

THE GRAND JURY

AN ESSAY

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OF THE PHILADELPHIA BAR

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TO THE LAW ACADEMY OF PHILADELPHIA

As the Committee of your Faculty requested to examine and report upon the essays submitted for the Annual Prize offered by the Law Academy, we desire to inform you that we have carefully read and compared the two essays which have been placed in our hands, one submitted under the *nom de plume* "Lawyer," and the other under that of "American," and that the result of our examination is as follows: —

1. We find that both essays are in form and substance excellent and very creditable to the Academy.
2. We find that, of the two, the essay signed "Lawyer" is the better, and evinces the greater labor and research and is worthy of the prize offered.
3. We, therefore, recommend that the prize offered by the Academy be awarded to the writer of the essay signed "Lawyer," whoever he may be.

Although in strictness, it does not fall within our province, we feel that we ought not to omit this opportunity of expressing our approval of the subject chosen for this year's prize essay. Not only is it extremely interesting, from an historical standpoint, but it is one of great practical importance. Since Mr. Furman Sheppard prepared his "Manual for Grand Juries" in 1875, of which but a few copies are now in existence, no work of any importance, which deals in a practical way with the Grand Jury System as it is in force in this Commonwealth, has been published. The essay to which we have recommended the award of this prize contains a vast amount of valuable information on the subject and with a few slight alterations and additions (incorporating the points decided by the Superior Court in the case of Commonwealth *vs.* Brown, which was decided after these essays were handed in) might be made a useful handbook for those concerned with practice in the Criminal Courts, and we suggest that the Academy, if it sees its way clear to do so, take steps to have it printed for the use of the Bar.

(Signed)

CHAS. Y. AUDENRIED, ROBERT N. WILLSON,
ABRAHAM M. BEITLER.

Philadelphia, May 11, 1904.

PREFACE

THIS essay was originally written with particular reference to the law relating to the grand jury in England, Pennsylvania and the United States Courts. After the committee by whom it was read had reported favorably upon it, the suggestion was made that its scope be enlarged so as to make the work applicable to all of the states. This suggestion was communicated to Judge Audenried, the Chairman of the Committee, and received his approval.

In effecting this change it has been found necessary to make few alterations in the text. So far as the common law principles relating to the grand jury are in force in the various states, the law and the decisions thereon are generally uniform. In such states as have adopted a code of criminal procedure, the common law principles relating to the grand jury constitute an important part of the code, and the decisions thereunder, in such instances, will be found to be in harmony with the decisions at the common law. Only where the common law has been superseded by statute do we find any material conflict in the decisions, and this is due, in large measure, to differences in the constitutions or statutes of the various states. By adding the citations of the state court decisions in the foot notes, with occasional additions to the text where the rulings of the courts may be regarded as of local application only, the author trusts the work has been made of more general utility than when originally submitted to the committee.

While the subject of juries has received careful attention from legal writers, and within the scope of their work the law as to grand juries has been considered fully, sufficient attention has not been given to the historical growth of the grand jury. In this essay the origin, history and development of the grand jury have been, therefore, considered at length. The history of the grand jury is closely interwoven with that of the petit jury, while the judicial records during its infancy are very meagre and confusing.

In tracing its historical development, much must be left to surmise, and this necessarily has resulted in conflicting opinions. Where doubt has arisen, the author has endeavored to present the reasons upon which his conclusions are based, and in all cases has sought to treat his subject in the light of the conditions which he conceives existed at the period of which he treats. To present the matter as clearly as possible, the method has been adopted of showing the character of trial awarded with relation to the manner of instituting the prosecution. By so doing, it becomes possible to trace the development of the grand jury separate and apart from the petit jury and thus the likelihood of confusing the action of these bodies in the early stages of their existence is in large measure avoided.

The author desires to express his thanks to Carlyle H. Ross, Esq., of the Philadelphia Bar, for his valuable assistance in the preparation of the index to this book.

He also acknowledges his appreciation of the criticism and suggestions of John M. Gest, Esq., and his obligation to Luther E. Hewitt, Esq., Librarian of the Law Association, for his interest in the preparation of this work.

G. J. E., JR.
March 20, 1906.

PART I: THE GRAND JURY - ITS ORIGIN, HISTORY AND DEVELOPMENT

The grand jury is an institution of English-speaking countries, of historic interest by reason of the obscurity surrounding its origin, its gradual development, and the part it has played in some of the most stirring events in the history of the Anglo-Saxon race; of political interest by its effectual protection of the liberty of the subject from the arbitrary power of the government; of legal interest in that its power and action is utterly repugnant to "the experience and theory of English law."¹ It has been extravagantly praised as the "security of Englishmen's lives,"² the conservator of his liberties,³ and the noblest check upon the malice and oppression of individuals and states;⁴ it has been bitterly assailed as "purely mischievous"⁵ and a "relic of barbarism."⁶

The origin of the grand jury has given rise to protracted discussion on the part of learned writers and has been productive of widely differing conclusions. Some have claimed to find traces of the institution among the Athenians,⁷ but if such an institution ever existed in Athens it had become extinct before {2} the existence of Britain became known to the Mediterranean Countries. And although Athenian history makes mention of customs similar to the Norman appeal with the wager of battle and also of a trial by a large number of jurors, it is silent concerning a body whose duty was to accuse.

Other writers claim for the institution an Anglo-Saxon origin,⁸ and in confirmation of their opinion point to the law of Ethelred II⁹ (A. D. 978-1016), while still others urge that juries were unknown to the Anglo-Saxons and were introduced into England by the Normans after the conquest.¹⁰

Strictly speaking there is no obscurity surrounding the origin of the "grand jury," for it was not until the 42nd year of the reign of Edward III (A. D. 1368) that the modern practice of returning a panel of twenty-four men to inquire for the county was established and this body then received the name "*le graunde inquest*."¹¹ Prior to this time the accusing body was known only as an inquest or jury, and was summoned in each hundred by the bailiffs to present offences occurring in that hundred. When, therefore, this method of proceeding was enlarged by the sheriff returning a panel of twenty-four knights to inquire of and present offences for the county at large, we see the inception of the grand jury of the present day. But while it is true that our grand jury was first known to England in the time of Edward the Third, it is nevertheless not true that it was an institution of Norman origin or transplanted into England by the Normans.

That the petit jury was a Norman institution and by them brought into England cannot well be doubted. Mr. Reeves¹² {3} shows that the trial by twelve jurors was anciently in

use among the Scandinavians, and became disused, but "was revived, and more firmly established by a law of Reignerus, surnamed Lodbrog, about the year A. D. 820. It was about seventy years after this law, that Rollo led his people into Normandy, and, among other customs, carried with him this method of trial; it was used there in all causes that were of small importance." At the time the Normans were using the Scandinavian *nambda*, the Anglo-Saxons were proceeding with *sectatores*, that is suitors of the court, to whom were referred all questions of law and of fact. The number of *sectatores* was indeterminate¹³ and we have no record that unanimity was required in their verdict. While, therefore, we see that in Normandy, the *nambda*, and in England, the *sectatores*, were performing similar functions in determining questions of fact, we further find their jurisdiction extending only to civil causes.

The ancient modes of bringing offenders to justice in Normandy and in England were as radically different as they are to-day.

The Norman method was by appeal, (from the French *appeler*, to call)¹⁴ the direct individual accusation, the truth of which was determined by the wager of battle. The *nambda* took no cognizance of criminal pleas, and crimes, where no appellor appeared, went unpunished. The English method was designed to prevent the escape of any who had violated the law. This was sought to be accomplished first, by prevention through the system of frank pledge, by which in every tithing the inhabitants were sureties to the king for the good behavior of each other;¹⁵ and, second, by prosecution instituted by the presentment of the twelve senior thanes in every hundred or wapentake, whose duty was, according to the law of Ethelred, to accuse such persons as they found had committed any {4} crime.¹⁶ There was also the hue and cry, which was raised when any offence was discovered and the offender was pursued until taken; if he escaped, then the hundred in which he was in frank-pledge was liable to be amerced.¹⁷ Inasmuch as in this period all offences were regarded as of purely private concern, the offender could escape trial and punishment upon payment to the person wronged, or, if he was dead, to his next of kin, of a sum of money, varying in accordance with the enormity of the offence, and the rank of the person injured. This was known as the custom of *weregild*.¹⁸ If, however, the defendant either could not or would not pay *weregild*, then the truth of the charges prosecuted by these methods was determined by compurgation, by the *corsned* or morsel of execration, or by the ordeal of fire or water.¹⁹ Where the accused failed to clear himself by compurgation, which occurred when he failed to obtain the necessary number of persons who were willing to swear their belief in his innocence, he was obliged to purge himself by the ordeal.²⁰

It will therefore be seen that the grand jury was not a Norman institution brought into England by the conquest, for an accusing body was wholly unknown among the Normans; and while the Normans did introduce the *nambda* into England, where its similarity to the *sectatores* caused it to firmly impress itself into the English customs,²¹ in the land which sent it forth to England it gradually sank into disuse.²²

The English system of frank-pledge, with the holding of the sheriff's tourn semi-annually in the county, and the court-leet {5} or view of frank-pledge, annually in the hundred, when offenders appear to have been punished,²³ were supplemented in their purpose of preventing crime and bringing offenders to justice by the accusing body of twelve thanes of each hundred as ordained by the law of Ethelred.²⁴ Whether this law created the accusing body or was merely declaratory of a custom then in use in parts of the kingdom with the intent to make it of universal application, is a matter of much doubt. It is more probable, however, that the statute of Ethelred was declaratory of the law then subsisting and this view is strengthened by the statement of Blackstone,²⁵ that "the other general business of the leet and tourn was to present by jury all crimes whatsoever that happened within their jurisdiction," although he cites no authority in support of his opinion.

That the accusing body was the result of a slow growth, eventually being confirmed by statute, would seem to receive support from the nature of the institution of frank-pledge. Twice each year the sheriff would visit each hundred in the county and keep a court leet where he would view the frank-pledges,²⁶ and as wrongdoers were at such times awarded punishment, it is manifest that some method must have been employed to make the offenders known. The principal thanes and freeholders of the hundred being responsible for their subordinates, would most naturally be the ones upon whom would devolve the duty of presenting the offenders. We see these customs substantially appearing in the law of Ethelred, which provides that a *gemot*²⁷ that is, a meeting be held in every wapentake (hundred) and the twelve senior thanes go out and the reeve (sheriff) with them, to accuse those who have committed any offence.²⁸

The statute would merely seem to have made secure that which the very nature of frank-pledge had of necessity {6} previously brought forth. That it was but declaratory of the existing law would seem to be further verified by the fact that the statute was ordained as "frith-bot for the whole nation at Woodstock in the land of the Mercians, according to the law of the English,"²⁹ thereby indicating such to have been the existing law in some parts of the kingdom at least. Whether the number composing this accusing body had by usage been fixed at twelve or whether it was first definitely fixed by the statute cannot be determined, but the statute is the only evidence we have of the number necessary to present offenders, until the time of Glanville, nearly two hundred years later. It is probable, however, that, like the *sectatores*, the number was indeterminate until the statute of Ethelred reduced it to a certainty, although there is one instance even as late as the reign of Henry III (A. D. 1221)

where a presentment was made to the itinerant justices by seven jurors.³⁰ That the number should be fixed at twelve is perhaps due to the superstition of the period which tolerated the trial by the corsned and the ordeal, believing God would miraculously intervene to protect the innocent. Lord Coke³¹ thinks "that the law in this case delighteth herself in the number of twelve and that number of twelve is much respected in holy writ, as twelve apostles, twelve stones, twelve tribes, &c."

The Norman conquest, while it brought into England the customs and laws of the conquerors, did not materially alter the Saxon laws and customs relating to the detection and punishment of crime. With them came the barbarous trial by battle,³² but they also brought what afterward became a blessing in the trial by jury.³³

Under the Norman occupation the system of frank-pledge still continued, although not perhaps of its former importance {7} now that the accusing body in each hundred regularly made its presentments, and its importance was still further lessened by the Norman appeal with its wager of battle. The appeal materially promoted the importance of the accusing body, for unless the appellor himself suffered the injury, there was no incentive to him to risk his life or liberty in the trial by battle, when the crime could equally well be presented by the inquest.³⁴

In the period of one hundred years following the conquest, the Normans were actively engaged in introducing their laws and customs in the stead of the Saxon laws and customs. It is therefore of interest that at the close of this period, the accusing body should receive its second statutory confirmation and at the hands of a descendant of William the Conqueror. By the Assize of Clarendon A. D. 1166, it was enacted "that inquiry be made in each county and in each hundred, by twelve lawful men of the hundred and four lawful men of every township — who are sworn to say truly whether in their hundred or township there is any man accused of being or notorious as a robber, or a murderer or a thief, or anybody who is a harbinger of robbers, or murderers or thieves, since the king began to reign. And this let the justices and the sheriffs inquire, each (officer) before himself."³⁵ All persons thus presented were to be tried by ordeal.

This statute marks an important change in the administration of the criminal law. Prior to this all offences were tried in the county or hundred courts, but now those offences named in the statute became offences against the peace of the king and were cognizable only in the itinerant courts which this same statute created. It is thought by some writers that these courts were not created by this statute,³⁶ but were first provided for by the statute of Northampton A. D. 1176, but it would rather seem that they were created by the Assize of {8} Clarendon,³⁷ that of Northampton merely dividing the kingdom into six circuits as the Assize of 1179 subsequently divided the kingdom into four circuits.³⁸ The Assize of Clarendon marks still another important event in the history of the administration of the criminal law in England, for by reason of what was called "the implied

prohibition" in this statute, (the statute provided for trial by the ordeal) compurgation in criminal cases disappears in the king's courts although it continued until a later period in the hundred courts where the sheriff presided.³⁹ The system of frank-pledge while itself falling into disuse, really formed the root of a broader scheme for administering justice.

The idea of itinerant justices was not in use among the Normans at the time of the conquest, nor does it seem to have ever been adopted in Normandy. Under the Saxon law the sheriff was the king's officer in the county, and was appointed each year. During his term, his authority in the county was supreme except when directed otherwise by the king.⁴⁰ It, therefore, was an easy matter in order to increase the influence of the crown, and to insure the administration of Norman laws and customs, to appoint sheriffs chosen by the king from the justices of the *curia regis*.⁴¹ We consequently have the king's judicial officer acting in the capacity of sheriff and, in accordance with the Saxon custom, viewing the frank-pledges in each hundred of his county and blazing the way for the system of itinerant justices, who came into the county to hold the eyre and, like the sheriff, administered the pleas of the crown in each hundred. The inhabitants gathered before the itinerant justices as the frank-pledges gathered before the sheriff; and the twelve knights made their presentments to the justices in the same manner in which the twelve thanes had, under the Saxon law, presented offenders before the sheriff.

By the Assize of Northampton, A. D. 1176, the institution of {9} the accusing body was again confirmed⁴² by the following provision: that "anyone charged before the king's justices with the crime of murder, theft, robbery or receipt of such offenders, of forgery, or of malicious burning, by the oaths of twelve knights of the hundred: if there were no knights, by the oaths of twelve free and lawful men, and by the oaths of four out of every vill in the hundred" should be tried by the ordeal.⁴³ If he failed in the ordeal, he lost a hand and foot and was banished. If he was acquitted by the water ordeal he still suffered banishment if accused of certain crimes.⁴⁴

This statute divided the kingdom into six circuits and provided for holding an eyre in each county of the circuit of the justices not more than once in every seven years.

The treatise of Glanville on the laws of England was written in the period 1180 to 1190, and is of great interest by reason of the light it throws upon this institution and the administration of justice relating to the pleas of the crown. The old Saxon custom of *weregild* lost its force with the coming of the Normal appeal and wager of battle, and, in the time of Glanville, when an appeal was once properly brought which concluded against the king's peace, the parties could not settle the dispute between them or be reconciled to each other except by the king's license.⁴⁵ Like the custom of *weregild*, the appeal was a personal action, and in those appeals which were cognizable in the king's courts, the king had an interest by virtue of the breach of the peace, but this right was only exercised when the battle was not waged.⁴⁵ When the appellee emerged victorious

from the battle, he was wholly acquitted of the charge even against the king, for by his victory he purged his innocence against them all.⁴⁶

In the time when Glanville wrote, there were two methods of {10} instituting prosecutions, viz., by appeal at the suit of the person injured or his proper kinsman; and the accusation by the public voice, that is, the presentment by the accusing body that the defendant was suspected of certain offences.⁴⁷ If the appeal was properly brought, the trial by battle was usually awarded. Whether the appellee had the privilege of electing to do battle or submit to the ordeal, as in the latter part of the reign of King John he might elect between the battle and the country, does not appear. It is certain, however, that he was not entitled to demand the battle in all cases. If the appellor was upward of sixty years of age or was adjudged to have received a mayhem, he seems to have had the privilege of declining battle, and the defendant was then compelled to purge himself by the ordeal.⁴⁸ If the appellor was a woman and was entitled to make the appeal, the defendant was obliged to either abide by her proof or submit to the ordeal.⁴⁹ If the appeal failed, or before battle was awarded the appellor withdrew, the accusing body was asked if it suspected the man of any offence, and if it did he was obliged to clear himself by the ordeal, as though the presentment had been made against him upon suspicion in the first instance.⁵⁰

Up to this time (A. D. 1190) we have no evidence of the petit jury being used in criminal cases,⁵¹ and the fact that Glanville fails to make any reference to any mode of trial other than the ordeal upon presentments of the accusing body, and the battle upon appeals, may safely be taken as conclusive that the time had not yet arrived when a defendant was permitted to have the country pass upon questions affecting his life or his liberty. The accusing inquest seems, however, to have a somewhat wider scope than heretofore appears, for Glanville speaks of it as having authority to make inquisitions concerning {11} nuisances and certain other matters.⁵² In A. D. 1194, the fifth year of Richard I, the jurisdiction of the itinerant justices was further increased and certain capitula or articles of inquiry were delivered to them, which they were to make known to the accusing body, and to each article which concerned the hundred, this body was obliged to make answer.⁵³ The four men of each vill or township mentioned in the Assize of Clarendon and the Assize of Northampton are not referred to in these instructions to the justices, which one writer thinks would seem to indicate that the four men formed no part of the accusing body.⁵⁴

With the year A. D. 1201, and the third of the reign of King John, we have the court rolls of the eyres which the itinerant justices held in the several hundreds of their respective districts, which the efforts of the Selden Society⁵⁵ are bringing to light, and many doubtful points by means thereof, are being cleared up. From these records we are enabled to obtain some idea of the instances in which this accusing body would exercise its right of presentment. They seem to have presented where they had knowledge of, or suspected a person of an offence;⁵⁶ where a person was

accused,⁵⁷ probably by some one appearing before them and there charging a person with an offence; where an appeal had been held to be null;⁵⁸ where an appeal had been made by a woman;⁵⁹ and apparently in all cases where appeals had been made concluding against the king's peace.⁶⁰ The inquest was required to answer fully concerning each article of the capitula;⁶¹ and if they failed in this, they were accused of concealing the truth and were in the {12} king's mercy and liable to be fined and imprisoned.⁶² In such case, therefore, it is very reasonable to suppose they would present all persons whom they suspected or knew had violated any of the articles with which they were charged, irrespective of the fact that some of those whom they presented may have been regularly appealed. The inquest was not restrained in any manner from making such presentments, nor does it appear that they were required to make presentment of such cases except where the appeal had failed. When we also consider that the eyre was held in the county only once in every seven years, it would be manifestly impossible for the freeholders of each hundred to remember who had been appealed within their hundred during the period, so that they might not present in such cases. Further than this, the manner of proceeding before the justices upon the appeals would seem to make it necessary in the interest of justice, that the inquest should also present those offences where appeals had been made.

In order to properly make his appeal, the appellor was required to raise the hue and cry, go to the king's sergeants, thence to the coroners of the county where his complaint was enrolled word for word, and lastly to the county court, where his complaint was similarly enrolled.⁶³ Then when the cause came before the justices, the appellor was heard and the appellee answered, after which the coroner's rolls were read, and if they or the majority of them agreed with the appellor and there were no good exceptions, then the appellee could choose how he would be tried.⁶⁴ If the coroners' rolls disagreed, but were {13} evenly divided, then the sheriff's roll was read, and accordingly as this showed, the trial was or was not awarded. If it happened that an appellor did not prosecute his appeal, there seems to have been no provision in the law for making known to the justices such complaint as contained in the rolls, yet it might well happen that the appellee was then confined in prison. It would consequently appear that if the inquest did not present the appellee where an appeal had been made, not only might a felony go unpunished, but an injury be done to the king in the concealment by the inquest of the breach of his peace.⁶⁵ How, then, the accusing body could discriminate between appeals that were prosecuted, and those where the appellor defaulted, accusations and rumors, and present in all cases except where the appeal was prosecuted, particularly when they were organized, sworn, charged and went about the performance of their duties before the court was ready to hear the criminal pleas, cannot easily be perceived. It would seem more probable that they presented in all cases where they had either actual knowledge or public fame upon which to base their presentment, irrespective of the fact that an appeal was then pending.

Two instances of this are disclosed by the Selden Society⁶⁶ in their researches into the record rolls of the courts held by the itinerant justices in the reign of King John, in both of which the inquest made presentments of offences in which appeals had been made, and in both cases the inquest was adjudged in the king's mercy because the appeals were found to have concluded against the sheriff's peace and therefore were improperly presented in the king's court. This view we see supported by the proceedings in the modern case of *Ashford vs. Thornton*.⁶⁷ In this case the defendant was indicted for murder, tried and acquitted. The brother of the murdered woman then brought an appeal and the appellee elected to wage his battle, which the appellor declined. The attorney general {14} thereupon caused the defendant to be immediately arraigned upon an indictment which had been found in the meantime for the felony at the king's suit, to which at once the defendant pleaded his former acquittal upon the indictment for murder, and the plea was adjudged sufficient.

The rolls of the courts held by the itinerant justices⁶⁸ reveal a practice which adds further burdens to the already difficult task of tracing the development of the accusing body. Where the inquest presented anyone either upon suspicion or accusation who had not been appealed, the presentment of the inquest does not appear to have been regarded as sufficiently conclusive in all cases to award the ordeal. In such cases, the justices asked the four neighboring townships if they suspected the defendant, and if they did, then he was obliged to purge himself by the ordeal.⁶⁹ What the office of the four townships actually was, how they came to exercise this office, and in what instances they exercised it are purely matters of conjecture. Where an appeal was declared null or for some other cause failed and the inquest ignored the breach of the king's peace, the verdict of the inquest seems to have been conclusive,⁷⁰ and the four townships were not called upon, and this also seems to be true in many cases where the inquest presented upon suspicion or accusation.⁷¹

Glanville makes no reference to the four townships, and his silence is singular if the townships were called upon to officially act. It is also to be noted that he makes no reference to, or comment upon, the four freemen out of every vill in the hundred referred to in the *Assize of Clarendon*. If the statute had reference to criminal proceedings, this new appendage of the inquest was such a departure from the ancient law as to be the subject of comment. That this comment was not made, leaves but two conclusions to be drawn, either that it is a mistaken idea in holding this provision of the statute to relate to the {15} accusing inquest, or that it remained a dead letter until after Glanville's period.

Whether or not the "four freemen out of every vill" and the "four townships" were identical, can only be a subject for conjecture. It remains, however, that the only jurist who wrote in the period A. D. 1166-1200, mentions neither, and the rolls of the courts held by the itinerant justices beginning with A. D. 1201, make reference only to the "four townships" being inquired of. Whatever may have

been the purpose of this provision of the Assize of Clarendon, there seems to be no mention of the four freemen until Bracton's treatise was written, and then but little light is shed upon the capacity in which they were required to act. Bracton, however, shows that they formed no part of the inquest which presented the defendant.

The court rolls disclose that the four townships did not act until after the inquest had presented on suspicion. In discussing a presentment on suspicion Glanville states that the defendant was immediately thereafter to be taken into custody. He then continues: "The truth of the fact shall then be inquired into by means of many and various inquisitions and interrogations made in the presence of the justices, and that by taking into consideration the probable circumstances of the facts, and weighing each conjecture which tends in favor of the accused, or makes against him; because he must purge himself by the ordeal, or entirely absolve himself from the crime imputed to him."⁷²

If this paragraph could be taken as referring to the four townships, then they were only asked when the justice had a doubt concerning the presentment of the inquest; but that it does not would seem more likely in view of the fact that Glanville does not mention them. That it does not have reference to the four freemen out of every vill in the hundred may be regarded as equally conclusive by his omission to mention them, and particularly so in view of the fact that he was an itinerant justice from 1176 to 1180, a time when he must necessarily have been brought in close contact with them if they were called upon to act, and subsequently wrote his famous {16} treatise.⁷³ That they were not brought into existence by the instructions of 1194 is equally well settled, for they are not referred to therein.⁷⁴ That they were not called upon in all cases has already been seen.⁷⁵ So far as the cases show, their power did not extend beyond confirming what the inquest had already presented, and they apparently could not nullify its presentment. It would therefore seem that no provision of law made their use obligatory, otherwise they must have acted in all cases; and when they were called upon to act, they were limited to a concurrence with what the inquest had presented, and if they did not concur, their verdict had no effect upon the result. The townships appear never to have acted until the inquest made its presentment.⁷⁶

They did not act with the accusing jurors as a trial jury after the defendant had been presented, otherwise he was obliged to submit to two trials — the petit jury as thus composed, and the ordeal, and then too, the trial by jury in criminal cases had not yet come into use.⁷⁷ It is therefore probable that it was optional with the justices whether or not they would inquire of the four townships, and they did this only to satisfy themselves whether the ill repute of the defendant was believed by others than the accusing body.

Mr. Forsyth⁷⁸ makes this comment upon the relation which the accusing body bore to the four townships: "We here see that the neighboring townships were associated with the jury in the inquest; and this was by no means an unusual practice. But they were not considered part of the jury, but

seem rather to have assisted in the character of witnesses, and to have constituted part of the *fama publica*."

We have still to consider the methods of trial in force at this {17} time in order to fully comprehend the duty of the inquest in this period.

The trial by battle was in force upon appeals properly brought, but the exceptions which might be taken to the appeal were becoming more numerous. The right of the appellee to decline battle and put himself upon the country is not mentioned by Glanville, nor does there seem to be a recorded instance of it until the early years of King John's reign.

The first instances where the accused was allowed to put himself upon the country, appear to have been the result of an application to the favor of the king and the payment to him of a sum of money for the issuance of a writ awarding an inquest.⁷⁹ These cases were, however, rare, and what few cases appear in the books give but little information concerning the instances in which the king would grant such a writ.⁸⁰ If wager of battle was declined and the king petitioned for a writ awarding an inquest, if granted, there was apparently no accusation made by the accusing body against such defendant for the breach of the king's peace; the verdict of the trying inquest being alone given and was conclusive.

It was provided by Article 36 of the Magna Charta of King John that writs awarding an inquest should no longer be sold, but be of right.⁸¹ It may, however, be doubted whether this provision was intended to apply to writs thus sold awarding an inquest in criminal cases.⁸² It is more probable that it was intended to apply to writs awarding an assize, for the statutes of Clarendon and Northampton had made provision for such an assize in determining property rights. So far as the inquisition to determine title to real property was concerned, this had {18} become a fixed method of procedure which almost universally superseded the determination of such issue by the wager of battle. In criminal proceedings, however, the inquest was wholly foreign to their institutions and something seemingly to be shunned rather than encouraged.

The ordeal which in Glanville's time was generally awarded when the battle could not be waged, was in full vigor during this period up to the year 1215, when by the action of the Fourth Lateran Council of Innocent III, by which the clergy were expressly forbidden to participate in the ceremonies of the ordeal, the practice came to an end thereby opening the way for the trial by the country.⁸³

It is said by Professor Thayer⁸⁴ that "the Assize of Clarendon, in 1166, with its apparatus of an accusing jury and a trial by ordeal is thought to have done away in the king's courts with compurgation as a mode of trial for crime; and now the Lateran Council, in forbidding ecclesiastics to take part in trial by ordeal, was deemed to have forbidden that mode of trial, as well in England as in

all other countries where the authority of the Council was recognized. The judges would naturally turn to the inquest."

It is reasonable to suppose that the inquest would be adopted as the learned writer above quoted says, for the inquest was the only mode of trial remaining by which suspected persons might be tried.⁸⁵ But this the judges could not do unless authorized by the king. The next eyre was held in the years

1218-19, and the judges had started on their journey when the order of the king in council was sent to them in the following words: "When you started on your eyre it was as yet undetermined what should be done with persons accused of crime, the Church having forbidden the ordeal. For the present we must rely very much on your discretion to act wisely, according to the special circumstances of each case." The judges were {19} then given certain general instructions: Persons charged with the graver crimes, who might do harm if allowed to abjure the realm, are to be imprisoned, without endangering life or limb. Those charged with less crimes, who would have been tried by the ordeal may abjure the realm. In the case of small crimes there must be pledges to keep the peace.⁸⁶

This is one of the most important and interesting periods of English history, for at this time the signing of the Great Charter occurs, establishing the liberties of the people, and the system which was to be most potent in assuring these liberties according to the guaranties of the Charter, supplanted a custom that was brutal in the extreme.

Bracton,⁸⁷ who wrote clearly and at great length, in the reign of Henry III, sets forth with precision the various methods of prosecuting offenders against the law. He points out that where there was a certain accuser he might make his appeal or might sue, that is, make his accusation before the inquest; that when the appeal had fallen, the king might sue on behalf of his peace; and finally the presentment which the inquest might make of persons not accused or appealed, but suspected by the inquest to be guilty by reason of public fame.⁸⁸ This is a lucid summing up of the methods then pursued, as has been heretofore shown, and may reasonably be assumed to have been the method in vogue at least since the Assize of Clarendon, and from possibly an earlier date. The workings of the system are described carefully and with much attention to detail.⁸⁹ When the justices proposed holding an eyre in any county "a general summons issues to appear before the justices itinerant and should issue at least fifteen days prior to their coming."

When the justices come the writs authorizing them to hold an *iter* are read, after which one of the older and more discreet of them sets forth the cause of their coming and what is the utility of their itineration, and what is the advantage if peace be observed. After this they go to a secret place and call four {20} or six of the greater men, the *busones*, of the county to them and consult with them in turn and explain that the king has provided that all knights and others of the age of fifteen and upwards ought to swear

that they will not harbor outlaws, etc., and will arrest, if possible, those whom they regard as suspected, without waiting for the mandate of the justices. Afterward the sergeants and bailiffs of the hundred are convoked and the inhabitants of the hundred are enrolled in order. The sergeants each shall pledge his faith "that he will choose from each hundred four knights who shall come forthwith before justices to perform the precept of the lord the king, and who shall forthwith swear that they will choose twelve knights or free and "legal men if knights cannot be found, who have no suit against any one and are not sued themselves, nor have any evil fame for breaking the peace, or for the death of a man or other misdeed," and the names of the twelve are placed in a schedule and delivered to the justices. Then the principal one shall make this oath: "Hear this ye justices that I will speak the truth concerning this which ye shall ask me on the part of the lord the king, and I will do faithfully that which you shall enjoin me on the part of the lord the king, and I will not for any one omit to do so according to my ability, so may God help me and these Holy Gospels of God."⁹⁰ And afterward they shall each of them swear separately and by himself: 'The like oath which A. the first juror has here sworn, I will keep on my part so may God help me and these Holy,' etc."⁹¹

When this has been done the justices read to the accusing body the various articles, to which the inquest shall make true answers and have their verdict there by a certain day. It is said quietly to them that if they know of anyone in the hundred of evil repute, they shall seize him if possible, otherwise his name is to be secretly conveyed to the justices, that the sheriff may seize him and bring him before the justices.

"And the amercers (jurors) shall pledge their fealty to do this faithfully, that they will aggrieve no one through enmity nor show deference to any one through love, and that they will {21} conceal those things which they have heard."⁹² This would appear to be the first reference we have to the inquest observing a pledge of secrecy, that feature of the grand jury which has aroused the strongest criticism. The purpose of this provision would, however, seem to have been to prevent the escape of offenders who were presented by the inquest. The proceedings were not as they are at the present time to be kept secret from every one, for the justices had the power if they suspected the inquest, to inquire of each member separately or of the inquest generally, the causes which induced such action.⁹³

We find that Bracton mentions but two kinds of trial in criminal cases, the battle and the country. It remains to consider how these trials were awarded in relation to the method of instituting the proceedings against the offender. If an appeal was made, after all exceptions to it had been disposed of, the appellee was entitled to choose the wager of battle or put himself upon the country, but if he chose the country he could not afterward retract and offer to defend himself by his body.⁹⁴ If the appellor was a woman, the appellee was compelled to put himself upon the country or be adjudged guilty; and if a man over the age of sixty years, or who had a mayhem, the appellee was obliged to put

himself upon the country, unless the appellor was willing to wage battle, but with these exceptions it was optional with the appellee to choose the battle or the country, but he could only choose the battle if the appeal was of a felony.

Where the initial step in the prosecution was the presentment by the accusing body, or where the appeal failed and the defendant was presented by the inquest, then he had no alternative but to place himself upon the country.

Whether when a defendant placed himself upon the country, he placed himself upon the same jurors who accused him, has been a subject of wide discussion, and able authors express contrary opinions upon this point. Mr. Forsyth⁹⁵ says they "for {22} a long time seem to have united the two functions of a grand jury to accuse, and a petit jury to try the accused." Mr. Reeves⁹⁶ considers that the defendant put himself upon the same jury which indicted him and then the jury "under the direction of the justices were to reconsider their verdict and upon such review of the matter they were to give their verdict finally." Mr. Crabb⁹⁷ gives utterance to the same thought, but states that if the defendant "had suspicion of any of the jurors he might have them removed." Mr. Ingersoll⁹⁸ considers it doubtful that in Bracton's time the jury which tried offenders was composed of the same persons who had indicted him. Bracton⁹⁹ describes the method of proceeding with the trial jury in the following language:

"In order that the proceeding to a judgment may be more safe and that danger and suspicion may be removed, let the justice say to the person indicted, that if he has reason to suspect any one of the twelve jurors he may remove him for just grounds. And let the same thing be said of the townspeople, that, if there have been any capital enmities between any of them and the person indicted, on account of covetousness to possess his land, as aforesaid, they are all to be removed upon just suspicion, so that the inquisition may be free from all suspicion. Twelve jurors therefore being present and four townspeople, each of the townspeople or all together, each holding up his hand shall swear in these words:¹⁰⁰

"Hear this, ye justices, that we will speak the truth concerning those things, which ye shall require from us on the part of the lord the king, and for nothing will we omit to speak the truth, so God us help," &c.

This statement of the action of the petit jury, made when the institution was in its infancy, discloses several interesting facts. We see without question that an inquest had indicted the defendant before this body was required to determine the {23} issue. We see now for the first time the four townspeople mentioned in the Assize of Clarendon, who apparently form a part of the trial jury. For while the accusing body consisted of but twelve jurors, the trying jury was not so limited, and instances will be seen where the trial jury consisted of twenty-four.¹⁰¹ If, when the oath was taken by the four townspeople, the twelve jurors were not then sworn, as may well be deduced from Bracton's statement,¹⁰² then it would seem probable that the jurors

were the same persons who had indicted the defendant, for they must have been sworn at some prior stage of this particular proceeding. If, however, by this paragraph, Bracton means to convey the idea that the entire sixteen were sworn at one time, then it might well be that the members of the trying jury differed from the accusing body. In either event the make up of the trying jury was changed by adding the four townspeople, while if it was the original accusing jury, charged with the trial of the defendant after they had indicted him, it might be still further and materially changed by challenges for cause.¹⁰³

The theory that the entire sixteen were sworn at one time is strengthened by noting the difference in the oath taken by those acting as the accusing body and those who are to try the truth of the accusation.¹⁰⁴ The trial jurors merely swear that they will speak the truth as to the things required of them. This was in strict accord with their original character as witnesses of the facts of which they spoke the truth. The oath of the accusing juror was much more comprehensive, and required not only that the juror should speak the truth, but that he should do the things enjoined upon him on the part of the king and "not for any one omit to do so."

There is still another and what is perhaps the strongest {24} argument that can be made against the trial jury being the same jury which accused. The accusing body was composed of twelve only, who presented all offenders.¹⁰⁵ In order that they might present, it was not necessary that all the jurors should be cognizant of the facts as will appear by the following statement by Bracton. Speaking of indicting upon common fame he says,¹⁰⁶ "some one will probably say, or the greater part of the jurats, that they have learnt those things which they set forth in their verdict from one of the associate jurats." It is therefore very clear that the accusing body could indict upon the knowledge of one of their number. It is equally plain, and in this all writers apparently agree, that the trial jury was a jury of witnesses who had personal knowledge of the facts.¹⁰⁷ If the twelve of the trial jury did not agree, then the ancient doctrine of "afforciamment," that is, the adding of jurors who were cognizant of the facts until twelve could be found who agreed upon a verdict was employed.¹⁰⁸ This was not done with the accusing body. It would consequently seem that the jury which tried was, in most cases, a different body from that which accused, for the accusing body found all indictments with no change in its make up, while the trial jury had not only four townspeople added to it, but the jurors themselves were subject to the defendant's challenge for cause. The record rolls¹⁰⁹ of the itinerant justices show two instances of a separate jury trying the offenders after they were indicted. The first was an appeal by a woman for the murder of her husband, and she having remarried and no appeal being made by her husband, it was adjudged that the country should inquire concerning the truth. "And the twelve jurors say that he is guilty of that death, and twenty-four knights (other than the twelve) chosen for this purpose say the same."¹¹⁰ In the second case {25} the defendant was taken on an indictment for theft, and it was adjudged the truth should be inquired of by the country. "And twenty-four knights chosen for the purpose, say the same as the said twelve jurors."¹¹¹ We consequently see that at a period

forty years before Bracton's work was written, the use of two juries had been instituted, and within a period of thirty years after Bracton, the two juries were separate and distinct in cases involving life at least.¹¹²

In the three decades following the writing of Bracton's treatise, the accusing body suffered marked changes which are revealed by the pages of Britton. The number still continued at twelve, the method of summoning and organizing them was the same, but they now took this oath: "that they will lawful presentment make of such chapters as shall be delivered to them in writing and in this they will not fail for any love, hatred, fear, reward, or promise, and that they will conceal the secrets, so help them God and the Saints."¹¹³ The presentments were made in writing and indented, the inquest keeping one part, the other being delivered to the justices.¹¹⁴ An indictor could not serve upon the petit jury in offences punishable with death, if challenged by the defendant.¹¹⁵ The inquest was required to present those whose duty it was to keep in repair bridges, causeways, and highways, for neglect of duty;¹¹⁶ to inquire into the defects of gaols and the nature thereof, who ought to repair them, and who was responsible for any escapes which had occurred;¹¹⁷ if any sheriff had kept in gaol those whom he should have brought before the justices;¹¹⁸ and of all cases where the sheriff placed on the panel persons holding under "twenty shillings to be on inquests and juries in the county."¹¹⁹

The inquest now corresponded, in general, with the modern {26} inquest except in point of number. We find this change taking place in the time of Edward the Third, when the sheriff of the county, in addition to the twelve returned by the bailiffs for each hundred, returned a panel of twenty-four knights to inquire at large for the county, and this body was termed "*le graunde inquest*," not for the purpose of distinguishing it as the accusing body, but to distinguish it from the hundred inquests. This grand inquest seems to have its foundation solely in the action of the sheriff in returning such a panel,¹²⁰ for it was authorized by no statute, and apparently had no existence in prior custom. It, however, was destined to be permanent by reason of its jurisdiction over the entire county and the fact that its number of twenty-four was less unwieldy than the twelves of the many hundreds in the county.

Consequently while the influence of "*le graunde inquest*" grew, that of the hundred inquests declined, until finally they ceased to present offenders and filled the office of petit jurors only.¹²¹ While we therefore see that the beginning of the "grand jury" as known to us, occurs in time within the mind of man, it is plain that this was but the new branch of a tree already firmly rooted among English institutions. It was distinctly a growth produced by the necessities of the times to which its origin relates, and would no more have been a deliberate creation of a Parliament of the fourteenth century than it would of the legislature to-day. Nor did this change, which was apparently without warrant of law, materially alter the ancient institution. The necessity that twelve should concur remained, and to-day in England and all of the states which have not by statute provided

otherwise, twelve jurors are all that need be present upon the grand jury, but all must concur.¹²² The increase in the number of jurors having occurred in a period when unanimity was requisite, if the increased number was authorized by law, undoubtedly the same principle, which required twelve jurors or twelve or even thirty-six {27} compurgators (in such instances as compurgation had been allowed) to concur, must necessarily have required the twenty-four on the grand inquest to do likewise. That this was not required makes it quite probable that all over twelve were unlawfully upon the panel.¹²³

With the coming of the grand inquest to inquire at large for the county, and the disappearance of the accusing bodies of the hundreds, we practically complete what may be termed the period of formation in the development of the grand jury. So far as we have considered it, we have found it to be an arm of the government, acting as a public prosecutor for the purpose of ferreting out all crime, the members of the inquest being at all times bound to inform the court either singly or collectively their reasons for arriving at their verdict and the evidence upon which it was based.¹²⁴ The seed, however, had been sown in Bracton's time, which was destined to change the grand jury from a mere instrument of the crown to a strong independent power which stood steadfast between the crown and the people in the defence of the liberty of the citizen.

In enjoining secrecy upon the inquest in Bracton's time, and in making it a part of the grand juror's oath as shown by Britton,¹²⁵ it was perhaps the idea of the crown that such a regulation would prevent knowledge of the action of the inquest from being conveyed to the defendant to allow his escape. That it was for no other purpose will be seen by the fact that the justices might still fully interrogate the jurors as to how they arrived at their verdict.¹²⁶ The power of interrogation does not appear to have been exercised by the justices in all cases, but only in such instances as the jury presented upon suspicion and the defendant must purge himself by the ordeal, although this practice continued after the ordeal was abolished. When the separate trial jury became finally established, there no longer existed any necessity for the justices to inquire of the presenting jury, for the ordeal no longer existed, while the {28} truth of the matter was fully inquired of by the country. Further than this, it was more logical that the justices should make inquiry of the trial jurors whose competency rested upon their knowledge of the truth rather than the presentors, whose accusation neither determined the truth nor falsity of the charge and was not conclusive as in Glanville's time. When the grand inquest came to present for the county, their personal knowledge of the facts, in most cases, became more limited, and the practice at this time of requiring the grand inquest to divulge upon what ground their presentment was based, had probably fallen into disuse.

It was in this period that the independence of the grand jury became established. No longer required to make known to the court the evidence upon which they acted, meeting in secret and sworn to keep their proceedings secret by an oath

which contained no reservation in favor of the government, selected from the gentlemen of the best figure in the county, ¹²⁷ and without regard to their knowledge of any particular offence, the three centuries that followed the return of a panel of twenty-four knights, witnessed its freedom of action from all restraint by the court. The independence which the institution had attained was soon to be put to the severest tests, but protected by the cloak of secrecy and free from the control of the court as to their findings, they successfully thwarted the unjust designs of the government.

It was in the reign of Charles the Second that we find the two most celebrated instances of the fearless action of the grand jury in defending the liberty of the subject, although subjected to the strongest possible pressure from the crown. In 1681 a bill of indictment for high treason against Stephen College, the Protestant joiner, was submitted to a grand jury of the City of London. Lord Chief Justice North compelled the grand jury to hear the evidence in open court and of the witnesses produced it was said, "It is certainly true that never men swore more firmly in court than they did." The grand jury demanded that the witnesses be sent to them that they might examine them privately and apart, which the court {29} permitted to be done. After considering the matter for several hours the grand jury ignored the bill. Upon being asked by the Lord Chief Justice whether they would give a reason for this verdict, they replied that they had given their verdict according to their consciences and would stand by it.¹²⁸ The foreman of this grand jury, Mr. Wilmore, was afterwards apprehended upon a false charge, examined before the Council, sent to the tower, and afterward forced to flee beyond the seas.¹²⁹

In the same year an attempt was made to indict the Earl of Shaftesbury for high treason.¹³⁰ As in College's case, the grand jury desired to hear the evidence in private, but the king's counsel insisted that the evidence be heard in open court and Lord Chief Justice Pemberton assented. After hearing the evidence the grand jury desired that they might examine the witnesses apart in their chamber and the court granted the request. After again hearing the witnesses and considering their verdict they returned the bill "ignoramus," upon which "the people fell a hollowing and a shouting." This case is perhaps pointed out more often than any other as an instance of the independent action of the grand jury, and while it is not sought to minimize the action of the grand jurors, for their stand was a bold one in view of the strong pressure which was brought to bear upon them by the crown, still the side lights when thrown upon it disclose other facts which may have been potent in shaping the return of this body.¹³¹ The Earl of Shaftesbury was a very powerful nobleman, with influential friends and adherents in the king's service, but his greatest strength, perhaps, lay in the regard in which he was held by the people. The sheriff who returned the grand jurors before whom the case was laid, was an open adherent of Shaftesbury, {30} and it is reasonable to assume that the panel was composed wholly of those whose sympathies were inclined toward the Earl.¹³² It is not strange, therefore, that the proceeding by the crown should meet with an ignominious defeat.

It was by reason of the failure of the crown to coerce grand juries to its oppressive purpose, that the king's officials sought a method whereby justice might be dispensed with results more agreeable to their royal master. The statute of 3 Henry VIII, C. 12, provided that the judges and justices should have power to reform the panel by taking out the names of improper persons and putting in others according to their discretion, and the sheriff was then bound to return the panel as reformed. This statute was enacted by reason of the abuse by the sheriffs of their power in the selection and returning of grand jurors resulting in packing the panels with those who would carry out the nefarious designs of the sheriff and those with whom he might be acting.¹³³

This statute, Sir Robert Sawyer, the attorney general, sought to employ to carry out the wishes of the crown. The Court of Sessions endeavored to compel the sheriffs to return the panels as they directed, but the sheriffs refused. The king thereupon ordered that all the judges should attend on a certain day at the Old Bailey. Here the same proceeding was desired to be had, but the sheriffs demurred and desired to consult counsel. The court, however, urged that as all the judges were agreed as to such being the law, there could be no necessity for them to consult counsel, and thereupon the sheriffs {31} returned the panel as directed.¹³⁴ Whatever change this may have produced in the success of state prosecutions, was in any event destined to be short lived, for the reign of Charles the Second ended four years later, his successor, James the Second, fled to France in 1688, and William of Orange ascended the throne and a more liberal policy of state has since ensued.

One of the last known instances of the court attempting to coerce a grand jury occurred in 1783, in Pennsylvania. Mr. Oswald, the printer of the *Independent Gazette*, criticised the conduct of the Supreme Court. The justices thereof, Chief Justice McKean and Judge Bryan ordered him to be indicted for libel, but the grand jury ignored the bill. The judges severely reprovved them in open court in an attempt to overawe the inquest and sent them back to reconsider the bill, but the jury refused to return an indictment.¹³⁵

When the settlement of America was begun by Englishmen, they brought with them all the civil rights which they enjoyed in their native land, and with them came the grand jury.¹³⁶

{32} The institutions which they brought, naturally nourished in a land so far away from the mother country, and consequently removed from the attacks which were subsequently made by the crown upon the liberties of the people. For nearly one hundred years the colonies were allowed to exercise to the fullest extent a greater degree of civil rights than at any time had been permitted to the subject in England. The only restraint placed upon them was by the appointment of royal governors, but even then there were no state prosecutions like those being carried on in the mother country. Free from restraints which were there placed upon them, it was most natural that the grand jury should exercise their great power in a manner most calculated to insure the liberty and freedom of thought of

the people. In New York in 1735, an attempt was made to indict John Peter Zenger, the editor and proprietor of a newspaper called the *Weekly Journal*, for libel because of the manner in which he held up to scorn the deeds of the royal governor, but the grand jury ignored the bill. He was then proceeded against by an information filed by the attorney general for the province, and after a trial in which he was defended by the Philadelphia lawyer, Andrew Hamilton, was triumphantly acquitted.¹³⁷

The Constitution of the United States, as adopted by the states, contained no guaranty of presentment or indictment by a grand jury, but this omission was remedied by the passing of the first ten amendments, substantially a bill of rights, of which Article V provides: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the {33} land or naval forces,¹³⁸ or in the militia when in actual service in time of war or public danger;"....

This provision applies solely to offences against the United States and triable in the United States Courts,¹³⁹ and has reference not only to those offences which at common law were capital or infamous, but to such as might thereafter be made capital or infamous by legislation of Congress.¹⁴⁰ It has been held not to affect prosecutions brought by means of an information filed by the United States District Attorney in cases where the offence does not constitute a capital or otherwise infamous crime.¹⁴¹ In this respect the Constitution of the United States assures to the citizen the same protection to his liberty which the laws of England afford to the subjects of the king.

The Fourteenth Amendment does not require the states to prosecute crimes by means of indictment or prohibit them from proceeding by information. The provision "due process of law" refers only to the prosecution of offences by regular judicial proceedings.¹⁴²

It has, therefore, become usual both in England and the United States to proceed by information where the law gives that right, and has frequently been employed in cases where a bill has been submitted to, and ignored by, a grand jury.

The Constitution of Pennsylvania affords a still greater {34} protection to the liberty of the citizen. Section 10 of the Declaration of Rights provides: "No person shall for any indictable offence, be proceeded against criminally, by information, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger, or by leave of the court for oppression or misdemeanor in office."

As all offences are indictable offences in Pennsylvania, the filing of an information has been very rarely employed, by reason of the limited class of cases to which it can be applied. The nature of this proceeding received judicial construction in an early Pennsylvania case¹⁴³ decided by Mr. Justice Shippen, who delivered the following opinion:

"The present is the first instance, that we recollect, of an application of this kind in Pennsylvania; and on opening the case, it struck us to be within the 10th section of the ninth article of the constitution, which declares that no person shall for any indictable offense, be proceeded against criminally by information, except in cases that are not involved in the present motion. But, on consideration, it is evident that the constitution refers to informations, as a form of prosecution, to punish an offender, without the intervention of a grand jury; whereas an information, in the nature of a writ of quo warranto, is applied to the mere purpose of trying a civil right and ousting the wrongful possessor of an office."

Under the same statute the court made absolute a rule for an information where the proceeding was against a justice of the peace who was charged with a misdemeanor in office in taking insufficient bail.¹⁴⁴ But where a prosecutor appeared to be proceeding from vexatious motives, the court discharged the rule for an information.¹⁴⁵

The grand jury of the present time is a wholly different institution from that originated by the Anglo-Saxons. The ancient institution was designed to aid the government in detecting and punishing crime; the tyranny of kings made it an instrument to defeat the government. Now it occupies the {35} anomalous position of a public accuser, while at the same time it stands as a defender of the liberty of the people.

It remains to consider whether or not the grand jury is worthy to be retained among the institutions of a free government in this progressive age. The institution has been attacked with great vehemence by writers of acknowledged ability, both English and American, but at the same time it has been defended with equal vigor by men no less able. That the institution and its workings are open to criticism no one will question, but that the defects which are pointed out by its critics are of such a nature as to justify its abolition cannot be so readily conceded.

The attacks upon it are based principally on three grounds:

1. That it is now a useless institution.
2. Its irresponsibility.
3. Its secrecy of action.

It is well said by an English opponent of the institution,¹⁴⁶ "ten centuries of usage give a very striking respectability to any institution; and grand juries existed before the feudal law and have survived its extinction. They are perhaps the oldest of existing institutions; but if they are to continue, they must rest on their continuing utility, not on their antiquity, for future toleration."

It is urged with great earnestness and the argument contains much merit that the system which has been in force the past three hundred years of giving a defendant a preliminary hearing before a magistrate, makes the work of the grand jury in this class of cases superfluous.¹⁴⁷ In many instances this argument would seem to be well founded, since the

finding of a true bill by the grand jury in cases returned to the district attorney by the committing magistrates would be but a ratification of the action of the magistrate, but it is not true in all cases. There are many cases of a trifling nature which are returned by the committing magistrates and when brought before the grand jury the indictments are ignored. In counties where the volume of business is small, it would be of little {36} consequence if the grand jury found true bills even in these cases, but in counties where the volume of business is large, and this is particularly true of the great cities which frequently are coextensive with the boundaries of the county, it then becomes of vital importance that there should be a tribunal to sift from the great mass of cases those which are too trifling in their nature to require further prosecution. And this is a duty which could not well devolve upon a single officer, for unless testimony was heard by him there would be no feasible way to determine which cases should be prosecuted and which should be ignored. If evidence is therefore to be heard, it is wiser that it be heard and considered by a body impartially selected from the people, than by a single officer whose training would incline him to find those grounds upon which the prosecution might be sustained.

While in ignoring bills of indictment it frequently happens that defendants are set free who undoubtedly merit punishment, it is idle to charge that this is a defect in the system or a reason why it should be abolished, for the same result is of frequent occurrence where defendants are tried before petit juries, when the evidence is heard in open court. If, when the grand jurors hear only the evidence in favor of a prosecutor, given by witnesses summoned by the district attorney, and examined by him before the grand jury, they are unable to return a true bill, how can it reasonably be asserted that a petit jury, where the entire twelve must concur, would have found the defendant guilty when the grand jury, which usually exceeds this number, are unable to muster twelve who concur in finding the bill. To charge a grand jury with failure to act in furtherance of justice, under such circumstances, is an unwarranted imputation upon the judgment of intelligent men and is only made by writers who give the subject a superficial consideration.¹⁴⁸ That because the minority view the evidence in a different {37} light from the majority is to say the majority have come to the wrong conclusion, is a proposition not recognized in this country. The defendant, no matter what the evidence against him may be, is presumed to be innocent until proven guilty, and if the prosecuting officer, with all the power he possesses within the sealed doors of the grand jury room, is unable to convince twelve out of those present, of the guilt of the defendant, he cannot well say that he could do more before the petit jury, where the defendant has the additional advantages of counsel and witnesses in his defence, and a trial judge who may be called upon to rule out incompetent and irrelevant evidence. There are undoubtedly many cases in which true bills are found where incompetent and irrelevant evidence has been given before the grand jury and formed the inducement to their action.

The fact that sometimes they indict innocent persons is to be deplored, but as an argument in favor of the abolition of

the institution is without merit. The right still remains for such defendant to establish his innocence before a petit jury, where he is aided by his counsel and may have witnesses in his behalf. If, in such cases, the prosecution was by information filed by the district attorney upon the return of the committing magistrate, there would be no possible chance of the innocent defendant escaping trial. Primarily the object of the grand jury is not to protect the innocent, for all accused persons are presumed innocent until the contrary be shown, but is to accuse those persons, who, upon the evidence submitted by the prosecutor, if uncontradicted, would cause the grand jurors to believe the defendant guilty of the offence charged.¹⁴⁹ When, therefore, the evidence is of such a nature as to justify the return of an indictment by the grand jury, it is only proper that whether innocent or guilty, the accused should be put upon his trial.

It is true that the grand jury ordinarily do but little more than review the judgment of the committing magistrate, and for this reason the institution is said to be useless. But it is eminently fitting that such a body should exist to review the judgment of such magistrates. It is absurd to contend that {38} in a government such as ours, composed of a system of checks and balances, a committing magistrate is an individual whose discretion does not require review. They are chosen as a rule from men who have but little knowledge of the law and whose principal qualification is the political service rendered to their party and not the personal fitness of the individual for the office. In a large number of cases the warrant will be issued by a magistrate, known either to the prosecutor or his counsel, who invariably is selected because of the acquaintanceship. That a defendant who is committed or held in bail under such circumstances should be entitled to have the judgment of the magistrate reviewed by a tribunal sufficiently large and without personal interest in the case, is but a reasonable requirement. Not that the magistrate may have acted improperly or violated the terms of his oath, but that prosecutions which are or may have been begun under such conditions, shall be declared by an impartial body to be well founded in fact before a defendant shall be obliged to answer.

An English writer¹⁵⁰ discusses the subject in this language:

"The criminal who has been committed on the well considered opinion of the responsible magistrate is set at large by the influence of the random impressions of twenty-three irresponsible gentlemen. Such an enlargement is in itself a slander or a serious charge against the committing magistrate, and logically ought to be almost conclusive evidence of his unfitness to act either from malice or incapacity."

The English system of committing magistrates is of a somewhat different nature from that of Pennsylvania. They have there what are known as stipendiary magistrates, that is, men who are paid fixed salaries for their services, but are required either to be learned in the law or to be accompanied by a duly articulated clerk.¹⁵¹ If the logic of the

writer above quoted is to be pursued to a conclusion, it means when the appellate court reverses the court below that that is conclusive evidence of the unfitness of such judge to fill his high office, notwithstanding {39} he has adjudged correctly in the great majority of cases which have come before him.

If it be said the cases are not analogous in that the grand jurors are laymen who review the decision of a magistrate learned in the law, it may be answered that the laymen review not the law, but the facts of the case, and as to those facts all the legal learning which the magistrate may possess will not make him a better judge of the truth of the facts or the credibility of the witnesses. As to the facts, he is but one layman against twenty-three, and all experience has taught that the latter body are far more apt to arrive at a correct conclusion. The same author who contends that the judgment of the stipendiary magistrate is superior to that of the twenty-three grand jurors would probably repel the assertion that the judge who presides at the trial is more likely to arrive at a correct conclusion upon disputed facts than the twelve jurors sworn to pass upon them, yet the two cases are precisely analogous. Upon all questions of fact, the composite make-up of the twelve or the twenty-three vests in such body a knowledge which no one man can possess and is more productive of correct findings. It is given neither to one man nor to any body of men to invariably arrive at correct conclusions, but because they at times may err, it affords no ground for saying that by reason of such error they are either ignorant, malicious or incompetent.

Upon this point an English writer¹⁵² pertinently remarks,

"Moreover the stipendiary magistrates we have are not all such oracles of wisdom that we should conclude that the grand jury must always be wrong and the magistrate right upon the question of whether there is a prima facie case."

It is thought by one writer that the grand jury is a useless institution because it no longer occupies its original position, and by reason of this fact should be abolished.¹⁵³ Were we to {40} apply this reasoning to the various branches of the law at the present day, to our courts, our institutions, and our procedure, nearly all must be swept away, for but little of it retains its original position. Things have changed with the progress of the centuries and it is the height of absurdity to contend that because the grand jury is no longer a power in the hands of unscrupulous persons to oppress those who hindered or interfered with their improper designs as it was in times past, it no longer occupies its original position and should be cast aside.

That the grand jury is an irresponsible body is admitted and it is this want of responsibility which the opponents of the institution seize eagerly upon in their endeavor to show why the institution should be abolished. An American writer¹⁵⁴ thus expresses his views: "The principal objection which can be urged against the grand jury, as now constituted, is the absolute personal irresponsibility of the

individual juror attendant upon the performance of his duties. He is a law unto himself; no power can regulate him and no power can control him. He can be called before no earthly tribunal, except his own conscience, to account for his action. He can pursue an enemy for personal motives of revenge; he can favor a friend or political associate; he can advance and maintain before the jury by argument ideas that he would never father in any other place; he can shirk responsibility by voting to turn the guilty loose, pleading for mercy for the confessed criminal and the next moment {41} cast his vote to indict the innocent, but friendless accused; ignoring in order to do so his oath and every distinction between hearsay and competent evidence. The state's attorney is powerless to protest against or prevent these insane antics upon the juror's part, and the court is as equally unable to prevent the denial of justice."

Undoubtedly it is within the power of a grand juror to act in the manner thus described, and that this is sometimes done will hardly be questioned. That, however, it is of such universal occurrence as to seriously affect the administration of justice and demand the abolition of the institution is not the fact. To contend that it is, is to say that on every grand jury there are at least twelve men so lost to all sense of truth, honor and justice and so utterly oblivious to the requirements of their oath, that they will perjure themselves in order to do the will of a fellow juror.

We have only to turn back to early English history to see how the grand jury was so used for improper purposes that the statute of 3 Henry VIII, C. 12, was enacted, giving to the judges and justices the right to reform the panels of grand jurors returned by the sheriff, and then compelling the sheriff to make return of the panel so reformed. It is recited by the preamble of the above statute¹⁵⁵ "That many oppressions had been, by the untrue demeanor of sheriffs and their ministers, done to great numbers of the king's subjects, by means of returning at sessions holden for the bodies of shires, the names of such persons, as for the singular advantage of the said sheriffs and their ministers; by reason whereof many substantial persons (the king's true subjects) had been wrongfully indicted of divers felonies and other misbehaviour by their covin and falsehood; and also sometimes by labor of the said sheriffs, divers great felonies had been concealed, and not presented by the said persons, by the said sheriffs and their ministers partially returned, to the intent to compel the offenders to make fines, and give rewards to the said sheriffs and their ministers."

Lord Coke¹⁵⁶ also directs attention to this evil and points {42} out the statutory remedy. In Scarlet's case,¹⁵⁷ one Robert Scarlet had unlawfully procured himself to be placed upon a panel of grand jurors and caused indictments to be found against innocent persons. The court suspected that something was wrong, and inquired of the inquest as to the evidence upon which the bills had been found, which disclosed the agency of Scarlet and brought punishment upon him.

At the present day it cannot justly be said that the grand jury is wholly irresponsible. It is true that they have great freedom of action and the reasons which induce their action cannot be inquired into.¹⁵⁸ But if they have acted from improper motives or been improperly influenced, and this could not be made to appear upon a motion to quash the indictment, it is still within the power of the district attorney with leave of court, to enter a nolle pros or submit the bill, without trial, to a petit jury and have a verdict of not guilty rendered thereon. On the other hand, if the grand jury improperly reject a bill, it is still competent for the district attorney to lay the matter before a subsequent grand jury, which may act otherwise.¹⁵⁹ The ability of the grand jurors to work harm by the abuse of their power is, therefore, more fancied than real.

Nor can there be said to be any more merit in the complaint that the secrecy surrounding the grand jury is an evil which should be done away with. They deliberate in secret, but the petit jury does likewise, and no one would contend for a moment that a petit jury should deliberate in public. What reason can then be advanced why a grand jury should deliberate in public? Nor would the hearing of the testimony in public be of any advantage unless counsel for the defence were permitted to cross-examine the witnesses produced, which would necessitate a judge being present, and such a course as this would neither be desirable nor productive of good. If the closed doors of the grand jury room are an incentive to perjury, the witness must also perjure himself before the petit jury to make his false testimony effective. And as only the witnesses for the prosecution are heard, it is very unlikely that {43} a defendant would be set free by reason of the prosecution's witnesses committing perjury in his behalf.

The partisan feeling of the opponents and the defenders of the grand jury usually leads them into violent and unwarranted condemnation or rash and extravagant praise. Chief Justice Shaw,¹⁶⁰ of the Supreme Court of Massachusetts, in a charge to a grand jury in 1832, admirably set forth the conservative view of this institution. "In a free and popular government," he said, "it is of the utmost importance to the peace and harmony of society, not only that the administration of justice and the punishment of crimes should in fact be impartial, but that it should be so conducted as to inspire a general confidence, and that it will and must be so. To accomplish this, nothing could be better contrived than a selection of a body, considerably numerous, by lot, from amongst those, who previously and without regard to time, person, or occasion, have been selected from among their fellow citizens, as persons deemed worthy of this high trust by their moral worth, and general respectability of character. And although under peculiar states of excitement, and in particular instances, in making this original selection, party spirit, or sectarian zeal may exert their influence, yet it can hardly be expected that this will happen so frequently or so extensively, as seriously to affect the character or influence the deliberations of grand juries. Should this ever occur, to an extent sufficient to weaken the confidence now reposed in their entire impartiality, and thus destroy or impair the utility of this noble institution, it would be an event, than which none

should be more earnestly deprecated by every lover of impartial justice, and every friend of free government.

"Were the important function of accusation placed in the hands of any individual officer, however elevated, it would be difficult to avoid the suspicion of partiality or favoritism, a disposition to screen the guilty or persecute the innocent. But the grand jury, by the mode of its selection, by its number and character, and the temporary exercise of its powers, is placed beyond the reach or the suspicion of fear or favor of being overawed by power or seduced by persuasion."

{44} In some of the Western States the grand jury has either been abolished, or the constitution has been altered to permit this to be done.¹⁶¹ In California, where the district attorney files an information in all cases of felony and misdemeanor, the statutes make provision for a grand jury and confer upon it greater inquisitorial power than has ever been conceded to it in those states which proceed with it according to the common law.¹⁶²

The conservatism of the Eastern States has caused the retention of the grand jury among their institutions. Whether the policy of those states which have abolished it is a wise one or not cannot yet be determined. This can only be learned after the system which has supplanted it has stood the test through the coming years and emerged unscathed and with honor from great crises. But when it is proposed to turn aside from a course which has been followed for centuries to new and untried methods, the warning of Judge King¹⁶³ applies with great force: "Any and every innovation in the ancient and settled usages of the common law, calculated in any respect to weaken the barriers thrown around the liberty and security of the citizens, should be viewed with jealousy, and trusted with caution."

Endnotes

1. An Essay on the Law of Grand Juries, (E. Ingersoll, Philadelphia, 1849).
2. The Security of Englishmen's Lives, etc., (Lord Somers, London, 1694).
3. 4 Bl. Com. 349; Judge King, in Case of Lloyd and Carpenter, 3 Clark (Pa.) 188.
4. Addison, App. 18.
5. Bentham — Rationale of Judicial Evidence, Vol. II, p. 312.
6. Grand Juries, 29 L. T. 21.
7. Jas. Wilson's Works, Vol. II. p. 361.
8. Crabb's Hist. Eng. Law, 35; Spence — Equitable Jurisdiction of the Court of Chancery, Vol. I, p. 63; Grand Juries and the Pleas of Criminals, (John Lascelles) Law Mag. & Rev. Vol. 4 (N. S.) 767; Grand Jury in Ireland, etc. (Wm. G. Hubbard) 5.
9. Wilkins Leges Anglo Saxonicae 117; Note to Grand Juries and the Pleas of Criminals (John Lascelles) Law Mag. & Rev. Vol. 4 (N. S.) 767.
10. 1 Reeves Hist. Eng. Law 23.

11. 3 Reeves Hist. Eng. Law 133; Growth of the Grand Jury System (J. Kinghorn) 6 Law Mag. & Rev. (4th S.) 367.
12. Hist. Eng. Law, Vol. I, p. 84.
13. 1 Reeves Hist. Eng. Law 22.
14. Bouvier's Law Dictionary (Rawle's Revision).
15. 1 Bl. Com. 114; Bouvier's Law Dictionary (Rawle's Revision); Growth of the Grand Jury System (J. Kinghorn) 6 Law Mag. & Rev. (4th S.) 367.
16. Wilkins Leges Anglo Saxonicae 117; The Grand Jury, etc., in Ireland (Wm. G. Huband) 11; Spence — Equitable Jurisdiction of the Court of Chancery, Vol. I, p. 63; Crabb Hist. Eng. Law 35.
17. 4 Bl. Com. 294.
18. For the amount to be paid as weregild, see Stubbs Select Charters, 65; Reeves Hist. Eng. Law 14 et. seq.
19. 4 Bl. Com. 414; 1 Reeves Hist. Eng. Law 15, 20, 21.
20. Forsyth Trial by Jury 159.
21. An Essay on the Law of Grand Juries (E. Ingersoll, Philadelphia, 1849); Origin of Grand Juries (Hon. E. Anthony), 1 Chic. L. News, 20.
22. The Jury and Its Development, (Prof. J. B. Thayer), 5 Harv. L. Rev. 251.
23. 4 Bl. Com. 273.
24. Wilkins Leges Anglo Saxonicae 117.
25. 4 Bl. Com. 274.
26. 4 Bl. Com. 273.
27. Bouvier's Law Dictionary (Rawle's Revision).
28. Wilkins Leges Anglo Saxonicae 117.
29. Note to Grand Juries and the Pleas of Criminals, (John Lascelles), 4 Law Mag. & Rev. (N. S.) 767. Stubbs Select Charters 72.
30. Select Pleas of the Crown, (Selden Society) Case No. 162.
31. Coke on Littleton 155a.
32. The Older Modes of Trial, (Prof. J. B. Thayer) 5 Harv. Law Rev. 65.
33. Id. p. 45.
34. An Essay on the Law of Grand Juries, (E. Ingersoll, Philadelphia, 1849); Lesser, Hist. Jury System 136.
35. Lessor's Hist. Jury System 138.
36. Forsyth Trial by Jury 81.
37. 4 Bl. Com. 422.
38. Forsyth Trial by Jury 82.
39. The Older Modes of Trial, (Prof. J. B. Thayer) 5 Harv. L. Rev. 59.
40. Bl. Com. Book 1, p. 343; Bispham Equity (5th Ed.) Sec. 5.
41. Bispham Equity (5th Ed.) Sec. 5.
42. Lesser Hist. Jury System 140.
43. The Older Modes of Trial (Prof. J. B. Thayer) 5 Harv. L. Rev. 64; Lesser Hist. Jury System 140.
44. Reeves Hist. Eng. Law, Vol. I, p. 193.
45. Glanville (Beame's Translation — Legal Classic Series) 282.
- 45*. Britton (Legal Classic Series) 86.
46. Bracton — de legibus, (Sir Travers Twiss ed.) Vol. II, 417.
47. Glanville (Beames Translation — Legal Classic Series) 278; 1 Reeves Hist. Eng. Law 195.
48. Glanville (Beames Translation — Legal Classic Series) 282.
49. Id. 287.
50. Bracton — de legibus. Vol. II, p. 447, 448.
51. Hallam's Middle Ages, Vol. II, p. 176, 177; Palgrave English Commonwealth 269.
52. Glanville (Beames Translation — Legal Classic Series) 194.
53. Bracton — de legibus, Vol. II, p. 241; 1 Reeves Hist. Eng. Law 201.
54. The Grand Jury, etc., in Ireland (Wm. G. Huband) 11.
55. Select Pleas of the Crown.
56. Id. Cases No. 5, 6, 12, 57.
57. Id. Cases No. 10, 181.
58. Id. Case No. 13; Bracton — de legibus, Vol. II, p. 449.
59. Select Pleas of the Crown, cases No. 68, 153.
60. Id. Cases No. 15, 21.
61. 2 Reeves Hist. Eng. Law 3; Bracton — de legibus, (Sir Travers Twiss ed.) Vol. II, 241.
62. Bracton — de legibus, Vol. II, p. 239. A very curious analogy to this will be found in the laws of the State of Connecticut. By Gen. St. tit. 20, C. 12, Sec. 23, it is provided that a sworn grand juror shall forfeit \$2, if he "shall neglect to make reasonable complaint of any crime or misdemeanor committed within the town where he lives, which shall come to his knowledge." In *Watson v. Hall*, 46 Conn., 204, it was held that this must be construed to give him discretion as to whether the offence is too trivial for a criminal prosecution, and he is not liable, if in good faith, he omits to complain.
63. Bracton — de legibus (Sir Travers Twiss ed.) Vol. II, p. 425.
64. Id. p. 431. This discloses a change in the law subsequent to the time when Glanville's Treatise was written, as the appellee was apparently at that time not permitted to choose the method of trial. *Supra*. 10.
65. Bracton — de legibus, (Sir Travers Twiss ed.) Vol. II, p. 449.
66. Select Pleas of the Crown, Cases No. 15, 21.
67. *Ashford v. Thornton* 1 B. & Ald 405. This was the last time an appeal was brought in England, the wager of battle being abolished in 1810 by Statute 59, Geo. III, C. 46.
68. Select Pleas of the Crown (Selden Society).
69. Id. Cases No. 5, 6, 10, 12, 57, 181.
70. Id. Case No. 13. This case is probably the first recorded instance of an "ignoramus." And see Case No. 153.
71. Select Pleas of the Crown, Cases No. 157, 170.
72. (Beames Translation — Legal Classic Series), p. 278.

73. This is doubted by eminent authors who attribute it to Hubert Walter, who was clerk to Glanville at the time he was Chief Justiciar. — See Pollock & Maitland Hist. Eng. Law. Vol. I, p. 164.
74. The Grand Jury, etc., in Ireland (Wm. G. Huband), p. 11.
75. Supra 14.
76. See generally the cases in Select Pleas of the Crown.
77. Lesser Hist. Jury System 142.
78. Trial by Jury, p. 166.
79. Lesser Hist. Jury System 142, 144; Forsyth Trial by Jury 166.
80. Select Pleas of the Crown.
81. Magna Charta of King John, Article 36, provided: "Nihil detur vel capiatur de cetero pro brevi inquisitionis de vita vel membris, sed gratis concedatur et non negatur." Stubbs Select Charters, p. 301. In the confirmation of the Great Charter by Henry III, in 1216, Article 36 of King John's Charter becomes Article 29: Stubbs Select Charters, p. 342.
82. But rather a contrary view is expressed by Professor J. B. Thayer in The Jury and its Development, 5 Harv. L. Rev. 265, although no reasons are given for the opinion he expresses.
83. Lesser Hist. Jury System 142, Note 24; Hallam's Middle Ages, Note to Chapter VIII; Stubb's Select Charters, p. 142.
84. The Jury and its Development, 5 Harv L. Rev. 265.
85. While trial by battle was still in use, it could only be used where an appeal had been properly brought.
86. Maitland Glou. Pleas XXXVIII.
87. de legibus (Sir Travers Twiss ed).
88. Bracton — de legibus, Vol. II, p. 451.
89. Id. Vol. II, p. 235, et. seq.
90. Bracton — de legibus, Vol. II, p. 239, (Sir Travers Twiss ed.).
91. Bracton — de legibus, (Sir Travers Twiss ed.) Vol. II, p. 241.
92. Bracton — de legibus, (Sir Travers Twiss ed.) p. 243.
93. Id. p. 453.
94. Id. p. 403.
95. Trial by Jury 164; but see Id. p. 170.
96. 2 Hist. Eng. Law 33.
97. Hist Eng. Law 162.
98. Essay on Law of Grand Juries (E. Ingersoll, Philadelphia, 1849).
99. de legibus, (Sir Travers Twiss ed.) Vol. II, p. 455.
100. Bracton — de legibus, (Sir Travers ed.) Vol. II, p. 457.
101. Post 24, 25.
102. Supra. 22.
103. Bracton — de legibus, (Sir Travers Twiss ed.) Vol. II, p. 455. That a petit juror was a member of the grand jury which found the indictment, was made ground of challenge by 25 Edw. III, Stat. 5, Chap. 5. See Robert's Digest of British Statutes, p. xxx, also p. 346.
104. Compare the two oaths Supra. 20 and 22.
105. Supra. 6, 7, 9.
106. Bracton — de legibus, (Sir Travers Twiss ed.) Vol. II, p. 455.
107. Forsyth — Trial by Jury, 104; Lesser Hist. Jury System 104, 113; Hallam's Middle Ages, note to Chapter VIII.
108. Forsyth — Trial by Jury, 105; Lesser Hist. Jury System 113.
109. Select Pleas of the Crown (Selden Society), Cases No. 153, 157.
110. Id. Case No. 153.
111. Select Pleas of the Crown (Selden Society) Case No. 157.
112. Britton (Legal Classic Series) 25.
113. Britton (Legal Classic Series) 17.
114. Id. p. 19.
115. Id. p. 25.
116. Id. p. 65.
117. Id. p. 72.
118. Id. p. 74.
119. Id. p. 75.
120. King v. Fitch, Cro. Chas. 414. In this case it is said that "it is usual to have more than twelve *at the sheriff's pleasure*," on an inquest of office.
121. 3 Reeves Hist. Eng. Law 133.
122. Post 45, 46, 147.
123. Supra. 26.
124. Supra. 21. And see Forsyth Trial by Jury 171.
125. Britton (Legal Classic Series) 18.
126. Bracton — de legibus, (Sir Travers Twiss ed.) Vol. II, p. 455.
127. 4 Bl. Com. 302.
128. Growth of the Grand Jury System, (J. Kinghorn), 6 Law Mag. & Rev. (4th S.) 375. Note to College's Trial, 8 How. State Tr. 549.
129. Growth of the Grand Jury System, (J. Kinghorn) 6 Law Mag. & Rev. (4th S.) 373.
130. 8 How. St. Tr. 774.
131. For an interesting discussion of this ignoramus see Hallam's Const. Hist. England, Vol. II, p. 202 et seq.
132. Earl of Shaftesbury's Case, 8 How. St. Tr. 775. The following excerpt from the report of the proceedings shows the attitude of the sheriff toward the Earl:
- Sheriff P. I desire the witnesses may be kept out of court, and called one by one.
- L. C. J. It is a thing certainly, the king's counsel will not be afraid of doing; but sheriffs do not use to move anything of this nature in court, and therefore 'tis not your duty, Mr. Sheriff, to meddle with it.
- Sheriff P. It was my duty last time my lord, and appointed.
- Att. Gen (Sir Robert Sawyer). You were acquainted 'twas not your duty last time, and you appear against the king.
133. 4 Reeves Hist. Eng. Law 298.

134. North's Examen Part 3, Chap. 8. Growth of the Grand Jury System, (J. Kinghorn), 6 Law Mag. & Rev. (4th S.) 376.
135. Francis Hopkinson's Works, Vol. 1, p. 194. In *Mississippi* in 1902, in the case of *Blau v. State*, 34 So. 153, will be found an instance where the Court successfully coerced the grand jury into finding a true bill. A motion to quash was overruled. On appeal the judgment was reversed upon the ground of the improper influence exercised over the grand jury in the finding of the indictment.
136. Lesser Hist. Jury System 128. Details of the earliest use of the grand jury in the American Colonies are few and very unsatisfactory. In the New Haven colony, theocratic notions caused the inhabitants to dispense with trial by jury because no precedent for it could be found in the laws of Moses. Fiske — *Beginnings of New England* 314. In Boston in 1644, a certain Captain Keayne was tried for larceny by a jury and acquitted: *Id.* 129; while in Plymouth in 1651, a grand jury presented one Holmes for holding a disorderly meeting; *Id.* 218. In Pennsylvania, the early cases in which reference to a grand jury is made, have been collected by Hon. Samuel W. Pennypacker, in an address entitled *Pennsylvania Colonial Cases*. The first case cited is that of the *Proprietor v. Charles Pickering*, and arose in August, 1683: *Pennsylvania Colonial Cases*, p. 32. The case of *Proprietor v. Mattson* was founded upon an indictment by the grand jury charging the defendant with witchcraft: *Id.* p. 35. Two presentments by the grand jury in 1685 called attention to various public evils and suggested certain public improvements: *Id.* p. 71-72. In the case of *Peter and Bridgett Cock v. John Rambo*, the indictment, which was found in 1685, is reproduced entire. This indictment seems to have been read to the grand jury in open court at the request of counsel for the prosecution. The finding thereon was "Wee find this bill. John King, foreman." *Id.* p. 79. In 1703, in Pennsylvania, a grand jury presented a number of individuals for various offences: *Watson's Annals of Philadelphia*, Vol. I, p. 308; Fiske — *The Dutch and Quaker Colonies in America*, Vol. II, p. 382.
137. *The Dutch and Quaker Colonies* (John Fiske), Vol. II, pp. 290-299.
138. See *Ex Parte Wildman*, 29 Fed. Cas. 1232.
139. *Hurtado v. California*, 110 U. S. 516; *Bollyn v. Nebraska*, 176 U. S. 83; *Twitchell v. Com.* 7 Wall (U. S.) 321; *Noles v. State*, 24 Ala. 672; *State v. Wells*, 46 Iowa, 662; *State v. Barnett*, 3 Kan. 250; *State v. Jackson*, 21 La. Ann. 574; *Jackson v. Wood*, 2 Cow. (N. Y.), 819; *Prescott v. State*, 19 Ohio, 184; *State v. Shumpert*, 1 S. C., 85; *Pitner v. State*, 23 Tex. App. 366; *State v. Keyes*, 8 Vt. 57; *State v. Nordstrom*, 7 Wash., 506; *State v. Baldwin*, 15 Wash., 15. The powers of local government exercised by the Cherokee Nation are local powers, not created by the Constitution, and hence are not operated upon by Amendment V thereof, requiring a presentment by a grand jury in the case of a capital or other infamous crime; *Talton v. Mayes*, 163 U. S., 376.
140. U. S. v. *Brady*, 3 Cr. Law Mag. 69.
141. *Mackin v. U. S.*, 117 U. S. 328; *Ex Parte Wilson*, 114 U. S. 417.
142. *Hurtado v. California*, 110 U. S. 516; *Kalloch v. Superior Court*, 56 Calif. 229; *Rowan v. State*, 30 Wis. 129.
143. *Res. v. Wray*, 3 Dall. (Pa.) 490.
144. *Res. v. Burns*, 1 Yeates (Pa.) 370.
145. *Res. v. Prior*, 1 Yeates (Pa.) 206.
146. *Grand Juries* 29 L. T. 21.
147. *Bentham — Rationale of Judicial Evidence*, Vol. II, p. 312.
148. Hon. Daniel Davis, Attorney General of Massachusetts, speaking of his own experience says: "But the experience of thirty years furnishes an answer most honorable to the intelligence and integrity of that body of citizens from which the grand jury are selected; and that is, that they almost universally decide correctly." *Precedents of Indictments*, p. 21.
149. *Post* 105, 141, 142.
150. *Grand Juries* 29 L. T. 21.
151. *Id.*
152. *Grand Juries*, 67 L. T. 381.
153. *On Grand Juries*, (E. E. Meek) 85 Law Times 395. The absurdity of this argument is brought to our attention in the case of *Hurtado v. California*, 110 U. S. 516, in which it was contended that the words "due process of law" as used in the Fourteenth Amendment to the Constitution of the United States was the equivalent of the phrase "law of the land" in the twenty-ninth chapter of Magna Charta and had acquired a fixed, definite, and technical meaning; and by reason of this amendment a State could not proceed against a defendant for felony except upon an indictment found by a grand jury. Mr. Justice Matthews who delivered the opinion of the Court meets this argument in this language:
- "But to hold that such a characteristic is essential to due process of law would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.
- "This would be all the more singular and surprising in this quick and active age when we consider that, owing to the progressive development of legal ideas and institutions in England, the words of Magna Charta stood for very different things at the time of the separation of the American colonies from what they represented originally."
154. *The Abolition of the Grand Jury*, (C. E. Chipfield) 5 Am. Law 487.
155. *Hawk. Pl. C. Book 2, Ch. 25, Sec. 32.*
156. *Co. Inst.*, Vol. III, p. 33.
157. 12 *Co.* 98.
158. *Post* 119, 166.
159. *Post* 112, 152.
160. *Charge to Grand Jury*, 8 Am. Jurist 216.
161. See *Constitutions of Colorado*, 1876, Art. II, Sec. 23; *Illinois*, 1870, Art. II, Sec. 8; *Indiana*, 1851, Art. VII, Sec. 17; *Nebraska*, 1875, Art. I, Sec. 10. See *Thompson & Merriam on Juries*, Sec. 471-2. In *Michigan*, *How. Ann. St.*, Sec. 9554, dispenses with grand juries unless summoned by the order of the judge. See *People v. Reigel*, 78 N. W., 1017. As to *Montana*, see *State v. King*, 24 Pac., 265. *Grand Juries abolished in Kansas* by Act of Feb. 12, 1864, Sec. 7, and see *Rice v. State*, 3 Kan. 141. In *Minnesota* the people, by a large majority vote, have adopted a constitutional amendment abolishing the grand jury. *The Literary Digest*, Vol. 30, P. 50.
162. See *Grand Juries in the United States*, 7 Law Journal, 729. *Penal Code Calif.*, Sec. 915-929. *The Constitution of California*, Art. I, Sec. 8, provides: "Offences heretofore required to be prosecuted by indictment, shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as

may be prescribed by law. A grand jury shall be drawn and summoned at least once a year in each county."

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