PART IV:
HOW THE GRAND JURY TRANSACTS BUSINESS AND ITS RELATION TO THE COURT

When the grand jurors have been duly empaneled and sworn, the court delivers to them a charge ordinarily in relation to their duties and those matters concerning which they may be called upon to investigate.[1] At times the court may thus commit specially to their care, matters of great public importance.[2] Judge Addison, in his charges to grand juries, availed himself of the opportunity in that early stage of our Federal government, to inculcate in the citizens through the medium of the grand jury, a better knowledge of our political institutions, the theory of government, the relations between the government and its subjects, and the subjects with each other. Other eminent jurists have used it as a means of communication with the public. Judge Wilson expressed the same thought when he said:[3] "The grand jury are a great channel of communication, between those who make and administer the laws, and those for whom the laws are made and administered."

In the press of business at the present day, it is rare, in the absence of some event of great public importance which the court deems it necessary the grand jury should consider, for {125} the court to do more than deliver a brief charge as to the duties of the grand jury.

While it is usual for the court to charge the grand jury only when they first enter upon their duties, it may at any time during their period of service, deliver a supplementary charge or charges to them upon any particular matter, or upon any special matter which the district attorney may be prepared to send before them, or may direct them to investigate any matters of grave importance to the public welfare. This is usually done by the court upon its own motion or at the request of the grand jury and probably would be done upon motion of the district attorney. Whether it will be done upon motion of counsel for a defendant whose case will be considered by the grand jury, has not been settled.[4]

This question first arose in this country upon the trial of Aaron Burr.[5] In the report of the trial the following appears:

"Mr. Burr called up the motion for a supplemental charge to the grand jury, in support of which he had, on yesterday, submitted a series of propositions, with citations of authorities.

"The Chief Justice (Marshall) stated that he had drawn up a supplemental charge, which he had submitted to the attorney for the United States, with a request that it should also be put into the hands of Col. Burr's counsel; that Mr. Hay had, however, informed him that he had been too much occupied to inspect the charge with attention, and deliver it to the opposite counsel; but another reason was, that there was one point in the charge which he did not fully approve. He should not, therefore, deliver his charge at present, but should reserve it until Monday. In the meantime Col. Burr's counsel could have an opportunity of inspecting it, and an argument might be held on the points which had produced an objection from the attorney for the United States."

It does not appear in the report of the case that this charge was ever delivered. The same case discloses, however, that a {126} communication on the part of the defendant was actually sent to the grand jury by the Chief Justice:

"Mr. McRae hoped that notice of his communication would be sent to the grand jury.

"Mr. Martin hoped that Col. Burr's communication also would go along with it. The Chief Justice was unwilling to make the court the medium of such communications. The Chief Justice subsequently reduced the communications to writing and sent them to the grand jury."

What would seem to be the true rule in such instances was laid down by Judge Cranch, who said;[6] "The court may in its discretion, give an additional charge to the grand jury, although they should not ask it; and when they do ask it, the court may, perhaps, be bound to give it, if it be such an instruction as can be given without committing the court upon points which might come before them to be decided on the trial in chief. When an instruction to the grand jury is asked either by the accused or the prosecutor, it is a matter of discretion with the court to give the instruction or not, considering the extent of the prayer, and all the circumstances under which it is asked."

The fact that a portion only of the grand jurors were specially advised, at their request, as to the law governing the case then under consideration, will not invalidate an indictment found by such grand jury.[7]

The charge of the court delivered to the grand jury will not, in general, be ground for setting aside the indictment even though highly inflammatory language be used,[8] unless the court should so charge with relation to a specific case to come before them.[9] If the charge be in general terms, no matter how impolitic its delivery may be, a defendant can hardly complain that he was prejudiced thereby. Should the court urge the finding of a particular indictment or in any manner {127} endeavor to influence the finding of the grand jury, a bill so found will be quashed.[10]

When the court has charged the grand jury as to their duties, the jurors then retire to their room to consider the matters which may come before them. They are there attended by the district attorney[11] or one of his assistants, who aids them

in examining the witnesses and advises them upon questions of law.[12] At common law the grand jurors conducted the examination of witnesses themselves, not permitting the attorney for the crown to enter the room, and receiving their instructions as to the law directly from the court. In order that the crown officer might know what evidence was given to the grand jury and perhaps with a view of overawing the grand inquest when they should retire to deliberate, they were in several instances in state prosecutions required to hear the evidence in open court, although after so hearing it they were never denied the right to again hear the witnesses in private.[13] In 1794 upon the indictment of Hardy and others for treason, the grand jury requested the attendance of the solicitor for the crown for the purpose of managing the evidence, for which leave of court was first obtained.[14]

It is the general custom at the present day in all jurisdictions to permit the district attorney to attend the grand jury,[15] {128} but he has no right to be present during the deliberations of the grand jurors[16] and should withdraw if requested to do so;[17] nor is it proper for him to attempt to control or influence the action of the grand jury[18] or to say what effect should be given to the testimony adduced before them.[19] But the fact that the district attorney was present during the deliberations of the grand jury and the taking of the vote is at most an irregularity and no ground for quashing the indictment[20] in the absence of any averment and proof that the defendant was thereby prejudiced;[21] likewise where after certain persons had testified in a particular case the district attorney said: "I suppose you do not want to hear any more."[22] If the district attorney should participate in the deliberations of the grand jury, or make any effort to influence their finding, the indictment will be quashed.[23] Private counsel for the prosecution {129} have no right to be present in the grand jury room to examine witnesses and the district attorney cannot authorize such action.[24]

The relation which should be maintained between the district attorney and the grand jury is well stated by Mr. Justice Clark:[25]

"The district attorney is the attendant of the grand jury: it is his duty as well as his privilege to lay before them matters upon which they are to pass, to aid them in their examination of witnesses, and to give them such general instructions as they may require. But it is his duty during the discussion of the particular case, and whilst the jurors are deliberating upon it, to remain silent. It is for the jury alone to consider the evidence and to apply it to the case in hand, any attempt on the part of the district attorney to influence their action or to give effect to the evidence adduced, is in the highest degree improper and impertinent. Indeed, it is the better practice and the jurors have an undoubted right to require, that he should retire from the room during their deliberations upon the evidence and when the vote is taken whether or not an indictment shall be found or a presentment made."

The tendency of the modern cases is to hold that it is the "right" of the district attorney to be present to examine the witnesses and conduct the case for the government.[26] That it was not his right at common law was conceded by the abandonment of hearing the evidence in public when the grand jury refused to indict in Lord Shaftesbury's case.[27] In the absence of any statute which grants this right to him, it would {130} seem that the common law rule is still in force and that the presence of the district attorney in the grand jury room, even for the purpose of examining witnesses, is not by reason of his right, but as a matter of grace on the part of the grand jury.

The Pennsylvania statute under which the office of district attorney was created provides:[28] "The officer so elected shall sign all bills of indictment, and conduct in court all criminal or other prosecutions." This statute does not expressly give him the power to conduct proceedings before the grand jury; can this authority be said to be implied by it? That the grand jury is in court although not in open court will admit of no question. The direction therefore that the district attorney shall conduct *in court* all criminal proceedings, would seem to be ample authority to conduct all parts of the prosecution from the time it first comes into court, usually on the return of the magistrate, until the case is finally disposed of, either by the acquittal, or conviction and sentence of the defendant.[28*]

There are two ways in which a grand jury may act in order to put a defendant upon his trial.

I. By presentment.[29]

II. By indictment.

A presentment is the notice taken by a grand jury of any offence from their own knowledge or observation upon which the officer of the court must afterwards frame an indictment before the party presented can be put to answer it.[30]

{131} The Constitution of the United States provides:[31] "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury." The provision is in the disjunctive and Chief Justice Marshall makes the pertinent inquiry,[32] "Is it the indictment or presentment he is to answer?" Judge Addison expresses the opinion[33] that a defendant under this provision may be required to plead to the presentment without a formal indictment based upon the presentment being submitted to the grand jury and returned a true bill by them. His view undoubtedly receives strong support from the use of the conjunction *or* in this clause; but opposed to it is the practice at common law, which has been universally adopted in this country, of framing an indictment upon the presentment and submitting it to the grand jury for their action. Chief Justice Marshall observes[34] that the indictment "is precisely the first presentment, corrected in point of form .... to be considered as one and the same act, and that the second is only to be considered as an amendment of the first."

Irrespective of the question of the right of the government to require a defendant to plead to and be tried upon a presentment without an indictment being founded upon it, the lack of "technical form" in the presentment makes it necessary that it should serve only as the basis of an indictment, otherwise in many instances a defendant would escape by the failure of the presentment to properly charge an offence against the statutes.

An indictment is a written accusation of one or more persons of a crime or misdemeanor, preferred to and presented upon oath by a grand jury.[35]

In Pennsylvania as a legal presentment can only be made where the offence charged is within the personal knowledge {132} of at least one of the grand jurors, and the presentment is the result of his disclosure of knowledge to his associates, it follows that there are no witnesses to testify before the grand jury in support of it,[36] although it sometimes happens when an indictment has been framed upon the presentment and is sent to the grand jury that witnesses are sent before them in support of its averments.[37]

Where the indictment is not based upon the former presentment of a grand jury, it is necessary that witnesses should testify in support thereof; if the indictment be found without hearing evidence it will be quashed.[38]

In Georgia it has been held that an indictment founded on a presentment of the grand jury need not again be sent before them for their action upon it.[39]

If an indictment has been quashed or nolle prossed, a new indictment for the same offence may be found by the same grand jury which returned the former one without hearing evidence in support of the second bill.[40]

In order to procure the attendance of witnesses to testify in support of any bill which may be sent before the grand jury, a subpoena is issued by the district attorney and served upon such persons as are not bound by recognizance to appear.[41] Those who are so bound to appear and testify are {133} required to be produced by their bondsmen upon whom notice is duly served. If the witness cannot be produced the bond will be forfeited and a bail piece issued to bring the witness into court. If the witness is not bound by recognizance and fails to appear after being subpoenaed, an attachment may issue to compel his attendance upon motion of the district attorney. If it is necessary that books or papers be produced in evidence before the grand jury, a subpoena duces tecum may issue but it should particularly describe the books and papers wanted,[42] and if there is any question as to whether or not the books or papers so produced are relevant or material, they may be submitted to the inspection of the court.[43]

A witness before the grand jury who refuses to testify upon the ground that his evidence may tend to convict him of a crime, is not guilty of contempt[44] but if the question propounded to the witness does not disclose upon its face that it will have such tendency and the witness fails to clearly show to the court how it will have such effect, he may be punished for a contempt if he refuses to answer after being directed to do so by the court.[45]

While a witness cannot be compelled to testify as to matters which would tend to incriminate him, there is no duty imposed upon the grand jury to inform a witness, who is prepared to so testify, of his constitutional privilege.[46] This ruling is based upon the theory that every person is bound to know the law and any failure through ignorance or otherwise to claim the constitutional privilege will be deemed a waiver of it.

A witness duly summoned before the grand jury cannot refuse to be sworn or refuse to testify without sufficient excuse. The grand jury may ask the advice and assistance of the court {134} in such case and if the witness still prove recalcitrant he may be punished for contempt.[47]

The bills are sent or brought into the grand jury room by the district attorney and delivered to the foreman. The indictment ought to be signed by the district attorney[48] before being submitted to the grand jury,[49] but should he fail to do so the court will not quash upon that ground after the grand jury find a true bill, but will permit him to affix his signature to the bill in court, and the motion to quash will then be overruled.[50] The district attorney's signature constitutes no part of the indictment. It is only necessary as evidence to the court that he is officially prosecuting the accused in accordance with the duty imposed upon him by statute.[51] In the Federal courts the signature of the district attorney may be affixed by one of his assistants acting under a general authority conferred upon him by the district attorney.[52]

An indictment signed by a person designating himself as "solicitor general" when there was no such state officer was held to be invalid.[53]

{135} Upon the back of the bill, the names of the witnesses should be endorsed by the district attorney,[54] and in Pennsylvania[55] it is provided by statute that "no person shall be required to answer to any indictment for any offence whatever, unless the prosecutor's name, if any there be, is endorsed thereon."[56] Where no prosecutor is proved to exist, then the defendant must plead without the name of a prosecutor being endorsed on the indictment.[57]

In Mississippi,[58] Ohio,[59] Tennessee[60] and Virginia[61] it is also necessary that the name of the prosecutor be endorsed on the bill. In Arkansas,[62] Florida,[63] Kentucky[64] and {136} Missouri[65] the prosecutor's name must be endorsed in cases of trespass not amounting to felony.

In Alabama,[66] the statute requiring the name of the prosecutor to be endorsed on the indictment has been held to be merely directory and the omission of such endorsement will not invalidate the indictment.

In North Carolina[67] the prosecuting officer may, in his discretion, endorse the governor of the state as prosecutor

on indictments whenever public interest may require it; and in Mississippi[68] it has been held that the foreman of the grand jury may be endorsed as the prosecutor.

In Massachusetts[69] the practice is in vogue of omitting the names of witnesses from the indictment, the grand jury making a general return of the names of the witnesses examined by them but without in any manner indicating the bills upon which they testified. In the case of Commonwealth *vs.* Knapp,[70] counsel for the defendant applied to the court for a list of the witnesses appearing before the grand jury. The court granted the application, Judge Wilde, before whom the application was made saying that such a request had never been refused.

{137} In Mississippi,[71] the names of the witnesses need not be returned with the indictment.

Before the witnesses summoned to attend the grand jury are permitted to testify, they must be sworn. At common law the witnesses were all sworn in open court at the one time,[72] and this practice is followed in the Federal courts at the present time, the witnesses there being sworn by the clerk.[73] But this method of procedure is open to the objection that the grand jury have no accurate knowledge as to whether or not a particular witness has been sworn.[74] In some jurisdictions it is customary to summon a justice of the peace as a grand juror, and the witnesses are sworn in the grand jury room by him.[75] But in Pennsylvania[76] it is provided by the act of March 31.1860: —

"The foreman of any grand jury, or any member thereof, is hereby authorized and empowered to administer the requisite oaths or affirmations to any witnesses whose names may be marked by the district attorney on the bill of indictment."

The inconvenience resulting from swearing witnesses in open court who, subsequently, were to appear before the grand jury, and the ease with which an unsworn witness might present himself and testify have caused similar statutes to be adopted in almost every state.

The power of a grand juror to administer the oath[77] is {138} limited to those cases where the name may be marked on the bill of indictment.[78] The presence of the district attorney in the grand jury room during the examination of witnesses should, however, make this clause free from controversy, for if the name of the witness be not endorsed on the bill when he comes to be sworn, it can then and there be done by that officer. The question, however, did arise in the case of Jillard *v.* Commonwealth[79] where the defendant sought to take advantage of the swearing and examining of certain witnesses whose names were not marked upon the indictment, by a plea in bar, but it was held that at most it was only ground for a motion to quash.[80] It need not appear by the indictment or otherwise that the witnesses who testified before the grand jury were sworn or affirmed.[81] The presumption is that the grand jury complied with all the requirements of the law before finding a true bill.

Where the grand jury find a true bill and one or more of the witnesses upon whose testimony the bill was found were not sworn, if objection be taken before the defendant pleads, the indictment will be quashed.[82] If a motion to quash be not made and the defendant pleads, the objection has been held to have been waived and cannot be raised by a motion in arrest {139} of judgment.[83] This may now be considered as the English rule although the decisions have not been uniform.[84] In Rex *v.* Dickinson,[85] where none of the witnesses before the grand jury had been sworn at all, while a motion in arrest of judgment was overruled, the twelve judges unanimously made application for a pardon.

While it is usual for the district attorney to conduct the examination, any of the grand jurors may fully interrogate a witness.[86] But it is not lawful for one witness to be interrogated by another witness who may happen to be in the room, nor will more than one witness at a time be permitted to be in the grand jury room and an indictment will be quashed if it be shown that this was permitted.[87]

An indictment will likewise be quashed where a person, other than a grand juror is present in the grand jury room during their deliberations[88] and participates in the voting.[89] But where a stenographer in the employ of the district attorney was present and took notes of the testimony of a witness, it was held that such stenographer was an assistant to the district attorney and the court refused to quash the indictment.[90]

{140} Neither the defendant nor any of his witnesses will be permitted to appear before the grand jury.[91] Upon this point Chief Justice McKean thus expresses himself:[92]

"Were the proposed examination of witnesses on the part of the defendant to be allowed, the long established rules of law and justice would be at an end. It is a matter well known and well understood, that by the laws of our country, every question which affects a man's life, reputation or property, must be tried by twelve of his peers; and that their unanimous verdict is alone, competent to determine the fact in issue. If then you undertake to inquire, not only upon what foundation the charge is made, but, likewise, upon what foundation it is denied, you will in effect usurp the jurisdiction of the petty jury, you will supersede the legal authority of the court, in judging of the competency and admissibility of witnesses, and having thus undertaken to try the question, that question may be determined by a bare majority, or by a much greater number of your body, than the twelve peers prescribed by the laws of the land. This point has, I believe, excited some doubts upon former occasions; but those doubts have never arisen in the mind of any lawyer, and they may easily be removed by a proper consideration of the subject. For the bills, or presentments, found by a grand jury, amount to nothing more than an official accusation, in order to put the party accused upon his trial: till the bill is returned, there is therefore, no charge from which he can be required to exculpate himself; and we know that many persons against whom bills were returned, have been afterwards acquitted by a verdict of their country."

{141} The same question was considered by Judge Addison[93] whose opinion is well expressed in the following language:

"But if witnesses, brought forward by the accused person, were to be heard in his defence before the grand jury, and they should find the charge true, this would approach so near to a conviction, that the traversing of the indictment afterwards, and the trial by the traverse jury, would appear nugatory, and might be abolished. The finding of the bill would raise such an opinion and presumption of the guilt of the accused person, as must be a bias in the minds of all men; and the prisoner could not come before the traverse jury with a hope of that impartiality in his judges, which the constitution of a jury trial supposes him to expect."

The duty of the grand jury is to determine whether or not the evidence presented by the state raises a prima facie presumption of the guilt of the defendant, or, in other words, is the evidence for the prosecution sufficient to sustain a conviction. If it is, then a true bill should be returned; if not, the bill should be ignored. With this intermediate stage of the prosecution a defendant has no concern except that it shall be according to law. He has secured to him the constitutional right of trial by jury and not trial by grand jury, and until he shall have been indicted he is not called upon to make defence. Until he is thus called upon to face a petit jury he is neither entitled nor will he be permitted to present any evidence in his own behalf.

In the Federal courts it was formerly held that the defendant's witnesses might go before the grand jury with the consent of the district attorney;[94] but it is now held that the district attorney cannot give permission to the defendant to send witnesses in his own behalf before the grand jury.[95] Only in the event that the testimony of any of defendant's witnesses is essential to make out a case for the government will this rule be departed from.

In the hearing of the testimony of the witnesses appearing {142} before them, the grand jury should be governed by the ordinary rules of evidence and no indictment should be found upon evidence, which, before the petit jury and uncontradicted, would not support a conviction.[96] It is the duty of the district attorney to permit the grand jury to receive no incompetent evidence,[97] but the restriction which prohibits him from taking any part in their proceedings after adducing all the evidence for the government, would likewise prevent him from expressing his opinion as to the insufficiency of the evidence to warrant a conviction. While it is the duty of the district attorney not to proceed further when he knows the evidence insufficient to convict, it is at the same time the exclusive province of the grand jury to determine the sufficiency of the evidence to justify the indictment. Should an indictment be found upon insufficient evidence, it is within the province of the district attorney to enter a nolle pros which he may do with leave of court. In this manner he would leave the grand jurors to arrive at their own conclusions without interference from him, while at the same time he could observe the duty imposed upon him by his oath, and relieve the defendant from an unsupported accusation. But while he expresses no opinion as to the sufficiency or insufficiency of the evidence to justify the finding of a true bill, he should advise them as to the legal requirement.

The grand jury should, therefore, receive only the best evidence which can be procured, being admissible evidence before the petit jury.[98] They should not receive hearsay or irrelevant {143} evidence, but if they do receive it, this will not of course be sufficient ground for quashing the indictment,[99] and cannot be availed of on motion in arrest of judgment.[100]

In North Carolina[101] it was held that an indictment would be quashed where it was found upon the testimony of interested or incompetent witnesses.

Where a paper is sent before the grand jury it should be relevant to the matter then under consideration, although its materiality may not appear.[102] When a subpoena duces tecum has issued, the court will decide whether the books, papers and documents ordered to be produced are relevant and material, and whether or not they are privileged communications.[103]

Where the grand jury suspect that a witness has been tampered with by the prisoner, they will not be permitted to receive in evidence his written examination before the committing magistrate in lieu of his parol testimony.[104]

An indictment found upon the evidence of a person who is an incompetent witness by reason of his conviction of an {144} infamous crime will be quashed[105] as will one founded upon the testimony of a witness who has been convicted of perjury.[106] But where an indictment was found upon the uncorroborated evidence of an accomplice the court refused to quash.[107] The court has also refused to quash where an indictment has been found after the defendant voluntarily testifies before the grand jury.[108]

In England an indictment for treason will be quashed unless it is founded on the evidence of two witnesses to the same overt act[109] but the rule is otherwise in the Federal courts.[110]

It would seem, however, where the grand jury find an indictment either upon the evidence of a single witness who is incompetent, or after hearing the evidence of more than one witness, one of whom is incompetent, that it should be quashed if these facts be made to appear.[111] While an opposite view {145} has been taken in some of the states,[112] it can hardly be said that their position is well founded in reason. If the grand jury should not be permitted to receive evidence inadmissible before a petit jury, if they do receive it the indictment should be quashed upon the same theory which prompts the award of a new trial when the trial judge against the objection of counsel permits an incompetent witness to testify. If, as the courts have said, it is impossible to say what effect the testimony of the incompetent witness may have had toward influencing the verdict of the petit jury,[113] which hears the evidence in the presence of the judge, how much more strongly the same reason applies

where an incompetent witness testifies before the grand jury and his evidence is heard in secret.

The same reason which has moved the court to quash an indictment when it was based upon the testimony of a single person and he incompetent,[114] should also apply in cases where there is more than one witness some of whom are and one or more of whom are not competent. It may well be that the testimony of the incompetent witness formed the principal evidence against the defendant, or it may have been the necessary connecting link in the chain of circumstances, without which the grand jury would have ignored the bill, and it would be manifestly unjust to compel a defendant to answer to an indictment found in such a manner. That the tendency of the cases in general may be said to accord with this view will be seen in the fact that although other witnesses were examined at the same time, an indictment was quashed where the defendant was compelled to testify against himself,[115] and {146} where an unsworn witness testified before the grand jury.[116]

The ground upon which the contrary view is based is that the court will not inquire whether or not the evidence was sufficient to justify the finding.[117] But this can hardly be said to be either an accurate or an adequate reason. If the witness be incompetent, then to sustain the indictment the court must assume that it was found upon the evidence of the competent witnesses only and that the evidence of the incompetent witness was disregarded; if this be not assumed, then we have the condition of an indictment being sustained although founded wholly or in part on incompetent evidence. While in sustaining the indictment all intention to weigh the evidence is disclaimed, in assuming the sufficiency of the evidence the court necessarily weighs it in favor of the commonwealth. If the sufficiency of the evidence be not assumed, then the court should not permit the indictment to stand.[118]

After the grand jury have had all the evidence in the particular case under investigation presented to them, they are then prepared to consider the bill and endorse thereon their finding. They may find a true bill as soon as they have heard enough evidence to convince them that a prima facie case has been made out but they must not ignore a bill until they have {147} examined all the witnesses, for the last examined may supply the evidence necessary to make out the case.[119] If twelve or more, but not exceeding twenty-three, agree to find the bill, the return was anciently at common law "billa vera," but now the return is expressed in English, "a true bill."[120] If less than twelve agree to find the bill, it is then said to be ignored, and while anciently the return was "ignoramus," it is now "ignored," or what is a better return "not found."[121] But if an indictment be found with less than twelve grand jurors concurring, the finding is bad[122] and a motion in arrest of judgment will be sustained.[123]

A grand jury may find a true bill as to one or more counts of an indictment,[124] but the finding is bad if they return a true bill as to part of a count and ignore the balance of the same {148} count:[125] and if the bill charges more than one person, they may find the bill true as to some of the defendants and ignore it as to the balance.[126] And where the grand jury upon a bill for murder find "billa vera se defendo" the finding is bad;[127] and so where the bill charges murder and the jury find for manslaughter only;[128] or where the finding avers that the offense was committed while the defendant was insane.[129] Where the finding is incomplete or insensible it is bad.[130]

The finding of the grand jury is then endorsed on the bill accordingly as they may have acted, and this return must be signed by the foreman[131] or the foreman pro tem.,[132] as the case may be. In some states it is not essential to the validity of the indictment that it should be signed by the foreman,[133] {149} but the ruling in these cases is not to be commended. It is at variance with the common law rule, and if the signature be omitted, there is nothing upon the bill to attest the fact that the finding was duly authorized or placed thereon by a competent person.

A variance between the name of the foreman as shown by the record of his appointment and by the attestation of the finding on the bill is, in general, immaterial.[134] It is not material where the signature of the foreman may be placed,[135] and if he omit to add his official title and merely affix his signature to the finding it has been held that such endorsement can only relate to his official act as foreman and the indictment will be sustained.[136] And likewise if he sign his surname and use the initials of his Christian name only[137] or abbreviate his Christian name.[138]

The omission of the words "a true bill" has been held in some states not fatal to the indictment[139] although the weight of authority is to the contrary, if advantage be taken, before verdict, of the omission of such finding.[140]

{150} It has been said "the endorsement is parcel of the indictment, and the perfection of it,[141] but the name of the offence thus endorsed thereon forms no part of the finding of the grand jury.[142]

The foreman must thus attest the return even though he voted in a manner opposite to the majority of the jurors. And it was held to be proper for him to so attest the return, notwithstanding he had been directed by the court to take no part in the consideration of that particular bill.[143]

It is no ground of objection to the finding of the grand jury that they had at first voted to ignore the bill and afterwards reconsidered their decision and without hearing any additional evidence voted to return a true bill.[144] After the grand jury have found a true bill and presented it, they cannot thereafter vote to ignore the bill and recall it.[145]

While it is the usual course, if the bill be found, for the foreman to endorse thereon "a true bill" with his name and "foreman" annexed, it has been held a sufficient return where the endorsement was simply "a bill" without the word "true,"[146] and signed by the foreman. The endorsement of the words "true bill" omitting the letter "a" is likewise a {151} sufficient return.[147] And it has been held

that judgment would not be arrested because the words "a true bill" were printed on the back of the bill when it was sent to the grand jury room.[148]

Where there is no endorsement of their finding and the name of the foreman only is written thereon, or where the return is not signed at all, a motion to quash the indictment or a plea in abatement will be sustained.[149] The court, however, has refused to arrest the judgment where the endorsement, instead of being upon the bill, was upon the envelope in which the bill was enclosed.[150]

Where a statute sets forth the manner in which the foreman of the grand jury shall endorse the indictment, if the act be not substantially complied with, the indictment must be quashed.[151]

The indictment never alleges the organization and action of the grand jury. The signature of the foreman vouches for the regularity of the proceedings after the jury is empaneled, and the records of the court show the venire[152] and the appointment of the foreman.[153] It has been held that the indictment need not show when it was found,[154] although it is now the usual practice for the foreman to endorse upon the bill the date of its finding.

Where a bill contained ten counts and the grand jury found {152} a true bill and returned it with the endorsement "a true bill on both counts," the finding was held to be bad.[155]

If the grand jury return an indictment against a defendant by the initials of his Christian name only, a plea in abatement will be sustained unless the indictment shows that his name is not known to them otherwise than as set out.[156] And where the grand jury set forth in the indictment that the names of the persons from whom the defendant had received certain contributions were unknown to them, but on the trial it appeared that the names were known to the grand jurors, the court directed a verdict for the defendant.[157]

Should they happen to ignore a bill, a new bill charging the same offence may be submitted to the same or a subsequent grand jury; but in England a new bill cannot be sent before the same grand jury although it may be found by a subsequent one.[158]

The practice of submitting a new bill to the same or a subsequent grand jury has nothing in it to commend it, while it has been very severely criticised. That such, however, is the law is undoubted[159] and Mr. Justice Woodward says,[160] "If {153} the question were an open one, there would be little doubt as to the rule it would be the duty of this court to lay down. On principle, the return of 'ignoramus' made on an indictment by a grand jury ought to be the end of the prosecution originating in the information returned by the committing magistrate. The defendant has complied with the conditions of his recognizance. The prosecution has failed with the failure of the bill. The sureties of the defendant are released, and he is entitled to be discharged.[161] In analogy to the rules by which other judicial proceedings are governed, this ought to be the end of the case founded on the complaint he was called on in the first instance to answer."

It has therefore been held to be error, where, after a grand jury had ignored a bill, a defendant was held in bail to answer the same charge without a new prosecution being instituted.[162]

Where the grand jury ignored the bill and an application was made to the court by private counsel for the prosecutor for leave to send a new bill before the next grand jury, the court held that in the absence of any allegations of irregularity or fraud it had no jurisdiction to review the proceedings of the grand jury or direct the sending of a new bill to the next grand jury.[163]

In some states, it has been provided by statute that a bill once ignored shall not again be submitted to the grand jury except by leave of court;[164] but this has been construed not to apply to a bill charging a different offence arising out of the same assault[165] nor to a case where the grand jury on their own motion find an indictment which has once been dismissed.[166]

{154} When the grand jurors have completed their findings, they are prepared to return into court and make their presentment. They therefore proceed from their room to the court room where they were empaneled, and the names of the grand jurors being called, those present answer thereto. They are then asked by the crier if they have agreed upon any bills and bade to present them to the court.[167] The indictments having been brought in by the foreman,[168] they are handed by him to the crier, who asks if they agree that the court shall amend matter of form altering no matter of substance. To this the grand jury signify their assent. This assent it has been said was necessary to be had at common law in order that clerical errors in the indictment might be corrected; without the consent of the grand jury, the court was powerless to make any alteration in the bill as found, and with it, cannot alter the indictment in matter of substance.[169]

In Pennsylvania,[170] in view of the act of March 31, 1860, which allows the court for any formal defect appearing oh the face of the indictment to forthwith cause such defect to be amended, it would seem no longer necessary to obtain the assent of the grand jury to the making of a change which the law directs shall be made. And this would also seem to be the law in the Federal courts.[171]

Where it becomes necessary to alter an indictment in matter of substance, the bill may be re-submitted to the same grand jury which originally found it, if they are then in session, and they may find a true bill in its altered form without hearing {155} any further evidence.[172] If the grand jury which found the bill has been discharged, then the altered bill, or what is better, a new bill may be submitted to a subsequent grand jury,[173] but, in either event they cannot find a true bill unless evidence is heard in support thereof. In Ex Parte Bain[174] the district attorney amended the

indictment in matter of substance by leave of court and without re-submitting the bill to the grand jury. The defendant was tried, convicted and sentenced to the penitentiary. Upon habeas corpus proceedings, the defendant was discharged, the United States Supreme Court holding, "Upon an indictment so changed the court can proceed no farther. There is nothing (in the language of the Constitution) which the prisoner can be held to answer. A trial on such an indictment is void. There is nothing to try."

If the grand jury after hearing the evidence find a true bill without it being read to them, it has been held not to afford ground for setting aside the indictment so found.[175] It is difficult, however, to reconcile this decision with the ruling in Ex Parte Bain. It can hardly be said that the finding of a bill, the contents of which are unknown to the grand jurors, is any more their finding than the bill altered in substance after presentment. The grand jury have no knowledge of the nature of the charge to which they give their sanction. They may vote to find a true bill upon the evidence they have heard, while the allegations of the bill to which their sanction has apparently been given may present a totally different offence, and which, if known to the grand jurors upon hearing the evidence, they would have ignored. But the reading of the {156} entire bill may be dispensed with providing the material portions of the bill charging the offence be read to the grand jury.

They are not required to read in open court their finding upon the various bills of indictment presented by them.[176] The handing of the bill to the crier or clerk and the entry made by him on the records is a sufficient publication of the finding of the grand jury.[177] And where indictments, when found, were sent into court by the district attorney or a messenger and they were neither presented by the grand jury or a member thereof, the court refused to quash, the indictments having been recorded by the clerk.[178]

The finding of the grand jury should be recorded by the clerk of the court and a failure to do this cannot be excused by the defendant pleading not guilty, and a motion in arrest of judgment will be sustained upon this ground.[179] And {157} where several persons are indicted in the one bill and the finding is recorded as to one only, the court will sustain the indictment against the defendant as to whom the finding was properly recorded, and quash as to the other defendants.[180]

When the finding of the grand jury has been recorded, the bills of indictment should be filed. In some states the statutes make provision for the filing of indictments. Such provisions, however, may in general be regarded as directory[181] and courts are disinclined to invalidate an indictment where the statute has not been complied with.[182] If the date of the filing has not been endorsed on the indictment, the court may thereafter direct that the actual date of filing be endorsed thereon.[183]

When the grand jurors have completed all the duties which will devolve upon them, it is now customary for them to prepare a written report of their work, which is signed by their foreman and handed to the court crier with the indictments. In this report they frequently take occasion to discuss various matters affecting the public welfare, criticise public officials, act as censors of the morals of the community, and make recommendations which it is impracticable and impossible to carry into effect.

That they are acting outside of their duties as grand jurors in making such presentments will hardly be doubted. As the official accuser for the government, their duty is to present persons not things. That this practice should be continued upon the ground that it calls to the public eye abuses in the administration of government or the existence of vice in the community, is a proposition which rests upon no logical basis. If they have any evidence of the things which they thus set forth, {158} it is their duty to the public and to themselves under their oath, to present the individuals guilty of such offences.[184] If they have no personal knowledge of the facts, they are then proceeding in a manner contrary to law.[185] If they know the things which they present, they should present individuals; if they do not know, they are committing a wrong in making broad accusations, which, while they cannot be sustained, grievously injure those to whom they indirectly apply.

This practice received severe condemnation over seventy years ago at the hands of Honorable Daniel Davis[186] then Attorney General for the State of Massachusetts, who says:

"The practice, not uncommon in some parts of the United States, of bringing forward, in the form of presentments, what are denominated public grievances, relative to the political or moral state of the country, is altogether extra-official, and may be and has been adopted and pursued for purposes foreign to, and inconsistent with, the nature of the institution; and perhaps it is not too much to assert, that the opportunity has been used and perverted to party purposes, and with an intention to produce an effect upon public measures and the public mind. Whenever this shall be the case it is to be considered in the same light as any other usurpation or abuse of the judicial authority. It may, with the same propriety, be exercised by any other branch of the judicial power, by the court, or the traverse jury, as well as the grand jury."

In the case of Rector *v.* Smith,[186*] the grand jury made a written report to the court wherein libellous statements were made relating to the conduct of a person then in public office. An action for libel was begun against the clerk of the grand jury who had brought the report into court and there read it.

{159} An answer was filed by the defendant who claimed the report was a privileged communication, to which answer the plaintiff demurred but the demurrer was overruled by the lower court. On appeal, the Supreme Court affirmed the judgment and expressly ruled that the report was not a privileged communication. In delivering the opinion of the court, Balwin, J., says:

"The grand jury have no power, nor is it their privilege or duty to present any person for a criminal offence except by indictment. If the misconduct of an officer does not amount to a crime, and is not of such magnitude as will justify the jury in finding an indictment, their powers over the offence complained of, are at an end. .... A report by a grand jury, presents nothing upon which the court can act, unless it is in reference to the condition of the prison. The court can take no jurisdiction over the complaint charged by such report. Nor can a person thus presented have an opportunity to show himself innocent of the matters complained of. With this view of the question we conclude that the report presented by the defendant as a juror, was not a privileged communication, and that he cannot plead this in bar of plaintiff's right to recover."

When the grand jury in their presentment thus go beyond their lawful authority, whether they refer to persons by name, title, or by innuendo, or to any particular matter or thing, it becomes a serious question whether or not their presentment should be permitted to stand. Clearly in such instance they have exceeded their authority, and in such event their presentment rests upon no legal foundation. There would consequently seem to be no valid reason why a motion to quash or dismiss the presentment, or strike it, or the objectionable part thereof, from the files should not be made. If the grand jurors have exceeded their authority in making such presentment, it is clearly invalid and illegal and may be subjected to attack either by the attorney for the state or by the person or persons to whom the presentment may relate, in the same manner as any presentment or indictment may be attacked. This course has been pursued in Georgia[186**] where the grand jury made a {160} presentment reflecting upon the judges of the Superior Court. The attorney general moved to expunge the presentment from the minutes which was accordingly done.

After submitting their report they are then discharged from further service by the court, and go out and mingle with their fellow citizens and their identity as grand jurors is forever lost.[187] But a grand jury cannot legally dissolve itself[188] or dismiss or excuse any of its members.[189] This is the prerogative of the court alone and until the court takes such action, the existence of the grand jury continues during the balance of the statutory period for which it was summoned.[190] It may be dismissed from time to time during the period for which it was convened and again summoned back to duty when any matters are to be laid before it;[191] or it may adjourn upon its own motion and again reconvene and act whether court is in session or not.[192] But when the record shows that the grand jury has been discharged, it will be presumed to have been legally and properly discharged.[193]

Whether or not the members of the grand jury may be again re-assembled after once being discharged is a matter as to which there is considerable difference of opinion. Two {161} learned writers hold[194] that "When an emergency arises, requiring the presence of a grand jury after the regular body has been discharged, in the absence of statutory authority to summon a new panel, the court should set aside the order of discharge and re-assemble the previous grand jury."[195] But a contrary and what would seem the better opinion, is held by Hon. Daniel Davis,[196] who says: "When the grand jury have finished their business and been unconditionally discharged, they cannot be re-summoned and reorganized. No grand jury can be created or brought into existence but in the manner directed by the statutes of the state."

It would seem that grand jurors in such cases are analogous to petit jurors, who, upon being discharged from further service and having separated, cannot again be reassembled. The statutes provide a method for selecting and summoning grand jurors and the requirements of these statutes must be strictly followed. When, therefore, the grand jurors have been discharged, their official capacity at once comes to an end and they are but ordinary citizens. To set aside the order of discharge would not restore them to their former official position. Their official capacity having once terminated, it can only be again created by the method provided by statute.[197] If there is no statute which provides for setting aside the order of discharge and the reassembling of the grand jury with the {162} same power as before its discharge, a grand jury thus called back to duty would not be lawfully organized.[198]

The order of discharge cannot be collaterally attacked.[199] When the grand jurors are in session or during the time they retain their official position their oath restrains them from disclosing to any one out of the grand jury room that which transpires therein, and it is likewise unlawful for any one to approach a grand juror and attempt in any manner to influence his action. When actually engaged in his duties as a grand juror he is prohibited from holding communication with any one except the court, the district attorney, such witnesses as are sent before the grand jury by the district attorney, and his fellow jurors. It is improper for any one else to send communications to the grand jurors, or for them to receive them, whether with a view to influence the action of the grand jury or not.[200] If any person outside the grand jury room has knowledge of any matter proper for their consideration, he should lay such information before the district attorney who will act accordingly, but he must not attempt to have any direct communication with them.

This question arose in Pennsylvania in the case of Commonwealth *v.* Crans,[201] where the defendant sent a communication to the grand jury, giving his views upon certain subjects which were liable to come before them, and Judge Parsons, there said, "if they (the grand jurors) are to be instructed previous to their retiring by the judge who {163} presides, it necessarily follows they are not to be instructed after they retire to their rooms by any one else. Individuals have no more right to appear before them to discuss matters, or send them letters relative to subjects which are before them, or which may come before them, than they would have to communicate with a petit jury after a charge had been delivered from the bench, in relation to a case which had just been tried."

From the time the grand jurors are summoned until finally discharged, they bear an official relation to the court, and while all jurists agree that they are under the control of the court, none have expressed a well defined opinion as to how far the authority of the court over the grand jurors extends, or to what extent they are independent of the court. [202]

In the days of Bracton and Britton and for a long period thereafter, such a question as this would have been easy to determine. Then, the grand jury was but an instrument wholly under the control of the justices and acting in such manner as they should direct. If the justices so desired, the grand jurors would hear the evidence (when it became customary for them to hear evidence) in open court. If they heard any evidence in private or acted as they then most usually did, upon their own knowledge, or upon hearsay, it was optional with the justices to compel them to disclose how they obtained knowledge of the facts which the jurors set forth in their presentment, and the court was at liberty to set this presentment aside. And it would seem that where a false presentment was made the jurors were liable either to be fined or be imprisoned at the pleasure of the king's justices, and likewise, if the grand jurors refused to present when directed to do so by the justices.

The causes which tended to make the grand jury to a certain extent independent of the court have been heretofore fully considered,[203] and while the court at various times thereafter {164} endeavored to compel juries to do their will as we have seen occurred in Pennsylvania,[204] the practice of punishing them by fine or imprisonment for refusal to act in accordance with the wishes of the justices was brought to an end long prior thereto by the resolute action of Sir Hugh Windham.[205] In this case the grand jurors refused to find a bill for murder although they were satisfied that the deceased came to his death at the hands of the defendant. The chief justice thereupon fined eleven of them, among whom was Sir Hugh Windham, and bound them over until the King's Bench should determine the matter. The court relieved them of the fine although holding that the grand jury should have found a bill for murder. The chief justice was afterward accused in Parliament by Sir Hugh, and was obliged to acknowledge that the fining was unlawful.

That the grand jury from that time has been absolutely free from the control of the court in their findings, there can be no question, and Judge King said,[206] when discharging a prisoner upon habeas corpus proceedings: "I rejoice that our judgment is not conclusive of the subject; the sole effect of this decision, is that in the present state of the evidence we see no sufficient cause to hold the defendant to bail. It is still competent for the proper public officer to submit the case to the grand jury; that respectable body are entirely independent of us; they may form their own view of the prosecutor's case, and may if their judgment so indicates, place the defendant on his trial."

But aside from the independence which they possess in regard to their finding, in what respect, if any, are they independent of the control of the court. Dr. Wharton states: [207] "When the grand jury are in session, they are completely under the control of the court," and in the case of State *v.* {165} Cowan[207*] the court said: "The grand jury are under the control of the court. And it is the province and duty of the court to see that the finding is proper in point of law; and if not, the court may recommit an improper or imperfect finding, and may, if necessary, exercise the power of compelling a proper discharge of duty on the part of the grand jury."

It was said by Judge Parsons[208] that the grand jury "have no power to compel the appearance of a witness, none to attach him for contempt should he refuse to testify, and even on bills pending before them, it became necessary to pass a special law to authorize them to swear witnesses endorsed on the bills." While they are thus unable to take any legal action on matters not within their own knowledge except with the assistance of the court, the court cannot compel them to receive the witnesses subpoenaed, and while it may recommit to them an imperfect finding,[209] it cannot compel them to alter it if they refuse.

Within their own room they are supreme in their action;[210] within the court room, they are subject to the control of the judge in the same manner as any other officer of the court, [211] but even in the court room, the judge has no authority over the grand jurors in any matter which is in their discretion.

In Pennsylvania[212] a person can only be committed for contempt where the offence is actually committed in the presence of the court, although fines may be imposed for contempts not committed in open court, but in the event of the grand jurors in their own room acting contrary to the instructions of the court all that the judge could do would be to discharge the jurors from further service.

A different rule prevails in the Federal courts, for the judges may commit for contempt where the offence was not committed in their presence. Thus in Summerhayes case[213] the court {166} sentenced a grand juror to six months imprisonment for contempt in disregarding his oath and the instructions of the court by revealing to persons outside the grand jury room matters which had transpired therein, relating to such persons. And in Ellis' case[214] on motion of the prosecuting attorney, the court fined Ellis, who was foreman of the grand jury, thirty dollars, discharged him from the grand jury and ordered that execution issue to collect the fine.

A different and rather better view was taken by the court of King's Bench[215] which refused to attach a grand juror for certain acts done by him while acting in his official capacity, although they will attach one who had been a grand juror for acting as such after he has been dismissed.

The grand jury has jurisdiction over its own members for any presentable offence which may be committed by a grand juror while acting as such. Thus in Pennsylvania the grand jurors presented one of their number for drunkenness,

he being present in the grand jury room in a drunken condition and sleeping by the fire while the inquest performed its duties, and the court held the presentment proper if the jury believed the drunkenness to have been voluntary.[216]

Unlike the private prosecutor a grand juror comes ordinarily unwillingly in obedience to the command of the law to act as an official accuser. If, while so acting, he should disregard his oath and maliciously procure the indictment of any person or persons for some alleged offence, the law affords no redress to the person whom he has wronged. No inquiry can be made as to what he said or how he voted; the veil of secrecy surrounding the acts of grand jurors presents a most complete barrier to any investigation into the motive which inspired his action. Even though it were possible to make such investigation, considerations of public policy would require that no action should be maintained against a grand juror for any act done in his official capacity. The fact that he was liable to answer to a {167} defendant for his official acts, would operate as a powerful deterrent to finding a true bill in many cases. The law, therefore, affords a grand juror the most unqualified indemnity for his official acts. "During the whole of their proceedings the grand jury are protected in the discharge of their duty and no action or prosecution can be supported against them in consequence of their finding, however it may be dictated by malice, or destitute of probable foundation."[217]

Endnotes

1. While it is the duty of the court to charge the grand jury, it will not invalidate an indictment should this be omitted: Stewart *v.* State, 24 Ind. 142; Com. *v.* Sanborn, 116 Mass. 61; State *v.* Froiseth, 16 Minn. 313; Clair *v.* State, 40 Neb. 534; Cobb *v.* State, Id. 545; State *v.* Edgerton, 69 N. W. 280; State *v.* Furco, 51 La. Ann. 1082. And see State *v.* Will, 97 Iowa 58; State *v.* Turlington, 102 Mo. 642. Nor will a conviction be disturbed: Porterfield *v.* Com. 91 Va. 801.

2. In re Citizens Association, 8 Phila. (Pa.) 478.

3. Jas. Wil son's Works, Vol. II, p. 366.

4. See Post 126.

5. U. S. *v.* Aaron Burr, 25 Fed. Cas. 63.

6. U. S. *v.* Watkins, 28 Fed. Cas. 419.

7. State *v.* Edgerton, 69 N. W. 280.

8. Parker *v.* Territory, 52 Pac. 361; Clair *v.* State, 28 L. R. A. 367; S. C. 40 Neb. 534.

9. State *v.* Turlington, 102 Mo. 642.

10. Blau *v.* State, 34 So. 153; State *v.* Will, 97 Iowa 58. And see Hall *v.* State, 32 So. 750; People *v.* Glen, 173 N. Y. 395.

11. Byrd *v.* State, 1 How. (Miss.) 247. A county attorney is in effect the assistant to the attorney for the commonwealth and may lawfully conduct the examination of witnesses before the grand jury: Franklin *v.* Com. 48 S. W. 986. The district attorney may be present to assist the grand jury in disposing of township applications for bridge appropriations under Act of April 16, 1870, (P. L. 1199): In re Bridge Appropriations, 9 Kulp (Pa.) 427.

12. U. S. *v.* Cobban, 127 Fed. Rep. 713; Shattuck *v.* State, 11 Ind. 473. The powers and duties of the grand jury do not cease because there may happen to be no district attorney: State *v.* Gonzales, 26 Tex. 197. And see U. S. *v.* McAvoy, 26 Fed. Cas. 1044.

13. Supra. 28, 29, 117.

14. Growth of the Grand Jury System (J. Kinghorn) 6 Law Mag. & Rev. (4th S.) 380.

15. Charge to Grand Jury, 30 Fed. Cas. 992; Ex Parte Crittenden, 6 Fed. Cas. 822; In re District Attorney U. S., 7 Fed. Cas. 745; U. S. *v.* Edgerton, 80 Fed. Rep. 374; Shattuck *v.* State, 11 Ind. 473; Shoop *v.* People, 45 Ill. App. 110; State *v.* Adam, 40 La. Ann. 745; State *v.* Aleck, 41 La. Ann. 83; People *v.* O'Neill, 107 Mich. 556; Com. *v.* Salter, 2 Pears. (Pa.) 461; State *v.* Mickel, 65 Pac. 484; State *v.* McNinch, 12 S. C. 89; State *v.* Baker, 33 W. Va. 319. See Anonymous 7 Cow. (N. Y.) 563. Where the county attorney is disqualified, an attorney appointed to prosecute a case may lawfully appear before the grand jury: State *v.* Kovolosky, 92 Iowa, 498. And see State *v.* Gonzales, 26 Tex. 197; U. S. *v.* Cobban, 127 Fed. Rep. 713.

16. Charge to Grand Jury, 30 Fed. Cas. 992; Lung's Case, 1 Conn. 428; Rothschild *v.* State, 7 Tex. App. 519.

17. In re District Attorney U. S., 7 Fed. Cas. 745.

18. Com. *v.* Frey, 11 Pa. C. C. Rep. 523.

19. Com. *v.* Frey, 11 Pa. C. C. Rep. 523; Com. *v.* Bradney, 126 Pa. 199.

20. Com. *v.* Twitchell, 1 Brews. (Pa.) 551; U. S. *v.* Terry, 39 Fed. Rep. 355; Com. *v.* Bradney, 126 Pa. 199. And see Regent *v.* People, 96 Ill. App. 189.

21. U. S. *v.* Terry, 39 Fed. Rep. 355.

22. Com. *v.* Salter, 2 Pears. (Pa.) 461.

23. Com. v. Bradney, 126 Pa. 199; CONTRA Hall v. State, 32 So. 750. And see as to the presence of other officers in the grand jury room, Post 139, Note 90. An indictment was quashed where private counsel entered the grand jury room while they were deliberating and advised them as to their duty: State v. Addison, 2 S. C. 356. And see Miller v. State, 28 So. 208.

24. Durr *v.* State, 53 Miss. 425; People *v.* Scannell, 72 N. Y. Sup. 449; State *v.* Heaton, 56 Pac. 843. But see Wilson *v.* State, 51 S. W. 916, where private counsel was present on the invitation of the district attorney and examined the witnesses, but was not present when the grand jury was deliberating. And see People *v.* Bradner, 44 Hun (N. Y.) 233; Blevins *v.* State, 68 Ala. 92. This forms no ground for reversing a judgment: State *v.* Whitney, 7 Ore. 386.

25. Com. *v.* Bradney, 126 Pa. 109.

26. In re District Attorney U. S., 7 Fed. Cas. 745; Com. *v.* Salter, 2 Pears. (Pa.) 461.

27. Supra. 117.

28. Act May 3, 1850, P. L. 654.

28*. See the discussion in State *v.* Warner, 165 Mo. 413 of the authority of the district attorney in the conduct of criminal prosecutions.

29. In California the constitution of 1879 omits all reference to "presentments," and consequently a "presentment" by a grand jury is unauthorized: In re Grosbois, 109 Calif. 445. In Georgia, Code Sec. 4632, obliterates the distinction between presentments and indictments: Groves *v.* State, 73 Ga. 205.

30. 4 Bl. Com. 301; Mr. Justice Field's Charge to Grand Jury, 30 Fed. Cas. 992. And see Collins *v.* State, 13 Fla. 651. In Com. *v.* Towles, 5 Leigh (Va.) 743, the defendant was obliged to answer to the presentment of the grand jury and was tried thereon. For a similar case see Smith *v.* State, 1 Humph. (Tenn.) 396.

31. Amendment V.

32. U. S. *v.* Hill, 26 Fed. Cas. 315.

33. Addison, App. 38.

34. U. S. *v.* Hill, 26 Fed. Cas. 315.

35. 4 Bl. Com., 301. The court may order an indictment to be sent *to* the grand jury without a previous presentment: U. S. *v.* Madden, 26 Fed. Cas. 1138; U. S. *v.* Thompkins, 28 Fed. Cas. 89.

36. See State *v.* Love, 4 Humph. (Tenn.) 255; State *v.* Cain, 1 Hawks (N. C.) 352; State *v.* Richard, 50 La. Ann. 210.

37. In Com. *v.* Hayden, 163 Mass. 453, it was held that an indictment is not void because it was found by the grand jury after hearing testimony by one of the grand jurors, since the grand jury may properly act upon the personal knowledge of any of its members. In North Carolina, where a bill is found upon the evidence of a grand juror, he must be regularly sworn as a witness and be noted as such: State *v.* Cain, 1 Hawks 352. And see In re Gardiner, 64 N. Y. Sup. 760.

38. State *v.* Grady, 84 Mo. 220. And see State *v.* Cain, 1 Hawks. (N. C.) 352.

39. Nunn *v.* State, 1 Kelly 243

40. Com. v. Woods, 10 Gray (Mass.) 477; State v. Peterson, 61 Minn. 73; Whiting v. State, 48 Ohio St. 220. CONTRA State v. Ivey, 100 N. C. 539. See McIntire v. Com., 4 S. W. 1.

41. At common law the committing magistrate before whom the case was heard, in default of bail, can commit the witnesses to await the next term of court: 2 Hale, PI. C. 52, 282; Bennet *v.* Watson, 3 M. & S. 1.

42. U. S. *v.* Hunter, 15 Fed. Rep. 712.

43. Id. In re Archer, 96 N. W. 442.

44. In re Morse, 87 N. Y. Sup. 721; See People *v.* Kelly, 12 Abb. Pr. Rep. (N. Y.) 150.

45. In re Rogers, 129 Calif. 468. And see Wheatley *v.* State, 114 Ga. 175.

46. State *v.* Comer, 157 Ind. 611.

47. Heard *v.* Pierce, 8 Cush. (Mass.) 338; In re Harris, 4 Utah 5.

48. Penna. Statute, May 3, 1850, P. L. 654.

49. Fout v. State, 3 Hayw. (Tenn.) 98; Hite v. State, 9 Yerg. (Tenn.) 198; Teas v. State, 7 Humph. (Tenn.) 174; Jackson v. State, 4 Kan. 150. CONTRA Ward v. State, 22 Ala. 16; Harrall v. State, 26 Ala. 53; McGregg v. State, 4 Blackf. (Ind.) 101; Thomas v. State, 6 Mo. 457; Keithler v. State, 10 Smedes & M. (Miss.) 192; Anderson v. State, 5 Ark. 444; State v. Vincent, 1 Car. Law R. 493.

50. Com. *v.* Lenox, 3 Brews. (Pa.) 249; And see Com. *v.* Browr, 23 Pa. Superior Ct. 470. That the prosecuting officer's signature is not essential to the validity of an indictment. See Joyner *v.* State, 78 Ala. 448; Watkins *v.* State, 37 Ark. 370; People *v.* Butler, 1 Idaho 231; State *v.* Wilmoth, 63 Iowa 380; State *v.* Williams, 107 La. 789; Com. *v.* Stone, 105 Mass. 469; State *v.* Reed, 67 Me. 127; State *v.* Murphy, 47 Mo. 274; State *v.* Vincent, 1 Car. Law R. 493; Brown *v.* Com. 86 Va. 466. CONTRA Heacock *v.* State, 42 Ind. 393; State *v.* Bruce, 77 Mo. 193; Fout *v.* State, 3 Hayw. (Tenn.) 98; State *v.* Lockett, 3 Heisk (Tenn.) 274.

51. U. S. *v.* McAvoy, 26 Fed. Cas. 1044.

52. U. S. *v.* Nagle, 27 Fed. Cas. 68; State *v.* Coleman, 8 S. C. 237. And see Com. *v.* Brown, 23 Pa. Superior Ct. 470; Reynolds *v.* State, 11 Tex. 120; State *v.* Gonzales, 26 Tex. 197.

53. Teas *v.* State, 7 Humph. (Tenn.) 174. And see State *v.* Salge, 2 Nev. 321.

54. Harriman *v.* State, 2 Greene (Iowa) 270; Andrews *v.* People, 117 Ill. 195; Bartley *v.* People, 156 Ill. 234. It has been held that if this be omitted it will not be fatal to the indictment: U. S. *v.* Shepard, 27 Fed. Cas. 1056; State *v.* Scott, 25 Ark. 107; People *v.* Naughton, 38 How. Pr. (N. Y.) 430.

55. Act March 31, 1860, Sec. 27, P. L. 427. Memorial of Citizens Association, 8 Phila. (Pa.) 478.

56. U. S. *v.* Mundell, 27 Fed. Cas. 23; U. S. *v.* Helriggle, 26 Fed. Cas. 258; U. S. *v.* Shackelford, 27 Fed. Cas. 1037; U. S. *v.* Hollinsberry, 26 Fed. Cas. 345. The omission of the name of the prosecutor is not good ground for a motion in arrest of judgment: U. S. *v.* Jamesson, 26 Fed. Cas. 585; U. S. *v.* Lloyd, 26 Fed. Cas. 986; nor for general demurrer to the indictment; U. S. *v.* Sandford, 27 Fed. Cas. 952.

57. U. S. *v.* Dulany, 25 Fed. Cas. 922; U. S. *v.* Lloyd, 26 Fed. Cas. 986; Tenorio *v.* Territory, 1 N. M. 279; King *v.* Lukens, 1 Dall. (Pa.) 5. And see Wortham *v.* Com., 5 Randolph (Va.) 669.

58. Peter *v.* State, 3 How. 433; Cody *v.* State, Id. 27; Moore *v.* State, 13 Smedes & M. 259; Kirk *v.* State, Id. 406.

59. Statutes, Sec. 7207.

60. Code (1898), Sec. 7058. If omitted the objection may be raised at any stage of the proceedings: Medaris *v.* State, 10 Yerg. 239. See, however, Rodes *v.* State, 10 Lea. 414, where the court holds that the policy of the law has changed and rules to the contrary. If the bill is founded on a presentment, the prosecutor's name may be omitted: State *v.* McCann, 1 Meigs 91. A married woman is incompetent as a prosecutrix: Moyers *v.* State, 11 Humph. 40; Wattingham *v.* State, 5 Sneed, 64; and a husband is incompetent as a prosecutor against his wife: State *v.* Tankersley, 6 Lea. 582.

61. Code, Sec. 3991. Haught *v.* Com. 2 Va. Cas. 3; Com. *v.* Dove, Id. 29. But see Thompson *v.* Com., 88 Va. 45.

62. State *v.* Brown, 10 Ark. 104; State *v.* Stanford, 20 Ark. 145. And see State *v.* Harrison, 19 Ark. 565; State *v.* Scott, 25 Ark. 107; State *v.* Denton, 14 Ark. 343. The name of a prosecutor need not be endorsed on an indictment for passing counterfeit coin: Gabe *v.* State, 1 Eng. 540.

63. Towle *v.* State, 3 Fla. 202.

64. Bartlett *v.* Humphreys, Hardin, 513; Com. *v.* Gore, 3 Dana 474. And see Allen *v.* Com, 2 Bibb 210.

65. Rev. Code 1899, Sec. 2515. For cases within the statute see State *v.* McCourtney, 6 Mo. 649; State *v.* Hurt, 7 Mo. 321; McWaters *v.* State, 10 Mo. 167; State *v.* Joiner, 19 Mo. 224. Cases not within the statute see State *v.* Rogers, 37 Mo. 367; State *v.* Goss, 74 Mo. 592; Lucy *v.* State, 8 Mo. 134; State *v.* Moles, 9 Mo. 694; State *v.* Roberts, 11 Mo. 510; State *v.* Allen, 22 Mo. 318; State *v.* Sears, 86 Mo. 169. The endorsement may be written on the face of the bill: Williams *v.* State, 9 Mo. 270.

66. State *v.* Hughes, 1 Ala. 655; Molett *v.* State, 33 Ala. 408; Hubbard *v.* State, 72 Ala. 164.

67. State *v.* English, 1 Murphy, 435.

68. King *v.* State, 5 How. 730.

69. 1 Whart. Cr. Law, Sec. 479. (7th ed.)

70. 9 Pick (Mass.) 498.

71. King *v.* State, 5 How. 730.

72. In North Carolina this method of swearing witnessses has not been abrogated by Act 1879, c. 12: State *v.* Allen, 83 N. C. 680. If the witness is not sworn in open court the indictment will be quashed: State *v.* Kilcrease, 6 S. C. 444; Gilman *v.* State, 20 Tenn. 59.

73. And see State *v.* White, 88 N. C. 698. It is not necessary that the judge should be upon the bench if his absence be but temporary: Jetton *v.* State, 19 Tenn. 192.

74. See Duke *v.* State, 20 Ohio St. 225, where the statute provided against this contingency.

75. State *v.* Fassett, 16 Conn. 457. And see 1 Whart. Cr. Law, Sec. 488. (7th ed.)

76. Sec. 10, P. L. 433.

77. The witnesses may be sworn by the foreman of the grand jury: Bird *v.* State, 50 Ga. 585; State *v.* White, 88 N. C. 698. In Tennessee he cannot swear them in case of a felony: Ayrs *v.* State, 5 Cold. 26.

78. Com. *v.* Price, 3 Pa. C. C. Rep. 175; Jillard *v.* Com., 26 Pa. 169; Com. *v.* Wilson, 9 Pa. C. C. Rep. 24.

79. 26 Pa. 169; s. c. 13 L. I. (Pa.) 132. This case arose under the Act of April 5, 1826, which is similar in its provisions to the Act of March 31, 1860, Sec. 10, P. L. 433.

80. Com. *v.* Wilson, 9 Pa. C. C. Rep. 24; Com. *v.* Schall, 9 Lanc. Law Rev. (Pa.) 332; Com. *v.* Frescoln, 11 Id. 161; State *v.* Roberts, 2 Dev. & Bat. (N. C.) 540; King *v.* State, 5 How. (Miss.) 730; Gilman *v.* State, 1 Humph. (Tenn.) 59.

81. Com. *v.* Salter, 2 Pears. (Pa.) 461; King *v.* State, 5 How. (Miss.) 730; Gilman *v.* State, 1 Humph. (Tenn) 59. They will be presumed to have been sworn: Com. *v.* Rovnianek, 12 Pa. Superior Ct. 86.

82. U. S. v. Coolidge, 25 Fed. Cas. 622; Joyner v. State, 78 Ala. 448; Ashburn v. State, 15 Ga. 246; In re Lester, 77 Ga. 143. CONTRA State v. Easton, 113 Iowa 516, upon the ground that the failure to administer the oath was not one of the grounds of objection designed by the statute.

83. Rex *v.* Dickinson, Russ. & Ry. Crown Cases 401; Reg. *v.* Russell, I C. & M. 247; 1 Whart. Cr. Law, Sec. 489 (7th ed.)

84. Id.

85. Russ. & Ry. Crown Cas. 401.

86. An indictment will not be set aside because the clerk of the grand jury was a practicing attorney and asked the witness some questions at the request of the foreman: State *v.* Miller, 95 Iowa 368.

87. U. S. v. Edgerton, 80 Fed. Rep. 374; Com. v. Dorwart, 7 Lanc. Bar (Pa.) 121; And see State v. Fertig, 98 Iowa, 139. CONTRA Bennett v. State, 62 Ark. 516; Mason v. State, 81 S. W. 718; State v. Wood, 84 N. W. 503

88. State *v.* Watson, 34 La. Ann. 669; State *v.* Clough, 49 Me. 573; Wilson *v.* State, 70 Miss. 595; People *v.* Metropolitan Traction Co., 50 N. Y. Sup. 1117; Rothschild *v.* State, 7 Tex. App. 519; Doss *v.* State, 28 Id. 506. And see Sims *v.* State, 45 S. W. 705. A judgment will not be reversed upon the ground that a stranger was in the room during the deliberations of the grand jury where no objection was made to such irregularity before trial: State *v.* Justus, 11 Ore. 178.

89. State *v.* Fertig, 98 Iowa 139; Territory v. Staples, 26 Pac. 166; State *v.* Tilly, 8 Baxt. (Tenn.) 381.

90. U. S. v. Simmons, 46 Fed. Rep. 65; State v. Brewster, 42 L. R. A. 444; State v. Bates, 148 Ind. 610; Thayer v. State, 138 Ala. 39; And see Courtney v. State, 5 Ind. App. 356. CONTRA State v. Bowman, 90 Me. 363. And see as to the presence of other officers in the grand jury room: State v. Kimball, 29 Iowa 267; Richardson v. Com., 76 Va. 1007; State v. District Court, 55 Pac. 916; Cross v. State, 78 Ala. 430; Bennett v. State, 62 Ark. 516; Raymond v. People, 30 Pac. 504; State v. Bacon, 77 Miss. 366. See as to presence of interpreter: People v. Ramirez, 56 Calif. 533; People v. Lem Deo, 132 Calif. 199.

91. Supra. 103. CONTRA In re Morse, 87 N Y. Sup 721.

92. Res *v* Shaffer, 1 Dall (Pa.) 236.

93. Addison, App. 41.

94. U. S. *v.* White, 28 Fed. Cas. 588.

95. Supra, 103.

96. Supra, 105, 141; People *v.* Stern, 68 N. Y. Sup. 732; People *v.* Harmon, 69 N. Y. Sup. 511.

97. 2 Hawk. PI. C. c. 25, s. 138-139. Davis' Precedents of Indictments, 25; 1 Whart. Cr. Law, Sec. 493 (7th ed.); Denby's Case, 1 Leach C. C. 514.

98. 1 Chitty Cr. Law, 319; 1 Whart. Cr. Law, Sec. 493 (7th ed.); U. S. *v.* Reed, 27 Fed. Cas. 727; U. S. *v.* Kilpatrick, 16 Fed. Rep. 765; Sparrenberger *v.* State, 53 Ala. 481; Washington *v.* State, 63 Ala. 189; Bryant *v.* State, 79 Ala. 282; People *v.* Sellick, 4 N. Y. Cr. Rep. 329; People *v.* Strong, 1 Abb. Prac. Rep. (N. S.) 244. The court will not pass upon the sufficiency of the evidence heard by the grand jury: Stewart *v.* State, 24 Ind. 142; Com. *v.* Minor, 89 Ky. 555; State *v.* Lewis, 38 La. Ann. 680. And see U. S. *v.* Cobban, 127 Fed. Rep. 713; State *v.* Fowler, 52 Iowa 103; People *v.* Lauder, 82 Mich. 109; State *v.* Logan, 1 Nev. 509; Hope *v.* People, 83 N. Y. 418; Morrison *v.* State, 41 Tex. 516; Cotton *v.* State, 43 Tex. 169; Terry *v.* State, 15 Tex. App. 66; Carl *v.* State, 28 So. 505; Hall *v.* State, 32 So. 750; McIntire *v.* Com., 4 S. W. 1. But see People *v.* Metropolitan Traction Co., 50 N. Y. Sup. 1117.

99. U. S. v. Jones, 69 Fed. Rep. 973; State v. Fasset, 16 Conn. 457; People v. Lauder, 82 Mich. 109; State v. Dayton, 23 N. J. Law 49; People v. Molineux, 58 N. Y. Sup. 155; Wadley v. Com. 35 S. E. 452; Buchanan v. State, 52 S. W. 769; Territory v. Pendry, 22 Pac. 760. But see CONTRA State v. Robinson, 2 Lea (Tenn.) 114; People v. Metropolitan Traction Co., 50 N. Y. Sup. 1117.

100. Com. *v.* Spattenhover, 8 Luz. Leg. Reg. 101. In this case the defendant's wife was called as a witness against her husband before the grand jury which found the indictment.

101. State *v.* Fellows, 2 Hayw. 340.

102. U. S. *v.* Aaron Burr, 25 Fed. Cas. 68.

103. U. S. *v.* Hunter, 15 Fed. Rep. 712; Hartranft's Appeal, 85 Pa. 433.

104. Denby's Case, 1 Leach C. C. 514. In California the depositions of witnesses taken before a magistrate upon a criminal charge may be used before a grand jury: People *v.* Stuart, 4 Calif. 218. And see State *v.* Marshall, 74 N. W. 763; Hope *v.* People, 83 N. Y. 418.

105. 2 Hawk. PI. C. Ch. 25, Sec. 145; 1 Whart. Cr. Law, Sec. 493. (7th ed.)

106. The Penna. Act of May 23, 1887, Sec. 2, P. L. 158, provides that a person convicted of perjury shall not be a competent witness for any purpose except in cases of violence done or attempted to be done to his person or property.

107. King *v.* Dodd., 1 Leach C. C. 155.

108. People v. King, 28 Calif. 265; State v. Trauger, 77 N. W. 336; People v. Willis, 52 N. Y. Sup. 808; Lindsay v. State, 24 Ohio Cir. Ct. Rep. 1; State v. Comer, 157 Ind. 611; People v. Lauder, 82 Mich. 109; State v. Hawks, 56 Minn. 129. And see People v. Hayes, 59 N. Y. Sup. 761. CONTRA People v. Singer, 18 Abb. N. C. 96; State v. Froiseth, 16 Minn. 296.

109. 1 East's PI. C. 128. In 1 Chitty Cr. Law 320, it is said that it will be sufficient if there is one witness to one overt act and another witness to another overt act.

110. The Constitution of the United States, Art. Ill, Sec. 3, provides, "No person shall be *convicted* of treason unless on the testimony of two witnesses to the same overt act." At common law one witness was sufficient to support a conviction in cases of treason: 1 East PI. C. 128.

111. People *v.* Price, 2 N. Y. Sup. 414; People *v.* Briggs, 60 How. Pr. (N. Y.) 17; State *v.* Lanier, 90 N. C. 714. This common law principle is recognized in New York by the provisions of Cr. Code, Sec. 256, providing "the grand jury can receive none but legal evidence," and in People *v.* Metropolitan Traction Co, 50 N. Y. Sup. 1117, the indictment was dismissed upon the ground that the grand jury had been allowed to receive illegal evidence.

112. Bloomer *v.* State, 3 Sneed (Tenn.) 66; State *v.* Tucker, 20 Iowa 508; Com. *v.* Minor, 89 Ky. 555. And see 1 Whart. Cr. Law, Sec. 493 (7th ed.); U. S. *v.* Brown, 24 Fed. Cas. 1273; U. S. *v.* Smith, 27 Fed. Cas. 1186.

113. Grier *v.* Homestead Borough, 6 Pa. Superior Ct. 542; Rahlfing *v.* Heidrick, 4 Phila. (Pa.) 3; Railway Co. *v.* Johnson, 55 Kan. 344; Mussey *v.* Mussey, 68 Me. 346; Hamblett *v.* Hamblett, 6 N. H. 333; Sherman *v.* Railroad Co., 106 N. Y. 542; Penfield *v.* Carpenter, 13 Johns. (N. Y.) 350.

114. State *v.* Fellows, 2 Hayw. (N. C.) 340; and see Lennard *v.* State, 30 S. E. 780.

115. U. S. v. Edgerton, 80 Fed. Rep. 374; State v. Froiseth, 16 Minn. 296; State v. Gardner, 88 Minn. 130. And see Counselman v. Hitchcock, 142 U S. 547; State v. Frizell, 111 N. C. 722. CONTRA U. S. v. Brown, 24 Fed. Cas 1273. In State v. Krider, 78 N. C 481, the indictment was quashed where the grand jury examined each of two persons against the other in order to obtain a true bill against both.

116. U. S. *v.* Coolidge, 25 Fed. Cas. 622. In Com. *v.* Price, 3 Pa. C. C Rep. 175, where a witness testified before the grand jury without being legally sworn, Judge Sittser quashed the indictment, saying: "We cannot tell whether the grand jury found the indictment upon the testimony of this witness alone or upon that of others, nor can we inquire into that."

117. Turk *v.* State, 7 Hammond (Ohio) part 2, p. 240; People *v.* Hulbut, 4 Denio (N. Y.) 133; State *v.* Logan, 1 Nev. 509; State *v.* Boyd, 2 Hill (S C.) 288. In New York even though illegal evidence was introduced before the grand jury, if legal evidence was also presented, which if unexplained, would warrant a conviction, the indictment must be sustained: People *v.* Winant, 53 N. Y. Sup. 695. See people *v.* Metropolitan Traction Co., 50 N. Y. Sup. 1117; People *v.* Molineux, 58 N. Y. Sup. 155.

118. See remarks of Judge Sittser in Com. *v.* Price, 3 Pa. C. C. Rep. 175.

119. Com. *v.* Ditzler, 1 Lanc. Bar. (Pa.) Aug. 28, 1869. After an indictment has been dismissed and the case again referred to the grand jury, they need not hear all the witnesses: Mclntire *v.* Com., 4 S. W. 1.

120. Where a bill is erroneously returned endorsed, "a true bill," it may be shown on motion to quash that the grand jury voted to ignore the bill and their clerk was directed to endorse it "not a true bill;" State *v.* Horton, 63 N. C. 595.

121. 4 Bl. Com. 305; 1 Chitty Cr. Law 324.

122. People *v.* Roberts, 6 Calif. 214; People *v.* Butler, 8 Id. 435; People *v.* Gatewood, 20 Id. 146; People *v.* Hunter, 54 Id. 65; Lung's Case, 1 Conn. 428; State *v.* Ostrander, 18 Iowa, 435; State *v.* Shelton, 64 Iowa, 333; Donald *v.* State, 31 Fla. 255; State *v.* Copp, 34 Kan. 522; Wells *v.* Com. 15 Ky. Law Rep. 179; Low's Case, 4 Greenl. (Me.) 439; Barney *v.* State, 12 Smedes & M. (Miss.) 68; State *v.* McNeill, 93 N. C. 552; State *v.* Barker, 107 Id. 913; Turk *v.* State, 7 Ham. (Ohio) part 2, p. 240; In re Citizens Assn., 8 Phila. (Pa.) 478; State *v.* Williams, 35 S. C. 344; State *v.* Brainerd, 56 Vt. 532; Fitzgerald *v.* State, 4 Wis. 395. In English *v.* State, 31 Fla. 340, the court held that Stat. 4015, Sec. 5 (1891) was unconstitutional upon the ground that it authorized the finding of an indictment upon the concurrence of eight grand jurors. And see State *v.* Hartley, 40 Pac. 372. A grand jury of seven persons does not conflict with amendments V and XIV of the U. S. Constitution: Hausenfluck *v.* Com. 85 Va. 702.

123. 2 Hawk. PI. C. Ch. 25, Sec. 16; 2 Hale PI. C. 161; R. S. U. S., Sec. 1021; Clyncard's Case, Cro. Eliz. 654; Sayer's Case, 8 Leigh (Va.) 722.

124. 1 Chitty Cr. Law 323; 1 Whart. Cr. Law., Sec. 504 (7th ed.); Rex. *v.* Fieldhouse, 1 Cowper 325.

125. 1 Chitty Cr. Law 322; 1 Whart. Cr. Law, Sec. 504 (7th ed.); 2 Hale PI. C. 162; King *v.* Ford, Yelv. 99; Shouse *v.* Com. 5 Pa. 83; Com. *v.* Keenan, 67 Pa. 203; Com. *v.* Grossly, 12 Lanc. Bar (Pa.) 52; State *v.* Wilhite, 11 Humph. (Tenn.) 602; State *v.* Creighton, 1 N. & McC. (S. C.) 256; State *v.* Wilburne, 2 Brevard (S. C.) 296. And see Hall's Case, 3 Gratt (Va.) 593.

126. 1 Chitty Cr. Law 323; 2 Hale PI. C. 158; 1 Whart. Cr. Law Sec. 504 (7th ed.)

127. Powle's Case, 2 Rolle Rep. 52. In U. S. *v.* Elliott, 25 Fed. Cas. 1003, the grand jury made a presentment that the defendant acted in self-defence and the court thereupon ordered his discharge from custody.

128. 2 Hale PI. C. 158; State *v.* Cowan, 1 Head (Tenn.) 280; Compare People *v.* Nichol, 34 Calif. 211, where on an indictment for murder, the grand jury found a true bill for murder in the second degree.

129. Reg. *v.* Hodges, 8 Car. & P. 195.

130. 2 Hawk. PI. C. Ch. 25, Sec. 2; 1 Chitty Cr. Law 323; 1 Whart. Cr. Law, Sec. 505 (7th ed.); R. *v.* Cooke, 8 C. & P. 582; U. S. *v.* Levally, 36 Fed. Rep. 687; Frisbie *v.* U. S., 157 U. S. 160.

131. U. S. *v.* Plumer, 27 Fed. Cas. 561; Com. *v.* Sargent, Thach. Cr. Cas. 116; Com. *v.* Ditzler, 1 Lanc. Bar. (Pa.) Aug. 28, 1869; Com. *v.* Diffenbaugh, 3 Pa. C. C. Rep. 299. That the foreman's name was signed by the clerk will not invalidate the indictment, it appearing that it was done at the foreman's request and in his presence: Benson *v.* State, 68 Ala. 544.

132. White *v.* State, 93 Ga. 47; State *v.* Collins, 6 Baxt. (Tenn.) 151.

133. McGuffie *v.* State, 17 Ga. 497; Com. *v.* Ripperdon, Litt. Sel. Cas. (Ky.) 194; Com. *v.* Walters, 6 Dana (Ky.) 200; State *v.* Cox, 6 Ired. (N. C.) 440; State *v.* Calhoon, 1 Dev. & Bat. (N. C.) 374; State *v.* Creighton, 1 N. & McC. (S. C.) 256; Pinson *v.* State, 23 Tex. 579; State *v.* Flores, 33 Tex. 444; Robinson *v.* State, 24 Tex. App. 4; State *v.* Hill, 35 S. E. 831.

134. State *v.* Stedman, 7 Port. (Ala.) 495; State *v.* Taggart, 38 Me. 298; Com. *v.* Hamilton,:5 Gray (Mass.) 480; Geiger *v.* State, 25 Ohio Cir. Ct. Rep. 742; State *v.* Calhoon, 1 Dev. & Bat. (N. C.) 374; State *v.* Collins, 3 Dev. (N. C.) 117. And see People *v.* Roberts, 6 Calif. 214; Deitz *v.* State, 123 Ind. 85; Green *v.* State, 4 Pickle (Tenn.) 614.

135. Goodman *v.* People, 90 Ill. App. 533; State *v.* Bowman, 103 Ind. 69; Overshiner *v.* Com. 2 B. Mon. (Ky.) 344; Blume *v.* State, 56 N. E. 771; State *v.* Shippey, 10 Minn. 223.

136. McGuffie *v.* State, 17 Ga. 497; State *v.* Chandler, 2 Hawks (N. C.) 439; State *v.* Brown, 31 Vt. 602. And see State *v.* Sopher, 35 La. Ann. 975; Whiting *v.* State, 48 Ohio St. 220.

137. Wassels *v.* State, 26 Ind. 30; Zimmerman *v.* State, 4 Ind. App. 583; State *v.* Groome, 10 Iowa 308; State *v.* Granville, 34 La. Ann. 1088; Com. *v.* Gleason, 110 Mass. 66.

138. Studstill *v.* State, 7 Ga. 2; State *v.* Folke, 2 La. Ann 744.

139. Com. *v.* Smyth, 11 Cush. (Mass.) 473; State *v.* Freeman, 13 N. H. 488; Price *v.* Com. 21 Grat. (Va.) 846; White *v.* Com. 29 Id. 824; State *v.* Hill, 35 S. E. 831. And see State *v.* Magrath, 44 N. J. Law 227, where the indictments were drawn after the investigation by the grand jury.

140. Alden *v.* State, 18 Fla. 187; Gardiner *v.* People, 3 Scam. (Ill.) 83; Nomaque *v.* People, Breese (Ill.) 109; Johnson *v.* State, 23 Ind. 32; Cooper *v.* State, 79 Ind. 206; State *v.* Buntin, 123 Ind. 124; Denton *v.* State, 155 Ind. 307; Com. *v.* Walters, 6 Dana (Ky.) 290; Oliver *v.* Com., 95 Ky. 372; State *v.* Logan, 104 La. 254; Webster's Case, 5 Greenl. (Me.) 432; Spratt *v.* State, 8 Mo. 247; State *v.* McBroom, 127 N. C. 528; Gunkle *v.* State, 6 Baxt. (Tenn.) 625; Bird *v.* State, 103 Tenn. 343.

141. King *v.* Ford, Yelv. 99. See State *v.* Thacker, 38 S. E. 539.

142. State *v.* Rohfrischt, 12 La. Ann. 382; State *v.* Valere, 39 Id. 1060; State *v.* DeHart, 109 La. 570; Collins *v.* People, 39 Ill. 233. And see Cherry *v.* State, 6 Fla. 679; Humpeler *v.* People, 92 Ill. 400; Com. *v.* English, 6 Bush (Ky.) 431; Thompson *v.* Com., 20 Gratt. (Va.) 724.

143. State *v.* Lightfoot, 78 N. W. 41.

144. U. S. *v.* Simmons, 46 Fed. Rep. 65. And see State *v.* Clapper, 59 Iowa 279; State *v.* Parrish, 8 Humph. (Tenn.) 80; State *v.* Brown, 81 N. C. 568. In People *v.* Sheriff of Chautauqua County, 11 Civ. Proc. Rep. (N. Y.) 172, it was held that the grand jury had full control of every charge presented for its investigation until its final discharge, and before that time may reconsider and change any of its former acts.

145. Fields *v.* State, 25 So. 726. And see In re Morse, 87 N. Y. Sup. 721.

146. Sparks *v.* Com., 9 Pa. 354.

147. Martin *v.* State, 30 Neb. 507; State *v.* Elkins, Meigs, (Tenn.) 109; State *v.* Davidson, 12 Vt. 300.

148. Com. *v.* Usner, 7 Lanc. (Pa.) 57. And see Tilly *v.* State, 21 Fla. 242; State *v.* Hogan, 31 Mo. 342; State *v.* Elliott, 98 Mo. 150; State *v.* Williamson, 4 Weekly Law Bulletin, (Ohio) 279.

149. U. S. *v.* Levally, 36 Fed. Rep. 687; Frisbie *v.* U. S., 157 U. S. 160.

150. Burgess *v.* Com. 2 Va. Cas. 483.

151. Cooper *v.* State, 79 Ind. 206; State *v.* Bowman, 103 Ind. 69; Strange *v.* State, 110 Ind. 354.

152. U. S. *v.* Laws, 26 Fed. Cas. 892. And see Conner *v.* State, 4 Yerg. (Tenn.) 137; State *v.* Davidson, 2 Cold (Tenn.) 184.

153. If the indictment be returned endorsed by one of the grand jurors as foreman, the record need not show his appointment as such: Yates *v.* People, 38 Ill. 527.

154. Burgess v. Com., 2 Va. Cas. 483; CONTRA Com. v. Schall, 9 Lanc. Law Rev. (Pa.) 332.

155. R. *v.* Cooke, 8 Car. & P. 582. See People *v.* Hulbut, 4 Denio. (N. Y.) 133.

156. U. S. v. Upham, 43 Fed. Rep. 68; Gerrish v. State, 53 Ala. 476; O'Brien v. State, 91 Ala. 25; Gardner v. State, 4 Ind. 632; Jones v. State, 11 Ind. 357. And see Skinner v. State, 30 Ala. 524; Levy v. State, 6 Ind. 281; Wilcox v. State, 34 S. W. 958. CONTRA State v. Webster, 30 Ark. 166; Com. v. Kelcher, 3 Met. (Ky.) 485; State v. Johnson, 93 Mo. 73.

157. "U. S. *v.* Riley, 74 Fed. Rep. 210. And see Cheek *v.* State, 38 Ala. 327; Winten *v.* State, 90 Ala. 637; Blodget *v.* State, 3 Ind. 403; Yost *v.* Com., 5 Ky. Law Rep. 935; State *v.* Stowe, 132 Mo. 199; Sault *v.* People, 34 Pac. 263.

158. 4 Bl. Com. 305; Reg. v. Austin, 4 Cox C. C. 385; Reg. v. Humphreys, Car. & M. 601. CONTRA 1 Chitty Cr. Law 325; R. v. Newton, 2 M. & Rob. 503; Queen v. Simmonite, 1 Cox C. C. 30.

159. U. S. *v.* Martin, 50 Fed. Rep. 918; Christmas *v.* State, 53 Ga. 81; State *v.* Green, 111 Mo. 585; State *v.* Brown, 81 N. C. 568; State *v.* Harris, 91 N. C. 656; Ex Parte Job, 30 Pac. 699; State *v.* Reinhart, 38 Pac. 822; 1 Chitty Cr. Law 325. Mr. Chitty, however, states, p. 324, when the bill is ignored "the party is discharged without further answer," which is inconsistent with his subsequent statement.

160. Rowand *v.* Com., 82 Pa. 405.

161. In U. S. *v.* Bates, 24 Fed. Cas. 1042, it was held that a prisoner was not entitled to be discharged because the grand jury ignored the bill.

162. In re Moragne, 53 Pac. 3.

163. Com. *v.* Priestley, 10 Dist. Rep. (Pa.) 217. And see Com. *v.* Allen, 14 Pa. C. C. Rep. 546; Com. *v.* Charters, 20 Pa. Superior Ct. 599; In re Moragne, 53 Pac. 3.

164. State *v.* Collis, 73 Iowa 542; People *v.* Clements, 5 N. Y. Cr. Rep. 288; People *v.* Warren, 109 N. Y. 615.

165. People *v.* Warren, 109 N. Y. 615.

166. State *v.* Collis, 73 Iowa 542.

167. 1 Whart. Cr. Law, Sec. 500. (7th ed.)

168. Laurent *v.* State, 1 Kan. 313; Com. *v.* Cawood, *2* Va. Cas. 527. They should not be brought in by the foreman alone, but by the grand jury as a body: State *v.* Bordeaux, 93 N. C. 560. People *v.* Lee, 2 Utah 441.

169. 1 Chitty Cr. Law 324; Ex Parte Bain, 121 U. S. 1; Sparks *v.* Com., 9 Pa. 354. In Harrison *v.* Com., 123 Pa. 508, where the district attorney amended the indictment by inserting "copper" before "lightning rod," without submitting the amended bill to the

grand jury, this point was raised, but the court below awarded a new trial upon other grounds.

170. Sec. II, P. L. 427.

171. R. S. U. S. Sec. 1025; Caha *v.* U. S., 152 U. S. 211.

172. Com. *v.* Woods, 10 Gray (Mass.) 477. In Com. *v.* Clune, 162 Mass. 206, the same ruling was made, although some of the grand jurors who found the former indictments were absent and their places were filled by jurors who had heard no evidence. See State *v.* Peterson, 61 Minn. 73.

173. 1 Chitty Cr. Law 325; State *v.* Allen, R. M. Charltons Rep. (Ga.) 518; Com. *v.* Woods, 10 Gray (Mass.) 477; see State *v.* Davidson, 2 Cold. (Tenn.) 184; Lawless *v.* State, 4 Lea (Tenn.) 173.

174. 121 U. S. 1; and see Watts *v.* State, 57 Atl. 542.

175. U. S. *v.* Terry, 39 Fed. Rep. 355. And see U. S. *v.* Farrington, 5 Fed. Rep. 343, where the court directs attention to this fact, but quashed the indictment upon other grounds.

176. U. S. *v.* Butler, 25 Fed. Cas. 213; Hopkins *v.* Com. 50 Pa. 9.

177. Id. And see Hogan *v.* State, 30 Wis. 428.

178. Com. *v.* Salter, 2 Pears. (Pa.) 461; Danforth *v.* State, 75 Ga. 614; Laurent *v.* State, 1 Kan. 313.

179. Holcombe v. State, 31 Ark. 427; Thornell v. People, 11 Colo. 305; Gardner v. People, 20 Ill. 430; Kelly v. People, 39 Ill. 157; Aylesworth v. State, 65 Ill. 301; Adams v. State, 11 Ind. 304; Heacock v. State, 42 Ind. 393; State v. Glover, 3 G. Greene (Iowa) 249; State v. Sandoz, 37 La. Ann. 376; Jenkins v. State, 30 Miss. 408; Pond v. State, 47 Miss. 39; State v Brown, 81 N. C. 568; State v. Davidson, 2 Cold. (Tenn.) 184; Rainey v. People, 3 Gil. (Ill.) 71; Chappel v. State, 8 Yerg. (Tenn.) 166; Brown v. State, 7 Humph. (Tenn.) 155; Hardy v. State, 1 Tex. App. 556; Simmons v. Com., 89 Va. 156; Com. v. Cawood, 2 Va. Cas. 527; State v. Gilmore, 9 W. Va. 641; State v. Heaton, 23 W. Va. 773. CONTRA Moore v. State, 81 S. W. 48; State v. Crilly, 77 Pac. 701; People v. Lee, 2 Utah 441; Mose v. State, 35 Ala. 421. And see as to a sufficient record of the finding: McCuller v. State, 49 Ala. 39; Robinson v. State, 33 Ark. 180; Johnson v. State, 24 Fla. 162; Fitzpatrick v. People, 98 Ill. 269; Kelly v. People 132 Ill. 363; Wall v. State, 23 Ind. 150; Beavers v. State, 58 Ind. 530; Clare v. State, 68 Ind. 17; Reeves v. State, 84 Ind. 116; Heath v. State, 101 Ind. 512; Millar v. State, 2 Kan. 174; Patterson v. Com., 86 Ky. 313; Nichols v. State, 46 Miss. 284; State v. Vincent, 91 Mo. 662; State v. Gainus, 86 N. C. 632; Hopkins v. Com., 50 Pa. 9; Bennett v. State, 8 Humph. (Tenn.) 118; Maples v. State, 3 Heisk (Tenn.) 408; Peoples v. State, 35 So. 223; Pearce v. Com., 8 S. W. 893; State v. Jones, 42 Pac. 392. In State v. Muzingo, 19 Tenn. (Meigs) 112, it was held that a presentment of the grand jury need not be entered on the minutes of the court.

180. Drake and Cochren's Case, 6 Gratt (Va.) 665; State v. Compton, 13 W. Va. 852. CONTRA State v. Banks, 40 La. Ann. 736.

181. Stanley *v.* State, 88 Ala. 154; Dawson *v.* People, 25 N. Y. 399.

182. Pittman *v.* State, 25 Fla. 648; Engelman *v.* State, 2 Cart. (Ind.) 91; State *v.* Jolly, 7 Iowa 15; Com. *v.* Stegala, 8 Ky. Law Rep. 142; Reynolds *v.* State, 11 Tex. 120.

183. Franklin *v.* State, 28 Ala. 9; State *v.* Gowen, 7 Eng. (Ark.) 62; James *v.* State, 41 Ark. 451; Pence *v.* Com. 95 Ky. 618; State *v.* Clark, 18 Mo. 432; Caldwell *v.* State, 5 Tex. 18; Rippey *v.* State, 29 Tex. App. 37.

184. See Judge Stowe's Charge to Grand Jury, 3 Pitts. Rep. (Pa.) page 179. It may be doubted whether this charge, so far as it relates to the power of the grand jury to originate prosecutions, is entirely correct; it is at least an inadequate statement of the authority of the grand jury.

185. Case of Lloyd and Carpenter, 3 Clark (Pa.) 188.

186. Precedents of Indictments, p. 11.

186*. 11 Iowa 302.

186**. Presentment of Grand Jury, 1 R. M., Charlt. 149.

187. Chief Justice Shaw's Charge to Grand Jury, 8 Am. Jurist 216; Addison, App. 75.

188. In re Gannon, 69 Calif. 541.

189. See Gladden *v.* State, 12 Fla. 562; Smith *v.* State, 19 Tex. App. 95; Watts *v.* State, 22 Id. 572; Drake *v.* State, 25 Id. 293; Jackson *v.* State, 25 Id. 314.

190. In re Gannon, 69 Calif. 541; People *v.* Leonard, 106 Calif. 302; State *v.* Bennett, 45 La. Ann. 54; Com. *v.* Rich, 14 Gray (Mass.) 335. And see Barger *v.* State, 6 Blackf. (Ind.) 188; Harper *v.* State, 42 Ind. 405. R. S. U. S. 811 provides: "The circuit and district courts, the district courts of the Territories, and the supreme court of the District of Columbia, may discharge their grand juries whenever they deem a continuance of the sessions of such juries unnecessary."

191. Ulmer *v.* State, 14 Ind. 52; Long *v.* State, 46 Ind, 582; State *v.* Pate, 67 Mo. 488. That the grand jurors did not return until after the day designated will not dissolve the grand jury: Clem *v.* State, 33 Ind. 418.

192. Nealon *v.* People, 39 Ill. App. 481; People *v.* Sheriff of Chautauqua County, 11 Civ. Proc. Rep. 172. And see Com. *v.* Bannon, 97 Mass. 214.

193. White *v.* People, 81 Ill. 333. And see State *v.* Wingate, 4 Ind. 193.

194. Thompson & Merriam on Juries, Sec. 497.

195. See Newman *v.* State, 43 Tex. 525.

196. Precedents of Indictments, p. 30. And see Reg. *v.* Holloway, 9 Car. & P. 43.

197. Findley *v.* People, 1 Manning (Mich.) 234: In Mackey *v.* People, 2 Colo. 13, the indictment was found by a special grand jury summoned during the term and after the regular grand jury had been discharged for the term. The defendant challenged the array upon the ground that the statute provided that the regular grand jurors had been summoned for the term and that after they were discharged no grand jury could be summoned until the next term. The challenge was overruled upon the ground that there was a common law power in the court to so cause a grand jury to be summoned and that it did not conflict with the statute. And see Stone *v.* People, 2 Scam. (Ill.) 326; Empson *v.* People, 78 Ill. 248; Freel *v.* State, 21 Ark. 212; State *v.* Grimes, 50 Minn. 123.

198. Gay *v.* State, 49 S. W. 612; Matthews *v.* State, 58 S. W. 86; Trevinio *v.* State, 27 Tex. App. 372. See State *v.* Reid, 20 Iowa 413.

199. State *v.* Hart, 67 Iowa 142. It is impossible to reconcile the ruling in this case with those cases which hold a new grand jury to be illegally empanelled because the former grand jury was not legally discharged.

200. People *v.* Sellick, 4 N. Y. Cr. Rep. 329; Charge to Grand Jury, 30 Fed. Cas. 992; Com. *v.* Crans, 2 Clark (Pa.) 441; Doan's Case,

5 Pa. Dist. Rep. 211. And see Henry Bergh's Case, 16 Abb. Pr. N. S. (N. Y.) 266; People *v.* Shea, 147 N. Y. 78. The authority of the grand jury to investigate a criminal charge is not affected by an order from the President of the United States to the district attorney directing him not to prosecute the defendant: In re Miller 17 Fed. Cas. 295.

201. 2 Clark (Pa.) 441.

202. In People *v.* Sheriff of Chautauqua County, 11 Civ. Proc. Rep. (N. Y.) 172, it was held that the grand jury is not a part of the court in which it is drawn, and that the court has no control over its sittings or adjournments.

203. Supra. 28.

204. Francis Hopkinson's Works, Vol. I, p. 194. Supra. 31.

205. King *v.* Windham, 2 Keble 180. And see Bushel's Case, Vaughn 153; 2 Hale, PI. C. 158 et seq.

206. Com. *v.* Ridgway, 2 Ash. (Pa.) 247.

207. 1 Whart. Cr. Law, Sec. 506 (7th ed.): And see State *v.* Cowan, I Head (Tenn.) 280.

207*. 1 Head (Tenn.) 280

208. Com. *v.* Crans., 2 Clark (Pa.) 441.

209. 1 Whart. Cr. Law, Sec. 506 (7th ed.); State *v.* Squire, 10 N. H. 558; State *v.* Cowan, 1 Head (Tenn.) 280.

210. Allen *v.* State, 61 Miss. 627.

211. U. S. *v.* Kilpatrick, 16 Fed. Rep. 765.

212. Act June 16, 1836, P. L. 23.

213. In re Summerhayes, 70 Fed Rep. 769.

214. In re Ellis, 8 Fed. Cas. 548.

215. King *v.* Baker, Rowe's Rep. of Interesting Cases, 603.

216. Penna *v.* Keffer, Add. 290.

217. 1 Chitty Cr. Law 323. And see Floyd *v.* Barker, 12 Co. 23; Johnstone *v.* Sutton, 1 Term Rep. 513-14; Turpen *v.* Booth, 56 Calif. 65; Thornton *v.* Marshall, 92 Ga. 548; Hunter *v.* Mathis, 40 Ind. 356; Rector *v.* Smith, 11 Iowa 302; Ullman *v.* Abrams, 72 Ky. 738; Griffith *v.* Slinkard, 44 N. E. 1001. In Scarlett's Case, 12 Co. 98, a grand juror was indicted, convicted and sentenced for maliciously causing seventeen innocent persons to be indicted. And see Poulterer's Case, 9 Co. 55b. But this could not be done at the present day by reason of the policy of the law not to permit any grand juror to testify what any member of the jury had said or how he voted. In Allen *v.* Gray, 11 Conn. 95, it was held that where process issues on complaint of a grand juror for an offence of which he is not cognizant, he is liable in trespass.