PART II:
ORGANIZATION AND QUALIFICATIONS

Number of Jurors

The grand jury is a body composed of not less than twelve[1] and not more than twenty-three persons;[2] and in the Federal courts it is provided by Act of Congress that the number shall not be less than sixteen nor more than twenty-three.[3] Twenty-four, however, are summoned, but never more than twenty-three are sworn, lest there be two full juries, one of whom is for finding a true bill, the other for ignoring it.[4] Where twenty-four were sworn the indictment was quashed,[5] and this decision is undoubtedly in accord with the reason of the rule.

If twenty-four are sworn and serve upon the panel, then the reason of the rule that there shall not be two full juries is violated, and while the jurors may be interrogated as to whether {46} twelve concurred in finding the bill, they will not be permitted to make known how many either voted for or against it.[6] The law's requirement of secrecy concerning the manner in which the grand jury acts, therefore makes it imperative that the reason of the rule be adhered to strictly. If more than the number prescribed by law are sworn on the grand jury, even though all be regularly drawn, summoned and returned, it cannot legally act.[7] All on the panel in excess of the legal number are not bound by the oath and their presence in the grand jury room destroys its secrecy of action, and will vitiate the indictment. If more than the legal number of grand jurors are drawn, summoned, empaneled and sworn, but only the legal number actually serve, the defendant will in no manner be prejudiced thereby and an indictment found by such grand jury will be sustained.[8]

While the presence of more than the maximum number of grand jurors will invalidate an indictment, the presence of less than the minimum number will not always work this result[9] unless there should be present less than the legal number required to find an indictment. The general rule seems to be that where the statute specifies a certain number shall constitute the grand jury and less than this number be empaneled, the grand jury is illegally constituted; but if the legal number be empaneled and afterward some of the grand jurors absent themselves, an indictment will be valid if found by the number of grand jurors required to concur in its finding.[10]

{47} While the decisions upon this point are by no means uniform, the later cases hold that the grand jury having consisted of the prescribed number at the time it was empaneled, and thereby was a lawful body when formed, it remains a lawful body thereafter even though less than the minimum number remain, provided the number required to find a true bill are present at its finding. It must be remembered, however, that this question can only present itself where a statute has been enacted prescribing the minimum number of grand jurors necessary to form a legal grand jury and then providing that a number less than the minimum may find a true bill. This question could not arise with the common law grand jury. There the minimum number to constitute a lawful body is fixed at twelve, and this entire number must concur in order to find a true bill. If less than the minimum in such case be present, a bill found by such lesser number would be void.

The leading case upon this question is In re Wilson[10*] where the United States Supreme Court refused to discharge upon a writ of habeas corpus a defendant who had been indicted by a grand jury consisting of fifteen persons, twelve concurring, where the statute provided that the grand jury should consist of not less than seventeen nor more than twenty-three, and requiring only the concurrence of twelve for the finding of a true bill. Mr. Justice Brewer, who delivered the opinion of the court in this case says:

"By petitioner's argument, if there had been two more grand jurors it would have been a legal body. If the two had been present, and had voted against the indictment, still such opposing votes would not have prevented its finding by the concurrence of the twelve who did in fact vote in its favor. It would seem, therefore, as though the error was not prejudicial to the substantial rights of the petitioner."

Selection of Jurors

The manner of selecting and procuring the attendance of grand jurors is now wholly regulated by statute in the various states. While the statutes differ in the method provided for procuring the attendance of grand jurors, the general practice in many of the states is for the court to issue an order or {48} precept[11] to the proper official[12] directing that a venire issue[13] which commands the persons charged with such duties[14] to draw and summon a panel of grand jurors. The venire should be under the seal of the court,[15] although it has been held not to be void when issued without the seal.[16] If it is improperly tested the writ may be amended.[17]

In some states it is provided by statute that the grand jurors shall be drawn or summoned at a certain time prior to the session of the court. Where this requirement has been neglected or disregarded the indictment in some instances has been {49} quashed;[18] in others it has been sustained upon the ground that this provision of the statute is but directory and a failure to comply with it will in no manner prejudice the defendant.[19]

A venire which directs the sheriff to summon good and lawful men is sufficient; it need not set forth the qualifications requisite to constitute them good and lawful grand jurors.[20] It should set forth correctly the names of the persons to be summoned; failure to observe this

requirement affords good ground upon which a defendant may move to set aside the indictment. It has, however, been held that the omission of a middle name, the insertion of a wrong initial, the omission of an initial, or the mis-spelling of a name will in general be no ground for quashing an indictment, there being no proof that a person other than the one summoned bears the name as set forth in the writ and was the person designated thereby to be summoned as a grand juror.[21]

It is the duty of the officer charged with the execution of the venire to make a return thereto, showing the manner in which the command of the writ was obeyed and the authority by which he acted.[22] Should he fail to do so, an indictment will not be quashed for this reason, but the court will, on its attention being directed to the fact, order such officer to make a return, or sign such return if made and not signed.[23] The court {50} has allowed it to be signed after verdict of guilty in a capital case.[24]

In this case it was said by Chief Justice Parker:

> "Here the return was duly made, except that the officer through inadvertence had omitted to affix his signature; and this he has now done, and we think properly, by the permission of the court. It is true, that in a capital case the court would not permit the prisoner to be prejudiced by an amendment, but they are not bound to shut their eyes to the justice of the case, when an error in matter of form can be rectified without any prejudice to him."

Too Few Jurors

The return may be amended to accord with the facts.[25] Where it happens that less than the requisite number of persons are present to constitute a legal grand jury, it is ordinarily provided by statute how sufficient jurors shall be procured to bring that body up to the legal number. The court issues an order to the sheriff or other officer charged with the duty of summoning the jurors, directing the number to be returned[26] and whether they shall be summoned from the same or other panels of jurors,[27] from the body of the county[28] or from the bystanders.[29] If the judge should give to the sheriff the names {51} of persons to be summoned as talesmen, while this is an irregularity, it has been held not sufficient to invalidate an indictment found by a grand jury so constituted[30] In the absence of a statute regulating the summoning of talesmen it has been held that a judge has no authority to issue a venire to supply any deficiency in the number of grand jurors, but that a tales should issue and by-standers be brought in.[31] Substitutes cannot be received for any part of the regular panel.[32]

Too Many Jurors

Before talesmen can lawfully be summoned, the panel must be reduced below the number necessary to indict or form a legal grand jury,[33] and this must be shown affirmatively by the record which must also show that a formal order for summoning talesmen was made by the court. If this be not affirmatively shown by the record, it is an irregularity which may be taken advantage of by motion to quash.[34] A trial on the merits of the issue will cure such irregularity.

Late Jurors

A grand juror regularly drawn and summoned, but who does not appear until after the grand jury has been organized, sworn and charged, may in general be allowed to act with that body after the oath has been administered to them.[35] This, {52} however, is within the discretion of the court, and the court may refuse to allow him to be sworn if there are sufficient jurors without him.[36]

At common law if the array was quashed, or all of the grand jurors challenged or absent, a tales could not issue, and it was necessary that a new venire should be awarded.[37] But under statutes enacted in the various states, talesmen may be summoned when all of the grand jurors are disqualified.[38] If, for any reason, a grand jury has not been drawn and summoned as required by statute, in some States the judge has the statutory power to enter an order directing the sheriff to summon a panel of grand jurors.[39] and should there be no statute giving such authority, there is an implied power in the court to direct that this be done.[40]

Should the order of the court direct that talesmen be selected from an improper class of persons, it has been held that an indictment found by a grand jury so constituted is invalid; otherwise where the order is regular and incompetent persons are selected by the sheriff in executing the order.[41]

The manner of selecting and procuring the attendance of grand jurors in Pennsylvania is regulated by the Act of April {53} 10th, 1867,[42] which provides for two jury commissioners who are elected for three years and cannot succeed themselves, one each being of the majority and minority parties. The jury commissioners and a judge, or a majority of them, meet at the county seat thirty days before the first term of the Court of Common Pleas, and place in the proper jury wheels the number of names designated by the Common Pleas Court at the preceding term. The wheels are then locked, sealed, with the separate seals of the jury commissioners and the sheriff,[43] and remain in the custody of the jury commissioners, while the sheriff has possession of the keys to the wheels.

Drawing the Jurors

To procure the drawing of a panel of grand jurors, a writ of venire facias is issued by the clerk of the Court of Quarter Sessions or Oyer and Terminer, upon the precept of the court, commanding the sheriff and jury commissioners to empanel, and the sheriff to summon a grand jury.[44] The panel of grand jurors is drawn from the wheel by at least one jury commissioner and the sheriff, who, before

selecting or drawing jurors, take an oath that they will faithfully and impartially perform their duties.[45]

After the names of the jurors are drawn from the wheel they {54} are to be inserted in the venire and such persons are then summoned to appear by the sheriff or his deputies. If a grand juror receives notice and attends the court, it has been held to be of no consequence how he was summoned. His attendance in obedience to the command of the writ cures any defect in the manner of summoning.[46] The sheriff makes his return to the venire, showing the persons summoned as grand jurors, but it has been held that it is not necessary for the sheriff and jury commissioners to make an affidavit to their return that the jurors were drawn and returned according to law.[47]

Extensions

The grand jury may be summoned to meet prior to the holding of the regular terms of court if the judges of such court deem it expedient, and may be detained for an additional week if the business of the court, in the opinion of the judges, requires it.[48]

Filling Vacancies

Where the panel by reason of the failure of grand jurors to appear, or through challenges or other cause, is reduced below the number necessary to indict, a *tales de circumstantibus* may issue.[49] The number of talesmen who may be summoned by this writ, has not been defined by law, but as the full grand jury consists of twenty-three, it would seem that talesmen might lawfully be summoned until the grand jury contained its full number.[50] In Commonwealth *v.* Morton,[51] the panel was reduced to eleven jurors, and on a tales being issued, two talesmen were brought in, were sworn and acted with the grand {55} jury in the finding of indictments. This proceeding was sustained by Judge Allison.

Federal Juror Selection and Drawing

In the Federal courts, the selection and drawing of grand jurors is regulated by the Act of June 30, 1879,[52] which provides that grand jurors shall be drawn from a box containing at the time of each drawing, the names of not less than three hundred persons, the names having been placed in the box by the clerk of the court and a commissioner, appointed by the judge of such court, and being a citizen of good standing, residing in the district and a well known member of the political party opposing that of which the clerk is a member. The clerk and the commissioner shall each place one name in the box alternately until the necessary number of names has been placed therein.[53] The right is reserved to the court to order the grand jurors to be drawn from the wheels used by the State authorities in drawing jurors to serve in the highest court of the state.[54]

Summons

When the grand jurors have been drawn, a venire issues from the clerk's office to the marshal, directing him to summon twenty-four persons to serve as grand jurors. The names of the persons thus drawn from the box are inserted in the venire and are thereupon summoned by the marshal. If it happens that less than sixteen appear, or having appeared the number is depleted by challenge or other cause to less than the legal requirement, in such case the court orders the marshal to summon, either immediately or for a day fixed, a sufficient number of persons to complete the grand jury, and these persons are taken from the body of the district and not from the by-standers.[55]

{56} This statute, like the Pennsylvania statute,[56] does not define whether the number to be summoned shall make the panel sixteen or twenty-three. This, however, would seem to be largely within the discretion of the court,[57] for there being no limitation of the number to be summoned, no objection can well be made where the additional jurors do not increase the panel beyond the legal number. While it is thus necessary that sixteen should be present to constitute a legal grand jury, it is only necessary that twelve should concur in order to find a true bill or make a valid presentment.[58]

Where less than seventeen and more than twelve were present and a true bill was found, the defendant tried on the merits, convicted and sentenced, it was held by the United States Supreme Court upon habeas corpus proceedings based upon an alleged illegal detention that this was not such a defect as would vitiate the entire proceeding, even although the defendant had no knowledge of it until after sentence had been imposed upon him.[59] If, however, exception should be taken to an indictment found by a grand jury so constituted, either by plea in abatement or motion to quash, the objection should be sustained, for the indictment thus found is the finding of a grand jury not constituted in the manner provided by law.[60] This defect will be cured, however, by the plea of the general issue.

Where in the venire for a panel of grand jurors the court directed that they should be summoned from a certain part of the district,[61] as may be done under authority of the Revised {57} Statutes of the United States, Section 802, it was held that this was not in conflict with the Sixth Amendment to the Constitution of the United States which provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. ..."

England's Selection and Summoning of Jurors

In England[62] grand jurors are selected and summoned in accordance with the provisions of the statute 6, Geo. IV, c. 50 as amended. The clerk of the peace causes warrants,

precepts and returns to be printed in the form set out in the schedule annexed to the statute. These precepts are then sent by the clerk to the church wardens and overseers of every parish and the overseers of every township, who are required to prepare an alphabetical list of every man residing in their respective parishes or townships who is qualified and liable for grand jury service, with his place of abode, title, quality, calling or business. A copy of such list when prepared is affixed to the principal door of every church and chapel on the first three Sundays of September. The justices of the peace then hold a special session during the last seven days of September of each year, when the lists are produced and names either added or stricken from the list, but no name can either be added or removed unless the justice first gives notice to the party whose name it is proposed to add or remove from the list. The lists are returned to the quarter sessions and kept by the clerk of the peace. The jurors are selected from this list by the sheriff, who thereupon summons them to appear.

Where the provisions of the statute under which grand jurors are selected and drawn are but directory, the court will not quash an indictment upon the ground of irregularity in the selection or drawing when it does not appear that such irregularity will prejudice the defendant.[63]

Participation of Officers

{58} In the selection and drawing of grand jurors, the absence of any particular officer designated to participate in the proceedings will not ordinarily invalidate the selection and drawing thus made, a majority of those directed to perform such duty being present and legally competent to act.[64] The duty thus imposed upon any person by statute cannot be delegated by him to another;[65] it is wholly personal and when disregarded may be successfully relied upon by a defendant for setting aside an indictment returned against him.

Where grand jurors have been selected by officers de facto, it has been held that this cannot be availed of by a defendant for the purpose of invalidating the indictment. The acts of such officers as to third persons are as valid as the acts of officers de jure.[66]

An indictment found by a de facto grand jury has been sustained.[67]

This doctrine was carried to the extreme limit in New York in the case of People *v.* Petrea,[67*] where the act under which the grand jurors were selected was unconstitutional, but the {59} Court of Appeals held that the indictment had been found by a de facto grand jury and was therefore valid.

In discussing the case Andrews, J. says:

> "We are of opinion that no constitutional right of the defendant was invaded by holding him to answer to the indictment. The grand jury, although not selected in pursuance of a valid law, were selected under color of law and semblance of legal authority. The defendant, in fact, enjoyed all the protection which he would have had if the jurors had been selected and drawn pursuant to the general statutes. Nothing could well be more unsubstantial than the alleged right asserted by the defendant under the circumstances of the case. He was entitled to have an indictment found by a grand jury before being put upon his trial, an indictment was found by a body, drawn, summoned and sworn as a grand jury before a competent court and composed of good and lawful men. This we think fulfilled the constitutional guaranty. The jury which found the indictment was a de facto jury selected and organized under the forms of law. The defect in its constitution, owing to the invalidity of the law of 1881, affected no substantial right of the defendant. We confine our decision upon this point to the case presented by this record, and hold that an indictment found by a jury of good and lawful men selected and drawn as a grand jury under color of law, and recognized by the court and sworn as a grand jury, is a good indictment by a grand jury within the sense of the Constitution, although the law under which the selection was made, is void."

After grand jurors have been drawn they must be summoned to attend at court. This duty, unless other persons be designated by statute, devolves upon the sheriff and his deputies, and should they for any reason be disqualified, then upon the coroner.[68]

In the conduct of legal proceedings the presumption is that official acts have been performed in the manner prescribed by law. When the sheriff selects and summons grand jurors, he {60} will be presumed to have complied with every requirement of the law in the selection, summoning and return of a panel of legal jurors[69] in the absence of evidence to the contrary. In the case of Wilson *v.* People,[70] Chief Justice Thacher said: "We are not permitted to presume in the silence of the record, that the court adopted an illegal method in convening the grand jury." The burden of proof rests upon anyone who alleges irregularity in the drawing" or return of the panel or who alleges that a grand juror is personally disqualified from serving.[71]

Juror Qualifications

The qualifications of grand jurors are in general the same as at the common law. In Bracton's time no persons could be grand jurors unless they were "free and loyal men who have no suit against anyone, and are not sued themselves, nor have evil fame for breaking the peace or for the death of a man or other misdeed," and be of the hundred in which they were chosen.[72] In the Sixteenth Century a grand juror must be a "freeman, and a lawful liege subject, and, consequently neither under an attainder of any treason or felony, nor a villain, nor alien, nor outlawed, whether for a criminal matter, or as some say, in a personal action," all of whom were to be of the same county,[73] and they need not be freeholders.[74] A similar view is expressed by Mr. Chitty,[75]

who adds, "this necessity for the grand inquest to consist of men free from all objections existed at common law,"[76] and Lord Coke says,[77] "if the indictment be found by any persons that are {61} outlawed, or not the king's lawful liege people, or not lawfully returned, or denominated by any, viz.: by all or any of these, that then the indictment is void." Perhaps the earliest statute relating to the qualifications of grand jurors was II Hen. IV. C. 9, which, after setting forth the classes of persons who were disqualified from acting as grand jurors, provided that if an indictment should be presented by a grand jury containing a single disqualified person, it was wholly void.[78]

Blackstone omits all reference to the qualifications of grand jurors except to say, "they are usually gentlemen of the best figure in the county," and considers they should be freeholders.[79]

In England[79*] at the present day the qualifications of grand jurors are defined with great minuteness. The statute 6, Geo. IV. c. 50, provides that a grand juror shall be between twenty-one and sixty years of age, having in his own name or in trust for him in the same county "ten pounds by the year above reprizes, in lands or tenements, whether of freehold, copyhold, or customary tenure, or of ancient demesne, or in rents issuing out of any such lands or tenements, or in such lands, tenements, and rents taken together, in fee simple, fee tail, or for the life of himself or some other person, or who shall have within the same county twenty pounds by the year above reprizes, in lands or tenements, held by lease or leases for the absolute term of twenty-one years, or some longer term, or for any term of years determinable on any life or lives, or who being a householder shall be rated or assessed to the poor rate, or to the inhabited house duty in the county of Middlesex, on a value of not less than thirty pounds, or in any other county on a value of not less than twenty pounds, or who shall occupy a house containing not less than fifteen windows."

In Pennsylvania there are no statutes defining the {62} qualifications of grand jurors, beyond the provision that only sober, intelligent and judicious persons shall be chosen,[80] and, as the common law is a part of the law of the state, their competency would be determined in accordance therewith, but they are not required to be freeholders. It would also seem that a grand juror, like a petit juror, must stand indifferent between the commonwealth and the accused.[81]

In many states, a grand juror is required to be a freeholder; [82] in others a freeholder or householder.[83] In Tennessee[84] he need not have a freehold in the county in which he is summoned, while in West Virginia,[85] although a grand juror is required to be a freeholder, the court has refused to quash an indictment upon the ground that a member of the grand jury finding the indictment did not possess this qualification.

In Arkansas,[86] and South Carolina,[87] it has been held that grand jurors are not required to be freeholders.

In North Carolina the rule which prevailed in Bracton's time that a grand juror must have no suit against any man nor himself be sued seems to be in force. Thus it has been held there was no error in quashing an indictment on the ground that one of the grand jurors was, at the time it was found, a party to an action pending in the same county,[88] and it is not necessary to show that such juror participated in the {63} deliberations and finding of the grand jury.[89] In Louisiana a grand juror who is charged with any crime or offence cannot legally serve.[90]

In some states a grand juror must be a qualified voter, either for candidates for office, to impose a tax, or regulate the expenditure of money in a town.[91]

Where a statute provided that jurors should be selected only from the persons who had paid their taxes for the preceding year, an indictment found by a grand jury containing three persons who had not paid such taxes was quashed.[92]

In the State of Washington, although it is provided by statute that women shall be qualified electors, they are not competent to serve as grand jurors under a statute providing that grand jurors shall be drawn from the qualified electors. [93]

In the Federal courts the qualifications of grand jurors, except where otherwise provided by the Revised Statutes, are determined according to the law of the state in which such court is located.[94] Congress, however, has provided that no person shall be summoned as a grand juror in a court of the United States more than once in two years,[95] nor shall any person be a grand juror who has been engaged in rebellion against the United States.[96]

The common law provided that no alien should be a grand {64} juror,[97] and, consequently, an alien accused of an offence has no right to demand that he be indicted by a grand jury *de medietate linguae*[98] although he may demand that a jury *de medietate* be summoned for his trial.[99]

Challenges

Defendant's Right of Challenge

Where a person is accused of an offence, he has a right to take advantage of every irregularity in the proceedings on the part of the officers appointed to administer the law, of their personal disqualifications, and of the personal disqualifications of the grand jurors, providing he does so at the proper time. There are three separate stages at which a defendant may object to the manner in which the grand jury has been constituted and the members constituting it.

1. Before the grand jurors are sworn.[100]

2. After they have been sworn, but before the defendant is indicted.[101]

3. {65} After the defendant has been indicted.[102]

Where the right of challenge exists, it has been held that a refusal by the court to allow a prisoner, criminally charged, to challenge the grand jury, renders the jury incompetent to sit in his case, and the indictment worthless and insufficient,[103] but there is no duty imposed upon the court having jurisdiction of the cause to notify the defendant of this right.[104]

When it is proposed to make objection to the grand jurors before they have been sworn, the objection may be either to the array[105] or to the personal qualifications of any juror.[106]

Objections to the Array

{66} The challenge to the array may be made for irregularity in making the original selection;[107] keeping the jury wheels in an improper place or in the custody of an improper person, or in failing to lock and seal the wheels in the manner provided by statute;[108] irregularity in the venire, in drawing and summoning the grand jurors,[109] in the list[110] or in the return.[111]

The array will be quashed if it appear that the persons charged with making the selection of grand jurors failed to take the oath which it was prescribed by statute should be taken before any selection was made.[112] It has also been held a good cause for challenge to the array as being in violation of the rights guaranteed by the Fourteenth Amendment to the Constitution of the United States, where the officers, whose duty it was to select and summon the grand jurors, excluded from the {67} panel, members of the negro race.[113] That negroes were denied the right to vote, although qualified electors, will not be ground for quashing an indictment where the statute provided that grand jurors should be selected from the qualified electors and the persons prevented from voting were lawfully registered as qualified electors in the registration book from which the selection of grand jurors was made.[114] A white man, however, has no right to complain where negroes are excluded by statute from the grand jury, since the Fourteenth Amendment to the Constitution of the United States has given him no rights which he did not possess before its adoption.[115]

While advantage may be taken of any defects or irregularities in the foregoing instances, the court will not quash the array because the sheriff was not present during the entire time in which the selection of jurors was being made; that the selection was spread over a period of several weeks; that the duty of writing the names was done by a clerk in their presence and by their order; because of mere carelessness in keeping the names before being placed in the wheel, or in the keeping of the wheel after being properly locked and sealed.[116] And it has also been held that the array will not be quashed where the defendant alleges a failure to comply with the provisions of a statute in the drawing and selection of grand jurors but neither alleges nor proves that fraud, corruption or partiality was shown.[117]

The court will not quash an indictment upon the ground that the jury commissioners broke open the jury box (the key being lost) and drew the grand jury therefrom;[118] because names drawn were laid aside in the erroneous belief that such {68} persons had removed from the county;[119] that the record does not show the taking of the oath by the sheriff and his deputies before summoning the jurors;[120] that the grand jurors were not drawn or summoned at the time prescribed by statute, the provisions of the statute being for the convenience of the jurors and not for the benefit of the defendant;[121] or that the grand jurors were selected from the registries of voters instead of the poll books, the two lists being identical as to names.[122]

The challenge to the panel of grand jurors is made by a motion to quash the array, which motion can only be made where the objection is to irregularity in selecting and empaneling the grand jury based upon some one or more of the grounds heretofore named, and does not extend to the competency of the individual juror.[123] A challenge to the array must be supported by an affidavit setting forth the facts upon which the challenge is based[124] and be substantiated by evidence.[125]

The motion may be made at any time before the defendant pleads to the indictment,[126] although a contrary view was taken {69} in United States *v.* Butler,[127] where it was held that a challenge to the array of the grand jury cannot be made after it is organized and enters upon its duties, but this ruling has been somewhat modified.[128] In the Federal courts the law now is, that if the defendant was arrested and held in bail, or in any other manner had knowledge that proceedings would be instituted against him before the session of the grand jury at which he was indicted, then he must move to quash the array and make his challenge to the polls before the grand jury is sworn; but if he was indicted without knowledge that the grand jury either was or intended taking any action against him, then he might, before pleading to the indictment, file a plea in abatement, or move to quash the indictment for the same reasons as would have supported a motion to quash the array or challenges to the polls for statutory or common law disqualifications,[129] but not for favor. The courts of some of the states have adopted a similar rule.[130]

Qualifications to Challenge

Where a challenge is made to the array but the objection is to only a portion of the grand jurors, it will be overruled and the defendant left to challenge the individual jurors for cause.[131]

{70} The right to determine the time and manner of making objections to the qualifications of grand jurors is vested in the legislature, and while it has the power to enact laws designating the time and specifying how such objection shall be made, it has no power to wholly take away the right of objecting.[132]

It is necessary in order to make a challenge, either to the array or to the polls of the grand jury, that the person proposing to make the challenge shall show that he is under prosecution.[133] In Iowa[134] it was decided that the challenge

could not be made where a defendant was held to await the action of a subsequent grand jury, and the grand jury then sitting, of its own motion examined into the offence and returned an indictment. At first sight this ruling would appear to deprive the defendant of a substantial right, but a close inspection of the decision shows that no allegation was made by defendant that the grand jury which found the indictment was not a legal body nor did the defendant allege the disqualification of any member thereof. He was therefore indicted by a body unobjectionable in every respect which acted on its own motion and not on the return of the magistrate.

The state's attorney cannot challenge the panel[135] although he may challenge the individual jurors for favor or for cause.[136] Where a challenge is made by the state, whether {71} authorized or not, and is afterward withdrawn, this cannot be assigned as error by a defendant.[137]

The defendant must express a desire to challenge; if he fail to demand at the proper time the privilege of exercising this right he cannot afterward complain.[138] If a time is designated by statute when the challenge shall be made, if the defendant does not avail himself of his right at that time he will be held to have waived the privilege. It is no ground for subsequently pleading in abatement or moving to quash, that he was, at the time designated for challenging the grand jurors, confined in prison, friendless, without counsel or funds, or that he was not apprised of his right to challenge. He is presumed to know the law and abide by it; if he should not, his misfortune will afford him no redress.[139] The challenge may be made by an attorney as *amicus curiae* or as representing accused persons awaiting the action of the grand jury.[140] It may be made by a defendant at a later time than that fixed by statute where he was confined in the jail of another county and thereby deprived of exercising his right to challenge at the proper time.[141] If the defendant declines to challenge when the opportunity is offered, he thereby waives his right[142] and cannot afterward question the validity of the indictment upon any {72} ground going to the competency of the grand jurors and which could have been raised by challenge.

Objections to Specific Jurors

The exclusion of a grand juror on a challenge, or for cause, extends only to the particular case in which he was challenged.[143]

In some of the states, statutes have been enacted exempting certain classes of persons from jury service. In many instances exempt persons have served upon grand juries and this has led to attacks upon the indictments found by such grand juries upon the theory that the exempt person was not a legal juror. A distinction, however, is to be noted between disqualifications and exemptions; the former vitiate the proceedings if attacked before issue joined; the latter are privileges which may be waived by the persons entitled to the benefit thereof and an indictment will not be quashed because an exempt person served as a grand juror.[144]

Under a Florida statute providing that persons "under sixty years shall be liable to serve and are hereby made competent jurors," a person over that age was held not a competent juror.[145] In other states having similar statutes the weight of authority is to the contrary.[146]

{73} Section 1671 R. S. U. S. provides: "All artificers and workmen employed in the armories and arsenals of the United States shall be exempted, during the time of service, from service as jurors in any court."

Objections to the personal qualifications of a grand juror may be divided into two classes.[147]

1. Those where the disqualification is imposed by statute or by the common law, to which exception may be taken at any time before the defendant pleads to the indictment.[148]

2. Those where the juror does not stand indifferent between the state and the accused and may be challenged for favor,[149] but in this case unless the right of challenge is exercised before the indictment is found it cannot thereafter be exercised.

With the exception of the provisions of the United States Revised Statutes that no person shall be a grand juror who has been engaged in rebellion against the United States,[150] which has been held to be an absolute disqualification;[151] or a person who has served as a grand juror within two years[152] {74} which has been held to be a disqualification which can only be taken advantage of by challenge,[153] the grand jurors in the Federal courts may be challenged for the same causes as a grand juror serving in the highest court of the state within which such Federal court may be located.[154]

In the case of Crowley *v.* United States,[155] it was held that a disqualification of a grand juror imposed by statute is a matter of substance and cannot be regarded as a mere defect or imperfection within the meaning of Section 1025 R. S. U. S.

The challenge to grand jurors for favor was a common law right,[156] but if not exercised before an indictment is found, the right is wholly gone,[157] notwithstanding a defendant may have had no knowledge that he was charged with any offence. It was perhaps first used in the United States on the trial of Aaron Burr for treason in 1807.

In that case, "the grand jury being reduced to sixteen, Colonel Burr claimed the right to challenge for favor. This challenge he admitted was not a peremptory challenge and good cause must be shown to support it."[158]

The authors of a well known work upon juries comment {75} upon challenges to grand jurors in the following language,[159]

> "If it is to be conceded that the right of challenging grand jurors existed at common law, it would seem clear that consistency requires that this right should embrace all kinds of challenge, namely: to

> the array, for cause, and peremptory. Perhaps the best evidence that a challenge of any sort to grand jurors is anomalous, is found in the fact that no court was ever sufficiently bold to allow peremptory challenges to grand jurors."

Their criticism, however, will be seen to be without merit when we consider that the grand jury in criminal cases is of much greater antiquity than the petit jury,[160] the qualifications of which were clearly defined. If any person was returned thereon who was not qualified, the only manner in which the disqualification could be made known and taken advantage of, was by an objection made before the justices. A defendant could not peremptorily challenge a grand juror in the majority of cases since he would have no notice that they were considering an accusation against him until presentment was actually made. In the time of Bracton and Britton peremptory challenges were wholly unknown, while both writers describe with great care the objections which may be made to the competency of the jurors.

In 1811 on Sheridan's Trial,[161] Mr. Justice Osborne refused to permit grand jurors to be challenged, holding that

> "In the case of a grand juror, the objection is to be relied upon, in the form of a plea. Therefore, I think that there does not exist by the common law, the right to challenge a grand juror."

Since that time this has been the uniform English practice. That the right to challenge grand jurors for cause or for favor has been but seldom used, cannot be made an argument against its existence. It is firmly established in the common law and can only be destroyed by legislative enactment.

If a grand juror is disqualified when drawn and summoned {76} but becomes qualified before service as such, an indictment found by the grand jury of which he is a member will be sustained;[162] but where a grand juror though competent when drawn and summoned was incompetent when a true bill was found, the indictment was quashed.[163]

A grand juror may be challenged for favor who has conscientious scruples against capital punishment,[164] for while the grand jury is usually not sworn in any particular cause, it may be necessary for them to consider a bill charging a capital offence. A similar ruling was made in the case of United States *v.* Reynolds where a grand juror had conscientious scruples against indicting persons charged with the crime of polygamy.[165] In this case it was said: "A person who upon his conscience could not find indictments under a law, would not make a good juryman to enforce that law. And if all members or a majority of a grand jury had like scruples, that ancient and venerable body would not only become useless, but also an absolute hindrance to the enforcement of the law. A party having these conscientious scruples would, if sworn upon the grand jury, have to commit moral perjury. He upon oath, admits that his conscience forbids his aiding in the enforcement of a specific law, yet as a grand juryman he swears to go counter thereto, and enforce the law."

A challenge may be made where a grand juror has formed and expressed an opinion as to the guilt or innocence of the accused[166] but this only applies where such grand juror is not {77} the prosecutor;[167] or where he has any personal or financial interest in the result of the finding of the grand jury;[168] or that he is an alien;[169] or not a qualified elector[170] or freeholder[171] or householder.[172] But it has been held not to be a ground for challenge that a grand juror belonged to a particular political party and was a strong partisan;[173] that he had previously issued a warrant for the arrest of the defendant and had expressed an opinion as to his guilt,[174] that a grand juror was a tax payer and acted on a grand jury which found an indictment against the township supervisors for neglecting to {78} repair a township road;[175] that he was the magistrate who committed the defendant;[176] that he was a civil officer[177] or special police officer,[178] or that he was a member of an association the object of which was to detect crime;[179] that he has subscribed funds for the suppression of crime;[180] or that his name was absent from the last assessment roll of the county from which he is summoned.[181]

Where the prosecutor is returned upon the grand jury without his agency or instigation, the better opinion is that the challenge for favor should not be sustained for as a lawful member of that body a presentment could be made upon knowledge which he might communicate to them as to this particular offence.

Where a grand juror admits that he has formed an opinion as to the guilt or innocence of the accused but declares that his opinion would not preclude him from passing on the question impartially as presented by the evidence,[182] or where the evidence of the alleged forming and expressing of opinion is not clear, a challenge will not be sustained.[183]

If a case be submitted to the grand jury which considered a former bill against the same defendant, the question at once arises whether or not they are competent to again pass upon the question by reason of their expressed opinion as to the guilt of the accused in finding the former indictment. There are but few decisions upon this point and the better view seems to be that the grand jurors may be challenged upon the ground {79} that they have formed and expressed an opinion upon the matter to come before them.[184]

The reason for this is best expressed in the language used by Stockton, J., in the case of State *v.* Gillick:[185]

> "The juror challenged was as much disqualified from taking any part in the consideration of the charge against the defendant, by reason of the opinion formed by him from the evidence given under oath in the grand jury room, and by his action thereon, as if that opinion had been formed from rumor, or had been induced by malice or ill-will. It is the preconceived opinion, that renders a grand jury incompetent, and not the sources from

> which that opinion is formed or derived. A juror who has formed or expressed an opinion, is set aside, because he is supposed not to be indifferent to the result of the matter to be tried. Such an opinion, in the presumption of law, is not less {80} the effect of partiality and prejudice operating on the mind of the juror, than it is the efficient agent to produce such partiality and prejudice on his mind, perhaps without his consciousness."

Upon this principle a plea in abatement has been sustained where it was made to appear that one of the grand jurors who found the indictment had served on a petit jury which formerly convicted the defendant of the same offence.[186] A precisely opposite view was taken in a case where one of the grand jurors had been a member of the coroner's jury which found that the deceased was murdered by the accused.[187]

An indictment will not be set aside upon the ground that a grand juror was related to the prosecutor by blood or marriage,[188] although defendant could have availed himself of this fact by challenge before indictment found.[189]

{81} In Tennessee,[189*] Section 5085 of the Code, provides that if any member of the grand jury is connected by blood or marriage with the person charged, he shall not be present or take part in the consideration of the charge. A defendant pleaded in abatement that one of the grand jurors was related to him within the prohibited degree by affinity and the plea was sustained and the indictment quashed. The appellate court, however, reversed the judgment of the court below and in its opinion said: "But the provision is merely directory, as the next section, which provides for supplying the vacancy during the investigation, clearly shows. No doubt, either the state or the defendant might make the objection, and it is the duty of the juror to conform to the requirement. But if, through inadvertence, a relation or connection of the person charged does actually participate in the finding, it is not seen how his relationship could have prejudiced such person."

That one of the grand jurors making presentment of an indictment for not making and opening a road through a town was a taxable inhabitant of the town, cannot be used as an objection to the validity of the indictment by the town as a defendant, since his interest would be favorable to the defendant.[190]

A person is not disqualified from serving as a grand juror by reason of his absence from his domicile, there being no intention to change the domicile;[191] but should he remove after being summoned but before serving as a grand juror, he thereby becomes incompetent to act.[192]

A grand juror is not disqualified because of his religious belief.[193]

When a challenge was made for favor it has been held to be against public policy to permit the grand juror to be examined upon his *voir dire* to establish the favor, but the court {82} was willing that it should be proved by other evidence.[194]

> "A due regard for public policy as well as for the interests of justice and the nature of the inquiry, forbids that grand jurors should be polled and tried in this manner. If the prisoner have evidence to purge the panel, let him produce it."[195]

That this was the law was recognized by Colonel Burr[196] upon his trial, who, after announcing his intention to challenge for favor said to the Chief Justice (Marshall): "It would, of course, be necessary to appoint triers to decide, and before whom the party and the witnesses to prove or disprove the favor must appear." The same method of determining a challenge for favor was pursued in Pennsylvania.[197]

Challenges by the Court

While peremptory challenges to grand jurors are not allowed,[199] a practice bordering closely upon this was permitted {83} upon Lewis' trial[200] where the attorney for the Crown took exception to some of the grand jurors and stood them aside, the court permitting it, although it had previously in another case refused to permit such a proceeding. A somewhat similar proceeding was taken in a case in a United States court,[201] the court of its own motion excusing certain of the grand jurors and substituting other qualified persons in their stead. No objection was made to this procedure by counsel for defendant although they were then present, but the question being afterward raised the court sustained its action.

This action, however, is open to severe criticism and such a practice should not be permitted to continue. If upheld, it places within the power of the court the ability to so mold the grand jury that it may be deprived of its independence of action.[202] The statutes and the common law prescribe the way in which a grand jury shall be constituted and what shall disqualify any person from acting as a grand juror, and it would seem that where there is no statute giving the court the power on its own motion to remove persons who are duly qualified in order to substitute others, such an act is done without warrant of law, and a grand jury thus made up is illegally constituted.

The general tendency, however, is to preserve to grand {84} jurors the right to act unless in some manner they are not competent. Thus where a district attorney in good faith but through a misunderstanding excluded a legally competent grand juror, who had been duly sworn, from the grand jury room during the consideration of a certain case by the grand jury, the court sharply criticised the action of the district attorney.[203]

In England the rule is now firmly established that the court cannot lawfully order a grand juror to withdraw himself from the panel in a particular case,[204] and inasmuch as all objections to the qualifications of a grand juror must be

taken by plea in abatement[205] this rule would seem to apply even although the juror was not competent.

Excusing Jurors

It is ordinarily within the province of the court to excuse a grand juror upon application and showing sufficient reason why he should not serve.[206] And where the record does not show the reason for excusing such person, it will be presumed that the excuse was sufficient.[207] The court may of its own motion dismiss a grand juror for cause[208] and may fill the vacancy with a qualified juror[209] or a talesman.[210] The {85} grand jury as thus constituted is a legal body, although the foreman be not again appointed nor the oath re-administered to him or to the other members as a body.[211]

In Arkansas where more than sixteen persons were selected and summoned and the record showed that only sixteen were empaneled, it was held that it would be presumed that the grand jurors in excess of the legal number were excused from serving.[212]

Deadlines

After the grand jury has been sworn, but before indictment found, a defendant may still either challenge the array or the polls[213] (except in states where the statute otherwise provides) for the same causes and with the same effect as if the right of challenge had been exercised before the oath was administered,[214] reasonable excuse being shown in the Federal courts for failure to act before the grand jury was fully organized.[215]

After the defendant has been indicted he may except to the array or to the individual jurors for any cause which would disqualify except for favor.[216] In the Federal courts this {86} right is limited to those cases where the defendant shows good cause why he could not raise the objection either before the grand jury was sworn or before it found the indictment.[217] The objection, however, cannot be raised by challenge either to the array or to the polls but must be raised by a motion to quash the indictment, and in the Federal courts may also be raised by a plea in abatement,[218] or by leave of court a defendant may file two or more pleas in abatement.[219] It cannot be raised by demurrer unless the defect appears upon the face of the indictment.[220]

The accused cannot afterward plead in abatement the same grounds or facts upon which he has challenged the array of the grand jury.[221]

Decision Making

The courts do not look with favor, at the present time, upon objections to the grand jury which are based merely upon the ground of irregularity in its organization, the defendant having suffered no prejudice thereby,[222] and the Federal courts are averse to quashing an indictment upon such a ground and will not do so unless the defendant take advantage of such irregularity at each stage of the proceedings.[223]

{87} Where the defendant before pleading to the indictment does not object to the array or to the polls of the grand jury, he will be held to have waived his right and cannot afterward raise the objection upon a motion in arrest of judgment,[224] and it is too late to move to quash the array after the defendant has been arraigned, pleaded "not guilty" and four jurymen have been selected.[225]

It has been held that the presence of one disqualified person upon the panel of grand jurors will vitiate the indictment found by it,[226] but this is subject to the qualification that the defendant had no opportunity to challenge the disqualified juror before indictment found, and raises the objection either by motion to quash or by plea in abatement before pleading to the indictment. After a trial on the merits, the objection cannot be raised on a motion in arrest of judgment.[227]

{88} While the right is thus reserved in general to a defendant to take advantage of irregularities in the organization of the grand jury, such irregularity cannot be availed of by a person who attacks the grand jury in a collateral proceeding.[228] It has therefore been held that in a proceeding to punish a witness for defying the authority of the grand jury, he cannot in such collateral proceeding question its regularity;[229] and similarly, a person cannot refuse to testify before a grand jury upon the ground that it was not empaneled in accordance with the law.[230]

Empaneling the Jurors

When the grand jurors have appeared in court in answer to the summons, they are then empaneled.[231] This has been judicially determined to mean the final act of the court ascertaining who should be sworn immediately preceding the administration of the oath to the grand jurors.[232] In the absence of any statutory provision prescribing the time when the grand jury shall be organized, it would seem that it may be empaneled at any time during the term for which it was summoned.[233] If, however, the grand jury is not formed in accordance with such statute then the indictments are void.[234]

{89} Where persons summoned as "trial jurors" were empaneled as a grand jury the indictment was set aside.[235]

The record must show the empaneling of the grand jury otherwise the indictment may be set aside,[236] but this need not be repeated in the record of each indictment found.[237] If the indictment recites the empaneling and the record shows its return into court, this will be sufficient,[238] but if the only evidence of the empaneling be the endorsement on the indictment "a true bill" and the foreman's signature, the indictment will be quashed.[239]

In the absence of statutory authority, the same judge cannot organize two successive grand juries with general powers at the same term.[240] If the first grand jury be illegally empaneled, the court may, during the term, discharge it and empanel another according to law.[241] But the second grand jury cannot be legally empaneled while the first grand jury

continues to be recognized as a legal body and before it is set aside.[242]

Should a court without authority of law empanel a grand jury, it has been held that all indictments found by the body so constituted are void.[243]

Where a statute is enacted changing the manner of drawing and summoning grand jurors and repealing former statutes, a grand jury drawn while the prior statutes are in force may lawfully be empaneled and act after the repealing statute becomes effective.[244] And where a territory is admitted as a {90} state, the territorial laws relating to the authority of the grand jury to act and the powers conferred upon it which were in force before its admission, remain in effect after its admission, as to offences committed prior thereto.[245]

Final Organization of the Grand Jury

Foreman of the Grand Jury

After any challenges to the array or to the polls have been disposed of, the foreman is then selected from the persons summoned.[246] In no case should he be illiterate for his duties are important and require knowledge and ability, but an indictment will not be invalidated because the foreman could not write his name.[247]

In England, the United States Courts and in many of the state courts, the foreman is appointed by the court.[248] In some states he is selected by the grand jury from their number;[249] in others they are permitted to make selection subject to the approval of the court,[250] or the court may direct them to choose their foreman.[251] If he should afterward be excluded from the grand jury by reason of disqualification or other cause, the court may appoint his successor,[252] and if he is but temporarily disqualified from serving by reason of sickness, absence or the like, then a foreman *pro tem*. may be named,[253] who lawfully exercises all the powers, and must perform all the duties, which devolve upon the regularly appointed foreman.

The appointment of the foreman should be noted upon the minutes of the court and such entry is sufficient evidence of his {91} appointment;[254] although this has been held not to be material where the indictment was indorsed by the foreman and returned into court.[255]

If the record shows that one person has been appointed foreman and an indictment is returned signed by another as foreman, in the absence of proof to the contrary the court will presume that the foreman named in the record has been regularly discharged and the other appointed in his stead.[256]

An indictment endorsed "a true bill" and returned upon the authority of the whole grand jury was sustained although no foreman had been appointed.[257]

Clerk of the Grand Jury

The clerk of the grand jury is usually one of that body, who is selected by his fellow jurors after they have been sworn and have retired to their room. In his absence or inability to act, another juror may be named to act in his stead.

Administration of the Oath

When the foreman of the grand jury has been appointed, but one step more is required to complete its organization and fit it to enter upon the performance of its duties, and that is the administration of the oath.[258] The foreman is first sworn alone and afterward the grand jurors, three at a time come forward and take the oath, and such of them as will not take an oath are allowed to affirm,[259] until all have either been sworn or {92} affirmed.[260] This was the common law method of administering the oath and in some jurisdictions has now given place to the custom of swearing the grand jurors as a body after the administration of the oath to the foreman; in others, it is provided by statute that the full oath shall be administered to the first two grand jurors whose names appear upon the list, and then the balance of the panel shall be sworn with the short form of oath.[260*]

The method of administering the oath has been discussed by Chief Justice Johnson in the case of Brown *vs*. State[261] in the following language:

> "The form of oath required to be administered to the grand jurors is of ancient origin, and it is necessary that it should be observed, at least in substance; but the mode or order of administering it is purely a matter of practice, and must of necessity be governed by circumstances. .... It is conceived to be entirely a matter of practice as to the number that shall be sworn at a time, and that such practice is regulated alone by considerations of convenience."

The panel need not be complete when the oath is administered, but the full oath must be administered to those who are added after part have been sworn.[262]

If a form of oath be prescribed by statute, it should be substantially complied with.[263]

The minutes of the court must show that the grand jury was sworn;[264] it is not sufficient that the indictment sets forth that {93} the grand jurors were duly sworn.[265] If regularly sworn but this fact be inadvertently omitted from the record, the defect may be cured and the record amended *nunc pro tunc*.[266] The record must show that the foreman was sworn.[267]

Endnotes

1. Ostrander v. State, 18 Iowa, 435; State v. Green, 66 Mo., 631; State v. Clayton, 11 Rich. Law (S. C.) 581; Pybos v. State, 3 Humph. (Tenn.) 49; State v. Kopp, 34 Kan., 522; State v. Brainerd, 56 Vt, 532; State v. Perry, 29 S. E., 384. The record must show

that the grand jury consisted of twelve men or the judgment will be reversed. Carpenter v. State, 4 How. (Miss.) 163.

2. 4 Bl. Com. 302. In Utah the statute provides that a grand jury must consist of twenty-four. Brannigan v. People, 3 Utah, 488.

3. R. S. U. S. Sec. 808; 1 Whart. Cr. Laws, Sec. 463a. In Reynolds v. U. S., 98 U. S. 145, it was held that Sec. 808 of the Revised Statutes applied only to circuit and district courts of the United States; territorial courts being governed by the territorial laws then in force.

4. 1 Whart. Cr. Law, Sec. 465, (7th ed.).

5. People v. King, 2 Caines (N. Y.) 98; Com. v. Salter, 2 Pears. (Pa.) 461; Com. v, Leisenring, Id. 466; In Com. v. Dietrich, 7 Pa. Supr. Ct. Rep. 515, a presentment of the grand jury was signed by the twenty-four grand jurors, but this question was not raised until after a trial on the merits. In his opinion, Rice, P. J., says, "Its action was none the less valid because it was preceded by the unanimous presentment of a former grand jury." See King v. Marsh, 1 N. & P. 187.

6. Post 118, 121, 166.

7. Harding v. State, 22 Ark. 210; People v. Thurston, 5 Calif. 69; Keech v. State, 15 Fla. 591; Downs v. Com. 92 Ky. 605; Com. v. Wood, 2 Cush. (Mass.) 149; Miller v. State, 33 Miss. 356; Box v. State, 34 Miss. 614; People v. King, 2 Caines (N. Y.) 98; Com. v. Salter, 2 Pears (Pa.) 461; Com. v. Leisenring, Id. 466; Lott v. State, 18 Tex. App. 627; Wells v. State, 21 Id. 594; Harrell v. State, 22 Id. 692; Ex Parte Reynolds, 34 S. W. 120; Ex Parte Ogle, 61 S. W. 122; Ogle v. State, 63 S. W. 1009.

8. Turner v. State, 78 Ga. 174; Crimm v. Com., 119 Mass. 326; State v. Watson, 104 N. C. 735; State v. Fee, 19 Wis. 562. And see Wallis v. State, 54 Ark. 611; Leathers v. State, 26 Miss, 73.

9. People v. Simmons, 119 Calif. 1; State v. Perry, 29 S. E. 384. But see State v. Cooley, 75 N. W. 729.

10. Gladden v. State, 12 Fla. 562; Straughan v. State, 16 Ark. 37; In re Wilson, 140 U. S. 575. And see Post 56, 147.

10*. In re Wilson, 140 U. S. 575.

11. This need not be entered of record unless directed by statute: Mesmer v. Com., 26 Gratt. (Va.) 976. A verbal order is sufficient; U. S. v. Reed, 27 Fed Cas. 727. Where an indictment is found by a grand jury summoned by a sheriff without precept, the indictment will be quashed: Nicholls v. State, 5 N. J. Law 539; Chase v. State, 20 N. J. Law 218; State v. Cantrell, 21 Ark. 127. But see Hess v. State, 73 Ind. 537. In McGuire v. People, 2 Parker Cr. Rep. (N. Y.) 148, it was held that if no precept issued the defendant could avail himself of such irregularity after verdict. Where a statute authorized the sheriff to summon grand jurors without precept, but he neglected to have a grand jury in court on the first day of the term, it was held that the judge could issue a precept to the sheriff, directing him to produce a grand jury at a later day; the statute did not take from the court the right to issue its precept: Challenge to Grand Jury, 3 N. J. Law Jour. 153. That the order was not served upon the sheriff is not error, he having regularly summoned a grand jury; People v. Cuitano, 15 Calif. 327.

12. That the venire was issued by a person not legally qualified to act was held not a good objection in arrest of judgment: Peters v. State, 11 Tex. 762.

13. State v. Lightbody, 38 Me. 200. A venire need not issue: Bird v. State, 14 Ga. 43; Boyd v. State, 46 Tenn. (6 Cold.) I; Robinson v. Com. 88 Va. 900; Combs v. Com., 90 Va. 88.

14. Conner v. State, 25 Ga. 515. That the venire is not addressed to the proper officer will not avail a defendant where the writ was actually received and executed by the proper person: State v. Phillips, 2 Ala. 297.

15. State v. Lightbody, 38 Me. 200; State v. Fleming, 66 Me. 142; People v. McKay, 18 Johns (N. Y.) 212.

16. Maher v. State, 1 Port. (Ala.) 265; Bennett v. State, 1 Martin & Yerger (Tenn.) 133; State v. Bradford, 57 N. H. 188.

17. People v. The Justices, 20 Johns (N. Y.) 310; Davis v. Com. 89 Va. 132. In State v. Bradford, 57 N. H. 188, it was held that the venire need not bear teste of the chief, first or senior justice.

18. State v. Lauer, 41 Neb. 226; Thorpe v. People, 3 Utah, 441.

19. State v. Smith, 67 Me. 328; State v. Smith, 38 S. C. 270.

20. State v. Alderson, 10 Yerg. (Tenn.) 523. And see Welsh v. State, 96 Ala. 92; Stewart v. State, 98 Ala. 70.

21. Rampey v. State, 83 Ala. 31; State v. Armstrong, 167 Mo. 257; State v. McNamara, 3 Nev. 70; State v. Van Auken, 68 N. W. 454. See Turner v. State, 78 Ga., 174. In Nixon v. State, 68 Ala. 535, a juror regularly drawn was falsely personated by another person of the same surname, who was sworn as a member of the grand jury and a plea in abatement was sustained.

22. State v. Rickey, 9 N. J. Law, 293; Challenge to Grand Jury, 3 N. J. Law Jour. 153; Chase v. State, 20 N. J. Law 218; State v. Clough, 49 Me. 573. And see State v. Powers, 59 S. C. 200. It is not necessary that the return should show that the sheriff served the writ upon the jury commissioners, the record showing that the writ issued and that the commissioners acted in accordance therewith: State v. Derrick, 44 S. C. 344.

23. Com. v. Chauncey, 2 Ashm. (Pa.) 101; State v. Derrick, 44 S. C. 344.

24. Com. v. Parker, 2 Pick (Mass.) 550.

25. Rampey v. State, 83 Ala. 31; State v. Clough, 49 Me. 573.

26. Kilgore v. State, 74 Ala. 1; Levy v. Wilson, 69 Calif. 105. No precept need issue to summon talesmen as grand jurors: State v. Pierce, 8 Iowa 231.

27. State v. Gurlagh, 76 Iowa 141; State v. Silvers, 82 Iowa 714; State v. Jacobs, 6 Tex. 99.

28. Keech v. State, 15 Fla. 591; Jenkins v. State, 35 Fla. 737; State v. Garhart, 35 Iowa 315; Montgomery v. State, 3 Kan. 263; See Chartz v. Territory, 32 Pac. 166. The court may order that the deficiency be filled either from the list furnished by the county commissioners, by drawing from the box or from the body of the county: Jones v. State, 18 Fla. 889; Dukes v. State, 14 Fla. 499; Newton v. State, 21 Fla. 53. In Finley v. State, 61 Ala. 201; Couch v. State, 63 Ala. 163 and Benson v. State, 68 Ala. 513, it was held that talesmen must be summoned from the qualified citizens of the county and not from the by-standers.

29. State v. Swim, 60 Ark. 587; Winter v. Muscogee Railroad Co., 11 Ga. 438; Nealon v. People, 39 Ill. App. 481; Dorman v. State, 56 Ind. 454; Dowling v. State, 5 Smedes & M. (Miss.) 664; Portis v. State, 23 Miss. 578; Yelm Jim v. Territory, 1 Wash. T. 63; Watt v. Territory, Id. 409.

30. State v. Copp., 34 Kan. 522. And see State v. Keating, 85 Md. 188; Runnels v. State, 28 Ark. 121.

31. State v. Symonds, 36 Me. 128.

32. Rawls v. State, 8 Smedes & M. (Miss.) 599. If a grand juror regularly drawn is falsely personated by another person of the same surname, who is sworn as a member of the grand jury in

place of the other, this is good ground for a plea in abatement: Nixon v. State, 68 Ala. 535.

33. Cross v. State, 63 Ala. 40; Berry v. State Id. 126; Blevins v. State, 68 Ala. 92; Boyd v. State, 98 Ala. 33; State v. Garhart, 35 Iowa 315; Jewell v. Com., 22 Pa. 94; Harris v. State, 13 So. Rep. 15, and see Winter v. Muscogee Railroad Co., 11 Ga. 438; Beasley v. People, 89 Ill. 571. Talesmen may be added to the grand jury after it has been empanelled: State v. Mooney, 10 Iowa 506.

34. Jewell v. Com. 22 Pa. 94. In State v. Miller, 53 Iowa 84, the court made a verbal order and on appeal Judge Beck says: "The sheriff in this case was orally directed to fill the panel. The order upon which this direction was based, we will presume was entered of record, for doubtless the law so requires and the record before us does not show to the contrary."

35. State v. Fowler, 52 Iowa 103; In re Wadlin, 11 Mass. 142; Findley v. People, 1 Manning (Mich.) 234. In State v. Froiseth, 16 Minn. 313, where a juror appeared after the grand jury had duly entered upon its duties, was sworn but no charge delivered to him or again to the grand jury as a whole, McMillan, J., concludes his opinion with this language: "But it may not be improper to say, that in cases where a sufficient number of grand jurors upon the regular panel appear and are sworn and charged, the admission of others of the regular panel appearing afterwards, is a matter addressed to the discretion of the court, and in such cases when they are admitted, or where additional jurors are summoned after the organization of the jury, to supply any deficiency which may occur, in view at least of the oath prescribed, the charge should be repeated."

36. State v. Froiseth, 16 Minn. 313; Findley v. People, 1 Manning (Mich.) 234.

37. Dowling v. State, 5 Smedes & M. (Miss.) 664.

38. State v. Smith, 88 Iowa, 178.

39. State v. Brooks, 9 Ala. 9; Hester v. State, 103 Ala. 83; Newton v. State, 21 Fla. 53.

40. Straughan v. State, 16 Ark. 37; Wilburn v. State, 21 Ark. 198.

41. Oliver v. State, 66 Ala. 8.

42. Pamph. Laws 62; Section 8 of this Act was held to be directory; Com. v. Zillafrow, 207 Pa. 274.

43. Com. v. Delamater, 2 Dist. Rep. (Pa.) 562.

44. If separate writs of venire issue from the Courts of Quarter Sessions and Oyer and Terminer, the judges shall order the sheriff to return one and the same panel to both writs. Act April 14, 1834, Sec. 110, P. L. 360.

45. Act April 14, 1834, Sec. 87, P. L. 357; Act April 10, 1867, P. L. 62. In Philadelphia, the proceedings for drawing and summoning grand jurors are regulated by the Acts of March 31, 1843, P. L. 123; April 20, 1858, P. L. 354; April 13, 1859, P. L. 595; and March 13, 1867, P. L. 420. The persons eligible for jury duty are returned by the assessors in each ward. The Supreme Court Justices (when sitting in Philadelphia) and Judges of the Common Pleas Courts with the sheriff, constitute a board to superintend the selection and drawing of jurors. Any two of the judges and the sheriff form a quorum. Before December 10, in each year, the board selects sufficient jurors to serve on grand and petit juries for the ensuing year, the names, etc., of those selected being written on slips of paper and placed in the wheel, which is then locked and kept by the sheriff in his exclusive custody. A list of the names placed in the wheel are certified to each court by the members of the board then present, where it is filed. At least three weeks before the beginning of each term the board draws from the wheel sufficient names to constitute the panels of grand and petit jurors for the several courts, and a list of the names, etc., of such jurors is certified to the respective courts and to the sheriff.

46. Com. v. Salter, 2 Pears. (Pa.) 461; Sylvester v. State, 72 Ala. 201; Hughes v. State, 54 Ind. 95.

47. Com. v. Salter, 2 Pears, (Pa.) 461.

48. Penna. Act March 18, 1875, Sec. 1, P. L. 28; Com. v. Smith, 4 Pa. Sup. Ct. Rep. 1. See State v. Davis, 126 N. C. 1007; State v. Battle, 126 N. C. 1036.

49. Penna. Act March 31, 1860, Sec. 41, P. L. 439; Com. v. Morton, 34 L. I. (Pa.) 438.

50. Post 56. And see note 57.

51. 34 L. I. (Pa.) 438.

52. This act is mandatory, but an intention to carry out its provisions in good faith is all that is required: U. S. v. Ambrose, 3 Fed. Rep. 283. See U. S. v. Greene, 113 Fed. Rep. 683, where many points arising under this act were decided.

53. U. S. v. Rondeau, 16 Fed. Rep. 109.

54. Act June 30, 1879, 21 Stat. L. 43; R. S. U. S. Sec. 800-801; U S. v. Reed, 27 Fed. Cas. 727; U. S. v. Richardson, 28 Fed. Rep. 61. The clause of Sec. 801, R. S. U. S., relating to Pennsylvania was repealed by Act June 30, 1879.

55. R. S. U. S. Sec. 808.

56. Act March 31, 1860, Sec. 41, P. L. 439

57. In U. S. v. Eagan, 30 Fed. Rep. 608, Judge Thayer says, "Undoubtedly the court may determine of how many persons up to twenty-three the grand jury shall consist."

58. 1 Whart. Cr. Law, Sec. 463a (7th ed.).

59. In re Wilson, 140 U. S. 575, and see State v. Swift, 14 La. Ann. 827; CONTRA Doyle v. State, 17 Ohio 222.

60. State v. Hawkins, 10 Ark. 71; Doyle v. State, 17 Ohio 222; Barron v. People, 73 Ill. 256; Norris House v. State, 3 G. Greene (Iowa) 513; State v. Cooley, 75 N. W. 729, and see Brannigan v. People, 3 Utah 488.

61. U. S. v. Ayres, 46 Fed. Rep. 651; People v. Reigel, 78 N. W. 1017. See Williams v. State, 61 Ala. 33. In Finley v. State, 61 Ala. 201, Ulmer v. State, Id. 208, Couch v. State, 63 Ala. 163, and Benson v. State, 68 Ala. 513, will be found instances where the writ directed the sheriff to summon a grand jury from only a portion of the persons from whom the statute provided it should be drawn, and a grand jury thus constituted was held not a legal grand jury.

62. Chitty's English Statutes, Vol 6, Tit. Juries.

63. Bales v. State, 63 Ala. 30; State v. Carney, 20 Iowa 82; Johnson v.

State, 33 Miss. 363; State v. Haywood, 73 N. C. 437; State v. Martin, 82 N. C, 672; Com. v. Zillafrow, 207 Pa. 274.

64. Stevenson v. State, 69 Ga. 68; Roby v. State, 74 Ga. 812; Smith v. State, 90 Ga. 133.

65. Levy v. Wilson, 69 Calif. 105; State v. Conway, 35 La. Ann. 350; State v. Taylor, 43 Id. 1131; Preuit v. People, 5 Neb. 377; Challenge to grand jury, 3 N. J. Law Jour. 153; State v. McNamara, 3 Nev. 70. A deputy clerk may perform the duty imposed upon the clerk of the Circuit Court to draw from the box the names of the persons to serve as grand jurors: Willingham v.

State, 21 Fla. 761. But in Dutell v. State, 4 G. Greene (Iowa) 125, it was held that a deputy sheriff could not legally compare the list of grand jurors where that duty was by statute imposed upon the sheriff: And see State v. Brandt, 41 Iowa 593. Where a new constitution imposed upon a superior judge the duties performed by the county judge, the superior judge succeeds to the duties of the county Judge in drawing jurors: People v. Gallagher, 55 Calif. 462.

66. Durrah v. State, 44 Miss. 789; Dolan v. People, 64 N. Y. 485; State v Krause, 1 Ohio, N. P. 91.

67. State v. Marsh, 13 Kan. 596; People v. Petrea, 92 N. Y. 128; People v Morgan, 95 N. W. 542.

67*. 92 N. Y. 128.

68. State v. Williams, 5 Port. (Ala.) 130; Bruner v. Superior Court, 92 Calif. 239; Conner v. State, 25 Ga. 515; Com. v. Graddy, 4 Metcalf (Ky.) 223.

69. Dowling v. State, 5 Smedes & M. (Miss.) 664. The list of grand jurors returned by the sheriff is not evidence that such jurors are returned and qualified according to law: State v. Ligon, 7 Port (Ala.) 167. And see State v. Congdon, 14 R. I. 267.

70. 3 Colo. 325.

71. State v. Haynes, 54 Iowa 109; State v. McNeill, 93 N. C. 552 CONTRA Beason v. State, 34 Miss. 602.

72. Bracton — de legibus (Sir Travers Twiss ed.) Vol. 11, p. 235.

73. 2 Hawk. Pl. C. Ch. 25, Sec. 16.

74. Id. Ch. 25, Sec. 19.

75. 1 Chitty Cr. Law, 307.

76. Id. 309.

77. 3 Inst. 33.

78. 2 Hawk. Pl. C. Ch. 25, Sec. 28; 1 Chitty Cr. Law, 309: and see U. S. v. Hammond, 26 Fed. Cas. 99; Com. v. Smith, 10 Bush (73 Ky.) 476; State v. Jones, 8 Rob. (La.) 616; State v. Parks, 21 La. Ann. 251; State v. Rowland, 36 La. Ann. 193; Barney v. State, 12 Smedes & M. (Miss.) 68; State v. Duncan, 7 Yerg. (Tenn.) 271.

79. 4 Bl. Com. 302.

79*. Chitty's English Statutes, Vol 6, Tit. Juries.

80. Act April 10, 1867, P. L. 62. The Act of April 20, 1858, Sec. 2, P. L. 354, which applies only to Philadelphia, provides that the grand jurors shall be "sober, healthy and discreet citizens."

81. Com. v. Clark, 2 Browne (Pa.) 325; Rolland v. Com., 82 Pa. 306; Com. v. Cosler, 8 Luz. Leg. Reg. (Pa.) 97.

82. Fowler v. State, 100 Ala. 96; State v. Herndon, 5 Blackf. (Ind.) 75; Wills v. State, 69 Ind. 286; State v. Rockafellow, 6 N. J. Law 332; State v. Motley, 7 Rich. Law (S. C.) 327; Moore v. Com. 9 Leigh. (Va.) 639; Com. v. Cunningham, 6 Gratt. (Va.) 695.

83. State v. Brown, 10 Ark. 78; State v. Brooks, 9 Ala. 9; Barney v. State, 12 Smedes & M. (Miss.) 68; Jackson v. State, 11 Tex. 261; Stanley v. State, 16 Tex. 557.

84. State v. Bryant, 10 Yerg. 527.

85. State v. Henderson, 29 W. Va. 147.

86. Palmore v. State, 29 Ark. 248.

87. State v. Williams, 35 S. C. 344.

88. State v. Liles, 77 N. C. 496; State v. Smith, 80 Id. 410. But see State v. Edens, 85 Id. 522.

89. State v. Smith, 80 N. C. 410.

90. State v. Thibodeaux, 48 La. Ann. 600.

91. Adams v. State, 28 Fla. 51.1; State v. Davis, 12 R. I. 492; State v. Congdon, 14 R. I. 267.

92. State v. Durham Fertilizer Co., 111 N. C. 658. But see Cubine v. State, 73 S. W. 396.

93. Harland v. Territory, 13 Pac. 453; Rumsey v. Territory, 21 Pac. 152.

94. R. S. U. S. Sec. 721. U. S. v. Clune, 62 Fed. Rep. 798.

95. R. S. U. S. Sec. 812; U. S. v. Reeves, 27 Fed. Cas. 750. But this can only be taken advantage of by challenge to the jurors before indictment found. It cannot be raised by motion to quash or plea in abatement.

96. R. S. U. S. Sec. 820. This provision was repealed by the Act of Congress, June 30, 1879, 21 Stat. L. 43, but the revision committee apparently by mistake included this provision in the Revised Statutes as Sec. 820, and it was re-enacted by Congress. U. S. v. Gale, 109 U. S. 65; U. S. v. Hammond, 26 Fed. Cas. 99.

97. And see Reich v. State. 53 Ga. 73; State v. Haynes, 54 Iowa, 109; State v. Guillory, 44 La. Ann. 317; Territory v. Harding, 6 Mont. 323; Territory v. Clayton, 8 Id. 1; Com. v. Cherry, 2 Va. Cas. 20. In State v. Cole, 17 Wis. 674, the juror was a qualified elector of Wisconsin, but was not a citizen of the United States.

98. 2 Hawk. Pl. C. Ch. 43, Sec. 36; 2 Hale, P. C. 271; 1 Chitty Cr. Law 309; Bac. Abr. Juries E. 8; Trials per Pais (Giles Duncombe) Vol. 1, p. 246; 1 Whart. Cr. Law, Sec. 473, (7th ed.).

99. 4 Bl. Com. 352; Res. v. Mesca, 1 Dall. 73; Roberts Digest of British Statutes, 346. The Act of April 14, 1834, Sec. 149, P. L. 366, provides that no jury de medietate shall be allowed in Pennsylvania. In the District of Columbia a foreigner is not entitled to be tried by a jury de medietate; U. S. v. McMahon, 26 Fed. Cas. 1131.

100. If the objection is not raised before the grand jurors are sworn, it cannot thereafter be availed of on a motion to set aside the indictment: Moses v. State, 58 Ala. 117; State v. Ingalls, 17 Iowa 8; State v. Pierce, 90 Id. 506; State v. Gibbs, 39 Id. 318; Bellair v. State, 6 Blackf. (Ind.) 104; State v. Hensley, 7 Blackf. (Ind.) 324; State v. Welch, 33 Mo. 33; State v. Rickey, 10 N. J. Law 83; Lienberger v. State, 21 S. W. 603; State v. Ames, 96 N. W. 330. See People v. Borgstrom, 178 N. Y. 254. Under Code Sec. 2375 of Miss., objections to the qualifications of grand jurors must be made before they are empaneled; they cannot be made afterward. The Texas code of Cr. Proc. 1895, Sec. 397, contains the same provision: Barber v. State, 46 S. W. 233; Carter v. State, 46 Id. 236. And see as to Mississippi Head v. State. 44 Miss. 731; Dixon v. State, 20 So. 839.

101. See generally cases in Note 148, page 73.

102. In Alabama by Code Sec. 4445, it is provided that no objection shall be made to any indictment on a ground going to the formation of the grand jury except that the jurors were not drawn in the presence of the proper officers. See Boulo v. State, 51 Ala. 18; Weston v. State, 63 Id. 155; Phillips v. State, 68 Id. 469; Billingslea v. State, Id. 486; Murphy v. State, 86 Ala. 45. In Linehan v. State, 21 So. 497, it was held that this provision was not repealed by the Act of February 28, 1887, regulating the drawing and formation of grand juries. And see Compton v. State, 23 So. 750; Stoneking v. State, 24 So. 47. The Act of February 21,

1887, was repealed by the Act of March 2, 1901: Edson v. State, 32 So. 308.

103. People v. Romero, 18 Calif. 89; State v. Osborne, 61 Iowa 330; State v. Warner, 165 Mo. 399; People v. Wintermute, 46 N. W. 694.

104. People v. Borgstrom, 178 N. Y. 254. In People v. Romero, 18 Calif. 89, Judge Baldwin said in his opinion reversing the judgment of the court below: "If the prisoner were refused the privilege of challenging the grand jury in and by the Court of Sessions, the indictment is insufficient and worthless; it is not, in other words, a legal indictment, because not found by a body competent to act on the case; but to have this effect, the prisoner must have applied for leave or requested permission to appear and challenge the jury. It was not the duty of the Court of Sessions to bring him into court for the purpose of exercising this privilege. It is the prisoner's business to know when the court meets, and if he desires to challenge the jury, to apply, if in custody, to the court, to be brought into court for that purpose; and if he fails to do this, he waives his privilege of excepting to the panel or any member."

105. U. S. v. Gale, 109 U. S. 65; Gibbs v. State, 45 N. J. Law 379; Territory v. Young, 2 N. Mex. 93; Huling v State, 17 Ohio St. 583; Reed v. State, 1 Tex. App. 1; Green v. State, Id. 82; Van Hook v. State, 12 Tex. 252; State v. White, 17 Tex. 242; Cook v. Territory, 4 Pac. 887; Stanley v. U. S. 33 Pac. 1025. In some States it is now provided by statute that no challenge to the panel shall be allowed: State v. Davis, 41 Iowa 311; Carpenter v. People, 64 N. Y. 483; People v. Borgstrom, 178 N. Y. 254; State v. Fitzhugh, 2 Ore. 227. And see People v. Reigel, 78 N. W. 1017.

106. Rolland v. Com., 82 Pa. 306; Delaware River Road, 5 Dist. Rep. (Pa.) 694; In re Bridge in Nescopeck, 3 Luz. Leg. Reg. (Pa.) 196; State v. Herndon, 5 Blackf. (Ind.) 75.

107. Wells v. State, 94 Ala. 1; State v. Howard, 10 Iowa 101; Clare v. State, 30 Md. 163; Avirett v. State, 76 Md. 510; Green v. State, I Tex. App. 82. See also cases in note 108. CONTRA People v. Jewett, 3 Wend. (N. Y.) 314, where it appeared the jurors selected were in every respect qualified. And see People v. Petrea, 92 N. Y. 128.

108. Brown v. Com., 73 Pa. 321; Id. 76 Pa. 319; Rolland v. Com., 82 Pa. 306; Ins. Co. v. Adams, 110 Pa. 553; Klemmer v. R. R. Co., 163 Pa. 521; Com. v. Delamater, 2 Dist. Rep. (Pa.) 562.

109. U. S. v. Antz, 16 Fed. Rep. 119; Com. v. Salter, 2 Pears. (Pa.) 461; U. S. v. Reed, 27 Fed. Cas. 727; Freel v. State, 21 Ark. 212; Williams v. State 69 Ga. 11; Dixon v. State, 3 Iowa 416; State v. Howard, 10 Id. 101; State v. Beckey, 79 Id. 368; State v. Texada, 19 La. Ann. 436; State v. Underwood, 28 N. C. 96; State v. Duncan, Id. 98; State v. Hart, 15 Tex. App. 202; Whitehead v. Com., 19 Gratt. (Va.) 640; State v. Cameron, 2 Chand. (Wis.) 172. CONTRA People v. Fitzpatrick, 30 Hun. (N. Y.) 493; People v. Hooghkerk, 96 N. Y. 149.

110. Edmonds v. State, 34 Ark. 720.

111. Com. v. Chauncey, 2 Ashm. (Pa.) 101.

112. State v. Bradley, 32 La. Ann. 402; Campbell v. Com., 84 Pa. 187; Kendall v. Com., 19 S. W. 173. And see State v. Flint, 52 La. Ann. 62. An indictment will not be quashed nor will judgment be arrested in a capital case upon the ground that although the jury commissioners had taken the oath of office prescribed by the Constitution before entering upon their duties, it had not been filed in the prothonotary's office as provided by the Constitution: Com. v. Valsalka, 181 Pa. 17.

113. Neal v. Delaware, 103 U. S. 370; Carter v. Texas, 177 U. S. 442; Whitney v. State, 59 S. W. 895; Rogers v. Alabama, 192 U. S. 226.

114. Dixon v. State, 20 So. 839.

115. Com. v. Wright, 79 Ky. 22.

116. Com. v. Lippard, 6 S. & R. 395. And see Com. v. Valsalka, 181 Pa. 17; U. S. v. Greene, 113 Fed. Rep. 683.

117. Ex Parte McCoy, 64 Ala. 201; State v. Champeau, 52 Vt. 313. And see State v. Skinner, 34 Kan. 256; State v. Donaldson, 43 Kan. 431.

118. Long v. State, 103 Ala. 55.

119. State v. Wilcox, 104 N. C. 847.

120. State v. Clifton, 73 Mo. 430.

121. Johnson v. State, 33 Miss. 363; State v. Mellor, 13 R. I. 666.

122. Downs v. State, 78 Md. 128.

123. People v. Southwell, 46 Calif. 141; People v. Goldenson, 76 Id. 328; U. S. v. Blodgett, 35 Ga. 336; Dixon v. State, 3 Iowa 416; Barney v. State, 12 Smedes & M. (Miss.) 68; Chase v. State, 46 Id. 683; People v. Jewett, 3 Wend. (N. Y.) 314; Huling v. State, 17 Ohio St. 583; State v. Jacobs, 6 Tex. 99; Van Hook v. State, 12 Id. 252; State v. White, 17 Tex. 242; Reed v. State, 1 Tex. App. 1; Green v. State, Id. 82; Smith v. State, Id. 133; Cook v. Territory, 4 Pac. 887.

124. McClary v. State, 75 Ind. 260.

125. State v. Gillick, 10 Iowa 98; Hart v. State, 15 Tex. App. 202.

126. 1 Whart. Cr. Law 468; Carter v. Texas, 177 U. S. 442; Wilson v. People, 3 Colo, 325; Miller v. State, 69 Ind. 284; Pointer v. State, 89 Ind. 255; State. v. Belvel, 89 Iowa 405; State v. Kouhns, 103 Id. 720; State v. Herndon, 5 Blackf. (Ind.) 75; State v. Texada, 19 La. Ann. 436; State v. Hoffpauer, 21 Id. 609; State v. Watson, 31 Id. 379; State v. Thomas, 19 Minn. 484; Clare v. State, 30 Md. 163; State v. Welch, 33 Mo. 33; People v. Robinson, 2 Parker Cr. Rep. (N. Y.) 235; State v. Sears, 61 N. C. 146; Com. v. Freeman, 166 Pa. 332; Com. v. Shew, 8 Pa. Dist. Rep. 484; State v. Jeffcoat, 26 S. C. 114; Thomason v. State, 2 Tex. App. 550. Under Texas Code, the proper time to object to the array is before the grand jurors have been interrogated as to their qualifications: Reed v. State, 1 Tex. App. 1; Grant v. State, 2 Id. 163. An objection to the manner of empaneling cannot be made after indictment found: Carter v. State, 46 S. W. 236.

127. 25 Fed. Cas. 213. And see People v. Moice, 15 Calif. 329; People v. Arnold, Id. 476; State v. Howard, 10 Iowa 101.

128. U. S. v. Gale, 109 U. S. 65.

129. Carter v. Texas, 177 U. S. 442; Wolfson v. U. S., 101 Fed. Rep. 430; U. S. v. Reeves, 27 Fed. Cas. 750; U. S. v. Jones, 31 Fed. Rep. 725; U. S. v. Hammond, 26 Fed. Cas. 99; U. S. v. Blodgett. 30 Fed. Cas. 1157; Agnew v. U. S., 165 U. S. 36; U. S. v. Palmer, 27 Fed. Cas. 410.

130. People v. Beatty, 14 Calif. 566; People v. Hidden, 32 Id. 445: People v. Geiger, 49 Id. 643; Turner v. State, 78 Ga. 174; Musick v. People, 40 Ill. 268; Mershon v. State, 51 Ind. 14; Dixon v. State, 3 Iowa 416; State v. Hinkle, 6 Id. 380; State v. Ostrander, 18 Id. 435; State v. Reid, 20 Id. 413; State v. Gibbs, 39 Id. 318; State v. Ruthven, 58 Id. 121; Logan v. State, 50 Miss. 269; Patrick v. State, 16 Neb. 330; Territory v. Clayton, 19 Pac. 293.

131. U. S. v. Richardson, 28 Fed. Rep. 61; U. S. v. Rondeau, 16 Fed. Rep. 109; People v. Simmons, 119 Calif. 1; McElhanon v.

People. 92 Ill. 369; State v. Furco, 51 La. Ann. 1082; Foust v. Com., 33 Pa. 338; Rolland v. Com., 82 Pa. 306; Bowen v. State, 24 So. 551.

132. Palmore v. State, 29 Ark. 248. And see People v. Glen, 173 N. Y. 395, where the court in discussing the effect of the words but in no other except the two instances specified in Sec. 313 of the Code of Criminal Procedure says: "That the legislature has the undoubted right to regulate mere matters of procedure in all actions and proceedings, both criminal and civil, is too well established to require either discussion or citation of authority. But it is equally clear that no legislative enactment can be permitted to deprive the citizen of any of his constitutional rights."

133. 2 Hawk. PI. C. c. 25, Sec. 16; I Chitty Cr. L. 309; Hudson v. State, 1 Blackf. (Ind.) 317; Thayer v. People, 2 Doug. (Mich.) 417. And see State v. Davis, 22 Minn. 423.

134. State v. Chambers, 87 Iowa 1.

135. Keitler v. State, 4 G. Greene (Iowa) 291.

136. Challenge to Grand Jury, 3 N. J. Law Jour. 153. But see CONTRA as to Iowa, where in the case of Keitler v. State, 4 G. Greene 291, Greene, J., said: "While the Code expressly confers the right of challenge upon the defendant, it is entirely silent as to the state or private prosecutor, and hence it must be inferred that the object of the law was to limit this right exclusively to defendants."

137. State v. Gut, 13 Minn, 341.

138. Ross v. State, 1 Blackf. (Ind.) 390; Maher v. State, 3 Minn. 444; State v. Hinckley, 4 Id. 345; State v. Hoyt, 13 Id. 132; Kemp v. State, 11 Tex. App. 174; Brown v. State, 32 Tex. Cr. Rep. 119; Webb v. State, 40 S. W. 989; Barber v. State, 46 S. W. 233; Barkmann v. State, 52 S. W. 69. See Reed v. State, 1 Tex. App. 1; State v. Taylor, 171 Mo. 465; Territory v. Ingersoll, 3 Mont. 454.

139. Maher v. State, 3 Minn. 444; State v. Hinckley, 4 Id. 345; State v. Taylor, 171 Mo. 465; Kemp v. State, 11 Tex. App. 174; Barber v. State, 46 S. W. 233; Barkmann v. State, 52 S. W. 69.

140. Challenge to Grand Jury, 3 N. J. Law Jour. 153.

141. Russell v. State, 33 Ala. 366.

142. People v. Phelan, 123 Calif. 551.

143. State v. Hughes, 1 Ala. 655. And see People v. Manahan, 32 Calif. 68.

144. State v. Brooks, 9 Ala. 9; State v. Adams, 20 Iowa 486; Slagel v. Com., 5 Ky. Law. Rep. 545; State v. Stunkle, 41 Kan. 456; State v. Quimby, 51 Me. 395; State v. Wright, 53 Me. 328; Owens v. State, 25 Tex. App. 552. And see the cases cited in note 146.

145. Kitrol v. State, 9 Fla. 9. The decision in this case was rested wholly upon the words of the statute, Forward, J., saying:

"Had the statute ended where it says 'shall he liable to serve,' then we might with propriety say, the statute leaves it a question of privilege with the Juror; but the statute goes further; it declares that such persons are competent jurors, &c. It follows that if such persons are competent, others not possessed of such qualifications are not competent.

"It was evidently the intention of the legislature to secure, for the protection of the citizen whose rights might be affected, a grand jury composed of members possessing certain qualifications, defined by the law. In giving this statute such a construction we carry out that intention. We are therefore of the opinion that a person over sixty years of age is not, under the statute, a competent grand juror."

146. Spigener v. State, 62 Ala. 383; Loeb v. State, 75 Ga. 258; Carter v. State, Id. 747; Jackson v. State, 76 Ga. 551; Davidson v. People, 90 Ill. 221 State v. Miller, 2 Blackf. (Ind.) 35; Booth v. Com., 16 Gratt. (Va.) 519; State v. Edgerton, 69 N. W. 280.

147. U. S. v. Williams, 28 Fed. Cas. 666.

148. Crowley v. United States, 194 U. S. 461; State v. Herndon, 5 Blackf. (Ind.) 75; State v. Griffice, 74 N. C. 316; McTigue v. State, 63 Tenn. 313. In the following cases it was held that the objection must be made before indictment found: State v. Hamlin, 47 Conn. 95; State v. Felter, 25 Iowa 67; State v. Harris, 38 Id. 242; Com. v. Smith, 9 Mass. 107; Lacey v. State, 31 Tex. Cr. Rep. 78; People v. Jewett, 3 Wend. (N. Y.) 314. This ruling, however, was criticized in Newman v. State, 14 Wis. 393, Judge Cole saying: "We think these cases are unsound in reason and principle; and that the current of authorities is the other way."

149. Rolland v. Com., 82 Pa. 306; Com. v. Cosler, 8 Luz. Leg. Reg. 97; Com. v. Craig, 19 Pa. Sup. Ct. 81; U. S. v. Jones, 31 Fed. Rep. 725; U. S. v. White, 28 Fed. Cas. 572; State v. Ames, 96 N. W. 330.

150. R. S. U. S. Sec. 820.

151. U. S. v. Hammond, 26 Fed. Cas. 99.

152. R. S. U. S. Sec. 812. For a similar ruling under Rev. St. 5164 of Ohio see Roth v. State, 3 Ohio Cir. Ct. Rep. 59, where upon issue joined on plea in abatement the court excluded defendant's evidence showing that a grand juror had previously served within two years from the time at which the indictment was found. The Circuit Court on appeal held this to be error and reversed the judgment of the lower court. See State v. Elson, 45 Ohio St. 648; State v. Ward, 60 Vt. 142.

153. U. S. v. Reeves, 27 Fed. Cas. 750. In Roth v. State, 3 Ohio Cir. Ct. Rep. 59, the appellate court sustained the objection to the indictment that a grand juror had served as a petit juror within two years in violation of the Ohio statute. The point that the question should have been raised by challenge and that it could not be raised by plea in abatement does not seem to have been considered in this case. CONTRA U. S. v. Clark, 46 Fed. Rep. 633; State v. Brown, 28 Ore. 147.

154. U. S. v. Reed, 27 Fed. Cas. 727; U. S. v. Clune, 62 Fed. Rep. 798.

155. 194 U. S. 461. In this case Mr. Justice Harlan discusses in an admirable manner the question as to when a plea in abatement may be filed.

156. But see contra Sheridan's Trial, 31 How. St. Tr. 567.

157. The challenge must be made before the grand jury is sworn: State v. Ames, 96 N. W. 330. In the case of State v. Hamlin, 47 Conn. 95, it was doubted whether the members of a grand jury could be challenged for favor before they were sworn.

158. U. S. v. Aaron Burr, 25 Fed. Cas. 55.

159. Thompson & Merriam on Juries, Sec. 513.

160. Supra. 10.

161. 31 How. St. Tr. 567.

162. Collins v. State, 31 Fla. 574; and see State v. Perry, 29 S. E. 384.

163. State v. Wilcox, 104 N. C. 847.

164. Jones v. State, 2 Blackf. (Ind.) 475; Gross v. State, 2 Ind. 329.

165. U. S. v. Reynolds, I Utah 226.

166. Com. v. Clarke, 2 Browne (Pa.) 325; U. S. v. White, 28 Fed. Cas. 572; U. S. v. Aaron Burr, 25 Fed. Cas. 55; U. S. v. Jones, 31 Fed. Rep. 725; U. S. v. Clune, 62 Fed. Rep. 798; State v. Hamlin, 47 Conn. 95; State v. Hinkle, 6 Iowa 380; State v. Gillick, 7 Id. 287; State v. Osborne, 61 Id. 330; State v. Shelton, 64 Id. 333; State v. Billings, 77 Id. 417; People v. Jewett, 3 Wend. (N. Y.) 314; In re Annexation to Borough of Plymouth, 167 Pa. 612. CONTRA State v. Clarissa, 11 Ala. 57; People v. District Court, 29 Colo. 83; Musick v. People, 40 Ill. 268; Com. v. Woodward, 157 Mass. 516. In Betts v. State, 66 Ga. 508, in delivering the opinion of the court, Speer, J., said: "To hold that a grand juror was subject to challenge propter affectum would lead to endless embarrassments in criminal proceedings. We presume it rarely occurs that a crime, especially of great magnitude, does not elicit an expression of opinion from that class of citizens who make up the grand jury; to allow this expression to disqualify and vacate an indictment would entail endless delay and embarrassment in the prosecution of crime, and too often secure immunity to the criminal."

The Supreme Court of Georgia, however, appears to have weakened in this view in the next year, since in the cases of Williams v. State, 69 Ga. 11 and Lee v. State, Id. 705, the court intimated that if a defendant could except to a grand juror at all on the ground that he had formed and expressed an opinion, it should be done before a true bill was found.

167. The prosecutor is disqualified by statute to act as a grand juror: State v. Holcomb, 86 Mo. 371; State v. Williamson, 106 Mo. 162; State v. Millain, 3 Nev. 409; People v. Smith, 76 N. W. 124.

168. Rolland v. Com., 82 Pa. 306; Delaware River Road, 5 Dist. Rep. (Pa.) 694; In re Bridge in Nescopeck, 3 Luz. Leg. Reg. (Pa.) 410; In re County Bridge, 3 Luz. Leg. Reg. (Pa.) 196; Fisher v. State, 93 Ga. 309. But see State v. Brainerd, 56 Vt. 532.

169. Supra. 63, 64, note 97.

170. Supra. 63.

171. State v. Bleekley, 18 Mo. 428. Supra. 62.

172. Supra. 62.

173. U. S. v. Eagan, 30 Fed. Rep. 608.

174. U. S. v. Belvin, 46 Fed. Rep. 381; U. S. v. Williams, 28 Fed. Cas. 666; In re Tucker, 8 Mass. 286. CONTRA People v. Smith, 76 N. W. 124. In 1 Whart. Cr. Law, Sec. 469, the ruling as set forth in the text is severely criticised. But while it is true that if the accuser corruptly causes himself to be placed upon the grand jury a challenge should be sustained and the panel purged, yet if he was returned without his agency or instigation, the challenge should not be sustained, for as a lawful member of that body a presentment could be made upon knowledge which he might communicate to them.

175. Com. v. Bradney, 126 Pa. 199; Penna. Act April 16, 1840, Sec. 6, P. L. 411; and see State v. New fane, 12 Vt. 422.

176. U. S v. Palmer, 27 Fed. Cas. 410; State v. Chairs, 68 Term. 196.

177. Com. v. Rudd, 3 Ky. Law Rep. 328; Com. v. Pritchett, 74 Ky. 277; Owens v. State, 23 Tex. App. 552; Com. v. Strother, 1 Va. Cas. 186.

178. Com. v. Hayden, 163 Mass. 453.

179. Musick v. People, 40 Ill. 268. See Com. v. Craig, 19 Pa. Superior Ct. 81.

180. Koch v. State, 32 Ohio St. 353.

181. U. S. v. Benson, 31 Fed. Rep. 896; State v. Harris, 97 N. W. 1093.

182. State v. Hinkle, 6 Iowa 380; State v. Shelton, 64 Id. 333; State v. Billings, 77 Id. 417.

183. State v. Billings, 77 Iowa 417.

184. In State v. Osborne, 61 Iowa, 330, this question arose under Section 4261 of the Code and was considered at length by Beck, J., who says: "In the absence of any statute so providing, the prisoner ought to be permitted to exercise the right to challenge the jurors at any time before they consider the case, upon information gained that they are lawfully subject to challenge on account of matters arising after a prior challenge had been made. A different rule would defeat the very purpose of the statute, namely, to secure a fair and unprejudiced grand jury, to whom the charge shall be submitted. In the case before us, after the first indictment was set aside, the rights of the prisoner were no other or different from what they were when the first challenge was made. He had a right to an unprejudiced grand jury. The proceedings resulting in the first indictment stood for nothing. The prisoner should have been permitted to fully exercise his right to challenge the jurors. There was ground for believing, nay, for knowing, that the jurors had formed and expressed an opinion of the prisoner's guilt, for they had heard the evidence, and upon their oaths returned an indictment against him. But, it is said, they gained the knowledge of the facts, and expressed their opinion of his guilt, acting as grand jurors. This does not change the case. Suppose one of the grand jurors had been upon a coroner's jury, or had been upon a jury before whom an accomplice had been tried and convicted. In each case the juror would have gained knowledge of the facts, and expressed an opinion of the prisoner's guilt, under circumstances substantially the same as existed in this case. It will not be claimed that he would not be the subject of challenge. It is also said that no prejudice resulted from refusing defendant the right to make the challenge, as he was convicted, and thus shown to be guilty; and that we must presume another grand jury would have found an indictment against him. The facts stated may all be admitted, but we cannot exercise a presumption of a prisoner's guilt in order to sustain proceedings resulting in his conviction. Such a rule would in effect declare that a verdict cures all violations of law and irregularities in criminal trials. In People v. Hansted, 135 Calif. 149. it was said by McFarland, J.: "It is clear that grand jurors who have examined the charge against one accused of a crime, and found and presented an indictment against him for such crime, thus officially declaring their conviction upon the evidence before them that he is probably guilty, are disqualified from again passing upon a second charge against him for the same offence." But see People v. Northey, 77 Calif. 618.

185. 7 Iowa 287. Compare with the language of the court in People v. Northey, 77 Calif. 618.

186. U. S. v. Jones, 31 Fed. Rep. 725. And see People v. Landis, 139 Calif. 426. The case of State v. Cole, 19 Wis. 129, raises this question and presents a contrary ruling, but no reason is given for the ruling and the judgment was reversed on other grounds. And see State v. Wilcox, 104 N. C. 847, where the court held that the grand juror was competent and was bound by his oath to communicate to his fellow jurors the knowledge he had acquired while serving upon the petit jury.

187. Betts v. State, 66 Ga. 508; Lee v. State, 69 Ga. 705. It is interesting to note that the ruling in both of these cases is at variance with the illustration used by Judge Beck in his opinion in the case of State v. Osborne, 61 Iowa 330. Supra. page 79. Note 184.

188. State v. Russell, 90 Iowa 569; State v. Sharp, 110 N. C. 604; State v. Easter, 30 Ohio St. 542; Simpson v. State, 34 S. E. 204.

And see State v. McNinch, 12 S. C. 89; Shope v. State, 32 S. E. 140.

189. Lascelles v. State, 90 Ga. 347.

189*. State v. Maddox, 1 Lea (Tenn.) 671.

190. State v. Newfane, 12 Vt. 422. See Com. v. Ryan, 5 Mass. 90; Com. v. Brown, 147 Mass. 585.

191. State v. Alexander, 35 La. Ann. 1100; Harless v. U. S., 1 Morris (Iowa) 169; State v. Carlson, 62 Pac. 1016.

192. State v. Wilcox, 104 N. C. 847; and see State v. Kouhns, 103 Iowa 720.

193. Com. v. Smith, 9 Mass. 107; State v. Wilson, 2 McCord, (S. C.) 393.

194. Brown v. Com., 76 Pa. 319. And see Territory v. Hart, 14 Pac. 768. The Act of Congress of March 22, 1882, relating to the Territory of Utah provided that in prosecutions for bigamy, polygamy or unlawful cohabitation under any statute of the United States it should be cause for challenge that a proposed juror was himself living in the practice of bigamy, polygamy or unlawful cohabitation with more than one woman, and allowing the juror to be examined upon his oath as to such matters. This was held to apply to grand jurors in Clawson v. U. S., 114 U. S. 477. In the case of State v. Hughes, 1 Ala. 655, the court refused to allow counsel for defendant to ask grand jurors before they were sworn "whether they had formed and expressed an opinion as to the guilt or innocence of the prisoner"

195. Brown v. Com. 76 Pa. 319. In Com. v. Craig, 19 Pa. Superior Ct. 81, upon motion to quash upon the ground of favor, the court permitted the examination of the grand juror whom it was alleged did not stand indifferent. The grand jurors were examined on their voir dire: State v. Billings, 77 Iowa 417; Jones v. State, 2 Blackf. (Ind.) 475.

196. U. S v. Aaron Burr, 25 Fed. Cas. 56.

197. Com. v. Clarke, 2 Browne (Pa.) 323.

[198. There was no note 198.]

199. Jones v. State, 2 Blackf. (Ind.) 475. In this case Stevens, J. said:

"There is no statute or sanctioned practice in this state, authorizing a prisoner to peremptorily challenge grand jurors; and it is believed that no such practice exists in England. The common law requires grand jurors to be good and lawful freeholders, and the English statutes require several additional qualifications; and Chitty in his treatise on criminal law, when speaking of these qualifications of grand jurors, says that a prisoner, who is at the time under a prosecution for an offence about to be submitted to the consideration of a grand jury, may challenge any of the grand jurors, who lacks any of these qualifications required by the common and statute laws. Chitty refers to Hawkins' Pleas of the Crown, where it is said that a challenge to grand jurors is very properly limited to persons who are, at the time, under a prosecution for an offence about to be submitted to a grand jury. By these authorities it is clear, that in England, these challenges are limited to one certain class of cases, and then only for cause."

200. 7 How. St. Tr. 249.

201. U. S. v. Jones, 69 Fed Rep. 973. And see also Territory v. Barth, 15 Pac. 673; People v. Hidden, 32 Calif. 445; State v. Drogmond, 55 Mo. 87. In State v. Bowman, 73 Iowa 110, where the grand jury was empaneled in the absence of several persons drawn to serve as jurors, they failing to be present by reason of the judge stating to them that they would not be wanted and an indictment was found in their absence, the court held that the grand jury was illegally constituted and the indictment was quashed. And see Baker v. State, 23 Miss. 243.

202. O'Byrne v. State, 51 Ala. 25; Finley v. State, 61 Ala. 201; Keitler v. State, 4 G. Greene (Iowa) 291; Portis v. State, 23 Miss. 578.

203. Com. v. Bradney, 126 Pa. 199.

204. Bac. Abr. Indict. C. In Vermont, in the case of In re Baldwin, 2 Tyler 473, the Supreme Court held that they had no power to order a grand juror to withdraw from the panel in any particular case, although it was one of a complaint against himself.

205. Supra. 75.

206. Denning v. State, 22 Ark. 131; People v. Hidden, 32 Calif. 445; Mills v. State, 76 Md. 274; Portis v. State, 23 Miss. 578; State v. Bradford, 57 N. H. 188; State v. Ward, 60 Vt. 142; State v. Schieler, 37 Pac. 272. But see CONTRA Smith v. State, 19 Tex. App. 95; Watts v. State, 22 Id. 572; Drake v. State, 25 Id. 293; Trevinio v. State, 27 Id. 372.

207. Burrell v. State, 129 Ind. 290; Cotton v. State, 31 Miss. 504, and see Wallis v. State, 54 Ark. 611.

208. In re Ellis, 8 Fed Cas. 548; People v. Leonard, 106 Calif. 302; State v. Bradford, 57 N. H. 188; State v. Jacobs, 6 Tex. 99; Com. v. Burton, 4 Leigh. (Va.) 645; State v. Brooks, 48 La. Ann. 1519; Territory v. Barth, 15 Pac. 673. CONTRA Keitler v. State, 4 G. Greene (Iowa) 291.

209. Denning v. State, 22 Ark. 131; State v. Reisz, 48 La. Ann. 1446; Mill v. State, 76 Md. 274; State v. Wilson, 85 Mo. 134; State v. Thomas, 61 Ohio St. 444; Jetton v. State, 19 Tenn. 192; People v. Lee, 2 Utah 441; Com. v. Burton, 4 Leigh (Va.) 645. In Peters v. State, 08 Ala. 38; the court directed the sheriff to add two new members to the jury without first making an order discharging two who were incapacitated by illness from serving and it was held that the grand jury was illegally constituted. And see Ramsey v. State, 21 So. 209; Portis v. State, 23 Miss. 578.

210. Germolgez v. State, 99 Ala. 216; State v. Fowler, 52 Iowa 103; State v. Ward, 60 Vt. 142.

211. State v. Thomas, 61 Ohio St. 444.

212. Wallis v. State, 54 Ark. 611.

213. People v. Colmere, 23 Calif. 632; State v. Hamlin, 47 Conn. 95; U. S. v. Blodgett, 35 Ga. 336; Hudson v. State, 1 Blackf. (Ind.) 317; Ross v. State, Id. 390; Jones v. State, 2 Id. 475; Mershon v. State, 51 Ind. 14; Com. v. Smith, 9 Mass. 107; Com. v. Clark, 2 Browne (Pa.) 323; Lacy v. State, 31 Tex. Cr. Rep. 78; Territory v. Hart, 14 Pac. 768. See State v. Clarissa, 11 Ala. 57.

214. State v. Hamlin, 47 Conn. 95.

215. U. S. v. Blodgett, 30 Fed. Cas. 1157; Agnew v. U. S., 165 U. S. 36.

216. Fenalty v. State, 12 Ark. 630; Barney v. State, 12 Smedes & M. (Miss.) 68; State v. Larkin, 11 Nev. 314; Rolland v. Com., 82 Pa. 306. CONTRA Lee v. State, 45 Miss. 114. In Com. v. Smith, 9 Mass. 107, it was held that after indictment filed, no objection of irregularity in the empaneling of the grand jury would be received as a plea to such indictment. In Boyington v. State, 2 Port (Ala.) 100, it was held too late to except to the qualifications of a grand juror after indictment filed and accepted in court.

217. Carter v. Texas, 177 U. S. 442; Wolf son v. U. S., 101 Fed. Rep. 430; U. S. v. Reeves, 27 Fed. Cas. 750; U. S. v. Jones, 31 Fed. Rep. 725; Agnew v. U. S., 165 U. S. 36.

218. Carter v. Texas, 177 U. S. 442; U. S. v. Reeves, 27 Fed. Cas. 750; U. S. v. Gale, 109 U S. 65; Agnew v. U. S., 165 U. S. 36. And see Mershon v. State, 51 Ind. 14; State v. Seaborn, 15 N. C. 305; State v. Ward, 60 Vt. 142. In Lee v. State, 45 Miss. 114, it was held that the competency or qualifications of the grand jury cannot be questioned by plea in abatement, the empaneling being conclusive as to these facts. And see Durrah v. State, 44 Miss. 789; Head v. State; Id. 731. See also Supra. 64. Note 100.

219. U. S. v. Richardson, 28 Fed. Rep. 61.

220. State v. Brandon, 28 Ark. 410; Williams v. State, 60 Ga. 88; Jackson v. State, 64 Ga. 344; State v. Hart, 29 Iowa 268; State v. Vincent, 91 Md. 718; Com. v. Church, 1 Pa. 105; Com. v. Smith, 27 S. W. 810; Fisher v. U. S., 31 Pac. 195.

221. Meiers v. State, 56 Ind. 336; McClary v. State, 75 Ind. 260.

222. Woodward v. State, 33 Fla. 508; State v. Glascow, 59 Md. 209; Cox v. People, 80 N. Y. 500.

223. Wolfson v. U. S., 101 Fed. Rep. 430; U. S. v. Eagan, 30 Fed. Rep. 608.

224. State v. Clarissa, 11 Ala. 57; Horton v. State, 47 Id. 58; Sanders v. State, 55 Id. 183; Shropshire v. State, 12 Ark. 190; Fenalty v. State, Id. 630; Stewart v. State, 13 Id. 720; Dixon v. State, 29 Id. 165; Wright v. State, 42 Id. 94; Carpenter v. State, 62 Id. 286; People v. Hidden, 32 Calif. 445; Terrell v. State, 9 Ga. 58; Miller v. State, 69 Ind. 284; State v. Wash. 33 La. Ann. 896; State v. Griffin, 38 Id. 502; McQuillen v. State, 8 Smedes & M. (Miss.) 587; State v. Borroum, 25 Miss. 203; Green v. State, 28 Id. 687; State v. Smallwood, 68 Mo. 192; State v. Clifton, 73 Mo. 430; State v. Rand, 33 N. H. 216; People v. Robinson, 2 Parker Cr. Rep. (N. Y.) 235; People v. Griffin, 2 Barb. (N. Y.) 427; State v. Martin, 2 Ired. (N. C.) 101; State v. Seaborn, 15 N, C. 305; Com. v. Chauncey, 2 Ashm. (Pa.) 90; State v. Motley, 7 S. C. 327; State v. Washington, 28 Tenn. 626; Ellis v. State, 92 Id. 85; Robinson v. Com. 88 Va. 900; Territory v. Armijo, 37 Pac. 1117; Territory v. Barrett, 42 Pac. 66; Barber v. State, 46 S. W. 233. The same ruling was made in Dyer v. State, 79 Tenn. 509, even though a plea in abatement had been filed before general issue pleaded and was not acted upon.

225. Com. v. Freeman, 166 Pa. 332. And see Com. v. Shew, 8 Pa. Dist. Rep. 484.

226. U. S. v. Hammond, 26 Fed. Cas. 99; Com. v. Smith, 73 Ky. 476; State v. Rowland, 36 La. Ann. 193; Barney v. State, 12 Smedes & M. (Miss.) 68; State v. Duncan, 7 Yerg. (Tenn.) 271.

227. Johnson v. State, 62 Ga. 179; State v. Carver, 49 Me. 588; Clare v. State, 30 Md. 163; Territory v. Romero, 2 N. Mex. 474; State v. Lamon, 10 N. C. 175; State v. Martin, 24 Id. 101; State v. Haywood, 94 N. C. 847; State v. Vogel, 22 Wis. 471. But see State v. Parks, 21 La. Ann. 251; State v. Rowland, 36 Id. 193.

228. State v. Noyes, 87 Wis. 340.

229. In re Gannon, 69 Calif. 541. But see In re Lester, 77 Ga. 143.

230. Ex Parte Hammond, 91 Calif. 545.

231. In U. S. v. Wilson, 28 Fed. Cas. 725, it was held that although the Act of Congress, July 20, 1840 (5 Stat. 394) provided for the adoption in the Federal courts of the methods of the highest courts of the respective states "in so far as such mode may be practicable," the Federal court sitting in Ohio had authority in its discretion to adopt the mode of empaneling grand juries practiced in the inferior courts of the State.

232. State v. Ostrander, 18 Iowa 435.

233. Perkins v. State, 92 Ala. 66; Jackson v. State, 102 Ala. 167; Meiers v. State, 56 Ind. 336. Where the statute provided that the grand jury should be empaneled on the first day of the term, this provision was held to be merely directory and that if empaneled on a subsequent day it was legally constituted: State v. Davis, 14 La. Ann. 678; State v. Dillard, 35 Id. 1049.

234. Yelm Jim v. Territory. 1 Wash. T. 63; Stokes v. State, 24 Miss. 621. The court has refused to quash where the formality of drawing the names as provided by statute was disregarded: Workman v. State, 36 Tenn. 425. Where a statute provided a method for the convening of grand jurors it was held that the empaneling of a grand jury summoned prior to its passage was legal: Bell v. State, 42 Ind. 335. And see State v. Wiltsey, 103 Iowa 54.

235. People v. Earnest, 45 Calif. 29.

236. Parker v. People, 13 Colo. 155; App v. State, 90 Ind. 73. But see Turns v. Com., 47 Mass. 224.

237. Parker v. People, 13 Colo. 155.

238. Stout v. State, 93 Ind. 150.

239. Parmer v. State, 41 Ala. 416.

240. O'Brien v. State, 91 Ala. 16.

241. Meiers v. State, 56 Ind. 336.

242. State v. Jacobs, 6 Tex. 99. The discharge of the former grand jury will be presumed: State v. Dusenberry, 112 Mo. 277; State v. Overstreet, 128 Id. 470.

243. Ex Parte Farley, 40 Fed. Rep. 66; O'Brynes v. State, 51 Ala. 25; State v. Doherty, 60 Me. 504; Stevens v. State, 3 Ohio St. 453. And see Davis v. State, 46 Ala. 80; Finnegan v. State, 57 Ga. 427.

244. Bell v. State, 42 Ind. 335; State v. May, 50 Ind. 170; State v. Graff, 97 Iowa 568; State v. Wiltsey, 103 Iowa 54; In re Tillery, 43 Kans. 188; Broyles v. State, 55 S. W. 966. CONTRA Clark v. U. S., 19 App. D. C. 295.

245. State v. Rock, 57 Pac. 532.

246. In State v. Texada, 19 La. Ann. 436, it was held that the statute relating to the drawing of grand jurors makes it essential that the foreman should be selected from the whole venire.

247. State v. Tinney, 26 La. Ann. 460.

248. The court may appoint a talesman selected from the by-standers as foreman of the grand jury: State v. Brandt, 41 Iowa 593.

249. 1 Whart. Cr. Law, Sec. 466; Revised Statutes Maine, Ch. 135; Sec. 4; Revised Laws Massachusetts, Ch. 218, Sec. 7; Revised Statutes Florida, Sec. 2809.

250. Blackmore v. State, 8 S. W. 940.

251. Lung's Case, 1 Conn. 428.

252. U. S. v. Belvin, 46 Fed. Rep. 381.

253. Com. v. Noonan, 38 Leg. Int. (Pa.) 184.

254. Byrd v. State, 1 How. (Miss.) 247; Woodsides v. State, 2 How. (Miss.) 655.

255. People v. Roberts, 6 Calif. 214. And for a similar ruling see State v. Gouge, 80 Tenn. 132, in the absence of plea in abatement and proof to sustain the allegations thereof.

256. Mohler v. People, 24 Ill. 26; State v. Collins, 65 Tenn. 151.

257. Friar v. State, 3 How. (Miss.) 422; Peter v. State, Id. 433; And see Yates v. People, 38 Ill. 527.

258. The grand jury is not complete and organized for business until sworn: Ridling v. State, 56 Ga. 601. The oath may be administered under the direction of the court by any officer authorized generally to administer oaths: Allen v. State, 77 Ill. 484.

259. Where an indictment is based on the affirmations of some of the grand jurors it will be quashed unless it appears they were legally entitled to serve on their mere affirmation: State v. Harris, 7 N. J. Law 361; and where found on the affirmation of Quakers it must appear that they had conscientious scruples against taking an oath: State v. Fox, 9 N. J. Law 244.

260. 1 Whart. Cr. Law, Sec. 466.

260*. Revised Statutes Maine, Ch. 135, Sec. 2; Revised Laws Massachusetts, Ch. 218, Sec. 5; Wisconsin Statutes, Ch. 116, Sec 2547.

261. 10 Ark. 613.

262. Brown v. State, 10 Ark. 607. And see State v. Furco, 51 La. Ann. 1082.

263. Ashburn v. State, 15 Ga. 246. CONTRA West v. State, 6 Tex. App. 485.

264. The minutes of the court are not the exclusive mode of proving that the grand jury had been duly empanelled and sworn: State v. Stuart, 35 La. Ann. 1015.

265. Abram v. State, 25 Miss. 589; Foster v. State, 31 Id. 421; Russell v. State, 10 Tex. 288; Pierce v. State, 12 Id. 210. In People v. Rose, 52 Hun. (N. Y.) 33, it appeared that the oath was informally administered, but it was held that the facts thus shown did not impeach the recital of the indictment that the oath was duly administered.

266. Baker v. State, 39 Ark. 180; State v. Folke, 2 La. Ann. 744.

267. Roe v. State, 2 So. 459.