscript{136}

Where an inadequate number of special jurors appear or an insufficient number of qualified jurors remains upon the panel after examination, according to most authorities the court should fill the panel before striking by ordering a “tales” or summoning “talesmen,” i.e. directing the sheriff to procure additional jurors to the number designated by the court.\textsuperscript{137} It is improper to fill the jury from the general panel,\textsuperscript{138} unless, of course, the names of special jurors are all taken from the general panel as a matter of local practice.\textsuperscript{139} Nor is it proper to impanel bystanders to fill vacancies on the special jury, though this error was held to be harmless where the objecting appellant had unused strikes left which he could have used to remedy the matter.\textsuperscript{140} A recent Maryland case, however, was more liberal, leaving the necessity of filling up the panel within the discretion of the trial court.\textsuperscript{141}


\textsuperscript{133}Steed v. Knowles, (1893) 97 Ala. 573, 17 So. 75; Smith v. Kaufman, (1893) 100 Ala. 408, 14 So. 111; Dees v. State, (1921) 18 Ala. App. 133, 89 So. 95.

\textsuperscript{134}(1904) 143 Ala. 512, 39 So. 348.

\textsuperscript{135}(1931) 160 Md. 602, 125 Atl. 829.


\textsuperscript{139}McDermott v. Hoffman, (1871) 70 Pa. St. 31.

\textsuperscript{140}Evansville & L. I. Traction Co. v. Johnson (Ind. App. 1912) 97 N. E. 176.

\textsuperscript{141}Mitchell v. State, (1940) 178 Md. 579, 16 Atl. (2d) 161. No error where appealing defendant had been presented with a panel of 20 qualified jurors from which to strike, though the total panel had fallen from 25 to 22.
Occasionally courts have required each party to take the strikes to which he is entitled without permitting either to know which jurors had been struck by the adverse party. In *Railway Co. v. Dobbins* 142 the court found it was not required to rule on whether keeping the strikes secret constituted error, because the parties had actually struck different jurors in every instance. Accordingly, the court ruled that the error, if any, was not prejudicial. But in *Lewis v. United States* 143 this action was unequivocally held to be error. Where one of the parties refused to strike, it was proper for the court to make his strikes for him. 144

American courts have usually followed the common-law practice of charging the costs of the special jury to the party who applied for it, except in certain circumstances. 145 An Indiana court interpreted the local special jury statute as "a statutory recognition of the common-law method of obtaining this kind of special jury." 146 In *Pfisterer v. Key* 147 one of the parties applied for a special jury, but when the jury had been drawn, neglected or refused to make a deposit to cover the costs of the special jury. The sheriff then refused to summon the jurors without the deposit. The applicant for the special jury having urged on appeal that he had been denied the right to have a special jury, the court found there had been no error.

V. Can the Special Jury Be Useful Today?

The need for an improved method of handling certain types of disputes is fairly shown by the expansion of commercial arbitration, by the tremendous growth of administrative tribunals, and by the increase in proposals for various types of specialized courts. The demand for a competent tribunal in certain commercial cases has been so great that arbitration courts, wherein the parties select and mutually agree upon the most competent person or persons

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142(1895) 60 Ark. 481, 31 S. W. 147.
143(1892) 146 U. S. 370, 13 S. Ct. 136, 36 L. Ed. 1011.
146Board of Commissioners of Randolph County v. Board of Commissioners of Henry County, (1901) 27 Ind. App. 378, 61 N. E. 612, 619.
147(1941) 218 Ind. 521, 33 N. E. (2d) 330.
148Berle, Expansion of American Administrative Law, (1917) 30 Harv. L. Rev. 430; Pound, Executive Justice, (1907) 46 Am. L. Reg. (N.S.) 137. Dean Pound stated: "Executive justice is an evil. It has always been and it always will be crude and as variable as the personalities of officials. . . . But any justice is better than no justice. The only way to check the onward march of executive justice is to improve the output of judicial justice." Italics supplied.
WHY NOT USE THE SPECIAL JURY?

available, have had frequent use. From small beginnings use of commercial arbitration has increased in recent years until there has now been organized a national group known as the American Arbitration Association, regularly publishing its own periodical.\(^{149}\)

That there is still considerable dissatisfaction with administrative tribunals is well known. Nor does arbitration seem a complete answer, since it is only voluntary and to a certain extent lacks legal sanctions. Hence it may well be that a means by which a tribunal at least equally competent can be utilized as an integral part of the judicial system would be welcomed. It is submitted that the special jury, with its use properly controlled, would prove to be a valuable trial device in certain situations today. It is not suggested that the common jury should be supplanted or substantially modified, but only that the special jury should be available as a supplementary trial device for use in proper cases.

If the argument that the common-law special jury, as it existed at the time of American national independence, is today allowable in courts of general jurisdiction in the discretion of the court\(^{150}\) is deemed to be sound, the mechanical and legal details of the special jury system are fairly well formulated and reasonably accessible in the English cases heretofore reviewed.\(^{151}\) With the common-law special jury as a working model, and with an open mind for such modifications as may prove to be necessary to meet local needs, the special jury could be an immediate adjunct to contemporary jurisprudence.

On the other hand, if legislation is deemed necessary in particular jurisdictions to establish or to implement a system of trial by special jury, three points deserve careful attention in statutory drafting. First, designation of the occasions for use of special juries should remain a matter in the discretion of the court, and not a matter of right upon demand by the parties, or one of the parties. Retention of the common-law practice of granting

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\(^{149}\) Arbitration Journal. In addition, commercial arbitration is sufficiently widespread to have inspired serious consideration in conventional legal periodicals, e.g. (1941) 4 U. Toronto L. J. 1-32, Commercial Arbitration and the Rules of Law.

\(^{150}\) See Part III of this article.

\(^{151}\) See Part I of this article. In Goodson v. United States, (1898) 7 Okla. 117, 54 Pac. 423, where jury drawing provisions for criminal proceedings were inadequate, it was held proper to resort to the common-law practice to supply the procedural defects. One appropriate exception to the complete acceptance of the English system is the lack of suitability of the provisions relating to qualifications of jurors, since England's class distinctions are out of line with American traditions. However, most of our states will be found to have adopted statutes specifically relating to the qualifications of jurors. Such statutes may be regarded as pro tanto amendatory of the common law.
such a jury only when the judge, in his sound discretion, feels that the case is a proper one for such a trial, would assure its best use. Under the watchful supervision of our judges utilization of the special jury in improper cases, use of the special jury as a means of obtaining delay, and attempted oppression by certain types of litigants by use of the special jury would be minimized or avoided.

Second, striking from the special jury panel out of the presence of the jurors, before the parties and attorneys have had an opportunity to see the prospective jurors, and before the members of the panel have been found to be unexceptionable for cause, should be avoided. Modification of these common-law details would be material departures from the striking principle, which is a substitute for the peremptory challenge and important for the purpose of assuring prisoners and litigants that particular jurors, of whom an unreasoning or inexplicable distrust is felt, will not be imposed upon them.

Third, individual selection of every member of the trial jury should be prevented. The officer selecting each panel should have discretion in selecting those persons whose qualifications and background assure their competence for the case pending. But an element of selection by lot should be present at some time between formation of the panel and trial of the case in order to accord with present-day accepted traditions as to impaneling of juries. Minor modifications, such as changes in the number of names placed on the panel or in the number of strikes, would be harmless and might be found to be desirable.

If these three matters are adequately treated, it is submitted that the resultant special jury will be a fair and an advantageous trial device, worthy of extensive use by the American bar.

—Jeannette E. Thatcher

195In the Court of King’s Bench, a rule for trial by special jury was discretionary on cause shown. Style, 477; 8 Mod. 248; 2 Ld. Raym. 1364; 2 Lil. Reg. 154, 155. In the Court of Common Pleas the rule was at first of course. Barnes, Notes Cas. 449, 61, 88; 5 Durn. & E. 464. But after 1812 the rule in Common Pleas was also discretionary. Bloxam, Knt. v. Brown, 4 Taunt. 471, 128 Eng. Rep. 411.