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SHOULD THE GRAND JURY SYSTEM BE ABOLISHED?*

The traditions of the common law, like the traditions of creed, resent change and innovation.

A system for the ascertainment of the commission of crime and the detection of the criminal, begun several centuries ago, and afterward evolved into an instrument of reasonable usefulness and protection, forcefully appeals to the prejudices of conservatism. But it is a maxim of the law, rarely admitting an exception, that when the reason for the law ceases so does the law. Has not the reason for the law ceased in America?

In order to reach a just and fair conclusion it is necessary to inquire, at least briefly, into the origin of the inquisitorial process, and the conditions surrounding its adoption. There is some reason to support the contention sometimes asserted, that the institution existed among the Saxons. (Crabb. Eng. Laws 35.) However, not until the reign of Henry II does the statute law provide for a jury for the investigation of supposed crimes. (Statute of Clarendon, 10 Hen. II, A. D. 1164.)

It was then provided "if such men were suspected whom none wished or dared to accuse, the sheriff being thereto required by the bishop, should swear twelve men of the neighborhood or village to declare the truth respecting such supposed crime," the jurors being summoned as witnesses or accusers, rather than as judges. It is generally conceded that the grand jury system was either created or reorganized by this statute. (Spence Eq. Jur., 63.)

Adverting to the relation of the old Frankish inquest to the initiation of criminal proceedings by indictment, a later authority refers to the accusing jury of Henry II thus: "The ancestors of our grand jurors are from the first neither accusers nor exactly witnesses; they are to give voice to the common repute." (2 Poll. & Maitl., 639.)

In the very beginning it is apparent that the system emanated from fear of royal influence and was designed to stand as a barrier,

* This paper was delivered before the New York State Bar Association on January 16, 1906.

protecting the accused from the baseless and malicious charges of the accuser. Criminal proceedings were then merely private affairs.

Judges and magistrates were royal favorites. Tenure of office rested entirely with the pleasure of the Crown. The rights of person were loosely regarded and more than ordinary courage was required to bring accusation against those who enjoyed royal protection. It had become practically impossible to secure a criminal's punishment unless the criminal happened to be of the class whose welfare and existence offered no special concern to those in power.

There was, indeed, a necessity for the existence of some tribunal where the common people might be heard, without fear of punishment for telling the truth. But even then the protection sought by the people seems to have been very imperfect and incomplete. It was during the reign of Henry VIII that the grand jury system was boastfully proclaimed to be the guardian of "the people's liberties" and "the bulwark of freedom," and yet 72,000 persons suffered death by hanging during this reign, in most cases for trivial offenses. Contemporaneous with the birth of the grand jury, a subject of Great Britain might bring his wife into the public market place, with a halter around her neck, to offer her for sale, and the husband might chastise the wife for the discipline of the whole family.

But there exists a vast difference between a theoretical relation of the grand jury to the ignorant and down trodden English subjects over three centuries ago and its relation to the free and enlightened citizenship of the United States of America in the twentieth century. The relief sought by the yeomen was in a popular system in which they should be both heard and represented as against every other judicial tribunal dominated by the Crown. Every branch of our government is of the people. We require no shield to protect the individual from the State's aggressions, and witnesses to the truth need no longer feel the displeasure of constituted authority. To maintain that the process of inquisition is of great service at the present time is to concede that under our republican form of government the liberties of the individual are subject to the same baneful influences as existed under a despotism in the dark ages.

What, then, are the specific charges against the grand jury system?

At the beginning of the eighteenth century some of the very ablest minds in England began to appreciate the grievous iniquities

of the inquisitorial process, and Jeremy Bentham, as early as 1825, speaking of the incongruities of the English Penal Procedure, marshalled the following specifications of impeachment: "The operations before this intermediate tribunal may be set down as purely mischievous. They once had an object, but that object has been done away. The object was to preserve an innocent man from the operation incidental to prosecution, and innocent, he might well be pronounced if even upon the face of the evidence produced against him by the adversary, delinquency did not appear probable. The design was laudable, and to this design the procedure, whatsoever might be the inconveniences attached to it in other respects, was naturally enough adapted.

1. Evidence was received only on one side, on the side of the prosecutor, on the side of the defendant not, for to call upon him for his evidence would be to subject him to the very vexation from which it was intended he should be prevented.

2. The evidence was received and collected in secret; that is to say, in so far as secrecy was compatible with the presence and participation of a number of persons from twelve to twenty-three. In the same intention these jurymen were sworn to secrecy. Why? Because at this time the defendant knew nothing of the matter. The bill being found by this jury thereupon there went an order of arrestation. Had it not been for the oath, a friendly jurymen might give intimation and the defendant make his escape. In the first place, the institution is useless; it has been so about these twenty-five years. The defendant has already been subjected to the vexation from which he was thus to have been preserved. From the middle of the sixteenth century examinations, as above described, have taken place (*i. e.*, the examinations before a Justice).

In the next place, it is mischievous; it is so in no small degree. One of the great boasts, as well as one of the greatest merits, of English procedure, is its publicity. This security, it has been seen, is sacrificed; sacrificed and so continues to be after the object for which the sacrifice was made is gone. The consequence is an unlimited domination to popular prejudice; to party, if not personal interest and affection; to false humanity; to caprice under all its inscrutable modifications." (Rationale of Judicial Evidence, Book 3, chap. 15.)

After a lapse of nearly a century of time the evils enumerated and inveighed against by Bentham, not only exist with us, but have grown to more harmful proportions.

The first, and probably the paramount objection lies in the

fact that a free man may be held to answer for a felony, as a suspect, in secret proceedings. He may never know that he is under suspicion until apprehended as a criminal after indictment. The evidence on which the indictment is based is presented to the jurors without notice to the party against whom the accusation is made. The *ex parte* statements of witnesses, who may be influenced by malice and revenge, are sufficient to brand the most innocent citizen with the foulest crime. And the accused is unheard! He may not even appear before the tribunal to explain or to contradict the testimony offered against him, and the accusing witnesses are not subjected to cross-examination.

No man should be held to answer for a crime without a hearing and without an opportunity to meet his accusers face to face. In a civilized society a person charged with infraction of the law should at least be informed by whom the charge is made.

It is our peculiar distinction that in New York State we have maintained, in the very essence, the most vicious provisions of the grand jury system. Conforming generally to the rules of the common law, we have embodied in statute form the following direction:

"The grand jury ought to find an indictment when all the evidence before them, taken together, is such as in their judgment would, if unexplained and uncontradicted, warrant a conviction by the trial jury." (Code Crim. Proc., sec. 258.) In effect, therefore, the indictment is the opinion of at least twelve men that the accused is probably guilty. An indictment must be found if the evidence is such that if "unexplained" and "uncontradicted," a conviction would be justified. And the accused is prohibited from presenting any evidence whatever that might contribute to the very explanation and the contradiction which might lead the investigating body to a different conclusion.

It is certainly unjust that there should exist any sort of a presumption that the accused is guilty before trial. But this is practically the result of every indictment. At the threshold of trial the prisoner is confronted with the solemn edict of one jury of his peers that there is evidence sufficient to warrant his conviction. Instead of a presumption of innocence until proved guilty beyond a reasonable doubt, a legal tribunal has already delivered an opinion and created the presumption that the accused is a criminal.

Surprising as may be the declaration, it has been confirmed by experience that a very large proportion of trial jurors indulge the belief that the prisoner would not be arraigned under an indictment if he were entirely innocent. Upon the trial the accused

must meet, therefore, not only the people's evidence, but the subtle and dangerous influence carried with the indictment, found as a result of proceedings to which the accused could not be a party. It is true that some degree of suspicion will exist in every case, whether the accused is held under an indictment or by order of a committing magistrate. But experience has justified the conclusion that trial jurors are not nearly so likely to assume that some truth exists in the charge against the prisoner, when the latter is held by a magistrate, as where at least twelve men, constituting a prior jury, have believed the charge to have been well founded on the evidence. It is the judgment of those who have made special study of the existing procedure that trial jurors will be strongly influenced by an opinion rendered by their fellow-neighbors on a question of fact presented before them, while they will regard with indifference the findings of a magistrate whose judgment may be based upon the technicalities of the law, as well as upon the facts. Furthermore, even if the opinion of a magistrate must necessarily create some suspicion as to the probable guilt of the offender, it must be remembered that the court's conclusion has been reached, not upon *ex parte* testimony alone, without cross-examination, but after the person charged has been given every opportunity to refute the accusations made against him.

A further serious objection is that the inquisition is frequently made the instrument of extortion. The experience of England and America has been the same in this respect. It is quite immaterial whether the suspected person be guilty or innocent. If innocent, his fears are worked upon. He dreads the public disgrace of the charge, however unfounded it may be. It means, at least, a blight to his own hopes and the humiliation of his family. A final vindication by a trial court may be an assured fact, still there must be the dreaded publicity, unless the prosecution can be stopped. Such a result may be effected with much less difficulty, because there has been no public hearing. No magistrate has listened to the evidence and the proceedings of the grand jury room are secret and sacred.

If the party be guilty, there is still a deeper motive for compromise. The innocent man may hope for an acquittal, but the guilty anticipates and fears conviction. All the influence of friends and of money is brought to bear in order to obstruct or to frustrate justice. Political power is too often used to the same end. And the reason all this is possible is because the inquisitorial proceedings are one-sided and secret and the accused and accuser may not meet. There no longer exists a single legitimate

reason why proceedings in any part of our judicial system should be secret, except in examinations or trials, where the testimony to be adduced is of such a nature that good morals and public policy are not best served by publicity. "Every movement should be towards publicity," said Bentham, "of the procedure before the trial jury, a characteristic and indispensable property is publicity; of the proceedings before the grand juries, a property still more characteristic is secrecy."

One of the earliest arguments in favor of secrecy in the inquisition was that the accused parties might not escape before legal apprehension. But this reason has long since disappeared. Time was when transportation and communication were so slow, difficult and incomplete that a criminal was afforded every facility for escape. With the telegraph and railroads and treaties of extradition with all civilized peoples there is very little possibility that the guilty may be secure in flight, although under any conditions he may delay capture.

The secrecy of the grand jury room is as unfair and un-American as its *ex parte* characteristic. Particularly at a time in our political development when the greatest publicity is demanded to insure the people's rights, it is important that every branch of our executive, administrative and judicial systems should be open to public observation and investigation.

Fatal as are these objections to procedure by indictment, the arraignment does not stop here. Other evils, if not, perhaps, so serious, still exceedingly vicious and harmful, contribute additional evidence in condemnation of the existing law.

It very frequently occurs that a grand jury fails to return an indictment, although the accused may be subjected to the greatest public criticism. Of course, a "true bill" should not be found, unless on sufficient legal evidence, but, nevertheless, this procedure places the alleged offender in a most cruel predicament. He has escaped the charge because the grand jury has intervened. Grave suspicion may still rest upon him, for the reason that it may never be known by what means or instrumentality the proof failed to satisfy the accusers. In its effect libel may be no less a libel because it is made under cover of the law. The man lives forever a suspect, without the privilege even of a fair explanation. Whenever it is believed that sufficient evidence exists to warrant an arrest for crime, the party against whom the charge is made should, at least, be accorded an opportunity for public vindication. Voicing the sentiments of all honorable men, Sir Nicholas Throckmorton, after an acquittal of high treason, declared: "It is better to be tried than live suspected."

Furthermore, whenever a crime is committed it is essential that the perpetrators of the crime be apprehended with the least possible delay. The grand jury system, instead of preventing, makes possible the felon's escape. In practice, it is quite usual that many weeks intervene between the time of the commission of the crime, and the convening of the grand jury. In nearly every instance where a preliminary hearing has not been held before a magistrate, the accused is granted sufficient opportunity to elude the process of the court.

While the common-law privilege of presentment, in the nature of information upon which an indictment may be framed, has never been sufficiently observed in this country to have established a general American practice, still there inheres to the system the right "to make a sort of general presentment of evil things to call public attention to them, yet not an instruction for any specific indictment. No one could be called to answer such a presentment." (Bish. Cr. Pro., 4th ed., sec. 137, subd. 2.)

Under protection of this arbitrary power, the acts of public officers and of public bodies may be criticised and condemned, and it matters not whether there be a reasonable excuse for such action or whether the motive is malice, revenge or partisan advantage. In this manner, the basest reflections may be cast upon the most innocent character, and the person who is held up to public censure and contempt is left practically without redress.

The exercise of this prerogative by the grand jury led the court, in the matter of Gardiner (31 Misc., 367), to declare: "While it may be observed that the court has tolerated rather than sanctioned such presentments, of things general, yet the grand jury should never, under cover of a presentment, present an individual in this manner, for if it have legal evidence of the commission of the crime, it should find indictment against him upon which he could be held to answer, and if it have no such evidence it might in fairness be silent." What, then, is there to be said in defense of a system to which statute law permits such irresponsible power and such arbitrary discretion?

The grand jury may not only find or decline to find an indictment upon the *ex parte* evidence presented, but it may go still further and of its own motion, with little knowledge, or no knowledge of existing facts and conditions, make such charges which, if true, should be made the basis of a criminal prosecution, to which the alleged offender should be given the privilege to answer.

It must also be taken into account that the expense of an intermediate tribunal amounts, in the aggregate, to a very large sum, to be met by taxation.

Admitting that all these imperfections exist, it is asked, if we do away with the present system, what procedure can be established more just, and better adapted to our requirements? They who would seek in this state a better method than proceedings by indictment are not beginners in an untried field. The undertaking here will not be the commencement of the assault. The sanctity of tradition and the veneration of ancient rights have not so blinded the people of our sister states that they have failed to observe and to remove certain legal obstructions that lie in the path of the administration of justice.

In nearly one fourth of the United States of America the common-law grand jury has either been entirely abrogated or so modified and restricted in its sphere as to more closely conform to present-day needs. In Indiana, Illinois, Iowa, Nebraska, Oregon, and Colorado, the state constitution gives the legislature authority to make laws dispensing with grand juries in any case. The legislature of Nebraska may provide for holding persons to answer for all criminal offenses on the information of a public prosecutor. Alabama and Michigan each permit other process in criminal cases.

Constitutional provisions permitting all criminal proceedings to be made by information, or dispensing with grand juries in certain cases further exist in the Federal government and in the following states: California Connecticut, Kansas, Louisiana, Montana, South Dakota, Utah, Vermont, Wisconsin and Wyoming.*

Referring to trial by jury, before the American Bar Association, in August, 1905, Mr. Justice Brown, of the United States Supreme Court, briefly alluded to the rapidly growing sentiment against the grand jury system and to the wisdom of the changes adopted in the several states. "The assumption of criminal proceedings by the State," says Mr. Justice Brown, "and the appointment of attorneys charged with the duty of prosecuting only those who were held for bail by any examining magistrate upon proof of probable cause, has been found in practice to afford ample protection to the accused. Indeed, as the accused may introduce evidence before the magistrate to disprove the existence of probable cause, he is even better protected than he is by a grand jury,

* See *Hurtado v. People*, 110 U. S. 516; *Kallock v. Sup. Ct.*, 56 Cal. 229; *In re Lowrie*, 8 Col. 499; *Romero v. State*, 60 Conn. 92; *State v. Bosswell*, 104 Ind. 451; *State v. Barnett*, 3 Kan. 250; *State v. Woods*, 31 La. An. 267; *State v. Brett*, 16 Mont. 360; *Miller v. State*, 29 Neb. 437; *State v. Ayers*, 85 So. Dak. 517; *Matter of Maxwell*, 19 Utah 495; *State v. Dyer*, 67 Vt. 690; *Rowan v. State*, 104 Ind. 541; *State v. Boulter*, 5 Wy. 236.

which listens only to evidence of his guilt, given in secret and with no opportunity of explanation."

For more than eighty years felonies have been prosecuted in the State of Connecticut by information, and in Michigan for more than fifty years. During a long service on the federal bench, Mr. Justice Brown was afforded every facility for observation of the new system, and he declares that in all his experience, he has yet to find a lawyer who advocated a return to the old process. And this is not strange, for the Michigan system is sensible, fair and equitable.

Under this procedure, before an indictment can be had, an open examination must be conducted where all the witnesses can be tested by counsel or confronted by the accused, and where all the proceedings are under the rules of law and where only legal evidence is admissible. The witnesses are likely to be truthful, as they sign depositions and their statements are at once exposed to full investigation. In the event of death, absence or insanity, the state may use their deposition.

A reasonable provision of the Michigan law permits the court, in its discretion, to summon a grand jury, where the inquisitorial character has been found efficient in the unearthing of frauds and the abatement of nuisances.

There can be no just objection to a system in this state which would permit the prosecution of all felonies by information and which would still allow the court, if public necessity seemed to require, to summon a grand jury for purposes of inquisition. It is quite generally admitted, even by those who do not favor abrogation of the grand jury system, that its chief efficiency now exists only in special instances, relating to matters of public concern. Permit the court, then, in its discretion, to determine when that need exists, and in all other cases let the preliminary proceedings be held before an examining magistrate alone. While it is maintained that results have uniformly and clearly demonstrated the great superiority of the method of prosecuting felonies without the intervention of a lay tribunal, still the retention of the inquisitorial process to be used in the discretion of the court, would serve to allay the fears of those who seem strongly inclined to believe that an examining magistrate would be less fearless and less independent in cases requiring the investigation of wrongs, arising from political corruption or malfeasance, than a body of laymen set apart. It is certainly manifest that the responsibilities of a magistrate will be greatly increased by the abrogation of the intermediate tribunal. In those states where prisoners are bound

over to the grand jury, it is the consensus of opinion, as expressed by the closest observers, that the magistrate feels a lesser degree of responsibility and is inclined to hold prisoners on less convincing evidence than is possible in those jurisdictions where proceedings by indictment follow the commitment. And, on the other hand, the grand jurors less appreciate the gravity of their undertaking, in cases which have already been passed upon by a magistrate. So that the magistrate is apt to be negligent, relying on the grand jury for a further investigation, and knowing that the onus of an indictment rests alone with that body, and the grand jurors, in turn, shift the burden and are less concerned because a judicial officer has already directed the accused to be held under the charge. Therefore, the interests of the people and the individual cannot be conserved by the existence of these two tribunals, side by side. But the magistrate, who is accountable directly to the people, with no intervention between himself and the trial court, is sure to feel the importance of his duties and the necessity that his judicial acts shall conform to the law and to the facts.

It has been successfully demonstrated, wherever the attempt has been made, that the prosecution of all crimes may safely be instituted before an examining court, and that the presentment and indictment of the grand jury are no longer necessary either to a prompt or to a certain and safe administration of justice.

Cessante ratione legis cessat et ipsa lex.

George Lawyer