

# NOTES ON JUDICIAL ORGANIZATION AND PROCEDURE

EDITED BY WALTER F. DODD

*Yale Law School*

**Methods of Jury Selection.** Only five years ago, a member of the bench was protesting that whereas "criticism of our courts has become so common that anyone with a pen or typewriter feels called upon to add his mite to the subject," still, "for some reason, perhaps for fear of being unpopular, very few have said anything regarding juries."<sup>1</sup> What a change has taken place! Today, baiting the jury is one of our safest, as well as most popular, pastimes. As stated by Dean Wigmore, "the issue stands thus: Shall jury trial be abolished? Or shall it only be reformed? No thoughtful person can be content to leave it as it is."<sup>2</sup> Abolition being beyond the realm of probability, the question narrows down to that of the improvement of the jury, which is primarily a problem of improving the methods of its selection.

## I. THE EARLY JURY

*Knowledge of the facts.* Although to Blackstone the trial jury seemed "to have been coeval with the first civil government" of England, more scholarly research has shown it to be of Norman origin. Such research has likewise pointed out marked changes in the character of the jury itself. Whereas we think of it as a group of individuals having neither knowledge of the facts nor bias as to the parties, who are to hear the evidence and decide according to its weight, the early jurors were chosen because of their knowledge of the facts. They did not hear witnesses; they *were* the witnesses. Glanville tells us that the first function of the court was to ascertain, by their oath, whether any of the jurors summoned were ignorant of the fact in issue. "If there be any such, they are rejected and others chosen."<sup>3</sup> How re-

<sup>1</sup> Judge K. E. Leighton, "How About The Jury?", 8 *Jour. Amer. Jud. Soc.* 246 (1924).

<sup>2</sup> "A Program for the Trial of Jury Trial," 12 *Jour. Amer. Jud. Soc.* 166 (1929).

<sup>3</sup> *A Treatise on the Laws and Customs of England*, Bk. II, c. 17. See also *The King v. Edmonds* (1821), 4 B. and Ald. 471, 490, 106 Reprint 1009, holding

markably different is the situation today, when we have need of appellate decisions to settle the right of jurors to avail themselves of their "common knowledge and experience" in passing upon the question of whether a fact is logically deducible from the circumstances in evidence!<sup>4</sup> And how strangely out of keeping is the Illinois decision, reversing the conviction of a forty-four-year-old confessed criminal of statutory rape because the only evidence showing that he was over sixteen years of age, aside from his confession, was the fact that the jury had seen him, and "the law does not allow the jury to fix his age by inspecting his person."<sup>5</sup> One similarity, however, remains: except under extraordinary circumstances, the jury must be chosen from the county in which the crime was committed or the action brought.

*Knowledge of the Field.* Having abandoned the requirement that jurors should be personally acquainted with the facts of the case, the common law still clung to the desire to secure jurors whose special training and experience would fit them to decide the particular type of questions involved. The books abound in examples of such *special juries*, e. g., those of "cooks and fishmongers" to hear accusations of the sale of bad food, of "attorneys of Common Bench and Exchequer" to pass upon technical questions of law, of "matrons" to decide if a widow was with child. A similar desire for specialists is to be noted today in the civil law countries that have adopted the criminal jury. A few years ago, a murder case in which the defense was to be emotional insanity was before the French Court of Assizes. On the evening before the trial was to open the press announced that everyone would be pleased to hear that one member of the jury was to be a professor of diseases of the mind at the Collège de France, and one of the leading experts of the world in this field. If such a juror were called in an American court, he would be eliminated by challenge, since "the American jury lawyer, where insanity is an issue, does not want anyone on the jury who knows more of the subject than he does."<sup>6</sup> The same is true in fields other than medicine, with the result that the special jury has long been moribund.

---

that "a knowledge of certain facts, and an opinion that those facts constitute a crime, are certainly no grounds of challenge."

<sup>4</sup> Burns v. U. S. (C.C.A. Okla. 1922), 279 F. 982, 987. Certiorari denied, 257 U. S. 638. See also Philadelphia, etc. B. Co. v. Berg (C.C.A. Pa. 1921), 274 F. 534. Certiorari denied (1921), 257 U.S. 638.

<sup>5</sup> Winstrand v. The People (1904), 213 Ill. 72.

<sup>6</sup> 47 Amer. Law Rev. 149 (1913).

*Selection.* The early common law method of jury selection was simplicity itself. Jury lists, wheels, and commissions were unknown. Whenever a jury case was docketed, the court issued a writ of *venire facias* commanding the sheriff to summon the necessary jurors for a given time. This was universally what is now spoken of as an *open venire*, in that there was no prior selection of those to be summoned, the sheriff choosing whom he pleased and entering their names upon a *panel* (oblong piece of parchment) annexed to the writ. If the required number of jurors did not appear, or if any were excused, additional jurors were summoned in like manner. It was not until Parliament abolished a separate jury for each case and substituted a panel of from 48 to 72 jurors to try all causes during a given session that absolute control was taken from the summoning officer through a chance drawing of each jury from the larger panel.

The *special jury* soon crystallized into its modern form of a *struck jury*. As described by Blackstone,<sup>7</sup> the clerk, in the presence of the parties, selected the names of 48 freeholders. Each party then *struck* [crossed out] the names of twelve, and the remaining twenty-four were returned upon the panel. By this time the motive for requesting such a jury was more often a desire to escape the absolute control of a biased sheriff than to secure a group of experts.

Whatever may be said for the effectiveness of the common law method of jury selection during the earlier period of its use, there can be no doubt that it outlived the period of its sufficiency. Blackstone praised it, to be sure, as "avoiding . . . frauds and secret management" through electing the twelve jurors by lot out of a panel chosen by an "indifferent officer." But what of the panel? And there was room for doubt as to the "avoidance of frauds and secret management" in the selection of the twelve,<sup>8</sup> as well as to the "indifference" of the sheriff. The professional juror was an accepted fact.<sup>9</sup> Packed juries were easily possible, which naturally caused a good deal of suspicion; and experience was even then showing that the personal followers of the sheriff are not always of the highest type. When Blackstone himself

<sup>7</sup> *Commentaries*, Bk. III, p. 358.

<sup>8</sup> The modern jury box was suggested by Bentham. See *Art of Packing Juries*, p. 238. Cf. *Benaway v. Coyne* (Wis. 1851), 3 Pinn. 196, where the common law was held to authorize the clerk to use slips of two colors, and to hold them in one hand as he drew them out with the other.

<sup>9</sup> Special jurors, who received a guinea per case, were spoken of as "being concerned in the Guinea trade." Bentham, *op. cit.*, p. 33.

was forced to admit that "the general incapacity, even of our best juries, . . . has greatly debased their authority,"<sup>10</sup> the seriousness of the situation was evident. "The administration of justice should not only be chaste, but (like Caesar's wife) should not even be suspected." The common law method of jury selection failed to meet this first requisite.

From the defects of the common law system, a few general requirements for a more satisfactory method can be drawn. First, it is not enough that the twelve be drawn by lot; the panel from which they are chosen is the key to the situation. If the quality of the jury is to be at all satisfactory, no one who fails to meet such tests as may be established should be allowed on the list from which the panel is drawn. This necessitates some sort of fact-finding machinery which will function in advance of the drawing of the panel. Finally, it may be laid down as a cardinal principle of justice in criminal cases that nothing should be left to the discretion of persons over whom the prosecution is likely to wield influence, which will generally include the sheriff.

## II. THE JURY OF TODAY

*Qualifications.* Aside from a number of tests that will disqualify a given juror to sit in a particular case, such as relationship, bias, or knowledge of the material facts involved, qualifications for jury service are relatively simple. The lower age limit is generally twenty-one or twenty-five, the upper from sixty to seventy. Eligibility to vote is almost universally required,<sup>11</sup> and a property test may or may not be added. Unless there is a sex qualification,<sup>12</sup> the only other tests are generally those of "ordinary intelligence," "full possession of one's natural faculties," and ability to read, write, and understand the

<sup>10</sup> *Commentaries*, Introduction, p. 8.

<sup>11</sup> New York provides that no one who has registered to vote shall be required to serve until all of the eligible non-voters have served. *Judiciary Law*, ss. 597-615. Opinion may differ as to whether this shows a regard for the citizen who goes to the polls on election day, or the extent to which jury service has fallen in the public eye. Other jurisdictions, through the use of registered voters' lists as the source of names for jury service, reverse the New York practice.

<sup>12</sup> Compare Louisiana, *Laws*, 1924, no. 19, s. 1 (no woman shall be drawn unless she files a declaration of desire); Wisconsin, *Laws*, 1921, c. 529 (no woman may be required to serve if she asks exemption when first called); *Laws of England, Supplement* (1929), s. 560 (the court "may . . . grant exemption by reason of the nature of the evidence to be given or of the issues to be tried," or he may

English language. Members of the leading professions, including law, dentistry, medicine, and teaching, are exempt from jury duty, together with public officials, firemen, national guardsmen, etc., the list varying from state to state and including many of those best qualified to serve. Although the qualifications are not high, their strict enforcement would greatly improve the character of juries in most jurisdictions.

*Jury List.* The first step in the selection of the jury is the preparation of a list of persons eligible for service. The names are secured in a number of different ways. Ordinary sources of information are the assessors' and poll lists, city directories, and, in a few jurisdictions, telephone directories and census reports. Most jurisdictions use only the first two, and many only one of the two. By eliminating persons who, from the information given, are known to be ineligible, a preliminary jury list is obtained.<sup>13</sup> Of course the results are very inaccurate. The poll list does not give the occupation; the assessor's list omits age; the city directory, if one is available, and if it is not hopelessly out of date, does not tell whether the person is a qualified elector; none gives definite information as to literacy or mental and physical condition. Yet, strange as it may seem, most jurisdictions stop here, the number of candidates required—anywhere from a hundred to several thousand—being chosen more or less at random from the list so compiled and their names deposited in the jury wheel.<sup>14</sup> Little wonder that when a panel is drawn many are found ineligible and the residue unsatisfactory!

Obviously, under such a system it matters little by whom the list is compiled. In Kansas, in first and second class cities it is prepared by the mayor, although "in many places it is said that they give the matter no personal attention."<sup>15</sup> In two of the judicial districts of

---

order that the jury be composed of men or women only). Even where the law places men and women on the same footing, it is not always true that the selecting officers do the same, with the result that relatively few women actually serve. See Elizabeth M. Sheridan, "Women and Jury Service," 11 *A.B.A. Jour.* 792-797 (1925).

<sup>13</sup> The law often provides that this list shall include the names of all who possess the necessary legal qualifications. Needless to say, this requirement is construed by the courts to be directory only, so that the incompleteness of the list does not invalidate it.

<sup>14</sup> See below, note 26.

<sup>15</sup> Judicial Council of Kansas, *First Report* (1927), p. 18.

that state it is made by the district judges themselves; but since they have "little more to indicate the qualifications of the persons for jury service than their names and places of residence,"<sup>16</sup> little advantage in having the judge enter into the process can be seen. In fact, the Judicial Council feels that the third practice, under which the list is selected by the township trustees or deputy assessors, "who come in personal contact with the taxpayers of their districts in making assessments," is superior to either.<sup>17</sup> From my own experience as to the value of this "personal contact," especially in urban districts, I can appreciate the Council's plea that since "none of these methods insures the proper selection of persons for jury service,"<sup>18</sup> the law should be completely revised.

*Milwaukee Jury Commission.*<sup>19</sup> In more progressive jurisdictions, where a jury commission or jury judge with investigative powers is employed, the list of eligible persons would only be a preliminary step in the preparation of a final list. The Milwaukee and Baltimore systems may be taken as typical examples of such methods at their best.

The Milwaukee commission consists of three electors chosen by the judges of the Circuit Court. Although appointments are for three years, the present commissioners have served for ten years, seven years, and one year, respectively, the newest member succeeding her husband, who had served for thirteen years. Starting with the poll lists, each name is checked against the city directory and the files of the commission to eliminate those who are exempt by occupation or prior service. Candidates are then selected at random from the various wards and notified by post-card to appear before the commission. If the card is ignored, a subpoena is issued. When those summoned appear, about sixty each evening, they fill out a short questionnaire giving information as to age, occupation, education, period of residence, interest in pending litigation, prior service, etc. This is done under the eye of the bailiff. Claims for exemption by way of occupation or sex<sup>20</sup> must be entered at this time; otherwise they are waived. Each candi-

<sup>16</sup> Judicial Council of Kansas, *First Report* (1927), pp. 18-19.

<sup>17</sup> *Ibid.*, p. 18.

<sup>18</sup> *Second Report* (1928), p. 8.

<sup>19</sup> The writer is indebted to Justice Oscar M. Fritz of the Supreme Court of Wisconsin, formerly presiding judge of the Circuit Court of Milwaukee, for this and other information.

<sup>20</sup> See above, note 12. About 90 per cent of the women candidates claim exemption.

date then appears individually before the commissioners, who ask further questions to test intelligence, mental alertness, hearing, eyesight, ability to understand English, etc. He is then excused, without being told whether or not he has been accepted. This will never be known by any but the commissioners until such time as he is actually summoned upon a venire. If not summoned, it may never be known.

*Baltimore Jury Judge.*<sup>21</sup> The Supreme Bench of Baltimore has eleven departments, of which seven are ordinarily engaged in the trial of jury cases. Each year one member of the court is designated as jury judge, with the duties ordinarily devolving upon a jury commission, in addition to those of summoning and impaneling jurors. Once each year this judge devotes from three to four weeks in preparing the jury list. Candidates are summoned from the various districts, their names being picked at random from the tax lists of the county, to appear for examination on their choice of two or three named days. Upon appearance, they go through much the same process as in Milwaukee, including the filling out of a questionnaire, followed by an oral examination by the judge. When a sufficient number of candidates have been accepted, they are divided into groups according to the time of year in which they prefer to serve. Every three weeks 400 names are drawn by chance, and these candidates again appear before the judge, who selects 175, or twenty-five per court, as the panel for the period.

There seems little to choose between the Milwaukee and Baltimore systems from the point of view of efficiency. However, it is evident that were it not that the panel chosen by the Baltimore judge is to be divided by chance among seven judges, the wisdom of such complete control over the selection of the final panel might well be doubted. Others will be of the opinion that if the first examination is all that it should be, the second is merely a fifth wheel to the cart. There is also no reason why a jury commission should not be as efficient and impartial as a judge, leaving the latter free to spend more of his time in the trial of cases. But the facts being that many jury commissions are neither efficient nor impartial, many jurisdictions will find it to their advantage to copy the Baltimore rather than the Milwaukee system.

*The Myth of the Jury Commission.* No better illustration of the

<sup>21</sup> The writer is indebted to Judge Walter I. Dawkins of the Baltimore Supreme Bench for much valuable material on the Baltimore system.

difference between "law in books and law in action" could be asked than the complete failure of many such commissions, no change from the older system being discernible save in the personnel of the group that copies names from the tax or poll list. In some cases the statute is at fault in not authorizing compulsory attendance for examination, but often the blame rests solely with the commission. The Illinois Crime Survey found that although the statute authorizes examination under oath, "the authority which it confers has never been exercised" in Cook county.<sup>22</sup> The commission does mail out a short questionnaire to determine eligibility, but even this is turned against the purpose of the statute, offering a handy avenue of escape to the busy but desirable candidate. "Occasional investigation into the truth of the answers would probably accomplish some improvement," but even this is not done.<sup>23</sup> Many will agree with the conclusion that "if the commission would personally examine all veniremen before being turned over to the court it would substantially improve the quality of juries."<sup>24</sup> That is its sole excuse for existence.

*Territorial Distribution of Jurors.* It is not enough that the selection of jurors be without partiality or favoritism; it should be above suspicion of either. One of the best ways of attaining this end is to represent all classes of society. Under the Milwaukee system, this is done by apportioning the names deposited in the jury wheel among the various wards according to their voting strength. Of course this necessitates a little extra bookkeeping on the part of the commission and the examination of a larger number of candidates, a majority of those from the lower class wards often being unacceptable. In the end, however, without lowering the standard of eligibility, the necessary number is easily obtained.

It is much simpler to follow such a practice as that of the federal district court for Philadelphia, which selects its jury lists, without reference to place of residence, from names submitted by such "representative citizens" as congressmen, bank presidents, manufacturers, clergymen, and factory superintendents.<sup>25</sup> Although this method is remarkably fitted to secure intelligent jurors, it is likely to create a

<sup>22</sup> *Illinois Crime Survey* (1929), p. 230.

<sup>23</sup> *Ibid.*, p. 230.

<sup>24</sup> *Ibid.*, pp. 230, 240.

<sup>25</sup> See Callender, *The Selection of Jurors* (1924), p. 44ff. Cf. the New York practice, *ibid.*, p. 53.

feeling of uneasiness and distrust among certain of the more restless elements of society. Many states, indeed, specifically prohibit the solicitation or submission of such recommendations. This appears to be wise, particularly in view of the fact that a satisfactory jury commission or jury judge will render them unnecessary.

*Drawing the Panel.* The jury list having been prepared, a definite number of names, varying from a hundred or so in some single-judge courts to several thousand in many cities, are deposited in the jury wheel.<sup>26</sup> Whenever a court needs a new panel of jurors an order is issued to the clerk to draw a given number of names from the wheel, and the persons so selected are summoned to appear for service. As names are drawn, others are added, so that a certain minimum is always maintained. In some jurisdictions each court has its own jury wheel, but the general practice is for all courts in a given city or town to draw from the same wheel.

*Summoning Jurors.* In the great majority of jurisdictions jurors are still summoned by a writ of *venire facias* directed to the sheriff. There would seem to be no reason for this, save that it has always been so.<sup>27</sup> The system is inefficient as well as costly, the proportion of names returned *non est inventus* [not found] often being large. The Illinois Crime Survey found that "deputy sheriffs frequently serve jury summons by leaving them in a mail box or under the door of the juror's supposed residence," and concluded that service by registered mail would have all of the advantages and few of the disadvantages of service by the sheriff.<sup>28</sup> This has been the experience of the courts now following the practice. Among other advantages, Chief Justice Powell, of the Cleveland Court of Common Pleas, states that "if a juror has changed his residence . . . the post office forwards the letter to him and we reach many in this way who could not be reached by service of the sheriff."<sup>29</sup> In addition, such evils as the excusing

<sup>26</sup> A jury wheel is merely a box so constructed that by turning it the slips are thoroughly mixed but the names thereon wholly concealed. Many jurisdictions use a "jury box" rather than a wheel. The distinction is unimportant, the sole function of either being to secure a fortuitous drawing.

<sup>27</sup> And, of course, it is an additional source of revenue to the sheriff, who is generally paid by fees.

<sup>28</sup> *Op. cit.*, p. 237.

<sup>29</sup> This court uses the ordinary post, registered mail being resorted to only when the juror ignores the first summons. The writer is indebted to Chief Justice Homer G. Powell for this and other information regarding the Cleveland courts.

of jurors by deputy sheriffs and charges of partiality in the returning of the panel are avoided.

Service by mail is a relatively new development and has been very favorably received. We may look for a rather rapid adoption of the practice as it is brought to the attention of other courts by our judicial councils, although in most states legislation will be necessary to allow its use. North Carolina has authorized summons by telephone as well as by mail;<sup>30</sup> but the writer is not informed as to what advantage has been taken of the statute. The telephone would seem to be a logical supplement to the post in many jurisdictions.

*Excusing Jurors.* If the method of preparing the jury list is a proper one, little remains to be done save to impanel those who have been summoned; otherwise the entire group must be examined to eliminate those who are not qualified. The court must also pass upon the claims of eligible candidates who insist upon exemption, in the course of which it becomes evident that next to paying taxes there is no responsibility of the citizen that seems so galling to him as the very thought of serving on a jury.<sup>31</sup> Too many courts have adopted an automatic system of excuses by failing to do anything about the complete ignoring of a summons,<sup>32</sup> which requires the summoning of an unnecessarily large number of jurors and reacts unfavorably upon the morale of those who are required to serve. If the panel is so reduced by excuses or other cause that additional jurors are required, they are generally chosen in the same manner, although the court may have power to issue an open venire to the sheriff, who chooses whom he will.

The shorter the period of service, the longer the period of exemption; and the more certain the ultimate necessity of serving, the fewer are the requests to be excused. Many courts are reducing the period of service to two weeks, not merely to lighten the burden but also because they feel that a more satisfactory juror is secured thereby.<sup>33</sup> At

<sup>30</sup> *Public Laws*, 1925, c. 98, p. 111; *Comp. Stat.*, s. 918.

<sup>31</sup> Contrary to the common belief, there is nothing either new or startling in this attitude. See Pollock and Maitland, *The History of English Law*, II, p. 629.

<sup>32</sup> Over 8 per cent of those summoned in 1927 in Cook county did not appear. *Illinois Crime Survey* (1929), p. 232. Such a condition is not peculiar to Chicago or the United States. See *Report of the Departmental Committee on the Law and Practice of Juries* (1913), I, pp. 27-8, published in *British Parliamentary Papers, House of Commons*, XXX.

<sup>33</sup> Many judges feel that when a juror serves for a longer period he is likely

the same time, the period of exemption following service is being increased from the customary one year to three, four, or even six years.<sup>34</sup> In Milwaukee, certainty of service is secured by substituting two jury wheels containing one thousand names each for the customary single wheel which may never be emptied. All juries are drawn from the first wheel until it has been exhausted, when the second is called into play and the first refilled. When the period for which the juror has been excused has expired, his name is returned to the wheel, from which it is certain to be drawn, although perhaps for a different court, at a future date. This divided wheel method has certain additional obvious advantages that should commend it to other jurisdictions.

*Challenges: Voir Dire Examination.* As each case is called, the names of all jurors who are present and not already engaged are placed in a box, and the first twelve drawn are presented to the parties for examination and challenge.<sup>35</sup> Challenges are spoken of as *to the array* (entire panel) or *to the polls* (individual juror). The former are based upon some serious irregularity in the selection of the panel, and their sole result is to delay the case until a new panel is summoned. Challenges *to the polls* may be either *peremptory* (without cause stated) or *for cause*, such as bias, relationship, or dealings with the parties, knowledge of the material facts of the case, or a lack of some legal qualification for jury service.

Perhaps no other single cause has had greater effect in bringing jury trial into disrepute than the abuse by counsel of the *voir dire* examination, which is the questioning of prospective jurors for the purpose of establishing grounds for challenge. Although the magnitude of this abuse has been over-emphasized, extreme cases are entirely too frequent;<sup>36</sup> and it is such cases that catch the public eye. Too frequently the questioning has no legitimate motive, but is purely for purpose of delay, or even to prevent the selection of really competent jurors.

The last few years have witnessed a decided change in attitude to become acquainted with attorneys and parties in such a manner as to form likes and dislikes which may impair his efficiency as an impartial juror.

<sup>34</sup> This is generally done by court rule rather than by statute. Milwaukee has adopted both the two-week period of service and the six-year exemption without handicapping the work of the jury commission in the least.

<sup>35</sup> This is the standard method. Others are discussed below.

<sup>36</sup> See *Illinois Crime Survey* (1929), p. 235; Kavanagh, *The Criminal and His Allies* (1928), p. 211; *State v. Welch* (1926), 121 Kan. 369, 374-5.

toward the proper degree of control by the judge. One of the first recommendations of the federal Board of Senior Circuit Judges was that the "examination . . . shall be by the judge alone. If counsel on either side desires that additional matter be inquired into, he shall state the matter to the judge, and the judge, if the matter is proper, shall conduct the investigation."<sup>37</sup> Such had long been the practice in many jurisdictions, and with the prestige added by the support of Chief Justice Taft and the senior circuit judges it has been adopted rather widely by federal courts. Granted proper confidence in the judge, there is no reason why the rule should not meet every possible requirement; and its efficiency cannot be doubted. But if any one is laboring under the illusion that this practice is about to become universal in our American courts, let him look into the results that followed its suggestion by the judicial council of Kansas for the courts of that state.<sup>38</sup> Before such a change can come about, there must be a wholesale repeal of statutes, and also the development of an entirely new attitude toward the proper function of the judge in the conduct of a jury case.

Many courts have adopted the practice of having the judge examine all prospective jurors, but allowing the counsel thereupon to ask such questions as may appear proper. This can be done without any change in the law, and its result is generally the same as under the rule suggested by the Board of Senior Circuit Judges. Chief Justice Powell states that in the Cleveland Court of Common Pleas, where this practice has been followed for some years, the usual time in qualifying a jury is from five to ten minutes. Under such circumstances, no attorney feels justified in conducting a fishing expedition, if for no other reason than because the reaction of the jurors toward this type of conduct would place him at a disadvantage. If the attorneys for *both* parties are required to question a given juror or waive examination before passing to another, an additional saving results in the elimination of the unnecessary repetition of questions.

<sup>37</sup> Recommendations of the Board of Senior Circuit Judges, 1923 and 1924, published in 8 *Jour. Amer. Jud. Soc.* 92, and in 10 *Amer. Bar. Assoc. Jour.* 875.

<sup>38</sup> *First Report* (1927), pp. 15-16; *Second Report* (1928), p. 7. Even the trial court judges of the state objected to the adoption of such a rule, and the council thereupon concluded that "perhaps if in each judicial district a procedure could be worked out that was adaptable to the peculiar conditions there existing, . . . it would be better for that to be done than for any of the suggested rules to be promulgated."

In the more important cases, particularly criminal prosecutions, each party is usually allowed a limited number of peremptory challenges. The common law practice was to present the jurors one at a time, requiring each to be accepted and sworn or challenged before the next was called. This was a very serious limitation upon the right of peremptory challenge, for one could never tell but that the next to be called would be even less acceptable, particularly when the panel was exhausted and the court was forced to resort to talesmen.<sup>39</sup> Although many courts still follow this practice, it is a general rule today to secure twelve jurors unchallenged for cause before either party is called upon to exercise a peremptory challenge.<sup>40</sup> The court may ordinarily require the parties to exercise their challenges in any order it may see fit, although there is a growing tendency to require them to alternate, the plaintiff or prosecution challenging first. A more expeditious manner of handling peremptory challenges is provided by the modern *struck jury*, described below.

*Talesmen.*<sup>41</sup> If the panel appears likely to be exhausted without obtaining a full jury, the court directs the summoning of talesmen, or emergency jurors who serve only for the particular case. At common law they were chosen by the sheriff, either from those present in court or from the county. Either practice renders it comparatively easy for interested and unscrupulous persons to get on juries, and although most jurisdictions still follow the common law practice, many now require talesmen to be named by the judge or chosen in the same manner as regular veniremen. Since many courts serve an extensive territory, the use of the regular jury wheel necessarily causes a good deal of delay, and a few courts now substitute a special *tales wheel* containing the names of persons living within a short radius of the court house.<sup>42</sup> Even under the best systems yet devised, the most that can be said is that the use of the talesmen is an evil to be avoided. Milwaukee had a striking illustration of this in an important murder case, a talesman

<sup>39</sup> See below, note 41.

<sup>40</sup> In Illinois, jurors must be passed upon and accepted in panels of four. *Revised Statutes* (1927), c. 78, s. 21.

<sup>41</sup> The term "talesman" is often used incorrectly to designate any person called for jury service. Throughout this article it is used in the more restricted sense of a person summoned to fill a deficiency in a particular jury.

<sup>42</sup> South Carolina, *Code*, 1922, I, p. 215; Iowa, *Code*, 1924, s. 10859 ff. Cf. *State v. Dorsey* (1915), 138 La. 410. Iowa allows the same names to be used over and over, which is a poor practice.

who was accepted as a "perfect juror" turning out to have been coached for the *voir dire* examination.<sup>43</sup> Perhaps the summoning of talesmen by the clerk or the jury judge by telephone, instead of drawing four or five names for each one required and allowing the sheriff or his deputy to select "those most easily located," would remedy some existing evils.

*Swearing the Jury.* When the final juror has been secured, the clerk swears all twelve at once, unless the court has followed the common law practice of swearing each juror as he is accepted. The jury is then ready to try the case.

*Struck Jury.* Although in many states special juries are still provided for by law, they are virtually never used.<sup>44</sup> To the antipathy of the bench for the expert juror and the prohibitive expense involved in summoning separate jurors for each case must be added the practical difficulties illustrated by *Bruce v. Beall*, where the specialists in "iron and wire cables" summoned by the court "were each . . . found to have a good, valid reason to be excused from serving."<sup>45</sup> In our search for expert fact-finders we are turning to commercial arbitration and administrative justice, which would seem to be the logical solution.

The struck jury has been remodeled into a refined method of handling peremptory challenges, and in this form it is receiving wide acceptance. In the practice of the Baltimore Supreme Bench, twenty jurors are presented to the parties. The judge or clerk questions them, and if any are found disqualified they are replaced by others. Each party then strikes four from the list, and the twelve remaining are sworn to try the case.<sup>46</sup> In many jurisdictions all juries are chosen in this manner; elsewhere, as in Philadelphia, it is adopted at the request of either party. A fairer or more expeditious manner of handling peremptory challenges would be hard to devise, but as yet the plan does

<sup>43</sup> *Hedger v. The People* (1910), 144 Wis. 279, 298-9. In Milwaukee, talesmen are drawn from the regular jury wheel.

<sup>44</sup> This was true also in England, where the struck jury was finally abolished by the Juries Act of 1922. The English special jury of today is one chosen in the regular manner from those possessing a certain amount of property.

<sup>45</sup> 100 Tenn. 573, 575 (1898).

<sup>46</sup> Each party is given a list containing the twenty names and the striking is done in secret, the clerk striking additional names in case of duplication. Other courts conduct the striking in the same manner as peremptory challenges, the better practice being for the parties to strike alternately, the plaintiff first.

not appear to have been applied to the class of cases where the peremptory challenge is of greatest importance, i. e., the trial of felonies.

Another modern use of the struck jury, where its purpose is more akin to that of Blackstone's day, is in the court of the justice of the peace. Since a jury is seldom required, no regular panel is in attendance, and until such time as the justice is authorized to borrow a jury from a neighboring court the only alternative seems to be to fall back upon common law methods. To prevent too great a degree of control from resting with the justice or the constable, it is commonly provided that the court shall present a list of some eighteen names to the parties, each of whom shall strike six, the remaining six being summoned as the jury for the case.<sup>47</sup> If talesmen are required, they are chosen in the same manner. Needless to say, the practice is not a satisfactory one.

### III. COURTS IN CITIES

The most serious problems of judicial administration today are peculiarly city problems. This is particularly true of those centering about the jury system. It is in cities that the evils of the tales system, the defective functioning of the jury commission, and other deficiencies reach their height. This is needlessly so. The multi-judge court, when properly administered, is the most efficient court yet devised, and that this can be as true in relation to jury selection as to any other feature of court administration has been conclusively demonstrated in a number of jurisdictions. But it is necessary to abandon what Chief Justice Taft describes as our policy of requiring each judge to paddle his own canoe, and to adopt in its stead a policy of inter-judge and inter-court coöperation.

One of the most efficient methods of handling juries in a large court is in use in the Cleveland Court of Common Pleas. Only 24 more jurors than are needed to give each judge a jury of twelve are summoned on a given venire. These names, close to 200 in all, are placed in a jury wheel in charge of the assignment commissioner. When a case is called and sent to a given department for trial, 18 jurors, drawn from this wheel, accompany the parties.<sup>48</sup> The trial judge examines

<sup>47</sup> The size of juries in justices' courts has quite commonly been reduced to six.

<sup>48</sup> This court uses the master calendar system of assigning cases, but of course the same method of a pooled jury panel could be fitted to the standard system. For a description of the master calendar, see the writer's article on "The Judicial Council Movement" in the November, 1928, issue of this *Review*.

these on their *voir dire*, counsel being permitted to ask additional questions if they desire, and ineligible candidates are replaced by others. Each party then strikes three names, and the six whose services are not required return to the assembly room, their names being replaced in the wheel ready for the drawing of the next jury. If a jury is not secured from the first eighteen, additional names are drawn from the wheel.

The Cleveland method has a number of very obvious advantages. Fewer jurors are needed, yet talesmen are almost unknown. Jury tampering in advance of the trial is next to impossible. As one jury retires to consider its verdict another is chosen for the trial of the next case. Justice Fritz, under a similar scheme in Milwaukee, has on several occasions had two juries out deliberating while still another was hearing evidence in a third case; and the writer understands that similar experiences are quite common in Baltimore. When Presiding Judge Ward, of the San Francisco Superior Court, copied the Cleveland plan in 1925, in an attempt to enable his court to catch up with its work, the results were so striking that the system was adopted on a permanent basis, and it is now provided for in the rules promulgated by the judicial council.<sup>49</sup> The writer knows of no instance in which this practice, once adopted, has been abandoned.

Even without adopting the Cleveland plan, many of its benefits can be secured by a policy of coöperation, each judge feeling free to call upon any other department when additional jurors are required. This is now the accepted practice in New York, Los Angeles, and a number of other jurisdictions, although its legality was in serious doubt in earlier years. The California Supreme Court held that "for the trial of causes" the various departments were distinct courts, and that the only way any given department could secure additional jurors was to summon talesmen in the regular manner.<sup>50</sup> The Los Angeles courts, however, very sensibly refused to accept the decision as final and secured an amendment to the statutes authorizing the continuance of

<sup>49</sup> Rule 25 (5), adopted August 1, 1928; continued as rule 24 (5), February 1, 1929. The master calendar, together with the pooled jury, increased the efficiency of the court nearly fifty per cent. Judicial Council of California, *Second Report* (1929), pp. 36-7. The Chicago Municipal Court feels that at least \$30,000 a year is saved through its pooled jury reserve as against a separate panel for each judge.

<sup>50</sup> *The People v. Compton* (1901), 132 Cal. 484; *The People v. Wong Bin* (1903), 139 Cal. 60.

their practice of coöperation.<sup>51</sup> Similar statutes have been adopted in many other jurisdictions, and a more sympathetic attitude on the part of many appellate courts has rendered them unnecessary in others.<sup>52</sup> There would still seem to be some doubt as to the legality of such an interchange of jurors between distinct courts, rather than departments of the same court;<sup>53</sup> but in many jurisdictions this is likewise the established custom.

In conclusion, it should be pointed out that anyone who makes a study of the methods of jury selection now in use will be struck by the fact that the greatest advance has been made in those jurisdictions where the courts have been free to exercise a fair amount of control by court rules, rather than in those where they are bound down by detailed statutory provisions. This is particularly true where the courts are so organized as to have an effective administrative head, and where they have had the assistance of the research and exchange of ideas made possible by a conference of judges or a judicial council. The attention now being devoted by the latter bodies to the problem of jury trial is encouraging.<sup>54</sup> The most recent proposal, emanating from California, is that the selection, returning, summoning, drawing, and impaneling of jurors be regulated by rules adopted by the judicial council.<sup>55</sup> A provision to this effect in a bill presented to the legislature failed,<sup>56</sup> but it may pass at a future date. In that event, we can look to California for further refinements in our methods of jury selection.

J. A. C. GRANT.

*University of Wisconsin.*

<sup>51</sup> *Laws*, 190E, p. 680.

<sup>52</sup> "There is but one criminal court of Cook county. All the jurors properly drawn and summoned . . . are eligible for service in any branch of the court . . . , and may be transferred from one branch to another as suits the convenience of the various branches of that court." *Winstrand v. The People* (1904), 213 Ill. 72, 77.

<sup>53</sup> See 35 *Corpus Juris* 291, which states unqualifiedly that "it is error to transfer jurors from another court." It appears, however, that there is little authority for this statement.

<sup>54</sup> See especially the *Second Report* (1929) of the California council and the *Second Report* (1928) of the Rhode Island council. The latter devotes about one-half of its entire report to jury trial.

<sup>55</sup> *Second Report* (1929), p. 95.

<sup>56</sup> Senate bill 84, as introduced. The bill passed, but the provision mentioned was dropped.