CHAPTER LXXXIII.

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I. INTRODUCTORY.

§ 1258. Conflict of opinion as to power of grand juries to originate prosecutions. The value of grand juries is one of those questions which shift with the political tendencies of the age. When liberty is threatened by excess of authority, then a grand jury, irresponsible as it is, and springing (supposing it to be fairly constituted) from the body of the people, is an important safeguard of liberty. If, on the other hand, public order, and the settled institutions of the land, are in danger from momentary popular excitement, then a grand jury, irresponsible and secret, partaking, without check, of the popular impulse, may, through its inquisitorial powers, become an engine of great mischief to liberty as well as to order. In the time of James II, when Lord Somers's famous tract was written, a barrier was needed against oppressive state prosecutions, and this barrier grand juries presented. In our own times a restraint may be required upon the malice of private prosecutors and the violence of popular excitement; and it is to the adequacy of grand juries for that purpose that public attention has been

turned.[1] It is possible to conceive of a third even more perilous contingency: that grand juries, selected in times of high party excitement, may be so organized as to become the unscrupulous political tools of the party which happens to be in power, and may be used by this party to annoy or oppress its political antagonists. Rejecting, however, this hypothesis as one which a free people living under a constitutional government would not permanently tolerate, we may view the question in its relation to the conditions above first stated. Assuming that of all prosecutions instituted either by government or individuals the grand jury has an absolute veto at the outset, the fundamental question still remains, Have grand juries anything more than the power of veto, or, in other words, can they originate prosecutions, and if so, with what qualifications?

§ 1259. —— THREE VIEWS. On this point three views are advanced, which it will be out of the compass of this work to do more than state, with the authorities by which they are respectively supported, leaving the question for that local judicial arbitrament by which alone it can be settled. These views are:

II. POWER TO INSTITUTE PROSECUTIONS.

§ 1260. THEORY THAT SUCH POWER BELONGS TO GRAND JURY. That grand juries may on their own motion institute all prosecutions whatsoever is a view which was generally accepted at the institution of the federal government, and was in accordance with the English practice then obtaining.[1]

1 See London Law Times, Oct. 4, 1879.

1 Report of the English Commissioners of 1879, we have the following (pp. 32-33):

"We doubt whether the existence of the power to send up a bill before a grand jury without a preliminary inquiry before a magistrate; the extent of this power, and the facilities which it gives for abuse, are generally known. It is not improbable that many lawyers, and most persons

The right of a prosecutor to make complaint personally to a grand jury was practically recognized by Mr. Bradford, at the time attorney-general of the United States, in a letter to the secretary of state, dated Philadelphia, February 20, 1794.[2]

§ 1261. —— Judge Wilson's view. Such, also, appears to have been the view of the late Judge Wilson of the Supreme Court of the United States.[1]

§ 1262. —— Views of Judges Hopkinson and Addison. In the works of the first Judge Hopkinson, the right of the grand jury to call such additional witnesses as they desire, not in themselves part of the witnesses for the prosecution, is defended in a tract written with much spirit,

who are not lawyers, would be surprised to hear that theoretically there is nothing to prevent such a transaction as this: Any person might go before a grand jury without giving any notice of his intention to do so. He might there produce witnesses, who would be examined in secret, and of whose evidence no record would be kept, to swear, without a particle of foundation for the charge, that some named person had committed any atrocious crime. If the evidence appeared to raise a prima facie case, the grand jury, who can not adjourn their inquiries, who have not the accused person before them, who have no means of testing in any way the evidence produced, would probably find the bill. The prosecutor would be entitled to a certificate from the officer of the court that the indictment had been found. Upon this he would be entitled to get a warrant for the arrest of the person indicted, who, upon proof of his identity, must be committed to prison till the next assizes. The person so committed would not be entitled as of right to bail, if his alleged offense were felony. Even if he were bailed, he would have no means of discovering upon what evidence he was charged, and no other information as to his alleged offense than he could get from the warrant, as he would not be entitled by law to see the indictment or even to hear it read till he was called upon to plead. He would have no legal means of obtaining the least information as to the nature of the evidence to be given, or (except in cases of treason) even as to the names of the witnesses to be called against him; and he might thus be tried for his life without having the smallest chance of preparing for his defense, or the least information as to the character of the charge."

2 1 Opinions of Attorneys-General 22.

1 Wilson's Lectures on Law 361.

though in a style intended at the time more for popular than professional effect.[1] A similar latitude of inquiry is apparently advocated by Judge Addison. "The matters which, whether given in charge or of their own knowledge, are to be presented by the grand jury, are all offenses within the county. To grand juries is committed the preservation of the peace of the county, the care of bringing to light for examination, trial, and punishment, all violence, outrages, indecency, and terror; everything that may occasion danger, disturbance, or dismay to the citizens. Grand juries are watchmen stationed by the laws to survey the conduct of their fellow-citizens, and inquire where and by whom public authority has been violated, or our Constitution and laws infringed."[2] As the learned judge, however, in the same charge, intimates an opinion that a grand jury is not to be permitted to summon witnesses before it, except under the supervision of the court, it would seem that the inquisitorial powers which he describes are to be only exercised on subjects which are given in charge to the jurors by the court, or rest in their personal knowledge.

§ 1263. —— Other views. Perhaps, however, the broadest exposition is found in an opinion of the Supreme Court of Missouri, where it was held that a grand jury have a right to summon witnesses and start a prosecution for themselves; and that the court is bound to give them its aid for this purpose.[1]

The same view has been taken in the Circuit Court of the United States in the District of Columbia.[2]

A similar question was raised in 1851, in the Circuit

1 1 Hopkinson's Works 194.

2 Addison's Charges 47.

1 Ward v. State, 2 Mo. 120, 22 Am. Dec. 449; see State v. Corson, 12 Mo. 404; State v. Terry, 30 Mo. 368.

2 United States v. Tompkins, 2 Cr. 46, Fed. Cas. No. 16483; though see United States v. Lyles, 4 Cr. 469, Fed. Cas. No. 15,646.

As to informations, see United States v. Ronzone, 14 Blatch. 69, Fed. Cas. No. 16192.

Court of the United States for the Middle District of Tennessee. The grand jury, it would seem, without the agency of the district attorney, called witnesses before them whom they interrogated as to their knowledge concerning the then late Cuban expedition. The question was brought before the presiding judge (Catron, J., of the Supreme Court of the United States), who sustained the legality of the proceeding, and compelled the witnesses to answer.[3]

[3] "The grand jury," said Judge Catron, "is bound to present on the information of one of its members. He states to his fellow-jurors the facts that have come to his knowledge by seeing, or hearing them confessed by the guilty party. The juror makes his statement as a witness, under his oath taken as a grand juror. He does state, and is bound by his oath to state, the person who did the criminal act, and all the facts that are evidence tending to prove that a crime had been committed.

"The grand jury have the undoubted right to send for witnesses and have them sworn to give evidence generally, and to found presentments on the evidence of such witnesses; and the question here is, whether a witness thus introduced is legally bound to disclose whether a crime has been committed, and also who committed the crime. If a grand juror was a witness, he would be bound to give the information to his fellow-jurors voluntarily, as his oath requires him to do so. And so also the general oath taken in court by a witness, who comes before a grand jury, imposes upon him the obligation to answer such legal questions as are propounded by the jury, to the end of ascertaining crimes and offenses (and their perpetrators) that the jurors suppose to have been committed. If general inquiries could not be made by the grand jury, neither the offense nor the offender could be reached in many instances where common-law jurisdiction is exercised. In the federal courts such instances rarely occur; still they have happened in this circuit, in cases where gangs of counterfeiters were sought to be detected; but especially in cases where spirituous liquors had been introduced among the Indians residing west of the Missouri River. That drunkenness, riots, and occasionally murder, had been committed by Indians who were intoxicated was notorious; but who had introduced the intoxicating spirits into the Indian country was unknown. The fact of introduction was the crime punishable by act of Congress. In the Missouri District many such cases have arisen; there the grand jury is instructed, as of course, to ascertain who did the criminal act. The fact and the offender it is their duty to ascertain; and these they do ascertain constantly, by general inquiries of witnesses, whether they know that spirituous liquors have

§ 1264. THEORY THAT GRAND JURIES ARE LIMITED TO CASES OF NOTORIETY, OR IN THEIR OWN KNOWLEDGE, AND TO CASES GIVEN TO THEM BY COURT OR PROSECUTING OFFICERS.

A second view is that the grand jury may act upon and present such offenses as are of public notoriety, and within their own knowledge, such as nuisances, seditions, etc., or such as are given to them in charge by the court, or by the prosecuting attorney, but in no other cases without a previous examination of the accused before a magistrate. This is the view which may be now considered as accepted in the United States courts, and in most

been introduced into the Indian country; and, secondly, who introduced them. It is part of the oath of the grand jury to inquire of matters given them in charge by the court, and to present as criminal such acts as the court charges them to be crimes or offenses indictable by the laws of the United States. And in executing the charge it is lawful for the grand jury—and it is its duty—to search out the crime by questions to witnesses of a general character. The questions propounded by the jury in this instance, and presented to the court for our opinion, are in substance: 'Please to state what you may know of any person or persons in the city of Nashville, who have begun or have set on foot, or who have provided the means for a military expedition from hence against the island of Cuba. 2d. Or of any person who has subscribed any amount of money to fit out such an expedition. 3d. Or do you know of any person who has procured any one to enlist as a soldier in a military expedition to be carried on from hence against the island of Cuba? 4th. Or of any person asking subscriptions for, or enlisting as soldiers in, a military expedition to be carried on from hence against the island of Cuba?'

"As all these questions tend fairly and directly to establish some one of the offenses made indictable by the Act of 1818, and are pertinent to the charge delivered to the grand jury, they may be properly propounded to the witness under examination, and he is bound to answer any or all of them, unless the answer would tend to establish that the witness was himself guilty according to the act of Congress.

"This doctrine is believed to be in conformity to the former practice of the state Circuit Courts of Tennessee, and is assuredly so according to the practice in other states, as will be seen by the opinions of the Supreme Courts and circuit judges found in Whart. Crim. Law, 3d ed., ch. 6." See 1 Kerr's Whart. Crim. Law, §§ 175-192.

of the several states.[1] In Pennsylvania the annoyances and disorders attending the unlimited access of private prosecutors to the grand jury room have led a court of great respectability to hold it to be an indictable offense for a private citizen to address the grand jury unless when duly summoned.[2]

In accordance with this view, Judge King, in an able decision delivered in 1845, refused to permit the grand jury, on their own motion, to issue process to investigate into alleged misdemeanors in the officers of the board of health, a public institution established in Philadelphia for the preservation of public health and comfort.[3] This

1 Infra, §§ 1295, 1912.

2 Com. v. Crane, 3 P. L. J. 442; see State v. Wolvott, 21 Conn. 272; Ridgway's Case, 2 Ashm. (Pa.) 247.

Such interference is a contempt of court, see Harwell v. State, 78 Tenn. (10 Lea) 544; infra, § 1912.

For agents of the government to interfere is ground for quashing. See, infra, § 1325. And see, also, comments in Hartranft's App., 85 Pa. St. 433, 27 Am. Rep. 667.

3 Judge King's decision. "A warrant of arrest, founded on probable cause supported by oath or affirmation, is first issued against the accused by some magistrate having competent jurisdiction. On his arrest, he hears the 'nature and cause of the accusation against him,' listens to the testimony of the witnesses 'face to face,' has the right to cross-examine them, and may resort to the aid of counsel to assist him. It is not until the primary magistrate is satisfied by proof that there is probable cause that the accused has committed some crime known to the law, that he is further called to respond to the accusation. He is then either bailed or committed to answer before the appropriate judicial tribunal, to whom the initiatory proceedings are returned for further action. On this return, the law officer of the commonwealth prepares a formal written accusation, called an indictment, which, with the witnesses named in the proceeding as sustaining the accusation, are sent before a grand jury, composed of not less than twelve, nor more than twenty-three citizens acting under oath, only to make true presentments, who again examine the accuser and his witnesses, and not until at least twelve of this body pronounce the accusation to be well founded by returning the indictment a true bill, is the accused called upon to answer whether he is guilty or not guilty of the offense charged against him. No system can present more efficient guarantees against the oppressions of power or prejudice, or the machinations of falsehood and fraud. The moral and legal responsibiiities of a public oath, the

conclusion was, in 1870, emphatically sustained by the

liability to respond in damages for a malicious prosecution, are cautionary admonitions to the prosecutor at the outset. If the primary magistrate acts corruptly and oppressively, in furtherance of the prosecution, and against the truth and justice of the case, he may be degraded from his judgment seat. By the opportunity given to the accused of hearing and examining the prosecutor and his witnesses, he ascertains the time, place, and circumstances of the crime charged against him, and thus is enabled, if he is an innocent man, to prepare his defense,—a thing of the hardest practicability if a preliminary hearing is not afforded to him. For how is an accused effectively to prepare his defense unless he is informed, not merely what is charged against him, hut when, where, and how he is said to have violated the public law. It is not true that a bill of indictment found, without a preliminary hearing, furnishes him with this vital information. It practically neither describes the time, place, nor circumstances of the offense charged. Time is sufficiently described, if the day on which the crime is charged is any day before the finding of the bill, whether it is the true day of its commission or not. Place is sufficiently indicated, if stated to be within the proper county where the indictment is found; and circumstances are adequately detailed, when the offense is described according to certain technical formulæ. Hence the inestimable value of preliminary public investigations, by which the accused can be truly informed, before he comes to trial, what is the offense he is called upon to respond to. It is by this system that criminal proceedings are ordinarily originated. Were it otherwise, and a system introduced in its place, by which the first intimation to an accused of the tendency of a proceeding against him, involving life or liberty, should be given when arraigned for trial under an indictment, the keen sense of equal justice, and the innate detestation of official oppression which characterize the American people, would make it of brief existence. It is the fitness and propriety of the ordinary mode of criminal procedure, its equal justice to accuser and accused, that renders it of almost universal application in our own criminal courts, and makes it unwise to depart from it, except under special circumstances or pressing emergencies."

Three exceptions were laid down to the general rule thus described as follows:

"The first of these is where criminal courts, of their own motion, call the attention of grand juries to and direct the investigation of matters of general public import, which, from their nature and operation in the entire community, justify such intervention. The action of the courts on such occasions rather bears on things than persons, the object being the suppression of general and public evils, affecting, in their influence and operation, communities rather than individuals, and, therefore, more properly the subject of gen-

Supreme Court of the state, by whom it was held that a

eral and special complaint; such as great riots, that shake the social fabric, carrying terror and dismay among the citizens; general public nuisances, affecting the public health and comfort; multiplied and flagrant vices, tending to debauch and corrupt the public morals, and the like. In such cases the courts may properly, in aid of inquiries directed by them, summon, swear, and send before the grand jury such witnesses as they may deem necessary to a full investigation of the evils intimated, in order to enable the grand jury to present the offense and the offenders. But this course is never adopted in cases of ordinary crimes charged against individuals, because it would involve, to a certain extent, the expression of opinion by anticipation of facts subsequently to come before the courts for direct judgment, and because such cases present none of those urgent necessities which authorize a departure from the ordinary course of justice. In directing any of these investigations, the court act under their official responsibilities, and must answer for any step taken not justified by the proper exercise of a sound judicial discretion.

"Another instance of extraordinary proceeding is where the attorney general, ex officio, prefers an indictment before a grand jury without a previous binding over or commitment of the accused. That this can be lawfully done is undoubted. And there are occasions where such an exercise of official authority would be just and necessary; such as where the accused has fled the justice of the state, and an indictment found may be required previous to demanding him from a neighboring state, or where a less prompt mode of proceeding might lead to the escape of a public offender. In these, however, and in all other cases where this extraordinary authority is exercised by an attorney general, the citizen affected by it is not without his guarantees. Besides, the intelligence, integrity, and independence which always must be presumed to accompany high public trust, the accused, unjustly aggrieved by such a procedure, has the official responsibility of the officer to look to. If an attorney general should employ oppressively this high power, given to him only to be used when positive emergencies or the special nature of the case requires its exercise, he may be impeached and removed from office for such an abuse. The court, too, whose process and power are so misapplied, should certainly vindicate itself by protecting the citizen. In practice, however, the law officer of the commonwealth always exercises this power cautiously,—generally under the directions of the court,—and never unless convinced that the general public good demands it.

"The third and last of the extraordinary modes of criminal procedure known to our Penal Code is that which is originated by the presentment of a grand jury. A presentment, properly speaking, is the notice taken by a grand jury of any offense, from their own knowledge or observation, without

grand jury can not indict, without a previous prosecution

any bill of indictment being laid before them at the suit of the commonwealth. Like an indictment, however, it must be the act of the whole jury, not less than twelve concurring on it. It is, in fact, as much a criminal accusation as an indictment, except that it emanates from their own knowledge, and not from the public accuser, and except that it wants technical form. It is regarded as instructions for an indictment. That a grand jury may adopt such a course of procedure, without a previous preliminary hearing of the accused, is not to be questioned by this court. And it is equally true, that in making such a presentment, the grand jury are entirely irresponsible, either to the public or to individuals aggrieved, —the law giving them the most absolute and unqualified indemnity for such an official act. Had the grand jury, on the present occasion, made a legal presentment of the parties named in their communication, the court would, without hesitation, have ordered bills of indictment against them, and would have furnished the grand jury with all the testimony, oral and written, which the authority we are clothed with would have enabled us to obtain. While the power of presentment is conceded, we think no reflecting man would desire to see it extended a particle beyond the limit fixed to it by precedent and authority. It is a proceeding which denies the accused the benefit of a preliminary hearing; which prevents him from demanding the indorsement of the name of the prosecutor on the indictment before he pleads,—a right he possesses in every other case; and which takes away all his remedies for malicious prosecution, no matter how unfounded the accusation on final hearing may prove to be,—a system which certainly has in it nothing to recommend its extension."

Within these limits, it was held, the action of a grand jury was confined, and in the particular case before the court, where a communication had been received from the grand jury, stating that charges had been made by one of their number, to the effect that one or more members of a public trust had been guilty of converting to their own use public money, and asking that witnesses should be furnished them, to enable them to examine the charge, the court held that such an investigation was incompatible with the limits of the common law. "Grand juries," it was said, "are high public functionaries, standing between accuser and accused. They are the great security to the citizens against vindictive prosecution, either by government or political partisans, or by private enemies. In their independent action the persecuted have found the most fearless protectors; and in the records of their doings are to be discovered the noblest stands against the oppression of power, the virulence of malice, and the intemperance of prejudice. These elevated functions do not comport with the position of receiving individual accusations from any source, not preferred before them by the responsible public authori-

before a magistrate, except in offenses of public notoriety,

ties, and not resting in their own cognizance sufficient to authorize a presentment. Nor should courts give, unadvisedly, aid or countenance to any such innovations. For if we are bound to send for persons and papers, to sustain one charge by a grand juror before the body against one citizen, we are bound to do so upon every charge which every other grand juror, present and future, following the precedent now sanctioned, may think proper hereafter to prefer. It is true, that in the existing state of our social organization, but partial and occasional evils might flow from grand jurors receiving, entertaining, and acting on criminal charges against citizens, not given them by the public authorities, nor within their own cognizance. But we can not rationally claim exemption from the agitations and excitements which have at some period of its history convulsed every nation. Those communities which have ranked among the wisest and the best have become, on occasions, subject to temporary political and other frenzies, too vehement to be resisted by the ordinary safeguards provided by law for the security of the innocent. Under such irregular influences, the right of every member of a body like the grand jury, taken immediately from the excited mass, to charge what crime he pleases in the secret conclave of the grand jury room, might produce the worst results. It is important, also, in the consideration of this question, to be borne in mind, that the body so to be clothed with these extraordinary functions is, perhaps, the only one of our public agents that is totally irresponsible for official acts. When the official existence of a grand jury terminates, they mingle again with the general mass of the citizens, intangible for any of their official acts, either by private action, public prosecution, or legislative impeachment. That the action of such a body should be kept within the powers clearly pertaining to it is a proposition self-evident,—particularly where a doubtful authority is claimed, the exercise of which has a direct tendency to deprive a citizen of any of the guarantees of his personal rights secured by the Constitution. Our system of criminal administration is not subject to the reproach, that there exists in it an irresponsible body with unlimited jurisdiction. On the contrary, the duties of a grand jury, in direct criminal accusations, are confined to the investigation of matters given them in charge by the court, of those preferred before them by the attorney general, and of those which are sufficiently within their own knowledge and observation to authorize an official presentment. And they can not, on the application of any one, originate proceedings against citizens, which is a duty imposed by law on other public agents. This limitation of authority we regard as alike fortunate for the citizen and the grand jury. It protects the citizen from the persecution and annoyance which private malice or personal animosity, introduced into the grand jury room, might subject him to. And it con-

such as are within their own knowledge, or are given them

serves the dignity of the grand jury, and the veneration with which they ought always to be regarded by the people, by making them umpire between the accuser and the accused, instead of assuming the office of the former.

"We have less difficulty in coming to these conclusions, from the consciousness that they have no tendency to give immunity to the parties named in the communication of the grand jury, if they have violated any public law. The charge preferred by the grand juror alluded to in the communication is clear and distinct. It is one over which every committing magistrate of the city and county of Philadelphia has jurisdiction. Any one of this numerous body may issue his warrant of arrest against the accused, his subpœna for the persons and papers named, and may compel their appearance and production. And if sufficient probable cause is shown that the accused have been guilty of the crimes charged against them, he may bail or commit them to answer to this court. The differences to the accused between this procedure and that proposed are, that before a primary magistrate the defendants have a responsible accuser, to whom they may look if their personal and official characters have been wantonly and maliciously and falsely assailed. They have the opportunity of hearing the witnesses face to face. They may be assisted by counsel, in cross-examining those witnesses, and sifting from them the whole truth. And not the least, they may by this means know what crime is precisely charged against them; and when, where, and how it is said to have been perpetrated; rights which we admit and feel the value of, and of which we would most reluctantly deprive them, even if we had the legal authority to do so.

"On the whole, we are of opinion that we act most in accordance with the rights of the citizen, most in conformity with a wise and equal administration of the public law, by declining to give our aid to facilitate the extraordinary proceedings proposed against the parties named in the communication of the grand jury; and by referring any one, who desires to prosecute them for the offenses charged, to the ordinary tribunals of the commonwealth, which possesses all the jurisdiction necessary for that purpose, and can exercise it more in unison with the rights of the accused than could be accomplished by the mode proposed in the communication of the grand jury."

Remarks of the Commissioners to revise the Criminal Code of New York, appointed in 1870:

"It had its origin," they say (p. 116), "in England, at a time when the conflicts between the power of the government on the one hand, and the rights of the subject on the other, were fierce and unremitting; and it was wrung from the hands of the crown, as the only means by which the subject, appealing to the judgment of his peers, under the immunity of secrecy, and of irresponsibility for their acts, could be rendered secure against

in charge by the court, or are sent to them by the district attorney.[4] This, however, does not preclude a grand

oppression. Happily, in our country, no illustration of its value in this respect has been furnished. But it was nevertheless introduced among us in the same spirit in which it took its rise in the mother country, and, as the very language of the Constitution shows, was designed to be a means of protection to the citizen against the dangers of a false accusation, or the still greater peril of a sacrifice to public clamor. That language is, that 'no person shall be held to answer for a capital or otherwise infamous crime (except in cases which are enumerated), unless on presentment or indictment of a grand jury.' Acting within this sphere, the institution of a grand jury may be regarded, not merely as a safeguard to private right, but as an indispensable auxillary to public justice; and within these limits, it is the duty alike of the legislature and of the people to sustain it in the performance of its duties. But when it transcends them,—when it can be used for the gratification of private malignity,—or when, wrapping itself in the secrecy and immunity with which the law invests it, its high prerogatives are prostituted for purposes frowned upon by every principle of law and human justice,—it may become an instrument dangerous alike to public and to private liberty."

See report of English Commissioners, given in the 7th edition of this work, § 458; 4 Cr. Law Mag. 182; Report in 1870 of commissioners to revise criminal code of N. Y., p. 116.

In New York a binding over is not necessary if the case is under examination. See People v. Hyler, 2 Park. Cr. Rep. (N. Y.) 566; People v. Horton, 4 Park. Cr. Rep. (N. Y.) 222.

A grand jury, it seems, may of their own knowledge indict a person committing perjury before them.—State v. Terry, 30 Mo. 368.

[4] McCullough v. Com., 67 Pa. St. 30; Com. v. Simons, 6 Phila. R. 167.

In McCullough v. Com., supra, it was said by the chief justice: "It has never been thought that the 9th section of the 9th article of the Constitution, commonly called the Bill of Rights, prohibits all modes of originating a criminal charge against offenders except that by a prosecution before a committing magistrate. Had it been so thought, the court, the attorney general, and the grand jury would have been stripped of power universally conceded to them. In that event the court could give no offense in charge to the grand jury, the attorney general could send up no bill, and the grand jury could make no presentment of their own knowledge, but all prosecutions would have to pass through the hands of inferior magistrates."

In Rowand v. Com., 82 Pa. St. 405, it was ruled that the district attorney, with the powers of the deputy attorney general conferred upon him by the Act of May 3, 1850 (P. L. 654), may prefer an

jury, when a bill sent to it by the prosecuting attorney contains a count as to which there was no specific binding over, from finding and returning such count.[5]

In Tennessee a presentment, found not on the knowledge of any of the grand jury, but upon information delivered to the jury by others, will be abated on a plea of the defendant.[6] But this does not preclude the grand jury from exercising inquisitorial power in respect to nuisances such as houses of ill-fame, and other matters of notoriety.[7]

In an authoritative charge of Justice Field, of the Supreme Court of the United States, delivered to a California grand jury, in August, 1872, is the following: "Your oath requires you to diligently inquire, and true presentment make, 'of such articles, matters, and things as shall be given you in charge, or otherwise come to your knowledge touching the present service.' The first designation of subjects of inquiry are those which shall be given you in charge; this means those matters which shall be called to your attention by the court, or submitted to your consideration by the district attorney. The second designation of subjects of inquiry are those which shall

indictment before the grand jury without a preliminary hearing or previous commitment of the accused, and this even after a return of ignoramus to a previous indictment of the accused for the same offense; but this power is to be exercised under the supervision of the proper court of criminal jurisdiction, and its employment can only be justified by some pressing and adequate necessity. It was further said, that where the exercise of such power by the district attorney has been approved by the Court of Quarter Sessions, it will not be reviewed by the Supreme Court. See, infra, § 1301.

To the same effect, see Brown v. Com., 76 Pa. St. 319.

Compare: People v. Horton, 4 Park. Cr. Rep. (N. Y.) 222.

5 Nicholson v. Com., 96 Pa. St. 503. In Com. v. Lewis, 15 W. N. C. (Pa.) 205, it was held that in such a case there could be a continuance, if the defendant was surprised, to the next term.

6 State v. Love, 23 Tenn. (4 Humph.) 255. See, also, State v. Caine, 8 N. C. (1 Hawks) 352.

Infra, § 1285, note.

7 State v. Barnes, 73 Tenn. (5 Lea) 598. See Com. v. Wilson, 2 Chest. Co. Rep. (Pa.) 164; infra, § 1265.

'otherwise come to your knowledge touching the present service'; this means those matters within the sphere of and relating to your duties which shall come to your knowledge, other than those to which your attention has been called by the court, or submitted to your consideration by the district attorney. But how come to your knowledge? Not by rumors and reports, but by knowledge acquired from the evidence before you, or from your own observations. Whilst you are inquiring as to one offense, another and a different offense may be proved, or witnesses before you may, in testifying, commit the crime of perjury. Some of you, also, may have personal knowledge of the commission of a public offense against the laws of the United States, or of facts which tend to show that such an offense has been committed, or possibly attempts may be made to influence corruptly or improperly your action as grand jurors. If you are personally possessed of such knowledge, you should disclose it to your associates; and if any attempts to influence your action improperly or corruptly are made, you should inform them of it also, and they will act upon the information thus communicated as if presented to them in the first instance by the district attorney. But, unless knowledge is acquired in one of these ways, it can not be considered as the basis for any action on your part. We, therefore, instruct you, that your investigations are to be limited: First, to such matters as may be called to your attention by the court; or, second, may be submitted to your consideration by the district attorney; or, third, may come to your knowledge in the course of your investigations into the matters brought before you, or from your own observations; or, fourth, may come to your knowledge from the disclosures of your associates. You will not allow private prosecutors to intrude themselves into your presence and present accusations. Generally such parties are actuated by private enmity, and seek merely the

gratification of their personal malice. If they possess any information justifying the accusation of the person against whom they complain, they should impart it to the district attorney, who will seldom fail to act in a proper case. But if the district attorney should refuse to act, they can make their complaint to a committing magistrate, before whom the matter can be investigated, and if sufficient evidence be produced of the commission of a public offense by the accused, he can be held to bail to answer to the action of the grand jury."[8]

It has been held in New York, that a grand jury may find a bill against parties who are under arrest on a coroner's warrant, after the coroner's jury has returned an inquest implicating them, and before the examination by the coroner has been completed.[9]

§ 1265. THEORY THAT GRAND JURIES ARE RESTRICTED TO CASES RETURNED BY MAGISTRATES AND PROSECUTING OFFICER. The third view is that the grand jury are in all instances limited in their action to cases in which there has been such a primary hearing as enables the defendant, before he is put on trial, to be confronted with the witnesses against him, and meet his prosecutor face to face.[1] If it should happen, under any contingencies of legislation,

8 Pamph. Rep., p. 9. See 2 Sawy. 663-667; S. P. Lewis v. Commis., 74 N. C. 194.

9 People v. Hyler, 2 Park. Cr. Rep. (N. Y.) 566.

The prosecuting attorney, according to the usual practice in the federal courts, may on his official responsibility send a bill to a grand jury without a prior arrest or binding over. — United States v. Fuers, 12 Int. Rev. Rec. 43, Fed. Cas. No. 15174.

1 Advocating this view may be noticed a pamphlet entitled "The History and Law of the Writ of Habeas Corpus, with an Essay on the Law of Grand Juries," by E. Ingersoll, of the Philadelphia Bar, 1849. 2 Hale's Pleas of the Crown, by Stokes & Ingersoll, 164. That, as is the old federal practice, any citizen may institute a prosecution, see United States v. Skinner, 2 Wheel. Cr. Cas. 232, Brun. Cal. Cas. 446, Fed. Cas. No. 16309.

In Virginia there must, in felonies, be a prior examination before a justice, or a waiver of such examination.—Butler v. Com., 81 Va. 159; supra § 111.

that grand juries should be selected by the dominant political party, so as to be used by that party for political ends, then it is important that they should be restricted in the way which this limitation prescribes. An executive should have power, it is true, to institute, at his discretion, prosecutions, even though these prosecutions are aimed at political antagonists. But he should act, when exercising this power, responsibly, taking upon himself the burden, and challenging impeachment or popular condemnation should he do wrong. In this check he will move cautiously, and with due regards to constitutional and legal sanctions. It is otherwise, however, when he is authorized to act through a grand jury selected by himself or his dependents, and ready to execute, in every respect, his will. Such a body, irresponsible, servile to the political party whose creature it is, armed with inquisitorial powers of summoning before it whomsoever it will, examining them in secret, giving whatever interpretation it may choose to their evidence, finding whatever bills it chooses and ignoring all others, may become a dangerous engine of despotism, calculated to disgrace the government which acts through it, and provoke to revolution those on whom it acts. Under a system in which the grand jury is appointed by the executive, it is better that its functions should be limited in the terms here prescribed; and that in all cases in which the executive desires to initiate a prosecution, it should be by information or preliminary arrest before a magistrate. At common law, the right in a grand jury to institute prosecutions on its own motion is based on the assumption that it represents the people at large, and ceases to exist when it is not so constituted.[2]

[2] Except where proceedings originate ex officio from the attorney-general, or where a grand juror possesses in his own breast sufficient knowledge of the commission of a crime to enable his fellows to find a bill exclusively on his evidence, cases, both in England and this country, are rare where an indictment is found

§ 1266. POWER OF GRAND JURIES LIMITED TO COURT SUMMONING THEM. Under the federal constitution, Congress has invested the courts of the United States with criminal jurisdiction, and since this jurisdiction is chiefly exercised through the instrumentality of grand juries, the power of Congress to determine their functions results by necessary implication. As a rule, the powers of grand juries are co-extensive with, and are limited by, the criminal jurisdiction of the courts of which they are an appendage.[1] Hence, a presentment by a grand jury in the Circuit Court of the United States, of an offense of which that court has no jurisdiction, is coram non judice, and is no legal foundation for any prosecution which can only be instituted on the presentment or the indictment of a grand jury.[2]

III. CONSTITUTION OF GRAND JURIES.

§ 1267. NUMBER MUST BE BETWEEN TWELVE AND TWENTY-THREE. Though twenty-four are usually summoned on grand juries, not more than twenty-three can be empanelled, as, otherwise, a complete jury of twelve might find a bill, when, at the same time, a complete jury of twelve

without a preceding hearing and binding over to answer; and even where the bill is based on the evidence of a member of the grand jury, it has been held in one of the states that public safety required his name to be indorsed on the bill as prosecutor.—State v. Caine, 8 N. C. (1 Hawks) 352.

In Michigan there must be a preliminary binding over.—O'Hara v. People, 41 Mich. 623, 3 N. W. 161. See Shepherd v. State, 64 Ind. 43.

In Tennessee the grand jury can not originate prosecutions except when by statute they have inquisitorial power.—State v. Robinson, 70 Tenn. (2 Lea) 114.

They have the power in liquor cases. See State v. Staley, 71 Tenn. (3 Lea) 565.

See, supra, § 1264.

Prosecuting attorney is not limited by returns. See Com. v. Morton, 12 Phila. 595.

1 See Shepherd v. State, 64 Ind. 43.

2 See United States v. Hill, 1 Brock. 156, Fed. Cas. No. 15364; United States v. Reed, 2 Blatchf. 435, Fed. Cas. No. 16134; United States v. Tallman, 10 Blatchf. 21, Fed. Cas. No. 16429.

might dissent.[1] If of twenty-four, the finding is void.[2] And it appears that, at common law, a grand jury composed of any number from twelve to twenty-three is a legal grand jury.[3] If less than twelve the defect at common law is fatal.[4] A venire facias is an essential prerequisite.[5]

§ 1268. FOREMAN USUALLY APPOINTED BY COURT. After the jury is assembled, the first thing, if no challenges are made, or exceptions taken, is to select a foreman, which, in the United States courts, in New York, in Pennsylvania, and in most of the remaining states, is done by the court; in New England, by the jury themselves.[1]

§ 1269. JURORS TO BE DULY SWORN. The oath administered to the foreman is substantially the same in most of the states: "You, as foreman of this inquest, for the body of the county of ———, do swear (or affirm) that you will diligently inquire, and true presentment make, of such articles, matters, and things as shall be given you in

1 Cro. Eliz. 654; 2 Hale 121; 2 Hawk., ch. 25, § 16; Ridling v. State, 56 Ga. 601; Hudson v. State, 1 Blackf. (Ind.) 317; State v. Copp, 34 Kan. 522, 9 Pac. 233; Com. v. Wood, 56 Mass. (2 Cush.) 149.

As to statutes limiting number, see United States v. Reynolds, 1 Utah 319; United States v. Reynolds, 98 U. S. 145, 25 L. Ed. 244.

As to venire facias, see Jones v. State, 18 Fla. 889; United States v. Antz, 4 Woods 174, 16 Fed. 119.

2 People v. Thurston, 5 Cal. 69; R. v. Marsh, 6 Ad. & El. 236, 33 Eng. C. L. 143.

3 Norris v. State, 3 G. Greene (Iowa) 513; State v. Symonds, 36 Me. 128; Dowling v. State, 13 Miss. (5 Sm. & M.) 664; State v. Davis, 24 N. C. (2 Ired.) 153; Pybos v. State, 22 Tenn. (3 Humph.) 49.

In Missouri twelve jurors suffice. —State v. Green, 66 Mo. 631.

In other states special limitations exist. See State v. Swift, 14 La. Ann. 827.

In Texas the number must be exactly twelve.—Rainey v. State, 19 Tex. App. 479.

4 CAL.—People v. Butler, 8 Cal. 435. ME.—State v. Symonds, 36 Me. 128. MISS.—Barney v. State, 20 Miss. (12 Smed. & M.) 68. N. C.—State v. Davis, 24 N. C. (2 Ired.) 153. VA.—Com. v. Sayres, 35 Va. (8 Leigh) 722. ENG.—Clyncard's Case, Cro. Eliz. 654, 78 Eng. Rep. 893.

5 United States v. Antz, 4 Woods 174, 16 Fed. 119.

1 Smith's Laws of Pa., vol. 7, p. 685; Rev. St. N. Y., part 4, ch. 2, tit. 4, § 26; Davis' Prec., p. 9.

charge; the commonwealth's (or state's) counsel, your fellows', and your own, you shall keep secret; you shall present no one for envy, hatred, or malice; neither shall you leave any one unpresented for fear, favor, affection, hope of reward, or gain, but shall present all things truly, as they come to your knowledge, according to the best of your understanding (so help you God)." The rest of the grand jury, three at a time, are then sworn (or affirmed) as follows: "The same oath (or affirmation) which your foreman hath taken, on his part, you and every of you shall well and truly observe, on your part (so help you God)."[1] In Pennsylvania, after the words, "shall be given you in charge," in the foreman's oath occur the words, "or otherwise come to your knowledge, touching the present service." In Virginia the same expression is introduced; but the subsequent clause, enjoining secrecy, is omitted.[2] In Massachusetts the jury are sworn in a body, the foreman being afterwards elected, but the oath is the same as above.[3] The fact that the grand jury were sworn must appear on the record.[4] The terms of the oath, however, need not be set forth.[5]

§ 1270. Bound to secrecy. As has been just seen, grand jurors, according to the form generally used, are bound to secrecy; and this duty is made obligatory by statute in several states.[1] The obligation to secrecy, however, is enforced by the policy of the law, as well as by

1 See Cr. Cir. Com., p. 11, 6th ed.

2 Tate's Dig., tit. Juries. In the Crimes Act of 1866 the oath is given in full.—Pamph. L. 926.

3 Rev. Stats. Mass., ch. 136, § 5. Where, on the first day of the term of a circuit superior court, a grand jury was empaneled and sworn, and proceeded in discharge of its duties, but next day it was discovered that one of the grand jurors wanted legal qualification, upon which the court discharged him and ordered another to be sworn in his place, it was held that this was regular, and the grand jury was duly constituted.—Com. v. Burton, 31 Va. (4 Leigh) 645, 26 Am. Dec. 337. See Jetton v. State, 19 Tenn. (1 Meigs) 192; Lyman v. People, 7 Ill. App. 345.

4 Baker v. State, 39 Ark. 180.

5 Brown v. State, 74 Ala. 478.

1 See 16 West. Jur. 5.

the terms of this oath; and hence the obligation is binding, though not imposed by the oath locally in force.[2] The reasons for the rule are the importance of sheltering the action of the prosecuting authorities from premature disclosure by which such action could be frustrated; the importance of protecting accused parties from the disclosure, under the shelter of judicial procedure, of charges against them which may have been ignored.[3] How far this obligation is made to yield to the duty of giving testimony in subsequent litigation is hereafter discussed.[4] As will be hereafter seen, only sworn officers are usually permitted to attend the sessions of the grand jury.[5]

IV. DISQUALIFICATION OF GRAND JURORS, AND HOW IT MAY BE EXCEPTED TO.

§ 1271. Irregularities in empanelling to be met by challenge to array or motion to quash or plea. It may be laid down as a general rule that all material irregularities in selecting and empanelling the grand jury, which do not relate to the competency of individual jurors, may usually be objected to by challenge to array,[1]

2 Little v. Com., 66 Va. (25 Grat.) 921. Infra, § 1306.

3 See Com. v. Mead, 78 Mass. (12 Gray) 167, 71 Am. Dec. 741, and cases cited infra, § 1306.

That the court, in a strong case, may order the prosecution to furnish the defendant with the evidence used before the grand jury, see Eighmy v. People, 79 N. Y. 546; People v. Naughton, 7 Abb. Pr. N. S. (N. Y.) 431.

4 Infra, § 1306.

5 Infra, § 1295.

1 CAL.—People v. Earnest, 45 Cal. 29. GA.—United States v. Blodgett, 35 Ga. 336. MISS.—Barney v. State, 20 Miss. (12 Smed. & M.) 68; Boles v. State, 24 Miss. 445; James v. State, 45 Miss. 572; Chase v. State, 46 Miss. 683; Logan v. State, 50 Miss. 269. N. Y.—People v. Jewett, 3 Wend. 314. TENN.—State v. Duncan, 15 Tenn. (7 Yerg.) 271. TEX.—State v. Jacobs, 6 Tex. 99; Vanhook v. State, 12 Tex. 252; Reed v. State, 1 Tex. App. 1. FED.—United States v. Tallman, 10 Blatchf. 21, Fed. Cas. No. 16429.

Not a good cause of challenge to the array, that the officers whose duty it was to make the original selection were two or three weeks at the work; nor, that one of them was temporarily absent; nor, that they employed a clerk to write the names selected,

or by motion to quash.[2] This must, when possible,[3] be before the general issue.[4] Objections by plea are hereafter noticed.[5] In New York, under the Criminal Procedure Code, there can be no longer a challenge to the body of the grand jury on the ground that it is irregularly or defectively constituted.[6]

§ 1272. DISQUALIFIED JUROR MAY BE CHALLENGED. When a person who is disqualified is returned, it is a good cause of challenge to the poll, which may be made by any person

and put them in the wheels (Com. v. Lippard, 6 Serg. & R. 395); nor that two unqualified persons were inadvertently placed on a list of three hundred.—United States v. Rondeau, 4 Woods 185, 16 Fed. 109. See Billingslea v. State, 68 Ala. 486; State v. Glascow, 59 Md. 209; Com. v. Lippard, 6 Serg. & R. (Pa.) 395.

Strong personal bias on the part of the persons employed in drawing the jury may be a cause for challenge of the array.—State v. McQuaige, 5 S. C. 429.

2 Infra, §§ 1277 et seq., § 1315. See State v. Lawrence, 12 Ore. 297, 7 Pac. 116; State v. Champeau, 52 Vt. 313, 36 **Am. Rep.** 754; State v. Cox, 52 Vt. 471; United States v. Antz, 4 Woods 174, 16 Fed. 119.

Indictment may be quashed when a juror was personated by a stranger to the panel.—Nixon v. State, 68 Ala. 535; State v. Hughes, 58 Iowa 165, 11 N. W. 706; People v. Petrea, 92 N. Y. 128, 1 N. Y. Cr. Rep. 233, affirming 30 Hun 98, 64 How. Pr. 139, 1 N. Y. Cr. 198.

3 Infra, § 1277.

4 Infra, § 1277. See: ARK.—Dixon v. State, 29 Ark. 165. CAL.—People v. Southwell, 46 Cal. 141. ILL.—Barrows v. People, 73 Ill. 256. MISS.—State v. Borroum, 25 Miss. 203; James v. State, 45 Miss. 572. MO.—State v. Whitton, 68 Mo. 91. MINN.—State v. Greenwood, 23 Minn. 104, 23 **Am. Rep.** 678. OHIO—State v. Easter, 30 Ohio St. 542, 27 **Am. Rep.** 478. PA.—Brown v. Com., 73 Pa. St. 34. FED.—United States v. Gale, 109 U. S. 65, 27 **L. Ed.** 857, 3 Sup. Ct. 1.

In North Carolina plea is said to be the proper mode of exception.—State v. Haywood, 73 N. C. 437.

For former New York practice as to plea in abatement, see Dolan v. People, 64 N. Y. 485; People v. Tweed, 50 How. Pr. (N. Y.) 262, 273, 280, 286.

For practice in refusing a challenge to the array, see Carpenter v. People, 64 N. Y. 382; People v. Fitzpatrick, 30 Hun 493, 1 N. Y. Cr. Rep. 425; People v. Duff, 65 N. Y. Prac. 365, 1 N. Y. Cr. Rep. 307.

As to practice in summoning jury in federal courts.—United States v. Munford, 16 Fed. 164.

5 Infra, § 1277.

6 People v. Hoogkerk, 96 N. Y. 38.

For an examination of the federal statute in this relation see United States v. Richardson, 28 Fed. 61.

There can be no challenge to array for personal objection to particular jurors.—Id.

who is concerned in the business to come before the grand jury;[1] and in like manner a prejudiced grand juror may be challenged by an accused person against whom the prejudice works.[2] Although it is said an amicus curiæ may be sometimes allowed to intervene,[3] yet generally the right is limited to those who are at the time under a prosecution for an offense about to be submitted to the consideration of the grand jury or against whom a prosecution is threatened.[4] The burden of proof is on the challenger.[5]

Exemption is a personal privilege of the juror. If the exempted person serves, the defendant has no right to complain.[6]

§ 1273. PREADJUDICATION GROUND FOR CHALLENGE. It is therefore a good cause of exception to a grand juror, that he has formed and expressed an opinion as to the guilt of a party whose case will probably be presented to the consideration of the grand inquest.[1] As will presently be

1 2 Hawk., ch. 25, § 16; Bac. Ab. Juries, A.; Burn, J., 29th ed. Jurors, A.; Mershom v. State, 51 Ind. 14; United States v. Richardson, 28 Fed. 61.

As to time of challenge, see People v. Geiger, 49 Cal. 643.

As to practice, see State v. Fowler, 52 Iowa 103, 2 N. W. 983.

As to plea, see Id. Infra, §§ 1277, 1347.

2 State v. Osborne, 61 Iowa 330, 16 N. W. 201.

3 Com. v. Smith, 9 Mass. 107.

4 ALA.—State v. Hughes, 1 Ala. 655; State v. Clarissa, 11 Ala. 57. GA.—United States v. Blodgett, 35 Ga. 336. IND.—Hudson v. State, 1 Blackf. 318; Ross v. State, 1 Blackf. 390; State v. Herndon, 5 Blackf. 75. MICH.—Thayer v. People, 2 Dougl. 418. MO.—State v. Corson, 12 Mo. 404. N. Y.—People v. Horton, 4 Park. Cr. Rep. 222.

But see contra, Tucker's Case, 8 Mass. 286.

5 State v. Haynes, 54 Iowa 109, 6 N. W. 156.

As to action after bail found, see infra, § 1277.

6 Infra, § 1627; Green v. State, 59 Md. 123, 43 Am. Rep. 542; United States v. Munford, 16 Fed. 164.

1 ALA.—State v. Clarissa, 11 Ala. 57. CAL.—People v. Manahan, 32 Cal. 68. ILL.—But see Musick v. People, 40 Ill. 268. IOWA—State v. Gillick, 7 Iowa 287; State v. Osborne, 61 Iowa 330. ME.—State v. Quimby, 51 Me. 395. MO.—State v. Holcomb, 86 Mo. 371. NEB.—Patrick v. State, 16 Neb. 330, 20 N. W. 121. N. J.—State v. Rickey, 10 N. J. L. (5 Halst.) 83. N. Y.—People v. Jewett, 3 Wend. 314. PA.—Rowand v. Com., 82 Pa. St. 306, 22

seen, the objection must be made, when there is opportunity to do so, before indictment found.[2]

§ 1274. —— So of conscientious scruples. A conscientious inability to find a bill for a capital offense is a good ground for challenge.[1]

§ 1275. Personal interest a disqualification. In Massachusetts it was held, in an early case, that the court would not set aside a grand juror because he had originated a prosecution for a crime against a person whose case was to come under the consideration of the grand jury.[1] In Vermont, a still more extreme doctrine has been maintained, it being held that the court has no power to order a grand juror to withdraw from the panel in any particular case, although it were one of a complaint against himself.[2] But these decisions can not be reconciled with the general tenor of authority, nor with the analogies of the English common law. It is a serious discredit as well as peril to a man to have a bill found against him; and if this is likely to be done corruptly, or through interested parties, he has a right to apply to arrest the evil at the earliest moment. Besides, it is far less pro-

Am. Rep. 758; Com. v. Clarke, 2 Browne 325. FED.—United States v. White, 5 Cr. 457, Fed. Cas. No. 16679.

2 Infra, § 1277. See Com. v. Clarke, 2 Browne (Pa.) 325.

1 IND.—Jones v. State, 2 Blackf. 477; Gross v. State, 2 Ind. 329. N. J.—State v. Rockafellow, 6 N. J. L. (1 Halst.) 332; State v. Ricey, 10 N. J. L. (5 Halst.) 83. TENN.—State v. Duncan, 15 Tenn. (7 Yerg.) 271. W. VA.—State v. Greer, 22 W. Va. 800.

See, infra, § 1600.

Challenge to the array, however, will not be allowed on the ground that in the selection of the grand jurors all persons belonging to a particular fraternity were excluded, if those who are returned are unexceptionable, and possess the statutory qualifications.—People v. Jewett, 3 Wend. (N. Y.) 314, sed quære. See Com. v. Lippard, 6 Serg. & R. (Pa.) 395.

1 Com. v. Tucker, 8 Mass. 286. See United States v. Williams, 1 Dill. 485, Fed. Cas. No. 16716.

In Kock v. State, 32 Ohio St. 353, having subscribed funds to put down the liquor traffic does not exclude a grand juror in a liquor case.

2 Baldwin's Case, 2 Tyler (Vt.) 473.

ductive of injury to public justice for a jury to be purged, at the outset, of an incompetent member, than for the indictment, after the grand jury adjourns, to be set aside on account of such incompetency.[3] But interest, to sustain a challenge, must be actual and operative, not remote and inoperative.[4]

§ 1276. "VIGILANCE" MEMBERSHIP NO GROUND. It is no ground for challenge to a grand juror that he belongs to an association whose object is to detect crime.[1]

§ 1277. OBJECTION, WHEN IT CAN BE TAKEN, MUST BE MADE BEFORE GENERAL ISSUE. The question of the mode in which objections to the organization and constitution of the grand jury are to be taken depends so largely upon local statutes that it is impracticable to solve it by any tests which would be universally applicable. The following general rules, however, may be regarded as generally applicable:

1. If the body by whom the indictment was found was neither de jure nor de facto entitled to act as such, then the proceedings are a nullity, and the defendant, at any period when he is advised of such nullity, is entitled to attack them by motion to quash, or by plea in abatement, or, when the objection is of record, by motion in arrest of judgment. He is, in most jurisdictions, sheltered by

[3] In New York, by the Revised Statutes, a person held to answer to any criminal charge may object to the competency of a grand juror before he is sworn, on the ground that he is the prosecutor or complainant upon any charge against such person, or that he is a witness on the part of the prosecution, subpœnaed or recognized as such; and if such objection is established, the juror is to be set aside. But no challenge to the array, or to any person summoned on it, shall be allowed in any other cases.—2 R. S. 724, §§ 27, 28.

[4] Com. v. Ryan, 9 Mass. 90, 6 Am. Dec. 40; Com. v. Strother, 3 Va. (1 Va. Cas.) 186; infra, § 1598.

In State v. Brainerd, 56 Vt. 532, 48 Am. Rep. 818, which was a prosecution for embezzling from a bank, it was held that a juror was not disqualified because his wife was a depositor.

[1] Musick v. People, 40 Ill. 268. See infra, § 1595.

constitutional provisions from prosecution except on indictment found by a grand jury; and when the body finding the indictment is not a grand jury either de jure or de facto, then its prosecution must fall whenever the question is duly raised.[1] But a de facto grand jury can not be deemed a nullity under this provision of the constitution.[2] It is otherwise with a grand jury which has no quorum in attendance.[3]

2. For such irregularities in drawing and constituting the grand jury as do not prejudice the defendant, he has no cause of complaint, and can take no exception.[4]

3. For irregularities of this class by which the defendant is prejudiced he is entitled to redress.[5] The way, however, in which this redress is to be sought depends upon local statute. It may be generally declared that the defendant must take the first opportunity in his power to make the objection. When, however, does this opportunity occur? In this relation the following distinctions may be recognized:

(a) Where the defendant is notified that his case is to be brought before the grand jury, he should proceed at once to take exception to its competency, as hereafter stated.[6] If he lies by until bill is found, then the exception may be too late in all cases where, having prior opportunity and capacity to object, he has made no objection.[7]

1 Infra, § 1280. See 23 Alb. L. J. 324; 4 Cr. Law Mag. 174-175.

2 People v. Petrea, 92 N. Y. 128. See Kerr's Whart. Crim. Law, §§ 855, 1893, 2145.

3 Doyle v. State, 17 Ohio 222.

Indictment found without evidence will be quashed, the fact being proved by the district attorney.—See State v. Grady, 84 Mo. 220.

4 State v. Mellor, 13 R. I. 666.

5 Com. v. Barker, 19 Mass. (2 Pick.) 563, and cases cited infra, in this section.

6 See Kemp v. State, 11 Tex. App. 174.

7 CAL.—People v. Beatty, 14 Cal. 566. FLA.—Gallaher v. State, 17 Fla. 370. IOWA—State v. Gilbert, 7 Iowa 287; State v. Ruthven, 58 Iowa 121, 12 N. W. 235. LA.—State v. Watson, 31 La. Ann. 379; State v. Miles, 31 La. Ann. 825; State v. Wittington, 33 La. Ann. 1403. ME.—State v. Quimby, 51

(b) Where the defendant has no such opportunity of objecting before bill found, then he may take advantage of the objection by motion to quash, or by plea in abatement, the latter, in all cases of contested fact, being the proper remedy. The objection, unless in extraordinary cases of surprise, is waived by pleading over.[8] But even where the

Me. 595, 81 Am. Dec. 593. MASS.—Com. v. Smith, 9 Mass. 107; Com. v. Moran, 130 Mass. 281. MO.—State v. Clifton, 78 Mo. 430. NEB.—Polin v. State, 14 Neb. 540, 16 N. W. 898. N. J.—State v. Rickey, 10 N. J. L. (5 Halst.) 83; Gibbs v. State, 45 N. J. L. (16 Vr.) 379, 46 Am. Rep. 782. N. Y.—People v. Jewett, 3 Wend. 314. N. C.—State v. Smith, 80 N. C. 410. PA.—Com. v. Morton, 12 Phila. 595. TENN. — Fitzhugh v. State, 81 Tenn. (13 Lea) 258, 350. TEX.—Douglass v. State, 8 Tex. App. 520. FED.—United States v. Tallman, 10 Blatchf. 21, Fed. Cas. No. 6429; United States v. White, 5 Cr. 457, Fed. Cas. No. 16679.

By statute in Pennsylvania, pleading, or even standing mute, waives errors in precept, venire, drawing, summoning, and returning of jurors.—Brown v. Com., 76 Pa. St. 319; Com. v. Chauncey, 2 Ashm. (Pa.) 90; Dyott v. Com., 5 Whart. (Pa.) 67.

But this does not preclude advantage being taken of such defects by challenge, motion to quash, or plea in abatement, before issue joined.

8 ALA.—State v. Brooke, 9 Ala. 10; State v. Clarissa, 11 Ala. 57; Weston v. State, 63 Ala. 155. See Battle v. State, 54 Ala. 93. ARK.—Wilburn v. State, 21 Ark. 198. FLA.—Kitrol v. State, 9 Fla. 9; Gladen v. State, 12 Fla. 562. GA.—Terrill v. State, 9 Ga. 58; Thompson v. State, 9 Ga. 210; Reich v. State, 53 Ga. 73. IND.—Pointer v. State, 89 Ind. 255; Henning v. State, 106 Ind. 386, 55 Am. Rep. 756, 6 N. E. 803, 7 N. E. 4. LA.—State v. Price, 37 La. Ann. 215; State v. Griffin, 38 La. Ann. 502. ME.—State v. Burlinghame, 15 Me. 104; State v. Symonds, 36 Me. 128; State v. Carver, 49 Me. 588, 77 Am. Dec. 275; State v. Wright, 53 Me. 328; State v. Fleming, 66 Me. 142, 22 Am. Rep. 552. MISS. — McQuillan v. State, 16 Miss. (8 Smed. & M.) 587; Rawls v. State, 16 Miss. (8 Smed. & M.) 599; Barney v. State, 20 Miss. (12 Smed. & M.) 68; Boles v. State, 24 Miss. 445; State v. Borroum, 25 Miss. 728. NEV.—State v. Collier, 17 Nev. 275, 30 Pac. 891. N. H.—State v. Rand, 33 N. H. 216. N. J.—State v. Rockafellow, 6 N. J. L. (1 Halst.) 332; State v. Norton, 23 N. J. L. (3 Zab.) 33. N. Y.—People v. Griffin, 2 Barb. 427; People v. Harriot, 3 Park. Cr. Rep. 112. N. C.—State v. Martin, 24 N. C. (2 Ired.) 101; State v. Duncan, 28 N. C. (6 Ired.) 98; State v. Griffin, 74 N. C. 316; State v. Cannon, 90 N. C. 711; State v. Lanier, 90 N. C. 714; State v. Haywood, 94 N. C. 847. OHIO—Doyle v. State, 17 Ohio 222; Huling v. State, 17 Ohio 583. PA.—Com. v. Chauncey, 2 Ashm. 90. R. I.—State v. Maloney, 12 R. I.

defendant has been notified, by binding over or otherwise, that his case is to come before the grand jury, the courts will permit him, in all cases in which laches are not imputable to him, or in which the defect is not discovered until after bill found, to raise the objection by plea in abatement or motion to quash.[9]

4. The objection that a grand juror is prejudiced must be made, when there is opportunity, before indictment found, by challenge,[10] though where there is no such op-

257; State v. Davis, 12 R. I. 492, 34 Am. Rep. 704. TENN.—State v. Duncan, 15 Tenn. (7 Yerg.) 271; State v. Bryant, 18 Tenn. (10 Yerg.) 527. TEX.—Jackson v. State, 11 Tex. 261; Vanhook v. State, 12 Tex. 252; State v. Mahan, 12 Tex. 283. VT.—State v. Newfane, 12 Vt. 422. VA.—Com. v. Williams, 46 Va. (5 Grat.) 702. FED.—United States v. Gale, 109 U. S. 65, 27 L. Ed. 857, 3 Sup. Ct. 1; United States v. Rondeau, 4 Woods 185, 16 Fed. 109; United States v. Richardson, 28 Fed. 61.

As to New York, see Dolan v. People, 64 N. Y. 485, and cases cited, supra, § 1271; Whart. Prec., § 1158.

As to practice on plea, see Bird v. State, 53 Ga. 602.

Remedy is exclusively plea in abatement. See Wallace v. State, 70 Tenn. (2 Lea) 29; infra, § 746.

9 Ibid., infra, § 1784.

Remedy must be by plea. See Ford v. State, 112 Ind. 373, 14 N. E. 241.

In New York the rule as stated by Andrews, J., in Cox v. People, 80 N. Y. 500 (1880), is that "mere irregularity in the drawing of grand or petit jurors is not a ground for reversing a conviction, unless it appears that they operated to the injury or prejudice of the prisoner." But as to grand juries, see under Rev. Code, supra.

10 ALA.—Boyington v. State, 2 Port. 100. CONN.—State v. Hamlin, 47 Conn. 95, 36 Am. Rep. 54. GA.—Williams v. State, 69 Ga. 11; Lee v. State, 69 Ga. 705. ILL.—Mackin v. People, 115 Ill. 313, 56 Am. Rep. 167, 3 N. E. 222. LA.—State v. Washington, 33 La. Ann. 896; State v. Jackson, 36 La. Ann. 96; State v. McGee, 36 La. Ann. 207. N. J.—State v. Rickey, 10 N. J. L. (5 Halst.) 83. OHIO—State v. Easter, 30 Ohio St. 542, 27 Am. Rep. 478. PA.—Rolland v. Com., 82 Pa. St. 306, 22 Am. Rep. 758. FED.—United States v. Williams, 1 Dill. 485, Fed. Cas. No. 16716.

As to challenge, see, supra, § 1272.

CAL.—People v. Hidden, 32 Cal. 445. ME.—State v. Carver, 49 Me. 588, 77 Am. Dec. 275. N. Y.—People v. Griffin, 2 Barb. 427. N. C.—State v. Ward, 9 N. C. (2 Hawks) 443; State v. Lamon, 10 N. C. (3 Hawks) 175; State v. Seaborn, 15 N. C. (4 Dev.) 305; State v. Martin, 24 N. C. (2 Ired.) 101. PA.—Rolland v. Com., 82 Pa. St. 306, 22 Am. Rep. 758.

portunity, or where the delay is not caused by the defendant, the defect may be taken advantage of by plea in abatement, or by motion to quash, before general issue pleaded.[11]

5. A question that is reserved when raised before indictment found, can be heard as fully after indictment found as before.[12]

6. Irregularity in selecting and empanelling the grand jury may be met by challenge to the array or motion to quash;[13] though this, as we have just seen, does not preclude an exception being taken after bill found when the defendant had no previous opportunity of being heard. But the objection is ordinarily waived by pleading over.[14]

§ 1278. PLEA SHOULD BE SPECIAL. It is necessary that the plea, in such case, should set forth sufficient to enable the court to give judgment on it on demurrer.[1] Thus where, upon a presentment by a grand jury for gaming, the defendant tendered a plea in abatement, that one of the grand jurors nominated himself to the sheriff to be

See for form, Whart. Prec., § 1158.

In Indiana such is, by statute, no longer the law.—Ward v. State, 48 Ind. 289, overruling State v. Herndon, 5 Blackf. (Ind.) 75; Vattier v. State, 4 Blackf. (Ind.) 72.

11 Infra, § 1315. ALA.—State v. Middleton, 5 Port. 484; State v. Ligon, 7 Port. 167; State v. Clarissa, 11 Ala. 57. GA.—Reich v. State, 53 Ga. 73, 21 Am. Rep. 265. ILL.—Musick v. People, 40 Ill. 268. N. C.—State v. Watson, 86 N. C. 624. OHIO — Doyle v. State, 17 Ohio 222. PA.—Com. v. Clarke, 2 Browne 325. VA.—Com. v. Cherry, 4 Va. (2 Va. Cas.) 20; Com. v. St. Clair, 42 Va. (1 Gratt.) 556. FED.—United States v. Gale, 109 U. S. 65, 27 L. Ed. 857, 3 Sup. Ct. 1.

Intoxication of a grand juror can not be taken advantage of by plea in abatement. See Allen v. State, 61 Miss. 627.

12 People v. Duff, 65 N. Y. Pr. 365; 1 N. Y. Cr. Rep. 307.

13 Supra, § 1271.

14 Hasley v. State, 14 Tex. App. 217.

Discharge of a grand jury in one case may operate generally. See People v. Fitzpatrick, 30 Hun (N. Y.) 493, 1 N. Y. Cr. Rep. 425.

1 IND.—Ward v. State, 48 Ind. 289; McClary v. State, 75 Ind. 260. NEB.—Priest v. State, 10 Neb. 393, 6 N. W. 468; Baldwin v. State, 12 Neb. 61, 10 N. W. 463. VT.—State v. Emery, 39 Vt. 84. FED.—United States v. Tuska, 14 Blatchf. 5, Fed. Cas. No. 16550.

put on the panel, who summoned him to serve, without alleging that this nomination of himself by the grand juror was corrupt, or that there was a false conspiracy between him and the sheriff for returning him on the panel; it was held that the plea was bad.[2] But that a sufficient number of jurors did not concur in its finding may be tested by plea in abatement.[3]

§ 1279. ALIENS NOT NECESSARY IN PROSECUTIONS AGAINST ALIENS. It is not necessary, at common law, that any part of a grand jury finding a bill against an alien should be aliens.[1] Such, it has been determined, is also the rule in Pennsylvania.[2] The doctrine, that all the grand jurors should be inhabitants of the county for which they are sworn to inquire, admits, it would seem, of no modification.[3]

§ 1280. AS TO RECORD JURISDICTIONAL OBJECTIONS THERE MAY BE ARREST OF JUDGMENT. As we have already seen, objections to the grand jury, when such objections are not of record, must be taken before trial of the general issue; and in some states even record defects are cured by verdict.[1] It is otherwise, at common law, as to objections of record showing want of jurisdiction. In absence of statutory impediment, a motion in arrest may be entertained.[2]

2 Com. v. Thompson, 31 Va. (4 Leigh) 667, 26 Am. Dec. 339.

Plea in abatement, that the grand jurors who found the indictment were selected by the board of commissioners on the 6th of May, 1841, and that they had no authority to make the selection on that day, is bad, for not showing that the said 6th of May was not included in the May session of the board in that year.—State v. Newer, 7 Blackf. (Ind.) 307.

3 Infra, § 1304.

1 Hawk., b. 2, ch. 43, § 36.

2 Respublica v. Mesca, 1 U. S. (1 Dall.) 73, 1 L. Ed. 42.

3 Roll. Abr. 82; 2 Inst. 32, 33, 34; Hawk., b. 2, ch. 25.

1 Supra, § 1277; infra, § 1699.

2 State v. Harden, 2 Rich. L. (S. C.) 533. See, also, Floyd v. State, 30 Ala. 511; State v. Watson, 34 La. Ann. 669; State v. Connell, 49 Mo. 282; State v. Vahl, 20 Tex. 779.

Infra, § 1699.

Objection not taken before verdict, can not be taken on motion for new trial.—Potsdamer v. State, 17 Fla. 895.

But mere irregularities in summoning the jury can not be thus excepted to.[3]

Where the error is of record, its existence must be determined by inspection.[4]

V. INDICTMENT MUST BE SANCTIONED BY THE PROSECUTING ATTORNEY.

§ 1281. ORDINARILY BILL MUST BE SIGNED BY PROSECUTING OFFICER. It is essential to the validity of an indictment that it should be submitted to the grand jury by the prosecuting officer of the state;[1] and it is even said that his signature is necessary before such submission,[2] though the point has been doubted;[3] and in several jurisdictions it has been expressly decided that an indictment need not be so signed.[4] In any view, the name of the prosecuting officer need not appear in the body of the indictment.[5]

3 Supra, § 1277; United States v. Gale, 109 U. S. 65, 27 L. Ed. 857, 3 Sup. Ct. 1.

4 Smith v. State, 28 Miss. (14 Smed. & M.) 728.

1 McCullough v. Com., 67 Pa. St. 30; Com. v. Simons, 6 Phil. 167; Foote v. State, 4 Tenn. (3 Hayw.) 98; Hite v. State, 17 Tenn. (9 Yerg.) 198.

2 Ibid.; State v. Bruce, 77 Mo. 193; Teas v. State, 26 Tenn. (7 Humph.) 174.

3 Holley v. State, 75 Ala. 14; Cooper v. State, 63 Ga. 515; State v. Vincent, 4 N. C. (1 Car. Law Repos.) 493.

4 ALA.—Ward v. State, 22 Ala. 16; Harrall v. State, 26 Ala. 53. ARK.—Anderson v. State, 4 Ark. (5 Pike) 444. IDA.—People v. Butler, 1 Ida. 231. IOWA—State v. Ruby, 61 Iowa 86, 15 N. W. 848 (under statute); State v. Wilmoth, 63 Iowa 380, 19 N. W. 249. ME.—State v. Reed, 67 Me. 127. MISS.—Thomas v. State, 6 Miss. (5 How.) 20; Keithler v. State, 18 Miss. (10 Smed. & M.) 192. N. C.—State v. Mace, 86 N. C. 668. S. C.—State v. Colman, 8 S. C. 237. VT.—State v. Pratt, 54 Vt. 484. FED.—See United States v. McAvoy, 4 Blatchf. 418, Fed. Cas. No. 15654.

Contra: Jackson v. State, 4 Kan. 150.

5 State v. Pratt, 54 Vt. 484.

In Indiana it would seem now necessary that the bill should come to court signed by the prosecuting attorney. — Heacock v. State, 42 Ind. 393; though see McGregg v. State, 4 Blackf. (Ind.) 101.

In Texas, signature is unnecessary by statute. — Campbell v. State, 8 Tex. App. 84.

Mere formal variances in the title of the prosecuting officer, or abbreviations which can be explained by the record, will not be

§ 1282. NAME MAY BE SIGNED AFTER FINDING. Even where the signature is necessary, the prosecuting attorney will be ordinarily allowed, at any subsequent period when the objection is made, to sign an indictment found without his signature being appended thereto, and a motion to quash for want of such signature will then be overruled.[1]

§ 1283. PROSECUTING OFFICER'S SANCTION NECESSARY. The proceedings in bringing an indictment before the court must be conducted by the prosecuting attorney in person, even where the trial before court and jury may be conducted by other counsel.[1] The indictment being

regarded as affecting the validity of the signature. — Supra, §§ 322 et seq.; infra, § 1281. Also: CAL.—People v. Ashnauer, 47 Cal. 98. IND.—Vanderkarr v. State, 51 Ind. 91. KAN.—State v. Tannahill, 4 Kan. 117. MONT.—See Territory v. Harding, 6 Mont. 323. NEV.—State v. Salge, 2 Nev. 321. TENN.—State v. Brown, 27 Tenn. (8 Humph.) 89; State v. Evans, 27 Tenn. (8 Humph.) 110; Greenfield, v. State, 66 Tenn. (7 Baxt.) 18; State v. Myers, 85 Tenn. 203, 5 S. W. 377.

—A title in itself unknown to the laws will be fatal.—Teas v. State, 26 Tenn. (7 Humph.) 174.

Signature of the proper officer may be affixed by his authorized deputy or other official representative: CAL.—People v. Darr, 61 Cal. 588. IND.—Choen v. State, 85 Ind. 209; Stout v. State, 93 Ind. 150. KAN.—State v. Nulf, 15 Kan. 404. PA.—Com. v. McHale, 97 Pa. St. 397, 39 Am. Rep. 808. TEX.—State v. Gonzales, 26 Tex. 197. UTAH—People v. Lyman, 2 Utah 30. FED.—United States v. Nagle, 17 Blatch. 258, Fed. Cas. No. 15852.

Variance in name of prosecuting officer is not ground for reversal.—State v. Kinney, 81 Mo. 101.

—Nor will variance as to his title be material.—State v. Myers, 85 Tenn. 203, 5 S. W. 377.

1 Knight v. State, 84 Ind. 73; State v. Ruby, 61 Iowa 86, 15 N. W. 848; Com. v. Lenox, 2 Brewst. (Pa.) 249.

In Alabama indictments are not usually drawn until the evidence is heard by the grand jury, and the character of the case determined.—Banks v. State, 78 Ala. 14.

1 Infra, §§ 1488 et seq.; Byrd v. State, 2 Miss. (1 How.) 247; Rush v. Cavanaugh, 2 Pa. St. 187; Jarnagin v. State, 18 Tenn. (10 Yerg.) 529.

See Bemis' Webster Case, where this practice is reported to have been sustained.

Attorney-general may properly assist the circuit attorney at a trial for murder, whether ordered by the governor to do so or not, and the prisoner can not take just exception.—State v. Hays, 23 Mo. 287.

signed and preferred by the attorney-general, it will be presumed, in the absence of anything to the contrary, that an attorney-general pro tem., who conducted the trial, was properly appointed.[2]

VI. SUMMONING OF WITNESSES AND INDORSEMENT OF THEIR NAMES ON BILL.

§ 1284. WITNESSES FOR PROSECUTION TO BE BOUND TO APPEAR. In every case where there has been a previous examination and binding over, which, as has been seen, is the regular, and with a few guarded exceptions, the sole way of putting an offender on his trial, the prosecutor, if there be any, and the witnesses, are ordinarily put under recognizance to appear and testify. The practice is, immediately at the opening of the court, to call their names; and, in case of non-appearance, to secure their attendance by process. At common law, a justice of the peace, at the hearing of a criminal case, has power to bind over the witnesses, as well as the defendant, to appear at the next court, and in default of bail to commit them.[1] The presence of witnesses not under recognizance to attend is obtained by the ordinary means of a subpœna.[2]

§ 1285. NAMES OF WITNESSES USUALLY PLACED ON BILL. The practice is, for the prosecuting attorney, or, in England, the clerk of the assizes, to mark on the back of each bill the witnesses supporting it; though it has been held both in England and in this country that the omission to

2 Isham v. State, 33 Tenn. (1 Sneed.) 112 (a capital case). See, infra, § 1488.

In Pennsylvania, by the first section of the Act of May 3, 1850, providing for the election of district attorney, it is provided that the officer so elected shall sign all bills of indictment, and conduct in court all criminal or other prosecutions in the name of the commonwealth, which arise in the county for which he is elected.—Pamph. 1850, 654; Com. v. Lenox, 3 Brewst. (Pa.) 249.

1 2 Hale P. C. 52, 282; 3 M. & S. 1.

For cases, see 1 Whart. Crim. Ev. (Hilton's ed.), § 352.

2 See 1 Whart. Crim. Ev., (Hilton's ed.), § 345.

make such indorsement is not fatal.[1] Nor, even when required by statute, is the prosecution afterward pre-

[1] ARK.—State v. Scott, 25 Ark. 107; State v. Johnson, 33 Ark. 174. N. Y.—People v. Naughton, 7 Abbott Pr. N. S. 421, 38 How. Pr. 430. WYO. — Wyoming Ter. v. Anderson, 1 Wyo. Ter. 20. FED.—United States v. Shepard, 12 Int. Rev. Rec. 10, Fed. Cas. No. 16273.

In Arkansas, the name of the prosecutor need not be indorsed on a bill for passing counterfeit coin, that offense not being a trespass less than felony upon the person or property of another.—Gabe v. State, 1 Eng. (Ark.) 519.

In Illinois, under the statute, it is enough if the names are entered after that of the prosecuting attorney.—Scott v. People, 63 Ill. 508. See, as to practice, Andrews v. People, 117 Ill. 195, 7 N. E. 265.

In Iowa, witnesses testifying to immaterial facts need not be indorsed.—State v. Little, 42 Iowa 51; and see State v. Flynn, 42 Iowa 164.

In Iowa, it is said that although the names of the witnesses should be indorsed on the indictment, they need not be made a part of the record.—Harriman v. State, 2 G. Greene (Iowa) 270.

In Kentucky, it is held that the omission of the name of the prosecutor, his addition, and residence, in cases of trespass, is fatal.—Bartlett v. Humphreys, 3 Ky. (Hardin) 513; Com. v. Gore, 33 Ky. (3 Dana) 474.

In Massachusetts, such does not appear to be the course, it being usual for the grand jury to return generally the names of all the witnesses examined by them, without specifying the bills; but in a leading case, where the prisoner's counsel requested that a list of the witnesses before the grand jury should be given, the court granted the application without doubt, it being remarked by Wilde, J., that such a request had never been refused.—Com. v. Knapp, 26 Mass. (9 Pick.) 498, 20 Am. Dec. 491.

In Mississippi, though the want of the name of the prosecutor indorsed on the back of the bill is fatal (Peter v. State, 4 Miss. (3 How.) 433), it is not necessary that the grand jury should return, with the indictment, the names of the witnesses examined, or the evidence.—King v. State, 6 Miss. (5 How.) 730.

In Missouri, the name of the prosecutor is required to be indorsed upon an indictment for any trespass not amounting to a felony (Rev. Code, 1835, § 451), and under this statute the prosecutor's name must be indorsed upon an indictment for petty larceny (State v. Hurt, 7 Mo. 321), or riot.—State v. McCourtney, 6 Mo. 649; McWaters v. State, 10 Mo. 167.

—But it need only be indorsed in cases of trespass on the person or property of another (State v. Goss, 74 Mo. 592; see Lucy v. State, 8 Mo. 134); hence not on an indictment for a disturbance by making loud noises (State v. Moles, 9 Mo. 685), and it is a sufficient indorsement if the prosecutor's name be written on the face of the bill.—Williams v. State, 9 Mo. 270.

In Pennsylvania, the Act of 1705 provides that no person or persons shall be obliged to answer to any

cluded, in cases of surprise, from calling non-indorsed witnesses,[2] and, in some states, they can be indorsed on

indictment or presentment, unless the prosecutor's name be indorsed thereupon (1 Smith's Laws, 56), though it has been held by the supreme court that the act does not go so far as to require that a prosecutor should be indorsed in cases where no prosecutor exists. —Respublica v. Lukens, 1 U. S. (1 Dall.) 5, 1 L. Ed. 13.

It is further provided in Pennsylvania by the Revised Act of 1860, that "No person shall be required to answer to an indictment for any offense whatsoever, unless the prosecutor's name, if any there be, is indorsed thereon, and if no person shall avow himself the prosecutor, the court may hear witnesses, and determine whether there is such a private prosecutor, and if they shall be of opinion that there is such a prosecutor, then direct his name to be indorsed on such indictment."—§ 27, Bright. Supp. 1376.

—A similar provision exists in Virginia.—Com. v. Dever, 10 Leigh (Va.) 685.

In Tennessee, the name of the prosecutor must, by statute, be marked on the back of the bill, and an omission to do so need not be pleaded in abatement, but may be taken advantage of at any time. —Medaris v. State, 18 Tenn. (10 Yerg.) 239.

—Name of prosecutor need not be indorsed on the bill if the indictment be founded on a presentment.—State v. McCann, 19 Tenn. (1 Melgs) 91.

In Virginia, the usual practice is to indorse the names.—Haught v. Com., 4 Va. (2 Va. Cas.) 3; Com. v. Dove, 4 Va. (2 Va. Cas.) 29.

It is not there essential, however, in an indictment for a trespass or misdemeanor, to insert the name of a prosecutor, if it appears that the indictment was found on the evidence of a witness sent to the grand jury, either at their request, or by direction of the court, and that whether there was a previous presentment or not.—Wortham v. Com., 26 Va. (5 Rand.) 669.

In the United States courts it is not the practice, it is said, that the name of the prosecutor should be written on the indictment (United States v. Mundel, 6 Call. 245, Fed. Cas. No. 15834; United States v. Flamikin, Hemp. 30, Fed. Cas. No. 15119a; see State v. Lupton, (63 N. C. 483), though this depends on the local practice.

Spirit of the common law requires that the bill itself should afford the defendant the means of knowing who are the witnesses on whose evidence the accusation against him is based.—Arch. C. P. by Jervis, 13; Barbour's Cr. Treatise, 272.

Grand jury act irregularly in introducing witnesses without the action of the attorney general, the proper course is to move to quash. The irregularity can not be pleaded in bar.—Jillard v. Com., 26 Pa. St. 169.

Omission can not be taken advantage of after verdict.—Rodes v. State, 78 Tenn. (10 Lea) 414.

2 Bulliner v. People, 95 Ill. 394; see State v. Fowler, 52 Iowa 103,

the bill after finding, or even after trial has begun, if due notice is given.[3]

As a rule, it may be said that whenever by statute such an indorsement is required, its omission can be taken advantage of by motion to quash, demurrer, or plea in abatement.[4] But after verdict the objection, if it could have been previously taken, comes too late.[5]

VII. EVIDENCE.

§ 1286. WITNESSES MUST BE DULY SWORN. By the old practice, witnesses to be sent to the grand jury must be previously sworn in open court.[1] If a witness who is sent to a grand jury be thus sworn, though not in the imme-

2 N. W. 983; Hill v. People, 26 Mich. 496; State v. Pagels, 92 Mo. 300, 4 S. W. 931; State v. Leohr, 93 Mo. 103, 5 S. W. 695.

Prosecution is not required to call all the witnesses so indorsed, though they should be produced in court, as will be hereafter seen. See, infra, § 1500.

3 People v. Hall, 48 Mich. 482, 42 Am. Rep. 477, 12 N. W. 665; State v. Cook, 30 Kan. 82, 1 Pac. 32; State v. Teissedre, 30 Kan. 210, 476, 2 Pac. 108, 650.

4 FLA.—Towle v. State, 3 Fla. 262. KY.—Com. v. Gore, 33 Ky. (3 Dana) 474. MICH.—People v. Quick, 58 Mich. 321, 25 N. W. 302. MISS.—King v. State, 6 Miss. (5 How.) 730; Moore v. State, 21 Miss. (13 Smed. & M.) 259. MO.—State v. Courtney, 6 Mo. 649; McWaters v. State, 10 Mo. 167; State v. Joiner, 19 Mo. 224; State v. Roy, 83 Mo. 268. TENN.—Medaris v. State, 18 Tenn. (10 Yerg.) 239, and cases cited above.

Contra: State v. Hughes, 1 Ala. 655.

In California it is said that a misnomer of a witness is ground for quashing. — Kalloch v. San Francisco Court, 56 Cal. 229.

In Pennsylvania, as has been seen, the objection can not be taken after verdict. — Jillard v. Com., 26 Pa. St. 169; S. P., Hayden v. Com., 49 Ky. (10 B. Mon.) 125.

In Tennessee, if the only witness indorsed is incompetent, the indictment is defective.—State v. Tankersly, 74 Tenn. (6 Lea) 582.

See, infra, § 1291.

5 State v. Wilkinson, 76 Me. 317; Skipworth v. State, 8 Tex. App. 135.

1 Harriman v. State, 2 G. Greene (Iowa) 270.

In South Carolina, so.—State v. Kilcrease, 6 Rich. L. (S. C.) 444.

In England, the omission is fatal.—Middlesex Commis., 6 Car. & P. 90, 25 Eng. C. L. 336.

When the record avers a swearing this will be presumed to be regular. See Lumpkin v. State, 68 Ala. 56.

diate presence of the judge, or even in his momentary absence from the bench, it is good.[2] In Connecticut, witnesses before a grand jury, according to settled and uniform practice, are sworn by a magistrate, in the grand jury room, and not in the court; and this is pronounced a lawful mode of administering the oath.[3] In the United States Circuit Courts, the practice has been to summon a justice of the peace as one of the grand jury, and permit him to swear the witnesses in the jury room.[4] In many of the states power is given to the foreman to swear witnesses whose names are given to him by the prosecuting officer.[5] This power, however, may be viewed as cumulative, not doing away with the right to swear in open court.[6]

§ 1287. DEFECTS IN THIS RESPECT MAY BE MET BY PLEA. In England, it has been held that a conviction will not be shaken, although the bill was found on illegal testimony, if on the trial the evidence against the prisoner is sufficient; and in a case where it appeared the witnesses before the grand jury had not been sworn at all, the twelve judges held that the objection, as raised in arrest of judgment, should be overruled,[1] but at the same time unanimously made application for a pardon, recognizing, in fact, the irregularity of the finding, though regarding the plea as a waiver of the technical error. In this coun-

2 Jetton v. State, 19 Tenn. (1 Meigs) 192.

3 State v. Fassett, 16 Conn. 457.

4 7 Smith's Laws 686.

5 See Bird v. State, 50 Ga. 585; Allen v. State, 77 Ill. 484.

In Pennsylvania, by the Act of April 5, 1826, as incorporated in the revised Act of 1860, the foreman of the grand jury, or any member thereof, is authorized to administer the oath to witnesses It will be observed, however, that in the latter state the authority is expressly limited to such witnesses "whose names are marked by the attorney-general on the bill of indictment"; and, consequently, all others must be sworn in open court. See Jillard v. Com., 26 Pa. St. 169.

Contra: Ayers v. State, 45 Tenn. (5 Cold.) 26.

6 State v. Allen, 83 N. C. 680; State v. White, 88 N. C. 698.

1 R. v. Dickinson, Russ. & R. C. C. 401.

try it has been several times determined that a motion in arrest of judgment can not be sustained on the ground that it does not appear from the indorsement on the indictment that the witnesses were sworn before they were sent to the grand jury; for the judgment can be arrested only for matter appearing, or for the omission of some matter which ought to appear, on the record; and such indorsements form no part of the bill.[2] But where the objection is taken before plea, on a motion to quash, it has in England been sustained.[3] It is true that the English practice has varied, and that afterwards it was declared that it would be improper for a court to inquire whether the witnesses were regularly sworn, as the grand jury, supposing such may not have been the case, were competent to have found the bill on their own knowledge;[4] but this limitation has not been always applied in England,[5] and has not been recognized in this country. Thus, where an irregularity was shown in the swearing, Story, J., exclaimed, with great emphasis, that if such irregularities were allowed to creep into the practice of grand juries, the great object of their institution was destroyed.[6] Where a defendant was called before a grand jury, and required to testify on a prosecution against himself, the indictment found on such testimony was properly quashed.[7] And in a case in North Carolina, the law was pushed still further, it being held that where a bill was found on the information of one of their own body, it

2 MISS.—King v. State, 6 Miss. (5 How.) 730. N. C.—State v. McEntire, 4 N. C. (1 Car. Law Repos.) 287; State v. Roberts, 19 N. C. (2 Dev. & B. L.) 540; State v. Sheppard, 97 N. C. 401, 1 S. E. 879. PA.—See Jillard v. Com., 26 Pa. St. 169. TENN.—Gilman v. State, 20 Tenn. (1 Humph.) 59.

3 Middlesex Commis., 6 Car. & P. 90, 25 Eng. C. L. 336.

4 State v. Hatfield, 40 Tenn. (3 Head) 231; R. v. Russell, 1 Carr. & M. 247, 41 Eng. C. L. 139.

5 R. v. Dickinson, R. & R. 401. See Middlesex Commis., 6 Car. & P. 90, 25 Eng. C. L. 336.

6 United States v. Coolidge, 2 Gall. 364, Fed. Cas. No. 14858. Infra, § 1291.

7 State v. Froiseth, 16 Minn. 296. Infra, § 1291.

was essential that the prosecuting juror should be regularly sworn, and so noted.[8] But a bill will not be quashed when supported by one competent witness.[9]

§ 1288. EVIDENCE CONFINED TO THE PROSECUTION. The question before the grand jury being whether a bill is to be found, the general rule is that they should hear no other evidence but that adduced by the prosecution.[1] The practice, however, is, that as they are sworn to "inquire," they may, if the case of the prosecution appear imperfect, call for such witnesses as the evidence they have already heard indicates as necessary to make out the charge.[2] Under such a suggestion, it would become the duty of the prosecuting officer to cause the requisite witnesses to be summoned; and it is his duty in any view to bring before the grand jury all competent witnesses to the res gestæ.[3] But it is not the usage to introduce, in matters of confession and avoidance, witnesses for the defense, unless their testimony becomes incidentally necessary to the prosecution.[4]

§ 1289. PROBABLE CAUSE ENOUGH. The question was in former times much considered whether the sole inquiry of a grand juror should not be whether sufficient ground has been adduced by the prosecution to require a defend-

8 State v. Cain, 8 N. C. (1 Hawks) 352.

9 Washington v. State, 63 Ala. 189.

Due swearing of witness presumed.—United States v. Murphy, 1 McArth. & Mac. (D. C.) 375, 48 Am. Rep. 754; Hope v. People, 83 N. Y. 418, 38 Am. Rep. 460.

1 United States v. Palmer, 2 Cr. 11, Fed. Cas. No. 15989; United States v. Lawrence, 4 Cr. 514, Fed. Cas. No. 15576.

2 1 Chitty C. L. 318. See Dickenson's Quar. Ses. 174, 175.

3 Infra, § 1500.

4 Supra, §§ 112-114; 1 B. & C. 37, 51; 3 B. & A. 432; 1 Chit. Rep. 214; Addison's Charges, 42; Respublica v. Schaeffer, 1 U. S. (1 Dall.) 236, 1 L. Ed. 116; United States v. Blodgett, 35 Ga. 336, Fed. Cas. No. 14611, Fed. Cas. No. 18312; United States v. Palmer, 2 Cr. 11, Fed. Cas. No. 15989; United States v. White, 2 Wash. 29, Fed. Cas. No. 16685.

See, infra, §§ 1289, 1290.

ant to account for himself on a public trial. On the one hand, it has been laid down by high authority that the inquest, as far as in them lies, should be satisfied of the guilt of a defendant,[1] and Judge Wilson, in examining the position that a prima facie case is all that is necessary for a grand juror's purpose, remarked, "It is a doctrine which may be applied to countenance and promote the vilest and most oppressive purposes; it may be used, in pernicious rotation, as a snare in which the innocent may be entrapped, and as a screen under cover of which the guilty may escape."[2] The same position is taken by Professor J. A. G. Davis, in his elaborate examination of criminal law in Virginia.[3] Sir E. Coke, far more humane in the study than on the bench, in speaking of the reign of Edward I, said: "In those days (as yet it ought to be) indictments taken in the absence of the party, were formed on plain and direct proof, and not upon probabilities and inferences."[4] Such, also, was the standard adopted by the first learned editor of the laws of Pennsylvania,[5] of Mr. Daniel Davis, for many years solicitor general of Massachusetts, to whose excellent treatise on grand juries allusion has more than once been made,[6] and of the first Judge Hopkinson, so far as a tract published by him anonymously, but afterwards avowed, may be taken as an index of his views.[7] And this rule has been adopted by statute in California,[8] and has been accepted by Field, J., in the practice of the Federal Circuit Court in that state.[9]

1 4 St. Tr. 183; 4 Bl. Com. 303; Lord Somers on Grand Juries, etc.; People v. Hyler, 2 Park. Cr. Rep. (N. Y.) 570.

This question is examined in relation to the duty of committing magistrates, supra, §§ 112-114.

2 2 Wilson's Works 365.

3 Davis' C. L. in Va. 426.

4 2 Inst. 384. For a specimen of the style in which Coke procured convictions by smuggling in hearsay and declarations of third parties, see Amos' Great Oyer.

5 Smith's Laws, vol. 7, p. 687.

6 Davis' Prec. 25. See, also, 1 Chit. Cr. L. 318.

7 1 Hopkinson's Works 194.

8 People v. Tinder, 19 Cal. 539, 81 Am. Dec. 77.

9 See Treason Cases, Pamphlet, 28; 2 Sawyer 660-7.

§ 1290. —— Sir Matthew Hale's view, and others. On the other hand, it is said by Sir Matthew Hale that "in case there be *probable* evidence, the grand jury ought to find the bill, because it is but an accusation, and the party is put on his trial afterwards,"[1] and such is the conclusion we may draw from the initiatory proceedings before magistrates.[2] The arguments which lead to such a position were recapitulated with great force by McKean, C. J., in an early charge to a grand jury in Pennsylvania; where he said, among other things, on the question whether witnesses for the defense should be called, that "by the law it is declared that no man should be twice put in jeopardy for the same offense; and yet it is certain that the inquiry now proposed by the grand jury would necessarily introduce the oppression of a double trial.[3] Nor is it merely upon maxims of law, but, I think, likewise upon principles of humanity, that this innovation should be opposed. Considering the bill as an accusation grounded entirely on the testimony in support of the prosecution, the petit jury receive no bias from the sanction which the indorsement of the grand jury has conferred upon it. But, on the other hand, would it not, in some degree, prejudice the most upright mind against the defendant, that on a full hearing of his defense, another tribunal had pronounced it insufficient, which would then be the natural inference from every true bill? Upon the whole, the court is of opinion that it would be improper and illegal to examine the witnesses, on behalf of the defendant, while the charge against him lies before the grand jury." Upon one of the grand inquest remarking, that "there was a clause in the qualification of the jurors, upon which he and some of his brethren wished to hear the interpretation of the judges, to wit: What

1 2 Hale P. C. 157. See, supra, § 114; and see, to same effect, R. v. Hodges, 8 Car. & P. 195, 34 Eng. C. L. 686.

2 Supra, § 114.

3 See, supra, § 114.

is the legal acceptance of the words 'diligently inquire'?" The chief justice replied that "the expression meant, diligently to inquire into the circumstances of the charge, the credibility of the witnesses who support it, and from the whole to judge whether the person accused ought to be put upon his trial. For," he added, "though it would be improper to determine the merits of the cause, it is incumbent upon the grand jury to satisfy their minds, by a diligent inquiry, that there is a probable ground for the accusation, before they give it their authority, and call upon the defendant to make a public defense."[4] This view derives much countenance from the English rule, that a grand jury has no authority by law to ignore a bill for murder on the ground of insanity, though it appear plainly from the testimony of the witnesses, as examined by them on the part of the prosecution, that the accused was in fact insane; but that if they believe the acts done, if they had been done by a person of sound mind, would have amounted to murder, it is their duty to find the bill.[5]

§ 1291. LEGAL PROOF ONLY TO BE RECEIVED. Grand jurors are bound to take the best legal proof of which the case

[4] ALA.—Sparrenberger v. State, 53 Ala. 481, 25 Am. Rep. 643. KY.—Parker v. Com., 75 Ky. (12 Bush) 191. MO.—Spratt v. State, 8 Mo. 247. N. Y.—People v. Hyler, 2 Park. Cr. Rep. 570. S. C.—State v. Boyd, 2 Hill L. 288, 27 Am. Dec. 376. TENN.—State v. Cowan, 38 Tenn. (1 Head) 280. FED.—United States v. Blodgett, 35 Ga. 336, Fed. Cas. No. 14611, Fed. Cas. No. 18312; Respublica v. Schaeffer, 1 U. S. (1 Dall.) 237, 1 L. Ed. 116.

See Judge Addison's remarks, Addison's Charges 39.

[5] R. v. Hodges, 8 Car. & P. 195, 34 Eng. C. L. 686.

In Connecticut, such was the course taken in 1879, in State v. Lounsbury, a case in which the wife of a clergyman, in an insane paroxysm, killed him by a pistol shot. The grand jury found the bill for murder in the first degree, on evidence on which the prosecuting officers afterwards advised an acquittal. The evidence made a prima facie case of guilt, and the bill was therefore properly found; but this case was one on which no conviction could be based, and on which an acquittal was proper. In no other way could the defendant be protected from subsequent prosecutions, and the case exhibited in such a way as to satisfy the public sense of justice.

admits; and it is the duty of the prosecuting officer of the state to take care that no evidence is submitted to them which would not be admissible at trial.[1] It is impossible, however, to impose on such a body the technical limitations which are only insisted on by courts when required by counsel; and the inquiries of grand jurors, therefore, are analogous more to the examinations of courts sitting without juries than of courts sitting with juries.[2] Hence it has been held that an accomplice, even though uncorroborated, is adequate to the finding of a bill, though he may have been taken from prison by an order altogether surreptitious and illegal.[3] It seems, however, that if a bill is found solely on incompetent testimony it will be quashed before plea, though the objection will be too late after conviction.[4] And so, in a case already noticed, where a defendant was compelled to testify against himself.[5]

On the other hand, the fact that one of several witnesses, who testified to an offense before the grand jury, was incompetent, is not sufficient to sustain a plea in abatement to the indictment, since it is impossible to show that an indictment was found on the testimony of one wit-

1 1 Leach 514; 2 Hawk., ch. 25, §§ 138, 139; Davis' Precedents 25; 1 Chitty Cr. L. 318; United States v. Reed, 2 Blatchf. 435, Fed. Cas. No. 16134; R. v. Willett, 6 T. R. 294.

2 Mere reception of some evidence that was incompetent does not avoid the finding. — Jones v. State, 81 Ala. 79; State v. Fassett, 16 Conn. 457; State v. Wolcott, 21 Conn. 272; State v. Fulker, 20 Iowa 509; Turk v. State, 7 Ohio (Pt. II) 242; State v. Boyd, 2 Hill L. (S. C.) 509.

3 R. v. Dodd, 1 Leach 155.

4 2 Hawk., ch. 25, § 145, in notis. See: IOWA—State v. Huston, 50 Iowa 512. MASS.—Com. v. Knapp, 26 Mass. (9 Pick.) 496, 20 Am. Dec. 491. N. Y.—People v. Naughton, 7 Abb. Pr. N. S. 421, 38 How. Pr. 430; People v. Briggs, 60 How. Pr. 17; People v. Moore, 65 How. Pr. 177. N. C. — State v. Fellows, 3 N. C. (2 Hayw.) 340; State v. Cain, 8 N. C. (1 Hawks) 352. TENN.— See State v. Tankersly, 74 Tenn. (6 Lea) 582 (cited, supra, § 1285). FED. — United States v. Farrington, 5 Fed. 343.

5 State v. Froiseth, 16 Minn. 296; see People v. Singer, 18 Abb. (N. Y.) N. C. 96, 5 N. Y. Cr. Rep. 1. Supra, §§ 1287, 1288.

ness alone.[6] And as a general rule, the court will not inquire into the sufficiency or technical admissibility of the evidence before the grand jury.[7] How far jurors may be examined to impeach their finding is hereafter considered.[8]

The practice where there has been irregularity in swearing of witnesses has been already discussed.[9]

§ 1292. GRAND JURY MAY ASK ADVICE OF COURT. The grand jury, if they have any doubts as to the propriety of admitting any part of the evidence submitted to them, may pray the advice of the court to which they are attached;[1] though it is usual to apply to the counsel of the state, who is bound to be at hand, and ready to communicate to them any information that may be required.[2]

§ 1293. NEW BILL MAY BE FOUND ON OLD TESTIMONY. Where a bill has been withdrawn or quashed, a new bill may be found as a substitute, by the same grand jury, without examining witnesses.[1]

VIII. POWERS OF PROSECUTING ATTORNEY.

§ 1294. PROSECUTING OFFICER USUALLY ATTENDS DURING EVIDENCE. In England, as a general rule, the clerk of the

6 State v. Tucker, 20 Iowa 508; Bloomer v. State, 35 Tenn. (3 Sneed) 66; supra, §§ 1287, 1288.

7 IOWA — Fowler v. State, 52 Iowa 103, 2 N. W. 983. MISS.—Smith v. State, 61 Miss. 754. NEV.—State v. Logan, 1 Nev. 509. N. J.—State v. Dayton, 23 N. J. L. (3 Zab.) 49, 53 Am. Dec. 270. N. Y.—People v. Hulbert, 4 Den. 133, 47 Am. Dec. 244; Hope v. People, 83 N. Y. 418, 38 Am. Rep. 460. OHIO — Turk v. State, 7 Ohio (Pt. II) 240. TEX.—Terry v. State, 15 Tex. App. 66. WIS.—State v. Cole, 19 Wis. 129, 88 Am. Dec. 678. FED.—United States v. Reed, 2 Blatchf. 435, Fed. Cas. No. 16134.

8 Infra, § 1307.

9 Supra, §§ 1287, 1288.

1 Dalton, J., ch. 185, § 9; 4 Bl. Com. 303, n. 1; 2 Hale 159, 160.

As to their sitting in open court, under direction of the judges, see 5 St. Tr. 771; 3 Camp. 337.

2 Davis' Precedents 21; 7 Cowen 563; Davis' Virg. Crim. Law 425; Lung's Case, 1 Conn. 428; Kel. 8; 1 Chitty Cr. L. 816.

1 IOWA — State v. Clapper, 59 Iowa 279, 13 N. W. 294. MASS.—Com. v. Woods, 76 Mass. (10 Gray) 477. NEV.—State v. Logan, 1 Nev. 509. TEX.—Steel v. State, 1 Tex. 142; infra, § 1300.

assizes is the attendant of the grand jury, and is expected not only to aid them in their examination of evidence, but to place before them each several item of business as it successively arises, retiring when they proceed to their deliberations.[1] In those cases which by the old practice were under the control of private prosecutors, such prosecutors were sometimes permitted to present their cases to the grand jury. This, however, was at the grand jury's option, to be exercised where a case of difficulty requires the marshalling of evidence or the leading of unwilling witnesses.[2] In state prosecutions the attorney-general, or his representative, was sometimes, on special invitation, and by permission of the court, in attendance for the presentation of evidence; but this was at the election of the jury, and was sometimes refused.[3] The practice in Massachusetts, as stated by Mr. Davis, is for the officer having charge of the preparation of the indictments to attend the grand jury, to open each particular case as it arises, to commence the examination of each witness, and to meet any question as to the law of the case which may be given to him. But it is his duty, "during the discussion of the question to remain perfectly silent, unless his advice or opinion in a matter of law is requested. The least attempt to influence the grand jury in their decision upon the effect of the evidence is an unjustifiable interference, and no fair and honorable officer will ever be guilty of it. It is very common, however, for some one of the grand jury to request the opinion of the public prosecutor as to the propriety of finding the bill. But it is his duty to decline giving it, or even any intimation on the subject; but in all cases to leave the grand jury to decide independently for them-

1 1 Chitty Cr. L. 816; R. v. Hughes, 1 Car. & K. 519, 526, 47 Eng. C. L. 518, 525, where it is held also that a police officer may be stationed in the room.

2 4 Bl. Com. 126, note by Christian; Dick. Q. S., 6th ed., 1837.

3 R. v. Crossfield, 8 How. St. Tr. 773, note.

selves. It may be thought that this is too great a degree of refinement in official duty. But the experience of thirty years furnishes an answer most honorable to the intelligence and integrity of that body of citizens from which the grand jury are selected; and that is, that they almost universally decide correctly."[4]

This is the uniform practice in Pennsylvania. In the United States courts the same practice obtains,[5] and is thus stated by Justice Field in a charge delivered to a California grand jury in August, 1872:[6] "The district attorney has the right to be present at the taking of testimony before you for the purpose of giving information or advice touching any matter cognizable by you, and may interrogate witnesses before you, but he has no right to be present pending your deliberations on the evidence. When your vote is taken upon the question whether an indictment shall be found or a presentment made, no person beside yourselves should be present."[7] The privilege of attendance should be strictly limited to the prosecuting officer officially clothed with this high trust, and to his permanent deputies,[8] and not extended to mere temporary assistants; and indictments have been properly quashed when attorneys temporarily representing the prosecuting authorities entered the room of the grand jury when they were deliberating as to the bill, and advised them as to their action.[9] It is proper in this connection to keep in mind the fact, already noticed,[10] that the

4 Davis' Precedent 21. See, also, M'Lellan v. Richardson, 13 Me. 82, where it appears that the same usage exists in Maine.

5 United States v. Reed, 2 Blatch. 435, 455, Fed. Cas. No. 16134.

6 See Pamph. Rep. 9 et seq.; 2 Sawyer 663-7.

7 See, to same effect, United States v. Schumann, 7 Sawy. C. C. 439, Fed. Cas. No. 16235, where, however, it is said that he can not prevent an investigation by saying the government will not prosecute the case. Infra, § 383.

8 See Shattuck v. State, 11 Ind. 473; Crittenden, Ex parte, Hemp. 176, Fed. Cas. No. 3393a.

9 Durr v. State, 53 Miss. 425; State v. Addison, 2 S. C. 356; United States v. Kilpatrick, 16 Fed. 765.

10 Supra, § 1265.

only valid basis on which the institution of grand juries rests is that they are an independent and impartial tribunal between the prosecution and the accused; and it is the duty of the courts to refuse to tolerate any practice which conflicts with this independence and impartiality. The rule in the text was disastrously departed from in the Star Route cases, tried in Washington in 1883-4, in which private counsel, appointed to assist the district attorney, were permitted to advise the grand jury during their deliberations. The consequences of this course, however, have not been such as to encourage its adoption in other cases. And in any view, the presence of counsel for the prosecution, public or private, during the deliberations of the jury, should be ground for quashing the bill, unless it appear that there was no interference by such counsel in any degree with the freedom of such deliberations.[11] The purpose of the institution of grand juries was, as we have seen, to interpose a check upon the sovereign; and they would cease to answer this purpose, and would increase the danger they were intended to avert, if they should be put under the official direction of the prosecuting authorities of the state.[12]

§ 1295. DEFENDANT AND OTHERS NOT ENTITLED TO ATTEND. In England, and in the courts of each of the several states, neither the defendant, nor any person representing him, is permitted to attend the examination of the grand jury.[1]

11 **Charge of Field, J.,** ut sup. See: CONN.—Lung's Case, 1 Conn. 428. IOWA—State v. Kimball, 29 Iowa 267. N. C.—Lewis v. Wake Co., 74 N. C. 194. S. C.—State v. Addison, 2 S. C. 356. TEX.—State v. McNinch, 12 S. C. 89, 95; Rothschild v. State, 7 Tex. App. 519.

Compare: Shattuck v. State, 11 Ind. 473.

12 The reader is referred to an excellent article on this topic by Mr. Merriam in 16 West. Jurist (January, 1882), pp. 1 et seq.

1 1 B. & C. 37, 51; 3 B. & A. 432; 1 Ch. R. 217; 1 Ch. C. L. 317. CONN.—State v. Fassett, 16 Conn. 458; State v. Hamlin, 47 Conn. 95, 36 Am. Rep. 54, modifying Lung's Case, 1 Conn. 428. PA.—McCullough v. Com., 67 Pa. St. 30; Com. v. Simons, 6 Phil. 167. FED.—United States v. Blodgett, 35 Ga. 336, Fed. Cas. No. 14611, Fed. Cas.

And Judge King, in an opinion marked with his usual good sense, held that the sending of an unofficial volunteer communication to the grand jury, inviting them to start on their own authority a prosecution, is a contempt of court, and a misdemeanor at common law.[2] Any vol-

No. 18312; United States v. Palmer, 2 Cr. 11, Fed. Cas. No. 15989; supra, § 1264.

Compare: State v. Whitney, 7 Ore. 386.

2 Com. v. Crans, 3 Penn. L. J. 443. Infra, § 1309.

Judge Field's remarks: "There has hardly been a session," said Justice Field, of the Supreme Court of the United States, in addressing a grand jury in California in 1872 (Pamph. Rep. 2 Sawyer 663-7), "of the grand jury of this court for years, at which instances have not occurred of personal solicitation to some of its members to obtain or prevent the presentment or indictment of parties. And communications to that end have frequently been addressed to the grand jury, filled with malignant and scandalous imputations upon the conduct and acts of those against whom the writers entertained hostility, and against the conduct and acts of former and present officers of this court, and of previous grand juries of this district.

"All such communications were calculated to prevent and obstruct the due administration of justice, and to bring the proceedings of the grand jury into contempt. 'Let any reflecting man,' says a distinguished judge, 'be he layman or lawyer, consider of the consequences which would follow, if every individual could, at his pleasure, throw his malice or his prejudice into the grand jury room, and he will, of necessity, conclude that the rule of law which forbids all communication with grand juries, engaged in criminal investigations, except through the public instructions of courts and the testimony of sworn witnesses, is a rule of safety to the community. What value could be attached to the doings of a tribunal so to be approached and influenced? How long would a body, so exposed to be misled and abused, be recognized by freemen as among the chosen ministers of liberty and security? The recognition of such a mode of reaching grand juries would introduce a flood of evils, disastrous to the purity of the administration of criminal justice, and subversive of all public confidence in the action of these bodies.'—Judge King, in Commonwealth v. Crans, in 3 Pa. Law Jour, pp. 459-464."

"Eaves-dropping" on a grand jury is said to be indictable at common law.—State v. Pennington, 40 Tenn. (3 Head) 299, 75 Am. Dec. 771.

By an act of Congress, passed in 1872, such solicitations are indictable.—Infra, §§ 1664, 1912.

In New York, such appeal to a grand jury is, under statute, only a contempt when marked by contemptuous action to the court in its presence.—Bergh's Case, 16 Abb. Pr. N. S. (N. Y.) 266.

unteer attendance is by the same rule subject to the same law.[3]

In Maine, it is said that the presence of a stranger does not vitiate an indictment if he does not interfere,[4] but the better opinion is that such presence is ground for quashing a bill,[5] and, when shown on record, has been held ground for arrest of judgment.[6]

IX. FINDING AND ATTESTING OF BILL.

§ 1296. TWELVE MUST CONCUR IN BILL. The examination being over, it becomes the duty of the grand jury to pass upon the bill; and unless twelve of their number agree to find a true bill,[1] the return is "ignoramus," or, as is more commonly the case, "ignored," or "not found." If the finding be by less than twelve, the indictment may be quashed by motion made before plea.[2] The objection can not, it has been said, be taken advantage of by plea in abatement.[3]

§ 1297. FOREMAN USUALLY ATTESTS THE BILL. In those states in which it is the practice for indictments to be prepared complete by the prosecuting attorney and submitted as such to the grand jury for their action, the assent of the grand jury is signified by the indorsing on the bill of the words "true bill," with the foreman's name attached, while an ignoring of the bill is signified

3 McCullough v. Com., 67 Pa. St. 30. See United States v. Farrington, 2 Cr. L. Mag. 525, 5 Fed. 343.

4 State v. Clough, 49 Me. 573.

5 Com. v. Dorwart, 7 Luz. Bar 121.

6 State v. Watson, 34 La. Ann. 669. But see State v. Justus, 11 Ore. 17, 8 Pac. 337.

1 Sayer's Case, 35 Va. (8 Leigh) 722.

As to United States courts, see, supra, § 1266.

If twelve jurymen are present and concur, the absence of others is not ground for exception.—People v. Hunter, 54 Cal. 65. See State v. Brainerd, 56 Vt. 532, 48 Am. Rep. 818.

2 People v. Shattuck, 6 Abb. (N. Y.) N. C. 33.

As to whether juror may be examined to this, see, infra, § 1307.

3 State v. Hamlin, 47 Conn. 95, 36 Am. Rep. 54.

by indorsing of the word "ignoramus," with the foreman's name attached. When this is the practice, or when the foreman's signature is required by statute, the omission of the words "true bill" with the foreman's name, is fatal if the objection is made before verdict.[1] The omission, however, of the word "true" before "bill" has been held not fatal.[2] Nor, a fortiori, are clerical mistakes in the indorsement,[3] and in any view exceptions of this class must be taken before verdict.[4] In some states the signature of the foreman is held sufficient without any other indorsement,[5] even though the title "foreman" be left out.[6]

1 1 Ch. C. L. 324; Archibald's C. P. by Jervis 39. See: ALA.—Garraway v. State, 23 Ala. 772. FLA.—Alden v. State, 18 Fla. 187; Tilley v. State, 21 Fla. 242. ILL.—Nomague v. People, 1 Ill. (Breese) 109; Gardner v. People, 4 Ill. (3 Scam.) 83. IND.—Johnson v. State, 23 Ind. 32; Cooper v. State, 79 Ind. 206; Strange v. State, 110 Ind. 354, 11 N. E. 357. IOWA—Wankon-Chaw-Neck v. United States, 1 Morris 332; Harriman v. State, 2 G. Greene 270. KY.—Com. v. Walters, 36 Ky. (6 Dana) 290. LA.—State v. Onnmacht, 10 La. 198; State v. Morrison, 30 La. Ann. (Pt. II) 817. ME.—State v. Webster, 5 Me. (5 Greenl.) 373. MASS.—Com. v. Hamilton, 81 Mass. (15 Gray) 480; Com. v. Gleason, 110 Mass. 66; Com. v. Sargent, Thatch. C. C. 116. MISS.—Smith v. State, 28 Miss. 728. MO.—Spratt v. State, 8 Mo. 247; McDonald v. State, 8 Mo. 283. PA.—Hopkins v. Com., 50 Pa. St. 9, 88 Am. Dec. 518. TENN.—State v. Elkins, 19 Tenn. (Meigs) 109; Bennett v. State, 27 Tenn. (8 Humph.) 118. VT.—State v. Davidson, 12 Vt. 300.

Objection is too late after verdict.—Benson v. State, 68 Ala. 544; People v. Johnston, 48 Cal. 549; Weaver v. State, 19 Tex. App. 547, 53 Am. Rep. 389.

2 State v. Mertens, 14 Mo. 94; Sparks v. Com., 9 Pa. St. 354.

3 State v. Chandler, 9 N. C. (2 Hawks) 439; White v. Com., 70 Va. (29 Gratt.) 294.

4 Cooper v. State, 79 Ind. 206; Com. v. Betton, 59 Mass. (5 Cush.) 427; Burgess v. Com., 4 Va. (2 Va. Cas.) 483.

5 IND.—State v. Heaton, 95 Ind. 773; State v. Bowman, 103 Ind. 69, 2 N. E. 289. IOWA—State v. Axt, 6 Iowa 511. MASS.—Com. v. Smyth, 65 Mass. (11 Cush.) 473. MINN.—State v. McCartney, 17 Minn. 76. N. H.—State v. Freeman, 13 N. H. 488. N. Y.—Brotherton v. People, 75 N. Y. 159, 2 Cow. Cr. Rep. 520, affirming 14 Hun 486. N. C.—State v. Chandler, 9 N. C. (2 Hawks) 539. VA.—Price v. Com., 62 Va. (21 Gratt.) 846; White v. Com., 70 Va. (29 Gratt.) 824.

6 GA.—McGuffle v. State, 17 Ga. 497. IND.—Walls v. State, 23 Ind. 150; Wassels v. State, 26 Ind. 30.

In those states, on the other hand, in which the action of the grand jury approving of the principle of a bill is prior to the presentation of the bill to them, then the attestation of the foreman is not the primary proof of approval, and may be omitted.[7] In other states the practice has grown up, there being no statutory prescription, of treating the formal return of the bill into court as a "true bill" as a sufficient verification of its finding.[8]

§ 1298. BILL TO BE BROUGHT INTO COURT. When the bill has been verified, it is brought publicly into court, and the clerk of the court calls all the jurymen by name, who sev-

N. C.—State v. Chandler, 9 N. C. (2 Hawks) 439. VT.—State v. Brown, 31 Vt. 603.

Foreman may sign through a clerk.—See Benson v. State, 68 Ala. 544.

Foreman pro tem. will be held to be duly appointed.—State v. Collins, 65 Tenn. (6 Baxt.) 151.

Indorsement of the foreman's name, followed by filing, is sufficient evidence of finding.—See Hubbard v. State, 72 Ala. 164; State v. Gouge, 80 Tenn. (12 Lea) 132.

Name may be omitted. — See State v. Sopher, 35 La. Ann. 976.

Signature by initials is enough.—See State v. Taggart, 38 Me. 338; Com. v. Hamilton, 81 Mass. (15 Gray) 480; Com. v. Gleason, 110 Mass. 66.

Surplusage will be disregarded.—See Thompson v. Com., 61 Va. (20 Gratt.) 724.

"True bill" is enough if copied into the transcript immediately after the indictment.—Green v. State, 79 Ind. 537.

Variances in the foreman's name are not fatal.—State v. Stedman, 7 Port. (Ala.) 496; Jackson v. State, 74 Ala. 557; State v. Collins, 14 N. C. (3 Dev.) 117; State v. Calhoun, 18 N. C. (1 Dev. & B.) 374.

[7] See State v. Magrath, 44 N. J. L. (15 Vr.) 227; State v. Creighton, 1 N. & McC. (S. C.) 256.

[8] CAL.—People v. Roberts, 6 Cal. 214. FLA.—Cherry v. State, 6 Fla. 479, 63 Am. Dec. 217. KY.—Com. v. Walter, 36 Ky. (6 Dana) 290. LA.—State v. Tinney, 26 La. Ann. 460. MINN.—State v. Shippey, 10 Minn. 223, 88 Am. Dec. 70. N. H.—State v. Freeman, 13 N. H. 488. N. J.—State v. Magrath, 44 N. J. L. (15 Vr.) 227. N. Y.—Brotherton v. People, 75 N. Y. 159, 2 Cow. Cr. Rep. 520, affirming 14 Hun 486. N. C.—State v. Cox, 28 N. C. (6 Ired.) 440. S. C.—State v. Creighton, 1 Nott. & McC. L. 256. TEX.—Jones v. State, 10 Tex. App. 552; Weaver v. State, 19 Tex. App. 547, 53 Am. Rep. 389.

Indorsement of the name of the offense on the indictment is no part of the finding of the grand jury.—State v. Rehfrischt, 12 La. Ann. 382.

erally answer to signify that they are present,—the grand jury attending in a body.[1] Then the clerk proceeds in order to ask the jury whether they have agreed upon any bills, and bids them present them to the court;[2] and then the foreman of the jury hands the indictments to the clerk, who asks them if they agree the court shall amend matter of form, altering no matter of substance, to which they signify their assent.[3] This form is necessary in order to enable the court to alter any clerical mistake, because they have no authority to change the form of the accusation, without the consent of the accusers.[4] The bringing of the indictment into court may be inferred from the fact of reception with proper indorsements.[5]

§ 1299. FINDING MUST BE RECORDED. The finding should then be recorded by the clerk, ignoramus,[1] as well as true bill, and an omission in that respect can not be supplied by the indorsement of the foreman, nor by the recital in the record that the defendant stands indicted, nor by his arraignment, nor by his plea of not guilty, nor by the minutes of the judge.[2] It can not be intended that

1 State v. Bordeaux, 93 N. C. 560.

Compare: Danforth v. State, 75 Ga. 614, 58 Am. Rep. 480.

As to polling, see, infra, § 1304.

2 4 Bla. Com. 366; Cro. C. C. 7. See form, Cro. C. C. 7; Clare v. State, 68 Ind. 17; State v. Heaton, 23 W. Va. 773.

3 Cro. C. C. 7; Dick. Sess. 158. See form, Cro. C. C. 7; Dick. Sess. 158, last vol. London ed.

As to Alabama statutes, see Wesley v. State, 52 Ala. 182.

4 R. T. H. 203; 1 Ch. C. L. 324; R. v. Pewtress, 2 Str. 1026, 93 Eng. Rep. 1011. See Willey v. State, 46 Ind. 363.

Return may be inferred.—See State v. Gratz, 68 Mo. 22.

5 FLA.—Willingham v. State, 21 Fla. 761. ILL.—Fitzpatrick v. People, 98 Ill. 269. IND.—Reeves v. State, 84 Ind. 116. IOWA—State v. McIntyre, 59 Iowa 267, 13 N. W. 287. LA.—State v. Manson, 32 La. Ann. 1018; State v. DeServant, 33 La. Ann. 979. MISS.—Cooper v. State, 59 Miss. 257. UTAH—People v. Lee, 2 Utah 441.

1 State v. Brown, 81 N. C. 516.

2 ILL.—Sattler v. People, 59 Ill. 68. IND.—Heacock v. State, 42 Ind. 393. MISS.—Fitzcox v. State, 53 Miss. 585. TEX.—Terrell v. State, 41 Tex. 463; Rasberry v. State, 1 Tex. App. 664. W. VA.—Crookham v. State, 5 W. Va. 510.

Compare: State v. Gratz, 68 Mo. 22.

he was indicted; it must be shown by the record of the finding. The recording of the finding of the grand jury, it is said, is as essential as the recording of the verdict of the petit jury.[3]

§ 1300. BILL MAY BE AMENDED BY GRAND JURY. It seems that if an existing indictment be altered by the prosecuting officer, and submitted, thus changed, to the grand jury, who again return "true bill" thereon, such informality will not destroy the indictment.[1] The practice in such cases, however, is for a new and more regular bill to be framed, and sent to the grand jury for their finding.[2]

§ 1301. FINDING MAY BE RECONSIDERED. In England, if the grand jury at the assizes or sessions has ignored a bill, they can not find another bill against the same person for the same offense at the same assizes; and if such other bill is sent them, it has been said that they should take no notice of it.[1] But the better view is that a bill may be sent up if the emergency require, after an ignoramus, at the discretion of the court.[2] An ignoramus may be reconsidered before, but not after, the return of the bill to the court.[3]

3 IOWA—State v. Glover, 3 G. Greene 249. LA.—State v. Shields, 33 La. Ann. 991. N. C.—State v. Cox, 28 N. C. (6 Ired. L.) 440; State v. Brown, 81 N. C. 516. TENN.—State v. Davidson, 42 Tenn. (2 Coldw.) 184. VA.—Com. v. Cawood, 4 Va. (2 Va. Cas.) 527.

Indictment indorsed as a "true bill," and returned by the authority of the whole grand jury, is sufficient, without the special appointment of a foreman.—Friar v. State, 4 Miss. (3 How.) 422; Peter v. State, 4 Miss. (3 How.) 433.

Record not showing that the grand jury returned the indictment into court, it was held that the judgment was erroneous and should be reversed.—Rainey v. People, 8 Ill. (3 Gilm.) 71; Chappel v. State, 16 Tenn. (8 Yerg.) 166; Brown v. State, 26 Tenn. (7 Humph.) 155.

1 State v. Allen, Charlt. (Ga.) 518.

2 1 Chitty Cr. L. 335. See State v. Davidson, 42 Tenn. (2 Cold.) 184; supra, § 1293.

1 R. v. Humphreys, Carr. & M. 601, 41 Eng. C. L. —; R. v. Austin, 4 Cox C. C. 385.

Contra: R. v. Newton, 2 M. & Rob. 506.

See, infra, §§ 1317, 1382.

2 Rowand v. Com., 82 Pa. St. 405; supra, § 1259; infra, § 1376.

3 State v. Brown, 81 N. C. 568;

§ 1302. JURY CAN NOT USUALLY FIND PART ONLY OF A COUNT. Usually the jury can not find one part of the same count to be true and another false, but they must either pass or reject the whole; and, therefore, if they ignore one part and find another, the finding is bad,[1] though there is no reason why, when a count contains a lower offense inclosed in a higher, the grand jury should not ignore the higher offense and find the lower. Where there are several counts, they can find any one count and ignore the others.[2] So in an indictment against several, they can distinguish among the defendants, and find as to some and reject as to the rest.[3]

§ 1303. INSENSIBLE FINDING IS BAD. If the finding be incomplete or insensible, it is bad.[1]

§ 1304. GRAND JURY MAY BE POLLED, OR FINDING TESTED BY PLEA IN ABATEMENT. When the grand jury are in session, they are under the control of the court, and the court may at any time recommit an imperfect finding to them,[1] or may poll them, or take any other method, on the suggestion of a defendant, of determining whether twelve

but see State v. Harris, 91 N. C. 656.

1 2 Hale 162; Bac. Ab. Indictment, D. 3; Bulst. 206; 2 Hawk., ch. 25, § 2; 5 East 304; 2 Camp. 134, 584; 2 Leach 708; Com. v. Keenan, 67 Pa. St. 203; State v. Wilburne, 2 Brev. L. (S. C.) 296; State v. Creighton, 1 Nott. & McC. (S. C.) 256; State v. Wilhite, 30 Tenn. (11 Humph.) 602; State v. Cowan, 38 Tenn. (1 Head) 280.

2 1 Chitty Cr. L. 323.

3 2 Hale 158; 1 Chitty Cr. L. 323.

1 2 Hawk., ch. 25, § 2; 1 Chitty Cr. L. 323.

Where grand jury returned bill of indictment which contained ten counts for forging and uttering the acceptance of a bill of exchange, with an indorsement, "A true bill on both counts," and the prisoner pleaded to the whole ten counts; and where, after the case for the prosecution had concluded, the prisoner's counsel pointed this out, the finding was held bad, and the grand jury was discharged; in such case the court will not allow one of the grand jurors to be called as a witness to explain their finding.—R. v. Cooke, 8 Car. & P. 582, 34 Eng. C. L. 903. See People v. Hulbut, 4 Den. (N. Y.) 133, 47 Am. Dec. 244.

1 State v. Squire, 10 N. H. 558. See Byers v. State, 63 Md. 209.

assented to the bill.[2] The question of concurrence of sufficient number of the jurors may be tested by plea in abatement.[3]

X. MISCONDUCT OF GRAND JUROR.

§ 1305. GRAND JUROR MAY BE PUNISHED BY COURT FOR CONTEMPT, BUT IS NOT OTHERWISE RESPONSIBLE. In case of criminal misconduct or neglect of duty on the part of a grand juror, when on duty, an indictment may be maintained against him, or he may be proceeded against by the court for contempt.[1] His official decisions, however, can not be made the ground of a civil action against him by a party offended; nor can he be subsequently indicted for such decisions.[2]

XI. HOW FAR GRAND JURORS MAY BE COMPELLED TO TESTIFY.

§ 1306. GRAND JUROR MAY BE EXAMINED AS TO WHAT WITNESS SAID. Whatever may have been the old rule,[1] it is now settled that a witness may be indicted for perjury on account of false testimony before a grand jury,[2] and

2 Lowe's Case, 4 Me. (4 Greenl.) 448, 16 Am. Dec. 271; State v. Symonds, 36 Me. 128.

Contra: State v. Baker, 20 Mo. 338. Infra, § 1307.

3 State v. McNeill, 93 N. C. 552; supra, § 1277.

1 Pa. v. Keffer, Addison (Pa.) 290.

2 1 Chitty Cr. L. 323, 324; Lloyd v. Carpenter, 5 Pa. L. J. 60, 3 Clark Phila. 196, where it was said by King, J.: "The grand jury are entirely irresponsible, either to the public or to individuals aggrieved—the law giving them the most absolute and unqualified indemnity for such an official act." And again: "When the official existence of a grand jury terminates, they mingle again with the general mass of the citizens, intangible for any of their official acts, either by private action, public prosecution, or legislative impeachment." See, to same effect, Turpin v. Booth, 56 Cal. 65, 38 Am. Rep. 48; Hunter v. Mathis, 40 Ind. 357, also cited in 16 West. Jur. 70.

1 See 16 West. Jur. 8.

2 4 Black. Com. 126, note; 1 Whart. Crim. Ev. (Hilton's ed.), § 510; 1 Chitty C. L. 322. See, also: CAL.—People v. Young, 31 Cal. 564. CONN.—State v. Fassett, 16 Conn. 457. ILL.—Mackin v. People, 115 Ill. 313, 36 Am. Rep. 167, 3 N. E. 222. IND.—State v. Offutt, 4 Blackf. 355. PA.—Huldekoper

grand jurors are competent witnesses to prove the facts;[3] and so may be the prosecuting attorney.[4] In New Jersey, however, it is said a grand juror is not admissible to prove that a witness who had been examined swore differently in the grand jury room,[5] though the contrary is now the general and better opinion.[6] And a grand juror may be called to sustain a witness.[7]

§ 1307. CAN NOT BE ADMITTED TO IMPEACH FINDING. But the affidavit of a grand juror will not be received to impeach or affect the finding of his fellows,[1] even for the

v. Cotton, 3 Watts 56. VA.—Thomas v. Com., 41 Va. (2 Rob.) 795. ENG.—Sykes v. Dunbar, 2 Selw. N. P. 1059, and cases cited infra.

3 Ibid.; Com. v. Hill, 65 Mass. (11 Cush.) 137; Crocker v. State, 19 Tenn. (Meigs) 127; R. v. Hughes, 1 Car. & K. 519, 47 Eng. C. L. 518, and cases cited infra, § 1307, footnote 6.

4 State v. Van Buskirk, 59 Ind. 384; infra, § 1308.

5 Imlay v. Rogers, 7 N. J. L. (2 Halst.) 347. See State v. Baker, 20 Mo. 338.

6 2 Whart. Crim. Ev. (Hilton's ed.), § 510. See: CAL.—People v. Young, 31 Cal. 564. CONN.—State v. Fassett, 16 Conn. 457. ILL.—Granger v. Warrington, 8 Ill. (3 Gilm.) 299. IND.—Burnham v. Hatfield, 5 Blackf. 21; Perkins v. State, 4 Ind. 222; Burdick v. Hunt, 43 Ind. 384. KY.—White v. Fox, 4 Ky. (1 Bibb) 369, 4 Am. Dec. 643. ME.—State v. Benner, 64 Me. 267. MASS.—Com. v. Hill, 65 Mass. (11 Cush.) 137; Com. v. Mead, 78 Mass. (12 Gray) 167, 71 Am. Dec. 741; Way v. Butterworth, 106 Mass. 75. MISS.—Sands v. Robison, 20 Miss. (12 Smed. & M.) 704, 51 Am. Dec. 132; Rocco v. State, 37 Miss. 357. MO.—Beam v. Link, 27 Mo. 261. N. H.—State v. Wood, 53 N. H. 484. N. Y.—People v. Hulbut, 4 Den. 133, 47 Am. Dec. 244. N. C.—State v. Broughton, 29 N. C. (7 Ired. L.) 96, 45 Am. Dec. 507. PA.—Gordon v. Com., 92 Pa. St. 216, 37 Am. Rep. 672; Huidekoper v. Cotton, 3 Watts 56. S. C.—State v. Boyd, 2 Hill L. 288, 27 Am. Dec. 376. TENN.—Crocker v. State, 19 Tenn. (Meigs) 127; Jones v. Turpin, 53 Tenn. (6 Heisk.) 181. VA.—Thomas v. Com., 41 Va. (2 Rob.) 795; Little v. Com., 66 Va. (25 Grat.) 921. FED.—United States v. Reed, 2 Blatch. 435, 466, Fed. Cas. No. 16134; United States v. Charles, 2 Cr. 76, Fed. Cas. No. 14786. ENG.—R. v. Gibson, 1 Car. & M. 672, 41 Eng. C. L. 364; Sykes v. Dunbar, 2 Selw. N. P. 1059.

Regulated by statute: In several states, e. g., Missouri, the privilege is regulated by statute.

7 Perkins v. State, 4 Ind. 222; People v. Hulbut, 4 Den. (N. Y.) 133, 47 Am. Dec. 244.

1 GA.—State v. Doon, R. M. Charl. 1. IOWA—State v. Gibbs, 39 Iowa 318; State v. Davis, 41

purpose of showing how many jurors were present when the bill was found, which jurors voted in its favor, what were their views,[2] or that the bill was found without evidence.[3] But where a grand juror was guilty of gross intoxication while in the discharge of his duty as such, the court, on a presentment of such fact by the rest of the grand jury, ordered a bill to be preferred against him.[4] And a grand juror may be examined to prove, on a motion to quash a bill, who were the witnesses on whose evidence it was found;[5] to show who was the prosecutor;[6] and to

Iowa 311. MINN.—State v. Beebe, 17 Minn. 241. MO.—State v. Baker, 20 Mo. 338. N. C.—State v. McLeod, 8 N. C. (1 Hawks) 344. ENG.—R. v. Marsh, 6 Ad. & El. 236, 33 Eng. C. L. 143, 1 N. & P. 187.

As to jurors generally, see, infra, § 1787.

2 ALA.—Spigener v. State, 62 Ala. 383. CONN.—State v. Fassett, 16 Conn. 457. IOWA—State v. Mewherter, 46 Iowa 88, affirming State v. Gibbs, 39 Iowa 318. MO.—State v. Baker, 20 Mo. 238. N. Y.—People v. Hulbut, 4 Den. 133, 47 **Am. Dec.** 244, but **contra** People v. Shattuck, 6 Abb. N. C. 33. N. C.—State v. Broughton, 29 N. C. (7 Ired.) 98, 45 **Am. Dec.** 507. PA.—Gordon v. Com., 92 Pa. St. 216, 37 **Am. Rep.** 672; Huidekoper v. Cotton, 3 Watts 56. TEX.—State v. Oxford, 20 Tex. 428. W. VA.—State v. Baltimore & O. R. R., 15 W. Va. 362, 36 **Am. Rep.** 803.

Compare: Infra, § 1787; supra, § 1296.

3 State v. Grady, 34 Mo. 220.

4 Pa. v. Keffer, Addis (Pa.) 390.

On trial of an indictment for selling liquor without a license, which charged five offenses in separate counts, the defendant, in order to limit the proof to a single count, offered to show, by one of the grand jury, that only one offense was sworn to before that body, it was held that the evidence was inadmissible.—People v. Hulbut, 4 Den. (N. Y.) 133, 47 **Am. Dec.** 244. See R. v. Cooke, 8 Car. & P. 582, 34 Eng. C. L. 903.

In Missouri, it is provided by statute that no grand juror shall disclose any evidence given before the grand jury. — See State v. Baker, 20 Mo. 338.

But it has been held that a grand juror is not prohibited by the statute from stating that a certain person, naming him, testified before the grand jury, and the subject-matter upon which he testified.—State v. Brewer, 8 Mo. 373; Tindle v. Nichols, 20 Mo. 326; Beam v. Link, 27 Mo. 261.

5 People v. Briggs, 60 How. Pr. (N. Y.) 17.

6 Freeman v. Arkell, 1 Car. & P. 135, 12 Eng. C. L. 89; Sykes v. Dunbar, Selwyn N. P. 1091.

prove, also, that less than twelve concurred in the finding.[7] Where, also, the allegation is that the bill was found on testimony totally incompetent, and where this is ground for quashing, it would follow that grand jurors should be admitted to prove such fact. But the right of revision in such cases should be exercised within narrow limits, since if the action of grand juries is open to be overhauled and supervised by courts, not only would the secrecy of the grand jury as a protective institution be impaired and the solemnity of its proceedings destroyed by being subjected to the subsequent parol attacks of its members, but its findings would take the place of the verdicts of petit juries, and become not certificates of probable cause, but adjudications under the direction of the court on the merits.[8]

§ 1308. PROSECUTING OFFICER OR OTHER ATTENDANT INADMISSIBLE TO IMPEACH FINDING. As a grand juror ought not to be received to testify to any fact which may invalidate the finding of his fellows, a prosecuting attorney is incompetent to testify to the same effect.[1] But, as has been already seen, he should be received to state what was the issue before the jury, and what was testified to by witnesses.[2] The same distinctions apply to clerks and other attendants on the grand jury.[3]

7 Low's Case, 4 Me. (4 Greenl.) 430; State v. Baker, 20 Mo. 338; State v. Womack, 70 Mo. 410; People v. Shattuck, 6 Abb. N. C. (N. Y.) 33; State v. Oxford, 30 Tex. 428.

Contra: R. v. Marsh, 6 Ad. & El. 236, 33 Eng. C. L. 143.

8 **See remarks of Nelson, J., in** United States v. Reed, 2 Blatchf. C. C. 435, 466, Fed. Cas. No. 16134; also People v. Hulbut, 4 Den. (N. Y.) 133, 47 Am. Dec. 244.

1 1 Bost. Law Rep. 4; McClellan v. Richardson, 13 Me. 82; Clark v. Field, 12 Vt. 485.

2 See 1 Whart. Crim. Ev. (Hilton's ed.), § 513; State v. Van Buskirk, 59 Ind. 384; White v. Fox, 4 Ky. (1 Bibb) 369, 4 Am. Dec. 643.

3 State v. Fassett, 16 Conn. 470; State v. Van Buskirk, 59 Ind. 384; Knott v. Sargent, 125 Mass. 95; Beam v. Link, 27 Mo. 261; United States v. Farrington, 5 Fed. 343.

XII. TAMPERING WITH GRAND JURY: IMPEACHING FINDING.

§ 1309. To TAMPER WITH GRAND JURY IS AN INDICTABLE OFFENSE. It is not only a contempt of court, punishable summarily, but it is a misdemeanor at common law, punishable by indictment, for volunteers to approach a grand jury for the purpose of influencing its action.[1]

1 Com. v. Crans, 3 Pa. L. J. 442; 2 Clark Phil. 172; Greenl. on Ev., § 252; and see, supra, § 1264; infra, §§ 1664, 1912, and charge of Justice Field, cited supra, § 1295, footnote 2.

CHAPTER LXXXIV.

NOLLE PROSEQUI.

§ 1310. Nolle prosequi a prerogative of sovereign.
§ 1311. Nolle prosequi will be granted in vexatious suits.

§ 1310. NOLLE PROSEQUI A PREROGATIVE OF SOVEREIGN. A nolle prosequi is the voluntary withdrawal by the prosecuting authority of present proceedings on a particular bill, and at common law is a prerogative vested in the executive,[1] by whom alone it can be exercised.[2] At com-

1 Com. v. Tuck, 37 Mass. (20 Pick.) 356; Com. v. Smith, 98 Mass. 10; State v. Tufts, 56 N. H. 137; State v. Thompson, 10 N. C. (3 Hawks) 613; United States v. Watson, 7 Blatchf. 60, Fed. Cas. No. 16652.

See 5 Crim. Law Mag. 1.

In Campbell's Lives of the Chancellors, II, 173, we are told that Lord Holt having committed some of a party of fanatics, called "Prophets," for seditious language, he was visited by Lacy, one of their friends, when the following conversation took place: "Servant: 'My lord is unwell today, and can not see company.' Lacy (in a very solemn tone): 'Acquaint your master that I must see him, for I bring a message to him from the Lord God.' The Chief Justice, having ordered Lacy in, and demanded his business, was thus addressed: 'I come to you a prophet from the Lord God, who has sent me to thee, and would have thee grant a nolle prosequi for John Atkins, his servant, whom thou hast cast into prison.' Chief Justice Holt: 'Thou art a false prophet, and a lying knave. If the Lord God had sent thee it would have been to the attorney-general, for he knows that it belongeth not to the Chief Justice to grant a nolle prosequi; but I, as Chief Justice, can grant a warrant to commit thee to bear him company.'"

Power to enter belongs to the prosecuting officer who represents the government, not to the court. —State v. Maligan, 48 Ind. 416, 1 Am. Cr. Rep. 542.

As to power of public prosecutor to enter, see note 35 L. R. A. 701-716.

Material part of indictment can not be quashed, having remainder of allegations standing intact.—Duty v. State, 54 Tex. Cr. Rep. 613, 22 L. R. A. (N. S.) 469, 114 S. W. 817.

As to right to quash part of indictment, see note 22 L. R. A. (N. S.) 469.

2 Ibid.; R. v. Dunn, 1 Car. & K. 730, 47 Eng. C. L. 728; R. v. Colling, 2 Cox 184.