The Origins of the Special Jury

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Special juries do not exist, as many people seem to suppose, by the authority of a modern statute; on the contrary, they are as ancient as the law itself, and were always struck, as they are at this day, by direction of the Court, when trials were had at the bar and not at nisi prius.

Thomas Erskine, Esq., November 15, 1793

During the eighteenth and nineteenth centuries, the special jury emerged in English common and statutory law as a familiar feature of the civil trial.² Ordinarily the term "special jury" appeared in case reports and statutes without explanation or definition, suggesting a concept that was widely understood.³ As the Erskine quotation indicates, however, the origins of the special jury were not well understood as of the late eighteenth century. Its origins had not then, nor have they since, been subjected to careful historical study.⁴

† Professor of Law, Georgetown University Law Center. In addition to indispensable library support, see infra note 11, I wish to acknowledge with special thanks the following colleagues in history and law departments elsewhere who took the time to read all or part of this article in draft, and who extended to me valuable criticism and suggestions: Professors John Langbein, Richard Helmholz, James Cockburn, John McCusker, Charles Donahue, and Dr. J.H. Baker. Also, I have benefitted from the excellent assistance of Georgetown law students Violette Fernandez, Sarah Teslick, and Katharine Gresham, and I am grateful to the Georgetown University Law Center for research funds that made possible the essential detective work in sixteenth- to eighteenth-century English legal literature.

¹ The Case of Libel, the King v. John Lambert and Others, Printer and Proprietors of the Morning Chronicle 16 (2d ed. London 1794). A trial at bar was a trial conducted in London before all of the judges of a particular court, contrasted with a trial at nisi prius conducted before a single judge in the country on assize or at special sittings in London and Westminster.

² As will be shown, infra notes 85-108 and accompanying text, the special jury was used in criminal trials, especially during the formative era of the late seventeenth and eighteenth centuries. Except for high treason and seditious libel cases, civil usage was much more frequent than criminal usage by the mid-1700's.

³ This article does not deal with the "special verdict." For a discussion of the special verdict, see 3 W. Blackstone, Commentaries *377-78. Except in the loose sense that a special verdict might be requested as a way of getting a meaningful jury response to complicated facts, the concepts of special verdict and special jury are unrelated.

The history of the special jury has contemporary relevance to the ongoing debate in the United States over the right to a jury trial in complex civil litigation. More important, the special jury demonstrates that the jury cannot be viewed as a simple institution with a limited fact-finding role. Unsuspected layers of com-


Occasional twentieth-century articles have advocated the revival of the special jury, and these pieces contain some historical discussion. See, e.g., Baker, In Defense of the "Blue Ribbon" Jury, 35 Iowa L. Rev. 409 (1950); Thatcher, Why Not Use the Special Jury?, 31 Minn. L. Rev. 232 (1947); see also sources cited infra note 5.

* This issue recently has received considerable attention in the law reviews. Morris Arnold and Patrick Devlin, each commissioned to write articles in connection with then-pending cases, provide especially provocative and opposing views. See Arnold, A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation, 128 U. Pa. L. Rev. 829 (1980); Devlin, Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment, 80 Colum. L. Rev. 43 (1980). Devlin's article contains a short passage on the special jury. See id. at 80-83.


One study has argued specifically for the use of special jurors in complex civil litigation. Note, The Case for Special Juries in Complex Civil Litigation, 89 Yale L.J. 1155 (1980); see also Luneberg & Nordenberg, supra, at 899-950 (proposing the same thing).

The special jury may be seen as a compromise solution to the present debate over the "complexity exception" to the seventh amendment. As this study shows, common law courts have been familiar with the use of special juries to decide issues requiring expertise. This usage reached its zenith in the merchant juries impaneled in Lord Mansfield's court (see infra note 13; infra note 451 and accompanying text), an era just before the period relevant to the American constitutional inquiry. Perhaps, therefore, these historical patterns deserve more attention in the ongoing constitutional debate.
plexity present a rich and varied history deserving of further study. This article goes part way by isolating the origins of the special jury in English law and tracing its evolution until the mid-eighteenth century.

Close examination of the usage of the term "special jury" since its appearance in cases and legal literature during the second half of the seventeenth century reveals two fundamental points. First, a special jury might satisfy any or all of the following definitions: a jury of individuals of higher class than usual; a jury of experts; and a "struck jury," that is, one formed by a special procedure allowing parties to strike names from an unusually large panel of prospective jurors. Second, various juries were formed before and after the seventeenth century that met the first two of the above definitions, even though these juries were never expressly denominated "special." For example, in cases of national importance, grand juries often consisted of leading citizens. The same was true of petit juries in cases involving such issues as high treason or seditious libel. Juries of experts ranged from panels of cooks and fishmongers to the all-female jury impaneled to ascertain whether a female defendant was pregnant. Only the third definition, the struck jury, came to be consistently identified as the "special jury."

This article traces the history of all three kinds of "special jury" from the earliest era for which meaningful records were accessible to 1730, the year of Parliament's first significant enact-

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6 The struck jury procedure was associated early with trials at bar. See infra notes 316-61 and accompanying text.
7 See infra notes 131-35 and accompanying text.
8 See infra note 85 and accompanying text.
9 See infra note 206 and accompanying text.
10 See infra notes 186-95 and accompanying text.
11 Apart from the useful and varied English law collection of the Georgetown-University Law Library, my chief resources have been the extensive holdings of the Library of Congress and the Harvard Law School. Extraordinarily helpful to me at the Library of Congress were Kersi Shroff of the American-British division, R.M. Clemandot of the processing section, and Philip Berwick of the law library. Special thanks are due to Professor Harry S. Martin, Law Librarian at the Harvard Law School. Also helpful was the rare book collection of the University of Michigan Law School, which Professor Beverly Pooley kindly made available to me. Other printed sources in this country and in England would undoubtedly add to the work that I have done, but I am reasonably confident that no major change in findings would be necessary after canvassing these sources.

Manuscript records are, of course, another matter. I have used manuscript and notebook reports of cases held by the Harvard Law Library [hereinafter cited as Harvard MS; Harvard NB] and manuscript reports held by Gray's Inn [hereinafter cited as Gray's Inn MS]. These reports, and many more, are available on microfiche in the English Legal Manuscripts Project, edited by Dr. J.H. Baker and published by Inter Documentation Company AG, Zug, Switzerland. The Project, which reprints collections held by the Harvard
ment concerning the special jury. Part I deals with the first two kinds of special juries identified above: juries of higher-than-ordinary social standing and juries of persons with special knowledge or expertise. Part II examines the emergence and characteristics of the struck jury culminating in its statutory recognition in 1730. The history of the special jury after 1730, when it became synonymous with the struck jury, remains the subject of future research.

I. Qualifications of Jurors

Several identifiable themes recur in the statutes and rules of court establishing qualifications for jurors. First, the statutes and rules sought to ensure that persons of understanding and intelligence served on juries, even though the level of concern varied ac-
cording to the nature and importance of the litigation. Second, they sought to ensure that jurors had sufficient wealth to be presumptively immune from bribery. Third, they sought to curtail the avoidance of jury service by “men of quality.” Finally, these measures were meant to prevent impaneling officers—usually sheriffs and coroners—from manipulating jury panels or from accepting payoffs from persons wishing to avoid jury service. The first theme—ensuring that persons of understanding and intelligence served on juries—is the primary object of this study, but each of the remaining themes will be touched upon.

A. The Problem of Filling Juries With Capable Individuals

Encomiums heaped upon the English jury by law writers over the centuries presuppose the availability of able, intelligent men to serve as jurors. Occasional sources, however, portray common jur-

14 Parliament chose statutory requirements of minimum property holdings as the device to ensure that jurors be reasonably intelligent and honest. The scope and success of those requirements are explored infra notes 31-61 and accompanying text.

15 Bias in jurymen has been handled largely through detailed rules allowing parties to challenge prospective jurors, both peremptorily and for cause. These rules will be discussed infra note 251. It is important to observe, however, that the earliest jurors were expected to be biased. Jurors were called upon as individuals with knowledge of events in dispute. They thus performed a role much different from their modern function; “bias” in the sense of predisposing foreknowledge was expected. It has been suggested that in the early phases of jury history most jurors had their minds made up before traveling to court, or at least this was true for jurors required to travel from the country to Westminster, where they would hear no new evidence. See 18 Year Books of Edward II, at xv-xvi (W. Bolland ed. 1920). The jury’s modern role as a fact-finding body responding to evidence presented in court was not established until at least the fifteenth century. See J. Thayer, supra note 4, at 85-182.

16 The problem of avoidance of jury service by the landed gentry was addressed, largely ineffectively, by royal exhortation or Parliamentary investigation, some instances of which are mentioned infra notes 18, 31-61 and accompanying text. The problem of corrupt sheriffs or coroners was addressed by royal proclamation and by statute, and is treated to a limited extent infra notes 18-25, 44, 48, 455-57 and accompanying text.

17 See, e.g., E. Coke, The First Part of the Institutes of the Laws of England, or, A Commentarie Upon Littleton § 234, at 155a-56b (2d ed. London 1629) (1st ed. London 1628); W. Walwin, Juries Justified 4 (London 1651); E. Waterhous, Fortescutus Illustratus 252, 342 (London 1665). The extent of wishful thinking (or of hopeless naivete) is well illustrated in J. Hawles, The Englishman’s Right; A Dialogue Between a Barrister at Law and a Jurymen (London 1844) (1st ed. London 1860). Hawles included the following as his sixth qualification for the common juror:

Endeavor, as much as your circumstances will permit, at your spare hours to read, and understand, the fundamental laws of the country; such as Magna Carta, the Petition of Right, the late excellent act for Habeas Corpus’s, Horne’s Mirror of Justices, Sir Edw. Coke, in his 2d, 3d, and 4th Parts of the Institutes of the Law of England, and judge Vaughan’s Reports. These are books frequent to be had, and of excellent use to inform any reader, of competent apprehension, of the true liberties, and privileges, which every Englishman is justly entitled unto . . . as also the nature of crimes, and the punishments severally, and respectively, inflicted on them by law; the office, and
rors as a dismal rabble. A 1607 Proclamation for Jurors by James I declared that jury service

oftentimes resteth upon such as are either simple and ignorant, and almost at a gaze in any cause of difficultie, or else upon those that are so accustomed and inured to passe and serve upon Juries, and they have almost lost that tendernesse of Conscience, which in such cases is to bee wished, and make the service, as it were an occupation and practice.\(^{18}\)

Later seventeenth-century voices were heard to the same effect.\(^{19}\)

This problem often was attributed to corrupt sheriffs, who excused all who could afford to pay, leaving only the poor and the ignorant to serve on juries.\(^{20}\) Several of the jury statutes identified in the Appendix reflect this theme. For example, in An Act agaynst Shreifs for abuses,\(^{21}\) Parliament referred to “grete [great] extor-

\[^{18}\text{A Proclamation for Jurors, by James I (Oct. 5, 1607). A copy of this proclamation printed later that year by Robert Barker in London is held in the Rare Book Room of the University of Michigan Law Library.}\]

\[^{19}\text{After discussing the characteristics enumerated by Coke as desirable in jurors, John March still was unconvinced: “Yet for all this, when I again consider what weak and ignorant Juries are for the most part returned, I cannot sufficiently wonder and lament, that mens lives and fortunes should depend upon such mens verdicts.” J. MARCH, THE COMMONWEALTH’S FRIEND 102 (London 1651). According to another tract writer, “[i]n ordinary Cases, the Jurors are of the meanest of Free-holders, both in Understanding, Credit, and Estate; and, for the most part, such as will give the Bayliffs nothing to excuse them.” [A. Booth], EXAMEN LEGUM ANGLIAE 77 (London 1656). The first of Henry Robinson’s well-known seven objections to trial by jury was that “[t]here is not a competent number of understanding and fit men to be had in the lesser Divisions of a County, for tryall of all Causes upon all occasions.” H. ROBINSON, CERTAIN CONSIDERATIONS IN ORDER TO A MORE SPEEDY, CHEAP, AND EQUALL DISTRIBUTION OF JUSTICE THROUGHOUT THE NATION 2 (London 1651) (emphasis omitted). Robinson added in his fourth objection that “[m]ost commonly one or two active & nimble-pated men over-sway all the rest, of the Jury, and too often for the worst.” Id. Coke’s juror characteristics referred to by J. MARCH, supra, at 100-01, were: First, he ought to bee dwelling most neere to the place where the question is moved. Secondly, he ought to bee most sufficient both for understanding, and competencie of estate. Thirdly he ought to bee least suspitious, that is, to be indifferent as he stand unsworne, and then he is accounted in Law liber et legalis homo, otherwise he may be challenged & not suffered to be sworne. E. COKE, supra note 17, § 234, at 155b (footnotes omitted).}\]

\[^{20}\text{See infra notes 41-44 and accompanying text. Consider also Duncombe’s allegation about sheriffs’ abuses and jury service as a means of sustenance, quoted infra text accompanying note 30. This language was “borrowed” by Sir James Astry in his early eighteenth-century monograph on juries. See J. ASTRY, A GENERAL CHARGE TO ALL GRAND JURIES, AND OTHER JURIES 6 (2d ed. London 1725) (1st ed. London 1703).}\]

\[^{21}\text{3 Hen. 8, ch. 12 (1511-12).}\]
cions and oppressions" caused by "subtilie and untrue demanor of Sherevis [Sheriffs] and their ministers" and as a remedy provided that justices of the peace at criminal quarter sessions might reform jury panels to ensure panels that were "good and lawfull."²²

Parliament did not solve the problem. As Professor Cockburn observed in his illuminating history of English assizes, sheriffs and undersheriffs in the mid-seventeenth century "were repeatedly censured . . . for returning insufficient freeholders for jury service, and ordered to compile new books of freeholders."²³ More particularly,

seventeenth-century undersheriffs commonly oscillated between two equally unacceptable courses: they either warned indiscriminately all the county's freeholders to attend for jury service, or failed to summon any at all. In consequence bailiffs customarily took up "men of all sorts" at assize time to form the tales de circumstantibus²⁴ by which deficient juries might be made up. . . . By the 1620s, "contrary to the ancient writs and forms of law", more Western Circuit causes were tried by tales-men than by jurymen proper.²⁵

The evidence is not entirely one-sided and is subject to demographic variations. In his study of seventeenth-century grand jury practice in Cheshire, Professor Morrill concluded that grand jurymen "came from a coherent social group, the middling freeholders

²² Id. This statute reenacted an earlier version that had expired. See An Act for Writts of Attaynt to Be Brought Agaynst Jurors for Untrue Verdicts, 11 Hen. 7, ch. 24 (1495). Sixteenth- and seventeenth-century local practice manuals faithfully described the 1512 statute. See, e.g., M. DALTON, THE OFFICE AND AUTHORITY OF SHERIFFS 310 (London 1682 ed.) (Dalton or the printer mistakenly identified the statute as "33 H.8. c.12" instead of 3 Hen. 8, ch. 12 (1511-12)); [A. FITZGERBERT], THE NEW BOKE OF JUSTICES OF THE PEAS fol. 129 (R. Redman comp. 1538 & photo. reprint 1972). Fitzherbert's authorship has been challenged, although he may have translated the work from a contemporary French original. Glazebrook, Introduction to [A. FITZGERBERT], supra, at 10-20. Parts of this work, including the cited passages, were reprinted in 11 editions between 1540 and 1573 in a separate book. See, e.g., THE OFFICES OF SHYRFYS, BAYLYFFES OF LYBERTYES, ESCHEATOuRs, CONSTABLES AND CORONERS (London 1545).

²³ J. COCKBURN, A HISTORY OF ENGLISH ASSIZES 1558-1714, at 112 (1972) (footnote omitted).

²⁴ The term "tales de circumstantibus" refers to people who are drawn from among the bystanders at the court to fill up a jury in circumstances where insufficient prospective jurors named on the panel have appeared or where the number of jurors has been reduced below 12 by virtue of challenges. See 3 W. BLACKSTONE, supra note 3, at *364-65.

²⁵ J. COCKBURN, supra note 23, at 118 (footnotes omitted).
The University of Chicago Law Review

... [who] were separated from the humbler freeholders less by wealth than by official recognition of their capacity to perform disinterested tasks for the good of the local community. In Cheshire, moreover, "trial juries were drawn from exactly the same group as grand juries. The point is worth making because it has been commonly assumed that trial juries comprised men of lower status." But if not one-sided, the evidence is surely lopsided in suggesting a more than occasional problem throughout the seventeenth century and earlier in obtaining honest and intelligent jurymen.

B. Juror Qualifications: Property-Holding and Quality

It is the general course of the World, to esteem men according to their Estate; For Quantum quisque sua nummorum servat in arca, Tantum habet et fidei; And sure I am; the makers of this Law, had cause enough to do so, in this Case; for if men of less Estates should serve in Juries, such Fellows would only be shifted into Enquests, as had more need to be relieved by the 8d. than discretion to sift out the truth of the fact: 'Tis hard to get an unbyassed Jury now; But surely, less rewards would sooner bribe and bypass meaner men, than these.

1. Specific Property Requirements. Through the reign of

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27 Id.
28 The reference is to legislation requiring jurors to own a specified amount of freehold—probably the four-pound freehold requirement of An Act for the Returninge of sufficient Jurors and for the better Expedicion of Trialls, 27 Eliz., ch. 6 (1584-85). See infra Appendix.
29 Eight pence was the customary fee earned by a common juror at nisi prius at Guildhall for his service during the seventeenth and eighteenth centuries. jurors at Westminster Hall earned more—one shilling apiece. See, e.g., THE PRACTICK PART OF THE LAW 53-54 app. (4th ed. London 1711) (1st ed. London 1654).
30 S.E., TRYALS PER PAIS 72 (London 1665). Later editions were claimed by Giles Duncombe and lead to the conclusion that Duncombe authored this book. See, e.g., G.D. [G. DUNCOMBE], TRYALS PER PAIS (2d ed. London 1682). The "S.E." in the first edition refers to Samson Euer, but whether Euer or Duncombe is the original author is unclear. See 57 BRITISH MUSEUM CATALOGUE OF PRINTED BOOKS 376-77 (Trustees of British Museum 1961); 58 id. at 512 (1960); 1 CATALOGUE OF THE LIBRARY OF THE LAW SCHOOL OF HARVARD UNIVERSITY 581 (Harvard Law School 1909); W. SPILSBURY, CATALOGUE OF PRINTED BOOKS IN THE LIBRARY OF HON. SOCIETY OF LINCOLN'S INN 843 (London 1849); 2 D. WING SHORT-TITLE CATALOGUE OF BOOKS PRINTED IN ENGLAND, SCOTLAND, IRELAND, WALES, AND BRITISH AMERICA AND OF ENGLISH BOOKS PRINTED IN OTHER COUNTRIES 1641-1700, at 19 (rev. 2d ed. T. Crist ed. 1982). To avoid unnecessary confusion, further citations to the 1665 edition will be designated G. DUNCOMBE, 1665 edition.
Elizabeth, Parliament sought to ensure that jurors were drawn from the vicinity of the trial and that jurors were men of property. The first of these goals was never vigorously pursued, and after Elizabeth's reign the emphasis was almost entirely on property holdings. Dr. J.H. Baker recently explained that

[a]ccording to medieval thinking, the likelihood of corruption varied in inverse proportion to wealth, and so the root cause of perjury in jurors was considered to be the impanelling of men of insufficient substance. . . . A typical fifteenth century reaction to the prevalence of corruption was to make the qualification even more exclusive . . . .\(^{31}\)

The Appendix to this article presents the attempts by Parliament from Magna Carta until 1730 to produce responsible and effective jurors. As the table and accompanying narrative indicate, Parliament experimented with a variety of formulae in different courts and in different types of cases, but a forty-shilling requirement was the general rule in the royal courts for over three centuries.\(^{32}\) The statute of 27 Eliz., ch. 6 (1584-85)\(^ {33}\) doubled the standard to four pounds, and the new figure was retained for almost eighty years. Then, in 1664, Parliament raised the requirement to twenty pounds "for reformation of abuses in Sheriffs and other Ministers, who for reward doe oftentimes spare the ablest and sufficientist, and returne the poorer and simpler Freeholders lesse able to descerne the Causes in question, and to beare the charges of appearance and attendance thereon."\(^ {34}\) By its own terms the

\(^{31}\) 2 THE REPORTS OF SIR JOHN SPELMAN 107 (J.H. Baker ed. 1978). In fact, expository language in successive juror qualification statutes shows that jury perjury was perceived as a recurring problem. For example, in the statute of 2 Hen. 5, Stat. 2, ch. 3 (1414), one of the "great Mischiefs" described was the return of common jurors who "have but little to live upon but by such Inquest, and which have nothing to lose because of the false Oaths whereby they offend their Consciences the more [largely]" (brackets contained in 2 STATUTES OF THE REALM 188 (1816); compilers substituted "largely" for "lightly," id. at n.5). The statute of 15 Hen. 6, ch. 5 (1436-37), describes the "great . . . Perjury" as being "[. . . most likely to tend to the greatest] Mischief which may fall to the said Realm" (brackets contained in 2 STATUTES OF THE REALM 29 (1816); compilers substituted this phrase for "to the grettest likly," id. at n.5). For additional examples, see An Act for retornynge sufficient Jurors, 1 Rich. 3, ch. 4 (1483-84) ("greate inconvenienccez and pjuries daily happen"); An Act agaynst Perjurye, 11 Hen. 7, ch. 21, § 1 (1495) ("pjurye is muche and custumbly used").

\(^{32}\) See infra Appendix.

\(^{33}\) An Act for the Returninge of sufficient Jurors and for the better Expedicion of Trials, 27 Eliz., ch. 6 (1884-85).

\(^{34}\) An Act for the returning of able and sufficient Jurors, 16 & 17 Car. 2, ch. 3, § 1 (1664-65). The quoted language is virtually identical to the preamble of the Elizabethan statute cited supra note 33.
new requirement expired thirteen years later, after which, presumably, the four-pound requirement of the statute of 27 Eliz., ch. 6, revived. But in 1692, expressly as a replacement for the expired twenty-pound rule of the statute of 16 & 17 Car. 2, ch. 3, § 1 (1664-65), Parliament required a ten-pound freehold for jurors in all royal courts (at Westminster, on assize, and at nisi prius), as well as in quarter sessions, oyer and terminer, and gaol delivery, cities and towns excepted. This standard remained in effect until a decade ago, though intermittently Parliament determined that certain leasehold or personal property holdings were the equivalents of the ten-pound freehold for purposes of jury qualification.

Overall, the freehold requirements were, if not a complete

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35 An Act for the returning of able and sufficient Jurors, 16 & 17 Car. 2, ch. 3, § 6 (1664-65).
36 Statute of 4 W. & M., ch. 24, § 16 (1692). Freehold requirements in Wales have traditionally been lower than those in England. Thus an Acte for certaine Ordinaunces in the Kinges Majesties Domynion and Principalitie of Wales, 34 & 35 Hen. 8, ch. 26 (1542-43), provided that any freehold would qualify jurors in all actions other than attaint in Wales, and a freehold of 40 shillings qualified them for actions of attaint, id. § 48. When Parliament increased the general freehold requirement in England to £20, the correlative figure for Wales was eight pounds. See An Act for the returning of able and sufficient Jurors, 16 & 17 Car. 2, ch. 3, § 1 (1664-65). Parliament set the requirement for Wales of six pounds in the statute of 4 W. & M., ch. 24, § 15 (1692).
In 1696 Parliament enacted one unusual requirement for Yorkshire. Jurors in Grand Inquests were required to own freehold worth £20. An Act for the Ease of Jurors and better regulating of Juries, 7 & 8 Will. 3, ch. 32, § 8 (1695-96). The statute also required the sheriff to return only one panel of 48 jurors for the Grand Inquest. Id. Apparently the statute sought to restrain the sheriff from returning a large number of freeholders, some of whom would, in all likelihood, buy their way off the panel. At the same time, the statute sought to ensure that those freeholders returned by the sheriff were of a high caliber. For the quality of grand jurors in general, see infra notes 128-37 and accompanying text.
37 Statute of 4 W. & M., ch. 24, § 8 (1692).
39 For example, leasehold worth £20 was declared in 1730 to be the equivalent of a £10 freehold. See An Act for the better Regulation of Juries, 3 Geo. 2, ch. 25, § 18 (1730).
40 Although the point is disputed, legal authorities have asserted that even when statutes did not specifically mention freeholding as a qualification for jury duty, common law required some freehold, however small. See 1 J. Chitty, A Practical Treatise on the Criminal Law 502 (London 1816); E. Coke, supra note 17, § 234, at 155b-57a; 2 W. Hawkins, A Treatise on the Pleas of the Crown 415 (London 1721); Remarks on the Lord Russell’s Trial, by Sir John Hawles, Solicitor General in the Reign of William III, in 9 State Trials 793, 795. (In this article, all citation to State Trials refers to T. Howell, Cobbett’s Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdeemours from the Earliest Period to the Present Time (London 1809-1826) (33 vols.). State Trials contains accounts of mostly criminal proceedings from Norman times down through the Stuart and (in later editions) the Georgian periods. The set of State Trials was first published in 1719, see T. Salmon, A Compleat Collection of State-Trials, and Proceedings Upon Impeachments for High Treason, and Other Crimes and Misdeemour (London 1719) (4 vols.), but was published definitively in
failure as a method to ensure honest and intelligent jurymen, of very limited value. The statutes suffered from two familiar problems—ineffective enforcement and obsolescence. Dr. J.H. Baker contends that increasingly higher property qualifications helped to foster underenforcement; the higher qualifications "made it difficult for sheriffs in some parts of the country to find enough men to return, a difficulty which was exacerbated by the habit of selling exemptions," leading in turn to a reduction in the property qualification. The property requirement for non-urban areas, however, was not decreased; it was doubled during Elizabeth's reign. Moreover, the sheriff's exemption of the richer freeholders occasionally overloaded the jury panels with poorer freeholders who then faced the choice of buying their way off the panel or, "by delays and by adjournments[,] being kept for a week or a fortnight, so that they lose their work and are wholly impoverished." In contrast, the jurors who were required to travel from outlying counties to Westminster cannot have been poor, given the time and expense involved in the journey, for which they were not reimbursed. The trouble was that most country jurors would risk a

Howell's edition of 1809-1826.) There are occasional indications that such a freeholding requirement was applied, for example, in city courts, which were exempted from the statutes requiring jurors to be freeholders, and in noncapital criminal trials, but no consistent pattern appears.

Dr. Baker cites as an example the statute Per the Juries infra Civitatem London, 4 Hen. 8, ch. 3 (1512), substituting personalty valued at 100 marks for freehold worth 40 shillings for the City of London, a development which Baker terms "a sensible adaptation to the realities of urban life." 2 The Reports of Sir John Spelman, supra note 31, at 107. Professor Cockburn discusses the dearth of men of sufficient property in rural districts in his Calendar of Assize Records, Home Circuit Indictments: Introduction (forthcoming 1985, HMSO), particularly in a chapter dealing with trial by jury. Cockburn gives numerous later sixteenth- and early seventeenth-century cases in which courts have difficulty in filling up assize juries, although the problem seemed to stem as much from corrupt sheriffs as a shortage of freeholders. The problem contributed to the practice of filling out juries "de circumstantibus," that is, from bystanders present in court. See supra note 24 and accompanying text; infra notes 410-13 and accompanying text. As the value of money declined, the property qualification became less significant as a restriction on the number of available qualified jurors. See infra notes 51-61 and accompanying text.

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fine for nonappearance rather than undertake the journey. The fine, if assessed, probably would be less than the expense of the trip. As Dr. Sayles observed, "[t]he declaration that no jury came is one of the most monotonous commonplace[s] of the records [of the Westminster courts]."

Instead of locating and fining nonappearing jurors, another way to enforce the property qualification was to amerce (fine) the sheriff for returning panels of unqualified jurors. Few cases following this approach are reported. Perhaps one reason why there are not more reported cases is the availability of a simpler enforcement mechanism. It was universally accepted that parties could challenge prospective jurors for failure to meet the freehold requirement, thereby ensuring that only qualified men served. How frequently the right was exercised is uncertain.

Even if challenges of prospective jurors had effectively enforced the property qualification, the problem of obsolescence remained. A fixed property qualification was of limited utility in the face of the constantly changing value of money. Writing in the 1560's, Sir Thomas Smith described "yeomen" as those "next early 1300's, see 18 YEAR BOOKS OF EDWARD II, supra note 15, at xvi-xxi.

46 2 SELECT CASES IN THE COURT OF KING'S BENCH at ciii (G. Sayles ed. 1938).

47 Id. (footnote omitted); accord 18 YEAR BOOKS OF EDWARD II, supra note 15, at xvii-xix.

48 For allegations of jury-packing by sheriffs, see supra notes 21-25 and accompanying text; infra notes 100-01 and accompanying text. For a rare reverse example, see 6 SELECT CASES IN THE COURT OF KING'S BENCH 54 (G. Sayles ed. 1965) (plea no. 30, Hil. 1347), where a sheriff was amerced for declining to return a panel of jurors for a trial in which he was a named plaintiff.

49 In his study of the Old Bailey Sessions Papers, Professor Langbein notes the infrequency of challenges, and asserts that "although the vast medieval law of challenge was preserved in the law books of the time [mid-1670's to mid-1730's], this book learning was virtually dead letter in the ordinary courts." Langbein, The Criminal Trial before the Lawyers, 45 U. CHI. L. REV. 263, 275-76 (1978) (footnote omitted). Compare the testimony of Sir William Owen in 1817 that the frequent challenging of jurors "scarcely ever happens in England; but in Wales, either from party prejudices or personal antipathies, the privilege of challenge is exercised to a very considerable extent." H.C. SELECT COMM. ON THE ADMINISTRATION OF JUSTICE IN WALES, REPORT FROM THE SELECT COMMITTEE ON THE ADMINISTRATION OF JUSTICE IN WALES 45 (H.C. Comm. Print 1817). See also cases cited infra note 100.

For early examples of the law writers who acknowledged the validity of a challenge for want of freehold, see E. COKE, supra note 17, § 234, at 155b-57a; J. FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE 59 (S. Chrimes ed. 1942) (1st ed. London 1545). Maitland surmised that Fortescue was probably the earliest important writer on English law to praise the jury. See 2 F. POLLOCK & F. MAITLAND, supra note 44, at 631. As Professor Chrimes pointed out, however, Fortescue's statements on jury qualifications were influenced by statutes enacted during the reign of Henry VI; these statutes railed against the perjuries "which horribly continue and daily increaseth in the common jurors of the said realm." J. FORTESCUE, supra, at 173 (quoting statute of 15 Hen. 6, ch. 5 (1436-37)).

50 Maitland, Preface to T. SMITH, DE REPUBLICA ANGLORUM at x (L. Alston ed. 1906)
unto the nobilitie, knights and squires . . . [who] are more travailed to serve in [the commonwealth] than all the rest." He then added,

I call him a yeoman whom our lawes doe call Legalem hominem, a worde familiar in writtes and enquestes, which is a freeman borne English, and may dispend of his owne free lande in yerely revenue to summ of xl. s. sterling: This maketh (if the just value were taken now to the proportion of monies) vi. l. [£] of our currant mony at this present. Using Smith’s rate of inflation, the forty-shilling requirement of the statute of 2 Hen. 5, Stat. 2, ch. 3 (1414), had been devalued threefold by, for example, 1560. Yet it was not until twenty-five years later that Parliament nominally increased the property requirement to four pounds.

In his seventeenth-century treatise, The Office and Authoritie of Sherifes, Michael Dalton incorporated Smith’s devaluation rate, noting that the old forty-shilling requirement “doth make at this present, at the least six pounds of our money.” Dalton did not speculate on the comparative value of seventeenth-century money, but Edward Waterhous did in his commentary on Fortescue, published in 1663. Observing that, in Fortescue’s time (around 1470), forty shillings may have served as a measure of property “somewhat considerable, as a convenient support to life, and a delivery of the Possessor from temptation to perjury,” Waterhous argued that the value of a juryman’s fortune should be enhanced “according to the value of Rents, and Prizes now; (40 l. a year being as little for a Free-holder now to have in Estate, as 40 s. then[ ]).” If Waterhous’s parenthetical comparison was accurate, the four-


82 Id.

83 The 40-shilling requirement, of course, originated in the thirteenth century. See Statutu de illis q’ debent poni in Jura’ & Assis’ (The Statute of Persons to be put in Assises and Juries), 21 Edw. (1293). I know of no treatment of the change in the value of 40 shillings from 1293 to 1414, although some fluctuation must have occurred.
84 See An Act for the Returninge of sufficient Jurors and for the better Expedicion of Trials, 27 Eliz., ch. 6 (1584-85).
85 M. DALTON, THE OFFICE AND AUTHORITIE OF SHERIFES 201b (London 1625). Later editors annotated the statement in the text with a citation to Smith’s work. See, e.g., M. DALTON, supra note 22, at 318.
86 E. WATERHOUSSUPRA note 17, at 342.
87 Id.
88 Some evidence supports these figures. Waterhous buttressed his assertion with many comparisons of wages, rents, commodity prices, and other fundamental components of the
pound requirement of 1584 had become a trifle, and even the increase to ten pounds in 1692 would have been quite small. Working the comparison backward, the four- and ten-pound requirements would, in fifteenth-century money, be worth two and ten shillings, respectively. Whatever the exact comparisons, it seems fair to conclude that the property qualification declined in real value from the sixteenth century onward. Parliament allowed the 1664 increase to twenty pounds to expire, and proposals for a major increase in the property qualification never succeeded.61

2. General Quality Requirements.

And this Sheriffs shall do well to take notice of, that the King’s Courts of Justice are never (to my observation) better pleased, then when they see Pannels and returns of Knights, Esquires and Gentlemen, of rank and quality before them.62

If statutory property qualifications did not produce able jurymen, other methods were available. Apart from peremptory challenges and the struck jury procedure,64 there is a long history of

cost of living over the previous two centuries. Id. Writing in the early eighteenth century, Sir James Astry observed that “in Hen. the Third’s Time One Shilling was as much as Forty Shillings now.” J. ASTRY, supra note 20, at 7. See also R. BOOTE, AN HISTORICAL TREATISE OF AN ACTION OR SUIT AT LAW 143 n./ (London 1766) (“But quaere, if 20 s. the 13 E. I was not more than 10 l. now?”). Further corroboration can be found in Phelps, Brown & Hopkins, Wage-rates and Prices: Evidence for Population Pressure in the Sixteenth Century, 24 ECONOMICA 289 (1957). The authors present in Table 4, id. at 306, a composite foodstuff price index for southern England running from 1400 to 1700. Applying the authors’ figures to the Waterhous example would yield an increase in prices from 1470 to 1663 of approximately 700%, translating 40 shillings at 1470 money into £14 of 1663 money. This is considerably below Waterhous’s estimate, but it is a far greater change than the nominal increases in statutory property qualifications for jurors.

60 An Act for the Returninge of sufficient Jurors and for the better Expedicion of Trials, 27 Eliz., ch. 6 (1584-85).
61 Statute of 4 W. & M., ch. 24, § 16 (1692).
62 As an example, a £50 freehold requirement was advanced in an early eighteenth-century reform pamphlet that ran through numerous editions. See PROPOSALS HUMBLELY OFFER'D TO THE PARLIAMENT, FOR REMEDYING THE GREAT CHARGE AND DELAY OF SUITS AT LAW, AND IN EQUITY 34 (4th ed. n.p. 1724). One legislative curiosity, mentioned supra note 36, was the enactment in 1696 of an £80 freehold requirement for grand jurors in Yorkshire. An Act for the Ease of Jurors and better regulating of Juries, 7 & 8 Will. 3, ch. 32, § 8 (1695-96). According to the statutory recitations, Yorkshire enjoyed an abundance of property owners who were potential jurymen. Id. § 7.
63 E. WATERHOUS, supra note 17, at 252.
64 Challenges to the qualifications of prospective jurors theoretically helped to produce able jurors. See supra note 15; infra note 251. This approach, however, was imperfect; peremptory challenges applied only in crown cases, and, in any event, the process was wholly dependent upon the nature of the panel arrayed by the sheriff. The number and type of challenges varied over time and according to the type of case. These specifics are outside the
attempted control over jury quality by the king, the court, and the parties.

a. Juries of knights. Coke observed that in ancient times juries consisted entirely of knights. Jury service by knights on the grand assize was standard medieval procedure, but as C.T. Flower noted, knights "also formed the backbone of juries in possessory assizes." On occasion they were put on a jury by royal order and on occasion by judicial order. Before the invention of scope of this article; they can be found in numerous sources. See, e.g., 1 J. Archbold, supra note 4, at 204-08; E. Coke, supra note 17, § 234, at 155b-58b; The Complete Juryman, supra note 4, at 39-145.

It was established sometime before the end of the seventeenth century that either party could request a struck jury, which was presumably drawn from an array of men of better quality. See infra notes 310-15 and accompanying text.

There is at least a speculative possibility that certain of the Year Book cases are distant procedural cousins to the struck jury. Discussion of the cases is deferred until procedural aspects of the struck jury are explored. See infra notes 266-74 and accompanying text.

In addition, certain types of cases or inquests called for juries composed wholly or partially of men of higher class than usual. See infra notes 109-37 and accompanying text.


See infra notes 110-19 and accompanying text.

Introduction to the Curia Regis Rolls, 1199-1230 A.D., at 434 (C. Flower ed. 1944). The petit assizes, established by the latter part of the twelfth century, were novel disseisin, mort d'ancestor, darrien presentment, and utrum. See generally R. Van Caenegem, Royal Writs in England from the Conquest to Glanvill 86-88 (1959) (discussing the various assizes).

1 Pleas Before the King or His Justices 1198-1202, at 93 n.3 (D. Stenton ed. 1953).

See Introduction to the Curia Regis Rolls, 1199-1230 A.D., supra note 68, at 435. Observe Flower's use there of the term "special jury" in describing these panels of knights. Id. Lady Stenton used the term "special jury" in describing the offer by a prisoner of money to the King "to have a verdict of a jury on the general question of guilt or innocence." Rolls of the Justices in Eyre Being the Rolls of Pleas and Assizes for Lincolnshire 1218-9 and Worcestershire 1221, at lxx (D. Stenton ed. 1934) [hereinafter cited as Lincolnshire Eyre Rolls]. In giving an illustration concerning a prisoner named Richard Estrech, Lady Stenton wrote: "He is clearly asking for a special jury, for the presenting jury having recorded that his wife had been killed and that certain people have fled for the death go on to state that they suspect Richard himself." Id. See also Rolls of the Justices in Eyre Being the Rolls of Pleas and Assizes for Gloucestershire, Warwickshire and Staffordshire, 1221, 1222, at lix (D. Stenton ed. 1940) [hereinafter cited as Gloucestershire Eyre Rolls], where Lady Stenton added:
techniques to force a recalcitrant prisoner to plead how he would be tried, courts on a number of occasions ordered “strong juries” when a defendant either stood mute or expressly refused to put himself upon the country. These “strong juries” ordinarily consisted of twenty-four knights, but on at least one occasion “a specially strong jury of thirty-six” was impaneled.

Trials were sometimes conducted with specially-formed juries of knights chosen by consent of the parties. C.T. Flower’s edition

The general principle on which the judges acted seems to have been that no one shall be condemned to death on the sole verdict of the jury which has indicted him, even if he has agreed to put himself on the verdict of the country. The representatives of the villages were there and could be consulted, and if necessary a special jury of knights could be empanelled.

Neither Flower nor Stenton used the term “special jury” in a technical sense. Nonetheless, their usage was entirely apt in describing juries formed by a special procedure and composed of jurymen of higher quality than usual. See also infra notes 269-71 and accompanying text.

The most infamous technique was “peine forte et dure.” Professor Radzinowicz describes this as follows:

A prisoner who upon arraignment “stood mute,” which meant that he refused to plead so as to evade conviction, might be laid naked on his back in a dark room, while weights of stone or iron were put on his chest. If he continued to maintain silence, he was pressed until he died.

1 L. RADZINowICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 26 n.82 (1948) (citing A. ANDREWS, THE EIGHTEENTH CENTURY 285-86 (London 1856)). This form of torture was not abolished by statute in England until 1772, although it was used infrequently during the eighteenth century. See An act for the more effectual proceeding against persons standing mute on their arraignment for felony, or piracy, 12 Geo. 3, ch. 20 (1772) (peine forte et dure eliminated, but willful refusal to plead became equivalent to conviction). In 1827, Parliament adopted the “modern rule,” which treated refusal to plead as though it were a plea of not guilty. See An Act for further improving the Administration of Justice in Criminal Cases in England, 7 & 8 Geo. 4, ch. 28, § 2 (1827).


Whether the jurymen were knights does not appear. This case and one other recorded by Richardson and Sayles, id. at 121-22 (entry no. 122), are interesting because they were civil in nature. As Richardson and Sayles note: “The treatment of a defendant who refused to accept trial by jury is a question upon which a good deal of learning has been expended, but we do not recall that it has been considered in relation to civil actions.” Id. at clx (footnote omitted). The emphasis here is on juries of higher quality than usual, however, not on procedure.

Many reports of Year Book cases note juries chosen by consent of the parties, with-
of the Curia Regis Rolls includes a "perambulation"76 in 1203, consisting of knights to be chosen in equal number by each disputant.77 Flower notes, however, that the detailed instructions in this case "suggest that at the time it was a novel experiment."78 In ordinary cases, "[t]he justices did not expect too much of jurymen, and generally merely discharged an incompetent panel."79

Flower's last observation is interesting because of its implicit assumption that the justices considered it their responsibility to differentiate between competent and incompetent panels and to insist upon the former, even before the charter of 1300,80 which called for men who were "most sufficient, and least suspicious" to be jurors.81 Thus, in an early thirteenth-century plea of novel disseisin, the poverty of the jury caused it to be respited "so that knights and other free men may be appointed."82 Similarly, in a plea in Kent during the year 1202, after a jury was unable to resolve the disputed seisin, the court "ordered that other jurors be elected, because [the first jurors] are paupers and unworthy."83 And, according to Flower,

[d]ifficulties with regard to the selection of jurors did not diminish as time went on. As late as 1230 the roll has two consecutive entries relating to the inadequacy of the panels. In a Lincolnshire case their certificate was not accepted because none of those who came were knights . . . . In the neighbouring county of Cambridge every member of a jury was poor and incompetent.84

b. State trials. The medieval concern about the service of

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76 A "perambulation" was "a technique to fix the exact dimensions of an estate . . . performed by a number of people who lived in the area, neighbours, who walked all along the boundaries, so that they obtained a precise idea of what belonged to whom." R. Van Caemgen, supra note 68, at 77.

77 See Introduction to the Curia Regis Rolls, 1199-1230 A.D., supra note 68, at 57-58.

78 Id. at 58. Cf. id. at 441, where Flower mentions a case in 1230 decided by a "specially constituted" panel of "eight knights of Cornwall and eight lawful men of Devonshire."

79 Id. at 451.

80 Articuli super Cartas (Articles upon The Charters), 28 Edw., ch. 9 (1300); see infra Appendix.

81 Articuli super Cartas (Articles upon The Charters), 28 Edw., ch. 9 (1300).

82 Gloucestershire Eyre Rolls, supra note 70, at 30 (plea no. 90).

83 Select Civil Pleas 50 (W. Baldon ed. 1890) (plea no. 126) (brackets in original).

84 Introduction to the Curia Regis Rolls, 1199-1230 A.D., supra note 68, at 453 (footnote omitted).
knights on juries occurred in unexceptional cases. Later, in exceptional cases of importance to the government, it became commonplace to impanel "special" trial juries of "men of quality and substance." A brief survey of the decisions reported in the *State Trials* will illustrate this pattern. In scores of such cases, including some of the most notorious trials in English history, juries consisted of knights, esquires, or gentlemen.\(^{86}\)

\(^{86}\) Although not necessarily an exhaustive list, a thoroughly representative selection of cases follows. Cases of serious crime arising in the City of London and the County of Middlesex were tried at regular sessions held at Guildhall and at Justice Hall in the Old Bailey. Criminal jurisdiction of these sessions was founded on the three commissions applicable to all the judges on circuit—peace, gaol delivery, and oyer and terminer. See 3 W. Blackstone, *supra* note 3, at *58. References to trials held at these sessions are hereinafter cited as "Guildhall" and "Old Bailey." The cases are: Rex v. de Berkele, 1 State Trials 55, 56 (Parliament 1331) (murder of King Edward II; jury of knights); Rex v. Fisher, 1 State Trials 395, 399 (O. & T. at Westminster 1535) (high treason; jury of knights and esquires); Regina v. Abington, 1 State Trials 1141, 1143 (O. & T. at Westminster 1586) (high treason; jury of esquires and gentlemen); Regina v. Blunt, 1 State Trials 1409, 1409 (O. & T. at Westminster 1600) (high treason; jury of Aldermen of London and gentlemen); Rex v. Raleigh, 2 State Trials 1, 4 (O. & T. at Westminster 1603) (high treason; jury of knights and gentlemen); Rex v. Drewrie, 2 State Trials 357, 360-61 (Old Bailey 1607) (high treason; a "verie sufficient Iurie"); Rex v. Turner, 2 State Trials 929, 931 (K.B. 1615) (aiding and assisting a murderer; jury of knights, esquires, and freeholders); Rex v. Franklin, 2 State Trials 947, 947 (K.B. 1615) (murther; jury of esquires and gentlemen); Sindercome's Case, 5 State Trials 841, 844 (Upper Bench 1657) (high treason; jury of "gentlemen of worth and quality," separately described as "a very substantial company of men, most of them being justices of the peace," id. at 843 n.*); Rex v. Coleman, 7 State Trials 1, 3 (K.B. 1678) (high treason; jury of one baronet and esquires); Rex v. Ireland, 7 State Trials 79, 81 (Old Bailey 1678) (high treason; jury of baronets, one knight, esquires, and one gentleman); Rex v. Green, 7 State Trials 159, 161 (K.B. 1679) (murther; jury of baronets, knights, and esquires); Rex v. Wakeman, 7 State Trials 591, 595 (Old Bailey 1679) (high treason; jury of esquires and gentlemen); Rex v. Gascoigne, 7 State Trials 959, 966 (K.B. 1680) (high treason; jury of one knight and 11 esquires); Rex v. Palmer, 7 State Trials 1067, 1067 (K.B. 1680) (high treason; jury of baronets, esquires, and one gentleman); Rex v. Thwing & Pressicks, 7 State Trials 1161, 1163 (York assizes 1680) (high treason; jury of one baronet and gentleman); Rex v. Stapleton, 8 State Trials 501, 503 (York assizes 1681) (high treason; jury of knights and esquires); Rex v. Bushby, 8 State Trials 525, 528 (Derby assizes 1681) (high treason; 10 of the 12 jurors gentlemen); Rex v. Borosky, 9 State Trials 1, 14 (Old Bailey 1689) (murther; jury of one baronet, esquires, and gentlemen); Rex v. Grey, 9 State Trials 127, 127 (K.B. 1682) (debachery; jury of gentlemen); Rex. v. Sidney, 9 State Trials 817, 823 n.* (K.B. 1683) (high treason; entire panel of 89 names enumerated, all baronets, knights, esquires, or gentlemen); Rex v. Hampden, 9 State Trials 1053, 1061 (K.B. 1684) (high misdemeanor; jury of one baronet and esquires); Rex v. Rosewell, 10 State Trials 147, 157 (K.B. 1684) (high treason; jury of one baronet, knights, and esquires); Mossam v. Ivy, 10 State Trials 555, 555 (K.B. 1684) (title to tenements; a "special jury of the county of Middlesex" made up of baronets, knights, and esquires); Rex v. Johnson, 11 State Trials 1339, 1339-40 (K.B. 1686) (seditious libel; jury of knights and gentlemen); Duke of Norfolk v. Germaine, 12 State Trials 927, 927 (K.B. 1692) (trespass on the case for adultery; jury of knights and esquires); Rex v. Anderton, 12 State Trials 1245, 1245 (Old Bailey 1693) (high treason; jury of gentlemen); Rex v. Charnock, 12 State Trials 1377, 1379 (Old Bailey 1696) (high treason; panel called by sheriff of "above eight-score, and consisting of baronets, knights, esquires, and gentlemen");
Occasionally the court took part overtly in jury selection. The report of Lady Alice Lisle’s trial in 1685 for high treason notes that “it being a cause of great expectation and moment, the lord chief justice ordered the sheriff to take care, that a very substantial jury should be returned, of the best quality in the county.”

Regina v. Baynton, 14 State Trials 597, 597 (Q.B. 1702) (forcible taking; jury of gentlemen); Regina v. Lindsay, 14 State Trials 987, 990 (Old Bailey 1704) (high treason; jury of esquires); Regina v. Dammaree, 15 State Trials 521, 548 (Old Bailey 1710) (high treason; knight and five esquires among the 12 jurors); Rex v. Hendley, 15 State Trials 1407, 1411-12 (Rochester assizes 1719) (unlicensed preaching; one baronet and 10 esquires among the 12 jurors); Rex v. Francklin, 17 State Trials 625, 625 (K.B. 1731) (seditious libel; jury of esquires); Regina v. Dammaree, 15 State Trials 521, 548 (Old Bailey 1710) (high treason; knight and five esquires among the 12 jurors); Rex v. Francklin, 17 State Trials 625, 625 (K.B. 1731) (seditious libel; jury of esquires); Craig v. Earl of Anglesea, 17 State Trials 1139, 1139 n.* (Exchequer in Ireland 1743) (ejectment; “the jury (most of them) gentlemen of the greatest property in Ireland, and almost all members of parliament”).

In all of the foregoing cases, the State Trials reports specifically indicate the juror characteristics. In other cases, the reports name jurors without any indication of social status, but this fact alone does not prove that these jurors were not knights, esquires, or gentlemen. For example, in Rex v. Tasborough & Price, 7 State Trials 881, 881 (K.B. 1680) (suborning of perjury), the jurors named without indication of social standing included Charles Umphervile. In Rex v. Coleman, 7 State Trials 1, 3 (K.B. 1678) (high treason), “Charles Umfrevil, esq.” was a juror and in Rex v. Green, 7 State Trials 159, 161 (K.B. 1679) (murder), “Charles Humphrevile” was a juror and was designated an esquire. Very likely the same man served as a juror in all three cases. The jurors in Rex v. Tasborough & Price also included Thomas Earsby, Richard Paggett, and Edward Wilford. 7 State Trials at 881. All three men are shown as “esquires” in the jury list for the 1679 treason trial against Nathaniel Reading. Rex v. Reading, 7 State Trials 259, 267 (O. & T. at Westminster 1679).

It does not necessarily follow, of course, that merely because jurors are designated “knights, esquires, or gentlemen,” they were in fact men of quality or of substantial property. There may have been considerable looseness in the use of the terms, especially “esquires” and “gentlemen.” See, e.g., Rex v. Gascoigne, 7 State Trials 959, 966 (K.B. 1680) (high treason), where the jury consisted of one knight and 11 esquires despite the fact that “the best gentlemen stay at home.” (This case is discussed infra notes 94-98 and accompanying text.) Nonetheless most of the cases reported in the State Trials were sufficiently consequential to allow weight to be given to the designations of juror quality.

This was Lord Chief Justice Jeffreys, who never hesitated to speak his mind. He has been described by one critic as “this very worst judge that ever disgraced Westminster Hall.” E. Foss, supra note 13, at 369 (quoting Mr. Justice Foster). Foss added:

His [Jeffreys'] brutality in the examination of the witnesses in Lady Lisle’s case, the blasphemy of his imprecations, his unjust insinuations against the unfortunate prisoner in his summing up, the ferocious anxiety he evinced for her conviction, and the threats to the jury by which he enforced it, are truly disgusting, and were equalled if not surpassed in what we hear of all the subsequent trials.

Id. at 372.

Jeffreys was not always successful in manipulating juries to his liking. Commenting on Rex v. Hayes, 10 State Trials 307 (K.B. 1684), Bishop Burnet stated:

Jeffries pressed the jury, in his impetuous way, to find Hales guilty of high treason; because, tho’ there was not a witness against Hales, but only presumptions appeared upon the proof, yet, Jeffries said, it was proved by two witnesses that the letter was found in Armstrong’s pocket; and that was sufficient, the rest appearing by circumstances. The little difference between the writing in the letter and his ordinary hand, was said to be only a feint to hide it, which made him the more guilty. He required the
Whether instructions of this type destroyed or protected the rights of the defendant may have depended upon the character of the judge delivering the instructions.\textsuperscript{88}

When defendants requested substantial juries, they had mixed success. In his felony trial at the Croydon assizes in 1590, Puritan minister John Udall stated, “I do desire to be tried by an inquest of learned men; but seeing I shall not, I am contented to be tried by the ordinary course, as these men before me are, that is, as you use to say, by God and the country.”\textsuperscript{89} But in the proceedings

Jury to bring him in guilty: And said, that the King’s life and safety depended upon this trial: So that if they did it not, they exposed the King to a new Rye-Plot; with other extravagancies, with which his fury prompted him. But a Jury of merchants could not be wrought up to this pitch. So he was acquitted, which mortified the Court a little: For they had reckoned, that now Juries were to be only a point of form in a trial, and that they were always to find bills as they were directed.

1 G. BURNET, BISHOP BURNET’S HISTORY OF HIS OWN TIME 599-600 (London 1724).

\textsuperscript{88} Consider, for example, the following reassurances given in 1683 by Lord Chief Justice Pemberton to defendant Lord Russell about the absence of a freehold requirement for London jurors:

I must tell you, you will have as good a jury, and better than you should have had in a county, of 4l. or 40s. a year freeholders. The reason of the law for freeholds is, [t]hat no slight persons should be put upon a jury, where the life of a man, or his estate, comes in question; but in the city, the persons that are impanelled are men of quality and substance, men that have a great deal to lose.

Rex v. Russell, 9 State Trials 577, 594 (Old Bailey 1683). At the time, Pemberton was Lord Chief Justice of Common Pleas. \textit{See id.} at 580 n.*; E. Foss, supra note 13, at 508.

Pemberton was acknowledged to be an excellent judge, even if somewhat egocentric and independent.

Compare with the Pemberton example the following report of the exchange between Lord Chief Justice Scroggs and the Staffordshire sheriff at the beginning of the trial of Andrew Brommich for high treason for “being a Romish Priest”:

The Lord Chief Justice having the night before charged the sheriff to return a good jury, and the court being sat, he enquired of him if he had observed his directions; the sheriff acquainted his lordship, that since he had impannelled the said jury, he had heard that one [ ] [sic] Allen, of [ ] [sic] in the said county, being then returned to serve on the said jury, had said in discourse with some of his fellows, that nothing was done against the popish priests above, and therefore he would do nothing against them here, nor find them guilty; whereupon his lordship called for the said Allen and one Randal Calclough, one of his fellow jurors, and another witness upon oath, who proving the words against him, his lordship discharged him of the jury, and committed him to prison till he found sureties for his good behaviour; and likewise three more of the jury were discharged upon suspicion of being popishly affected, his lordship commanding the sheriff to return good men in their places; which was accordingly done . . . .

Rex v. Brommich, 7 State Trials 715, 715-19 (Stafford assizes 1679). According to Foss, “[t]he obloquy which is attached to the name of Scroggs may serve as a warning to every man to avoid obsequiousness to those from whom favour flows.” E. Foss, supra note 13, at 597. Ultimately Scroggs was undone by his own “gross partiality and brutal conduct.” \textit{Id.} at 699.

\textsuperscript{89} Regina v. Udall, 1 State Trials 1271, 1277 (Croydon assizes 1590). See also the 1303 Year Book case discussed by Sir James Stephen, in which a defendant unsuccessfully protested “that he was a knight, and his jurors were not his equals, not being knights.” 1 J.
against William Acton for murder in 1729, the crown solicitor unsuccessfully sought to avoid drawing a second jury from the same panel that had produced a jury that acquitted Acton in his first trial. Defense counsel’s response to the crown solicitor’s attempt was that “[t]he other pannel cannot write; these are men of ability and experience.”

Further, in the trial of the elderly Sir Thomas Gascoigne, baronet, for high treason, Gascoigne requested “a jury of gentlemen, of persons of my own quality, and of my own country, that may be able to know something how I have lived hitherto,” to which Lord Chief Justice Scroggs replied: “Tell him he shall have a good jury of gentlemen of his own country.” The jury sworn consisted of one knight and eleven esquires, despite the following colloquy during the impaneling process:

\[\text{Att. Gen.}^{[97]} \text{I perceive the best gentlemen stay at home.}\]
\[\text{Serj. Maynard. Yes, it is so small a business.}^{[88]}\]

Occasionally the responsibility for the quality of a jury was laid at the feet of a defendant who exercised too many challenges. Judge Francis Bacon, in conducting the trial of Connor, Lord Macguire, for high treason, observed: “He [the defendant] hath spent three days this term already, this is the fourth: we would have proceeded now, but for his peremptory challenge; but if we stay till tomorrow, he must be content to be tried by a meaner jury.”

The cases in the State Trials demonstrate that, in cases of national importance, jury panels of well-bred men were returned almost as a matter of course. Although the precise dynamics remain obscure except in those few instances of overt directions from

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- Rex v. Acton, 17 State Trials 511 (Surrey assizes 1729).
- Id. at 511. Acton was the deputy keeper of the Marshalsea Prison. The crown prosecuted Acton for the alleged murders of four prisoners. Acton was found not guilty in each case. Rex v. Acton, 17 State Trials 545, 562 (Surrey assizes 1729); Rex v. Acton, 17 State Trials 525, 544 (Surrey assizes 1729); Rex v. Acton, 17 State Trials 511, 524 (Surrey assizes 1729); Rex v. Acton, 17 State Trials 461, 510 (Surrey assizes 1729).
- Presumably, the different panel sought by the solicitor for the crown.
- Acton, 17 State Trials at 511.
- Rex v. Gascoigne, 7 State Trials 959, 963 (K.B. 1680).
- Id.
- Id. at 966.
- Sir Creswell Levinz. He later became a judge of the Court of Common Pleas where he was “respected for his legal knowledge and upright conduct.” E. Foss, *supra* note 13, at 406.
- 7 State Trials at 966.
- Rex v. Macguire, 4 State Trials 663, 665 (K.B. 1645). Judge Bacon was distantly related to the much more famous Francis Bacon of a generation previous.
the crown or court, it is clear that the sheriff was the key to the impaneling process. Customarily he decided how large a panel should be returned in crown cases\textsuperscript{100} and who should be on the panel.\textsuperscript{101} Jury composition could be influenced in this manner much more effectively than by statutory property qualifications. The practice did not necessarily produce juries predisposed toward guilty verdicts,\textsuperscript{102} but it may have tended in that direction. The commoner was not convinced that a jury of men of quality "chosen" by the impaneling officer secured a fair trial, despite the availability of challenges; he was more apt to suspect that such jurymen were partial toward the crown.\textsuperscript{103} This was true of both petit\textsuperscript{104} and grand juries,\textsuperscript{105} in trials at Westminster Hall\textsuperscript{106} and on

\begin{enumerate}
\item In civil cases the regular jury panel consisted of 24 names. See M. \textsc{Dalton}, \textit{supra} note 22, at 316. But because of the large number of potential challenges, much larger panels were returned in criminal cases. \textit{See, e.g.}, Rex v. Charnock, 12 State Trials 1377, 1390 (Old Bailey 1696) (defendants exercised 33 challenges before jury impaneled); Rex v. Sidney, 9 State Trials 817, 823 n.* (K.B. 1683) (89-man panel).
\item The admonitions to sheriffs by Lord Chief Justice Jeffreys in Lady Alice Lisle's case, \textit{see supra} text accompanying notes 86-87, and by Lord Chief Justice Scroggs in the trial of Andrew Brommich, \textit{see supra} note 88, illustrate the court's reliance on the sheriff to return the right kind of jurors. It is also clear that sheriffs exercised wide discretion in returning jurors for unexceptional trials. For example, in Ashfield v. Dawling, Gray's Inn MS 34, fol. 396 (Upper Bench 1658), a verdict was set aside because after the Sheriff had returned a Jury, the party for whom the verdict was given came to the Sheriff and told him that Booth[,] one whom he had returned[,] was resolved not to find for him and would starve first[,] as Booth had declared, and [he] desired him to put him out, which accordingly the Sheriff (taking it for good Cause) put him out, and put in of his own Head one Cole, which Cole did not serve because 12 besides appeared. \textit{Id.} The influential role of the sheriff continued well into the nineteenth century. \textit{See} H.C. \textsc{Select Comm. on Special and Common Juries}, \textit{supra} note 13, at 3, 31.
\item \textit{See, e.g.}, \textit{supra} note 87.
\item This attitude finds support across several centuries. Defending himself against a libel charge, John Horne cast many aspersions on special jury practice, including:
\begin{quote}
The best men and the worst men are sure to attend upon a special jury where the crown is concerned; the best men, from a nice sense of their duty; the worst men, from a sense of their interest. The best men are known by the Solicitor of the Treasury: such an one cannot be in above one or two verdicts; he tries no more causes for the crown. There is a good sort of a man, who is indeed the most proper to try all this kind of causes; an impartial, moderate, prudent man, who meddles with no opinions. That man will not attend; for why should he get into a scrape? He need not attend; he is sure not to be censured; why should he attend? The consequence follows, that frequently only four or five men attend, and those such as particularly ought not to attend in a crown cause.
\end{quote}
\item As Cockburn notes: "If Chamberlain is to be believed, Edmund Peacham's conviction at the Somerset assizes in 1615 was ensured by drafting seven knights, all apparently local magistrates, to serve on the petty jury." J. \textsc{Cockburn}, \textit{supra} note 23, at 115 (footnote omitted). John Chamberlain, an Englishman, was "an accomplished scholar and an admirable letter-writer," who lived from 1553 to 1627. 4 \textsc{The Dictionary of National Biography} 2
assize.\textsuperscript{107} Indeed, accusations of jury-packing invariably accompanied trial by jury, of whatever kind.\textsuperscript{108}

3. \textit{Specific Traditions Requiring Jurors of High Social Standing.} Parliamentary legislation and efforts by the court, the crown, and the parties show a long history of concern for ensuring able jurors. In addition, it was well established that specific types of cases or inquests required juries consisting wholly or partially of "men of quality."\textsuperscript{109}

\footnotesize{(L. Stephen & S. Lee eds. 1921-1922) (entry by T. Cooper).}

\textsuperscript{106} \textit{See infra} note 107.

\textsuperscript{107} For example, in Rex v. James, 6 State Trials 67 (K.B. 1661), a report of the trial written by James's friends states:

\begin{quote}
[B]etwixt the commitment and trial . . . John James received a letter from a person of note, to advertise him that there was such a jury of life and death impannelled to proceed upon him, as had not been for many years before, being all picked men, and most of them knights and gentlemen; and that if he did not except against them, or most of the chief of them, he was a dead man.
\end{quote}

\textit{Id. at 75-76}.

\textsuperscript{108} Cockburn asserts that "[f]rom the 1640s onwards assizes increasingly came to resemble a political forum in which judges and local factions lobbyed for support and competed openly for control of the grand jury," and that "[i]n this environment jury packing became a standard political tool." J. Cockburn, \textit{supra} note 23, at 116 (footnote omitted).

\textsuperscript{109} For representative examples, see Regina v. Tutchin, 14 State Trials 1095, 1099 (Guildhall 1704); Rex v. Lewis, 7 State Trials 249, 249-50 (Monmouth assizes 1679); The Trials of Twenty-Nine Regicides, 5 State Trials 947, 985 n.* (Old Bailey 1660); Penruddock's Case, 5 State Trials 767, 773 (O. & T. at Exeter 1653); Regina v. Throckmorton, 1 State Trials 869, 871 (Guildhall 1654); J. Astry, \textit{supra} note 20, at 27; [A. Booth], \textit{supra} note 19, at 77; \textit{Select Cases in Chancery} 21 (W. Baildon ed. 1899) (entry no. 19); L. Spooner, \textit{supra} note 22, at 148-49; \textit{20 Year Books of Edward II}, at 152 (M. Legge & W. Holdsworth eds. 1934) (entry no. 56, Anonymous, Y.B. Mich. 10 Edw. 2 (1316)); \textit{Remarks on Fitzharris's Trial}, by Sir John Hawles, Solicitor General to King William the Third, 8 State Trials 425, 435-36 (1681).

\textsuperscript{101} The best known category hardly requires mention—trials of peers. Magna Carta secured to every free man the right not to be deprived of liberty or property "but by the lawful Judgment of his Peers." 9 Hen. 3, ch. 29 (1225). This principle was already in place under Henry I, see F. Palmer, \textit{Peerage Law in England} 146 (1907); 1 F. Pollock & F. Maitland, \textit{supra} note 44, at 409, but it did not necessarily guarantee to earls and barons since the king's judges also could be viewed as peers, \textit{id. at} 409-10. Bracton, however, pointed out that in cases of high treason and felony, the king was the prosecutor, and a baron or earl should not be judged by the king's own representatives, his justices. 2 Bracton on the \textit{Laws and Customs of England}, \textit{supra} note 66, at 337. In this way, trial by other barons and earls came to be established for these cases. 1 F. Pollock & F. Maitland, \textit{supra} note 44, at 410.

\footnotesize{\textsuperscript{108} For example, in Rex v. Audley, 3 State Trials 401, 402 (Wiltshire assizes 1631); \textit{see} 2 W. Hawkins, \textit{supra} note 40, at 425. The principle extended to misprision of treason or felony, \textit{id.}, but did not apply to \textit{appeals} of felony, that is, to private civil actions involving accusations of felonious behaviour, \textit{id.}; 4 W. Blackstone, \textit{supra} note 3, at *308-12.}

In civil actions and misdemeanors, peers have been tried by the country. For a long
The grand assize. A defendant in possession of disputed land could invoke the grand assize as an alternative to trial by battle.\footnote{110} The grand assize was distinguished by its special composition and method of selection. As stated by C.T. Flower, "[t]he mere fact that the jurors had to be knights gave the grand assize a pre-eminence, since freedom was a sufficient qualification for jurors under the possessory assizes."\footnote{111} Pollock and Maitland make clear that the jury in the grand assize was, originally at least, only the twelve knights impaneled—the four knights who selected them did not participate in the verdict.\footnote{112} Assembling four knights as selectors and twelve knights as jurymen was no simple task,\footnote{113} but the requirements were flexible. Even in the formative years of the grand assize, it is noted in Glanvill that

> with the consent of the parties, the court may award that, although all four knights have not come, one of them may elect the twelve by joining with two or three other knights of the

while, peers had the right to insist that there be at least one knight on the panel of jurors returned, whether the peer be plaintiff or defendant. See, e.g., R. Brownlow, \textit{Declarations and Pleadings in English Law} 64 (3d ed. London 1659) (1st ed. London 1653-1654); T. Powell, \textit{The Attourney's Academy} 72-73 (London 1647). Parliament eliminated this privilege by statute in the eighteenth century. An act for the better regulation of trials by jury, 24 Geo. 2, ch. 18, § 4 (1751) (citing "great delays . . . in trials, where a peer or lord of parliament is party, by reason of challenges to the arrays of panels of jurors, for want of a knight's being returned") (emphasis omitted).

\footnote{110} "A grand assize is composed of twelve lawful knights of the district in which the disputed tenement lies, who have been chosen in the presence of the justices by four knights, who have been chosen by the sheriff." 2 F. Pollock & F. Maitland, \textit{supra} note 44, at 621 (footnote omitted). For additional descriptions of the grand assize, see 1 W. Holdsworth, \textit{A History of English Law} 327-29 (7th ed. 1956); 1 Reeves' \textit{History of the English Law} 394-401 (W. Finlason ed. 1880).

\footnote{111} Henry II created the grand assize and made it available to a tenant-defendant sued under a writ of right. See W. Dugdale, \textit{Origines Juridicales} 73 (London 1666); 1 F. Pollock & F. Maitland, \textit{supra} note 44, at 147. See generally Russell, \textit{I Trial by Battle and the Writ of Right}, 1 J. Legal Hist. 111 (1980) (discussing the writ of right as a form of trial by battle).

\footnote{112} \textit{Introduction to the Curia Regis Rolls}, 1199-1230 A.D., \textit{supra} note 68, at 130. Flower was speaking of the early part of the thirteenth century; thus, the property qualification of the Statute of Westminster II, 13 Edw., ch. 38 (1285), had not yet become a requirement for common jurors in the possessory assizes.

\footnote{113} 2 F. Pollock & F. Maitland, \textit{supra} note 44, at 621 n.1. See \textit{supra} note 110.

\footnote{114} Flower describes a case from 1200 to illustrate this problem, which was exacerbated by the normal defaults and delays attending the litigation of the era. \textit{Introduction to the Curia Regis Rolls}, 1199-1230 A.D., \textit{supra} note 68, at 130-32. See also 1 Reeves' \textit{History of the English Law}, \textit{supra} note 110, at 398-99 (describing delays inherent in assize procedures).
same county if any such can be found in court, even if they were not summoned for that purpose.\footnote{115}

Much later, in his Commentaries Upon Original Writs, William Hughes described a case in which the sheriff returned two knights and two serjeants as selectors, because “there were not more Knights within the County who were not of affinity to the one [party] or to the other.”\footnote{116} Acknowledged to be an insufficient return, the court allowed it to stand \textit{ex assensu partium},\footnote{117} with Hughes adding “and yet it was conceived, that if the Sheriff had returned Gentlemen, and called them Knights, it was sufficient, and not traversable whether they were Knights or not.”\footnote{118}

Over time, the grand assize atrophied, but it was not formally abolished until the nineteenth century.\footnote{119} Both in terms of the unusual quality of the jurors and the special selection procedure, the grand assize can be viewed as an antecedent to the later development of the special jury.

\textbf{b. Attaint.} From the thirteenth to the sixteenth centuries, the writ of attaint hovered over common jurors in civil actions, admonishing them to behave honestly. The attaint “consisted in summoning a jury of twenty-four, and the proceedings were not merely a reconsideration of the facts in dispute, but also a criminal trial of the first jury for perjury.”\footnote{120} If found guilty, the original jury faced severe punishment: “They were imprisoned for a year, forfeited their goods, became infamous, their wives and children were turned out, and their lands laid waste.”\footnote{121}

\footnote{115} GLANVILL, supra note 66, at 32. In Glanvill, it is urged that six or more knights be summoned for safety, and in general it is urged that “it is far better to rely on the discretion of the court than to insist on the settled law and custom of the court.” \textit{Id.} Later writers adopted this passage from Glanvill. \textit{See}, e.g., W. DUGDALE, supra note 111, at 73.

\footnote{116} W. HUGHES, \textit{The Commentaries Upon Original Writs} 67 (London 1655).

\footnote{117} \textit{Id.} That is, by or with the consent of the parties.

\footnote{118} \textit{Id.}; \textit{see also} J. KENNEDY, supra note 4, at 121 (noting a case in which the requirement that the sheriff return four knights was not strictly followed). Alternatively, an accepted practice allowed knights to be summoned from a neighboring shire or county if there were an insufficient number available locally. Such knights, however, could serve only if they owned land in the shire or county to which they were summoned. \textit{See} M. DALTON, supra note 22, at 313; W.J., \textit{The Common and Statute Law of England Concerning Trials in High-Treason, Misprision of Treason, and in All Other Crimes and Offences Relating to the Crown} 234 (London 1710).

\footnote{119} 1 W. HOLDSWORTH, supra note 110, at 329. The statute abolishing real actions eliminated the grand assize. An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto, 3 & 4 Will. 4, ch. 27, \textsection{} 36 (1833).

\footnote{120} T. PLUCKNETT, \textit{A Concise History of the Common Law} 131 (5th ed. 1956).

\footnote{121} 1 W. HOLDSWORTH, supra note 110, at 341.
The relevance of the attaint to this study lies again in the special quality of the attaint jurors. Fortescue observed that the jurors of attaint were to be persons "having much greater patrimony than the first jurors," and the statutory property qualifications support his statement. In 1436 Parliament passed a requirement that attaint jurors each possess a twenty-pound freehold in cases involving pleas of land worth more than fifteen shillings or pleas of personalty worth more than forty pounds. City and borough courts were excepted, but near the end of the fifteenth century, Parliament required attaint jurors in London to have £100 real or personal property. During the first half of the sixteenth century, the various property-holding requirements for attaint jurors were reduced somewhat, but they remained substantially higher than the requirements for common jurors.

c. The grand jury. The accepted wisdom of the law writers of the seventeenth century held that members of the grand jury were

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122 It is not necessary for my purposes to trace the history of the writ or its scope. Suffice it to say that the writ was largely obsolete by the late sixteenth century, and by the mid-eighteenth century Lord Mansfield described it as "a mere sound." Bright v. Eynon, 1 Burr. 391, 393, 97 Eng. Rep. 365, 366 (K.B. 1757). The writ was formally abolished in 1825. See An Act for consolidating and amending the Laws relative to Jurors and Juries, 6 Geo. 4, ch. 50, § 60 (1825). See generally W. Holdsworth, supra note 110, at 337-42 (discussing attaint procedure). The writ was never applicable to criminal actions, and authorities differ about the types of civil actions to which the writ attached. See Glanvill, supra note 66, at 36 n.1; W. Holdsworth, supra note 110, at 337-40; Select Cases of Procedure Without Writ Under Henry III, supra note 74, at lxxxvii-lxxxix. In early cases, attaint jurors were knights. For an example of a distingas of 24 knights in an attaint, see R. Brownlow, Writs Judiciall 30 (London 1653). William Sheppard, however, described the attaint jurors merely as "twenty four sufficient Gentlemen of the Countrey." W. Sheppard, An Epitome of all the Common & Statute Laws of this Nation, Now in Force 121 (London 1656). This is corroborated by Hughes's statement that "the Writ of Attaint is 24 Milites [knights], and yet if the Return be Generosos [gentlemen], it is good." W. Hughes, supra note 116, at 67. Statute of 15 Hen. 6, ch. 5 (1436-37). Three years later, Parliament enacted a special rule for Kent, allowing a £20 leasehold or nonfreehold to qualify. Statute of 18 Hen. 6, ch. 2 (1459).

124 Statute of 15 Hen. 6, ch. 5 (1436-37).

125 An Act agaynst Perjurye, 11 Hen. 7, ch. 21, § 1 (1495).

126 As of 1531, an attaint juror was qualified by a freehold worth 20 marks per year for cases involving neither a capital offense nor less than £40 in dispute. See An Acte concerninge pjurie & punysshement of untreue verdictes, 23 Hen. 8, ch. 3, § 1(o) (1531-32). For disputes concerning amounts in controversy less than £40, the qualification was freehold worth five marks per year or personalty worth 100 marks. Id. § 3. The old (higher) standard remained in effect for capital offenses.

In 1545, 400 marks personalty were made equivalent to 20 marks freehold for jurors serving in the royal courts while sitting in London. An Acte that such as have goods to CCC marks maye passe in Attaints, 37 Hen. 8, ch. 5 (1545).
generally men of "Great Worth," who were "ingenious and learned." Zachary Babington observed that grand jurors might be "called Grand in respect of the quality of their Persons, and greatness of their Estates, ability of their Judgments (being of good Education)."

Doubtless these characteristics were present on occasion, such as in cases reported in State Trials. For example, in Rex v. Messenger, the defendants were indicted after "having been several times examined, upon confession of some, and pregnant proof against others, by a special jury of several knights, esquires and gentlemen, of very great worth and esteem, of the county of Middlesex." Similarly, Bishop Burnet describes the grand jury that shocked the court by returning an ignoramus bill against Lord Shaftesbury as having been "composed of many of the chief citizens of London."

Nevertheless, after extensive research on sixteenth- to early eighteenth-century assize calendars, Cockburn concludes that Blackstone's contention that grand juries in his day usually consisted of "gentlemen of the best figure in the county" is not true of earlier centuries. Respected local freeholders—those "sufficient inhabitants" on whom community service as tithingmen, constables, and coroners rested so heavily—with a leavening of junior magistrates and lesser

128 A GUIDE TO ENGLISH JURIES 143 (London 1682).
130 Z. BABINGTON, supra note 66, at 5 (emphasis in original). See also J. ASTRY, supra note 20, at 5 (echoing Babington's observation); [J. HAWLES], THE GRAND-JURY-MAN'S OATH AND OFFICE EXPLAINED 2 (London 1680) (describing grand jurors as men who "ought to be Persons of more than ordinary Account, Estates, Understanding"); [J. SOMERS], THE SECURITY OF ENGLISH-MENS LIVES 14 (London 1681) (describing grand jurors as "of the most honest, and most sufficient for Knowledge, and Ability of Mind and Estate").
131 6 State Trials 879 (Old Bailey 1668).
132 Id. at 879.
133 If the grand jury found the evidence insufficient to indict, the accepted practice of the time was to return the bill of indictment marked "ignoramus," meaning "we know nothing of it." 1 J. CHITTY, supra note 40, at 324.
134 Rex v. Shaftesbury, 8 State Trials 759 (Old Bailey 1681).
135 1 G. BURNET, supra note 87, at 508 (emphasis in original). Upon the return of the bill, pandemonium broke out among the spectators, causing the Attorney General to remark: "[L]et it be recorded this hollowing and hooping in a court of justice." 8 State Trials at 821. In the view of Sir John Hawles, the jury "did like honest understanding gentlemen." REMARKS ON THE EARL OF SHAFTESBURY'S GRAND JURY, BY SIR JOHN HAWLES, SOLICITOR GENERAL IN THE REIGN OF WILLIAM III, 8 STATE TRIALS 835, 842. Hawles observed further that the serious business of the grand jury is "composed of more substantial and understanding men than a petit jury." Id. at 839.
gentlemen would perhaps describe more adequately the composition of sixteenth- and seventeenth-century grand juries. Other recent work on the grand jury confirms Cockburn’s conclusion. If these assessments of grand juror quality are accepted, the panels would appear to represent a stratum of society roughly comparable to that drawn upon in the late seventeenth and early eighteenth centuries for special juries.

C. Juror Qualifications: Special Knowledge or Expertise

Jurors with qualifications other than minimum property holdings traditionally were impaneled in certain types of cases. Jurors in these cases have been “special,” even if not so called, because they were selected for their particular knowledge or expertise. During the late eighteenth century, for example, special juries of merchants well-versed in mercantile customs helped Lord Mansfield articulate and order principles of commercial law. Mansfield’s use of the jury as a resource of particular knowledge was not new. As Thayer states, “[w]hat we call the ‘special jury’ seems always to have been used. It was a natural result of the principle that those were to be summoned who could best tell the fact, the veritatem rei.” These earlier juries included not only jurors supposedly knowledgeable of the facts in dispute, but also jurors supposedly having special expertise or understanding. Both types of cases are illustrated below.

1. Hundredors. Originally, jurors were presumed to know the facts in dispute because they were residents of the vicinity where the dispute arose. The early statutes called for jurors who were “next Neighbours,” those who “have best Knowledge of the Truth, and be nearest.”

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136 J. COCKBURN, supra note 23, at 112-13 (footnotes omitted).
138 See supra note 13.
139 J. THAYER, supra note 4, at 94.
140 Articuli super Cartas (Articles upon the Charters), 28 Edw., ch. 9 (1300).
141 Statute of 42 Edw. 3, ch. 11 (1368). Occasionally the vicinage requirement inspired arguments resembling motions for a change of venue. In 25 YEAR BOOKS OF EDWARD II, at 119-20 (J. Collas ed. 1964) (Paues v. Fraunceys, Y.B. Trim. 12 Edw. 2 (1319)), a wardship case is reported involving the tender of marriage at a fixed time in Somerset, allegedly to one John Fraunceys during his minority. Fraunceys asserted that he was then of age. Plaintiff’s attorney argued that the writ alleged a tender of marriage in Somerset and “therefore we ought to have a jury of the country in the county of Somerset.” Id. at 120. But, agreeing
In time, the concept that all jurors be “next Neighbours” proved unworkable. The diluted variation that arose required that each common jury contain a certain number of “hundredors.” The term “hundred” escapes uniform definition, but historically it refers to a subdivision of a county, measured either by a number of villages or by population. According to Dalton, “hundredors be men impannelled, or fit to be impannelled upon a Jury for any Controversie, and dwelling within the Hundred where the Land lieth, which is in question, &c. whereby they (by intendment of Law) may have Notice de rei veritate, or better knowledge of the Cause.”

Coke reported that common law required four hundredors to be on a jury “in a plea reall, mixt, and personal.” The statute of 35 Hen. 8, ch. 6 (1543-44) altered this rule by requiring that six hundredors be returned on nisi prius panels, if available “within the saide hundred where the Venewe lieth.” During Elizabeth’s reign, Parliament decreed that the appearance of two hundredors would suffice in trials of personal actions. In 1705 Parliament eliminated altogether the requirement of hundredors for civil cases.

with the defendant Fraunceys, the court held that “none can have such good knowledge of whether he was of full age at that time as those who have knowledge of his birth; and so you shall have a jury of the county where he was born etc.”

142 See 3 W. BLACKSTONE, supra note 3, at *360; E. COKE, supra note 17, § 234, at 157a.
143 According to Sir Thomas Smith:
An hundred, or lath, rape, or wapentake be called of the divisions or partes of shires in divers countries diversly named after the manner and language of each countrey. For the shires be divided some into x. xii. xiii. xvi. xx. or xxx. hundreds, more or lesse, either that they were at the first C. townes and villages in eche hundred: and although now they be but xvi. xx. xxx. xl. l. lx. more or lesse, yet it is still called an hundred, or else there were but so many at the first as be nowe, or a fewe more or lesse, and they did finde the king to his warres an hundred able men.

T. SMITH, supra note 51, at 81.
144 M. DALTON, supra note 22, at 315.
145 E. COKE, supra note 17, § 234, at 157a.
146 An Acte concerninge thapparaunce of Jurors in the Nisi Prius, 35 Hen. 8, ch. 6 (1543-44).
147 Id. § 1.
148 An Act for the Returninge of sufficient Jurors and for the better Expedicion of Trials, 27 Eliz., ch. 6, § 5 (1584-85).
149 An Act for the Amendment of the Law and the better Advancement of Justice, 4 & 5 Anne, ch. 3, § 6 (1705) (citing “great Delays . . . by reason of Challenges to the Arrays of Pannels of Jurors and to the Polls for Default of Hundredors”).

Before the 1705 enactment, there were some limitations on challenges for default of hundredors. Juries in treason and felony trials were to be drawn from the shire where the acts were laid, but no challenge was “to be had for the Hundred.” F. PULTON, De PACE REGIS ET REGNI 242a (London 1610). Coke noted that in attaints, “although the Jury is double, yet the Hundredors are not double.” E. COKE, supra note 17, § 234, at 157a. Shep-
Of special interest to this study are the cases in which one party challenged the jury for want of hundredors after both parties had formed the jury through the struck jury procedure. Some judges were naturally irked to receive such a challenge when hundredors on the panel had been struck off the panel by one of the parties. During the seventeenth century, the King's Bench allowed two such challenges, but the Court of Exchequer ruled otherwise. Chief Baron Hale stated that "[i]t is against the common course to take a challenge for want of hundredors...where there are but twenty-four left by the parties themselves." Later, in the 1724 decision of Rex v. Burridge, the King's Bench held that when the parties consented to the rule for a special jury, they impliedly waived their rights to challenge for want of hundredors.

pard stated that 12 of the 24 attaint jurors must be of the hundred, W. SHEPPARD, supra note 123, at 121, but according to Finch, four hundredors would suffice even in an attaint jury, H. FINCH, LAW: OR, A DISCOURSE THEREOF, IN FOURE BOOKS 410 (London 1636).

Even the watered-down requirement for ordinary civil cases in Elizabeth's time annoyed some judges. For example, at the Norfolk summer assizes in 1658, Atkins, J. denied a challenge for want of hundredors, apparently on the seemingly inapplicable ground that the challenge should have been to the polls and not to the panel. Gray's Inn MS 34, fol. 406; see infra note 251 for an explanation of the distinction between challenges to the polls and those to the panel. In Benson v. Dawson, at the York assizes in the mid-seventeenth century, a panel was challenged because two hundredors did not appear at trial, though they were returned in the panel; "and it was now allowed a good challenge, but the Judg [sic] said he will not do it again, for this will overthrow most of the tryalls." [J. CLAYTON], REPORTS AND PLEAS OF ASSIZES AT YORKE 130 (London 1651).


Burridge, 2 Ld. Raym. at 1366, 92 Eng. Rep. at 390. Thus the court was able to distinguish its seventeenth-century decisions, supra note 150 and accompanying text, because in those cases the court had ordered struck juries without the consent of the parties, see 2 Ld. Raym. at 1366, 92 Eng. Rep. at 390. For a discussion of the circumstances in which consent was required, see infra notes 365-81 and accompanying text.

Counsel for Burridge cited the practice in Common Pleas to issue a rule for a special jury only after the parties had agreed not to challenge for want of hundredors, arguing that, by negative inference, the Common Pleas admitted a right in the parties to challenge whenever that right had not been expressly waived. 2 Ld. Raym. at 1365, 92 Eng. Rep. at 389. The King's Bench rejected this theory, expressing annoyance at the defendant's challenge as "a concerted contrivance, only to put off the trial." Id. at 1366, 92 Eng. Rep. at 390. One report recited that the defendant had advanced this challenge "with an air of insolence." 8 Mod. at 246-47, 88 Eng. Rep. at 176. Strange reported the court's blunt response to the defendant's challenge as: "This is a plain contempt." 1 Str. at 593, 93 Eng. Rep. at 720.

Another report noted that the court "was of the opinion, that the defendant was guilty of a premeditated contempt." 8 Mod. at 247, 88 Eng. Rep. at 176.
Reports of *Rex v. Burridge* give no indication that either the court or the parties sought a special jury of experts. Assuming the struck jury request was genuine and not a delaying tactic by counsel, the parties probably sought a jury of gentlemen. Clearly the parties had not sought special expertise through hundredors. By the mid-sixteenth century, it was fanciful to view the hundredor requirement as likely to produce jurymen who were "experts" in the sense of being especially knowledgeable about the facts in dispute. Arguably the requirement never had this effect, but was merely a transitional device preserving the appearance of the old jury of witnesses while the jury assumed its new role of deciding the facts based on evidence presented in court.

2. *Jurors in Trials of Aliens, Clerics, and Others.* Another specially constituted jury long present in the law pertained to trials of aliens or foreigners. An alien had the right in most cases to request a trial *de medietate linguae*. Thayer states that "[t]he jury of the ‘half-tongue,’ *de medietate linguae*, was founded on considerations of policy and fair dealing, rather than a wish to provide a well-informed jury." Undoubtedly the concept was akin to the sentiment expressed by Sir Thomas Gascoigne in his request for "a jury . . . of my own country, that may be able to know something how I have lived hitherto."

The tradition was old and varied and was not limited to the royal courts. Parliament provided an early articulation of the principle in the following 1354 enactment:

And that in all Manner of Inquests and Proofs which be to be taken or made amongst Aliens and Denizens, be they Merchants or other, as well before the Mayor of the Staple as before any other Justices or Ministers, although the King be

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104 The case involved only a misdemeanor charge against the former Mayor of Tiverton for his alleged failure to appear on the day appointed for the election of his successor. 2 Ld. Raym. at 1364, 92 Eng. Rep. at 389.
105 See *supra* note 153.
106 The idea that by being neighbors to the event jurors would know the facts was tenacious, finding repeated expression well into the eighteenth century. See, e.g., J. Astry, *supra* note 20, at 31.
107 Trials "*de medietate linguae*" were trials "of the half tongue," or trials in which one party was an alien whose native language was not English. The statutory property qualifications for jurors were not applicable to alien jurors who served in such cases, see *infra* notes 160-79 and accompanying text, because aliens would not be freeholders. See statute of 8 Hen. 6, ch. 29 (1429); *The Complete Jurymen*, *supra* note 4, at 146-47.
109 *Rex v. Gascoigne*, 7 State Trials 959, 963 (K.B. 1680); see *supra* text accompanying notes 94-98.
Party, the one half of the Inquest or Proof shall be Denizens, and the other half of Aliens, if so many Aliens [and Foreigners] be in the Town or Place where such Inquest or Proof is to be taken . . . .

The statutory reference to the Mayor of the Staple reveals antecedents from the law merchant. An inquest before the staple courts "was to consist wholly of aliens when both parties to the suit were aliens; wholly of denizens when both parties were denizens; and half of aliens and half of denizens when one party was an alien and the other a denizen." And, as Hubert Hall observed, "[t]hese juries of 'the half tongue' were no new expedient, for even Jews had long ago received this right.

There were other variants. Mary Bateson identified fourteenth-century borough customs calling for a jury of which half of

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160 Statute of 28 Edw. 3, ch. 13 (1354) (brackets contained in 1 Statutes of the Realm 348 (1816); compilers direct readers to omit bracketed words, id. at n.10). For representative early cases of such trials, see 7 Select Cases in the Court of King's Bench 90-91 (G. Sayles ed. 1971) (plea no. 46, Hil. 1397); 2 Select Cases in the Exchequer Chamber Before All the Justices of England 96, 100 (M. Hemmant ed. 1948) (entry no. 29, Lombards v. Taillour, Pasch. 1485). The form of the venire facias in use during the early seventeenth century is shown in R. Brownlow, supra note 109, at 455-56; R. Brownlow, supra note 123, at 155.

161 One year previous, Parliament had enacted a series of provisions applying aspects of the law merchant to staple towns, including the "medietate linguae" principle. See Ordinacio Stapularum (The Ordinance of the Staples), 27 Edw. 3, Stat. 2, ch. 8 (1353). Forsyth points out that the commonly held view that the origin of trial de medietate dates to the reign of Edward III is mistaken—evidence of the concept exists in a charter of Edward I. W. Forsyth, supra note 4, at 228. Forsyth was referring to the Carta Mercatoria of Edward I, discussed in 2 F. Pollock & F. Maitland, supra note 44, at 624 n.3; see infra note 198 and accompanying text. Charles Gross indicates that trial de medietate was followed as well in the temporary piepowder courts associated with trade fairs. Gross, The Court of Piepowder, 20 Q.J. Econ. 231, 243 (1906).

162 1 Select Cases Concerning the Law Merchant A.D. 1270-1638, at xxvii (C. Gross ed. 1908); see J. Thayer, supra note 4, at 94 n.4.

163 2 Select Cases Concerning the Law Merchant A.D. 1239-1633, at xx (H. Hall ed. 1930).

164 Select Plead, Starres, and Other Records from the Rolls of the Exchequer of the Jews A.D. 1220-1284 (J. Rigg ed. 1902).

165 Id. at xxiii. For examples of this procedural right, see Articles Touching the Jewry, id. app. V, at lxii, and various cases, id. at 63, 64, 78, 79, 83, 84, 103, 104, 116.
its members were burgesses in the trial of any burgess outside the borough. In general, the “half-tongue” principle applied to Welsh defendants, though not to Scots. Further applications occurred in the university and ecclesiastical courts. Blackstone observed that when a university scholar was indicted at the assizes or elsewhere for treason, felony, or mayhem, the vice-chancellor of the university could claim jurisdiction, and the resulting trial was before the high steward and a jury formed “de medietate”—half from a panel of eighteen freeholders returned by the sheriff and half from a panel of eighteen matriculated laymen returned by the beadles of the university. And under a writ of jure patronatus concerning church patronage, the dispute could be tried by the bishop or by a specially appointed commission, before “a Jury of six Clergymen and six Laymen of the Neighbourhood, or of as many more as the Bishop pleases; the Proportion being observed of Clergy and Laity, that there be as many of one Sort, as the other.”

It is therefore clear that the de medietate concept, known also in the literature as a “party jury,” had wide application. Thayer is undoubtedly correct in suggesting that the concept grew out of notions of fair dealing, spurred primarily by the idea that some members of the jury should speak the defendant’s language. The practice books give examples of venires calling for the aliens to be natives of the defendant’s country, sometimes even of the defendant’s city of residence. Yet this practice did not persist. Pulton

166 1 BOROUGH CUSTOMS 10-11 (M. Bateson ed. 1904).
167 Id. at 10 n.3; W. DUGDALE, supra note 111, at 64. Even before An Act for an Union of the Two Kingdoms of England and Scotland, 6 Anne, ch. 11 (1706), Scotsmen were not considered aliens. See THE COMPLETE JURYMEN, supra note 4, at 145-46; 2 W. HAWKINS, supra note 40, at 420. The reason was simple—they “speaketh our language.” W. LAMBARD, EIRENARCHA 555 (London 1614).
168 4 W. BLACKSTONE, supra note 3, at *275.
169 J. MALLORY, QUIARE IMPEDIT 169 (London 1737).
170 See, e.g., 3 R. BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 104 (J. King ed. 22d ed. 1814); J. HERNE, PLEADER 462 (London 1657).
171 See supra text accompanying note 168.
172 Hall, in describing a mercantile case involving a Lombard plaintiff relying on ledger accounts, states that “it was clearly essential (if justice was not to become a farce) that not only half the jurors, but also some at least of the auditors . . . and of the arbitrators . . . should speak the language that was before them in a written form.” 2 SELECT CASES CONCERNING THE LAW MERCHANT A.D. 1239-1633, supra note 163, at xx. See W. LAMBARD, supra note 167, at 554-55.
173 See, e.g., J. HERNE, supra note 170, at 462, where the plaintiff alleged that he was an alien born at Antwerp and requested a party jury, half to be aliens born at Antwerp. Five such alien jurors were returned. A sixth foreigner, who was also from Antwerp according to the pleadings, was added as a talesman from the bystanders in court.
observed that the trial "per medietatem linguæ" was available at the king's grant even before the statutes of 27 Edw. 3, Stat. 2 (1353) and 28 Edw. 3, ch. 13 (1354), but because the statute of 27 Edw. 3, Stat. 2, applied only to civil actions in staple towns, it "did not remedy the mischief, where the king was party." Thus "the before rehearsed statute of 28. E. 3. was provided, which maketh mention generally of aliens: therefore it is not materiall of what nation those aliens are." Eventually, it would suffice for each of the six alien jurors to be from a different nation. This ludicrous image of jury members wholly unable to communicate with each other, much less with the defendant, obviously contradicts the original justification for this type of trial.

There was additional erosion of the concept. By statute, trial de medietate was unavailable to "Egyptians," that is, to rogues and vagabonds commonly known as gypsies. Likewise, this privilege was unavailable in treason trials, in actions or suits concerning statutes regulating imports and exports and in inquests to assess damages by a writ of inquiry upon a default judgment taken against an alien. The privilege was also inapplicable to grand juries, and, if a defendant in a criminal action pleaded not guilty and allowed a common jury to be returned, he waived his right to a party jury.

By the late eighteenth century, therefore, the party jury had become more form than substance, even though it was still available. Perhaps never viewed as a jury of experts, the party jury emerged to ensure a jury able to understand the point of view of

174 F. PULTON, supra note 149, at 193a.
175 Ordinacio Stapularum (The Ordinance of Staples), 27 Edw. 3, Stat. 2 (1353).
176 Id.
177 F. PULTON, supra note 149, at 193a.
178 Id. See also G. DUNCOMBE, TRIALS PER PAIS 195 (5th ed. London 1718) (1st ed. London 1665); 2 W. HAWKINS, supra note 40, at 420.
180 An Acte concernyng Egypytians, 22 Hen. 8, ch. 10, § 1 (1530-31); An Acte for the Punishment of Vagabondes calling themselfes Egiptians, 5 Eliz., ch. 20, § 2 (1562-63). For discussion of these statutes, see 2 W. HAWKINS, supra note 40, at 420; F. PULTON, supra note 149, at 193a.
181 See An Acte wherby certayne Offences bee made Tresons; and also for the Government of the Kings and Quenes Majesties Issue, 1 & 2 Phil. & M., ch. 10, § 6 (1554 & 1554-55); THE COMPLETE JURYMAN, supra note 4, at 145.
182 See, e.g., An Act for preventing Frauds and regulating Abuses in His Majesties Customs, 14 Car. 2, ch. 11, § 13 (1662).
183 THE COMPLETE JURYMAN, supra note 4, at 146.
184 Id.; 2 W. HAWKINS, supra note 40, at 419.
185 J. KENNEDY, supra note 4, at 87.
the alien party. In this sense, its animating spirit was similar to that of the special jury of the eighteenth century.

3. Matrons. In Lambard's colorful words, a female defendant in a criminal case could "have (for once onely) the benefit of her belly, if it be found by women thereto appointed that she is with child."\(^1\)\(^8\) Lambard meant that, although pregnancy in a female criminal defendant would not delay her trial, the court could stay her execution if she were found guilty of a capital crime in order to permit the child to be born.\(^1\)\(^8\) For the limited purpose of ascertaining whether her claimed pregnancy was genuine, the court would impanel an all-female jury under the writ de ventre inspiciendo (to inspect the belly). Upon the appearance of the women in court, the clerk of assize would administer the following oath to the jurors: "You as [matrons] of this Jury shall swear that you shall search and try the Prisoner at the Bar, whether she be quick with Child of a quick Child, and thereof a true Verdict shall return according to the best of your judgment; so help you God."\(^1\)\(^8\) A bailiff would then escort the jury and the prisoner to a chamber where the jury would search and inspect the prisoner, returning a verdict declaring whether or not she was quick with child. If she was found to be pregnant, the court would stay her execution until the next assizes. If she should then be pregnant again, she gained no further reprieve, and "the Sheriff or Gaoler which had the custody of her, shall be fined for keeping her so slackly, that she had the company of a man."\(^1\)\(^8\)

Who the jurors were and how they were summoned are not known.\(^1\)\(^9\) Naturally courts used the all-female jury for reasons of

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\(^{186}\) W. LAMBARD, supra note 167, at 563.

\(^{187}\) Apparently the procedure was unavailable outside the royal courts. According to one authority, "Justices of Peace cannot award a Venire facias tot matronas, to know whether a Felon be with child or no." R. CHAMBERLAIN, THE COMPLETE JUSTICE 430 (London 1681).

\(^{188}\) THE OFFICE OF THE CLERK OF ASSIZE, supra note 129, at 61 (emphasis omitted).

\(^{189}\) Id. at 63.

\(^{190}\) There is some evidence that "pleading her belly" was a common phenomenon among female criminal defendants, so that the impaneling of a female jury would have been familiar to the public at large. In *Moll Flanders*, Daniel Defoe frequently refers to the practice in describing Newgate prisoners. Moll describes her own emergence into the world after her mother received a respite of her sentence of transportation, having "[p]lead her belly, and being found quick with child." D. DEFOE, THE FORTUNES AND MISFORTUNES OF THE FAMOUS MOLL FLANDERS 2 (Modern Library ed. 1950) (1st ed. London 1722). Much later when Moll was herself imprisoned in Newgate, a fellow prisoner explained that she was not under immediate threat of execution because "I pleaded my belly, but I am no more quick with child than the judge that tried me, and I expect to be called down next session." Id. at 262. Defoe explained that "[t]his 'calling down' is calling down to their former judgment, when a woman has been respite for her belly, but proves not to be quick with child, or if she has
delicacy, but they primarily viewed the women as experts on the subject of their inquiry. "Matrons" were impaneled—married women or widows who had experience with childbirth.  

The writ _de ventre inspiciendo_ was also used on occasion in civil cases, but for a different purpose. Blackstone describes the writ as appropriate "when a widow feigns herself with child, in order to exclude the next heir, and a supposititious birth is suspected to be intended." Richardson and Sayles trace the civil use of the writ back to 1220 in the records of Bracton, where they found knights and matrons jointly conducting the examination. One year later, a case is reported in which a jury of fourteen women from London was impaneled, and by 1223, the use of the writ was shown by its appearance on the plea roll.

been with child, and has been brought to bed." _Id._ Passages such as these help to explain the degree of suspicion that existed among the judges that defendants were not in fact with child. _See infra_ note 192.

One definition for "matron" is "[a] married woman considered as having expert knowledge in matters of childbirth, pregnancy, etc.; now only in jury of matrons." _6_ THE OXFORD ENGLISH DICTIONARY 239 (rev. ed. 1933). Blackstone states that the jury can be of matrons "or discreet women," _4_ W. BLACKSTONE, _supra_ note 3, at *388, but the cases invariably refer to matrons, _see, e.g.,_ Regina v. Beynton, 14 State Trials 598, 634 (Q.B. 1702) (names of 12 matrons contained in report of case).

_193_ 3 _W. BLACKSTONE, supra_ note 3, at *362. The courts were extremely suspicious of trickery in these situations, as is shown by the following cases. In Willoughby's Case, Cro. Eliz. 566, 78 Eng. Rep. 811 (C.P. 1597), a writ _de ventre inspiciendo_ issued out of Chancery directing the Sheriff of London to have Dorothy Willoughby viewed by 12 knights and searched by 12 women in the presence of the knights, and to report the results to Common Pleas. This was done and Dorothy was reported to be 20 weeks pregnant. Then a second writ issued commanding the sheriff safely to keep her in such an house, and that the doors should be well guarded; and that every day he should cause her to be viewed by some of the women named in the writ (wherein ten were named); and when she should be delivered, that some of them should be with her to view her birth, whether it be male or female, to the intent there should not be any falsity. _Id._ at 566, 78 Eng. Rep. at 811. A similar writ was issued in Theaker's Case, Cro. Jac. 686, 687, 79 Eng. Rep. 595, 595 (C.P. 1625), except that because the widow had remarried within a week after the death of her first husband, she was allowed to cohabit with her new husband, with daily inspections to take place at their house. See also _Ex parte_ Aiscough, 2 Peere Wms. 591, 594, 24 Eng. Rep. 873, 874 (Ch. 1730), where the Lord Chancellor allowed that the second writ need not be executed in quite so strict a manner, "provided people of skill had from time to time free access to her, and might be present at the birth."

_194_ _SELECT CASES OF PROCEDURE WITHOUT WRIT UNDER HENRY_ III, _supra_ note 74, at cliii. _Id._ at cliii-cliv. This case may be found in _3_ BRACHTON'S NOTE BOOK 417-18 (F. Maitland ed. 1887) (plea no. 1503).

_195_ _SELECT CASES OF PROCEDURE WITHOUT WRIT UNDER HENRY_ III, _supra_ note 74, at cliv. This case can be found in _3_ BRACHTON'S NOTE BOOK, _supra_ note 194, at 473-74 (plea no. 1605). For another example in the King's Bench from the late fourteenth century, see _7_ SELECT CASES IN THE COURT OF KING'S BENCH, _supra_ note 160, at 56 (plea no. 30, Pasch. 1388).
4. Merchants and Other Experts. Matrons were a rare species of expert jurors. Less rare were merchant juries, which existed long before Lord Mansfield. In some instances merchant status ensured quality rather than expertise, but usually it was otherwise. The distant heritage, of course, was the law merchant. Thus “[i]n a Court of Pipowders the triall is by the Merchants.” And the Carta Mercatoria of Edward I (1303) provided that a foreign merchant may have six foreign merchants on the jury. Many examples of juries of merchants, or “merchants and next neighbors,” can be found in the thirteenth-century records of the Fair Court of St. Ives.

Given this background, the regular use of merchant juries would be expected in the royal courts during the sixteenth and seventeenth centuries, a period when legal questions of mercantile importance appeared with increasing frequency. Writing in the mid-seventeenth century, Matthew Hale observed that when a question of *lex mercatoria* arose in the common law courts, “if it be a question touching the custom of merchants[,] merchants are usually jurors at the request of either party.”

Nevertheless, few reports of such cases exist. In his *Reges-

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198 See, e.g., *Rex v. Borosky*, 9 State Trials 1 (Old Bailey 1682). Count Conigsmark, one of the defendants on trial for murder, was an alien. Speaking through an interpreter, he requested a trial *de medietate*, a jury comprised of “half foreigners and half English . . . [who were] persons of some quality, as they use to treat persons of his quality, and strangers.” *Id.* at 9. Lord Chief Justice Pemberton responded: “There shall be such strangers, tell him.” He then addressed the undersheriff: “You have merchants of good account, I suppose, upon this pannel?” The undersheriff replied: “Yes, my Lord, they are all such.” *Id.* See *supra* note 87 (Bishop Burnet’s comments on *Rex v. Hayes*, 10 State Trials 307 (K.B. 1684)).


200 See 2 F. Pollock & F. Maitland, *supra* note 44, at 624 n.3 (discussing the Carta Mercatoria).


202 It should be emphasized again that most of the analysis in this article is derived from printed sources, which would not necessarily contain data about jury composition or characteristics. As the passage from Hale’s manuscript suggests, *see supra* text accompanying note 200, absence of evidence in such sources about seventeenth-century merchant juries
William Style mentions a 1646 King’s Bench decision in which the court granted a motion for “a Jury of Merchants . . . to try an issue between two Merchants, touching Merchants affairs,” because “they might have better knowledge of matters in difference which was to be tried, then [sic] others could who were not of that profession.” In the 1649 case of *Pickering v. Barkley*, the court held that a contract was to be interpreted according to the custom of merchants and summoned merchants to decide the issue.

Assorted cases can be identified indicating the courts’ readiness to impanel other juries of experts on an ad hoc basis. Thayer stated that jurors were occasionally “men of particular trades,” citing a 1394 jury of “cooks and fishmongers, where one was accused of selling bad food.” A further example arose in the 1663 libel trial of John Twyn. One of the defendants stated: “We desire we may have a jury of booksellers and printers, they being the men that only understand our business.” Lord Chief Justice Hyde replied: “There are those already that understand it as well as booksellers or printers; besides, half the jury are such, and they are able to make the rest understand it . . . .”

Later, in 1700, Holt reported an anonymous case involving a dispute between an earl and one of his farmers over the value of improvements on the land. Holt indicated that the first jury of farmers gave £ 200 damages, which the court considered excessive. But on the second trial, “a Jury of Gentlemen [was] order’d, who only gave 40 l.” The court considered this insufficient and granted the farmer’s motion for a third trial.

Sayles reports early King’s Bench cases in which juries of
clerks and attorneys were impaneled to deal with alleged falsification of writs by attorneys,\textsuperscript{213} extortion by court officials,\textsuperscript{214} and similar behavior.\textsuperscript{215} The problem of corrupt behavior by officers of the court persisted over the centuries, and expert juries of inquiry became a regular part of the administration of the Court of Common Pleas in the fifteenth, sixteenth, and seventeenth centuries. From an examination of fifteenth-century plea rolls, Dr. J.H. Baker has ascertained that official inquiries into alleged misconduct by an attorney or officer occurred “[v]ery occasionally.”\textsuperscript{216} In 1566 Lord Chief Justice Dyer ordered a sixteen-member jury of attorneys,\textsuperscript{217} and in 1654 Common Pleas issued a rule calling for a jury of clerks and attorneys to be impaneled once every three years “to enquire of Abuses, Extortions, &c. of Attorneys.”\textsuperscript{218} Undoubtedly these juries of inquiry functioned as investigative committees or special commissions more than as traditional juries addressing specific factual disputes. Yet in their role of applying expertise to the identification and evaluation of behavior differing from the norm, they resemble the later merchant juries that applied expertise on mercantile customs to the commercial behavior of the litigants.

D. Summary

Three meanings of the term “special jury” were presented at the beginning of this article. The first type of “special jury,” a jury of men of high social or economic status, served by informal practice in cases of national importance.\textsuperscript{219} Such juries served as well under formal legal rules or traditions in grand assizes,\textsuperscript{220} at-

\textsuperscript{213} 5 Select Cases in the Court of King’s Bench, supra note 44, at 47 (plea no. 18, Pasch. 1330).
\textsuperscript{214} Id. at xx.
\textsuperscript{215} Id. at 83-84 (plea no. 38, 1336). See also 6 Select Cases in the Court of King’s Bench 30-31 (G. Sayles ed. 1965) (plea no. 15, Pasch. 1344), reporting the lively case of a man arrested for insisting on walking about Westminster Hall in a full suit of armor. A jury of attorneys and ministers of the court confirmed that the defendant had been spoken to in “coarse and wicked language” by unknown men and that he was genuinely in fear of his life. Id. at 31.
\textsuperscript{216} Baker, The Attorneys and Officers of the Common Law in 1480, 1 J. Legal Hist. 182, 184 (1980).
\textsuperscript{217} Praxis Utriusque Bani 40-41 (London 1674).
\textsuperscript{218} [W. Bohun], The Practising Attorney 39 (London 1724).
\textsuperscript{219} A Proclamation for Jurors, by James I, supra note 18, urged “that there be a discretion used, as well in returning the most principall persons upon the greatest causes, as in sorting men of quality with their equals, as neere as may be.” See supra notes 85-108 and accompanying text.
\textsuperscript{220} See supra notes 110-19 and accompanying text.
taints, and grand juries. These formal rules and traditions were followed with varying degrees of fidelity. The second type of “special jury,” a jury of experts, included the jury of matrons, the jury de medietate linguae, and other juries whose members possessed special knowledge or expertise. The third type of “special jury,” the struck jury, is the subject of the remainder of this article.

II. Emergence of the Struck Jury

By the early eighteenth century, the term “special jury” became synonymous with “struck jury.” The statute of 3 Geo. 2, ch. 25 (1730), treats the struck jury as an established concept, using the terms special and struck jury interchangeably without elaboration. Struck juries did not always require men of above-average property holdings, high social standing, or particular knowledge or expertise. Rather, the formation procedure, allowing each party to strike twelve prospective jurors from a panel of forty-eight names, was the consistent distinctive characteristic.

One of the early articulations of the formation procedure was in Duncombe’s 1665 treatise on trial by jury. After mentioning the statutory four-pound freehold requirement, Duncombe wrote:

And the Court may in matters of great consequence, direct a Venire facias, for a Jury of above 4 l. per annum, a piece, but not under Cro. 2. part. 672. But in such Cases (every one knowes) the Court most commonly orders the Prothonotary to chuse 48. out of the Sheriffs Book of Freeholders, of the most substantial men in the County, and the parties strike out 12. a piece, then the Sheriff returns the rest.

221 See supra notes 120-27 and accompanying text.
222 See supra notes 128-37 and accompanying text.
223 Grand assizes, for example, were indeed tried by knights, see supra notes 112-13 and accompanying text, but contrary to the contentions of law writers, grand juries have not always been composed of leading citizens, see supra notes 128-37 and accompanying text.
224 See supra notes 186-95 and accompanying text.
225 See supra notes 157-85 and accompanying text.
226 See supra notes 196-218 and accompanying text.
227 An Act for the better Regulation of Juries, 3 Geo. 2, ch. 25 (1730).
228 Id. § 15.
229 G. DUNCOLME, 1665 edition, supra note 30, at 73. The chief clerk of King’s Bench on the plea side was the Prothonotary. His deputy was the secondary who was also called “the Master.” W. BOHUN, INSTITUTIO LEGALIS 16 (3d ed. London 1724) (1st ed. London 1708) (emphasis in original). On the crown side, the principal officer was the Clerk of the Crown Side, who in turn was attended by a secondary. See generally 1 THE CLERK’S ENGLISH TUTOR 42, 47-48 (London 1733) (descriptions of court officers).
This passage raises most of the remaining questions addressed in this study of the origins of the special jury: whether there is evidence before or during Duncombe's period indicating that the struck jury procedure was accepted and widely known; whether the order for a jury "of above 4 l. per annum, a piece" was accompanied always by the struck jury procedure; whether such juries were ordered only for trials at bar (the usual mode of trial for matters of great consequence); on whose motion such a jury would be impaneled; whether a showing of good cause was required; whether the court's granting of such a jury was a discretionary decision; and whether the court would order it over the parties' objections.

A. Earliest Appearances

Citing a King's Bench rule from Michaelmas term 1645, William Style in his 1657 Regestum Practicale referred to the special jury as follows: "In all cases where there is to be a special Jury, there the Venire Facias must be special. Mich. 22 Car. B.r. For ordinary forms are not applicable to extraordinary cases." Then, on the authority of a King's Bench rule from Trinity term 1646, Style gave the following example of cases meriting special juries: "Upon a motion and an Affidavit made in Court, that the Cause to be tryed at the barr, is a Cause of very great consequence, the Court will make a Rule for the Sheriff to returne 48. Jurors upon the Jury. Trin. 23 Car. B.r."

In his second edition (1670), Style added the following explanatory sentence to the preceding example: "That each party may have liberty of challenge and yet a sufficient Jury remain." But in the 1694 edition (published long after Style's death in 1679), Lilly significantly revised the text to read:

Upon a motion and an Affidavit made in Court, that the Cause to be tryed at the Bar, is a Cause of very great consequence, the Court will if they see Cause, make a Rule for the Secondary to name 48 Free-holders, and each party to strike out 12 by one at a time, the Plaintiff or his Attorney to begin

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230 G. DUNCOMBE, 1665 edition, supra note 30, at 73.
231 W. STYLE, supra note 202.
232 Id. at 329 (emphasis in original).
233 Id. at 163.
235 See 19 THE DICTIONARY OF NATIONAL BIOGRAPHY, supra note 104, at 140 (entry by J.M. Rigg).
first, and the remaining 24 shall be the Jury to be returned for the Tryal of the Cause, *Trin. 23 Car. B.R.*

The preceding passages suggest that Style was unaware of the struck jury procedure, despite Duncombe's 1665 assertion that the procedure was something "every one knowes." Certainly Style's 1670 explanatory sentence was peculiar. Large panels were often returned in criminal cases in anticipation of numerous challenges, but this was done at the sheriff's discretion without need for motion, affidavit, and rule of court. Style's text was not limited to criminal cases in any event, and the suggestion that an especially large panel was necessary in civil cases (where there were no peremptory challenges)—even civil cases of great consequence—appears unsupportable.

In his original edition, Style also dealt with situations "where it is conceived an indifferent Jury will not be retorned . . . by the Sheriff of the County where the venue lyes." He noted that in such cases, "the Court, upon motion, will order the Sheriff to attend the Secondary of the Office with his book of the Freeholders of the County where he is Sheriff, that he may see an indifferent Jury retorned." As authority, Style cited a rule of Trinity term

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> There having come to my Hands a little Book, entituled, Style's Practical Register, wherein I thought were many Things well worth Observation, and some others which wanted some Correction and Amendment . . . I did in the year 1694, make such Alterations, Corrections and Additions thereunto . . . as I thought necessary and fit for my own Private Use, without any Intention of making it Publick . . . .

J. LILLY, A CONTINUATION OF THE PRACTICAL REGISTER at iii-iv (London 1710). He added that the bookseller holding an interest in Style persuaded him to allow one impression of the 1694 revised version as a trial run, after which Lilly would do a more complete job if the trial succeeded. But the bookseller died and his executors published several impressions of the 1694 edition "with such Additions as they could get; and what they are, let the World judge." *Id.* at v. The two-volume "continuation" in 1710 was largely a compilation of new and revised material, but in 1719 Lilly incorporated this material into the 1694 edition of Style and published the Practical Register under his own name. J. LILLY, supra note 179. The revised passage from the 1694 edition quoted in the text was repeated unchanged in the 1719 edition, 2 *id.* at 123, and therefore seems properly attributable to Lilly as of 1694.

239 See supra note 234 and accompanying text.

240 See 4 W. BLACKSTONE, supra note 3, at *346.

241 W. STYLE, supra note 202, at 163.

242 *Id.* In the 1670 edition, an additional sentence appears: "But there may be probable matter shew'd to the Court why an indifferent Jury may not be had, else the Court will make no such Rule." W. STYLE, supra note 234, at 239 (emphasis in original). In 1694, the
Origins of the Special Jury

1646, but in the section about sheriffs he cited a rule of Michaelmas term 1645 for the following statement: "In some cases the Court will order the Sheriff to attend the Secondary of the Office, with his Book of Free-holders of the County where the Land in question doth lye, that an indifferent Jury may be returned for a tryal at the Bar. Mich. 22. Car. B.r." To this was added in 1670 the phrase: "That is in such cases where the Court conceives the Sheriff will not return an indifferent Jury." This additional phrase harmonized the two passages. The only apparent difference between them was that the court, in trials at bar, on its own motion could order the sheriff to attend the secondary; in other cases, the court required a motion by one of the parties and a showing of good cause.

Neither the 1657 nor the 1670 edition clarifies the procedure for these "unindifferent sheriff" cases, but Style implies that the secondary selected the jury ("that he [the secondary] may see an indifferent Jury returned"). In the 1694 edition, however, Lilly explicitly states that in trials at bar the court "usually" orders the sheriff to attend the secondary with his book of freeholders, in order "that an indifferent Jury may be struck by the Secondary in the presence of the Attornies, on both sides, and afterwards returned by the Sheriff."

None of the three editions of Style refers to a panel of forty-eight names or to a procedure by which each party strikes twelve names in the "unindifferent sheriff" cases. Yet during the eighteenth century, this type of case became a standard example of an occasion for the struck jury procedure, a procedure which was by word "may" was changed by Lilly to "must." W. Style, supra note 236, at 288. See also 2 J. Lilly, supra note 179, at 510 ("In Trials at the Bar the Court doth usually order the Sheriff to attend the Secondary . . . that an indifferent Jury may be struck by the Secondary in the Presence of the Attornies on both sides . . . ").

243 W. Style, supra note 202, at 163.
244 Id. at 304.
245 W. Style, supra note 234, at 503 (emphasis in original).
246 The expression is awkward, but it was standard usage in the legal literature of the seventeenth and eighteenth centuries.
247 W. Style, supra note 202, at 163; see supra text accompanying note 242.
248 W. Style, supra note 236, at 505 (emphasis added). The earlier passage in the 1694 edition dealing with ordinary trials (not at bar) states that "the Secondary in the presence of the Attornies on both sides [is] to strike a Jury." Id. at 288. That the secondary was on occasion the impaneling officer in cases of alleged bias receives further support in Style's report of Pooly v. Markham, Style 477, 82 Eng. Rep. 876 (Upper Bench 1655). The defendant alleged that some of the jurors were the same jurors who had been "feasted" by the plaintiff in a former trial. Chief Justice Glyn ruled: "Let the Freeholders book be brought to the Secondary, and let him return a Jury." Id. at 477, 82 Eng. Rep. at 876.
then invariably known by the term "special jury." The most likely catalyst for this eighteenth-century viewpoint was Blackstone, who wrote the following oft-cited passage:

Special juries were originally introduced in trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders; or where the sheriff was suspected of partiality, though not upon such apparent cause, as to warrant an exception to him. He is in such cases, upon motion in court and a rule granted thereupon, to attend the prothonotary or other proper officer with his freeholder's book; and the officer is to take indifferently forty eight of the principal freeholders in the presence of the attorney on both sides; who are each of them to strike off twelve, and the remaining twenty four are returned upon the panel.249

There is no known evidence that the struck jury procedure applied before the eighteenth century to the "unindifferent sheriff" situation. This situation presented a completely different problem from that of striking the jury in a trial of great consequence. In the latter instance, parties sought a highly capable jury of qualified individuals who would apprehend the importance of the case and would behave responsibly. This goal was accomplished by requiring a large panel of exceptional individuals. The panel could have been reduced from forty-eight to twenty-four by the secondary, but, perhaps to avoid overt appearances of jury-packing, the parties were given that task. In the unindifferent sheriff situation, there was neither a need for a larger panel than usual nor a need for jurors of exceptional ability; the problem was simply to avoid the alleged bias. This had been a recognized problem for centuries. The standard illustration in the legal literature from the fifteenth to the eighteenth centuries was a sheriff who was "cozen," or kindred, to one of the parties.250 In such cases, it was uniformly stated

249 3 W. BLACKSTONE, supra note 3, at *357-58. Blackstone perceived the inconsistency between the struck jury practice and the standard practice of having the coroner return the jury when the sheriff was biased, discussed infra notes 250-56 and accompanying text. Blackstone stated that the struck jury procedure applies only where the suspected partiality of the sheriff is "not upon such apparent cause, as to warrant exception to him." 3 W. BLACKSTONE, supra note 3, at *358.

250 See, e.g., 3 W. BLACKSTONE, supra note 3, at *359 ("challenges to the array . . . may be made upon account of partiality . . . in the sheriff"); E. COKE, supra note 17, § 234, at 156a ("there is a principall cause of challenge . . . if the sherife . . . be of . . . kindred or affinitie to the plaintife or defendant"); G. DUNCOMBE, 1665 edition, supra note 30, at 29 (if the plaintiff "surmise . . . that the Sheriff is his Cozen," he may pray that the "Venire be directed to the Coroners"); H. FINCH, supra note 149, at 401 ("Cosinage in the Sherife is a
that the plaintiff could have the venire directed to the coroner, not the secondary.***

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**good principal challenge to the array**); W. Greenwood, A PRINCIPAL DEMONSTRATION OF COUNTY-JUDICATURES 21 (5th ed. London 1675) (1st ed. London 1654) ("Challenge is said to be, where...[t]he Sheriff or Bayliff which make the Pannel, is of the Plaintiffs kindred"); J. Herne, supra note 170, at 256-57 ("Challenge for that Sheriff is father to the Wife of the Plaintiff"); J. Kitchin, JURISDICTIONS 180 (London 1651) ("the Plaintiff may quash the array though the Sheriff is of consanguinity or affinity of the Defendant"); 587 (if the sheriff is "cozen to the Plaintiff," the defendant "may have his challenge and quash the Jury"); T. Powell, THE ATTORNEYS ACADEMY 118 (London 1623) (if either party believes "the Jury to bee favourable, and not indifferently returned by the Sheriff," he may challenge); T. Powell, supra note 109, at 17-18 ("if the defendant be of kin to the Sheriff: either by blood or marriage, the plaintiff may pray the venire fac' may bee directed to the Coroners"); The PRACTICK PART OF THE LAW 30 (London 1654) ("where the Defendant is of kindred to the Sheriff...the Plaintiff may pray the Venire Facias directed to the Coroners"); 2 THE REPORTS OF SIR JOHN SPELMAN, supra note 31, at 104 (a party may challenge a jury impaneled by a sheriff who is a party or related to a party); R. Vaughn, PRACTICA WALLIAE 38 (London 1672) (the plaintiff may challenge the array if "there be any kindred, affinity, or alliance between [the defendant] or his Wife; and the Sheriff or his Wife"); J. Wilkinson, A TREATISE CONCERNING THE OFFICE AND AUTHORITIES OF CORONERS AND SHERIFES 377 (London 1657) (plaintiff may challenge the array if the "Sherife is Cousin" to the defendant).

If the coroner was also suspected of bias, process issued to two electors or elizors, "two whom the Court shall chuse and deeme fit to return the Jury; And to the return of these [Electores]...no challenge will be admitted." G. Duncombe, 1665 edition, supra note 30, at 28. See also J. Herne, supra note 170, at 257 ("coroners challenged for the cause of consanguinity"); R. Vaughn, supra, at 39 (the defendant may "put in a challenge to both coroners, if there be cause, and pray process to Elizors").

***Specific procedures and limitations circumscribed this privilege. If, upon examination, the defendant persuasively denied the alleged "cozenage," the court issued the venire to the sheriff "because the...Sheriff's Authority and profit shall not be taken away, without cause apparent to the Court." G. Duncombe, 1665 edition, supra note 30, at 29-30. A defendant, moreover, was not allowed to request that the coroner return the jury. Such a privilege would enable the defendant needlessly to delay his trial and was unnecessary because he was protected against biased jurors by his unlimited challenges for cause. See Lord Brooke's Case, Gray's Inn MS 34, fol. 323 (Upper Bench 1667); E. Coke, supra note 17, § 234, at 157b; G. Duncombe, 1665 edition, supra note 30, at 29-30.

This scheme can be illustrated as follows. If the plaintiff was cousin to the sheriff, the plaintiff could anticipate challenge by the defendant to the array of jurors and move to have the venire returned by the coroner. The coroner would do so if the defendant "confesse[d] it," that is consented. E. Coke, supra note 17, § 234, at 157b. If the defendant refused to consent, the plaintiff would have the venire issued by the sheriff, and the defendant would be estopped from challenging the array for cause. If the plaintiff did not move to have process issued to the coroner, the defendant could not do so, because he had the alternative of the challenge to the array. See, e.g., id. (If, however, the court ultimately upheld the defendant's challenge to the array, process would then issue to the coroner. 1 J. Chitty, supra note 40, at 548.)

If the relationship between the plaintiff and the sheriff were more tenuous, the defendant could still challenge "to the favour." See, e.g., E. Coke, supra note 17, § 234, at 156a. In such cases, two "triers," chosen from among the jury panel, the attorneys, or the coroners, would hear the challenge and recommend whether the court, in its discretion, should allow it. See 1 J. Archbold, supra note 4, at 208; 1 J. Chitty, supra note 40, at 549; E. Coke, supra note 17, § 234, at 157b-58a.

If the challenge to the array due to alleged bias in the impaneling officer failed, a defen-
Style's work contains the only seventeenth-century reference to the secondary as the impaneling officer when the sheriff's impartiality was questioned, although, as mentioned, Style supports his reference with a 1646 King's Bench rule. Possibly the rule was made to avoid the accepted limitations on the privilege of referring the venire to the coroner, particularly the unavailability of the privilege to a defendant.

Style may well have been one of Blackstone's sources. Style's Regestum Practicale states that it is applicable to proceedings in the Upper Bench "[t]aken for the most part, during the time that the late Lord Chief Justice Rolle did sit and give the Rule there." W. Style, supra note 202, at title page.

Some published court rules are available, see, e.g., Rules and Orders for the Court of the Upper Bench at Westminster, Made and Published by the Judges of the Said Court, in the Terme of St. Michael, in the year 1654 (London 1655), but I have found none for the years in question, the mid- and late-1640's.

Courts often turned to Style as an authoritative source. For example, in Dodson v. Taylor, Harvard MS 2050, vol. 1, at 169, 181 (K.B. 1736), Chief Justice Hardwicke, in upholding a rule of practice, stated, "I have looked into some of the Books concerning the
states that both in cases of unindifferent sheriffs and in matters of great consequence, the sheriff must attend the prothonotary or secondary with the book of freeholders in the presence of the attorneys for the parties. Perhaps these statements caused Blackstone to lump the two situations together as illustrations of the special (struck) jury.

It is also unclear how widely known the availability of a special jury was before the eighteenth century in cases involving matters of great importance (Style's original example). An examination of the reports from King's Bench, Common Pleas, and Exchequer throughout the 1600's yields only a handful of such cases. The earliest example is Style's report of the anonymous King's Bench case in 1649 involving a challenge to the array for want of hundredors. The court ruled that although the "Jury was returned by the Secondary by rule of Court, and the Hundreders were put out by the consent of the parties," the challenge was good. This report corroborates Style's reference in his original edition of Regestum Practicale to a King's Bench rule of Practice of Cts. In Style's Practical Reg. 344 there is mention of such a Rule, and it is transcribed in the very same Words into Lilly's Abr. 84, 87."

"See supra notes 241-48 and accompanying text.

Another source of Blackstone's application of the special jury to the case of the unindifferent sheriff could be the 1724 King's Bench decision in Rex v. Burridge. Several reports of the case were published, see supra note 152, one of which describes the court as stating that a special jury could be struck by the master if a lawful objection to the sheriff were established by affidavit. 8 Mod. at 248, 88 Eng. Rep. at 177. The point under discussion, however, was whether a special jury could be ordered without the consent of the parties, not who should be the impaneling officer. Id. at 245, 88 Eng. Rep. at 175. Indeed, in a later case, Rex v. Johnson, 2 Str. 1000, 93 Eng. Rep. 995 (K.B. 1734), the court not only belittled Rex v. Burridge but also acknowledged that "though the sheriff is mentioned in the rule, yet that is only as he is the usual officer; but it did not preclude the prosecutor from taking the venire to the coroner," id. at 1001, 93 Eng. Rep. at 995. The last statement was followed by this sentence: "And the court remembered in what manner the motion was made by Strange, viz. that where-ever the prosecutor thinks fit to take his venire, there may be a special jury." Id. Perhaps Strange was suggesting that when the sheriff was biased the venire could be directed to the coroner, and the coroner would attend the secondary with the freeholders book to strike the special jury.

"See supra notes 232-33 and accompanying text.

As excerpts from Style, see supra note 244 and accompanying text, and Duncombe, see supra note 229 and accompanying text, suggest, struck juries were used frequently in trials at bar. See also infra notes 316-19, 351-61 and accompanying text. In Charles Cremer's Reports, containing cases heard by the Upper Bench and King's Bench from 1650 to 1676, 36 cases are identified as having been trials at bar. Gray's Inn MSS 33-35. There were probably many more such cases. If all or most of the trials at bar used struck juries, the concept ought to have become reasonably familiar, at least to the judges and leading practitioners in London. But see infra notes 264-74, 294-309, 359-60 and accompanying text.


Id. at 233, 82 Eng. Rep. at 672.
and suggests that the parties had reduced the panel from forty-eight to twenty-four. The one other "hundredor" case found from the period is clearer; there, the court expressly noted that each party had, by rule, struck out twelve of the forty-eight jurors returned.

Other references to the struck jury procedure in the cases prior to 1700 are sporadic and incomplete. If, however, the procedure is divided into two parts—(1) the impaneling of a jury specially chosen by consent of the parties, and (2) the particular use of a panel of forty-eight and an impaneling officer other than the sheriff—earlier roots of, or analogies to, the procedure are discernible. Style's passages contain the earliest known references to the second part, but the first part was not new. In scores of Year Book cases, jurors were "chosen with the consent of the parties."

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261 See supra note 233 and accompanying text.
262 But see supra notes 234-40 and accompanying text for evidence that Style himself was unaware of the struck jury procedure.
265 See supra notes 233-34, 252, 257 and accompanying text.
R.C. Van Caenegem, in his study of royal writs in England from the conquest to Glanvill, identifies as a "remarkable feature" of the popular jury "the frequent election of the jurors by the litigants."\textsuperscript{267}

The customary reference in the early cases to "jurors chosen with the consent of the parties" is frustratingly terse, yet it appears with sufficient frequency to suggest an accepted and well-known practice. Perhaps the practice was connected to what has been termed "oblations," that is, applications for juries accompanied by the payment of fees.\textsuperscript{268} Van Caenegem states: "We find, for example, someone paying 1 mark of silver 'for the jurors whom he elected', which meant the privilege of choosing for himself the jurors rather than having them selected by the sheriff."\textsuperscript{269} Similarly, Lady Stenton remarks that "[i]t seems probable that when the accused were ready to purchase an inquest they expected to have the benefit of a jury specially empanelled."\textsuperscript{270} In the Curia Regis Rolls circa 1200, C.T. Flower finds many examples of oblations in both civil and criminal cases where parties sought "to have an enquiry by a jury on a specified issue, or to have a jury of a special type."\textsuperscript{271}

These early examples of oblations strongly resemble the later practice of impaneling a special jury at the request of one of the

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\textsuperscript{267} R. Van Caenegem, supra note 68, at 77.

\textsuperscript{268} Introduction to the Curia Regis Rolls, 1199-1230 A.D., supra note 68, at 77.

\textsuperscript{269} R. Van Caenegem, supra note 68, at 95 (footnote omitted).

\textsuperscript{270} Gloucestershire Eyre Rolls, supra note 70, at lxii. See also Lincolnshire Eyre Rolls, supra note 70, at lxx (discussing cases in which an accused person offers money to have a jury decide his guilt or innocence).

\textsuperscript{271} Introduction to the Curia Regis Rolls, 1199-1230 A.D., supra note 68, at 482. Thus, "Guy de Cesteinle gave two marks to have a jury from a single hundred," and Bernard de Scrouteby paid half a mark for an enquiry "by twelve lawful men of the soke of Hemsby who should be acceptable to both parties." Id. at 483 (footnotes omitted). Further [i]n an assise of mort d'ancestor, when the sheriff had been ordered to put other lawful men in the place of four who had been removed, the defendant gave a mark to have knights chosen to fill the vacant places, although the jurors in possessory assises were not necessarily knights; and the sheriff was ordered to do this. Id. at 484 (footnotes omitted). For another example, see id. at 436.
parties, who would then be responsible for additional fees.\textsuperscript{272} To the extent that the juries purchased by oblation were also chosen by the parties, the resemblance is stronger still. Apparently, however, an oblation did not automatically generate the right to choose the jurors; neither were jurors “chosen with the consent of the parties”\textsuperscript{273} invariably purchased by oblation.\textsuperscript{274}

How these practices continued or changed through the later Year Book period and the dark era of the sixteenth and early seventeenth centuries is not known. A similarly obscure but possibly related concept emerged toward the end of this period. The term “substantial jury” appears in several case reports. The expression was not a widely accepted term of art,\textsuperscript{275} but, from the cases, seems to have referred to a jury composed of men with property holdings at a specific level above the statutory minimum. Conceivably the term was an early description of a struck jury.

The first of these cases was \textit{Morris v. Thomas},\textsuperscript{276} decided in the Queen’s Bench in 1591. There the court agreed with counsel that a jury owning freeholds worth more than that required by statute “is no fault at common law; for it is for the benefit of the parties to have the better trial; and if it be, it is helped by the statute of \textit{jeofails}).”\textsuperscript{277} The same point arose in the 1623 King’s Bench decision of \textit{Philpot v. Feelder}.\textsuperscript{278} Responding to a motion in

\begin{itemize}
\item \textsuperscript{272} See infra notes 395-406 and accompanying text.
\item \textsuperscript{273} See supra note 266 and accompanying text.
\item \textsuperscript{274} Compare \textit{The Roll and Writ File of the Berkshire Eyre of 1248}, at 159, 186 (M. Clanchy ed. 1973) (pleas no. 379, 437) (oblations for juries chosen by consent of parties) [hereinafter cited as \textit{Berkshire Eyre Rolls}] with id. at 263 (plea no. 617) (jurors chosen by consent of the parties without reference to oblation) and id. at 322, 346, 380 (plea nos. 804, 873, 990) (oblations for juries without reference to consent of parties in choosing jurors) and id. at 229, 246 (plea nos. 535, 580) (jurors impaneled by sheriff without reference either to oblation or to consent of the parties in choosing jurors).
\item \textsuperscript{275} Although juries of higher stature than ordinary were often summoned in important trials, see supra notes 85-98 and accompanying text, no consistent use of the term “substantial jury” occurred in those cases.
\item \textsuperscript{276} Cro. Eliz. 256, 78 Eng. Rep. 512 (Q.B. 1591).
\item \textsuperscript{277} Id. at 257, 78 Eng. Rep. at 512 (emphasis in original). A statute of \textit{jeofails} allows a party to amend harmless errors of form after the fact. See 3 W. BLACKSTONE, supra note 3, at *406.
\item \textsuperscript{278} Cro. Jac. 672, 79 Eng. Rep. 582 (K.B. 1623), also reported sub nom. Philpot & Feilder’s Case, Godb. 334, 78 Eng. Rep. 196 (K.B. 1623). The suit originated in Chancery, which issued a venire facias. Returnable in King’s Bench, the venire called for jurors having at least four pounds annual freehold income. Defendant’s attorney argued that the four-pound requirement of “the statute of 27 Eliz. c.6 [An Act for the Returninge of sufficient Jurors and for the better Expedicion of Trialls, 27 Eliz., ch. 6, § 1 (1584-85)]” applied only to writs issued by “the King’s Bench, Common Pleas, Exchequer, and Justices of Assize,” Cro. Jac. at 672, 79 Eng. Rep. at 582. Writs issued by Chancery, he argued, were outside the statute. Id. Godbolt’s report provides another strand of defense counsel’s reasoning. He ar-
arrest of judgment on the ground that the *venire facias* specified jurors holding property worth more than the statutory minimum, plaintiff’s counsel argued: “[B]y the common law, Judges may direct a *venire facias tales quorum quilibet habeat tantum de terris*, in cases where the matter is of great consequence; but they may not appoint of lesser value than the statute limits.”

The court denied the motion, although not upon the strength of plaintiff’s argument. Justice Chamberlain was equivocal, stating that the Statute of *Jeofails* cured any problem with the venire at common law.

Godbolt’s report of the case describes two of the justices as having thought it “a plain case, for the *venire facias* ought to be according to 35 H. 8 cap. 6,” which only requires jurors to have forty shillings income.

These views explain why Duncombe, after stating that “the Court may in matters of great consequence, direct a Venire facias, for a Jury of above 4 l. per annum, a piece,” added “but not under Cro. 2. part. 672 [Philpot].”

Whatever doubt the King’s Bench may have had on the issue disappeared before *Attorney General v. Blood* was decided in 1680. There the writ of *venire facias* specified a twenty-pound freehold requirement for jurors called to try the defendants for a conspiracy to indict the Duke of Buckingham for buggery. Citing both Philpot and Morris, Henry Pollexfen argued for the
The term “substantial jury” appears in reports of other seventeenth-century cases: a trial in King’s Bench in 1638 for a breach of the peace was before a “substantial jury,” and one year later, a report of a murder case described the trial as having been before a “substantial jury of Surry [sic].” In neither of these cases did the reporter use the term in a technical sense, but the jurors may well have owned property worth more than the statutory minimum.

Whether these “substantial juries” were in fact early examples of struck juries cannot be established. The possibility is logical, especially by the time of Attorney General v. Blood, and is squarely supported by Duncombe’s assertion that these cases—Philpot excepted—were the very ones which by common knowledge involved the struck jury procedure. Nevertheless, what came to be described in the eighteenth century as the struck jury appears not to have emerged as a distinct procedural concept before the King’s Bench rule of 1646 noted by Style. Even during the second half of the seventeenth century, there is reason to question Duncombe’s assertion that the procedure had become one that “every one knowes.”

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291 Id. (Mr. Pollexfen). Shower reported the case under a different name and viewed the issue as one of statutory construction: “[T]he statute says four pounds a year at the least; so that it may be more, and it is the substance which is regarded by that statute.” Rex v. Curtis, 2 Show. K.B. 144, 144, 89 Eng. Rep. 848, 848 (K.B. 1680). Although the court agreed with Pollexfen, Raymond in his report of the case expressed doubts about giving the court so much discretion in setting the worth of jurors: “[F]or if it shall be in the power of the Court to put what sum they please in the venire fac. the defendant being in prison may be there detained for want of jurors of that value . . . .” Attorney General v. Blood, Raym. Sir. T. at 418, 83 Eng. Rep. at 218.
296 G. DUNCOMBE, 1665 edition, supra note 30, at 73; see supra text accompanying note 229.
297 See W. STYLE, supra note 202, at 163; supra note 233 and accompanying text.
298 G. DUNCOMBE, 1665 edition, supra note 30, at 73; see supra note 229 and accompanying text. The only case recognition of the concept before the turn of the century has been mentioned supra notes 259-63 and accompanying text. Among the seventeenth-century law writers, only Duncombe, see supra note 229 and accompanying text, and possibly Style, see
Consider, for example, the well-known *Trial of the Seven Bishops* in King's Bench in 1688. The report contains extended colloquies between Lord Chief Justice Wright and Sir Samuel Astry, Master of the Crown Office, on a variety of procedural points. Astry had been the chief clerk on the crown side for a dozen years and had been a civil practitioner for the twenty years previous. By the tone of the exchanges, it is clear that Lord Chief Justice Wright deferred to Astry's experience on court procedures, despite the dour comment from defendants' counsel that "Sir Samuel Astry has not been here so very long, as to make the practice of his time the course of the court." One of the procedural points that arose concerned a request by defendant's counsel "that in the return of the jury there may be forty-eight returned." The Attorney General responded: "I tell you what we will do; sir Samuel Astry shall have the Freeholders Book, if you please, and shall return twenty-four." Counsel for the defendant rejoined that "[e]ight and forty has been always the course, when the jury is

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supra notes 231-39 and accompanying text, address the subject. Most of the prominent works of the era do not mention the struck jury procedure, and occasional works suggest a positive unfamiliarity with the concept. For example, a report of an anonymous case brought under the Statute of Northampton, 2 Edw. 3 (1328), indicates that "forty six Jurors were returned, which was more then by law ought to be returned, but the tryall for all that did proceed." [J. CLAYTON], supra note 149, at 122. See also An Act for the Ease of Jurors and better regulating of Juries, 7 & 8 Will. 3, ch. 32, § 8 (1695-96) (at the York assizes no more than 10 panels of 24 jurors “shall be returned to serve upon Tryals in Civil Causes”). *Cf. W. NELSON, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE 433 (10th ed. London 1729) (at the Assizes there shall be ten Panels, and no more, of Petty Jurors; consisting of twenty-four Jurors in each Panel, except where Special Jurors are directed”).

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289 12 State Trials 183 (K.B. 1688). The charge was publishing a libel. Id. at 183.
290 Id. at 247.
291 Id. at 242 (Mr. Finch). Heneage Finch was Lord Nottingham’s son and a former Solicitor General. See E. Foss, supra note 13, at 254. Pollexfen, also counsel for the defendants (and later Chief Justice of Common Pleas, see supra note 289), acknowledged that it was “customary for the court to ask what is the course of the court in doubtful cases, and to receive the information from the officers of the court on both sides,” 12 State Trials at 243. Pollexfen argued, however, that what they reported was not to be taken as “final and conclusive.” Id. The main point of debate was whether the defendants were entitled to an imparlance and a copy of the information before they were required to plead. Astry stated that, although these could be granted at the court’s discretion, it was not the normal course of the court to do so. Id. at 252 (Sir S. Astry). Lord Chief Justice Wright stated that the certificate of court practice from Sir Samuel Astry “truly weighs a great deal with me.” Id. at 255 (Wright, L.C.J.). (According to Holdsworth, Jeffreys had engineered Wright’s elevation to the bench, and before that time, Wright had been “a notoriously incompetent lawyer.” 6 W. HOLDSWORTH, supra note 110, at 507.)

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292 Trial of the Seven Bishops, 12 State Trials at 276 (Sir. R. Sawyer).
293 The Attorney General was Sir Thomas Powys. Id. at 191.
294 Id. at 276 (Att’y Gen. Powys).
returned by sir Samuel Astry.” Counsel then agreed to follow whatever the usual practice was, and Lord Chief Justice Wright asked: "What is the usual course, sir Samuel Astry? Do you use to return twenty-four, or forty-eight, and then strike out twelve a-piece, which I perceive they desire for the defendants?" Astry responded: "My lord, the course is both ways, and then it may be as your lordship and the court will please to order it." Lord Chief Justice Wright ordered forty-eight because "that is the fairest," with which counsel for both sides were content.

By 1700 the struck jury procedure had become a much more regular feature of court practice. The first express statutory reference to the special jury had occurred in 1696, and during that same year two King’s Bench rules dealt specifically with procedural aspects of striking the jury. Sketchy reports exist of further encounters with the struck jury in the case law, and during the first three decades of the eighteenth century the concept crept by degrees into a number of the practice books. By the 1730 enactment, the procedure was established.

B. Relation to Trials at Bar

Blackstone’s view was that special juries were “originally introduced in trials at bar, when the causes were of too great nicety

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305 Id. (Sir. R. Sawyer).
306 Id. (Wright, L.C.J.).
307 Id. (Sir S. Astry).
308 Id. (Wright, L.C.J.).
309 Id.
310 An Act for the Ease of Jurors and better regulating of Juries, 7 & 8 Will. 3, ch. 32, § 8 (1695-96), specified the size and number of the jury panels for civil cases at the York assizes “except only where Special Juries are directed to be returned by Rule of Court.”
312 See supra note 264; infra notes 365-73 and accompanying text. See also supra note 258 and accompanying text (speculation that the use of struck juries in trials at bar should have made the concept familiar to judges and practitioners); infra note 363 and accompanying text (discussing a 1696 case in which the defendant’s attorney failed to attend the striking of a jury for a trial at bar).
314 An Act for the better Regulation of Juries, 3 Geo. 2, ch. 25 (1730).
315 See supra note 13 and accompanying text.
for the discussion of ordinary freeholders.” This is probably correct, but Robert Richardson’s flat statement in 1739 in his widely-used King’s Bench practice book that “[a]ll Issues to be tried at the Bar are to be tried by a Special Jury struck by the Secondary” is surely incorrect. Older authorities contain some illumination of the relation of the special jury to the trial at bar. Although there clearly is an historical connection between the two, its exact nature is not well defined. Style again provides a suitable starting point.

According to Style, trials at bar were granted in two situations—where the trial presented difficult questions or involved great value. In either case, “it is fit the Tryal should be at the Bar, where Tryals are more solemn, and where more time may be spent in the Tryal than can be at the Assizes.” Citing a 1648 rule of King’s Bench, Style noted that “the old use of practice” allowed only ten such trials per year because “Tryals at the Bar are a great hindrance to other businesses which are more proper for the Court.” Nevertheless, on May 1, 1650, the King’s Bench increased the maximum number of trials at bar to twenty per year,

316 3 W. BLACKSTONE, supra note 3, at *357-58; see supra note 249 and accompanying text.
317 [R. RICHARDSON], supra note 4, at 123. Although Richardson’s generalization was too broad when written, the close correspondence between trials at bar and special juries continued into the nineteenth century. Thus Archbold states: “The jury is almost invariably special; and the rule for the special jury, forms a part of the rule for the trial at bar.” 1 J. ARCHBOLD, supra note 4, at 168.
318 See 3 J. MORGAN, ESSAYS 369-98 (Dublin 1789) (collecting many of the cases).
319 An Act for the better regulation of Juries, 3 Geo. 2, ch. 25, § 15 (1730), ratifies the power of the court to strike juries “in such Manner as special Juries have been, and are usually struck . . . upon Trials at Bar.”
320 W. STYLE, supra note 202, at 310. Practice books trace this basic formula to the Statute of Westminster II, 13 Edw. (1285). The chapter concerning the authority of the justices at nisi prius provides that “Inquisitions of many and great Articles, the which require great Examination, shall be taken before the Justices of the [Bench,] except that both Parties desire that the Inquisition may be taken afore some of the Associates when they do come into those Parts.” Id. ch. 30 (brackets contained in 1 STATUTES OF THE REALM 86 (1810); compilers substituted this word for “Benches,” id. at n.2); see 1 P. BURTON, PRACTICE OF THE OFFICE OF PLEAS, IN THE COURT OF EXCHEQUER 245 (London 1791); 2 W. TDDD, supra note 4, at 747. Before the Statute of Westminster II, all civil trials were at the bar except those decided in eyre, the procedure for itinerant justices that existed before the circuits of assize. Id.
321 W. STYLE, supra note 202, at 310 (emphasis in original). In the 1670 edition, Style added the caution that “otherwise this Court is not to be troubled with Tryal Causes, because the Court is thereby hindered in their proceedings in matters of Law, and not matters of fact.” W. STYLE, supra note 234, at 510 (emphasis in original). Neither the 1694 edition, W. STYLE, supra note 238, at 513, nor Lilly’s 1719 continuation, see 2 J. LILLY, supra note 179, at 604, changes this passage.
322 W. STYLE, supra note 202, at 314 (emphasis in original).
all to be conducted, as had been true earlier, during Easter term. At some point after 1670, the year of Style's second edition, the limitations on the number of trials at bar and their confinement to Easter term disappeared; Lilly's revision of Style in 1694 noted that trials at bar "are now more desired than anciently they were," and that "the Court doth not think fit to limit them to any number."

Apart from the early numerical limitations, additional rules and cases circumscribed the court's discretion in granting trials at bar. For example, "[i]f the Venire chance to arise out of three Counties, the Trial must be at Bar, unless it be upon two Issues." Style states that a trial at bar could not be had without leave of the court, yet other authorities indicate that the Attorney General could always obtain a trial at bar for criminal cases if desired, at least where the Attorney General was the prosecutor. Similarly, the courts granted a trial at bar if one of the justices of the bench or a master in Chancery was involved in the litigation, "soit le value quel voet [be the value what it will]." And in an unsuccessful action brought against Sir Samuel Astry to capture his place as Clerk of the Crown for the Court of King's Bench, the court granted Sir Samuel's motion for a trial at bar over the Attorney General's protest, because "a trial at bar was never denied to any officer of the Court, nor hardly to any gentleman at the bar."

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323 Id. at 315. Specifically, all civil trials at bar were to be conducted during the fortnight before the end of the term. Id. The "old course" allowed some criminal trials at bar during Michaelmas term and, eventually, "special cases" in Hilary and Trinity terms as well. Id. at 316 (emphasis in original). By the early 1700's, the court could take up "extraordinary Cases" in any term if necessary to avoid prejudicial delay. 2 J. Lilly, supra note 179, at 615.

324 W. Style, supra note 236, at 517 (emphasis in original). Rules limiting the number of trials at bar pertained to King's Bench; I have located no comparable rules for Common Pleas.

325 The Practick Part of the Law, supra note 29, at 45.

326 W. Style, supra note 202, at 317.

327 See, e.g., Rex v. Robertum Hales, 2 Str. 816, 93 Eng. Rep. 868 (K.B. 1728); Lord Bellamont's Case, 2 Salk. 625, 91 Eng. Rep. 529 (K.B. 1700). In Robertum Hales, the Attorney General's motion for a trial at bar "was granted as of right to the King in his own cause." 2 Str. at 816, 93 Eng. Rep. at 868. Note that An Acte to redresse Disorders in Common Infourmers upon Penall Lawes, 18 Eliz., ch. 5, § 3 (1575-76), required the Attorney General to show reasonable cause for a trial at bar of any alleged criminal offense taking place more than 30 miles from Westminster. It seems doubtful that this statute was enforced during the late seventeenth and early eighteenth centuries.


329 See supra text accompanying note 300.

In Lord Sandwich's Case, the King's Bench in 1699 acknowledged that "[w]here there is value or difficulty, we are bound of common right to grant trials at the bar," but the court denied a motion for a new trial at bar. The court reasoned that, even though the value of the property in question was large, only the execution of a conveyance remained in dispute. Two unreported cases support the intimation in Lord Sandwich's Case that Chief Justice Holt was not pleased by the proliferation of trials at bar. In Drake v. Nicholle, Lord Raymond moved for such a trial, alleging that £150 was in dispute; Chief Justice Holt denied the motion, stating "the value is not all but the difficulty must be regarded." Similarly in Duke of Richmond v. Costelo, the court denied a trial at bar in an action for scandalum magnatum on the strength of an affidavit that less than 200 was in dispute.

In Fuller v. Mountjoy, Chief Justice Parker observed that "the real purchase money as 2000£ may be said to buy an 100£ annuity," thus a general rule of £100 income per annum real estate or £2000 personality was established. Despite Chief Justice Holt's reservations, the "value or difficulty" formula persisted until a swing of the pendulum back to a more sparing allowance of trials at bar can be observed, beginning in the late 1720's and becoming established in the 1730's. In 1725 the court had, on the strength of precedent, granted a trial at bar where the disputed matter was of trifling value but required lengthy testimony. In 1728 the new attitude of King's Bench was expressed in Goodright v. Wood.

Id. at 648, 91 Eng. Rep. at 550 (footnote omitted).
Id.
Harvard NB 163 (unpaginated).
Id.
Id.
Id.
Scandula magnata are "[w]ords spoken in derogation of a peer, a judge, or other great office of the realm." 3 W. BLACKSTONE, supra note 3, at *123.
Reports of Cases adjudged Between Trinity Term 13 Ann: & Trinity Term 1 Georgii inclus' in the King's Bench, Harvard MS 1019 [hereinafter cited as King's Bench Reports, 1714-1715, Harvard MS 1019], at 14 (K.B. 1714).
Id. This general rule was reiterated as an accepted principle in Wynn v. Middleton, Harvard MS 4055(7), fol. 32 (K.B. 1743).
See supra notes 331-37 and accompanying text.
See Wynn v. Middleton, Harvard MS 4055(7), fol. 32 (K.B. 1743); Haycroft v. Ross, Harvard MS 1110, at 3 (K.B. 1730); Mead v. Constable, King's Bench Reports, 1714-1715, Harvard MS 1019, at 102 (K.B. 1715).
On a Motion For a Trial at Bar, the Court laid down two Rules, that they never grant these Trials merely for the Consequence of the Cause, though it be of ever so great a Value; nor ever for the Length of Examination, where 'tis of a very small Value; and in Ejectments the Rule has been not to allow them but where the Yearly Value of the Land in Question is 100l. The Court said likewise that a general Swearing of the Length of a Cause, though there is Value too, will not be sufficient, unless there is a probable Foundation laid for them to believe it.344

Further, in the 1741 Common Pleas case of Frost v. Whadcock,345 plaintiff supported his motion for a trial at bar by citing the need for a close examination of title, involving many witnesses, to which the court responded: "As to strict Examination, it is necessary in all Cases, and is nothing with Respect to a Trial at Bar."346 There being "no Nicety in this Point, or Difficulty, so as to require the Attention of the whole Court," the court denied the request in favor of "a Day extraordinary at the Assizes, where an examination of a great Number of Witnesses is most proper, and least expensive."347

A further limitation on the trial at bar was its unavailability in London. By the city's charter, London jurors could not be required to journey outside city limits.348 Moreover, "[i]t was said by Rolle
Chief Justice, that the City of Bristol will not bring a matter to be tried here at the Bar, no more then the City of London will."349 The same rule existed generally regarding the counties palatine, as Coke's report of a Common Pleas case in 1568 indicates.350

With these general rules on the availability of a trial at bar as background, some features of the connections between the special jury and the trial at bar can be identified. First, not every trial at bar used a special jury. Mr. Farington's Case,351 a 1682 murder trial, clearly illustrates this fact. There, the court ordered a trial at bar upon good cause shown, after which a request was made that a special jury be struck "as is usual by the Secondary in Civil Causes upon Trials at Bar."352 The court denied the request as "contrary to the Course of the Court in capital Causes."353 Otherwise the defendant would be deprived of his right of thirty-five peremptory challenges.354

Conversely, not every special jury case was a trial at bar during the formative years under discussion. A majority of the reports of seventeenth-century special jury cases state that the trial was at bar, but many of them are silent on the subject, and the trials may not have been at bar.355 Moreover, by the second half of the cen-

rule. W. Style, supra note 202, at 313. The general limitation in the London charter was added to the 1694 edition. See W. Style, supra note 236, at 517.

349 W. Style, supra note 202, at 317 (emphasis in original). Later, the various geographic limitations were said to be waivable by the parties in a case otherwise appropriate for trial at bar. 1 J. Archbold, supra note 4, at 187 (relying upon Lockyer v. East India Co., 2 Wils. K.B. 136, 95 Eng. Rep. 728 (K.B. 1761) (trial at bar by a special jury of citizens of London)).


352 Id. at 222, 84 Eng. Rep. at 1227-28.


355 For cases shown as trials at bar, see Philips v. Crab, 12 Mod. 94, 94, 88 Eng. Rep. 1187, 1187 (K.B. 1693); Mr. Farington's Case, Jones T. 222, 222, 84 Eng. Rep. 1227, 1227 (K.B. 1682); Rex v. Kiffin, 3 Keble 740, 740, 84 Eng. Rep. 984, 984 (K.B. 1677); Mich. 1649. Banc. sup., Style 233, 233, 82 Eng. Rep. 672, 672 (Upper Bench 1650). For cases silent about whether the trial was at bar, see Rex v. Duncomb, 12 Mod. 224, 88 Eng. Rep. 1278 (K.B. 1698); Anonymous, 1 Salk. 405, 91 Eng. Rep. 352 (K.B. 1696) (does not state that trial was at bar, but case appears to be identical with Philips v. Crab, 12 Mod. 94, 88 Eng. Rep. 1187 (K.B. 1693), which was at bar); In Enquest, Br. 30., 1 Keble 884, 83 Eng. Rep. 1288 (K.B. 1665).
tury, courts on assize could order special juries. Lilly reports a ruling by Chief Justice Glyn stating that a struck jury could be awarded at nisi prius, and, in the 1724 decision of *Rex v. Burridge*, Chief Justice Pratt observed that “above thirty years ago there were several [such] precedents” in which struck juries were ordered, even without the consent of the parties.

Although the special jury may have deep roots, it was not well recognized until the latter half of the seventeenth century. Even then, judges and leading practitioners were uncertain about the procedure. Trials at bar, in contrast, were both familiar and common. It is unreasonable, therefore, to assume that struck juries invariably accompanied trials at bar for important or difficult cases. The sheriff may well have produced a “special,” nonstruck jury as a matter of course for trials of sufficient moment to command the full court’s attention; in this sense the special jury and the trial at bar seem to have been linked at least through the 1600’s. During the late 1600’s, however, the number of trials at bar increased significantly, reaching cases of trifling consequence that promised complicated or extended testimony. When this happened, even the “special,” nonstruck jury, probably was not returned on a consistent basis. Additionally, the increasing use of the special jury at nisi prius by the end of the century and the unavailability of the special jury in capital cases further distanced the two concepts. By the statute of 3 Geo. 2, ch. 25 (1730), the special jury had become synonymous with the struck jury and had acquired a life of its own.

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356 W. Style, supra note 236, at 286. See infra notes 374-77 and accompanying text for a discussion of this passage in Style and Lilly.
357 8 Mod. 245, 88 Eng. Rep. 175 (K.B. 1724).
358 Id. at 247, 88 Eng. Rep. at 177. See also Regina v. Banks, 2 Ld. Raym. 1082, 92 Eng. Rep. 217 (Q.B. 1704) (special jury granted for trial on assize after complex procedural dispute between prosecutor requesting a trial at bar and defendant seeking to have the case heard at nisi prius); infra notes 381, 398.
359 See supra notes 299-309 and accompanying text (discussing The Trial of the Seven Bishops).
360 During the first half of the eighteenth century, trials at bar again may have generated special juries automatically. Trials at bar were no longer freely granted, and after the passage of An Act for the better Regulation of Juries, 3 Geo. 2, ch. 25 (1730), practitioners had become increasingly familiar with struck jury procedures. That this in fact occurred is suggested by Pyle v. Grant, 1 Barnard. K.B. 260, 94 Eng. Rep. 177 (K.B. 1729), where the court stated that “in these Trials at Bar... the Rule is always drawn up with a Clause, that the jury shall be struck by the Master, without any special Direction.” Id. at 260, 94 Eng. Rep. at 178. See 1 J. Archbold, supra note 4, at 188; infra notes 382-85 and accompanying text (discussing Regina v. Harcourt).
361 An Act for the better Regulation of Juries, 3 Geo. 2, ch. 25 (1730).
C. Procedural Questions

Some procedural features of the special jury were settled before the statute of 3 Geo. 2, ch. 25 (1730). In 1696, the King's Bench ruled that if attorneys for both parties received proper notice and only one side appeared, "he that appears shall, according to the ancient course, strike out twelve; and the Master shall strike out the other twelve for him that is absent." Also, by a separate rule in the same year, the court ordered that the rule for a struck jury must specify that the Master is to "strike forty-eight, and each of the parties shall strike out twelve," or else "the Master is to strike twenty-four, and the parties have no liberty to strike out any."

Whether the consent of both parties was always required for a special jury is unclear. In *Rex v. Chipping-Norton*, Chief Justice

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342 Id.
343 Anonymous, 1 Salk. 405, 405, 91 Eng. Rep. 352, 352 (K.B. 1696). The events leading to the issuance of the rule are described in 2 J. LILLY, *supra* note 236, at 25-26. The case was to be tried at bar, but the defendant's attorney did not appear to participate in striking the jury. The court was irked, stating that if the rule for a trial at bar had been obtained by consent of counsel for both sides, then defendant's attorney was in contempt for not attending the striking of the jury, or at least "it was the Defendant's Attorney's Fault, and a Trick in him." *Id.* at 25. The court, however, grudgingly accepted defendant's attorney's excuse of having been too busy to attend and allowed the striking of a new jury, issuing at the same time the general rule to govern future cases. *Id.* at 25-26.

Lilly does not identify the case, but manuscript sources show that the case was Earl of Bath v. Earl of Montague (K.B. 1696). See James Wright, *A Collection of Certain Cases and Proceedings at Law, From the Death of King Charles 2, to the End of the Reign of King William 3* [hereinafter cited as James Wright's Reports], Harvard MS 1071, fol. 50. The case was tried in Trinity term, 8 Will. III (1696). Ward, plaintiff's attorney, gave Sherwood, defendant's attorney, notice to attend the secondary on a particular evening. Sherwood said he already had an appointment that night to appear before the Prothonotary of Common Pleas to strike a jury for a case pending in that court and then "offered to attend . . . the next day." *Id.* Ward nevertheless prevailed upon the secondary to strike a jury *ex parte*. Ultimately, Sherwood successfully moved to set the jury aside. *Id.* Although Lilly's version of the case depicts Sherwood as the culprit, Wright seems to have perceived Ward as the manipulative attorney. Interestingly, Wright notes elsewhere that an earlier phase of the dispute between the parties was "so very long and tedious" that it kept the court and jury sitting for an uninterrupted 24 hours, during which "refreshments were brought into Court to the Jury, once or twice." Earl of Montague v. Earl of Bath, James Wright's Reports, Harvard MS 1071, fol. 39.

Anonymou, 1 Salk. 405, 405, 91 Eng. Rep. 352, 352 (K.B. 1696). Several years later the court ruled that a new trial was not justified where the sheriff had erroneously returned a common jury despite a rule for a special jury, because the defendant had participated in the trial without protest. Anonymous, 12 Mod. 567, 88 Eng. Rep. 1525 (K.B. 1701). Cf. *supra* note 185 and accompanying text (discussing rule that an alien in a criminal action lost his right to request a jury *de medietate* if he allowed an ordinary jury to be impaneled without objection).

Raymond stated that the defendant could not have a special jury without the consent of the Attorney General. Yet Sir Samuel As-try was allowed a trial at bar over the Attorney General’s protest, and the trial at bar was then commonly tried before a special jury. And in the 1710 decision in Regina v. Harcourt, Justice Powell stated: “I have known the Court to overrule the Attorney General where he has prayed and claimed to have a thing tried at nisi prius, and the Court when they thought the issue deserved a Tryall at Barre have directed it to be had.”

In Rex v. Burridge the court asked the Master of the Crown Office whether a special jury could be granted without the consent of the parties. After a search of the precedents, he reported “that above thirty years ago there were several precedents for special juries upon trials for nisi prius, without the consent of the parties; but that in the last thirty years there were several motions made for that purpose, but always denied.” Chief Justice Pratt took this to mean that the court still had discretionary power to grant a special jury without the consent of the parties, but his three fellow justices disagreed. They believed “that a special jury might be granted to try a cause at BAR without the consent of the parties, but never at the nisi prius, unless very good cause was shewed, and that the cause now shewed was not sufficient.”

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356 Id. at 41, 94 Eng. Rep. at 29. See infra notes 416-17 and accompanying text.
358 See infra notes 378-80 and accompanying text.
359 Hollinshed’s Reports, Harvard MS 1142, at 150 (Q.B. 1710).
360 Id.
361 8 Mod. 245, 247, 88 Eng. Rep. 175, 177 (K.B. 1724); see supra note 152 for additional reports of the case.
363 Id. at 248, 88 Eng. Rep. at 177 (emphasis in original). By “very good cause,” the judges meant a “lawful objection” against the sheriff, proved by affidavit, because “the sheriff is the proper officer to return juries; and if there is no legal exception against him, the Court cannot slip him, and order another to strike a special jury, without the consent of the parties, to try an issue at the assizes.” Id. Presumably this would require a showing of affinity or of sufficient bias to justify a challenge to the favor. See supra note 251. No such showing was made in Burridge.

The point of contention in Burridge seems therefore to have been the policy question of when the sheriff was to be deprived of his fees for returning a jury if one party objected to a motion by the other party for a special jury. The court’s answer was that the sheriff should never be deprived at nisi prius, absent a valid challenge to the array. 8 Mod. at 248, 88 Eng. Rep. at 177. But in a trial at bar, the significance of the case might justify impaneling a special jury without the parties’ consent, a policy overriding the ordinary right of the sheriff to his fees. Apparently the court in Burridge did not perceive that, if a lawful challenge to the array existed, process could go to the coroner, and there would be no need to impanel a special jury over one party’s objection. See supra note 256.
Style further confuses the point. In his second edition, Style includes the following decision by Chief Justice Glyn:

This Court will not order the Secndary [sic] to return a Jury to try a Cause at the Assizes, except both parties consent; for this were to thwart the ordinary course of proceedings. But in Causes that are to be tryd at the Barr, the Court will upon good cause shewed by either party why it should be so, will order the Secondary to do it.\(^{374}\)

The third edition of Style (revised by Lilly), however, dropped the italicized sentence, and the report of the decision was altered to read “[t]his Court will order the Secundary [sic] to return a Jury to try a Cause at the Assizes, if they see reason for it, without both Parties consent, or else this were to thwart the ordinary course of proceedings, and obstruct Justice.”\(^{375}\) Lilly’s 1719 edition retained the altered version of Chief Justice Glyn’s decision.\(^{376}\)

The cause of the alteration is uncertain. Interestingly the master’s report in *Burridge* that motions for special juries at nisi prius without the parties’ consent had been denied for the past thirty years\(^{377}\) referred to a period beginning in 1694. Earlier prece-
tents allowing such special juries were said to exist, and perhaps those cases led to the change in the 1694 edition.

In any event, the early eighteenth-century practice seems to have been as follows. When a party requested a special jury, the opposing party was given notice and time to respond. A special jury would be ordered where good cause existed, even over the objection of one or both parties. The court might find good cause in the innate importance of the case, and the court could order a special jury on its own motion or on the motion of one of the parties. A unique and interesting variation on this pattern is an unreported anonymous case in 1710 in which the King's Bench accepted the prospect of jury-packing as good cause not to allow a special jury. The court granted the defendant's motion to discharge a rule for a special jury after he argued: "The suit is between the Lord of a Mannor and his Tenants. They will get all Lords of Mannors returned. I pray it may be tryed by a Common Jury."

If the sheriff was unindifferent, the plaintiff could request that process issue to the coroner and forego a special jury. The defendant, however, always retained his challenges in cases of alleged sheriff bias. But the defendant may have had the alternative of requesting a special jury, at least according to the dicta in the version of Rex v. Burridge contained in Modern Reports.

In the unreported case of Regina v. Harcourt an information had been brought against the Master of the Crown Office. His counsel moved for a trial at bar; crown counsel challenged the

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578 "It. . . has always been the course of the court, that when either party will suggest any special matter about awarding the venire out of the common course, a copy must be given to the opposite party, and they must have a reasonable time to consider it. . . ." Brocas v. Civit' London, 1 Str. 235, 235, 93 Eng. Rep. 493, 493 (K.B. 1719).

579 This was not likely to be done in a crown case if the Attorney General withheld his consent. See Rex v. Chipping-Norton, 1 Barnard. K.B. 41, 94 Eng. Rep. 29 (K.B. 1727); infra text accompanying notes 416-17. But in Pyle v. Grant, 1 Barnard. K.B. 269, 269, 94 Eng. Rep. 177, 177 (K.B. 1729), the court ordered a special jury as an automatic part of a trial at bar, despite the appellant's protest that he was too poor to bear the expense of a trial at bar. See also Wilks v. Eames, Andr. 51, 52, 95 Eng. Rep. 293, 294 (K.B. 1737), where the court stated that "though it was not usual, before the said act [An Act for the better Regulation of Juries, 3 Geo. 2, ch. 25 (1730)], to grant special juries without consent, yet in some instances, and for special causes, it was and might be done."

582 Hollinshed's Reports, Harvard MS 1142, at 150 (Q.B. 1710).
583 One of the defendant's counsel was his father, Simon Harcourt, a leading member of the bar who had already served briefly as Attorney General, later returned to that office, and eventually became Lord Chancellor. See 8 THE DICTIONARY OF NATIONAL BIOGRAPHY, supra note 104, at 1206-09 (entry by G.F. Barker).
motion on unusual procedural grounds. The notice originally given by the defendant's counsel stated that the defendant would move for both a trial at bar and a special jury. A venire was filed accordingly. Later, the formal motion for a trial at bar made no reference to a special jury. The question thus became whether the venire was fatally irregular, or whether it could be taken off the record. On this question the court was evenly divided, two to two, and the motion for a trial at bar did not carry.\textsuperscript{384}

The unusual problem was that the special jury could not be struck because the defendant was the secondary. According to Chief Justice Parker:

Here was notice given for a Tryall at Barre and for a Special Jury, but the motion for the Tryall at barre was only made, here the thing can't be done according to the Course of the Court that is for the Master to strike the Jury, because he is a party, the question is whether it can be taken off the file.\textsuperscript{385}

In the case of a biased sheriff, the venire was traditionally directed to the coroner, and if the coroner was tainted as well, electors were appointed.\textsuperscript{386} Apparently no similar contingent procedure had yet evolved for the special jury; when the secondary was biased, the court would deny the motion for a struck jury. This defect ultimately was cured. In \textit{South-Sea Company v. Crimes},\textsuperscript{387} a special jury was moved in London, but because the sheriff, one of London's two coroners, and the master all were South-Sea Company stockholders, the court directed the venire to the other coro-

\textsuperscript{384} Harcourt, Hollinshead's Reports, Harvard MS 1142, at 186-89.

\textsuperscript{385} \textit{Id.} at 187. Chief Justice Parker and Justice Eyre were of the view that the venire should not be taken off the record—an extraordinary measure—because the error was harmless. Had the notice contained no reference to the special jury, the venire would have been regular, and the omission by counsel should therefore not have made any difference. \textit{Id.} at 186-87. Observations about the court's recent practice strengthened this view. Previously the venire was "awarded" formally by being recorded on the Plea Roll, and no discrepancy could exist between the venire as awarded and as previously entered on the record. But the process of award by recordation on the Plea Roll had been abandoned, and as Solicitor General Raymond argued: "If proceedings are to be set aside for want of an Award of a Venire upon the Roll, no Tryall has been regular these 40 years . . . ." \textit{Id.} at 188.

Justice Powell stated that "it is commonly part of the Rule for a tryall at Barre to have a Speciall Jury," but "when a Venire is filed irregularly there is no room to move for a tryall at Barre and a good Jury till it is taken off the File." \textit{Id.} at 187. Justice Powys agreed. \textit{Id.} Because neither Parker nor Eyre would agree to taking the venire off the record, \textit{id.}, the court was stalemated, \textit{id.} at 189. Interestingly, both Justices Powell and Eyre used the terms "special jury" and "good jury" interchangeably. \textit{Id.} at 187 (Powell, J.), 188 (Eyre, J.). For a discussion of the "good jury," see \textit{infra} notes 414-46 and accompanying text.

\textsuperscript{386} See \textit{supra} notes 250-51 and accompanying text.

ner and ordered that the freeholder's book be delivered to the Clerk of the Papers to strike a jury. 868

Other remarks of the judges and counsel in Regina v. Harcourt provide clues to early eighteenth-century perceptions of the struck jury. 889 Chief Justice Parker noted that before the Statute of Nisi Prius, 890 the sheriff returned all juries to London, so that "the Jury are at the same Expense at a Tryall at Bar as to come to another Tryall in Middlesex." 891 Exactly what other trials Justice Parker had in mind is unclear; Solicitor General Raymond pointed out that "[b]efore the Stat[ute] of nisi prius all tryalls for Middlesex were at the Barre," adding that "then the Sheriff was not obliged to return gentlemen of the better Rank." 892

The Statute of Nisi Prius did not create any obligation "to return gentlemen of the better Rank," but this tradition emerged as a part of reserving protracted, difficult cases for trials at bar. 893 By the time of Regina v. Harcourt, however, there was some question about whether "gentlemen of the better Rank" were invariably jurors for trials at bar. Justice Eyre commented that "[i]n a Tryall at Barre the Jury is returned by the Master. The Jury is special only because it is returned in a special manner, it is no Objection that a man is a Common Juror." 894

With regard to the expense of a special jury, the applicable statute required the applying party to pay the costs of striking the

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868 Id. at 421, 94 Eng. Rep. at 283. Part of the information about the resolution of this case is taken from the manuscript report in Harvard MS 4055(1), at 88.

889 The case also vividly illustrates how strong personalities among the bar could intimidate the bench. When Simon Harcourt moved to put off the case until the next day, the Attorney General (Sir James Montague) protested indignantly:

Will you stay proceedings on the bare suggestion of a son in the case of his Father[,] who is Secondary to his Father? At that rate proceedings may be stayed without anything more than a motion. In the case of Chapman and Sedgewick to be tryed before my Ld. C.J. [Lord Chief Justice] this afternoone I pray proceedings may be stayed. There are irregularities in it.

Regina v. Harcourt, Hollinshed's Reports, Harvard MS 1142, at 187 (Q.B. 1710). Justice Powell responded, petulantly: "I have not known such Usage as that offered to the Court. I would have you know that tho' Mr. Attorney be a great man this Court is greater than he." Id.

890 The Statute of Westminster II, 13 Edw., ch. 30 (1285).


892 Id. at 188.

893 See supra notes 229, 249 and accompanying text.

894 Regina v. Harcourt, Hollinshed's Reports, Harvard MS 1142, at 187 (Eyre, J.). Eyre's comment supported his view that the venire issued pursuant to a notice for a special jury could be used for a common jury after the request for a special jury was abandoned. Id. at 187, 188 (Eyre, J.).
Previously, perhaps because courts almost always impaneled special juries with the consent of both parties, the practice had been for the parties to share equally the costs of striking the jury. The loser, however, bore the expense of paying the special jurymen. The amounts of the fees were not fixed by rule of court or by statute. In a 1694 table of customary fees, the fees due Mr. Richard Aston, Secondary of the Court of King's Bench, included: "For Returning Juries to Try Causes at the Bar, each Party give what he pleases." According to Richardson, "[t]he Secondary and Under-Sheriff had formerly each a Guinea a Side from Plaintiff and Defendant." And in 1730, a tabulation of the fees of Mr. Samuel Clarke, Secondary of King's Bench, showed one pound, one shilling due from each party for the nominating and striking all special Juries for Trials at the Bar and otherwise.

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395 An Act for the better Regulation of Juries, 3 Geo. 2, ch. 25, § 16 (1730).
397 See LISTS OF THE OFFICERS AND THEIR DEPUTIES, BELONGING TO THE SEVERAL COURTS IN WESTMINSTER-HALL, AND ELSEWHERE 66 (London 1731) (presented to the House of Commons pursuant to an order of March 4, 1730), where an entry for a proceeding in the Exchequer indicated that "[f]or striking a special Jury . . . half was paid by the Plaintiff, and half by the Defendant, before the Act of Parliament [An Act for the better Regulation of Juries, 3 Geo. 2, ch. 25 (1730)], to the Master."
398 Wilks v. Eames, Andr. at 52, 95 Eng. Rep. at 294. The court added that the practice of the loser bearing the expense of paying the special jurymen applied "whether with or without [the loser's] consent [to the special jury]." Id. In the manuscript report, Chief Justice Lee clarified this point:

It would be too much to take the Consent, which was objected at the Bar, as the Reason why the Party against whom the Verdict was given should pay the Costs of the Special Jury, for the Costs are always paid by him against whom the Verdict is given and that is the reason for paying costs.

Wilks v. Eves [sic], Harvard MS 2050, vol. 1, at 85.
399 AN EXACT TABLE OF FEES, OF ALL THE COURTS AT WESTMINSTER 53 (London 1694). See also THE PRACTICK PART OF THE LAW, supra note 29, at 38 app. (noting that no authentic tables of ancient fees on the plea side of King's Bench were known to exist, such tables reputedly having been burned in the great fire of London). The fees given, id. at 39 app., appear to be identical to those in the 1694 table; they were compiled from responses received from inquiries sent to the "several Offices and Clerks" of King's Bench, id. at 38 app. For trials at bar, special fees were due to other officers—for example, the Clerk of the Papers, the Deputy Marshall, the Crier—but these were not incidents of the special jury.
400 The practice, that is, before the enactment of An Act for the better Regulation of Juries, 3 Geo. 2, ch. 25 (1730).
402 LISTS OF THE OFFICERS AND THEIR DEPUTIES, BELONGING TO THE SEVERAL COURTS IN WESTMINSTER-HALL, AND ELSEWHERE, supra note 397, at 22. Apparently each clerk prepared his own list of fees. The secondary on the crown side merely showed one pound, one shilling "[f]or attending every Trial at Bar." Id. at 36. He added a fee of 10 shillings six pence per side "[u]pon striking of every special Jury, for the fair copies, which are made and delivered
In addition to the costs of striking, fees were paid to special jurymen. Chief Justice Lee observed in 1737 that “there has not been any Rule settled about the Sum that it is reasonable to give the Jury upon a Trial at Bar,” but the Master of the King’s Bench Office certified that “he never allowed less than a guinea to each special juror in London.” One case of a trial at bar was cited in which each juror received five guineas, and one justice questioned why a special juror should receive more than a common juror, because the former was better able to bear the cost of jury service than the latter.

A final point of procedure pertains to the use of talesmen. Originally, talesmen were summoned by a specific rule for a fixed number of additional prospective jurors when the initial panel did not yield a full jury. As the Appendix shows, statutory property out by the Secondary.” Id. at 37. The Prothonotary of Common Pleas showed one pound, one shilling “[f]or the striking of every special Jury each Side.” Id. at 45. In the Exchequer two pounds, two shillings were indicated “[f]or striking a special Jury, whereof half was paid by the Plaintiff, and half by the Defendant, before the Act of Parliament [An Act for the better Regulation of Juries, 3 Geo. 2, ch. 25 (1730)], to the Master.” Id. at 66.

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403 Wilks v. Eves [sic], Harvard MS 2050, vol. 1, at 60 (K.B. 1737).

404 Wilks v. Eames, Andr. 51, 52, 95 Eng. Rep. 293, 293-94 (K.B. 1737) (emphasis in original). Andrews’s report shows that the London jurors in Wilks received two guineas each (the two talesmen each received one-half guinea). Andr. at 52. In a companion case, the special jurors apparently received at least that much. Hamilton v. Style, Andr. 53, 53, 95 Eng. Rep. 294, 294 (K.B. 1737) (“311. 10s. charged for costs of the jury”). Manuscript reports, however, show that the jurors in Wilks each received one guinea, Wilks v. Eams [sic], Harvard MS 4055(6), fol. 10; Harvard NB 151, fols. 109, 114; the jurors in Hamilton received more, evidently sharing 31 guineas. Hamilton, Harvard NB 151, fol. 114. It should be noted that the author of this notebook erroneously wrote “Hamilton and Stiles was a Cause tried at Guildhall and 12 Guineas allowed[.] Wilks v. Eames tried at Chester and 31 Guineas allowed.” Id. He had transposed the two cases.

405 Wilks v. Eames, Andr. 51, 52, 95 Eng. Rep. 293, 294 (K.B. 1737). Indeed Duncombe, in his fifth edition, published in 1718, asserted that Middlesex juries “court the Bailiffs to return them, especially to Trials at Bar, where five Pounds a Man is frequent Gratuity, sometimes more.” G. DUNCOMBE, supra note 178, at 218. In Wilks, the court was referring to “the corporation of Bewdley, which was a trial at Bar by a Worcestershire jury.” Andr. at 52, 95 Eng. Rep. at 294. For a printed report of this case see Regina v. Bewdley, 1 P. Wms. 207, 24 Eng. Rep. 357 (Q.B. 1712). In Bewdley, the court reduced the costs allowed by Harcourt, the master. Statements of what Harcourt had originally allowed ranged from 20 guineas per juror, Wilks v. Eames, Andr. at 52, 95 Eng. Rep. at 294 (Page, J.), to 12 guineas per juror, Wilks v. Eams [sic], Harvard MS 4055(6), fol. 10. In truth, Harcourt allowed each juror seven guineas. See Regina v. Bewdley, Harvard NB 126 (unpaginated), in which the bill of costs is stated. The court reduced this allowance to five guineas per juror. See Wilks v. Eams [sic], Harvard MS 4055(6), fol. 10; Harvard NB 151, fol. 114. According to the bill of costs, the same allowance was extended to all special jurors appearing, whether or not they served. Harvard NB 126.


407 It is beyond the range of this study to state all of the particularized rules pertaining to talesmen. For useful summaries, see 2 J. CHITTY, supra note 40, at 517-21; THE COMPLETE
qualifications were set for talesmen in 1692 at a level half that required for the initial panel of jurors, certain courts and types of cases excepted. The old requirement of an order for a fixed number of talesmen generated delay, especially when there was no assurance that the order would produce a full jury. Thus Parliament authorized the tales de circumstantibus in the mid-1500's, permitting deficiencies in jury numbers to be filled from among the bystanders in court upon the prayer of the plaintiff or defendant. The tales de circumstantibus was not allowed, however, for trials at bar; otherwise it was available for special juries, despite the possible dilution of the quality or expertise represented by the special jury.

D. Relation to “Good” Juries

More elusive than the connection between the special jury and the trial at bar is the relationship of the special jury to the “good jury.” In contrast to the “substantial jury,” the expression “good jury” became a term of art, at least by the early eighteenth century. For example, in the 1727 case of Rex v. Chipping-Norton, King’s Bench granted the defendant’s motion “that he might have

JURYMAN, supra note 4, at 90-99.

408 See infra Appendix; see also statute of 4 W. & M., ch. 24, §§ 18-20 (1692).
409 For an example of a trial put off four times because a full jury was not produced by the original panel and four decem tales (four successive orders for the return of 10 new jurors as talesmen), see the pleadings in Regina v. Watson, 2 Ld. Raym. 856, 92 Eng. Rep. 72 (Q.B. 1703), reprinted in G. WnLSON, ENTRIES OR PLEADINGS 18-25 (3d ed. Dublin 1785) (1st ed. Dublin 1767).
410 See supra note 24.
411 See infra Appendix; see also An Acte for certaine Ordinaunces in the Kinges Majesties Domynion and Principalities of Wales, 34 & 35 Hen. 8, ch. 26, § 46 (1542-43); An Acte concerninge thapparaunce of Jurors in the Nisi Prius, 35 Hen. 8, ch. 6, § 3 (1543-44); An Acte to make uppe the Jurie withe Circumstantibus, where the King and Quenes Majesties is a Partie, 4 & 5 Phil. & M., ch. 7 (1557-58); An Acte to fill upp Juries De Circumstantibus lacking in Wales, 5 Eliz., ch. 25, § 1 (1562-63).
412 It is highly improbable that, despite the 1692 requirement, see supra note 408, talesmen impaneled de circumstantibus in ordinary cases were freeholders. Cockburn, in the chapter on the trial jury in his forthcoming introduction to calendar of assize records, quotes several sixteenth- and seventeenth-century sources critical of the tales de circumstantibus because it increased the likelihood that unqualified jurors would be impaneled and facilitated partisan jury-packing. J. Cockburn, supra note 41.
413 See The COMPLETE JURYMAN, supra note 4, at 93. Lilly noted that if a jury was not filled for a trial at bar from the original panel, “the Court will order the Sheriff to return a Decem Tales, which he usually doth of Gentlemen in London having Estates in his County. Pas. 23 Cor. B.R.” 2 J. LILLY, supra note 236, at 357 (emphasis in original).
414 See supra notes 316-61 and accompanying text.
415 See supra notes 275-96 and accompanying text.
a good Jury” but denied him a special jury since the Attorney General would not consent to the latter.417

Loosely described by Tidd as “a better sort of common jury,”418 a good jury typically was returned by the sheriff pursuant to a writ of inquiry419 to ascertain the amount of damages owing to a successful plaintiff. The good jury was not automatic in such cases; it was impaneled at the plaintiff’s request, often after the recovery of a default judgment.420 The term “good jury” may have originated in the form of the writ of inquiry, which directed that the inquest be conducted by “duodecim proborum et legalium hominum,”421 or, twelve good and lawful men. By comparison, the writ for a common jury called for twelve “free and lawful men of the neighbourhood,” or “free and lawful men of the body of your county.”422

The seventeenth- and early eighteenth-century practice books do not mention the good jury. Possibly this omission reflects the local nature of the inquiry before the sheriff in the venue where the dispute arose, yet even the late eighteenth-century practice books dealing with sheriffs and undersheriffs are silent on the subject.423 Nevertheless, in 1720 King’s Bench was able to refer to “the

417 Id. at 41, 94 Eng. Rep. at 29.
418 2 W. Tidd, supra note 4, at 787 (emphasis in original).
419 A writ of inquiry is a judicial writ, issuing out of the court where the action is brought . . . directed to the sheriff of the county where the venue is laid; setting forth the proceedings which have been had in the cause; “and that the plaintiff ought to recover his damages, by occasion of the premises: But because it is unknown what damages he hath sustained by occasion thereof, the sheriff is commanded, that by the oath of twelve honest and lawful men, he diligently inquire the same; and return the inquisition into court.”
420 See, e.g., Wilkinson v. Malin, 1 C. & M. 237, 238, 149 Eng. Rep. 388, 389 (Exchequer 1832) (stating that the granting of a good jury is at the court’s discretion); The Practick Part of the Law, supra note 29, at 137.
421 E.g., Anonymous, 3 Mod. 112, 112, 87 Eng. Rep. 71, 72 (K.B. 1686) (emphasis in original). Another common form of the writ in English called for 12 “honest and lawful” men. See, e.g., R. Brownlow, supra note 123, at 50, 64, 66, 68; 1 D. Reading, English Clerke’s Instructor In the Practice of the Court of King’s Bench and Common Pleas 119 (London 1733); 1 W. Tidd, supra note 4, at 573.
423 See, e.g., J. Impey, The Office of Sheriff (London 1786); The Under-Sheriff (London 1766).
common rule for a good jury,” and Common Pleas later observed that “[t]he practice of ordering a good jury existed long before the passing of the Acts which regulate special juries.” Tidd expands the latter point by noting that the use of good juries at nisi prius preceded the introduction of special juries.

Several good jury cases not initiated by the writ of inquiry occurred before the statutory endorsement of the special jury in 1730. In 1665 King’s Bench refused a request for a special jury in a new trial granted because of an initial verdict that was contrary to the evidence. The court did not want to set an “ill example” by impaneling a special jury whenever a common jury went wrong, but instead compromised and ordered a good jury. In 1724 the court also awarded a good jury in the retrial of a complex property dispute. Further cases include the previously mentioned Rex v. Chipping-Norton and Viner’s report of an unpublished King’s Bench decision in 1716 treating both special and good juries.

Initially, the consent of the parties was required for a good jury. In Bishop of Sarum v. Ashe, decided in 1710, Justice Powell responded to a motion for a good jury in an action of

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425 Tidd, supra note 4, at 787 (citing Rex v. Smith, 1 Str. 265, 93 Eng. Rep. 513 (K.B. 1720)).
426 Later cases suggest that after 1730, the special jury largely supplanted the good jury except in connection with the writ of inquiry. Indeed, evidence exists that the special jury displaced the good jury for a writ of inquiry conducted before a judge instead of before the sheriff. See, e.g., Price v. Williams, 5 Dowl. P.C. 160, 161 (Exchequer 1836).
428 Id.
430 1 Barnard. K.B. 41, 94 Eng. Rep. 29 (K.B. 1727). For a discussion of this case, see supra notes 416-17 and accompanying text.
431 21 C. Viner, supra note 354, at 301 (discussing the manuscript report of Rex v. Makartney (K.B. 1716)). In Makartney, Chief Justice Parker denied a special jury in a treason trial to preserve the defendant’s peremptory challenges. Id.
432 Hollinshed’s Reports, Harvard MS 1142, at 291 (Q.B. 1710).
scandalum magnatum by stating: "We can't do it; all Rules for good Juries are by consent." Some years later, however, King's Bench pointed out in Rex v. Burridge that "[i]f an affidavit be laid before the Court of suspicion that there will not be a fair jury, and the adverse party will not consent to a good jury, we will rule one without consent." The problem of suspected bias in jurymen could have been corrected by challenges, but perhaps the alternative of the good jury arose in cases where the suspicions of bias were not specific enough to sustain particular challenges. This possibility may be reflected in the 1714 case of Dux Leeds v. Hill Morton, in which the court granted the rule for a good jury "because there was a complaint made against the common panel."

Very little is known about the identity and social standing of good jurors returned during the seventeenth and early eighteenth centuries. Interestingly, absent special cause, motions for good juries were occasionally denied in London and Middlesex because "all are presumed to be good there." As with special juries, the sheriff undoubtedly used his discretion in tailoring the quality of the jury to the importance of the case. One illustration is the 1684 writ of inquiry of damages arising out of an action of scandalum magnatum brought by the Duke of York against Titus Oates. There, the sheriffs and undersheriff of Middlesex returned an inquest jury of fifteen men, consisting of knights, esquires, and gen-

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434 Id.
437 Id. at 130, 93 Eng. Rep. at 283.
438 Later practices are illuminated somewhat by Vickery v. London, B. & S. Coast Ry., 5 L.R.-C.P. 165 (1870) (indicating that good jurors were usually chosen from the special jury list).
439 Anonymous, King's Bench Reports, 1714-1715, Harvard MS 1019, at 20. Cf. Jacob v. Gore, Hollinshed's Reports, Harvard MS 1142, at 68, 101, 112 (Q.B. 1710), where the court refused a motion for change of venue, rejecting the assertion that a London jury would be unfit to try a usury case. In Dormer v. Jones, King's Bench Reports, 1714-1715, Harvard MS 1019, at 87, the court granted a motion for a good jury in Middlesex, "this being upon a Special occasion and otherwise all are presumed good as in London." In Rex v. Makartney (K.B. 1716), however, the unpublished case discussed in 21 C. Viner, supra note 354, at 301, Chief Justice Parker denied a similar motion, stating that "they are all good juries in Middlesex, and so in all cases of jurors at the bar," id. (emphasis in original). Parker reasoned further that if he granted a good jury in the important case before him, sheriffs might wrongly infer that good juries should not be returned in cases of less consequence. Id.
Another example is Strange's report of *Rex v. Smith*,[442] which reads, in full: "In this cause, and also in another against justices of the peace, the court refused the common rule for a good jury, because that is often made up of gentlemen who are in the commission."[443]

How widespread the practice was of impaneling justices of the peace (men "in the commission") on good juries is not known, but *Rex v. Smith* provides evidence that good jurors were above-average citizens. For common inquests, local practice books had long called for jurors of "good name and fame," sometimes in connection with statutory property qualifications and sometimes in the abstract.[444] It does not follow that common inquest jurors were able or trustworthy, for the statutes and other sources suggest a persistent problem of incompetence and corruption among ordinary jurors.[445] Just as the special jury developed in some measure as an antidote for this problem in the royal courts, the good jury appears to have developed into the local counterpart. The two concepts diverged only after the special jury began to acquire its distinct procedural characteristics. Tidd's description of the good jury as "a better sort of common jury"[446] suggests a qualitative middle zone between the common and special jury, but no evidence demonstrates that special jurors as a class were superior to good jurors.

**CONCLUSION AND EPILOGUE**

The present study of the origins of the special jury has, I hope, illuminated a few of the darkened interstices of seventeenth- and eighteenth-century procedure in the English courts. It has also illustrated the varied and numerous manifestations of the jury as an institution. Further, as Blackstone's treatment of the unindifferent sheriff situation indicates,[447] the struck jury shows how a procedural concept, once familiar, can take on applications completely

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41 *Id.* at 129. After the familiar harangue by Lord Chief Justice Jeffreys, the jury returned the following remarkable verdict: Damages, £100,000; costs, 20 shillings. *Id.* at 148.
43 *Id.* at 265, 93 Eng. Rep. at 513.
44 *See, e.g., [A. Fitzherbert], supra note 22, at fol. 30 (references to jurors "of good name and fame" with specific property holdings for inquiries at sheriffs' tournes), fol. 44 (reference to "men sufficient of inheritance, and of good fame" for escheat inquests).
45 *See supra* notes 17-27 and accompanying text.
46 *2 W. Tidd, supra* note 4, at 787 (emphasis in original); *see supra* text accompanying note 418.
47 *3 W. Blackstone, supra* note 3, at *357-58, quoted supra* text accompanying note 249.
unrelated to its original purpose.

The special jury of the late eighteenth and early nineteenth centuries was drawn from a special class of men of above-average wealth and standing in the community. This practice, beginning as a custom without statutory mandate, was formalized by Parliament in the County Juries Act of 1825. In the early eighteenth century, however, the special jury was equivalent to the struck jury, and at least one judge asserted that only a special procedure set the jury apart from the common jury—that there were no necessary differences in status or wealth between special and common jurors.

In the late eighteenth century Lord Mansfield frequently used special juries of experts (merchants). Indeed, only under Lord Mansfield were all three connotations of the special jury often present. As the eighteenth century drew to a close under Mansfield's successor, Lord Kenyon, the special jury was still used frequently, but in a more general way, not purposefully drawing upon the commercial expertise of the jurors. This pattern continued for many years. Accusations of the packing of special juries, however, brought them under the careful scrutiny of reform-minded Parliaments in the nineteenth century, resulting in additional legislative requirements. By the end of the nineteenth century, the popularity of the special jury had dwindled, and eventually (in 1949) the device was abolished in England for all except a very narrow category of cases.

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448 G. Duncombe, 1665 edition, supra note 30, at 73, quoted supra text accompanying note 229.
449 County Juries Act, 1825, 6 Geo. 4, ch. 50, § 31 (providing for a Special Jurors' List to be compiled of men who were “described . . . as Esquires or Persons of higher Degree, or as Bankers or Merchants”). This requirement did not guarantee that men described as such were in fact men of above-average wealth or standing, and further nineteenth-century reform efforts featured this problem. An Act to amend the Laws relating to the qualifications, summoning, attendance, and remuneration of Special and Common Juries, 33 & 34 Vict., ch. 77, § 6 (1870); H.C. SELECT COMM. ON SPECIAL AND COMMON JURIES, supra note 13, at 9, 11, 63, 65, 68, 70.
450 See supra text accompanying note 394.
451 See supra note 13 and accompanying text. Not all special juries in Lord Mansfield's court consisted of merchants. Some were expressly described as juries “of gentlemen,” and others were not described at all. From Lord Mansfield’s notebooks (see supra note 13), it is safe to conclude that most of the special juries for Guildhall sittings in London consisted of merchants. This may not have been the case for sittings after term at Westminster Hall.
452 See supra note 13.
453 See The Juries Act, 1949, 12 & 13 Geo. 6, ch. 27, §§ 18-19. The preserved exception was the City of London Special Jury, id. § 19, and that perished in 1971, The Courts Act, 1971, ch. 23, § 42.

The preceding developments will be explored in further work that I am undertaking.
A half century after Magna Carta, Parliament acted to remedy perceived abuses by sheriffs who returned unqualified, poor jurors. Freehold worth twenty shillings per year was required of each juror serving on petit assizes in his own shire; double this amount was required of a juror drawn into a foreign shire. When sheriffs' abuses persisted, Parliament increased the requirements to forty shillings and 100 shillings, respectively, in 1293. These new requirements applied to all types of royal juries except local juries in cities and market towns. In 1414, to allay false oaths by poor jurors who "have but little to live upon but by such Inquest," Parliament extended the forty-shilling requirement to city and market town juries for all capital criminal cases, real property disputes, and disputes involving personalty worth forty marks or more. In 1429 the forty-shilling requirement was extended to inquiries before justices of the peace into forcible entry, although it was removed as to trials de medietate linguae to relieve


1 W. Holdsworth, supra note 110, at 327-30; 2 F. Pollock & F. Maitland, supra note 44, at 569, 621-27.

1§ Statuto de illis q' debent poni in Jur' & Assis' (The Statute of Persons to be put in Assises and Juries), 21 Edw. (1293).

1§ Statuto of 8 Hen. 6, ch. 29 (1293).
the harmful effect on alien merchants.\textsuperscript{461}

In time, the freehold requirement became unworkable for London jurors, since nonresidents owned most London freehold.\textsuperscript{462} Thus Parliament enacted in 1512 that jurors in the king's courts sitting in London\textsuperscript{463} were qualified by possession of goods of 100 marks or more in value.\textsuperscript{464} This substitution of personalty for freehold as the basic jury qualification was extended in 1531 to all jurors except knights and esquires serving on murder and felony

\textsuperscript{461}Id.

\textsuperscript{462} See, e.g., Remarks on the Lord Russell's Trial, by Sir John Hawles, Solicitor General in the Reign of William III, 9 State Trials 794. According to Hawles:

[T]here is none who pretends to know anything of the history of England, that will say, that heretofore the cities were not inhabited mostly by the gentry, and especially the city of London; partly for luxury, partly for their security, and then there was no want of freeholders in the cities; but when matters became more quiet, and trade increased, and made houses in the cities more valuable, then were houses of equal convenience, and less price, situate in the suburbs, or in the country; gentry by degrees parted with their houses in the cities to tradesmen for profit, and removed themselves to other places.

\textit{Id.} at 797-98. See also Rex v. Russell, 9 State Trials 577, 590 (Old Bailey 1683) (Sergeant Jeffries) ("[T]his well known, that the ablest people in the city of London have scarce any freehold in it; for that most of the inheritances of the city of London remain in the nobility and in corporations.").

\textsuperscript{463} Both King's Bench and Common Pleas sat in the Guildhall in London.

\textsuperscript{464} Per le Juries infra Civitatem London, 4 Hen. 8, ch. 3, § 2 (1512). Parliament had previously enacted a requirement of this type for inquests in London city courts. See An Act agaynst Perjurye, 11 Hen. 7, ch. 21, § 1 (1495). Reductions of the 40-shilling requirement for local jury inquests outside London were also enacted. See, e.g., An Act for returnynge of sufficient Jurors, 1 Rich. 3, ch. 4 (1483-84); An Act that Shrieifs shall retorne sufficient Jurors, 11 Hen. 7, ch. 26, § 1 (1495); An Acte agaynst Escheators and Comissioners for making false returnes of Office & Comysions, 1 Hen. 8, ch. 8 (1509-10).

Despite these statutes, parties occasionally insisted on freehold as a requirement of jury service. In the trial of Sir John Freind in 1696 at the Old Bailey for high treason, the jury was drawn from a panel of men of London. Rex v. Freind, 13 State Trials 1, 7 (Old Bailey 1696). During the challenges, one prospective juror stated that he was not a freeholder. He was acceptable nevertheless to the defendant, but Attorney General Trevor interposed: "If he have no freehold, we that are for the king will except against him, for I would not have any body that is not a freeholder serve upon the jury." \textit{Id.} at 8. See also Rex v. Francia, 15 State Trials 897, 897-98 (Old Bailey 1717) (freehold insisted as requirement for jury service); Rex v. Cook, 13 State Trials 311, 314, 338 (Old Bailey 1696) (juror challenged for lack of freehold).

Local ordinances for city courts occasionally adopted variations of the statutory property qualifications. See, e.g., An Act of Common Council For the better Regulation of the Courts of Law in the Guild-Hall London 5 (London 1669), ordaining

[i]that no person or persons whatsoever be at any time hereafter returned, by any the Inquests of the Wards of this City, to serve as Jury-man, or Jury-men, either Grand, or Petty, in the Courts of this City, but such men as either have been, or for time to come shall be, Subsidy-men, and so taxed in the KING’s Book; or, in default thereof, such other discreet and sufficient persons as shall be equal in Quality and Estate with them.
cases in cities and towns.\textsuperscript{465} As was noted above,\textsuperscript{466} the property requirement was doubled to four pounds in 1585, temporarily raised to twenty pounds in 1664, allowed to revert to four pounds in 1677, and raised to ten pounds in 1692.\textsuperscript{467} These developments are shown in the following table, as are the special rules enacted by Parliament for cities and towns and for other geographic districts (most notably Wales).

\textsuperscript{465} An Acte that Men in Cities Borowes & Townes which be clerely worth xl £ in goods, shall passe in triall of murders, 23 Hen. 8, ch. 13, §§ 1-2 (1531-32).

\textsuperscript{466} See supra note 33 and accompanying text.

\textsuperscript{467} See supra notes 34-37 and accompanying text.
<table>
<thead>
<tr>
<th>STATUTE</th>
<th>YEAR</th>
<th>PROPERTY HOLDING REQUIREMENTS; OTHER REQUIREMENTS</th>
<th>LIMITS ON APPLICABLE CASES OR JURIES</th>
<th>JURISDICTIONAL OR GEOGRAPHICAL LIMITS</th>
<th>COMMENTS; OTHER PRACTICES ALLOWED; DURATION [perpetual unless noted]</th>
</tr>
</thead>
<tbody>
<tr>
<td>Magna Carta</td>
<td>1225</td>
<td>Trial by peers</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>9 Hen. 3, ch. 29</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Westminster I, 3 Edw., ch. 11</td>
<td>1275</td>
<td>Inquest by lawful men chosen by oath, of whom at least 2 to be knights</td>
<td>Sherriff’s murder inquests</td>
<td></td>
<td>[until statute of 28 Edw. 3, ch. 9 (1354)]</td>
</tr>
<tr>
<td>Westminster II, 13 Edw., ch. 38</td>
<td>1285</td>
<td>20s./yr. freehold; 70+yrs., ill, or living abroad ineligible</td>
<td>Petit assizes</td>
<td>Own shire</td>
<td>To remedy sheriff’s abuses in returning poor or unqualified jurors [until 1293]</td>
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<tr>
<td>Westminster II, 13 Edw., ch. 38</td>
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<td>40s./yr. freehold; 70+yrs., ill, or living abroad ineligible</td>
<td>Petit assizes</td>
<td>Other than own shire</td>
<td>To remedy sheriff’s abuses in returning poor or unqualified jurors [until 1293]</td>
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<tr>
<td>21 Edw.</td>
<td>1293</td>
<td>40s./yr. freehold</td>
<td></td>
<td>Local market town and city juries excepted; own county</td>
<td>To remedy sheriff’s abuses in returning poor or unqualified jurors</td>
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<tr>
<td>21 Edw.</td>
<td>1293</td>
<td>100s./yr. freehold</td>
<td></td>
<td>Local market town or city juries excepted; other than own county</td>
<td>To remedy sheriff’s abuses in returning poor or unqualified jurors</td>
</tr>
<tr>
<td>28 Edw., ch. 9</td>
<td>1300</td>
<td>&quot;[N]ext Neighbours, most sufficient, and least suspicious&quot;</td>
<td></td>
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</tbody>
</table>

* Jury qualifications were further revised during the eighteenth and nineteenth centuries. See especially An Act for consolidating and amending the Laws relative to Jurors and Juries, 6 Geo. 4, ch. 50 (1825).
<table>
<thead>
<tr>
<th>STATUTE</th>
<th>YEAR</th>
<th>PROPERTY HOLDING REQUIREMENTS; OTHER REQUIREMENTS</th>
<th>LIMITS ON APPLICABLE CASES OR JURIES</th>
<th>JURISDICTIONAL OR GEOGRAPHICAL LIMITS ALLOWED; DURATION [perpetual unless noted]</th>
<th>COMMENTS; OTHER PRACTICES</th>
</tr>
</thead>
<tbody>
<tr>
<td>27 Edw. 3, Stat. 2, ch. 8</td>
<td>1353</td>
<td>All jurors to be aliens if both parties foreign; half of jury to be alien if one party foreign; all jury to be denizen if neither party foreign</td>
<td>Merchant disputes</td>
<td>Staple courts</td>
<td></td>
</tr>
<tr>
<td>28 Edw. 3, ch. 13</td>
<td>1354</td>
<td>One half of jury to be alien if available</td>
<td>Disputes between aliens and denizens</td>
<td></td>
<td></td>
</tr>
<tr>
<td>34 Edw. 3, ch. 4</td>
<td>1360-1361</td>
<td>&quot;[N]ext People, which shall not be suspect nor procured&quot;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>34 Edw. 3, ch. 13</td>
<td>1360-1361</td>
<td>&quot;[G]ood People and lawful, which be sufficiently inherited and of good Fame&quot;</td>
<td>Escheator inquests</td>
<td>Jurors from county of inquiry</td>
<td></td>
</tr>
<tr>
<td>42 Edw. 3, ch. 11</td>
<td>1368</td>
<td>Nearest, most substantial people, not suspect, with best knowledge of truth</td>
<td>Inquests</td>
<td></td>
<td></td>
</tr>
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<tr>
<td>2 Hen. 5, Stat. 2, ch. 3</td>
<td>1414</td>
<td>40s./yr. freehold, lands or tenements</td>
<td>Capital criminal cases, real property disputes, personal property disputes 40+ marks, and see infra statute of 8 Hen. 6, ch. 29 (1429); statute of 4 Hen. 8, ch. 3 (1512); statute of 27 Eliz., ch. 6 (1584-85)</td>
<td>To allay false oaths by poor persons making living by jury service. [Until 1531 concerning murders and felonies in cities and towns; until 1429 concerning aliens; until 1585, in general]</td>
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<tr>
<td>7 Hen. 5</td>
<td>1419</td>
<td>100s. freehold</td>
<td>Treasons and felonies</td>
<td>Lancaster</td>
<td></td>
</tr>
<tr>
<td>8 Hen. 6, ch. 16</td>
<td>1429</td>
<td>People from county or Escheator or Commissioner</td>
<td>Escheator inquests</td>
<td></td>
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</tr>
<tr>
<td>8 Hen. 6, ch. 29</td>
<td>1429</td>
<td>40s. requirement of statute of 2 Hen. 5, Stat. 2, ch. 3 (1414)</td>
<td>De medietate linguae cases</td>
<td>To remedy harmful effect of statute of 2 Hen. 5, Stat. 2, ch. 3 (1414)</td>
<td></td>
</tr>
<tr>
<td>11 Hen. 6, ch. 1</td>
<td>1433</td>
<td>No persons from the Stews in Southwark to serve on juries</td>
<td>Surrey</td>
<td>To eliminate juror service by numerous criminals etc. with sufficient, often ill-gotten land, who otherwise qualify and live at the Stews.</td>
<td></td>
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<td>15 Hen. 6, ch. 5</td>
<td>1436-1437</td>
<td>£20 freehold if available, inhabitants of deeds concerning land with bailiwick</td>
<td>Attains of pleas of land 40s.; attains 40s. (detinue) or £40+ personalty</td>
<td>Cities and boroughs excepted</td>
<td>To remedy perjury by poor jurors which &quot;horribly continueth, and daily increaseth&quot;</td>
</tr>
<tr>
<td>18 Hen. 6, ch. 2</td>
<td>1439</td>
<td>£20 leasehold or non-freehold estate</td>
<td>Attains as in statute of 15 Hen. 6, ch. 5 (1436-37)</td>
<td>Kent</td>
<td></td>
</tr>
<tr>
<td>23 Hen. 6, ch. 9</td>
<td>1444-1445</td>
<td>Bailiff's or sheriff's officers not to serve</td>
<td>Sheriff's inquests</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33 Hen. 6, ch. 2</td>
<td>1455</td>
<td>100s./yr. lands and tenements, ownership, or use</td>
<td>Indictments in Lancashire or of Lancashire residents</td>
<td>Lancashire</td>
<td></td>
</tr>
<tr>
<td>1 Rich. 3, ch. 4</td>
<td>1483-1484</td>
<td>20s. freehold or 26s. 8d. copyhold; good name and fame</td>
<td>Inquiries</td>
<td>Sheriff's turns</td>
<td>To remedy perjury by poor jurors</td>
</tr>
<tr>
<td>3 Hen. 7, ch. 1</td>
<td>1487</td>
<td>40s. land or tenements</td>
<td>Inquests to inquire of concealment of other inquests</td>
<td></td>
<td></td>
</tr>
<tr>
<td>11 Hen. 7, ch. 21</td>
<td>1495</td>
<td>40 marks lands, tenements, and chattels; 100 marks if amount in dispute above 40 marks</td>
<td>Inquests</td>
<td>London city courts</td>
<td>To remedy perjury by poor jurors</td>
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<tr>
<td>11 Hen. 7, ch. 21</td>
<td>1495</td>
<td>£100; 4 indifferent, discrete persons of good fame in ward</td>
<td>Attains</td>
<td>London city courts</td>
<td>To remedy perjury by poor jurors</td>
</tr>
<tr>
<td>11 Hen. 7, ch. 24</td>
<td>1495</td>
<td>For £40+ cases, 20 marks freehold lands and tenements; for under £40 cases, 5+ marks freehold or 100 marks goods or chattels</td>
<td>Attains in cases &quot;betwixt parte and partie&quot; including cases concerning inheritances or freehold; no capital offenses involved.</td>
<td>Attains brought only in King's Bench, Common Pleas, or at nisi prius</td>
<td>After attaint verdict, panels reformed of good and lawful men at justice's discretion. If insufficient persons qualify in own shire, may have tales in adjoining shire. [Until next parliament; revived in revised form by statute of 3 Hen. 8, ch. 12 (1512) until 1696]</td>
</tr>
<tr>
<td>11 Hen. 7, ch. 26</td>
<td>1495</td>
<td>10s. freehold or 13s. 4d. [1 mark] copyhold if available</td>
<td></td>
<td>Sheriff's turns, Southampton, Surrey, and Sussex</td>
<td>Qualifications lowered — insufficient number or jurors at higher amounts [Until 1496]</td>
</tr>
<tr>
<td>19 Hen. 7, ch. 13</td>
<td>1503-1504</td>
<td>20s./yr. charterland or freehold, or 26s. 8d. copyhold within shire</td>
<td>Jury to enquire of riots</td>
<td></td>
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<tr>
<td>1 Hen. 8, ch. 8</td>
<td>1509-1510</td>
<td>40s. lands or tenements</td>
<td>Escheat inquests</td>
<td></td>
<td></td>
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<tr>
<td>3 Hen. 8, ch. 12</td>
<td>1511-1512</td>
<td>Good and lawful panels</td>
<td>Quarter sessions criminal cases</td>
<td></td>
<td>Discretion given to justices of peace to reform panels to overcome abuses by sheriff</td>
</tr>
<tr>
<td>4 Hen. 8, ch. 3</td>
<td>1512</td>
<td>100+ marks in goods</td>
<td>London—King's Bench, Common Pleas, Exchequer</td>
<td></td>
<td>To remedy delays caused by too few jurors because of unworkable property qualification of 40s. lands or tenements.</td>
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<td>23 Hen. 8, ch. 3</td>
<td>1531-1532</td>
<td>20 marks/yr. freehold</td>
<td>Attains in £40+ cases; no capital offenses</td>
<td>London city courts have choice of this act or statute of 11 Hen. 7, ch. 21 (1495)</td>
<td>[Until 1545 concerning London royal courts, see infra statute of 37 Hen. 8, ch. 5 (1545)]</td>
</tr>
<tr>
<td>23 Hen. 8, ch. 3</td>
<td>1531-1532</td>
<td>5 marks/yr. freehold or 100 marks personality</td>
<td>Attains in underlying action less than £40</td>
<td>London city courts have choice of this act or statute of 11 Hen. 7, ch. 21 (1495)</td>
<td>[Until 1545 concerning London royal courts, see infra statute of 37 Hen. 8, ch. 5 (1545)]</td>
</tr>
<tr>
<td>23 Hen. 8, ch. 13</td>
<td>1531-1532</td>
<td>£40 personality in lieu of freehold, except for knights and esquires dwelling in the city, borough, or town</td>
<td>Murders and felonies</td>
<td>Cities, boroughs, and towns</td>
<td></td>
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<tr>
<td>34 &amp; 35 Hen. 8, ch. 26</td>
<td>1542-1543</td>
<td>Any freehold</td>
<td>All actions except attain</td>
<td>Wales</td>
<td>Limited tales de circumstantibus authorized. [Until 1664, see infra statute of 16 &amp; 17 Car. 2, ch. 3 (1664-65); statute of 4 W. &amp; M., ch. 24, (1692)]</td>
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<td>34 &amp; 35 Hen. 8, ch. 26</td>
<td>1542-1543</td>
<td>40s./yr. freehold</td>
<td>Attains</td>
<td>Wales</td>
<td>Limited tales de circumstantibus authorized. [Until 1664, see infra statute of 16 &amp; 17 Car. 2, ch. 3 (1664-65); statute of 4 W. &amp; M., ch. 24 (1692)].</td>
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<td>35 Hen. 8, ch. 6</td>
<td>1543-1544</td>
<td>6 sufficient hundreds in every panel of 40s. freeholders</td>
<td>Nisi prius; cities and towns corporate excepted</td>
<td>Tales de circumstantibus authorized for criminal cases</td>
<td></td>
</tr>
<tr>
<td>37 Hen. 8, ch. 5</td>
<td>1545</td>
<td>400 marks personality in lieu of 20 marks freehold</td>
<td>Attain</td>
<td>London, King's courts</td>
<td></td>
</tr>
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<tr>
<td>4 &amp; 5 Phil. &amp; M., ch. 7</td>
<td>1557-1558</td>
<td>Present, able persons of the county</td>
<td></td>
<td></td>
<td>Tales de circumstantibus authorized for criminal cases</td>
</tr>
<tr>
<td>5 Eliz., ch. 25</td>
<td>1562-1563</td>
<td>Present, able persons of the county</td>
<td>Wales and counties palatine, cities and towns corporate excepted</td>
<td></td>
<td>Tales de circumstantibus authorized</td>
</tr>
<tr>
<td>14 Eliz., ch. 9</td>
<td>1572</td>
<td></td>
<td></td>
<td></td>
<td>Defendants entitled to tales to same extent as plaintiffs</td>
</tr>
<tr>
<td>18 Eliz., ch. 12</td>
<td>1576</td>
<td></td>
<td></td>
<td></td>
<td>Tales available to relieve freeholders’ too frequent service for trials at bar</td>
</tr>
<tr>
<td>27 Eliz., ch. 6</td>
<td>1584-1585</td>
<td>£4 freehold, 2 hundredors sufficient in personal actions</td>
<td>Queen’s courts and assizes; cities, towns, and Wales excepted</td>
<td>[Until 1692, see infra statute of 4 W. &amp; M., ch. 24 (1692)]</td>
<td></td>
</tr>
<tr>
<td>16 &amp; 17 Car. 2, ch. 3</td>
<td>1664-1665</td>
<td>£20 freehold</td>
<td>Trials de medietate linguae excepted</td>
<td>England, King’s courts, assizes, nisi prius, oyer and terminer, gaol delivery, quarter sessions</td>
<td>To remedy sheriff’s abuses in returning poor jurors [Until 1677]</td>
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<tr>
<td>16 &amp; 17 Car. 2, ch. 3</td>
<td>1664-1665</td>
<td>£8 freehold</td>
<td></td>
<td>Wales, King’s courts, assizes, nisi prius, oyer and terminer, gaol delivery, quarter sessions</td>
<td>To remedy sheriff’s abuses in returning poor jurors [Until 1677]</td>
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<td>4 W. &amp; M., ch. 24</td>
<td>1692</td>
<td>£10 freehold, £5 for talesmen</td>
<td>Trials de medietate linguae excepted</td>
<td>England, King's courts, assizes, nisi prius, over and terminer, gaol delivery, quarter sessions (cities and towns excepted)</td>
<td>Replaces expired statute of 16 &amp; 17 Car. 2, ch. 3 (1664-65)</td>
</tr>
<tr>
<td>6 &amp; 7 Will. 3, ch. 4</td>
<td>1694</td>
<td>Certified practicing apothecaries exempted from jury service</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7 &amp; 8 Will. 3, ch. 21</td>
<td>1695</td>
<td>Registered seamen exempted from jury service</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>3 Geo. 2, ch. 25</td>
<td>1730</td>
<td>£10 freehold, £5 for talesmen</td>
<td>Trials de medietate linguae excepted</td>
<td>Coverage of statute of 4 W. &amp; M., ch. 24 (1692) retained, and extended to Wales and counties palatine</td>
<td>To remedy corruption and sheriff's abuses in returning poor or unqualified jurors</td>
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</tbody>
</table>