Reforms of the Trial Process

The slightest acquaintance with the history of the jury makes it evident that discussions of its appropriateness tend to be long on platitudinous assertion and short on reasoned argument. This unfortunate fact applies equally to discussions of alternatives to common jury trial. In England, the most recent authoritative report is that of the Departmental Committee on the Jury Service, chaired by Lord Morris of Borth-y-Gest. The Committee made the following comments on the trial of lengthy frauds (Morris Committee, 1965, pp. 107-110):

> "The desirability has even been mooted of proposing that cases of this nature...... should be tried without a jury, possibly by a judge sitting with assessors. This suggestion is outside our terms of reference, but we wish to record our view that it would be unfortunate to make any such departure from the jury system...... We have been told that the problem presented to juries by such cases is aggravated by the fact, as to which we make no comment, that in difficult cases of commercial fraud counsel sometimes challenge just those very jurors who, by reason of their education or professional attainments, might be though to be best qualified to understand the issues. It has therefore been put to us that some procedure should be devised whereby in such cases the judge could order that there should be trial before a jury composed of specially qualified persons. If there were to be any such procedure, questions would arise as to what the special qualifications should be, and as to whether the consent of the defence should be necessary before having such a jury or whether the matter should be in the discretion of a judge. We do not think it necessary to explore these matters. We have already recognised that a heavy burden falls

> upon jurors trying long and complicated cases, but apart from our recommendations as to permissible allowances, we know of no way in which the burden could be lightened without introducing some new method of trial. Trial without jury in such cases we have already rejected. As to trial by specially qualified jurors, we think it right to say that we have discerned a trend of opinion among our witnesses against the adoption of such a procedure. Furthermore, witnesses who have been able to speak with experience have expressed the view that the average jury today is able to cope even with long and difficult cases. It must be remembered that, especially if a case is involved and complicated, a jury has great assistance in following and understanding it. The facts are fully explored and examined by both sides while evidence is being given, and are dealt with in the speeches of counsel. The main features of the case are recapitulated in the summing-up. We therefore recommend that no system should be established for having special juries in criminal cases. "

Almost two decades have passed since the Morris Committee came to these conclusions, during which time the number of frauds dealt with in the English Crown Courts has trebled and the complexity and length of cases prosecuted have increased in line with the greater readiness of the police to pursue some of the more difficult allegations. In the light of this experience, it is not easy to be as sanguine as the Committee about fraud trials. Significant sections of the police, the judiciary, independent organisations like Justice, and even the Law Society (in the 1981 Memorandum on Criminal Procedure) have expressed strong support for alternative ways of trying frauds. Indeed, there has been a "trend of opinion" away from trial by jury in general, a fact strongly regretted by many cogent critics (Devlin, 1979; Thompson, 1980). However, the desirability and practicability of alternatives remains a matter of dispute.

After lengthy consultations with interested parties within and without the Commonwealth, the following options emerge:

(1) Trial by special jury, whether comprised solely of people with relevant expertise or higher education, or comprised of a mixture of such persons with 'ordinary' jurors:

(2) Trial without jury at the election of the defentant(s);

(3) Trial by judge(s), with or without the assistance of expert assessors:

and (4) Piecemeal improvement of the current system, by simplifying indictments, providing more forceful pre-trial disclosure and practice directions, more sensible hearsay rules, and less traditional trial procedures.

These options need not be mutually exclusive. For instance, one could replace the present jury with a special one, but still give the defendant the option of trial by judge alone. Piecemeal improvements could (and should) take place irrespective of any radical change in the mode of trial. However, I shall seek to examine the advantages and disadvantages of each of the options in turn.

(1) Trial by Special Jury

History

The most traditionalist of the changes in the mode of trial, at least for those jurisdictions which presently have trial by jury, is the re-institution of trial by 'special jury'. The special jury is an institution of great antiquity. There are cases from medieval times in London where cooks and fishmongers were summoned to try persons accused of selling bad food, and many mercantile disputes were decided by juries comprising merchants in allied trades. The principle here was the original one whereby jurors decided cases by applying their own direct knowledge. In the civil sphere, Lord Chief Justice Mansfield developed the principles of mercantile law in conjunction with a special jury of City of London merchants.

In the late seventeenth century, the Court of King's Bench regularly summoned juries composed of higher social standing than ordinary juries. By 1730, any litigant could summon a special jury, provided he could pay the fee. More controversially, special juries were summoned in many criminal trials, particularly of sedition at the time of the French revolution. The Juries Act 1825 laid down that special jurors should be of the rank of "Banker, merchant, or esquire", and in 1870, a property qualification was added, namely that persons occupying houses having a net rateable value of £100 in larger towns and £50 in smaller ones, or who occupied business premises with a net annual value of £100 or farms of £300, could qualify for the special jury panel. Such qualification certainly was seen as a status symbol. At that time, any misdemeanour, which included conspiracy to defraud and falsification of documents (but not forgery, which was a felony) could be tried by a special

jury. Such trial was possibly only if the indictment was in the Queen's Bench Division or had been moved there by certiorari. Both the Tichborne claimants and the Jameson raiders were tried in this way.

More recently, however, the use of special juries fell into desuetude. One reason for this was the dilution of the panel by publicans and by small businessmen who called themselves merchants. Lord Mersey, in the course of interrogating the Law Society's representative before his committee on the jury in 1913, observed (p. 128) that

> "It is the common opinion......of the judges who sit to try cases, that there is in these days very little difference, if any, in the quality of the common and special juries."

Indeed, those who gave evidence before the Mersey Committee got into a dreadful tangle about what constituted the terms 'esquire' and 'merchant'. Some jury summoners uncritically accepted the self-definitions of those eligible for jury service. Mr. Justice Channell observed that the qualifications for special jurors were (p. 68)

> "a very rough and ready way of getting at the people who may be supposed to have more intelligence than the others, and supposed also to be in an independent position and independent of the result of a particular case."

However, the rateable value criteria for special jury eligibility ruled out many otherwise able people. One witness stated (p. 112) that he

> "would increase the status qualification very largely in the City by making such business men as chartered accountants, surveyors, architects, and engineers,

> members of the Stock Exchange, members of Lloyds and of the Baltic, insurance brokers, produce and colonial brokers, shipowners and shipbrokers, special jurymen by reason of their calling, without any regard to rental qualification. They are the men that are wanted for special jurymen, and in a great many cases a man may be a chartered accountant and have two partners, we will say, but he only occupies offices at, say, £200 a year. None of these men would be eligible for special jury service by the existing law."

The last major criminal fraud trial that I have found which was tried by special jury was that of Horatio Bottomley, M.P.

In the United States, too, the special jury has disappeared, not by legislation but by the egalitarian principles that have accelerated over the past thirty years. Earlier, however, they were used occasionally to try complicated frauds. During the 1870s, they were used in over a dozen cases related to public officials in the municipal corporation of New York City, who conspired to defraud the city of public funds totalling millions of dollars. (See, for example, People v. Tweed [1872] 13 Abb.Pr. (N.S.) 25; People v. Tweed [1876] 50 How. Prac. (N.Y.) 262, 280; People v. Tweed [1877] 11 Hun. (n.Y.) 195.)

The special jury was used most frequently in civil litigation where banking or securities issues were at stake. However, its use in criminal cases survived. In Lockhart v. State [1924] 145 Md 602, a special jury was used in a Maryland criminal prosecution of members of a firm of bond and stockbrokers on charges of conspiring to defraud customers. The qualifications for special juries differed from State to State. In New York, for instance, the so-called "blue-ribbon jury law" of 1896 stated that a special juror had to be a citizen of ten

years' standing, at least 30 years of age, and have an adequate knowledge of the duties of his office. Furthermore, it was incumbent upon him to show that he had never been convicted of a crime, *or found guilty of fraud or other misconduct by a civil court*. (Italics are mine). The special jury could be obtained only when the appellate division of the state supreme court was satisfied that (1) a fair and impartial trial could not otherwise be had, (2) the importance or intricacy of the case demanded it, (3) the matter had been too widely commented upon to be tried before an ordinary jury, or (4) for some other reason, the due, efficient, or impartial administration of justice necessitated a panel. Soon afterwards, in 1901, these qualifications were reduced, and the trial rather than the appellate branch of the Supreme Court was given the power to decide on special jury trial. By 1940, the distinction between special and common jurymen had nearly died out. (See, more generally, Thatcher, 1947, and Baker, 1950).

Advantages of trial by special jury

Two criticisms of trial by common jury for frauds are particularly relevant to trial by special jury: that jurors are unfamiliar with commercial concepts and practices, and consequently trials take far longer than necessary; and that some frauds are extremely complicated practically and conceptually, and therefore most jurors are not intelligent enough to follow the case properly. The first criticism could be answered by having a special jury of business and/or professional people. For the second, however, not all business and professional persons might prove adequate. It may seem reasonable to expect that they would be cleverer than present juries on average, and to that extent would be an improvement, but it would be foolish to claim that all businessmen, or even accountants, are capable of following the most complex cases. As I have observed already (and as the perusal of the Law Reports confirms) there are grounds for suspecting that even some judges may not have as thorough a grasp of fraud as is desirable. Nevertheless, on the principle that the good should not become the enemy of the best, the special jury, in whatever form, might be considered to be a better option than the current system. The English Director of Public Prosecutions has been reported as preferring this (Daily Telegraph, 21 January, 1982):

> "I don't think this is against the constitutional right of trial by your peers. Aren't you dealing with your peers in a case like this if the jurors have financial expertise?"

Disadvantages of trial by special jury

There are a number of possible objections, both in principle and in practice, to trial by special jury, particularly if this is chosen on the basis of professional relevance rather than intellectual ability.

(a) The jurors may tend to judge cases from their own experience and knowledge rather than on the basis of evidence presented in court. There is a certain historical irony in regarding this as an objection, since direct knowledge of the circumstances surrounding the offence was the original *rationale* for the jury. However, in the modern bureaucratic age, this sort of knowledge tends to be regarded negatively as 'bias' rather than positively as practical reasoning. In some cases involving national or local dignitaries, it may be hard to find jurors who do not know personally, or who have never had any commercial dealings with, the accused. For example, had he not died following the issue of a summons for fraud, could Sir Denys Lowson, a former Lord Mayor of London, have been tried by his commercial peers in the City in a way that would have satisfied outsiders as to its impartiality? In some cases, not even a change of venue would suffice. (This is a particular difficulty in the smaller Commonwealth countries such as those in the Caribbean, where the accused, if locals, are likely to be known to all prospective jurors.)

This source of objection to trial by special jury may be more pertinent to, say, stock exchange frauds than to the less close-knit fields of accountancy or business. However, the point remains that it may be more difficult for experts or quasi-experts than for amateurs to place themselves in the position of particular accused, rather than to speculate on what they

themselves (qua 'reasonable men') might have believed or done. (Though is this not equally relevant to jurors who try other types of dishonesty?)

(b) Special jurors drawn from the professions might become bogged down in discussing theoretical issues, such as what ought to constitute a 'true and fair view' of accounts rather than what the law actually states and what the accused believed. The criminal jury does not have the function of developing principles of law, as did Lord Mansfield's special jurors in the eighteenth century with mercantile law, so this might be inappropriate and might lengthen trials unduly.

(c) Special juries, if drawn from cognate professions or from businesspeople, might be unduly sympathetic to those accused of commercial offences. The standards of integrity that are adopted in these 'subcultures' may not conform to those required by law or those held in the wider society. Let us examine one public limited company whose activities were subject to a Department of Trade Inspectors' Report.

In Roadships Limited (1976), the Inspectors found that the company commonly had paid bribes to the servants of other companies to obtain road haulage work. They observed (p. 20) that

> "some witnesses appeared to think that underlying many of our questions was an assumption on our part of an unreal standard of commercial conduct, but after giving due regard to such views, we maintain our own. In fact, no constant pattern of attitudes emerged from the evidence. Some transport operators from fairly rough commercial backgrounds regarded such payments as disgraceful. Some operators - and, indeed some professional men - viewed them with

> equanimity or at least with philosophical acceptance as a necessary evil. McLintocks (the auditors) thought that the scale on which they were practised here was 'not large' for a transport undertaking"

It is fairly plain that if these 'sweeteners' had been proven to have occurred, they would have been offences against s.1(1) of the Prevention of Corruption Act, 1906. If the special jury had contained many of those of a tolerant disposition referred to above, they might well have acquitted.

In the same report, the Inspectors discussed the culpability of the issuing house for permitting the public flotation of Roadships in spite of, inter alia, the doubtful conduct of its 'leading light' with regard particularly to tax matters. Criticising the issuing house, the Inspectors stated (p. 58):

> "We have not arrived at this adverse conclusion without considering whether we have not overestimated the results which can be achieved by the sort of screening processes carried out by the average issuing house, whether in fact some merchant bankers on reading our comments may not intone to themselves, 'There, but for the grace of God, go we.'. "

Here again, though the question of criminal liability is by no means so clear, would such a jury of merchant bankers have acquitted against the dictates of strict application of the law to the facts?

Let us take another example, the window-dressing of company accounts. The object here is to inflate the cash figure at the year's end by borrowing money short-term (even overnight), thereby deceiving creditors, shareholders, and (in the case of a bank or deposit-taker) depositors as to the state of the company.

One secondary bank, London and County Securities Ltd., indulged in such practices, and when interrogated by Department of Trade inspectors, a director sought to justify them in the following terms (London and County Securities Group Ltd., 1976, 173):

> "Q: If you say you did not regard the effect of the transactions as misleading, what did you think the purpose of it was?
>
> A: I thought it was that they could show a better cash position at the end of the year.
>
> Q: Than they actually had?
>
> A: Than they actually had. It did not alter their assets and liabilities position; just their cash position.
>
> Q: It showed a million pounds greater liquidity than they in fact enjoyed?
>
> A: I suppose that is right.

In the case of London and County, prosecutions of some persons in respect of window-dressing charges were halted by the trial judge on the grounds that these practices were sufficiently tolerated in 1973-1974 that it would be unsafe to try to assess the degree of criminality involved, if any. In this instance, acquittal was directed by the judge, but on the assumption that his empirical observation about toleration of window-dressing in the City is accurate, a special jury composed of such persons presumably would have acquitted also. Whether they ought to have done so (and the judge to have ruled thus) is moot. It may depend upon whether one is an accountant or an unfortunate depositor or investor. This applies equally to the subject of company directors who finance personal amusements out of company funds, as has been alleged in recent commodity trading cases. Ralph Hilton, the man who built up Roadships, ran a boat at the company's expense, justifying this by its publicity value

to the company. The Department of Trade Inspectors referred to this (Roadships, 1976, 128) as

> "a view which...will be regarded with scepticism by those who are obliged to pay for their recreations out of their taxed income, but with considerable sympathy by many honest and shrewd company directors who are fortunate enough to find that the interests of their shareholders are consistent with them pursuing their own recreations partly at the expense of the shareholders and partly at that of the taxpayers."

Here too, then, the conduct might lead to an acquittal if tried by a special jury composed of such "honest and shrewd company directors".

In fairness, there are some counter-arguments on these points. If commercial men were so indiscriminately tolerant of business crime, there would be no attempts by defendants to make peremptory objections against their presence on fraud juries (unless, as may well be the case, defendants and their counsel are misguided in seeking to eliminate such persons from juries). It may be that instead of identifying sympathetically with the accused, special jurors would tend psychologically to distance themselves from conduct which has been the subject of official sanction by prosecution; that they would adopt a 'holier than thou' attitude towards their fellows; or even that they might wish to eliminate potential competitors while carrying out the dishonest practices themselves! I am not impressed overall by these counter-arguments, though they may illustrate the danger of regarding 'fraud' as a homogeneous category. Certainly, any blatant rip-off of creditors or investors, whether these be businesses or individuals, might be expected to be condemned severely by a commercial special jury. Cases of window-dressing or of insider trading that were well beyond the pale might be

rejected forcefully by such jurors, who unlike a judge or common jury, would know full well that they were not custom and practice. However, there are other sorts of cases, including many not prosecuted at present, where excessive sympathy might lead to acquittal.

One line of defence of jury 'equity verdicts' is that, when brought by the mini-Parliament which the jury supposedly represents, they can be a valuable temper to the harshness of the letter of the law. However, where the public are not assured that such verdicts are arrived at for the general good rather than out of group self-interest, they must be regarded as contrary to public policy. If special juries comprising professional and business persons were to acquit in fraud trials, the danger is present that this will be seen as an example of in-group preservation, thus undermining the impartiality of the Rule of Law. This aspect must be given careful attention in any revision of fraud trials, though clearly it is less relevant where the jury might comprise well-educated people rather than merely those in business or the professions.

(d) The objection may be raised that special juries are elitist in concept. This is undeniably the case. However, all non-random selection processes for anything, including Attorney-Generalship, are elitist! The point here is that a given form of special jury must be rationally defensible on the grounds of its capacity to do the job in a way that is demonstrably superior to what exists at present.

And (e) The recruitment of special jurors might present great practical difficulties. I shall not detail here the manner in which this might be accomplished, since Commonwealth practices vary widely. However, professional bodies such as the Institute of Chartered Accountants or the

Chambers of Commerce might keep a register of potential jurors. When electoral registers are compiled, people might be asked to indicate whether they have degrees or advanced levels, or whether or not they have any knowledge of accounting, which would at least improve the pool from which jurors are drawn for fraud cases. Unless the use of special juries served to shorten fraud trials (as one would expect), possibly by inducing pleas of guilty to some cases, and unless adequate remuneration were forthcoming, it might still be difficult to obtain volunteers for special juries. However, businesspeople and professionals who successfully plead to be excused jury service at present may in fact be no more unwilling to serve on a fraud trial than those who are not able to produce a justification for service which the court will accept. Although all the evidence suggests that most jurors accept their task responsibly, jurors in fraud cases, whether interviewed by me or as reported in the press, display a marked lack of enthusiasm subsequent to the trial. It may be more desirable to have a willing than an unwilling jury, but it is an open question whether those who serve are any more willing than those who do not.

These, then, are the objections to the introduction of trial by special jury for the more complicated kind of frauds. Readers must judge whether the advantages outweigh the disadvantages, both internally and in relation to the other proposals for change. There appear to be fewer disadvantages to trial by the well-educated than to trial by commercial and professional people, but there are also fewer advantages (for instance, familiarity with terminology and practices) in the former than in the latter. This discussion of special juries has concentrated on reasoned arguments, but one final point is germane here. However objectively an expert jury did in fact adjudicate in a criminal trial, an acquittal (or even, in some cases, a conviction) might be the object of suspicions by the

general public that the verdict was 'fixed' according to whether or not the accused were part of the 'in-group'. Public confidence in the judicial process, however irrationally based, has to be considered. Indeed, it is arguable that public confidence is a part of what one means by the rationality of a judicial system.

(2) Trial without jury at the Election of the Defendant(s)

It is rather curious that in English law, the defendant has no right to elect trial by judge alone, though for many company and bankruptcy offences, he may elect trial without jury in the lower courts. In the United States, such waivers on felony charges date from 1829 (in the State of Maryland). Indeed, in 1852, a Maryland statute extended the right of waiver to all criminal cases, including capital ones. In Patton v. United States, 281 U.S. 276 [1930], the Supreme Court held for the first time that a defendant had the right to trial by judge alone in federal cases. However, it warned (at 312-3) against the excessive use of such waivers:

> "Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable and undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity."

All of the States have adopted jury waivers, and though the sober warnings of the Supreme Court about careful scrutiny of all applications to waive jury trial are honoured more in the breach than in the observance, the courts sometimes refuse waiver. In Singer v. United States, 380 U.S. 24 [1965],

the request of the defendant charged with mail fraud for jury waiver was objected to by the prosecution, and the court, not being satisfied that the prosecution's objection was motivated by a desire to deny impartial justice, ordered jury trial. The defendant was convicted.

In Canada, the Federal Code gives the accused the right to opt for trial without jury before a county or district court judge in a large number of offences, including fraud (Laskin, 1969, 47). No figures are available, but I understand that this option is utilised quite frequently, particularly where juries may be believed to be prejudiced (for instance, anti-semitic), or where the trial judge is expected to be more sympathetic than a jury to the sort of defence to be put forward. (It is important to note that this 'judge-spotting' is central to the choice of mode of trial in Canada and in the United States. It would be intriguing to find out what difference it would make if counsel had to make their election without knowing who the trial judge would be!) However, even where there is believed to be local prejudice, the accused do not always wish to exercise their right to trial by judge alone. A recent fraud in Canada involved a number of persons who were accused, _inter alia_, of swindling elderly people out of their life savings. Not surprisingly, this attracted unfavourable publicity during the trial, which was the longest trial and jury deliberation ever held in Middlesex County. Not long afterwards, there was to be a further trial in relation to the same set of offences, and the defence commissioned a survey which found that 42 per cent of the local population expressed beliefs of irrevocable prejudice or at least uncertainty that they could set aside any prejudices (Vidmar and Judson, 1981). Armed with this information, the defence successfully applied for a change of venue.

What impact might the right of defendants to elect trial by judge alone have upon the present problems of fraud trials? The hardened observer might suggest that however meritorious in itself, the proposal is designed to give the appearance that 'something is being done' without bringing any substantial change. All of the English judges and some of the senior counsel who co-operated in this research expressed a certain scepticism about the proposal, and foresaw few defendants taking this path. Some counsel argued that accused with technical defences might prefer trial by judge alone, on the grounds that the jury might convict such persons for their odious conduct rather than on the strict application of the law to the facts. However, I am not impressed by this argument. It is presently the duty of trial judges to dismiss cases that they feel are unsafe to be left to the jury, and my research indicates that they are far from reluctant to do this in England: the experience of other Commonwealth countries may differ. If anything, English trial judges err on the side of generosity in directing acquittals, and it is difficult to envisage trial without jury transforming this figure upwards. It is possible that the need to give reasons for findings on the facts might induce a greater degree of circumspection among the judiciary than exists among the jury, but this is far from certain.

Prima facie, the analysis of the American experience might offer some insight into the likely impact on the Commonwealth of the right to waive jury trial. Kalven and Zeisel (1966, 24-30) offer an interesting analysis of this. They found that overall, although there is enormous regional variation, no fewer than 34 per cent of those charged with fraud and embezzlement waived their right to jury trial. It is not possible to deduce whether these were more or less than normally complex cases, though given the small number of complex cases, they must have been mainly less complex. In examining the

rationale for jury waiver, the authors suggest that the hope of sentence discount on conviction by judge alone influences the decision, much as it does in the plea-bargaining process. Thus, the defendant who does not wish to deprive himself of the chance of being acquitted, but who wishes to assure a modicum of leniency in case of conviction, might waive his right to jury trial: a sort of each-way bet! In particular, defendants might hope for a suspended rather than an immediate prison sentence if convicted by judge alone.

Another reason why an accused might opt for trial by judge alone is the fear that a jury might be prejudiced against him because of his alleged offence or because of his personal reputation. Kalven and Zeisel say nothing about this reason, but it is interesting that when the Reverend Moon (the sect-leader) was prosecuted in the United States for income tax fraud in 1982, his counsel initially sought trial without jury, on the grounds that any jury might be prejudiced against the 'Moonies' Universal Church. In such a case, a mere change of venue would not suffice to ensure a fair trial, since the unpopularity was national rather than local.

A third reason for the choice of trial by judge alone is that in criminal trials, prosecutors vet juries quite routinely for criminal convictions and prior convictions of the accused are revealed to the jury, so many defendants feel that this might place them at a disadvantage. In other words, they would prefer a judge to a 'prosecution-minded' jury (though more wealthy defendants can combat this by extensive use of voir dire and by employing psychologists to advise on the selection of a jury panel).

The final reason for opting for trial by judge alone is alleged to be the possibility of corrupting judges in the United States, particularly in the State courts. It has been suggested to me that such corruption is made easier when the judge is a finder of fact as well as a finder of law, and when the judiciary are elected and come not so much from a sheltered elite as from the hurly burly of political life. I am not in a position to evaluate these claims, but they are ironic in view of the jury corruption referred to earlier. Perhaps the message is that when such large sums and professional standing are at stake, the opportunity and incentive for corruption increase correspondingly.

In short, although the United States figures reveal a surprisingly high proportion of jury waivers in fraud trials, they are less useful than one might have hoped as a guide to what might happen if such a system were introduced elsewhere. This is because the data are not broken up to enable one to distinguish between the more and less complex cases of fraud, and because some important features of the American criminal justice system are not present in many of the Commonwealth jurisdictions. If there were grounds for suspecting that extensive use would be made of the right to elect trial by judge alone, one would expect to see a substantial number of accused electing summary trial at present but , with the possible exception of bankruptcy fraud, this does not appear to be the case. Few initial sceptics will be converted to the proposal as a means of reducing substantially the problems associated with fraud trials, though this does not mean that it is objectionable in itself.

(3) Trial by judge(s) alone

Provided that both the trial and the judgment took place in open court, judicial trial certainly represents the most clear-cut of the options for radical reform of fraud cases. No system can be better than the people who operate it, but a competent judge could cut a swathe through the mass of documentation referred to earlier. The hearsay rule, which causes particular difficulties in international cases and which leads to frequent trials-within-trials, could be by-passed. The tedious and quite spurious defences familiar to all those who attend lengthy fraud cases, which are devised deliberately to confuse the jury so that they cannot be satisfied beyond all reasonable doubt, would diminish in number. Moreover, there would be some advantages to the defence, inasmuch as the requirement that a judge give reasons for his verdict would enable the appellate courts to go beyond the convention that a jury's verdict is sacrosanct. There would be no diminution of the responsibility of summing up the law and applying the facts to it. Moreover, the high status of many (though by no means all) fraud offenders should protect them from the prosecution-mindedness that has been alleged to afflict stipendiary magistrates in their dealings with lower-class offenders, partly through the human tendency of discrediting explanations that are advanced too frequently. Provided that the trial judges were taken from the Queen's Bench Division rather than the Chancery Division, and thus were familiar with the criminal process, this might result in considerable improvements to fraud trials without any major disadvantages, however odd it might be to try criminal cases without a jury.

Whether such trials ought to be accompanied by assessors (expert or lay magistrate) as a matter of routine is moot. This may depend on whether or not it is possible to recruit persons of sufficient calibre. If retired persons were to be used, they might be out of touch with current custom and practice in, say, accounting standards (an objection which applies *a fortiori* to the use of expert special juries), and it may be better to recruit practising persons, as is done in Department of Trade enquiries under Section 165 of the Companies Act 1948. We might extend to criminal trials the provisions of Section 70(1) of the Supreme Court Act 1981, which state that

> "In any cause or matter before the High Court the court may, if it thinks it expedient to do so, call in the aid of one or more assessors specially qualified, and hear or dispose of the cause or the matter wholly or partially with their assistance."

Several Commonwealth countries already use assessors in this way and, although he doubtless intended to restrict his comments to civil cases other than patent or admiralty ones, Devlin J. observed in *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1956] A.C. 218 that there was no bar on the broader use of assessors. Proper remuneration would be needed, as it is at present in civil cases at the discretion of the court, but it certainly is arguable that service is part of the communal responsibility of those who complain about their losses from fraud.

The impact of such a system upon the length of trials may not always be great. In long-firm frauds and the more ordinary cases, the effects might be considerable, as it is there that the most long-winded and irrelevant defences tend to arise. However, in some banking, insurance and accounting frauds, it

may not take an appreciably shorter time to explain norms and technicalities to an inexpert judge than to an inexpert jury (though hopefully, at least the judge will understand it afterwards!) Judicial trial would also improve pre-trial preparation by counsel.

There are two principal objections that may be raised to this proposal. The first relates to the principle that all criminal cases should be made understandable to the general public. However, this principle is not cardinal. After all, the *verbatim* reporting of the full details of fraud trials is not something that has preoccupied media reportage hitherto (except where there is a sex appeal aspect to the case). In any event, any competent financial journalist will be able to produce a succinct analysis. There are many technical issues of a scientific or financial nature that do not reach the public, and fraud trials are no exception. In trial by judge(s) alone, or by judge with assessors, there would be opening speeches and a summing up, so apart from the occasional drama of police or juror or political corruption (which would occur still), there would be little change to the public's perception of fraud trials.

The political (and legal organisational) objections are things that have to be taken into account. The debates upon the Criminal Law Act 1977 and upon the Supreme Court Act 1981 are an indication of the difficulties facing reformers. In the course of the debate upon the latter, Mr. Frank Dobson, M.P. stated that

> "Jury service is more important to the preservation of individual liberty and the preservation of our judicial system than all the scurvy race of lawyers put together."

The Law Ministers doubtless would take a different view. When the House of Commons defeated the proposal to abolish trial by jury in civil cases where the length of the trial makes the action one which cannot conveniently be tried with a jury, Lord Hailsham (who previously had accused Lord Rawlinson of being "too conservative with a small 'c'") observed that

> "there are times when one is wise to retreat before the troglodytes, reactionaries, and pterodactyls, and other strange creatures in the undergrowth who oppose law reform."

Despite the furore over the length criterion for abolition, Section 70 of the Supreme Court Act 1981 provides

> "(1) Where, on the application of any party to an action to be tried in the Queen's Bench Division, the court is satisfied that there is in issue -
> (a) a charge of fraud against that party......the action shall be tried with a jury unless the court is of the opinion that the trial requires any prolonged examination of documents or accounts which cannot conveniently be made with a jury."

There seems to be no good reason why the 'prolonged examination of documents or accounts' criterion cannot be extended to the criminal trial also, though some might prefer the initiation of such a move to rest with the defendant and/or prosecution rather than with the judge.

Whether this option of trial by judge without jury would be attractive to the judges of first instance is a different matter. Some of those whom I consulted among the English judiciary were less enthusiastic than the higher judiciary, perhaps because they were cognisant of the extra responsibility that this would entail for them personally. I

refer here not only to the need to give reasons for a verdict but also to the moral responsibility that would accompany the change. In my view, there would be an advantage in having a two or three-person panel of judges, since the testing of argument and of belief is an important part of the judgment process. (Expert assessors, however, should not be involved in the decision, since the public might feel that the verdict was an 'in-group' one.) There may be pragmatic arguments regarding judicial resources which prevent there being more than one trial judge, but the superiority of a larger tribunal does not constitute a sufficient reason to abandon the change to trial by a single judge. Many of the arguments in favour of abolishing jury trial for frauds also point towards greater specialisation in fraud among the judiciary, where expertise and specialist knowledge is at a premium.

(4) Piecemeal Reforms of the Trial Process

It would be both tedious and pointless to seek to review in detail the variety of procedural rules which exist in all Commonwealth jurisdictions. Rather, I shall present in broad outline what I regard as some of the key reforms that might prove to be beneficial.

(a) Pre-Trial Reviews

The cornerstone of any reforms must be the improvement of the pre-trial procedures for frauds. More efficiently conducted trials will imply shorter delays for the accused who, whether they be in custody or on bail, will have their cases concluded sooner. Interviews with those convicted in fraud cases reveal that the waiting period was one of such anxiety that it was almost a relief to be convicted (Breed, 1979; Levi, 1981). Witnesses will be able to give their evidence when it is relatively fresh in their minds. The concentration of juries should not be distracted by constant breaks for legal argument between counsel on admissibility and by irrelevant and long-winded cross-examination. Those cases that are of doubtful strength will be dropped even before the trial rather than after, say, 100 days of prosecution evidence. The difficulty is to achieve these aims.

Whilst accepting that a certain amount of gamemanship is inevitable (and maybe even desirable) in any legal system, this appears to have reached unacceptable levels, particularly in fraud cases but also in organised crime cases. Numerous instances have been cited to me (not only in the United Kingdom) where witnesses have had to be brough from abroad or from distant parts of the country to give evidence which has not been disputed

in court. It is plain that the only motives for this are to try to induce the prosecution to drop a case (on cost grounds), to induce them to accept a plea bargain, or even to obtain a directed acquittal if no formal proof can be made of vital evidence. This is contrary to commonsense, however pleasant it may be for accused persons. There are no formal interlocutory procedures in English criminal courts and, given the delays that these often occasion, particularly in Chancery, this may be no bad thing. What are required are incentives to deal with major issues before the trial and disincentives for not doing so.

Among the most promising possibilities for improvement of the trial process without creating undue inroads into the rights of the accused are

(i) within, say, two weeks from committal for trial, the prosecution should indicate the counts on which it intends to proceed and the defence should indicate their pleas to the counts in question.

(ii) At this stage, the defence should indicate what evidence and witnesses need not be called to appear in person.

(iii) In cases of any complexity, pre-trial reviews, oral or written, should be held, which should deal with all legal issues, including arguments on admissibility and severance, which are to be raised during the trial. Prosecution counsel should not be permitted to fudge on the particularity of their indictments by arguing, for instance, that all will be clarified in the Opening Speech. Experience gives no grounds for such optimistic pronouncements!

(iv) The judge at the pre-trial review should always be the trial judge. I reject the counter-argument that this might lead him to pre-judge the case unduly. Preferably, the trial judges should be reasonably expert in the area of fraud, since this tends to generate some of the most difficult issues.

(v) The counsel who deal with practice directions should in all cases be the senior ones who are to appear at trial. If this is not the case, the tendency is for neither prosecutors nor defence representatives to concede anything, lest they be criticised subsequently by their leaders.

(vi) There should be sanctions for non-compliance with the practice directions. One way of strengthening their impact would be to impose a sort of exclusionary rule, whereby no legal argument on any of the matters accessible before the trial can be raised during the trial. If this is too severe, then such argument could be admitted at the discretion of the trial judge. However, at the minimum, the trial judge and taxing officers should be empowered to impose financial penalties upon counsel who do not respond to pre-trial directions and/or who draw out their conduct of the case in plainly irrelevant directions. These sanctions may be imposed upon both prosecution and defence. There should be increased fees for adequate pre-trial preparation by counsel on Legal Aid, so that there is some incentive for them. Defendants who are not Legally Aided might be required to pay some of the Court and Prosecution costs if they fail to respond to practice directions, though in England and Wales, there are very few privately funded defence counsel anyway.

(b) Disqualifications from Jury Service

General disqualifications of all previously convicted persons are extremely crude instruments for the selection of impartial juries. There seems no good reason to suppose that thieves and robbers are any more tolerant than the unconvicted of, say, child molesters, nor that petty persistent offenders are well disposed towards corporate fraudsters. Given the very low rates of prosecution for fraud and for corporation regulatory offences (including tax fraud in particular), it would be excessively optimistic to take the absence of convictions for these offences as an indicator of moral or legal probity. Assuming that the jury is to be retained, the issue of disqualification becomes a difficult one.

It seems reasonable to exclude from jury service on a fraud case those who lack regard for the legitimacy of laws governing commerce. On this criterion, we should disqualify all who have been convicted of any offences involving deception or any other relevant quasi-administrative offences such as those under the Companies Acts, Bankruptcy Acts, Fair Trading, Health and Safety at Work, or Public Health Acts. We might wish to include also those who have been censured in Department of Trade Inspectors' Reports (or their equivalent abroad), or by any of the self-regulatory bodies such as the Institute of Chartered Accountants, the Law Society, Lloyds of London, the Council for the Securities Industry, and the Stock Exchange. From a practical viewpoint, however, this might be difficult to do under a common rather than a special jury system. One might even wish to extend the ban to anyone who has ever been bankrupt or a director of a company that has gone into liquidation, on the grounds that some degree of deception is common in these situations. However, this too may be impractical, as well as being an undue violation of civil rights. For example, unless

all people eligible for jury service were to be required to answer such questions, those called might have to answer in open court, which would be embarrassing.

In my view, those convicted of fraud or 'regulatory' offences should be disqualified whatever the sentence that was imposed upon them, since for these offences, the sentence (actual or maximum) bears little relation to the seriousness of the acts. This issue is expressed nicely in a different context by the City of London magistrates in the case of R. v. Altman et al. (unreported, but see The Guardian, 22 April, 1978):

> "A City stockbroker and his company involved in a £2 million currency fraud...... were ordered to pay more than £220,000 in fines and costs yesterday......The magistrates, in a written judgment, said they were anxious about the proper sentence, and said that although Altman was a first offender who should not be imprisoned unless there was no suitable alternative, he had committed breach of trust and aided a very substantial fraud......In the event, they concluded, a very substantial monetary penalty was the right sentence.
> The magistrates protested that there was an anomaly in the laws designed to help rehabilitation of offenders. Because they had decided not to imprison Mr. Altman, he would become 'rehabilitated' after only five years, and no-one would be allowed to refer to his conviction. Society would wish to regard serious white-collar fraudsmen of this type as 'second-class' citizens for a long time, they said."

(For an extended discussion of related issues, see Levi, 1981, Ch. XII).

(c) The Peremptory Challenge

It is not unnatural for defence counsel to seek to maximise their client's chance of acquittal by procuring a jury favourable to the defence. Although there is a substantial body of evidence on the relationship between juror characteristics and verdicts, principally in the United States, opportunities for *voir dire* and for objections 'for cause' are highly circumscribed in most Commonwealth jurisdictions. Moreover, prosecution practices vary widely with regard to jury-vetting. New Zealanders, who fairly routinely omit from jury panels all persons with previous convictions, may regard with amazement the furore with which jury-vetting is treated in England. Between 1975 and 1978, the Director of Public Prosecutions, who prosecutes most major fraud cases in England and Wales, authorised only two cases of fraud - both international frauds - where juries were vetted in advance for previous convictions. Other jurors may have stood down because they obeyed the bans on service for those with certain sorts of previous records, but no official check took place. These factors clearly make a difference to the initial jury panel.

Beyond that, however, there exists the right to make a peremptory challenge. In his Commentaries, Blackstone (IV, 353) observed that the peremptory challenge applies only to capital cases. The accused should be able to object to a man if he does not like the look of him. This right is

> "a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous......As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner (when

> put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike."

Over the centuries, the number of peremptory challenges has declined, from twenty in 1509 to seven in 1948 to three in the Criminal Law Act 1973. However, s35 of the Criminal Justice Act 1948 extended the peremptory challenge to misdemeanours as well as to felonies, thus making it available for non-felonious frauds. In 1973, Lord Hailsham withdrew occupations from the jury list available to counsel, thereby diminishing the potential for using this as a basis for peremptory challenge.

Despite the reduction in the number of peremptory challenges, and in the information available to counsel making this decision, it is used not infrequently in fraud trials. The Morris Committee (1956, para 343) observed that "In difficult cases of commercial fraud counsel sometimes challenge just those very jurors who, by reason of their education or professional attainments, might be thought to be best qualified to understand the issues." My own interviews with counsel and solicitors, and direct observations in court, confirm the tactic adverted to by the Committee, though on rare occasions, counsel may prefer an 'upper-crust' jury. Readers of the Daily Telegraph, or military-looking persons certainly tend to be excluded on peremptory challenge, as do inhabitants of areas of the city thought to be less sympathetic to the type of fraud under trial. Professional livelihoods and reputations may be at stake in fraud prosecutions, but readers may question the rationale behind the retention of the peremptory challenge. Lord Denning (1982) and many recent letter-writers to The Times take the view that it should be abolished. In frauds where there are multiple

defendants, the systematic use of the challenge can eliminate a substantial number of persons from the jury panel, though this can misfire, as when the defence mistakenly permitted onto the jury a rather scruffy-looking individual who turned out to be a qualified accountant in a distinguished London firm, while objecting to a man wearing a pinstriped suit, with a bowler hat and rolled umbrella, who was in fact a market porter in his Sunday best! (Levi, 1981, 210). The right to challenge is therefore more significant than the reduction to three per defendant might suggest. If the principle of randomisation is taken to its logical conclusion, the peremptory challenge (and the stand by for the Crown) should disappear, and only objections for cause should remain.

There is, however, one reason why this proposal should be looked at with care, even by those who do not cling to traditionalism for its own sake. As one judge pointed out to me in discussion, if the peremptory challenge were abolished, there might be more pressure to institute an extension of objections for cause. This has begun to happen already in England, even with the present right of peremptory challenge, but few people would like to see the adoption of jury selection processes akin to those in major United States trials.

(d) The Taking of Notes

It has become common in the London Central Criminal Court for juries in fraud cases to be provided routinely with paper and writing implements. This should be universal, particularly in long and complex cases. There is no substance in the objection that it may be distracting for people who are not used to taking notes. If necessary, the trial judge may tell jurors of the dangers of being thus distracted, but no-one is compelled by the mere presence of pen and paper to take notes.

However, it probably would be unwise for jurors to attempt to set down _all_ the evidence on paper. It might be useful for counsel to present the jury with a copy of the opening speech and a summary of the principal lines of defence.

(e) The Routine Introduction of the Previous Convictions of the Accused

Americans often express amazement at the fuss that has been made over the proposals of the Criminal Law Revision Committee to introduce more readily the prior convictions of the accused. However, such concern by civil libertarians is well founded, as such a measure would increase the risk of convicting the innocent. Juries are more likely than judges and expert assessors to be gulled by _faux naif_ claims by the accused, but even there, one should not overestimate the impact upon convictions in _fraud_ trials of the proposal to introduce previous records routinely into evidence.

One quarter of those convicted at the Old Bailey between 1962 and 1972 in connection with long-firm fraud (businesses set up to obtain large quantities of goods on credit without intending to pay for them) had no previous convictions, and almost half had less than two previous convictions. Of those _acquitted_ during this period, no fewer than 60 per cent had no previous convictions and only a quarter had received total prison sentences of longer than twelve months prior to their present conviction. If we examine the prior criminal records of nine alleged 'professional long-firm fraudsters' who were acquitted at the Old Bailey between 1950 and 1976, we may note that at the time of their acquittal, only three had received sentences totalling more than twelve months' imprisonment, one had a previous one-year sentence, one had two previous convictions but had never been sent to prison, and four had no previous

convictions at all. However, all five who had criminal records had at least one conviction for commercial crime and, in their cases, the introduction of previous convictions _might_ have had some impact upon the decision of the jury. Whether this is a good or a bad thing depends upon one's values: they may have been innocent. We may assume too readily that all of the subsequent activities of convicted fraudsters are fraudulent, just as we may be too reluctant to label the unconvicted as 'fraudsters'.

There is one possible consequence of the introduction of previous convictions into evidence: that it will encourage the prosecution of persons who otherwise would not have been prosecuted. The police or Public Prosecutor might think that the prejudicial effect of the jurors' knowledge of the accused's previous convictions might lead to a conviction where, under the present rules, there would be an expectation of an acquittal. Ironically, if this view proved ill-founded, there might be an _increase_ in the acquittal rate for frauds. Since, with the exception of cheque and credit card fraudsters, long-firm fraudsters are more likely than corporate criminals generally to have prior convictions, the net effect of any change in the previous conviction rules probably will be negligible. If we were to take the 'similar fact' or 'moral character' arguments seriously, we would have to go further and introduce information about prior business failures which did not necessarily lead to any prosecution. Again, there is a conflict here between the desirability of possessing relevant information and the risk of creating undue prejudice which becomes more acute as one moves from a "due process" model to one more closely akin to a "people's court".

(f) Time limits on opening and closing speeches

The opening speech for the Crown probably is a major part of the trial, particularly a jury trial, since it places in perspective the relationship between all the bits of evidence and, in conspiracy trials, between all the accused. Therefore, it may be considered undesirable by some to impose a strict time limit. However, since a little pressure concentrates the mind wonderfully, it may be recommended that except with the express permission of the trial judge, an opening speech should never exceed one working day. The same principle should apply to the closing speeches of all counsel, whether for the defence or for the prosecution. The tendency for each counsel to see it as his or her duty to review laboriously all the evidence relating to each individual client and count is one that should not be encouraged. Jurors report that it adds little to their understanding and, if anything, makes them irritable at what they see as redundant argument. Its major impact probably is to increase the costs of Legal Aid. Lengthy judicial summings up are also to be discouraged, but it is doubtful if there should be such strict controls on length as there are, for example, in the United States.

(g) The use of alternate jurors

One final possibility to reduce the strains to jurors suffering from illness or domestic contingencies or even those whose holidays are threatened by trial over-runs is to introduce a system of 'alternate juries', as happens in the United States. If, say, three extra jurors were to sit on frauds which were expected to last longer than one month (or whatever period were deemed appropriate), then this might ease the social and organisational stresses that crop up in some long trials. The jurors would sit separate from the 'proper' jury.