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Jury Triers

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JURY TRIERS

By R. Justin Miller*

One of the steps in the criminal procedure of the state of Minnesota which has been abandoned by nearly all of the other states[1] is that of the use of triers in the selection of jurors.[2] The practice came from the common law. The authorities are by no means in harmony as to the extent and nature of its use. On the one hand it has been said that the use of triers was limited to the determination of challenges to the favor, or favour;[3] on the other, that triers should be appointed whether the challenge was for principal cause or for favor.[4] Triers were used in civil as well as in criminal cases.[5] They were usually two in number, though

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[1]Bishop, New Crim. Proc., 2nd ed., 698, 737; Clark, Crim. Proc. 453; O'Fallon Coal Co. v. Laquet, (1902) 198 Ill. 125, 128, 64 N. E. 767; 35 C. J. 402.

[2]Minn., G. S. 1913, sec. 9237.

[3]1 Coke on Littleton 156a, 158b, note 287; Bouvier, Law Dict.; Turner v. State, (1901) 114 Ga. 421, 423, 40 S. E. 308.

[4]16 R. C. L. 255 n. 8. 18 Halsbury's Laws of England 247, note (i), is as follows:

"It has been laid down (Co. Litt. 156a) that the determination of a principal challenge is for the court, and of a challenge to the favour for triers. The rule as thus baldly stated is unsatisfactory. If certain facts are not in dispute the court is entitled and ought to draw from them inferences which necessarily follow (as did Coleridge, J., in Queen v. Swain, (1838) 2 Mood. & R. 112, where the jurors challenged being examined upon the voir dire (see p. 251, post) admitted the matters complained of). Apparently the existence of various sets of circumstances had been ruled by the courts from time to time to be good ground of challenge, and these rulings left no discretion when similar facts arose. (See a list in "The Complete Juryman," a book published in 1752 after the passing of stat. (1730) 3 Geo. 2, c. 25). This view is borne out by the recognition of principal challenge by the legislature, which has enacted, e. g., in the Juries Act, 1825 (6 Geo. 4, c. 50), s. 50, that certain want of qualification in a person impanelled shall, if found, be taken as a principal challenge, i. e., as something which ipso facto will necessitate his leaving the box. On the other hand, if different inferences could reasonably be drawn from the same facts, it would be proper to leave the matter to triers, and this, one may imagine, was the origin of challenge to the favour and the traditional method of adjudicating upon it."

See also, an extensive list of authorities collected in State v. Knight, (1857) 43 Me. 11, 70.

[5]And in this connection, note: "The lords chosen to try a peer, when indicted for felony, in the court of the lord high steward, are also called triors." Black, Law Dict.

more could be appointed by consent or order of the court.[6] Challenges, both to the array and to the polls were tried in this manner.[7] In Coke on Littleton is to be found a frequently quoted statement as to the procedure followed in the trial of a challenge to the polls:[8]

"When any challenge is made to the polls, two triors shall be appointed by the court; and if they try one indifferent, and he be sworne, then he and the two triors shall try another; and if another be tried indifferent, and he be sworne, then the two triors cease, and the two that be sworne on the jury shall try the rest."

In England the use of triors is still retained for the trial of challenges to the array for favor, in which case the court appoints two impartial persons for that purpose;[9] and for the trial of challenges to the polls, for cause.[10] It would seem that the challenge for favor to the polls no longer exists in England, the two kinds of challenges now known being the ones familiar to us: peremptory challenges and challenges for cause.[11]

In the United States the practice seems at first to have been generally adopted except in New England.[12] The terminology used in the classification of challenges to the polls was also adopted. We find from the earlier American cases that if the challenge was for principal cause it was tried by the court;[13] if to the favor, it was tried under the direction of the court,[14] by triers.[15] In some jurisdictions, at least, the practice described in Coke on Littleton was followed also in this country, that is to say having the two

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[6]1 Coke on Littleton 158a.

[7]1 Coke on Littleton 158a, 3 Bla. Comm. 363.

[8]Ibid.

[9]9 Halsbury's Laws of England 360, Crim. Law & Proc. sec. 698.

[10]9 Halsbury's Laws of England 361, Crim. Law & Proc. sec. 700.

[11]9 Halsbury's Laws of England 360, Crim. Law & Proc. sec. 699; 18 Halsbury's Laws of England 249, Juries sec. 610.

[12]State v. Knight, (1857) 43 Me. 11.

[13]Milan v. State, (1866) 24 Ark. 346; Mann v. Glover, (1833) 14 N. J. Law 195; Pringle v. Huse, (1823) 1 Cow. (N.Y.) 432; Shoeffler v. State, (1854) 3 Wis. 823; Thompson v. Douglas, (1891) 35 W. Va. 337, 338, 13 S. E. 1015. But see Stout v. People, (1858) 4 Park. Cr. (N.Y.) 71, to the effect that in such case the challenge might properly be submitted to triers.

[14]Milan v. State, (1866) 24 Ark. 346; Thompson v. People, (1857) 3 Park. Cr. (N.Y.) 467, 471; Polk v. State, (1918) 148 Ga. 34, 95 S. E. 988.

[15]Milan v. State, (1866) 24 Ark. 346; Freeman v. People, (1847) 4 Denio (N.Y.) 9, 47 Am. Dec. 216; State v. Potter, (1846) 18 Conn. 166; Mann v. Glover, (1833) 14 N. J. Law 195, 201; Shoeffler v. State, (1854) 3 Wis. 823; Stout v. People, (1858) 4 Park. Cr. (N.Y.) 71, 109; Berry v. Wallen, (1805) 1 Overt. (Tenn.) 186; Polk v. State, (1918) 148 Ga. 34, 95 S. E. 988; Thompson v. Douglas, (1891) 35 W. Va. 337, 338.

jurors, who were first sworn, act as triers of subsequent challenges.[16]

After a time two very substantial changes took place; first, the use of the terms principal challenge and challenge to the favor gave way in many jurisdictions; and second, the use of triers was considerably limited and in most states entirely done away with. The old distinction between principal challenge and challenge to the favor seems to have been one very difficult to mark[17] and consequently difficult to apply in practice. We find in the older cases many attempts to define the two, and to distinguish them in order to determine which should be tried by the court and which by the triers.[18] This difficulty has been suggested as one of the reasons why the use of triers was abandoned and all challenges to the polls submitted to the court.[19] In some jurisdictions laws were passed which permitted the use of triers, or trial by the court at the election of the parties.[20] In others the use of triers was declared by the courts to be unnecessary or unsuited to conditions existing in this country and hence not taken over as a part of the common law.[21] In a much larger number of the states, statutes

[16]Berry v. Wallen, (1805) 1 Overt. (Tenn.) 186; Mechanics' Bank v. Smith, (1821) 19 Johns. (N.Y.) 115.

[17]East St. L. Elec. Ry. v. Snow, (1899) 88 Ill. App. 660, 16 R. C. L. 256: "The distinction at common law between challenges to favor and challenges for principal cause is now practically obsolete in most states."

[18]Turner v. State, (1901) 114 Ga. 421, 423; State v. Howard, (1845) 17 N. H. 171; Milan v. State, (1866) 24 Ark. 346; Mann v. Glover, (1833) 14 N. J. Law 195, 202; Shoeffler v. State, (1854) 3 Wis. 717; Stout v. People, (1858) 4 Park Cr. (N.Y.) 71, 109; State v. Potter, (1846) 18 Conn. 166, 171; Mechanics' Bank v. Smith, (1821) 19 Johns. (N.Y.) 115; Thompson v. People, (1857) 3 Park Cr. (N.Y.) 467; Freeman v. People, (1847) 4 Denio (N.Y.) 9, 33; Lowenberg v. People, (1863) 27 N. Y. 336, 26 How. Prac. (N.Y.) 202, 207; Thompson v. Douglas, (1891) 35 W. Va. 337; 339; 3 Bla. Comm. 363; People v. Mol, (1904) 137 Mich. 692, 696, 100 N. W. 913.

[19]East St. L. Elec. Ry. v. Snow, (1899) 88 Ill. App. 660.

[20]Milan v. State, (1866) 24 Ark. 346; State v. Hanley, (1866) 34 Minn. 430, 26 N. W. 397.

[21]State v. Knight, (1857) 43 Me. 11, 121; O'Fallon Coal Co. v. Laquet, (1902) 198 Ill. 125, 128, 64 N. E. 767; State v. Potter, (1846) 18 Conn. 166, 171; Rowell v. B. & M. Rd., (1879) 58 N. H. 514; State v. Howard, (1845) 17 N. H. 171; McGowan v. State, (1836) 9 Yerg. (Tenn.) 184, 193; Montague v. Comm., (1853) 10 Gratt. (Va.) 767; Rollins v. Ames, (1821) 2 N. H. 349, 350, 9 Am. Dec. 79. See the following from East St. L. Elec. Ry. v. Snow, (1899) 88 Ill. App. 660, 661: "The common law did not allow to a party the right of peremptory challenge in any civil action, nor in any criminal case other than in a case calling for the death penalty. This right was first secured to litigants in this state by a statute approved February 17, 1823. Under the privilege granted by this statute, when a party has grounds for suspicion that a juror does not stand indifferently, he may challenge a specified number, 'without cause.' Since the

were enacted which expressly abolished the old practice and made the trial judge the trier of all challenges.[22]

In Minnesota at the present time, it is provided by statute that:

". . . the challenge shall be tried as follows: 1. For implied bias, by the court. 2. For actual bias, *by triers, unless in cases not capital, the parties shall consent to trial by the court.*"[23]

The practice in many counties of the state seems to be for both parties to consent to the trial of all challenges by the court, except occasionally in murder cases.[24] In the absence of a demand

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passage of this statute, so far as we are advised, there has not been in this state, any practical distinction observed in the procedure, between cases where the challenge was for the principal cause and where it was to the favor only. The court has acted as trier upon all challenges touching the qualification or fitness of jurors."

[22]Balbo v. People, (1880) 80 N. Y. 484, 494; Abbott v. People, (1881) 86 N. Y. 460, 466; Young v. Johnson, (1890) 123 N. Y. 226, 236, 25 N. E. 363; Borden v. Borden, (1809) 5 Mass. 67, 78, 4 Am. Dec. 32; Milan v. State, (1866) 24 Ark. 346; Stewart v. State, (1853) 13 Ark. 720; Holt v. People, (1865) 13 Mich. 224; Reynolds v. United States, (1878) 98 U. S. 145, 157, 25 L. Ed. 244; State v. Munchrath, (1889) 78 Iowa 268, 273; 43 N. W. 211; State v. Porter, (1893) 45 La. Ann. 661, 663; 12 So. 832; Patterson v. State, (1886) 48 N. J. Law 381, 389, 4 Atl. 449; Serviss v. Stockstill, (1876) 30 Oh. St. 418; Border v. Carrabine, (1912) 30 Okla. 740; State v. Merriman, (1890) 34 S. C. 16, 32, 12 S. E. 619 (affirmed 34 S. C. 576, 13 S. E. 328); Thompson v. Douglas, (1891) 35 W. Va. 337, 338. 16 R. C. L. 283; 35 C. J. 402; and see note 1; Calhoun v. Hannan, (1888) 87 Ala. 277, 284, 6 So. 291; People v. Loper, (1910) 159 Cal. 6, 11, 112 Pac. 720; Ray v. People, (1917) 63 Colo. 376, 380, 167 Pac. 954.

[23]Minn., G. S. 1913, sec. 9237.

[24]The following excerpts from letters received from district judges and county attorneys of Minnesota indicate the practice:

Alfred Joyce, County Attorney, South St. Paul: "In the two years that I have been County Attorney I have tried about 100 criminal cases in the District Court, exclusive of moonshine cases, three of which were murder cases, *and there was no suggestion by anyone that triers should be used except in one of the murder cases.* The use of triers has become so nearly obsolete that one hardly ever thinks of them any more."

Hon. Edward F. Waite, District Judge, Minneapolis: "Triers are used very rarely. Only in murder cases and not always then."

Hon. William C. Leary, District Judge, Minneapolis: "Quite seldom, and only in murder trials."

Hon. John B. Sanborn, District Judge, St. Paul: "We appoint triers only in murder cases."

Hon. Bert Fesler, District Judge, Duluth: "Only in murder cases *and when demanded.* I have used them once in 12 years, a murder case."

Hon. I. M. Olsen, District Judge, New Ulm: "Triers have not been used in this district for the last fifteen or twenty years, except where the charge was murder in the first degree, in which case the statute apparently does not permit a waiver of triers."

Hon. Charles E. Callaghan, District Judge, Rochester: ". . . while I have been on the bench a little over seven years and have presided at the trial of a good many criminal cases, I now recall but one case in which jury triers were used. This was in a murder case tried over six years ago. . ."

Chester S. Wilson, County Attorney, Stillwater: ". . . In my law

for triers, consent that the challenge should be tried by the court is presumed.[25] It is probably because of this fact and also because the initiative must be taken by one of the parties in order to procure triers, that the present practice prevails. As has been already indicated, the only cases in which there continues to be any disposition to insist upon triers is in trials for murder. It is very probable that in such a case the insistence, or at least the suggestion, comes from a cautious trial judge. Some of our judges and some of our county attorneys contend that the statute requires triers in murder cases.[26] In the districts which they represent, of course, triers will be provided. In other districts they are not required except upon demand. One judge reported that in every murder case which he had tried, triers had been demanded by the defendant.[27] Apparently, except for the cautious attitude of some of the judges and county attorneys as to the way in which the Minnesota statute should be interpreted, the practice of using triers would have become obsolete in this state as in most of the other American jurisdictions.

It is at least doubtful whether this caution is justified. It will be noted that the statute referred to[28] speaks not of murder cases, but of "cases not capital." Since the enactment of that statute the death penalty has been abolished in Minnesota[29] and in consequence it is difficult to see how there can be such a thing as a capital case. The authorities seem to be uniform in defining capital cases as referring only to cases in which the death penalty

practice which has extended over some twelve years, I have never used them and do not recall ever having seen a case in which they were used. My predecessor as County Attorney, R. G. Thoreen, says he never had triers used in any case during his ten-year term. I was court reporter for three years, some years ago and reported all the cases in this judicial district during my term. I do not remember having seen triers used except in one murder case where of course the statute made the use of triers obligatory."

. S. Bernhard Wennerberg, County Attorney, Center City: ". . . in only one case in this county during the last eight years have triers been used, and that was a murder case in the first degree. In other criminal cases in other counties of this state in which I have appeared, no triers have been used, and it is the rare exception that consent is not given to try actual bias by the court."

[25]State v. Smith, (1899) 78 Minn. 362, 364, 81 N. W. 17.

[26]See note 24, particularly the statements of Judge Olsen and Mr. Wilson.

[27]Hon. William C. Leary of Minneapolis. Judge Leary has been a judge of the district court of Hennepin County for many years.

[28]Minn., G. S. 1913, sec. 9237.

[29]Minn., Laws 1911 C. 387.

may be inflicted.[30] So long as there is no decision of the Minnesota supreme court upon the subject, we may expect that the existing uncertainty will continue. If the opinion of those judges referred to above is correct in holding that the statute requires triers in murder cases, it is only a question of time until some murderer will appeal from a judgment of life imprisonment and escape punishment because of a deprivation of his right to triers. The lack of harmony in criminal procedure in the different counties is in itself undesirable. Then too, there is always the possibility that capital punishment may be re-established; in which case it would certainly at once become necessary to return to the use of triers in murder cases. It must be remembered too that in any case the defendant may demand triers and procure their use. What the result of this would be, if attorneys who specialize in the defense of men accused of crime, should decide to claim the privilege of jury triers in all cases, needs only to be mentioned, to be realized in terms of great expense and interminable delay. In this day, when the professional criminal well knows the difficulty which mere delay puts in the way of successful prosecution, it seems almost dangerous to indicate the possibility.

These considerations suggest that it is an appropriate time to consider the institution of jury triers on its merits, and either definitely to set out and limit its place in our criminal procedure, or else finally dispose of it.

It is submitted that there is no longer any reason, if there ever was one,[31] for retaining the practice in Minnesota. It is apparent

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[30]Standard Dictionary: "of or pertaining to the death penalty, formerly by beheading."

Black, Law Dictionary: "Affecting or relating to the head or life of a person, entailing the ultimate penalty. Thus, a capital crime is one punishable with death."

Bouvier's Law Dictionary: "Capital crime, is one for the punishment of which death is inflicted, which punishment is called capital punishment."

See also the following cases: Adams v. State, (1908) 56 Fla. 1, 48 So. 219; State v. Naylor, (1913) 5 Boyce (Del.) 99, 90 Atl. 880; In re Vickers, (1907) 201 Mo. 643, 100 S. W. 585; Ex parte Dipley, (1911) 233 Mo. 235; 135 S. W. 56; State v. Wren, (1914) 77 N. H. 361, 92 Atl. 170; State ex rel. v. Hackman, (Mo. 1924) 257 S. W. 457; State v. Giberson, (1922) 94 N. J. Eq. 25, 119 Atl. 284.

[31]Hon. Bert Fesler, District Judge, Duluth: "The practice appears to be a useless survival from an age when it probably was also useless."

William C. Leary, District Judge, Minneapolis: "My opinion is that the provision of the law providing for the appointment of jury triers is in the nature of a throwback. It may have served a very useful purpose in the past, but at the present time it seems to me is entirely needless. It delays the trial of defendants and adds somewhat to the expense thereof."

Harry H. Peterson, County Attorney, St. Paul: "It seems to me that

that if triers are unnecessary, whatever is paid for their services is a needless expense to the state, and that whatever delay results from their use, to that extent prevents the expeditious administration of justice which is being so insistently called for by the people. Every additional day required to make up a jury in a criminal case means one of two things, either the trial of other cases must be postponed, or additional courts, judges, clerks and other officers must be provided. Neither alternative is a pleasing one to the people. Just a few weeks ago a prominent attorney from southeastern Minnesota made the statement at a State Bar Association meeting that in his county a five weeks term of court had just been completed, of which four weeks had been spent in the trial of criminal cases. As one week was not by any means sufficient for the trial of the civil cases on the calendar, they were forced to go over until after the judge should have held court in the other counties of the district. In Hennepin County it is reported that the trial calendar is from eight months to one year behind. The same condition prevails and becomes more and more aggravated in many parts of the country.

Some authorities are not convinced that the use of triers causes substantial delay in criminal trials. Others are very positively of the opinion that it does.[32] Some attorneys suggest that the use of triers results in freeing the judges for other work. This is not true as the judge must be present in criminal trials, directing

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the whole practice of impaneling juries is archaic and expensive, partly on account of the procedure employed, and partly on account of the large number of challenges permitted."

[32]O'Fallon Coal Co. v. Laquet, (1902) 198 Ill. 125, 128; "Under our practice the competency of a juror, whether raised by principal challenge or challenge to the favor as at common law, is triable by the court without the intervention of triers, and the ruling of the trial court as to the competency of a juror is reviewable upon appeal or writ of error. We can see no good reason for departing from that practice. The common law method of trying challenges would be cumbersome and attended with unnecessary delay in the trial of causes, without any beneficial results."

Hon. William C. Leary, District Judge, Minneapolis: "I think it takes considerably more time to make up a jury when triers are used."

Hon. I. M. Olsen, District Judge, New Ulm: "The use of triers does, to some extent, lengthen the time required to secure a jury. It takes from fifteen minutes to an hour or more to select and secure the attendance and qualification of the triers; then the attorneys examining the jurors will go into more detail in their examination before the triers than they would before the court, and in that way more time is consumed."

James J. Quigley, County Attorney, St. Cloud: "I am strongly of the opinion that the situation could be handled more expeditiously and properly if triers were eliminated and their duties placed solely within the province of the court."

the triers in matters of law and generally protecting the defendant from any prejudicial action or misconduct.[33]

It would seem, then, that unless some very substantial reason can be urged for the retention of jury triers, this is an appropriate case for legislative action. Let us examine the arguments advanced in their favor. The argument usually heard is that this is one of the old safeguards of the man accused of crime and that it should be preserved for that reason alone. This is no more than one form of the contention that "whatever is, is right." It has been urged unsuccessfully in connection with many old ideas, such as "the divine right of kings," "slavery," and the belief that the world was flat. If lawyers can find no better reason for justifying the practices of their profession they should not complain at the actions of legislatures in attempting to regulate the administration of justice themselves. If old machinery is capable of doing the work of the present day world, it is retained. If it is not, it is junked, and new and adequate machinery takes its place. It is an inexorable rule and applies as well to the machinery of justice as to any other.

It is suggested that jury triers are desirable because they provide a more impartial tribunal than does a prejudiced judge. This may once have been true, but there are several very convincing answers to such a contention today. In the first place, there is no evidence in this state that defendants feel the necessity of avoiding prejudiced judges by demanding triers. The almost universal practice of consenting to trial of challenges by judges[34] demonstrates this fact. Second, the practically universal abandonment of the use of triers in other states demonstrates the same fact.[35] Third, if a defendant suspects that a judge is prejudiced against him, he may secure a change of venue.[36] It has been held that,

"The filing of an affidavit of prejudice . . . operated of

[33]Hon. I. M. Olsen, District Judge, New Ulm: "The judge cannot perform other duties while the triers are at work. The judge is required to be present and attentive to the proceeding at all stages of a criminal trial, and must rule on all objections made to questions asked of the juror while being examined before the triers."

See also: State v. Ring, (1882) 29 Minn. 78, 81, 11 N. W. 233; State v. Sheltrey, (1907) 100 Minn. 107, 111, 110 N. W. 353; Johnson v. Brastad, (1919) 143 Minn. 332, 335, 173 N. W. 668; State v. Bragdon, (1917) 136 Minn. 348, 162 N. W. 465; Leystrom v. City of Ada, (1910) 110 Minn. 340, 125 N. W. 507.

[34]See note 24.

[35]See notes 1, 12, 21, 22.

[36]Minn., G. S. 1913 secs. 7724, 7727.

itself, without any other act on the part of either counsel or court, to incapacitate the judge from trying the same."[37]

Fourth, in common law days, as has been previously pointed out, the triers consisted of the first two jurors sworn.[38] Presumably, they were impartial and uncontrolled by the court. Today, in Minnesota, it is provided that:

"The triers shall consist of three impartial persons, not on the jury panel, appointed by the court."[39]

It will be seen that the common law procedure has been radically departed from, even to the extent of expressly providing that the persons appointed shall not be on the jury panel. It should be obvious that if a judge were prejudiced, he could easily appoint persons who would express his prejudices as well as himself. As a matter of fact, fair minded persons grow rather impatient at the suggestion that it should be necessary to create a special jury to select a trial jury in order to guarantee a fair trial to a man accused of crime. Counting the grand jury, we have under our present system provision made for *three* juries in the initiation and prosecution of a criminal trial. As a matter of fact, the appointment of triers usually becomes largely a matter of form and the persons appointed, when they are demanded, usually consist of the younger or more impecunious attorneys "who are hanging around for crumbs from the professional table." It is to be feared that their main interest is to prolong the selection of the jury so that as many days' fees as possible may accrue.

We have learned in the administration of business that success or failure may depend on the elimination of small "leaks." We have yet to learn that the same is true of the administration of justice. We have little to hope for in immediate results from the adoption of elaborate new schemes of procedure. It is doubtful if we will ever make much progress except through small and carefully considered changes. But the fact must not be overlooked that although each change may seem small or even trivial, the sum of them may produce substantial results. The institution of "jury triers" is a splendid example of a small leak, expressed in terms of expense, or of a small obstruction expressed in terms of delay. Its removal presents a very obvious opportunity for beneficial legislation.

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[37]State v. Hoist, (1910) 111 Minn. 325, 327, 126 N. W. 1090.

[38]See notes 8, 16.

[39]Minn., G. S. 1913, sec. 9237.