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CRIMINAL LAW AND PROCEDURE

By Col. J. G. Freeze.

The criminal code and precedure in Pennsylvania are the outgrowth of a commission, authorized by a Resolution of the General Assembly of the 19th of April 1858, page 523, "to collect all the statutes relating to the Penal Laws of the Commonwealth, to arrange the same systematically under proper titles, to suggest improvements, to designate such as ought to be repealed, and to prepare and submit new statutes, which seem to be advisable or necessary, for the consideration of the Legislature."

Under the Resolution, the Governor appointed as commissioners to report upon the subject, Edward King, John C. Knox, and David Webster, who made a report to the Legislature, dated January 4th, 1860 and accompanied by a codification and system of Criminal law which was adopted by the Legislature, and signed by the Governor, March 31, 1860. Under that code and its various amendments and additions, we have continued nearly fifty years and there is a strong feeling among lawyers, that a revision of that revision is highly necessary. It is not my purpose to take up and deal with that question, except incidentally, but to give a brief historical resume of the criminal law as we have it, and its derivation and growth from and out of the law of England.

It was, among our English Ancestry, a growth from mere savagery, when the rule was, "Let those take who have the power, and let those keep who can," that there began to be a right of property; and while men took such as was unappropriated, possession being nine points of the law, the rule that might was right, ceased to exist. But for many years that was a rule only among the common people as to themselves. The ruling classes held the common people as serfs and their property as legitimate plunder, which they had the power to take and the power to hold.

For the protection and establishment of the liberties of the people, the writ of Habeas Corpus was the greatest safeguard to these liberties. Its origin is lost in antiquity, but it was well known to the Common law, which is or was, a body of unwritten law, and was in use even before Magna Charta, which dates from June 19th, 1215, in the reign of King John, and is the most ancient written law of the land.

The Habeas Corpus Act of 31 Charles II, (27 May 1679) provides the great remedy for the violation of personal liberty. The full title of the Act is "Habeas Corpus and subjeciendum" "That you have the body to answer." It is a writ of right. It is designed to give the person in confinement, or who is restrained of his liberty, an immediate opportunity to test the question of law involved in his imprisonment, or restraint.

Thus under Magna Charta of 1215 and Habeas Corpus of 1679, the personal rights and liberties of the subject were ordinarlly well secured and protected. But the King or some of his powerful Lords and Barons, occasionally thought that the rights and liberties of the subject were too carefully guarded, and therefore when some person, obnoxious to the King or to the Baron, was to be gotten out of the way, he was arrested and imprisoned; and as he was likely to be discharged or bailed under Habeas Corpus proceedings, the King issued a writ of Oyer and Terminer which was sent into the county where the obnoxious gentleman was confined, to try him. You observe this was the King's writ—

not by or under any law of the realm— and he appointed the Judges who held the Oyer and Terminer and jail delivery. These judges were sent to hear and condemn, and generally did so. A few examples of such writs extracted from "A History of the Criminal law of England" by Sir Fitz James Stephen, Vol. I, page 107, will show what these courts were.

The first express mention of them is in Statute 13 Edward I. Chap. 29, (A. D. 1285), which statute is in these words: "A writ of trespass, to hear and determine, from henceforth shall not be granted before any justices except justices of either bench and justices in eyre, unless it be for a heinous trespass where it is necessary to provide speedy remedy, and our Lord the King of his special grace hath thought it good to be granted." This of course implies that the practice had previously been different. The exception made in the Statute left in existence, if it did not introduce great abuses. This appears from a petition in the Parliament Rolls of 1315—thirty years after the statute.

The petition says: "Great evils and oppressions against law are done to many people by granting commissions of Oyer and Terminer, more lightly or commonly than is proper, against the Common law, for when a great lord or powerful man wishes to injure another, he falsely accuses him of a trespass, or maintains some one else on whom he"(his enemy)" has trespassed, and purchases commissions of Oyer and Terminer to people favourable to himself and hostile to the other side, who will be ready to do whatever he pleases, and will fix a day of which the other side will either receive no notice from the Sheriff and his bailiffs (who are procured to take part in the fraud,) or else such short notice that he cannot attend; and so he is greviously amersed, namely, lbs. 20, or 20 marcs, or lbs. 10, at the will of the Plaintiff: and then he has another day appointed him in some upland, inconvenient village in which his adversary is so powerful that the defendant dares not go there for danger of his life, and can have no counsel for fear of the same power- And thus he is fined three or four times the value of his chattels, that is to say, a common man, 26 lbs for a day, or 100 marcs or 40 pounds, more or less according as the plaintiff is urgent." "And if the defendant keeps his day, he will either receive bodily harm, or he will have to agree to do more than is in his power, or a jury from distant parts will be procured which knows nothing of the trespass, by which the defendant will be convicted of the trespass, though he may not be guilty, and the damage taxed at the will of his adversary, that is to say for a trespass for which 20 pence would be enough, at 200 lbs, 400 lbs, sometimes 1000 marcs, and if the party convicted is caught, he will be imprisoned, and remain there until he has paid every penny, or until he agrees to sell his land; or until his friends pay, if he is ever to get out. And if he cannot be taken he will be put in exigent and exiled for ever."(by being outlawed."

And this from a petition to Parliament to have the Writs and Commissions abolished.

No wonder that in the Pennsylvania Constitution of 1791, the Declaration of Rights provided, that no commission of Oyer and Terminer should ever be issued. And it was repeated in the Constitution of 1838, and in that of 1874.

The powers and duties of the Criminal courts as they exist at present are regulated by the Constitution of 1874 Art. 5, Sec. 1—in these words:

"The judicial power of this Commonwealth, shall be vested in a Supreme Court, Common Pleas, Courts of Oyer and Terminer and General Jail Delivery, Courts of Quarter Sessions of the Peace, Orphans' Courts, Magistrates Courts, and in such other courts as the General Assembly may from time to time establish."

And by section 9 of the same Article: "Judges of the Courts of Common Pleas, learned in the law, shall be judges of the Courts of Oyer and Terminer, Quarter Sessions of the Peace and General Jail Delivery, and the Orphans' Court, and within their respective districts, shall be Justices of the Peace as to Criminal matters."

As to the words "Learned in the law," they are construed in the case of O'Mara vs. The Commonwealth, 75 Pa. 430.

So, while we have Courts of Oyer and Terminer issued, but the same Judges who hold the Common Pleas hold the other Courts, any two of them, the President being one, constitute the court.

But an important part of that court are the Jurors—Grand and Petit.

The Grand Jury seems to have grown out of the coustitution of Clarendon, 10 Henry II A. D. 1164, by which, in case of suspicions against persons whom none wished or dared to accuse, authorized the sheriff, being required thereto by the Bishop, to swear twelve men of the neighborhood or village, to declare the truth. They were persons who knew the facts and declared the truth. From this beginning the Grand Jury grew up; the steps and processes are unknown, but the twelve men grew to twenty-four, and from being persons who knew the truth, they learn it from witnesses who testify before them and whose testimony is inviolable.

The present Pennsylvania Grand Jury seems to be cumbersome and unwieldy; it is unworkable and unduly expensive. It is composed of not less than twelve nor more than twenty-four, and if twenty-four answer to the call, one of them is discharged, although twelve of the twenty-four men can find a true bill. The twelve who say "No" if the twenty-four were left on, cannot overpower the twelve who say "Yea"—but notwithstanding, one must go. However, in many of the United States, either by constitution or by statute, there has come to be a great difference in the number required for a Grand Jury.

My researches into the subject enable me to present the following facts which are a little curious and quite instructive, upon the question of making some statutory changes in the criminal practice and proceedings and personnel, in Pennsylvania.

In Indiana, Illinois, Iowa, Nebraska, Oregon and Colorado, the constitution gives the legislature authority to make laws dispensing with a grand jury in any case. And in Alabama and Mississippi there is provision for other process in criminal cases. In Nebraska, the legislature may provide for holding persons to answer for criminal offenses on the information of a public prosecutor. In Oregon seven men are drawn from the body of jurors in attendance, and sworn as Grand Jurors. In Utah the law is the same. In South Dakota, not less than six nor more than eight. In Idaho, sixteen. In Washington not less than six nor more than seventeen. In North Dakota not less than sixteen nor more than twenty-three. In California nineteen, New Mexico twenty-one. In several states seven, but five can find a bill; in others twelve, but nine can find a bill. In Virginia nine to twelve; seven find a bill; in Florida twelve to fifteen, eight can find a bill; in Indiana six, five can find a bill.

It is clear that there is no magic in the number 23 for a grand jury, with 12 to find a bill. The variations prove that the younger states are progressing and that the Common low rule is cumbrous and ought to be abandoned. I am of opinion that a Grand Jury ought to be called, and I am also of the opinion that the number seven is sufficient for a Grand Jury. Certainly the present number is expensive and cumbrous; and as a true bill merely requires the defendant to be put upon trial, it is less dangerous when seven find a bill, than it would be when twelve out of twenty-three find one. At any rate it is a question for legislative consideration.

Along this line the legislature of the state, at its last session, passed an Act providing that in certain cases, defendants may enter pleas of "guilty" and be sentenced forthwith, without a bill of indictment being presented to a grand jury. There is, as it seems to me, altogether too much delay and fuss and feathers about the administration of the criminal law, with respect to minor offenses.

Prompt justice, whether it be acquittal or conviction, is most economical; and it is a deterrent from wrong doing. The District Attorney ought not only see to it that no guilty man escapes, but also that no innocent man is imprisoned or held under restraint. The condition of public manners and morals requires and demands prompt punishment, and the maximum that can be imposed.

The truth is, there is no substantial or satisfactory reason why any criminal charge should go before a Grand Jury, certainly none below a felony. If the investigation has any effect at all, it is against the prisoner, because the finding of the Grand Jury is the opinion of at least twelve men, that the accused is sufficiently guilty to be put on trial. But the case can be as well prepared and tried, and can be as well prepared and defended, without the intervention of a Grand Jury, as it can after that most ponderous body of gentlemen has sat upon it.

I am making no attack upon the organization called the Grand Jury. It is an important and necessary help to the court, and to the citizens of the county in many matters relating to the expenditure of money, and the general management of county affairs. But as a part and parcel of the criminal court, the Grand Jury is a back number.

It is very evident from the facts presented in these few remarks, that fifty years of the present Criminal Procedure Legislation has shown that it can be greatly simplified, and made much less expensive to the county and much more speedy and certain in the punishment of offenses. As for example: Last year the Grand Jurors were paid, by County Statement $925.-49. Twelve would reduce the amount one-half, and seven or nine would cut off another large sum.

Hoarding of enormous sums of money in gold by foreign-born miners and saloon keepers in Schuylkill county has been disclosed by investigation by bank officials. Of the sums of money received from foreigners for liquor licenses, all was in gold. Mine officials state that the hoarders are men ignorant of banking customs and privileges.

AUDITOR'S NOTICE.

Estate of Asa Yorks, Deceased.

Notice is hereby given that the undersigned, appointed an Auditor by the Orphans' Court of Columbia county, on exceptions to the second and final account of Asa Yorks, late of said county, deceased; and also to make distribution of the estate in the hands of his Executors, will sit to perform the duties of his appointment, at his office in the town of Bloomsburg, on Thursday, February 20th, 1908, at 10 o'clock in the forenoon, when and where all persons having claims against the estate, or interest therein, must appear and present the same, or be forever debarred from coming in on the said fund.

JOHN G. FREEZE,
Auditor.

Fred Ikeler, Att'y for Executors.
A. L. Fritz for the Heirs.
Wm. Chrisman for Exceptions. 1-16-ta