

# On the Question of a Complexity Exception to the Seventh Amendment Guarantee of Trial by Jury

JAMES OLDHAM\*

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The first clause of the Seventh Amendment to the United States Constitution is deceptively simple. It reads: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”<sup>1</sup> But a moment’s reflection prompts the question, “What right to trial by jury?” Justice Story responded in 1812 in the case of *United States v. Wonson*,<sup>2</sup> in which he stated: “Beyond all question, the common law here alluded to is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence.”<sup>3</sup> Justice Story’s interpretation of the language of the first clause of the Seventh Amendment became the standard guideline for the scope of the Seventh Amendment’s trial by jury guarantee, and it remains so today. It has come to be called “the historical test,” and an oft-quoted description of the test by the Supreme Court in the 1935 decision of *Dimick v. Schiedt*<sup>4</sup> is as follows: “In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791.”<sup>5</sup> The applications of this

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\* James Oldham is the St. Thomas More Professor of Law and Legal History at Georgetown University Law Center. His books include TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES (N.Y. Univ. Press 2006) and ENGLISH COMMON LAW IN THE AGE OF MANSFIELD (Univ. of N.C. Press 2004).

<sup>1</sup> U.S. CONST. amend. VII, cl. 1.

<sup>2</sup> 28 F. Cas. 745 (C.C.D. Mass. 1812) (No. 16,750).

<sup>3</sup> *Id.* at 750.

<sup>4</sup> 293 U.S. 474 (1935).

<sup>5</sup> *Id.* at 476.

test by the federal courts over the years since its formulation have been the subject of extensive academic scholarship, including my own.<sup>6</sup>

One important and as yet unanswered question is whether jury trial is required by the Seventh Amendment in complex civil litigation. That question was posed in a case before the Court of Appeals for the Third Circuit in 1980, *In re Japanese Electronic Products Litigation*,<sup>7</sup> but after studying competing briefs by legal historians Morris Arnold and Patrick Devlin,<sup>8</sup> the court demurred, choosing “not to pioneer in this use of history.”<sup>9</sup>

In my own writing, I have concluded that a “complexity exception” to the Seventh Amendment would be legitimate under the historical test.<sup>10</sup> Among other things, I have pointed out two fundamental features of late eighteenth century business litigation in England—the frequent referral of such cases to arbitration, and, for cases litigated to a conclusion, the strong likelihood that such cases would be put before a special jury of merchants.<sup>11</sup> These major differences between the English jury-trial practices of 1791 and jury practices in twenty-first century America have not been recognized by the Supreme Court or the lower federal courts in applications of the Seventh Amendment’s historical test. Yet if we believe that the Founders meant to preserve in the United States the realistic operational features of trial by jury as practiced in England at the time the Seventh Amendment was adopted, these realities ought to be recognized.

The fundamental inquiry in thinking about the possibility of a complexity exception to the Seventh Amendment is how the courts should deal with cases that demand expertise in the decision makers in coping with complicated facts. The Supreme Court in the *Dimick* case instructed that “resort must be had to the appropriate rules of the common law established at the time of the adoption of [the Seventh Amendment] in 1791.”<sup>12</sup> One of the rules of the common law of 1791 in England was the availability of a special jury, as of right, on demand by either party in a civil case.<sup>13</sup> This immediately presents a problem. Even though special juries were used extensively in the United States in earlier times, their use in federal courts has become unlawful as a result of the statutory rule that jury

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<sup>6</sup> See JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES (2006) [hereinafter OLDHAM, TRIAL BY JURY], in particular chapter one, “The Scope of the Seventh Amendment Guarantee,” and sources cited therein.

<sup>7</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* (*In re Japanese Elec. Prods. Litig.*), 631 F.2d 1069, 1071 (3d Cir. 1980).

<sup>8</sup> *Id.* at 1082–83.

<sup>9</sup> *Id.* at 1083.

<sup>10</sup> See OLDHAM, TRIAL BY JURY, *supra* note 6, at ch. 2.

<sup>11</sup> *Id.* at 22–23.

<sup>12</sup> *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935).

<sup>13</sup> See OLDHAM, TRIAL BY JURY, *supra* note 6, at 22.

pools must reflect a reasonable cross-section of the society from which the jury pool is drawn.<sup>14</sup>

In the discussion to follow, I expand my inquiry into what happened in the English courts of the late eighteenth and early nineteenth centuries in civil cases when special expertise on the part of the decision makers was needed. A major source that contributes to this study is the law reporting that appeared in *The Times*, founded in 1785.<sup>15</sup> I explore three questions: (1) What types of cases in late eighteenth century England were considered to be inappropriate for juries? (2) What recourses were available to the late eighteenth or early nineteenth century English judge when the issue in a case was outside his own expertise or beyond his individual capability? (3) What exactly was the role of merchant jurors in putting their mercantile expertise to work in a given case?

#### I. WHAT TYPES OF CASES IN LATE EIGHTEENTH CENTURY ENGLAND WERE CONSIDERED INAPPROPRIATE FOR JURIES?

Some complicated business litigation in England in the late eighteenth century never reached a jury. Some such cases were not “Suits at common law,” but were suits in equity in the Court of Chancery, where there were no juries. The fundamental task of the Court of Chancery in these cases was fact-finding, even though fact-finding is normally thought of as an exclusive jury function. The most common example of this type of case was the suit in which the plaintiff sought an accounting, for example, in activities of a partnership or in a bankruptcy proceeding. Such a case would ordinarily be referred to one of the twelve Masters in Chancery to work out the accounts.<sup>16</sup> In the 1794 case of *Barnard v. Assignees of Price*,<sup>17</sup> however, the Master in Chancery balked. The plaintiff had initially filed in the Court of Chancery seeking an accounting from the assignees of Price, after Price had become bankrupt.<sup>18</sup> At the plaintiff’s request, the case was referred to a Master in Chancery, but to everyone’s surprise, the Master, in turn, referred the case to the Court of King’s Bench for the verdict of a jury “on the state of this long and complicated account.”<sup>19</sup> The case was presented to Chief Justice Kenyon and a special jury of merchants on

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<sup>14</sup> *Id.* at 204; Pub. L. No. 90–274, 82 Stat. 53–54 (codified at 28 U.S.C. § 1861).

<sup>15</sup> Originally known as *The Daily Universal Register*, the entire run of *The Times* (London) is available online at [http://infotrac.galegroup.com/itw/infomark/0/1/1/purl=rc6\\_TTDA?sw\\_aep=colu44333](http://infotrac.galegroup.com/itw/infomark/0/1/1/purl=rc6_TTDA?sw_aep=colu44333).

<sup>16</sup> See OLDHAM, TRIAL BY JURY, *supra* note 6, at 18, for a discussion of the *Blad* and *Clench* cases.

<sup>17</sup> *Law Report: Barnard v. Assignees of Price*, TIMES (London), Dec. 19, 1794, at 3 [hereinafter *Law Report: Barnard*].

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

December 18, 1794 by two of the leading barristers of the day, William Garrow and Thomas Erskine. Garrow said that “the case consisted of such volumes of paper, that he should have no difficulty to say, without danger of being contradicted, that it was absolutely impossible for a Court and Jury to decide that cause.”<sup>20</sup> He said that if it had originated in a court of law, “it would have been considered as one of those causes, which, from unavoidable necessity, must be referred to arbitration.”<sup>21</sup> Garrow, therefore, suggested to Erskine that they should send the case to arbitration. Erskine said that “he should as soon attempt to describe the essence of the celestial or infernal spirits, as endeavour to describe what passed in the Master’s office,” but “[h]e had no objections to refer it, provided they could get some gentleman (who must be a young man) to devote the remainder of his days to this business.”<sup>22</sup> In the end, Garrow and Erskine agreed to refer the case to (young) barristers George Holroyd and John Bayley, and Lord Kenyon said “it could not be in better hands; and the verdict would be entered up, as the arbitrators should direct.”<sup>23</sup>

Other disputes requiring sophisticated fact-finding originated in Chancery and ended up in arbitration, as in *Gyles v. Wilcox*,<sup>24</sup> a copyright infringement dispute in which the plaintiff sought injunctive relief.<sup>25</sup> Lord Chancellor Hardwicke said, “The court is not under an indispensable obligation to send all facts to a jury, but may refer them to a master, to state them, where it is a question of nicety and difficulty, and more fit for men of learning to inquire into, than a common jury.”<sup>26</sup> He added, “The House of Lords very often, in matters of account which are extremely perplexed and intricate, refer it to two merchants named by the parties, to consider the case, and report their opinions on it, rather than leave it to a jury.”<sup>27</sup> Barnardiston, in his report of the case, quotes Hardwicke as saying that “where the Facts are of an extensive Nature, as Matters of Accounts, or the like,” the court might direct “that the Master should be attended by two Persons skilled in the Profession of the Law, to assist him. And

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Law Report: Barnard*, *supra* note 17, at 3.

<sup>23</sup> *Id.* (in the news account, *Bayley* is spelled *Baillie*). For a case with a comparable outcome, see *Law Report: Handy v. Camden*, DAILY UNIVERSAL REG. (London), Aug. 16, 1787, at 3. Counsel for the plaintiff said “he must go through accounts to upwards of [£]10,000 and he thought it would have been proper to have brought their night-caps, unless they chose to refer it.” *Id.* The parties chose to refer it to a Mr. Norris of the Sun Fire Office.

<sup>24</sup> (1740) 26 Eng. Rep. 489 (Ch.); 2 Atk. 141. This case is discussed in OLDHAM, TRIAL BY JURY, *supra* note 6, at 19–21.

<sup>25</sup> *Gyles*, at 489, 2 Atk. at 141–45.

<sup>26</sup> *Id.* at 490–91, 2 Atk. at 144.

<sup>27</sup> *Id.* at 491, 2 Atk. at 145.

Directions of this Sort have been made in Mathematical and Algebraical Inquiries.”<sup>28</sup> In the end, the *Gyles* case was referred to arbitration.<sup>29</sup>

It was open to the Court of Chancery in complex cases to work the case to a conclusion without referring it to arbitration. An example from the nineteenth century is the case of *Short v. Lee*.<sup>30</sup> There, a lessee of an ecclesiastical corporation sued in Chancery for tithes, and on being urged to send an issue to the law courts, the Master of the Rolls, Sir Thomas Plumer, said, “The evidence to disprove the immemorial existence of the [tithes] is entirely written, contained in thirty-six ancient rolls in a dead language, embracing many items of different kinds[,]” and, “[t]heir construction has called forth the applications of learning, critical and accurate investigation and collation, frequent and useful revision, and the assistance of glossaries and antiquarian knowledge, to form a correct judgment respecting their meaning and import.”<sup>31</sup> He then asked, rhetorically:

Could this be done before a jury at *Nisi Prius*, with the same effect as it may in a court, assisted by the learning and industry of the bar, during a hearing of many days, devoted entirely to this one subject, and with a knowledge of the whole of the cause to which the enquiry belongs?<sup>32</sup>

Apart from demands for an accounting or esoteric cases such as *Short v. Lee*, it must be acknowledged that most non-criminal cases—even those that were factually complex—would have been filed in the common law courts in the late eighteenth century. These would have been put on the *nisi prius* dockets in London or on the assizes. If it was clear from the start in such a case that special expertise would be required to understand and resolve complex facts, the plaintiff would request (as of right) a special jury, which by custom in mercantile cases would be made up entirely or predominantly of merchants.<sup>33</sup>

If the case were beyond the capability of a jury—even a special jury—two alternatives might be available: to refer the case to arbitration or to file a demurrer to the evidence. It was even possible for a special jury to confess its own inability. A brief newspaper account of the Suffolk assizes at Bury St. Edmunds in August 1791 described a special jury case involving canal construction between Ipswich and Stowmarket, and according to *The Times*:

After getting a little way into the cause, and the Jury confessing themselves not competent to decide on the skill or merits of canal-cutters, nor of the value of materials, nor of their use or necessity, and not much elucidation being

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<sup>28</sup> (1740) 27 Eng. Rep. 682 (Ch.); Barn. C. Rep. 368, 370.

<sup>29</sup> (1745) 26 Eng. Rep. 957 (Ch.); 3 Atk. 269, 270.

<sup>30</sup> (1821) 37 Eng. Rep. 705 (Ch.); 2 Jac. & W. 464.

<sup>31</sup> *Id.* at 719, Jac. & W. at 502.

<sup>32</sup> *Id.*

<sup>33</sup> See *infra* notes 65–68 and accompanying text.

expected from either the Bar or the Bench on such a subject, the parties agreed to refer the matters in dispute to a gentleman of skill and experience in this branch of business.<sup>34</sup>

References to arbitration were, of course, consensual, so that in theory there was a right to insist on trial by jury despite recommendations from the court and opposing counsel to refer the case. But whether this theoretical right was meaningful in practice can be questioned. In *Barnett v. Leader*,<sup>35</sup> for example, Lord Eldon, newly appointed Chief Justice of the Court of Common Pleas, "took an extraordinary degree of pains" to coax the defendant to refer a case involving a conveyancer's bill to arbitration.<sup>36</sup> Eldon explained that "he had never seen a conveyancer's bill in his life, that probably the Gentlemen of the Jury were nearly in the same situation, and that, therefore, all that they and he could do would be to form a sort of guess as to the value of the work[,] whereas a fair and reasonable outcome could be expected by a reference to a respected gentleman "who was acquainted with that branch of the profession."<sup>37</sup> Eldon added that if the defendant insisted that the case be tried, they would "give it all the attention they could."<sup>38</sup> The defendant capitulated, and the case was referred to Mr. Wilson.<sup>39</sup>

Avoiding a jury by the demurrer to the evidence can best be illustrated by a set of cases during 1788–1791 involving an interconnected series of bankruptcies precipitated by the failure of an extremely large and influential cotton manufacturer, Livesey & Co.<sup>40</sup> Collectively these cases involved millions of pounds sterling. The transactions were multi-layered and complex. All of the cases required the courts to consider the legitimacy of a suspect financial device—the use of fictitious payees in accommodation paper, principally bills of

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<sup>34</sup> *Summer Assizes: Bury St. Edmunds*, TIMES (London), Aug. 18, 1791, at 4.

<sup>35</sup> *Law Report: Barnett v. Leader*, TIMES (London), Dec. 17, 1799, at 4.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*; see also *Law Report: Wilkinson v. Wilkinson*, TIMES (London), Oct. 7, 1795, at 3 (reporting a King's Bench case from July 16, 1795). *Wilkinson* was a dispute between two brothers over a half-million pound investment in iron works. Lord Kenyon said that the cause "was so multifarious, that it would be impossible ever to get to the end of it at *Nisi Prius*." It was important "for the parties to understand that the Court of Chancery would not settle all these accounts for at least these fifty years." The parties, at Kenyon's recommendation, agreed to refer all matters in dispute "to a number of Iron-Masters that should be elected by the parties."

<sup>40</sup> The leading case was *Minet and Fector v. Gibson and Johnson*, (1791) 126 Eng. Rep. 326 (C.P); 1 H. Bl. 569. The case went all the way to the House of Lords, where the use of a fictitious payee was upheld. For a useful summary, see J.K. Horsefield, *Gibson and Johnson: A Forgotten Cause Celebre*, 10 *ECONOMICA* 233 (1943).

exchange. It is not necessary for purposes of the present article to explore the intricacies of these financial dealings, but the legal strategy of counsel for the defendants, Thomas Erskine, is relevant. The case of *Gibson and Johnson v. Lewis and Potter*<sup>41</sup> began in Chancery as a petition by Gibson and Johnson to prove securities worth at least £170,000 under the bankruptcy commission of Lewis and Potter.<sup>42</sup> At a hearing on November 22, 1788, Lord Chancellor Thurlow said the case was “of the first importance.”<sup>43</sup> Although “it appeared to be discoloured by the grossest fraud,” it would depend on factual proof that could not be developed in Chancery.<sup>44</sup> He therefore directed a trial at law, but as an intermediate step, he referred the case to the Master in Chancery “to examine all the books of account . . . in order to ascertain the real state of the transactions.”<sup>45</sup>

A month later, another case against the assignees of Lewis and Potter came on in the Court of King’s Bench before Lord Kenyon and “a very respectable special Jury of merchants.”<sup>46</sup> According to the newspaper report of the case, *Vere and Williams v. Lewis and Potter*, Erskine politely acknowledged that the Lord Chancellor “doubtless felt the necessity of its being determined according to the strict rule of the common law,” but then said,

[A]lthough he entertained the highest opinion of the judgment of a Jury of merchants upon all commercial questions, yet such was the magnitude of the present [case], that he felt it his duty to demur to the evidence, for the purpose of having the case investigated, and the law laid down upon it by the Court.<sup>47</sup>

Demurrers to the evidence were also filed by Erskine on behalf of the defendants in another case in the series, *Tatlock v. Harris*,<sup>48</sup> and in at least four subsequent cases.<sup>49</sup> In *Gosling & Co. v. Gibson & Johnson*,<sup>50</sup> Erskine explained

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<sup>41</sup> *Law Intelligence*: Gibson and Johnson—and Lewis and Potter, *TIMES* (London), Nov. 26, 1788, at 3.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> See *Vere and Williams v. Lewis and Potter*, 100 Eng. Rep. 522 (K.B.); 3 Term. Rep. 182, quoted in *Law Intelligence*: Lewis and Potter’s Commission, *TIMES* (London), Dec. 23, 1788, at 4.

<sup>47</sup> *Id.*

<sup>48</sup> (1789) 100 Eng. Rep. 517 (K.B.) 518; 3 Term Rep. 174, 175; see also *Law Report: Accommodation Notes of Lewis and Potter—Tatlock Versus Harris*, *TIMES* (London), May 11, 1789, at 3.

<sup>49</sup> *Hunter and Co. v. Gibson and Johnson*, *Williams v. Gibson and Johnson*, and *Master and Co. v. Gibson and Johnson*, are all reported in *TIMES* (London), Dec. 19, 1791 at 3.

his demurrer to the evidence by observing that no part of the discussion of the fictitious payee question “belonged to the Jury, being a question of a great deal of legal intricacy.”<sup>51</sup> According to *The Times*, “[t]he effect of this was, to take it from the consideration of the Jury, and to bring it before the Court of King’s Bench for their decision.”<sup>52</sup> And in *Hunter v. Gibson and Johnson*, Erskine, referring to opposing counsel Bearcroft, queried, “How, says my learned friend, can I venerate the Trial by Jury, when I wish to withdraw facts from their consideration?”<sup>53</sup> Erskine responded,

I respect the Trial by Jury, because it is a part of the Constitution of the country, and therefore entitled to my respect, but the same Constitution which instituted the Trial by Jury instituted also a *demurrer to evidence*, and therefore both of these, as parts of one harmonious whole, are equally respectable.<sup>54</sup>

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*Gosling and Co. v. Gibson and Johnson* is reported in *TIMES* (London), Dec. 30, 1791 at 3. The earlier *Minet* case was sent by Lord Chancellor Thurlow to the Court of King’s Bench with a directive that it be tried by a special jury. See *Law Report: Minet and Co. v. Gibson and Johnson*, *TIMES* (London), Nov. 5, 1789, at 5; see also OLDHAM, *TRIAL BY JURY*, *supra* note 6, at 156 (discussing such directives from Chancery). The special jury, in turn, issued a special verdict “in order that the record might be carried forward to the House of Lords.” (1789) 100 Eng. Rep. 689 (K.B.); 3 Term Rep. 481, 483 n.(a) (The report of the House of Lords case in Henry Blackstone’s Reports, folio edition, occupies 56 pages. (1791) 1 H. Bl. 569).

<sup>50</sup> *Law Intelligence: Gibson and Johnson*, *TIMES* (London), Dec. 30, 1791, at 3.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Law Report: Hunter and Co. v. Gibson and Johnson*, *TIMES* (London), Dec. 19, 1791, at 3.

<sup>54</sup> *Id.* The fictitious payee cases continued to occupy the courts beyond 1791. *Gibson and Johnson v. Hunter* was taken to the House of Lords on writ of error and a new trial was ordered. (1793) 126 Eng. Rep. 499 (H.L.) 510; 2 H. Bl. 187, 209. According to the *The Times*, the new trial was held on July 6, 1793 before a special jury, with Bearcroft for the plaintiff, Erskine for the defendant. *Law Report: Hunter versus Gibson and Johnson*, *TIMES* (London), July 9, 1793, at 3. Bearcroft opened by referring to the numerous cases that had been in litigation for many years involving “many hundred thousand pounds,” remarking that, as a result, the phrase “payable to a fictitious payee,” had become “perfectly understood.” In the course of the proceeding, Chief Justice Kenyon observed that Erskine “might tender a *Bill of Exceptions* if he objected to any part of the evidence that might be produced.” Erskine “thanked his Lordship for that indulgence,” and later tendered a bill of exceptions “as to the general course of the trade between these parties,” claiming that such evidence had no bearing on the specific bill of exchange that was before the court. In doing so, Erskine “begged it might be understood that by this bill of exceptions, he meant no disrespect to the Jury, who most undoubtedly were quite respectable,” explaining that “[t]he Jury were judges of fact, but they were not judges of what facts ought to be laid before them.” Lord Kenyon, addressing the jury, said that the fictitious payee bills had been before different courts for several years, and despite efforts to use the best means to sort out these



## II. WHAT CHOICES WERE AVAILABLE TO THE LATE EIGHTEENTH CENTURY OR EARLY NINETEENTH CENTURY ENGLISH JUDGE WHEN AN ISSUE WAS OUTSIDE HIS OWN EXPERTISE, BEYOND HIS OWN CAPABILITY, OR SO IMPORTANT THAT OTHERS SHOULD BE CONSULTED?

As we have seen, there were times during jury trials being conducted at *nisi prius* or on assize when the trial judge sought collegial or expert help. Not infrequently a legal question would arise that called for formal argument before the full four-judge court. One procedure was to convert the case into a special verdict, which would be taken to the full four-judge court during the next term. The factual findings by the jury reflected in the special verdict would then be assessed, and after argument of counsel, judgment would be given.<sup>55</sup> This,

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intricate proceedings, “[i]t had been found that demurring to the evidence was not the best mode of arriving at the justice of the case.” He hoped that the bill of exceptions “would be better suited to that end.” The jury found for the plaintiff, “subject to the judgment that might be given on the bill of exceptions.” The case then traveled again to the House of Lords on writ of error, where by a divided vote, the jury verdict was affirmed. *Gibson v. Hunter*, (1793) 126 Eng. Rep. 557 (H.L.) 562; 2 H. Bl. 288, 298. According to Henry Blackstone, “The various questions respecting bills of exchange, which arose from the bankruptcy of *Livesey and Co.* and *Gibson and Co.* seem at length to be finally settled.” *Id.*, 2 H. Bl. at 298 n.(a).

<sup>55</sup> Many examples could be given of cases in which counsel accepted the trial judge’s request or recommendation to convert to a special verdict in order to have a difficult question taken up by the full court. In *Clark v. Ewer*, the plaintiffs sued to collect insurance on their interest in a Danish ship that was damaged on its journey from Bengal to Copenhagen, and when a question arose about Danish law, Lord Kenyon said that it would be impossible for him to state what the applicable Danish law was, and “[h]e wished a special verdict to be given on the occasion, and he should agree that the law of Denmark on this subject, should be added to the special verdict.” *Law Report: Clark and Others Against Ewer and Others*, *TIMES* (London), Oct. 28, 1788, at 4 (reporting on a trial at Guildhall before Kenyon and a special jury held on July 5, 1788). In *Rex v. Picton*, the defendant was convicted in one of the island colonies of having inflicted torture on Louisa Calderon, an accomplice in a robbery. *Law Report: The King v. Gen. Picton*, *TIMES* (London), Apr. 28, 1806, at 3. Counsel for the defendant argued that the island was governed by the law of “Old Spain,” under which “slight torture” was permitted. The case was stopped at the suggestion of the presiding judge, Lord Ellenborough, so that a special verdict could be prepared. And in *Price v. Bell*, (1801) 102 Eng. Rep. 257 (K.B.); 1 East 663, a dispute involving French ordinances and a treaty between France and America “was turned into a special verdict by the desire of the Court, who thought the question raised . . . [was] of great magnitude.” *Id.* at 260, 1 East at 671. In addition to providing an opportunity for research and argument on difficult questions that arose at trial, the special verdict had the advantage of putting the facts on the record and positioning the case to be carried forward by writ of error if desired. In *Henley v. Wood*, for example, a case from the Cornwall assizes, the trial judge, Justice Holroyd,

however, was time-consuming and expensive because of the procedural steps and filings that were required.<sup>56</sup> A simpler alternative that had by the late eighteenth century become commonplace was to take the jury verdict at trial subject to a “case stated.”<sup>57</sup> The legal question would be agreed upon by counsel at the trial and would be forwarded in writing to the full court. The jury verdict would either be upheld or overturned according to the judgment of the full court after argument on the reserved legal question. If the jury verdict were overturned, a new trial would be necessary.

A third alternative was to reserve a question for deliberation by all twelve judges at an off-the-record meeting that might or might not be accompanied by argument of counsel and that might or might not become part of a public record.<sup>58</sup> This procedure was commonly used in criminal cases tried at the Old Bailey or on assize. It was also invoked in civil cases, although infrequently.

On difficult factual questions, a fourth option was available. The trial judge in some types of cases could arrange to have experts on the bench with him during the trial to give advice as needed. This was done, for example, in marine insurance cases by seeking the help of assessors, retired sea captains and others who were experts on navigation.<sup>59</sup>

In complex or sophisticated business disputes a fifth informal option was for the trial judge, after ordering a new trial, to consult men of business himself before the new trial came on.<sup>60</sup> A sixth option was for the judge, either at the

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entertained a strong opinion that the instrument upon which the ejectment had been brought would not support the action, and expressed his wish that the facts should therefore be put in the record, in the shape of a special verdict, in order that that question might first undergo the consideration of the Court, and be ultimately brought for its final determination before the House of Lords if either party should think fit.

*Cornwall Assizes: Henley v. Matthew Wood, Esq.*, TIMES (London), Mar. 31, 1818, at 3.

<sup>56</sup> See, e.g., Henry Cary, A PRACTICAL TREATISE OF THE LAW OF JURIES AT NISI PRIUS 116 (1826).

<sup>57</sup> For more detail on this procedure, see JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD 29 n.65, 52–53 (2004).

<sup>58</sup> For the full story of this informal procedure, see James Oldham, *Informal Law-Making in England by the Twelve Judges in the Late 18th and Early 19th Centuries*, LAW & HIST. REV. (forthcoming February 2011), available at [http://scholarship.law.georgetown.edu/facpub/361/\(may2010\)](http://scholarship.law.georgetown.edu/facpub/361/(may2010)).

<sup>59</sup> See, e.g., *Wilkinson v. Comm’rs of the Navy*, 501 nb 117 (London 7 Mar. 1785), in 1 JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 392, 394–95 (1992) [hereinafter OLDHAM, M. MSS.]; see also *Addison v. Overend* and *Casey v. Donald*, *infra* notes 115 and 117 and accompanying text.

<sup>60</sup> In *Vallezjo v. Wheeler*, (1774) 98 Eng. Rep. 836 (K.B.) 843; Lofft 631, 644 (also reported at Cowp. 143 as *Vallejo v. Wheeler*), the meaning of the word “barratry” as used in the standard Lloyd’s insurance policy was before the Court of King’s Bench, and in delivering the Court’s opinion, Lord Mansfield stated: “As it was a matter of a commercial

initial trial or during a new trial, to rely upon the expertise of merchant jurors. Of special relevance to the present study of the Seventh Amendment is this sixth option—reliance by the court upon knowledgeable merchant jurors.

### III. THE ROLE OF MERCHANT JURORS

Preliminarily we should repeat the familiar notion that questions of law were for the court, questions of fact for the jury. This division of responsibility was usually observed, but there were times when the merchant jurors disagreed with the court's view of what conclusion should be drawn from the facts that had been proved. When this happened, the court was in something of a quandary. The court could order a new trial, but if a second jury agreed with the first, should the court order a third trial? In *Camden v. Anderson*,<sup>61</sup> the ship *Active* was sent with a load of convicted felons to Botany Bay, with permission to bring back a cargo of cotton. The cotton was insured, and after the ship was lost on its return trip, suit was brought to collect on the policy. Before becoming lost, the ship had stopped at Goa, and the question was whether this was a deviation that voided the policy. Lord Kenyon thought it was a deviation and so instructed the jury, but the special jury of merchants thought otherwise and found for the plaintiffs. Two new trials were held, with the same result. On July 28, 1794, a fourth trial was conducted, and Lord Kenyon apologized to the jury, saying that "he was not vain enough to put up his opinion in opposition to that of three juries," but he was obliged to give them his honest opinion.<sup>62</sup> He did so, explaining his reasoning,

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nature, and turned greatly upon the usage and custom of merchants, I consulted an eminent merchant of whose skill and experience I have great opinion." And in *Medcalf v. Hall*, (1782) 99 Eng. Rep. 566 (K.B.); 3 Doug. 113, Lord Mansfield stated, after argument on the motion for new trial, "I have taken some trouble in informing myself as to the sense of mankind upon it, all the Merchants I have talked to are against the Verdict and I am told the majority of the Bankers are so likewise." 1 OLDHAM, M. MSS., *supra* note 59, at 158, quoting *Hill Ms.* 18, fol. 16, Lincoln's Inn Library, London. Although Mansfield did not hesitate to consult the merchants, he was not the only common law judge to do so. Holt did so, for example, during his time as chief justice of King's Bench. See Deirdre M. Dwyer, *Expert Evidence in the English Civil Courts, 1550-1880*, 28 J. LEGAL HIST. 93, 98 (2007). So did Mansfield's successor, Chief Justice Kenyon. The case of *Smith v. Kendal*, (1794) 101 Eng. Rep. 469 (K.B.); 6 Term Rep. 123, presented the question of whether a written promise to pay an agreed sum was a promissory note, and according to *The Times*, Lord Kenyon said "he had taken the liberty to give a very respectable merchant, whom he should not name, a copy of the note in question and had requested of him to ask of other merchants, what the practice was, with regard to instruments of that nature." *Law Report: Smith v. Kendal*, *TIMES* (London), Oct. 9, 1795, at 4. Kenyon said, "That Gentleman had made the desired enquiry of the Directors of the Bank [of England] and of a great number of other merchants of the City of London . . . to ascertain the practice," which he then reported. *Id.*

<sup>61</sup> (1794) 101 Eng. Rep. 394 (K.B.); 5 Term Rep. 709.

<sup>62</sup> *Law Report: Cambden and Others v. Anderson*, *TIMES* (London), Oct. 2, 1794, at 4

but the fourth jury again found a verdict for the plaintiffs, assessing damages of £478.<sup>63</sup>

It was extremely unusual, however, for there to be such tension between the courts and special juries. Ordinarily special juries cooperatively assisted the judges with complex business questions in a variety of ways, depending upon who the special jurors were, the nature of the issue or issues, and what evidence was presented. As the eighteenth century unfolded, many disputes arose about legal aspects of mercantile transactions. Frequently the merchants followed well-established customs that were new to the courts but that could sensibly be absorbed into the common law. As is well known, Lord Mansfield encouraged this process, working compatibly with special juries.<sup>64</sup>

Even though there was a legal right to a special jury on request, there was no legal right to a special jury of *merchants*.<sup>65</sup> Merchant juries were nevertheless used extensively with the consent of both parties, or at least by request of one side with no objection from the other. Separate lists of potential merchant jurors were undoubtedly kept, especially in the City of London, where the bulk of commercial litigation took place.<sup>66</sup> The lists may not have been long; according to *The Times*, May 30, 1794:

Many complaints have been made of the present practice of empannelling Special Juries to try causes in the Courts of Law at Westminster, for though the

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(reporting on sittings before Chief Justice Kenyon and a special jury of merchants, July 28, 1794).

<sup>63</sup> As I have discussed in prior writing, Lord Mansfield had a similar, though for him rare, encounter with special juries in dealing with the question of what was a reasonable time after receipt for merchants to deliver drafts to their banks for payment. See the discussion of *Medcalf v. Hall*, *Appleton v. Sweetapple*, and *Tindal v. Brown* in OLDHAM, TRIAL BY JURY, *supra* note 6, at 37–39; *see also id.* at 162–63. The question of whether action required to protect one’s right to property was taken within a reasonable time has vexed the courts for centuries. Sometimes the question of reasonableness of time has been considered purely a question of fact, *see, e.g., Law Report: Bischaft v. Agar*, TIMES (London) Oct. 4, 1797, at 4 (reporting sittings at Guildhall before Lord Kenyon and a special jury of merchants), sometimes a mixed question of law and fact, *see* Lord Mansfield’s opinion in *Tindal v. Brown*, (1786) 99 Eng. Rep. 1033 (K.B.) 1034; 1 Term. Rep. 167, 168–69, and sometimes a pure question of law, *see* Justice Buller’s opinion in the *Tindal* case, *id.* at 1034, 1 Term Rep. at 169. *See generally* Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867 (1966).

<sup>64</sup> 1 OLDHAM, M. MSS., *supra* note 59, at 93–97.

<sup>65</sup> *Id.* at 95.

<sup>66</sup> *See* OLDHAM, TRIAL BY JURY, *supra* note 6, at 154–55. According to Lord Ellenborough: “[T]he law does not absolutely require that the jurors shall be merchants, but the practice certainly has been within the City of London to take such only as came within that description.” *Rex v. Wooler*, (1817) 106 Eng. Rep. 71 (K.B.) 75; 1 Barn. & Ald. 193, 203.

metropolis is of such extent, yet the same faces are constantly to be seen on trials. This makes it necessary, that the books of the office where the Juries are struck, should be revised, and the Clerks of *Nisi Prius* examined on this business. If the latter shall have the power, on questioning the verdicts given by Jurymen, to prevent their being summoned in future, it requires correction.<sup>67</sup>

Complaints notwithstanding, clearly the merchants acted multiple parts throughout the late eighteenth and early nineteenth centuries in the common law courts in educating the judges about mercantile matters. Sometimes the merchants were special jurors, sometimes they were witnesses about customs of merchants or usages of trade, sometimes they were out-of-court advisers, and sometimes they were arbitrators.<sup>68</sup>

Introducing evidence of the customs of merchants was not always a simple matter, as is shown by the case of *Maclish v. Ekins*,<sup>69</sup> tried before a King's Bench jury in 1752 and argued to the full court in Hilary term 1753. Maclish was the Scottish owner of a ship that had been let to the Commissioners of the Navy. He relied on his London agent, John Todd, giving Todd a letter of attorney that authorized him to transact business with the Commissioners. Todd obtained a £1200 bill from the Commissioners, which Todd then pawned and later authorized to be sold at fair market value to a third party, who in turn sold it to Ekins, the defendant, also at market value. Four years later, Maclish brought a trover action against Ekins to recover the Navy bill. A special verdict was rendered, subject to a question referred to the Court of King's Bench, "whether Todd had an authority either to pawn or sell the Navy bill."<sup>70</sup> The court (Lee, Chief Justice) applied the maxim *caveat emptor* and held for the plaintiff. The defendant then brought an action in the Court of Chancery requesting an

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<sup>67</sup> *Law Report*: Curteen v. Gill, TIMES (London), May 30, 1794, at 3; see also OLDHAM, TRIAL BY JURY, *supra* note 6, at 166 (quoting the editorial from THE CRAFTSMAN in 1771). It was even possible for parties to secure some number of known, preferred men on special juries. Among Sir John Baker's private collection of manuscripts is correspondence between Creswell Pigot, an attorney of Market Drayton, Salop, and his London agents, Messrs Benbow & Alban, attorneys of Lincoln's Inn. In a letter to Pigot of July 22, 1819 concerning a pending lawsuit, *Sutton v. Ridgeway*, Messrs Benbow and Alban wrote that, "[w]e have not yet received another appointment to strike a special jury and suppose therefore the sheriff has not yet sent up the freeholders' book." This was followed by another letter on August 2 stating that, "we have reduced the special jury and have got our old acquaintances Aaron Moody and Mr. Hanning," adding that Hanning had previously told Mr. Alban of his favorable views on the key issue in the pending case. JHB Ms. 924.3(vii) (cited and quoted with permission).

<sup>68</sup> See 1 OLDHAM, M. MSS., *supra* note 59, at 94 (discussing the multiple roles of Thomas Gorman, an expert on insurance).

<sup>69</sup> (1753) 96 Eng. Rep. 807 (K.B.); Sayer 73.

<sup>70</sup> *Id.*

injunction against enforcement of the King's Bench judgment.<sup>71</sup> Lord Chancellor Hardwicke granted the injunction.<sup>72</sup> He thought the case of "great consequence . . . transacting money in the public funds."<sup>73</sup> According to a manuscript report of the case, Hardwicke explained that "[a]s to the usage, a difference was taken at law between admitting evidence of the custom of merchants in transactions of this nature" and admitting such evidence "in respect of a legal instrument."<sup>74</sup> Hardwicke surmised, "The court of B.R. [King's Bench] might be of opinion that it [the letter of attorney] was a legal instrument," but he pointed out that policies of insurance were legal instruments, and "unless evidence be admitted on policies of insurance, they would be unintelligible."<sup>75</sup>

Lord Hardwicke said that "evidence of usage & custom as to these transactions ought to be admitted & is very material,"<sup>76</sup> and according to Ambler's report, Hardwicke observed, "Perhaps the Judges of the Court of *King's Bench* thought the construction ought to be on the letter of attorney itself without such evidence. In this Court it is otherwise."<sup>77</sup> In support of the injunction, Hardwicke explained that, "[f]our witnesses who are conversant in buying & selling navy bills swear they should not have scrupled to have purchased under this letter of attorney."<sup>78</sup>

During Lord Mansfield's years as Chief Justice of King's Bench, the question of whether evidence could be given to the jury on the custom of merchants arose in a variety of commercial contexts. Such evidence was not allowed if the custom either contradicted or corroborated an established rule of law (in the latter case because there would be no question of fact for the jury to

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<sup>71</sup> *Ekins v. Maclish*, (1753) 27 Eng. Rep. 125 (Ch.); Ambler 184.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Thomas Ley: Cases in Chancery, 1750–1763, Misc. Ms. 196, fol. 8, Inner Temple Library, London.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Ekins*, 27 Eng. Rep. at 126, Ambler at 187.

<sup>78</sup> Thomas Ley, *supra* note 74; see also *Kruger v. Wilcox*, (1755) 27 Eng. Rep. 168 (Ch.) 168; Ambler 252, 253 (involving the question whether a factor could retain goods consigned to him by his principal, against the balance owing the factor on his account. Four merchants were examined by deposition, and after argument at the bar, Lord Hardwicke adjourned the cause so that "the four merchants . . . might attend in court, in order to be consulted by him upon the point."). They attended on the appointed day, and Hardwicke "asked them several questions, upon the custom and usage of merchants relating to the matter in doubt," after which "his Lordship gave his opinion with great clearness," incorporating the information that had been supplied by the merchants. *Id.* at 168, Ambler at 254–55.

decide).<sup>79</sup> But if the question in dispute had not been clearly established as a matter of law in prior cases, the testimony would be permissible.<sup>80</sup>

When acting as special jurors, the merchants called upon their own experience and knowledge in reaching their verdicts. As Lord Mansfield famously remarked in *Lewis v. Rucker*,<sup>81</sup>

The special jury, (amongst whom there are many knowing and considerable merchants) . . . understood the question very well, and knew more of the subject of it than any body else present; and formed their judgment from their own notions and experience without much assistance from any thing that passed.<sup>82</sup>

Of course the fact that a special jury of merchants had been empaneled did not mean that testimonial evidence on the custom of merchants as applicable to a given case was unnecessary. It would not have been feasible to ensure that the expertise of the merchant jurors would match the issue being litigated,<sup>83</sup> though, as apparently was true in *Lewis v. Rucker*, this could happen.

Another example is the case of *Carvick v. Vickery*,<sup>84</sup> which, according to Lord Mansfield, involved a general question of great importance, “whether an undertaking, by a bill of exchange, to pay *A. and B.* is an undertaking to pay *A. or B.*”<sup>85</sup> Mansfield nonsuited the plaintiff at the trial because only one of the payees had endorsed the bill. After argument, the full court granted a new trial, which came on in March 1783 before Lord Mansfield and a special jury. Counsel for the defendant offered to prove “that, by the universal usage and understanding of all the bankers and merchants in London, the indorsement was bad, because not signed by both the payees.”<sup>86</sup> Counsel for the plaintiff objected, because “the point was a question of law, and had been decided by the Court.” Lord Mansfield overruled the objection since he did not think the question had

<sup>79</sup> See, e.g., *Edie v. E. India Co.*, (1761) 97 Eng. Rep. 797 (K.B.); 2 Burr. 1216; *Grant v. Vaughan*, (1764) 97 Eng. Rep. 957 (K.B.); 3 Burr. 1516.

<sup>80</sup> For a cogent discussion of cases on point, see 2 W.D. EVANS, A GENERAL VIEW OF THE DECISIONS OF LORD MANSFIELD IN CIVIL CAUSES, 232–43, in particular n.(m) (1803).

<sup>81</sup> (1761) 97 Eng. Rep. 769 (K.B.); 2 Burr. 1167.

<sup>82</sup> *Id.* at 770, 2 Burr. at 1168.

<sup>83</sup> See, e.g., *Law Report: Bolland v. Barret*, TIMES (London), Mar. 2, 1793, at 3 (involving the sale of India cottons. Despite the presence of a special jury of merchants, “[s]everal witnesses were called to prove, that by the custom of the trade the phrase *with all faults* only applied to accidental holes, rents, and discolourations, but that the term did not extend to rotten; so that . . . *rottenness* was not a fault.”).

<sup>84</sup> (1783) 99 Eng. Rep. 414 (K.B.); 2 Doug. 654.

<sup>85</sup> *Id.* at 415, 2 Doug. at 655 (emphasis added).

<sup>86</sup> *Id.* at 414, 2 Doug. at 654.

been decided so as to preclude the evidence. Counsel for the defendant “then called Mr. Gosling, an eminent banker, to prove the usage; but the jury, *unâ voce*, declared that they knew it perfectly to be as he [counsel] had stated it; and, without hearing the witness, found a verdict for the defendant.”<sup>87</sup>

The judges recognized that in business disputes the merchant jurors brought to the courtroom valuable expertise. Indeed, at times, the judges confessed their own limitations. A good example across the years directly applicable to the Seventh Amendment historical test is the trial conduct of Lord Mansfield’s successor, Lloyd Kenyon, Chief Justice of the Court of King’s Bench from 1788 to 1802. Most of the time Kenyon was outspokenly self-confident in presiding over jury trials,<sup>88</sup> but by his own admission, he was often very much at sea in marine insurance cases and on questions of navigation.

Marine insurance policies invariably used the standard printed form that had been in place with Lloyd’s of London since the late seventeenth century. This was a curious one-page form with an astonishing lack of clarity. Judges and practitioners regularly complained about it, but to little effect. According to the official historians of Lloyd’s:

Short as it is, this form contains a good deal of apparent tautology; blanks that no one ever dreams of filling up; clauses, superfluous to most insurances, that no one ever troubles to strike out. It leaves many of the contingencies of

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<sup>87</sup> *Id.* There were, nevertheless, some limits on the behavior of the merchant jurors. In the insurance case of *Leftkin v. Hofthman*, counsel Erskine was examining his witnesses on behalf of the defendant, when “Mr. Dunnage, senior, one of the Gentlemen of the Jury, got up and said, *this was as legal a Policy of Insurance as ever was under written.*” *Law Report: Leftkin v. Hofthman*, *TIMES* (London), July 19, 1797, at 3. Lord Kenyon interposed, “It is a great misfortune when any Gentleman of the Jury makes up his mind on a cause before it is finished,” noting that it was not the first time he had made such an observation. Erskine added: “And on the same Gentleman.” Kenyon then lectured the jury of merchants about their proper role, after which Mr. Dunnage apologized. *Id.*

<sup>88</sup> See e.g., *Law Report: Johnstone v. Sheddon*, *TIMES* (London), Oct. 16, 1800, at 3. The issue in this insurance case was whether to use the contract price or the market price for damaged goods, and there was heavy reliance on Lord Mansfield’s decision in *Lewis v. Rucker*. The plaintiff’s only witness was a Mr. Oliphant who “had attended very frequently on Special Juries,” and “had been in the constant habit of settling average losses.” Counsel for the defendant, Vicary Gibbs, observed that on the facts before the court, calculating the loss “was rather an intricate question,” but Lord Kenyon said “he could find no intricacy in it”—“what Mr. Oliphant had said was as clear as the sun.” It may have been as clear as the sun to Lord Kenyon, but it was not so clear to his brother judges. A motion for new trial was argued in Easter term 1801, but the judgment of the court was not issued until Trinity term 1802. Kenyon died in April 1802 and was succeeded by Edward Law, Lord Ellenborough, who recused himself from the case. The court’s opinion was delivered by Justice Lawrence, ordering a new trial after concluding that Mr. Oliphant’s calculation was wrong. *Johnson v. Sheddon*, (1802) 102 Eng. Rep. 492 (K.B.); 2 East 581.



modern commerce wholly unprovided for; yet purports to give assurance against risks that are now uninsurable, or the subject of special contracts. These defects and omissions are made good by additional clauses written, stamped, or gummed on the policy, which explain, amplify, and frequently contradict the terms of the policy itself. These additional clauses are often printed and gummed on in batches, including many that are entirely irrelevant to the particular transaction in question.<sup>89</sup>

Historians Wright and Fayle explained that if the standard language of the Lloyd's policy had not been retained, "then the leading cases decided on the old form would cease to be binding precedents, and the moment a dispute arose, the whole business of litigation would begin again." Therefore, "[t]he body of the policy has long been regarded as sacrosanct."<sup>90</sup>

In a case that came before the House of Lords in 1754, *Fitz-Gerald v. Pole*,<sup>91</sup> William Murray (who two years later would become Lord Mansfield) gave some background of the Lloyd's policy in argument for the plaintiff.<sup>92</sup> He explained as follows:

A very inaccurate form of this contract [the Lloyd's policy] was anciently used among merchants, and drawn by themselves. It was brought into England by persons who came from abroad, and settled in Lombard-street; and the terms of it, though very imperfectly penned, having acquired a sense from the usage of merchants, the form is followed to this day, and every policy refers to those made in Lombard-street. Hence, contrary to the general rule, parol evidence is admitted to explain this contract, though in writing; and the words are controuled, or liberally supplied, by the intent of the agreement, the usage of merchants, and, above all, by judicial determinations, which are the strongest evidence of the received law of merchants.<sup>93</sup>

The incoherence of the standard Lloyd's policy required the courts to rely upon the merchants to work out the meaning of particular cases. As quoted above, Lord Chancellor Hardwicke remarked in a 1753 case that, "unless

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<sup>89</sup> CHARLES WRIGHT AND C. ERNEST FAYLE, A HISTORY OF LLOYD'S: FROM THE FOUNDING OF LLOYDS COFFEE HOUSE TO THE PRESENT DAY 126 (1928). See generally James Oldham, *Insurance Litigation Involving the Zong and Other British Slave Ships, 1780–1807*, 28 J. OF LEG. HIST. 299, 300–03 (2007).

<sup>90</sup> WRIGHT AND FAYLE, *supra* note 89, at 131.

<sup>91</sup> (1754) 2 Eng. Rep. 297 (H.L.); 4 Bro. P.C. 439.

<sup>92</sup> *Id.* at 301, 4 Bro. P.C. at 444. Murray and Hume Campbell represented the plaintiff, an underwriter of an insurance policy on the ship *Goodfellow*. Brown's report of the case does not specify whether Murray or Campbell was speaking, but given the content of the argument, there is no doubt that it was Murray, who was at the time Solicitor General and would have been lead counsel.

<sup>93</sup> *Id.*

evidence be admitted on policies of insurance, they would be unintelligible.”<sup>94</sup> Over the next half-century, things did not improve. In a 1779 insurance action, *Simond v. Boydell*,<sup>95</sup> Lord Mansfield commented on the “antient form of a policy of insurance, which is still retained,” calling it “in itself, very inaccurate,” and adding, “It is amazing when additional clauses are introduced, that the merchants do not take some advice in framing them, or bestow more consideration upon them themselves. I do not recollect an addition made which has not created doubts on the construction of it.”<sup>96</sup> And in *Rucker v. Allnutt*,<sup>97</sup> Lord Ellenborough began his opinion with the following gloomy description of the Lloyd’s policy:

A painful and anxious duty is cast upon the Court to construe an instrument, contradictory and redundant in some of its expressions, and penurious in others of them; the obscurity of which arises partly from the imperfection of the language of those who execute it, and partly from the extraordinary and novel risks meant to be covered by it.<sup>98</sup>

In the 1791 case of *Brough v. Whitmore*,<sup>99</sup> the insurance policy on an East India and China ship covered “the tackle, ordnance, ammunition, artillery, and furniture of the ship.”<sup>100</sup> The stores and provisions for the ship had accidentally burned up while in a warehouse during ship repairs, and the issue was whether the provisions, which were intended for the use of the ship’s crew, were covered under the policy. At the trial before Lord Kenyon, a member of the special jury said “that it had been determined in Lord Mansfield’s time that they [the provisions] were included under the word ‘furniture,’” and that the merchants in the city had since acquiesced in that view. After argument before the full court on a motion for new trial, Lord Kenyon reflected:

On the trial of this cause I had nothing to guide my judgment on the construction of this instrument but the words of the policy; and when it was stated that ‘provisions’ were included in the word ‘furniture,’ I confess I was

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<sup>94</sup> Thomas Ley, *supra* note 74; *see also* Baker v. Paine, (1750) 27 Eng. Rep. 1140 (Ch.) 1141–42; 1 Ves. Sen. 456, 459 (Lord Chancellor Hardwicke: “On mercantile contracts relating to insurances, &c., courts of law examine and hear witnesses, of what is the usage and understanding of merchants conversant therein: for they have a stile peculiar to themselves, which is short, yet is understood by them; and must be the rule of construction.”).

<sup>95</sup> (1779) 99 Eng. Rep. 175 (K.B.); 1 Doug. 268.

<sup>96</sup> *Id.* at 177, 1 Doug. at 270–71.

<sup>97</sup> (1812) 104 Eng. Rep. 849 (K.B.); 15 East 278.

<sup>98</sup> *Id.* at 851, 15 East at 283.

<sup>99</sup> (1791) 100 Eng. Rep. 976 (K.B.); 4 T.R. 206.

<sup>100</sup> *Id.*

somewhat at a loss to know to what extent the underwriters were liable on words so indefinite as these which are used.<sup>101</sup>

He mused that the rule of law ought to be given by the court and not by merchants, “though, when a question arises on the construction of the words of an instrument, which are in themselves ambiguous, it is a matter fairly within the province of those who alone act upon such instruments to declare the meaning of them,” and it was only by “the uniform practice of merchants and underwriters” that the policies had been rendered “intelligible.”<sup>102</sup> The court upheld the special jury’s finding that the provisions were covered by the word “furniture.” Justice Buller opened his concurring opinion by observing that “a policy of assurance has at all times been considered in Courts of Law as an absurd and incoherent instrument: but it is founded on usage, and must be governed and construed by usage.”<sup>103</sup>

One of the standard provisions in the printed Lloyd’s policy stated that specified perishable commodities were warranted free from various percentages of loss unless “the Ship be stranded.”<sup>104</sup> What exactly constituted a “stranding” became the subject of litigation before Lord Kenyon and multiple special juries.<sup>105</sup> The case of *Burnett v. Kensington*<sup>106</sup> occupied four jury trials on the question.<sup>107</sup> The second trial, as reported in *The Times*,<sup>108</sup> sharply illustrates the unreality of continuing to apply the Seventh Amendment historical test to cases that would have been decided in England by merchant juries—juries that are no longer lawful in federal courts in the United States. The second *Burnett* trial came before Lord Kenyon and a special jury of merchants. In addressing the jury, Kenyon said that “there was one point which he would not reserve for the consideration of the Court, but for the meaning of which *he would put himself upon the country*; and, therefore, upon the great question in this cause, he would request the assistance of the Jury, to tell him what was meant by the word STRANDING.”<sup>109</sup>

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<sup>101</sup> *Id.* at 977, 4 T.R. at 208.

<sup>102</sup> *Id.* at 977, 4 T.R. at 208–09.

<sup>103</sup> *Id.*

<sup>104</sup> See WRIGHT AND FAYLE, *supra* note 89, at 148 (illustration reproducing a 1794 policy on slave cargo, see the “N.B.” at the bottom).

<sup>105</sup> See, e.g., *Law Report: Baurin v. Elmslie*, TIMES (London), July 15, 1790, at 3 (described in *Burnett v. Kensington*, (1797) 101 Eng. Rep. 937 (K.B.) 939; 7 T.R. 210, 214 as *Bowring v. Elmslie*).

<sup>106</sup> *Burnett v. Kensington*, (1797) 101 Eng. Rep. 937 (K.B.); 7 T.R. 210.

<sup>107</sup> *Id.* at 938, 7 T.R. at 213 (reporting the argument on the case reserved after the fourth trial).

<sup>108</sup> *Law Report: Burnett v. Kensington*, TIMES (London), Mar. 28, 1796, at 3.

<sup>109</sup> *Id.* (emphasis added).

To “put oneself upon the country” was the standard expression for requesting a jury trial. Kenyon, however, certainly would not have used this expression if a common jury had been empaneled—what he sought was the collective opinions of the *merchants* in the jury box. Later, in the decision following the fourth trial in the *Burnett* case, Lord Kenyon mentioned the argument that had been advanced by counsel after the first trial, “that what was a stranding was a question of law,” and said “he had left it to the jury, not as a matter of law, but as to what was the meaning among merchants of a mercantile word in a mercantile instrument.”<sup>110</sup>

Lord Kenyon relied on the merchant jurors both for his own guidance and for the guidance of the commercial world at large. In the 1794 insurance case of *Cambden v. Ewer*,<sup>111</sup> Kenyon said, “[i]n great commercial cases . . . he always formed his opinion with considerable diffidence; but, if there was any mistake in it, he was sure it would be corrected, when submitted to a jury of merchants of the city of London.”<sup>112</sup> In *Thwaites v. Angerstein*,<sup>113</sup> Lord Kenyon

said he professed himself totally ignorant of navigation, except in so far as he had learned it from his apprenticeship in his judicial office. He had received a great deal of information from the different classes of merchants by whom he had had the honour of being assisted in the administration of justice.<sup>114</sup>

In addition to merchant jurors, as noted earlier, Lord Kenyon also got help from assessors. In *Addison v. Overend*,<sup>115</sup> a negligence case involving a ship collision, Lord Kenyon lamented that the case had not been “tried in the Court of Admiralty, where such cases used to be tried,” then complained that he “could hardly conceive a more disagreeable situation than that in which he was then placed, where, for the space of three hours, he had been obliged to write down so many unintelligible terms and phrases.”<sup>116</sup> The difficulty was solved, however, because “[o]ne of the Gentlemen of the Trinity House sat by his Lordship during the trial of this cause; and his Lordship said, that the great naval knowledge of that Gentleman amply supplied any defect of his.”<sup>117</sup>

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<sup>110</sup> *Burnett v. Kensington*, 101 Eng. Rep. at 938, 7 T.R. at 212.

<sup>111</sup> *Law Report: Cambden v. Ewer*, *TIMES* (London), June 19, 1794, at 3.

<sup>112</sup> *Id.*

<sup>113</sup> *Law Report: Thwaites v. Angerstein*, *TIMES* (London), Nov. 14, 1798, at 3.

<sup>114</sup> *Id.*

<sup>115</sup> *Law Report: Addison v. Overend*, *TIMES* (London), Dec. 25, 1795, at 4.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*; see also *Law Report: Casey v. Donald*, *TIMES* (London), Dec. 18, 1799, at 3 (another negligence case involving a ship collision, where Kenyon confessed that, “I am totally incapable of judging of questions of this kind,” but “I do not rely on my own opinion; for I have conversed with the two respectable Gentlemen who sit by me”); referring to two of

Finally, the case of *Case v. Grice*<sup>118</sup> was described in the report in *The Times* as “of immense importance to the Commercial World.”<sup>119</sup> This case brings into sharp relief the fact that the courts relied, not on the ordinary run of common jurors, but on the expertise of merchant jurors. The owners of the slave ship *Cyclops* sued the captain for mismanagement, claiming that he had caused the ship, with 432 slaves on board, to be captured by a French schooner off the coast of Jamaica. Reportedly, when the French schooner approached, the crew of twenty-four men prepared to resist, but the captain laughed at them, stating derisively, “Are you going to fight for a parcel of d—d rascally Underwriters. If you should lose a leg or an arm, would they replace it or maintain you?”<sup>120</sup> In his address to the jury of merchants, Lord Kenyon admonished,

that from the Verdict of a Jury in London, sitting in the Guildhall of the City, those who were entrusted with the interests of individuals and of the Public, were to learn how far they were obliged to exert their utmost endeavor; or how far they were to be sheltered when their utmost endeavours had not been exerted for their employers.<sup>121</sup>

Further,

The question, he said, was, whether the Jury would permit it to go forth out of that Court, that a Captain circumstanced like the present Defendant, was justified in surrendering his ship without firing a single gun. That was the question, and for any thing he knew, every Captain engaged in the private trade of the kingdom, as well as those who commanded our ships of war in various parts of the globe, would act upon the Verdict which the Jury should in this case give. That was the question to be answered by the Merchants of the City of London.<sup>122</sup>

#### IV. CONCLUSION: APPLES AND ORANGES

For complex civil cases, the historical test for the scope of the Seventh Amendment jury trial guarantee has become an exercise in comparing apples to oranges. We are told to compare the current civil case in which a jury has been requested to the litigation in the common law courts of England in 1791 to see

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the Elder Brethren of the Trinity-House, who were assessors to his Lordship, to give him any information with respect to the navigation); OLDHAM, M. MSS., *supra* note 59, at 395; *supra* note 59 and accompanying text.

<sup>118</sup> *Law Report*: *Case v. Grice*, TIMES (London), Dec. 16, 1796, at 2.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

whether a jury would have been empaneled then in a comparable case.

The first step is to see whether there were any comparable common law cases in England in 1791. As we have seen, some of the cases that were then considered complex—accounting cases, for example—were decided in Chancery, never reaching the common law courts. Others were resolved by arbitration. Some common law cases, however, could fairly be characterized as complex, such as those precipitated by bankruptcies of major financial houses. Would such cases have been tried by a jury? A few of these cases, as has been shown, were decided on demurrer to the evidence, but otherwise the answer would be yes.

This, however, is an unsatisfactory stopping place. Another question should be asked: What type of jury would have been empaneled? As the discussion above has shown, these cases almost certainly would have been tried by special juries, and by the late eighteenth century, the special juries would have been filled mostly or entirely by merchants.

If the function of the Seventh Amendment historical test is only to determine whether the plaintiff in the given case would have had a right to a jury—*any* jury—in a comparable case in England in 1791, then whether the jury would have been common or special presumably would not matter. But if “the right to trial by jury” that was preserved by the Seventh Amendment meant the right to trial by jury as practiced in England in 1791, then the right to have a special jury should be taken into account.

Just as trial by jury existed in the United States in 1791 in federal and state courts, so also did the right to a special jury.<sup>123</sup> Because of the emergence in the twentieth century of the reasonable cross-section requirement, that right is now gone, and the historical test has to that extent become anachronistic. Some might say this is akin to the changes that brought women and minorities into the jury pools. Obviously no one could insist that under the historical test, he or she would be entitled to an all-male jury, since the Seventh Amendment cannot be interpreted and applied in a manner that would violate other parts of the Constitution. The Seventh Amendment, however, is a protection for the parties to a lawsuit, while the reasonable cross-section requirement protects a completely different interest—the right of all citizens to have the opportunity to serve on juries.

Carrying these thoughts forward to the extreme, one could argue that the Seventh Amendment protects the right of a litigant *not* to have a jury in a complex civil case, since the thing most desired in such a case in 1791 would have been expertise, and that expertise would have come from Masters in

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<sup>123</sup> For a special jury case decided by the United States Supreme Court in 1794, see *Georgia v. Brailsford*, 3 U.S. 1 (1794). See generally OLDHAM, TRIAL BY JURY, *supra* note 6, at 174–212.

Chancery, arbitrators, special (merchant) jurors, assessors, or the judges themselves. Yet in the late eighteenth and early nineteenth centuries, English common law judges said over and over again that the merchant jurors knew more about the matters in litigation in commercial cases than the judges did. Absent special jurors, and arbitration aside, comparable expertise in the United States today would reside in the judges and in expert witnesses. It would be unlikely to be found in a jury chosen from a jury pool shaped by the reasonable cross-section requirement.

This reasoning, however, goes farther than is necessary in assessing the validity of a complexity exception to the Seventh Amendment. Such an exception need not be thought of as *precluding* trial by jury; the trial judge should have discretion to decide whether the case could be sensibly managed by a (common) jury.<sup>124</sup>

In the end, the debate returns to the fundamental question: *What* right to trial by jury in suits at common law was preserved by the Seventh Amendment? If a complex civil case in 1791 in England would either not have gone to a jury at all or would have gone to a form of jury that is today unlawful (the jury of experts, the special jury of merchants), it follows that a complexity exception to the Seventh Amendment should be constitutionally unobjectionable.

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<sup>124</sup>Note that in the *Japanese Electronic Products* case, the Third Circuit, though not wishing “to pioneer” in the use of history brought out in the argument about the Seventh Amendment, decided that the due process clause would have been violated if the case before the court had been allowed to go to a jury. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* (*In re Japanese Elec. Prod. Litig.*), 631 F.2d 1069, 1071 (3d Cir. 1980); *see also* OLDHAM, TRIAL BY JURY, *supra* note 6, at 17–19.

