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Nathan T. Elliff

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NOTES ON THE ABOLITION OF THE ENGLISH GRAND JURY

NATHAN T. ELLIFF¹

INTRODUCTION

The obituary of the English grand jury might well read: "Born in 1166 to increase accusations of crime, lived to be termed the palladium of justice, and died in 1933 of inutility on a wave of economy." Today, in the words of a London K. C., nobody mentions it, nobody regrets it, nobody is any the worse off. Yet Blackstone considered it an essential safeguard of liberty and wrote that no one would ever be so hardy as to attack it. The reason for this change is found in the history of English criminal law and procedure.

Henry II created the grand jury in 1166 by the Assize of Clarendon as a prosecuting rather than a protecting body. It merely supplemented private accusation (appeals). Trial was by ordeal until 1215, after which the grand jury determined the guilt. In 1351 the trial jury was separated from the grand jury, but both continued to act in a representative capacity.

It was centuries before the trial jury became a real safeguard, and in the meantime the grand jury came to be considered as a protective body. Early evidence of more manly trial juries appeared at the trial of Sir Nicholas Throckmorton in 1854. After Bushel's Case in 1670 juries were no longer subject to punishment for acquitting, and the freeing of the Seven Bishops in 1688 showed that an accused, although indicted, had a real protection in the trial jury.

From the Revolution of 1688, after which arbitrary authority declined, through the creation of the Court of Criminal Appeals in 1907, there was a steady growth in the protection provided a defendant after indictment. With each step, such as allowing the defendant to have witnesses (1702), and counsel (1758), allowing his counsel to address the jury (1836), and making the defendant and spouse competent witnesses (1898), the grand jury became less and less a vital safeguard against wrongful conviction.

Nevertheless, the grand jury continued to serve a useful purpose in stopping unjustified prosecutions before trial. Although

¹ Member Illinois Bar; Sec'y, Section on Criminal Law, Ill. State Bar Ass'n.

justices of the peace had been created in 1360, and given power to make preliminary examinations in 1554, they acted more as detectives and prosecutors than as impartial judicial officers. In 1848 justices of the peace and stipendiary magistrates were divorced from all police functions, and rules were set up for holding an unbiased preliminary examination, in public, with both sides being represented and heard. The satisfactory character of these examinations did away with the usefulness of the grand jury as a check on groundless prosecutions.

Four other factors might be mentioned which influenced the situation leading to the abolition of the grand jury. One was the rationalization of criminal law and punishment started early in the last century under the leadership of Sir Samuel Romilly. Another was the establishment of the police system in London in 1829 by Sir Robert Peel, followed by its extension throughout the country in later years. Still another was the establishment of stipendiary magistrates in 1792 in London, and extension of the system in 1835. The fourth was the creation of a director of public prosecutions in 1879, and the establishment of the office of director of public prosecutions in 1908.

With the facts outlined above as a background, the following references attempt to disclose some of the incidents along the road to abolition.

Some Early Arguments

Let us first take a look at William Lambard's "Eirenarcha," printed in 1581. It contains the following advice to grand jurors:

"Furthermore, that they hold not a Court of Common Plea, by admitting proofs of witnesses against the King, as knowing that they are not to trie an issue, but to offer an Information, the truth or falsitie whereof shall be afterwards tried by another Jurie."

The ultimate end seems to be forecast in these few words. We see the grand jury, no longer a necessary prosecuting body presenting offenders on common fame, losing its new position as a safeguard to the trial jury, and giving early evidence of becoming a "rubber stamp."

Next consider Zachary Babington's "Advice to Grand Jurors in Cases of Blood," written in 1677 to urge grand jurors always to indict for murder rather than to worry about whether the charge should be manslaughter. He wrote:

"They may more clearly than Pilate wash their hands in Innocency from the Innocent blood of such a person. Neither themselves, nor the party accused, can be prejudiced by what they shall so find, be it never so high. . . . They are to hear none but the King's Evidence. . . . And whoever is to advance (as the Grand Jurors are) but the interest of one side, ought as rationally to be permitted to raise and advance it to the highest pitch. . . . The Grand Jurors being like the good Huntsman, that observing where the Hare hath lately prickt . . . lays in his Hounds, and leaves them to make the discovery; so indeed should the Grand Jurors do the Jury of Life and Death in cases of Blood."

Lambard and Babington were not to stand unchallenged. In 1682 Lord Somers wrote a tract entitled "Security of English Men's Lives, or the Trust, Power, and Duty of Grand Juries in England," in which he said:

"(The reader will) do well . . . not to think that he, who obliquely Endeavours to render Grand Jurys useless, is less Criminal, than he, that would absolutely abolish them. . . . There are few Examples of men acquitted by Pettit Juries, because Grand Juries of old were so wary in canvassing everything narrowly. . . . It cannot be imagined, that so little time, as is usually spent in Trials at the Bar, before a Pettit Jury, should be allowed unless it were presumed, that the Grand Jury, had so well examined, prepared, and digested the matter that the other may proceed more succinctly without danger of error."

A second tract in 1682, called "A Guide to English Juries," was written by "A Person of Quality" and said:

"In all other Criminal Causes is required two Tryals of the Party before he can be said Guilty. . . . The Grand Jury must first Examine the matter and the Petty Jury after Examine all again to prevent and secure against all surprizes of the Party, and Mistakes or Errors in the Jury. . . . Some say that what they do, is but matter of course, a ceremony, matter of Form; barely an accusation, etc. But that this is not so indeed is apparent, for to what end then is a Grand Jury? Only for show. The law would certainly then have not required one to be at all. . . . Then, say they, this is no Tryal, but in Order to bring to Tryal, and the party is at no prejudice if the Bill be found. It's true, it's no determinative Tryal. . . . But . . . all things are, or ought to be alike in the whole proceedings, and to differ nothing, but the one to be before the other, and the later to be final, the other not. . . . One of the Grand Jury can't be afterwards on the other. And why? Says the Law, for he has once already found the party guilty, and if he should not again, he must Perjure himself. . . . Why should he (the accused) not be heard (by the Grand Jury)? Else one's Condemned first, and heard after; or indeed Hanged first, and Tryed after, or little else."

These writers, unfamiliar with the early history of the grand jury, justified and explained its existence in terms of the weakness of the trial jury. Anyone interested in the history of the grand jury system should read these two tracts in full. They probably show more clearly than anything else the anomalous position of the grand jury at the present time.

Sir John Hawles, Solicitor General under William III., attempted to provide a *rationale* for the grand jury, writing:

"It is true, it is generally said that the business of a grand jury, in capital matters, is *in favorem vitae*; that that taken simply is not true, for then what reason can be assigned why a man shall be arraigned on an appeal of murder, robbery, or the like, which touches his life, as much as an indictment of those crimes, without having the matter of the appeal first found to be true by a grand jury? But the true reason for a grand jury is the vast inequality of the plaintiff and defendant, which in an indictment is always between the king and his subject; and that doth not hold in an appeal, which is always between subject and subject; and therefore the law in an indictment hath given a privilege to the defendant, which it hath done in no other prosecution, on purpose, if it were possible, to make them equal in the prosecution and defense, that equal justice may be done between both. It considers the judges, witnesses, and jury are more likely to be influenced by the king than the defendant. . . . I own of late days, they have said the duty of the grand jury is to find, whether the accusation be probable or no."²

About this same time appeared a tract on the grand jury system by Henry Cave, entitled "English Liberties." He pointed out that its purposes were to inquire after offenses and preserve the innocent. We must remember that originally it had but the first of these two purposes. The second grew up as a result of the growth of liberty of the subject and in the absence of other reasonable safeguards.

Prophets of Abolition: Bentham, Denman and Laurie

Despite Blackstone's prediction, Jeremy Bentham opened the attack on the grand jury early in the 19th century. He wrote:

"A jury is a good thing; a grand jury is a jury, ergo, a grand jury is a good thing. . . . Such being the logic . . . it is necessary to show what sort of a thing a grand jury really is. . . . A grand jury is a bar to penal justice. . . . Whatever it may have been at one time, as matters have stood for a long time, a grand jury has been, is, and will be, an instrument worse than useless. . . . They once had an object, but that

² Quoted in 8 State Trials, 759 et seq.

object has been done away; it might be seen to be so, if bigotry had eyes; but bigotry is blind; the incumbrance keeps its place; lawyers and their dupes never speak of it but with rapture."³

Bentham objected because of its secrecy, which prejudiced the accused who was unrepresented and unheard. He compared a grand jury to so much putty in the hands of the prosecution.

Here a word might well be said about Scotland, where the grand jury has never existed. In 1825, Henry Cockburn advocated a grand jury system for Scotland, but he later recanted and apparently no one has suggested it since.

In 1827, the fight to abolish grand juries began in earnest. An article in "The Jurist," Vol. 1:190, claimed to be the first attempt to inquire into the effects of the system upon the administration of justice. After presenting the arguments on both sides, it concluded that abolition would be a decided improvement. This was followed in 1828 by Lord Denman's famous article in the "Edinburgh Review," which said:

"It is not without fear and trembling that we pronounce the word jury, in connexion with our general argument—a word so musical to English ears. The open trial by equals indifferently chosen, where the law is publicly laid down by a responsible Judge, and the fact decided by a full hearing of the evidence on both sides, is beyond all doubt one of the best and noblest securities for all the rights of social man. But the generous institution here characterised corresponds in no single feature with that anomalous excrescence attached to Courts of Criminal Law in England, under the name of a Grand Jury."

The attack was continued in 1832 by Peter Laurie in a pamphlet entitled "Use and Abuse of Grand Juries." He said:

"They are anomalous in theory—unnecessary in practice—impediments to justice—and prejudicial to the interests of the public. . . . Our indignation is aroused when we read of the Inquisition. . . . We congratulate ourselves on living in a country that boasts of 'Magna Charta' and 'Trial by Jury,' and we lay down the book to go to Clerkenwell Sessions House, to give evidence against a felon before a Tribunal, exactly similar to those which we had just before so indignantly denounced. . . . It is to be expected that such opinions as have been here hazarded, must trust to the 'great Innovator Time' for any attention."

The following comment on Laurie's pamphlet was made by "The Times" on May 7, 1832:

"Though we are not yet prepared for any change, we may say that

³ The Works of Jeremy Bentham, Vol. II, page 139; Vol. VI, page 472.

the subject deserves a more attentive examination than it has hitherto received. If anything could convince us of the inutility of Grand Juries in most cases, it would be the extraordinary rapidity with which they decide on the charges brought before them."

In 1834, Parliament, recognizing the injustice the system might work, enacted that no indictment for certain offenses should be found at the Central Criminal Court in London unless the party prosecuting or prosecuted was under recognizance, or the offender in custody. This was the first of a series of statutes which were to whittle away at the structure of the English grand jury.

In the meantime, the long battle in the columns of the press had begun, featured by the usual letters to the editor of "The Times." So on September 19, 1833, one correspondent listed twenty-one reasons for abolishing grand juries. On December 30, 1833, another wrote:

"Grand juries are deservedly considered one of the greatest protections provided for the liberty of the subject. He would be a bold man who should venture to bring a bill into Parliament to abolish them."

There was testimony concerning the system before the Royal Commission on Criminal Law in 1835. Two witnesses, Thomas O'Oyly and William Ewart, thought that the grand jury might be dispensed with altogether, if a preliminary examination were required in every case. However, they felt that the system of magistrates should be improved.

First Bills for Abolition

In 1837, a man bold enough to submit a bill for the complete abolition of grand juries appeared. George Pryme, on November 28, 1837, moved for leave to bring in such a bill in the House of Commons. The Attorney General is reported as saying in opposition:

"He did not wish it to be supposed, because he opposed the motion, that he considered the institution of grand juries one of the best possible institutions for criminal jurisprudence; on the contrary, he thought that an officer like the public prosecutor in Scotland . . . would be a far better institution. You must either have grand juries or a public prosecutor."

Two members spoke for the motion, a Mr. Warburton and a Mr. Wakelay. The latter is reported as saying:

"Every man in England, who paid the slightest attention to the subject, knew that the grand jury was a species of Star Chamber, which served the purpose of screening the magistracy."

The motion lost, 25 to 196.

In this same year, a century ago, the following reasons were given for abolishment. The grand jurors are never agreed as to whether they are trying the case or ascertaining if it is fit to be tried. If it were really useful, it would meet oftener and discharge persons wrongfully committed and in custody. The members do not know what questions to ask the witnesses. It takes responsibility off the committing magistrate. In the afternoon bills are disposed of hastily so that members may reach their homes.

There was a special demand growing for the abolition of the grand jury in London. In 1838 a committee of the Corporation of London said that they entertained "a strong opinion as to the inutility of Grand Juries." Bills were introduced into Parliament to accomplish this in 1846, 1849, 1852, and 1857, but all were overcome by passive resistance. A select committee of Parliament examined this question in 1849. One of the witnesses favoring abolition was John Clark, Clerk of Old Bailey, who stressed the cost and inconvenience.⁴ Another witness was Francis Bennock, a London merchant who had served on several grand juries. He said:

"You have all sorts of irrelevant and ridiculous questions asked. Every grand jury is composed of men of all ages; and I always find that the young men are exceedingly full of a virtuous desire to do justice. . . . Then I find, also, that there are some men of middle age, who often look upon the grand jury as a kind of a pleasant recreation. . . . From the manner in which witnesses are sometimes examined, that is evidently the case . . . if there is a particularly interesting witness of a prepossessing appearance, she will be called and recalled until their ingenuity for suggesting questions is exhausted. . . . Other classes of cases are still more painful, and that is where questions are put for the purpose of satisfying a prurient curiosity. . . . But, of course, when gentlemen get together of all sorts, of every mind and taste, you cannot restrain those things."

G. A. a'Beckett's "The Comic Blackstone" appeared in 1846, and he did not overlook the grand jury system. He said:

"An indictment must always be presented on oath by a grand jury,

⁴ In considering the question of cost, it should be borne in mind that grand jurors in England never received any pay for their services.

whose grandeur is generally explained to them in a charge from the judge, who says—'Gentlemen, you are a very ancient body; you are as old as King Ethelred,' but if they were told they were as old as Methuselah, they would be just as wise.⁵

"The grand jury then hear the evidence, which they generally get at by asking twenty questions at once, mistaking the beadle for the witness, and examining the door-keeper every now and then, by way of change. If they think the accusation groundless, they write on the bill 'not found'; but they used formerly to indorse it with the word *ignoramus*, which has been discontinued on account of its seeming to refer less to the bill than to themselves. . . ."

Writings Pro and Con

During the period around 1850, much continued to be written against the system. "Justice of the Peace" on Feb. 5, 1842, said:

"The grand jury in no way forms a vital part of (trial by jury). . . . It is in no way necessary for the due protection of the subject, and is in itself, at the present day, more of an excrescence than a necessary appendage to this species of trial."

In 1842 appeared the first edition of W. C. Humphrey's important booklet entitled "Observations on the Inutility of Grand Juries." He said that all that was necessary in the way of preliminary inquiry was done by a magistrate, and that the grand jury was no benefit to the public. In the preface to his second edition in 1857, he said that the grand jury "still remains a useless, nay, a mischievous—incubus on the Criminal Justice of the Country."

Woodford Ffooks published a tract in 1849 called "Remarks on the Subject of Grand Juries." He said they were—

"no practical benefit, but rather the fruitful source of expense, inconvenience and corruption. . . . It is not unfrequently found that magistrates commit, especially when they have an independent or extrajudicial knowledge of the accused, upon proof the most incomplete, and merely sufficient to warrant some suspicion, trusting to the Grand Jury, in case the evidence is not strengthened in the interval, to throw out the bill."

"The Law Times," on April 21, 1849, said that "the general inutility of the grand jury system had been most fully exposed by competent and experienced writers, and by the testimony of every

⁵ Shakespeare wrote, "They have been grand-jurymen since before Noah was a sailor," and some, with more justice say the grand jury existed under King Ethelred (978-1016), when it was ordained that "a gemôt be held in every wapentake."

one who has been in contact with the practical working of the system." It continued to point out that supporters of the system possess "some confused knowledge that the grand jury is part and parcel of 'our glorious constitution,' without knowing why or wherefore." On July 11, 1849, an editorial in "The Times" said:

"The grand jury is a relic of another condition of society, and of a method of administering justice now entirely reformed."

One cannot withhold a smile when reading W. Campbell Sleigh's pamphlet, written in 1852, urging abolition in London. He wrote:

"People forget they are living in the middle of the 19th century. . . . It might well be termed, not the grand jury, but the grand impediment."

The earlier writers placed the most emphasis on the evil that could result from a secret tribunal such as the grand jury. By this time, the emphasis was being placed not so much on the evil as on the inutility of the system.

The grand jury was not without its champions. In 1850, Graham Willmore wrote a treatise in its defense, saying that it extended the intelligence of the people by letting them have a part in the administration of criminal law. Another was written in 1852 by "A Member of the Middle Temple," who described the bill to abolish grand juries in London as the work of—

"impatient, rash, and exacting law reformers, rather than the matured and deliberate measure of a conservative government. We oppose it as an imposture, as an insidious and dishonest bill. . . . The occasional political convulsions by which nations are visited, equally point out to the lovers of constitutional freedom to take warning."

William Forsyth's "History of Trial by Jury" appeared in 1852. He concluded that in London, where there were stipendiary magistrates, grand juries were unnecessary. But he thought the system should be retained in the counties where the leading men "are called to take their part in the great judicial drama, and see justice administered in the purest and most enlightened form."

The testimony given before the Royal Commission on Criminal Law as shown by the eighth report in 1845 included twenty-two witnesses who spoke for the system and thirty against. However, the commissioners made no recommendation as to the grand jury. The following are bits of testimony from various witnesses:

"They show the humble classes that the first people of the county take an interest in the administration of justice."

"The leading men of the county would be deprived of the benefit of the judge's charge."

"The uprooting of this ancient institution would inflict a deeper wound on public feeling than would be justified by the inconvenience which it sometimes occasions."

"It has continued beyond the period when it was possibly a safeguard, or thought to be so, by the public."

"The only arguments which can be urged in favour of the grand jury system are, first, that it has been established for many years; and, secondly, that it is popular with the country gentlemen."

A colorful tribute was paid to the grand jury in a paper read before the Judicial Society in 1858, by T. Chambers, Common Sergeant. He said:

"The stream of justice is not only more picturesque, but more useful and more fresh and wholesome, when it winds, perhaps slowly, between devious but natural banks, than when it rushes through professional and official conduits, where it not only loses a grace, but contracts a hardness."⁶

Steps Toward Abolition

Two interesting features of the struggle continued throughout the years. One was the action of grand juries themselves resolving one way or the other on their own existence. Thus, in 1846, the Middlesex grand jury on ten different occasions passed resolutions against the system. In one, they said they "feel it a duty they owe, not only to themselves but to the Court, to offer a respectful representation of their utter uselessness."

The other was the practice of judges, recorders, and chairmen of expressing their views on the subject while charging the grand jury. Relative to this, "Punch" in 1853 said:

"Any philosopher who wished for an example of the emptiness of grandeur, and its unsatisfactory effect upon the grand themselves, need look no further than the Grand Jury of Middlesex. This venerable body never assembles without being lectured on its 'extreme antiquity' and its 'utter uselessness,' its 'respectability,' and its 'superfluousness'; in fine upon its having attained to such a good old age, as to be no good at all."

The "Birmingham Daily Post" in 1872, although it favored abolition, thought the judges were going a little too far. It said:

⁶ "The Law Times," Feb. 5, 1859.

"The Recorder of Birmingham, in his charge the other day, made the usual remarks about the uselessness of grand juries. . . . It is unpleasant enough to have to sit in a stuffy room for two or three days, against one's will, and it certainly does not render the infliction more tolerable to be penned up in a box, and be publicly told that one is incompetent and useless, and out of date, and in the way—nothing more in fact, than a sort of antiquated machine, less ornamental than a barrister's wig, and less useful and important than the wheeziest of 'criers of the Court'."

We don't know what effect this had on the Recorder, but in 1873, a Birmingham grand jury resolved that the system was "superfluous and unsatisfactory, relating as it does to a state of society long since vanished and gone."

The passing of the Vexatious Indictments Act in 1859 was another step towards abolition. It provided that no bill for perjury, conspiracy, false pretenses, keeping a gambling or disorderly house, or any indecent assault could be presented to a grand jury unless there had been a committal by a magistrate.

In 1867 it was enacted that if a defendant was acquitted who had been indicted without a previous committal, the court could order the person prosecuting to pay the defendant's costs. An unsuccessful attempt was made in 1879 to pass a bill which did away with the necessity of grand jury indictments in all cases not punishable by death or penal servitude.

The system was further crippled in 1908 when a statute was placed on the books requiring five days' notice of intention to present a charge to a grand jury, where there had been no previous committal. It was also provided that where no one had been committed for trial and no notice of voluntary bill given within five days of the time for meeting, notice was to be sent to the grand jurors not to attend.

F. W. Maitland wrote in 1885 that the grand jury system seemed necessary as long as preliminary examination before a magistrate was not essential in every case.⁷ Another great legal historian, Sir Frederick Pollock, writing in 1900, was somewhat stronger for the system. He said:

"Sometimes it is asked, what is the use of a grand jury nowadays? The question ought, perhaps, rather to be whether the saving of a little trouble and expense would be an adequate compensation for abolishing a dignified and at the worst harmless function which has been part of

⁷ Quoted in "Law Journal," May 3, 1872.

⁸ "Justice and Police," page 139.

the machinery of justice in England for more than eight centuries.”⁹

The historians Sydney and Beatrice Webb wrote in 1906 that the grand jury had been reduced “almost to insignificance.”¹⁰

Certain judges continued to speak for the system, as evidenced by a letter in “The Times” on July 18, 1891:

“How devoutly it is to be wished that the blessed day may come soon, and that common sense may prevail. . . . Pedantry will not fail to dish up some sort of argument for the continual usefulness of a grand jury; but common sense says loudly ‘No!’ even though judges here and there may join in the chorus of admiration for this old-fashioned paladium of the liberty of the subject, which represents now only the waste of time, the waste of labour, and the waste of money.”

It is seldom that a writer discusses the feelings of a member of a grand jury, such as John Galsworthy does in “The English Review” for March, 1912. He wrote:

“I wondered . . . whether they had the same curious sensation that I was feeling, of doing something illegitimate, which I had not been born to do, together with a sense of self-importance, a sort of unholy interest in thus dealing with the lives of my fellow men. And slowly, watching them, I came to the conclusion that I need not wonder. All—with the exception perhaps of two, a painter and a Jew—looked such good citizens. I became gradually sure that they were not troubled with the lap and wash of speculation; undogged by any devastating sense of unity; pure of doubt, and undefiled by an uneasy conscience.”

The Royal Commission on Delay in the King’s Bench Division, under the chairmanship of Viscount St. Aldwyn, made a study of the question and in their report in 1913 recommended that the grand jury be discontinued. They felt that “it had outlived the circumstances amongst which it sprang and developed, that it is little more than a historically interesting survival, and not an essential safeguard of innocence, and further, that it uselessly puts the country to considerable expense and numerous persons to great inconvenience.”

In the testimony before the commission, we find it said that grand jurors were of special value at assizes because of the opportunity of hearing the charge of the judge. Another view on this point was expressed by E. A. Parry in his book entitled “The Law and the Poor,” published in 1914. He said, speaking of the danger of a judge making irrelevant statements when summing up before a trial jury:

⁹ “Harvard Law Review,” 13:177.

¹⁰ “English Local Government, the Parish and the County,” page 449.

"This human habit of irrelevancy is the constitutional reason for maintaining the grand jury. For centuries the King's Bench judges have worked off their natural irrelevancy in charging the grand juries at the assize towns to the great benefit of themselves and the local papers. This natural safeguard, this barrier between irrelevancy and the public at large, should not be removed in a careless spirit. Our forefathers knew a thing or two. The grand jury is really a sound instrument of constitutional mechanics. It is the safety valve for the blowing off of judicial steam."¹¹

Buried Alive

Early in 1917 a bill was introduced in the House of Commons to suspend grand juries during the war. On moving the second reading, Sir Frederick Smith said that it was simply a war measure, although he personally favored abolition altogether. Mr. Swift MacNeill, speaking against the bill, said that if it carried, it meant "an end of the old grand jury system in England." The bill passed the Commons on February 19 without a division.

In the House of Lords, Lord Parmoor said that he would support the bill only as a war measure. He termed the grand jury "a pure form of criminal administration," and a protection to a number of innocent people. The Marquis of Salisbury, following him, said, "I have been trying to cudgel my memory, and I cannot recall in the whole of my experience that the grand jury was ever of any use." The measure passed the Lords on March 15, and April 2, 1917, found the English grand jury buried alive. "Justice of the Peace" had the following comment on May 26:

"Whether, now that the first plunge has been taken to dispense with the grand jury, it will revive in all its ancient lustre, and, as some think, superfluity, remains to be seen."

Another blow was received by the system, then still in suspension, by the Administration of Justice Act of 1920. It provided that if the accused pleaded guilty or admitted the truth of the charge before the magistrate, notice of this fact was to be sent to the clerk of the court. Upon presentation of this certificate, the grand jury was forthwith to return a true bill on the charge, without hearing any witnesses. It would seem that there was not a great deal left of Blackstone's "palladium" after this statute went into effect.

¹¹ In 1925 the Lord Chief Justice declined to charge a grand jury. "Justice of the Peace," on Nov. 7, 1925, said, "Lord Hewart has struck a shrewd blow at one of the favorite arguments for its retention. . . . Moreover, the charge to the Grand Jury is no original part of the system. It is simply a practice that has grown up, no legal historians can say how or when."

Starting in 1919, there was much discussion as to whether or not grand juries should be restored when the war was officially ended. On October 24, 1921, "The Times" said the reasons for opposing restoration were:

1. That the Grand Jury no longer serves its original purpose—that of a public prosecutor.

2. That the preliminary investigation of crime is now conducted by a more satisfactory authority, namely the magistrate.

3. That any malicious person has a right to appear before a Grand Jury and prefer a bill of indictment for felony against an absolutely innocent man without any preliminary inquiry.

4. That an innocent man is not necessarily protected by a Grand Jury, as only the witnesses for the prosecution are called before that tribunal.

5. That the grand jury system entails on Imperial and local funds and on individuals expense and inconvenience quite disproportionate to its theoretical advantages."

On October 29, 1921, "The Law Journal" said that the balance of authority was for abolition. But on December 3, it carried the opinions of fourteen leaders among the legal profession, seven being for restoration, six opposed, and one for restoration at assizes only. The Committee on Alterations in Criminal Procedure reported in 1921 as follows:

"The utility of the Grand Jury is largely discounted in the present day by reason of the very careful preliminary investigation before Justices."

On December 13, 1921, it was decided by an order in council that the Grand Jury Suspension Act would cease to have effect on December 23, 1921. The main reason for restoration was the strong opinions expressed by many judges, especially in favor of grand juries at assizes.¹²

Let us see what happened when grand juries started meeting again in January, 1922. During this month, a cursory examination discloses seventeen judges, recorders, and chairmen who favored abolition in their charges, four who favored abolition at quarter sessions, and ten who were against abolition. It also discloses twenty grand juries passing resolutions for abolition.

At one quarter sessions, the Recorder in his charge said he feared the grand jury might follow the example of others by pass-

¹² One English advocate explained to the writer that the judges liked the pomp and ceremony attached to the meeting of the grand jury at assizes.

ing a resolution in favor of abolition. So he praised the system. The grand jury did not wish to snub the learned Recorder. They passed a resolution in favor of abolition, but added that it was no longer necessary because of the high character and competence of judges and recorders.

There were numerous published comments. "The Law Times" on January 7, 1922, referred to the system as an "obsolete method of wasting time and money." A letter in "The Times" on January 11, 1922, gave as one reason for grand juries the opportunity it afforded of "partaking of the High Sheriff's hospitality."

A different note was struck in an article in "The Times" on January 9, 1922, written by "One of His Majesty's Judges." It said that the grand jury was the "only and the uncontrolled accusing authority." It pointed out that the only purpose of the grand jury was not to revise the committals of magistrates. It said that the question was whether for general purposes any other satisfactory accusing authority could be found.¹³

Abolition

In 1923 a bill was introduced in the House of Lords by the Lord Chancellor (Viscount Cave, Conservative) providing, among other things, for the abolition of grand juries at quarter sessions but not at assizes. He stated that no harm had been done during the war, but they should be retained at assizes because of the charge of the High Court Judge and the general graver character of cases. Viscount Haldane hoped that the grand jury would soon be abolished at assizes also, saying, "I know that a majority of the Judges pleaded for its retention, but we of the law are notoriously very conservative people." Lord Parmoor made a strong plea for retention, and said he could see no difference between the situation at assizes and quarter sessions. He said, "I believe it is a great constitutional safeguard . . . It popularizes our system of criminal jurisprudence . . . Above all, and I think this is most important, it convinces a great mass of people that every precaution is taken under our system in order to ensure, if possible, that an innocent man is not convicted."

¹³ It is interesting to note the lack of emphasis on this point. The investigative power of the grand jury is considered quite important here, but little reference to this feature was found in England.

The reader should keep in mind the fact that in England there is no public prosecutor, similar to a state's attorney or district attorney.

After passing the House of Lords, the Solicitor General (Sir Thomas Inskip, Conservative) moved that the bill be read a second time in the House of Commons. He said:

"On this side of the House we might be supposed to be so thoroughly conservative as to maintain the Grand Jury system, which has been of great historical interest for everybody connected with the legal profession."

Mr. Foot said that although everyone recognized that it was a "very interesting historical remnant," yet it was outgrown. Mr. Cassels, making his first speech, said:

"With regard to grand juries, eminent judges will always differ—in fact, in their retirement they generally spend their leisure hours in writing letters to 'The Times,' either attacking or defending the system. . . . As far as I understand the argument in favour of grand juries, apart from the fact that they happen to be a bulwark of the Constitution, it is that they enable eminent and respectable county gentlemen to meet together on certain occasions, and discuss the affairs of the county. Incidentally, they have an opportunity of seeing how justice should be administered. Incidentally, too, they return all true bills, and very, very occasionally throw bills out."

The measure was sent to a Standing Committee, but went no further due to the general election of that year. In 1924, under the first Labour Government, a similar bill was introduced. Although it quickly passed the House of Lords, it again died in the House of Commons due to the dissolution.

It was in 1923 that an amusing incident occurred at a quarter sessions. When the grand jury finished its duties, the Recorder told them they were no doubt "proud and pleased to do a little, as a Grand Jury, of service for their country." To which the foreman replied that they thought it was just a waste of time.

The Conservative Government introduced in the House of Commons a similar measure known as the Criminal Justice Bill of 1925. On the motion for second reading, Sir Henry Slessor (Labour) said that he was "one of those old-fashioned persons who very much regret this decision . . . I do not suffer from the Bolshevik desire of the Gentlemen on the Front Bench opposite to destroy all these ancient, venerable and useful institutions."

At the report stage on November 16, 1925, a motion was made by Sir Henry Slessor to strike out the clause abolishing grand juries at quarter sessions. He said:

"Are people not as much entitled to a proper consideration of their case now as they were one hundred years ago? . . . Even the grand jury in those days was so moved by Mr. Erskine's passionate appeals that they threw out the government prosecution and saved the freedom of the subject and the freedom of opinion in this country."

At this point the Attorney General reminded the Member that Mr. Erskine spoke to trial jurors, and the grand jury had nothing to do with the incident referred to. Then Sir H. Nield, arguing for the grand jury, said:

"Over and over again cases have been committed which ought not to have been. You had an astonishing illustration when Major Shepherd's bill was thrown out at the London Session. But for that he would have been sent before a petty jury, and who knows what his fate might have been?"

Whereupon the Attorney General pointed out that the case against Major Shepherd never got as far as a grand jury.

Foreseeing difficulty, the Government left the clause to the unfettered decision of the Commons. The vote was 184 to 149 in favor of eliminating the clause abolishing grand juries at quarter sessions. "Justice of the Peace" commented on the result as follows:

"There was a steady chanting of the refrain, 'Let us not abolish a safeguard.' It is remarkable with what consistency learned lawyers ignored legal history. The idea that the grand jury was devised by the wisdom of our ancestors as a safeguard can only be described as fantastic. Its function was, and still is, supposed to be that of an accuser not a protector."

The following editorial comment appeared in "The Times":

"These are revolutionary times in the law, but they are not times in which any political party desires to see the State jeopardize the freedom of its subjects by ill-considered legislation. . . . There are not many persons who can say that grand juries do not play an important part in seeing that justice is done."

The House of Lords amended the bill so that as enacted it provided that where the only cases committed to quarter sessions were cases where the accused had admitted his guilt, the grand jury need not meet. The indictments in such cases were to be signed and presented by the clerk of the court.

The years from 1925 through 1930 were comparatively quiet ones, but in 1931 the fight began to pick up again, as seen in the comments of judges and the resolutions of grand juries. The de-

pression was the important factor in reviving the subject. The Chairman of the London Sessions suggested that grand juries might be suspended during the financial emergency just as during the war. A true prophecy was made in "Justice of the Peace" on November 26, 1932. It said:

"As a piece of legal mechanism the grand jury loses ground steadily. It is time it went out of commission. Go it will, in one of our periodical fits of economy."

In December, 1932, the Lord Chancellor, Viscount Sankey, appointed a committee to consider the business of courts, including the question of retaining grand juries. An interim report was made on February 24, 1933, recommending their abolishment. The end was at hand. A correspondent to "The Times" on July 5, 1933, summed up the situation as follows:

"Fleet Street, the Strand, and the Temple have decided that a Grand Jury is an anachronism, a superfluity, a formality, a useless vestigial remnant, a third and paralysed arm of the law, a fifth wheel on the legal coach, and we are about to be abolished in the name of efficiency."

Professor W. S. Holdsworth, in a letter to "The Times" on July 13, 1933, fired the last heavy gun in defense of the grand jury. He wrote:

"Ever since 1681, when the Ignoramus of a grand jury saved Lord Shaftesbury from a trial for treason, it is clear that the grand jury is capable of being a real safeguard for the liberties of the subject. These liberties need safeguards even more today than they did in 1681, because bureaucrats of Whitehall who dominate the Cabinet which in turn dominates the House of Commons, have established a more effectual and a more oppressive tyranny than the Stuarts ever succeeded in establishing. We cannot in these days afford to lose one of our few remaining securities for freedom of speech and action."¹⁴

The Administration of Justice (Miscellaneous Provisions) Bill, providing among other things for the abolition of the grand jury, was introduced in the House of Lords in 1933. In 1925 the sentimental attachment for the grand jury had outweighed the desire

¹⁴ After reading this article in his morning paper, a high court judge was all set to defend the system in his charge to the grand jury meeting that day. He urged the members not to be indifferent to "some of the landmarks of our Constitution which were designed to secure the liberty of the subject." Following this charge, the grand jury made a presentment against abolition. The writer talked with a member of this grand jury, and was informed that this by no means represented the unanimous feelings of the members, but they did not want to hurt the judge's feelings.

for economy and efficiency. It might have been expected that even with the necessity for economy in 1933, a strong fight would have been put up. The interesting point is that the grand jury succumbed in Parliament without a semblance of a struggle.

Moving the second reading of the bill, the Lord Chancellor said:

"The ship of law . . . wants cleaning. Over and above that some of the machinery, very useful in its time, has become obsolete . . . It only adds to the burden without increasing the efficiency . . . All it provides is that when a bench of magistrates has solemnly declared on sworn evidence, that there is a *prima facie* case against the person charged, he shall be put upon his trial—a trial which, as your Lordships know full well, is a model of fairness to all the world."

Lord Darling, famous as a jurist and a wit, said:

"Anyone, I think, who has a liking for old things, must regret to see them go, but one can hardly help recognizing that they have survived for a long time any real utility. When they were first made part of the law of the land . . . there were no magistrates . . . There was an inquiry before all the wise men of the country, of whom there must have been a great number in olden days, and if they agreed that a person should be put upon his trial, or should be destroyed and afterwards tried, that happened to him."

None of the Lords spoke in opposition at any stage and the bill was passed on June 22 and sent to the Commons. There on June 28 the Attorney General, Sir Thomas Inskip, moved that it be read a second time. He said:

"We all recognize that in this practical age we cannot afford to pay too high a price for sentiment . . . The conclusion is that grand juries are not serving any really useful purpose and are at the same time very expensive."

The Opposition agreed with the Government that "this archaic procedure has ceased to have any reality in modern days." Only one member of the Commons spoke against the provision, the Marquess of Hartington, who said:

"Suppose it came to pass that we had in this country a Fascist Government which created a whole mass of new offenses—such as holding views disrespectful of the Government . . . (In such case) the grand jury might be a very constitutional safeguard and prove of immense value."

No further argument was made at any point, and the bill passed the House of Commons on July 18. The last grand jury met August

29, 1933, at the London Sessions, and on September 1 the system ended.

A letter to "The Times" on this date provided the eulogy, from the pen of St. John Hutchinson, who wrote:

"The words of the greatest literary figure that ever addressed a Grand Jury might serve to speak the eulogy over the dead. Henry Fielding, charging the Grand Jury at the Sessions of the Peace for the City and Liberty of Westminster on June 29, 1749, said:—'And if juries in general be so very signal a blessing to this nation as Fortescue thinks it . . . what, gentlemen, shall we say of the institution of Grand Juries, by which an Englishman, so far from being convicted, cannot be even tried, not even put upon his trial in any capital case, at the suit of the Crown; . . . till twelve men at least have said on their oaths, that there is a probable cause for his accusation? Surely we may in a kind of rapture cry out with Fortescue speaking of the second jury, "Who then can unjustly die in England for any criminal offense?"'"

Conclusion

Very little has since been written on the subject of the grand jury. Roland Burrows K. C. has an excellent summary in "The Law Quarterly Review" for January, 1935. He wrote:

"It is to be regretted that the abolition of this ancient institution was effected on a plea of economy, as it cost comparatively little . . . It should have been abolished, if at all, on its merits. At the same time, the reform in procedure on committal in 1848 and the separation of the functions of police and justices of the peace had in the result shown that grand juries had outlived their usefulness."

The following is from Kenny's "Outline of Criminal Law" published in 1936:

"The grand jury was established in order to multiply accusations of crime, but its function by a curious inversion became that of diminishing accusations . . . The function of the grand jury came to be to do badly what was done well."

On January 30, 1937, "Justice of the Peace" carried an editorial comment on the situation in the United States:

"We took a long time to perform the necessary operation ourselves, so we must not be critical of other communities for delay, though it is an odd fact that more antiquated English legal procedure survives in America than here."