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The Grand Jury and Self-Incrimination

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with an abandonment of the twin solecism involved in repealing bad law by overruling bad decisions.

(4) The courts should restrict themselves in the preparation of written opinions to a succinct statement of the grounds upon which the ultimate judgment or decree is intended to be rested. By an adherence to this principle, not only would the courts be removed from the temptation to write too much, but they would also be enabled to decide cases more expeditiously, and therefore, with greater satisfaction to the litigant, if not to the lawyer, who represents him.

If the judges in administering justice between litigants would recognize these principles, which I sincerely believe to be written into the constitution, or necessarily implied therein, there would be little or no occasion for any discussion of the recall of judicial decisions and none for the recall of judges, except in case of actual corruption.

THE GRAND JURY AND SELF-INCRIMINATION

The functions of a grand jury have come down to us almost unimpaired. There is no branch of the court machinery which in its present day form antedates it. We are told by Wilkins in his history of the laws of the Anglo-Saxons that it existed at the time of Ethelred. As administered by the Saxons it consisted of twelve men, **Seniores thani,** as they were called, who were directed, under their oaths to accuse no innocent man nor to permit any criminal to escape. Brocton, an early English commentator, is authority for the statement that at the time of Henry III., it was the practice of the courts to have four Knights for every hundred, who elected twelve other Knights, "free and lawful men," thus increasing the number to sixteen. Towards the close of the reign of Edward III., in addition to the inquest for the honored, the sheriff, by statute, was required to return a panel for the whole county, which was called le **graunde inquest,** from which is derived the term grand jury."

Even at these remote beginnings the grand jurors were instructed that presentments, or indictments, were to be returned in every instance where the evidence presented gave reasonable grounds for suspecting a crime or an offense had been committed, it being the practise to let the accused present his side of the case at the trial as is done today. Under the English procedure some one was appointed by the court to swear all witnesses who testified at a grand jury hearing, the practise of permitting the foreman of the jury to administer this oath not having obtained.

To such an extent has the grand jury become an integral part of the administration of justice among the English speaking races, that the creation of such a body by the organic law of a State is seldom found. The Constitution of Kentucky creates no such body but its existence as a part of the criminal administration by the courts, is recognized by a provision which fixes the number of the panel at twelve instead of sixteen, as formerly. In England, at present the grand jury, for all practical purposes is a mere farce. Its scope has never been extended as it has in this country, where its power both in the Federal and State courts, are almost unabridged. Not only may it present felonies, misdemeanors, treason, and all penal offenses, but it may indict for nuisance public and private; misfeasance and malfeasance in office, malpractice, the violations of all statutes punishable by fine, and has supervision, at the same time, over the public roads, public institutions, such as the jails, reformatories, asylumns, and penitentiaries.

Out of the fact that a grand jury panel has always been recognized as a purely inquisitorial body, that it is not a trial body, but merely a court of inquest, has caused much discussion and contrariety of opinion concerning the privilege of witnesses who testify before it, and how far a witness may be compelled to give testimony that would tend to criminate himself. The English courts have guarded with zealous care the rights of a witness, where he might divulge that which would expose himself to a criminal prosecution. As far back as William the Conqueror there may be traced a constitutional protection against self-incrimination. And curiously enough the question was largely the outgrowth of a contest between the courts of the common law and the church, and the political and ecclesiastical issues that disturbed England during the period of the dictatorial Stuarts. During the Anglo-Saxon period the bishops of the church sat as judges and heard suits in the civil courts. All this was abolished by the Conqueror, who directed the bishops to decide their questions according to the ecclesiastical law, the result being in a double court. The struggle between the State and church between the time of Henry II. and Henry VIII., a period of some four hundred years, concerning the rights of jurisdiction over laymen, as between the civil and church courts, if they accomplished nothing more, led up to a clear and distinct development of the rights of the individual against self-incrimination. Under the oath administered in a church trial the accused was put through a sort of inquisitorial process which compelled the witness to "make true answers to all things which should be asked of him." But the courts of law, throughout the whose discussion never lost sight of the distinctive fact that there

must be a presentment, a quitam, or grand jury proceeding, and in these proceedings the evidence in support of the presentment must be furnished by accusing witnesses and not by the accused. This entire controversy, however, was ended by the statutes of Elizabeth and James, which limited the jurisdiction of the ecclesiastical courts to "matters matrimonial and testamentary," thus removing the hazard of self-incrimination under oath from the church courts, and restoring the right of self-protection to all hearings in the legal courts. This question, which it took centuries in England to determine, has never been the subject of dispute in this country. The powers and duties of grand juries, ingrafted into our system by the Constitution, are, generally speaking, such as were possessed by grand juries at the common law, that is making return of indictments or presentments found on the testimony of accusing witnesses, that is witnesses for the State, or upon facts within the knowledge of the individual members of the grand jury. The legislative bodies of our country have in a number of instances attempted to create organizations, with inquisitorial powers, such as Commerce Commissions, Railroad Commissions, and public utilities commissions of various kinds, but these have found no favor in the courts. Indeed our system of law does not contemplate the theory of general inquisitorial power in a grand jury, the theory of our criminal proceeding on the contrary, like that of Great Britian, being accusatory rather than inquisitorial, (United States vs. James, 60 Fed., 257.) And against a witness being compelled to give incriminating testimony there is a Constitutional guaranty, and a broad construction in favor of this right, in the absence of immunity statutes, has always been given by the courts. Under our procedure there need be no definite charge before a grand jury can proceed, but against incriminating himself in giving testimony before a grand jury investigation, the witness has always been protected.

It is provided by Article 5, of the Amendments to the Constitution that "no person shall be compelled in any criminal case to be a witness against himself." Some difference of opinion concerning the use of the term "criminal case," as distinguishing a trial from a grand jury investigation has arisen, but the courts have generally construed the language of the amendment to include any judicial hearing. Discussing this subject Justice Brown, in Hall vs. Henkel, 201 U. S., 67, explains the purposes of this Amendment:

"The object of the amendment (5th) is to establish in express language and upon a firm basis the general principle of English and American jurisprudence, that no one shall be compelled to give

testimony which may expose him to prosecution for crime. It is not declared that he may not be compelled to testify to facts which may impair his reputation for probity, or even tend to disgrace him, but the line is drawn at testimony which may expose him to prosecution. If the testimony relate to criminal acts long since past, and against the prosecution of which the statute of limitations has run, or for which he has already received a pardon, or is guaranteed an immunity, the amendment does not apply."

The foregoing case was an appeal from a final order of the Circuit Court of the United States, for the Southern District of New York, dismissing a writ of habeas corpus, and remanding the petitioner to the custody of the marshal. The proceeding originated in a subpoena duces tecum directing the petitioner to appear in court "to testify and give evidence" in an action brought under the Sherman anti-trust act. The witness appeared before the grand jury in obedience to the subpoena, but before being sworn demanded to know the nature of the investigation, whether under any statute of the United States and the specific charge, if any had been made. The grand jury informed him that there was no specific charge against any one, but the witness declined to produce the books and papers designated in the subpoena, and declined to testify himself, because, among other reasons, his answers might incriminate him. These facts being reported to the judge of the court the witness was held to be in contempt, and committed to the custody of the marshal.

By Act of Congress, passed in 1903, it was provided that "no person shall be prosecuted or be subject to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts," meaning the anti-trust acts.

In determining whether by the terms of the Amendment its provisions included a grand jury hearing, Justice Brown in this same case, said:

"While there may be some doubt whether the examination of a witness before a grand jury is a suit or prosecution we have no doubt that it is a "proceeding" within the meaning of the proviso. The word should receive as wide a construction as is necessary to protect the witness in his disclosures, whenever such disclosures are made in pursuance of a judicial inquiry, whether such inquiry be instituted by a grand jury, or upon the trial of an indictment found by them.

The word "proceeding" is not a technical one, and is aptly used by the courts to designate an inquiry before a grand jury."

It may be said, by this decision, all doubt concerning the self-incriminating provision of the 5th amendment, applies as well to a hearing before a grand jury as it does to a hearing on an indictment found by a grand jury. But it may be said the introduction of the 5th amendment applies only where the witness is asked to incriminate himself, that is, give testimony which might expose him to a criminal charge, and where there exists an immunity statute, which gives the witness absolute protection, he can, by the processes of the court, be punished for contempt if he refuse to testify at a grand jury hearing. This question was fully discussed and determined in Brown vs. Walker, 161 U. S., 591.

Determined then by the present statutes of the law, it may be said that the Constitutional interdiction is an absolute protection to the witness from giving testimony before any judicial tribunal which would criminate him, but that no witness could refuse to testify where there was a statutory immunity.

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THE INCOME TAX

The Act of Congress, providing for a Federal Income Tax became a law on October 3rd, 1913. It imposes an assessment of 1 per cent per annum, known as the normal tax, upon the entire net income arising or accruing from all sources in the preceding Calendar year to:

(1) Every citizen of the United States, whether residing at home or abroad.

(2) Every person residing in the United States, though not a citizen thereof.

The normal tax of 1 per cent per annum is levied upon the entire net income, not exceeding the sum of $20,000 per annum. A further assessment, known as the additional tax, is levied upon net incomes exceeding $20,000, as follows:—On amounts of income from $20,000 to $50,000—1 per cent additional tax; from $50,000 to $75,000 2 per cent; from $75,000 to $100,000—3 per cent; from $100,000 to $250,000—4 per cent; from $250,000 to $500,000—5 per cent; and 6 per cent upon all income exceeding $500,000.

The Income Tax law allows certain exemptions and deductions. Section C., provides: