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For the Volunteer.

FAREWELL.

My heart is troubled I confess—
It doth with anguish dwell,
To leave the friend I now possess,
And bid with her farewell.

My heart is fill'd with serious grief,
Where shall I go to dwell—
There's none but thee can give relief
With whom I bid farewell.

Tho days of absence now draw nigh,
In vain do I repel—
It brings from me the throbbing sigh,
To bid my *love* farewell.

How shall I the pangs endure,
How long in absence dwell—
When shall I be with *thee* sweet one,
No more to bid *Farewell.*

ROMULOUS.

Mechanicsburg, Aug. 30.

TRIALS AT HARRISBURG.

Opinion of the Court, delivered by Judge Porter, on quashing the Indictment preferred by the mis-called Grand Jury.

Independent of the objections to the selection and return of the jurors, which will be considered by themselves, there have been several objections urged against the indictment itself, and the manner in which it has found its way into this court.

As it regards the absence of the attorney general's name; if it ought to be there, and the bill has been properly introduced to the grand jury and found by them, the court would direct his name to be inserted, as a mere matter of form.

As it regards the objection that the indictment contains a charge of a conspiracy to commit a riot as well as the charge of actually committing the riot, and that these offences cannot be joined in one indictment, the court do not think that this is a valid objection. It is true the doctrine contended for, has the highly respectable authority of chief justice Parsons, in the case of the Commonwealth *vs* Kingsbury, 5 Mass 106 to sustain it. But according to the practice in the criminal courts of Pennsylvania, such is not held to be the law here. With us, as in England, the court think it will be found that this doctrine is confined to cases of felonies: such too was the decision of the supreme court of New York in the case of the People *vs.* Mather, 4 Wendell 265, in which an indictment containing a count for a misdemeanor as well as a count for a conspiracy to commit it, was held good.

The remaining objection growing out of the manner in which the indictment found its way into court remains to be considered.

By an act of assembly passed on the 28th day of March, 1805, it is provided, that "*in all cases where one or more persons have committed an indictable offence the names of all concerned (if a prosecution shall be commenced) shall be contained in one bill of indictment; for which not more costs shall be allowed than if the name of one person only were contained therein.*" This act is only making *imperative*, a principle, which the court, in exercising a sound legal discertion, and having a due regard to the rights of individuals, would have enforced without it. In civil cases, where separate suits are brought on a number of bonds between the same parties, the court order the actions to be consolidated, and in every instance it is their duty to prevent the abuse of the process of the court, as well as its proceedings. But there is no need of vindicating statutory provisions where the express enactments of the legislature are found. They are obligatary on the court and must be observed.—The only inquiry here is, whether the case comes within the statute. Let us examine the facts. In December 1838, commencing about the 6th of that month and extending on for several days, on the complaint or affidavit of Charles B. Penrose, Thos. H. Burrowes, Thaddeus Stevens, Geo. M. Philips, Geo. Bergner, John P. Rutherford, George V. Hall, and sundry other witnesses, made before or produced to Calvin Blythe, Esq., then president judge of this judicial district, a number of persons were bound over for their appearance at January sessions and oyer & terminer, 1839, to answer to charges relative to the disturbances on the 4th of December last, at which sessions a bill of indictment was preferred to the grand inquest, against Charles Pray, John J. M'Cahen, John W. Ryan, John Savage, Joseph Hall, Aaron F. Cox, George W. Barton, John Snyder, Martin Dunlap, James Black, George Sanderson and E. J. Penniman which was found a true bill as to all the defendants, except George Sanderson and E. J. Penniman, and as to them not true. Of the *eleven* persons thus indicted, seven only, to wit: George W. Barton, John Savage, John J. M'Cahen, Joseph Hall, Charles Pray, John W. Ryan, and Aaron F. Cox, were bound over with surety for their appearance at the next April Court. The indictment in question charged the defendants therein named jointly, together with others unknown, with having conspired to commit and actually committing a riot, &c. in the Senate Chamber on the 4th of December last.

At the same sessions the witnesses for the Commonwealth to the number of twenty were recognized for their appearance at April sessions, 1839. At April sessions a motion to quash the indictment was successfully made on the ground of defect in the process or venire for summoning the jury for January sessions, and the seven defendants who had been bound over to April sessions were on the 19th of April, 1839, again recognized with security for their appearance at the present sessions, and sixteen witnesses for the Commonwealth were also bound over. At the present sessions, on the 21st day of the present month Mr. J. A. Fisher, on behalf of the prosecutors, asked the court to direct the attorney general to affix his name to an indictment for conspiracy and riot &c. in the Senate Chamber on the 4th of December last, which he proposed to send up against Charles Pray, John J. M'Cahen and Aaron F. Cox, omitting the defendants then and now held under recognizance to answer at this Court for participating in the same offence. The Court distinctly asked the counsel for the prosecution, if it was intended also to indict or prosecute the other persons charged with having been concerned in the same transactions. To this at first no answer was given. On the question being repeated, it was said they did, as soon as they saw fit and obtained evidence to identify them. But no evidence was offered to the Court to show that such evidence was not here, or could not be had at this time.—The attorney general stated, that from his own knowledge of their testimony, the witnesses in attendance would identify other persons who were said to be implicated, besides those named, which statement was not denied by the counsel for the prosecutors.—The Court, after hearing the argument of the counsel decided, that the prosecutors must include in one bill of indictment all the persons under recognizance to answer, which it was their intention to prosecute, and that they would not direct the attorney general to sign the bill, nor would they permit it to be sent to the grand jury against the three, unless the persons conducting the prosecution would consent to the entry of a *nolle prosequi* against those not intended to be named in the bill. This they declined to do. The persons composing the grand jury were in Court and heard this decision of the Court. They heard the Court say, that the attorney general was in the strict line of duty and that this conduct received the approbation of the Court. They then retired to their room to attend to the remaining business which was legally before them, and there *somehow*, but in what manner is yet unexplained to the Court, except that it was not by the consent of the attorney general or the Court, this very bill of indictment which the Court had decided could not according to law be legally sent up to them, did get before them, and Ner Middlewarth, Charles B. Penrose, Thomas H. Burrowes, Thaddeus Stevens, George M. Philips, Geo. Bergner, Daniel Eckles, M. Ritner, H. H. Etter, John Strohm, George J. Gross, Geo. Y. Hall, Abraham Miller and John Harper, as appears by their return, were examined as witnesses by them, and they then returned to the Court this same paper as a presentment or indictment, endorsing it 'a true bill,' having signed it by their foreman, Joseph Wallace, Esq. Subsequently they handed into Court a paper signed by all the eighteen grand jurors, called a presentment, relative to the conduct of Ovid F. Johnson, attorney general of the Commonwealth of Pennsylvania, which it is only material here to notice as stating "that the witnesses examined before them fully prove that the said Charles Pray, John J. M'Cahen and Aaron F. Cox, together with a great many other individuals to the number of one hundred and more did commit the crime and outrage charged upon them in that bill," and also stating, that they were in Court and heard what there transpired, when the Court approved of the course taken by the attorney general and refused to permit the bill of indictment, in the shape in which it then stood, to go before them. And yet it has been urged that the Court has no judicial knowledge on the subject of these transactions.—We have on the records of the Court the following entry in relation to the matter:

"Commonwealth *vs.* Charles Pray, John J. M'Cahen and Aaron F. Cox," "August 21, 1839. Mr. J. A. Fisher, moved the Court to direct the attorney general to sign a bill of indictment to be sent to the grand jury against the three defendants named, or, to permit him on behalf of the persons prosecuting to use the attorney general's name in so sending the bill to the grand jury, alleging that the attorney general had refused to sign or send the bill to the grand jury. And the attorney general having stated his reasons for so refusing, that other persons implicated in the same transaction and who are now under recognizance to answer with the defendants named for the same offences with which they are charged, who are not named in the bill proposed to be sent. He declines signing or sending such bill to the grand jury unless the names of all whom it is intended to prosecute for the same offence are included. The Court deem the attorney general's reasons sufficient and refuse to direct the attorney general to sign the bill or permit it to be sent to the grand jury unless all the names are included or a *nolle prosequi* be entered as to those who are not named in the bill."

And we have, independent of all recollection on the subject, and the written opinion of the Court filed, this presentment of the grand jury themselves, setting forth the facts before stated.

The Court on the fullest reflection are satisfied that they were right in the decision which they made in regard to this matter; that the bill was improperly introduced before the grand jury, and as improperly acted upon by them. The Court has the power of controlling the course of their proceedings, and it is right they should have it. The errors of the Court can be revised and corrected, by a higher tribunal which would not be the case were the mode of conducting the business of the Court committed to a body like the grand jury, whose erroneous proceedings could not be corrected at all, if the Court in which they sit and of which they are a constituent part, when in the line of their duty, have not the power to do it. On this ground then alone, independent of any other exceptions the Court is bound by every principle of law and justice, by every regard to the order and system necessary in conducting the business of the Court, as well by the positive provisions of an act of assembly which entends to and governs the case, to quash this indictment.

But there are other exceptions which being made and urged, the Court are bound to notice and decide.

From the first settlement of Pennsylvania up to the 29th of March, 1805, the Sheriffs of the different counties selected the jurors as well for the 'grand inquest,' as for the trial of issues. It is true, that by the act of 1789, the Sheriff was required to take an oath to make his selections with impartiality, and it is equally true that in very many instances the oath was disregarded and the jurors were selected by a system of favoritism that deserved scarcely a milder appellation than *packing*. So flagrant had this system become, in relation to the political opinions of jurors, and so constantly, in certain counties, were political prejudices brought into the jury box, that public confidence in the system then in operation was lost; for it was found that political prejudices and opinions with jurors, were often paramount to their oaths, which required them to decide causes according to the evidence. The act of 20th March, 1805 (4th Smith's laws 237) was passed as an experiment, to test the possibility of remedying the evil, and was originally limited in its operation to three years, and thence to the sitting of the next general assembly. The provisions of this act are mainly in accordance with those of the act of 1854, now in force, so far as regards the mode of selecting and drawing jurors.

By this act of April 4, 1807, the assessors of the several townships, or districts, &c. were required to return the names of the white male citizens to the County Commissioners, who were to deposite the names of the persons so returned in the proper jury wheel, in proportion to the numbers requisite for each; whence they were to be drawn, as jurors should be required, and to make a new return triennially or oftener if the names were sooner exhausted.

By the act of 4th April, 1809, the above provisions of the act of 1807 are repealed, and the original act of 1805 is made perpetual, and with the remaining sections of the act of 1807, left in force, and certain supplements not affecting the general provisions of the law, continued in force until supplied by the act of 14th of April, 1834, which prescribes an entire system, according to which, all juries are to be selected by the sheriff and commissioners, and summoned and returned to their respective courts "*and not otherwise.*" [Sec. LXXIX, Purdon 563.]

It follows then, if the jurors have been selected, summoned and returned, "*otherwise*" than is provided in that act, any party objecting thereto, can successfully challenge the array, or if he has not pleaded, can quash an indictment found by a grand jury so irregularly selected, summoned or returned. It also follows, that if either corrupt partiality or prejudice shall have operated upon the minds of the sheriff and commissioners in making the selection, or that, with a view to the opertaion of political feeling upon verdicts, in cases in which political feelings may be naturally supposed to operate, an undue pre-ponderance has been given to any political party in the selection, then a challenge to the array will be sustained, or the indictment quashed, although all the *forms* of law have been observed in making the selection and return, Because it is well known, that it was to prevent these very things that the present mode of selecting jurors was adopted, instead of the former one, and courts are bound to give the proper effect to the intention of the legislature in passing statutes.

It appears to the court in the present case that the following irregularities, occurred in making the selection of jurors for the service of the year 1839.

I. The act of assembly requires that the sheriff and commissioners, under the oath, which it prescribes, shall every year select from the taxable inhabitants a *sufficient number* of sober, intelligent judicious persons to serve as jurors of the several courts of such counties for the ensuing year, and that *sufficient number* is to be so regulated, that at the end of the year there shall remain in each wheel as near as may be the number of names requisite to compose the panels of jurors for one court at least, and *not any greater number.* (See Sections LXXXV and LXXXIX.)

Here 950 was agreed upon as about the requisite number. It appears that 1300 or 1400 were selected by the sheriff and commissioners, and then some 400 of the jurors whose names were actually on the ballots folded up, were drawn out of the number selected, not from the wheel, but from heaps on a table into which the names in the respective townships were thrown, where all the ballots were exposed to view, when part were removed and the balance only were deposited in the jury wheel. This is not the mode of selection which the act directs. The sheriff and commissioners are to pass judgment on each person in making the selection, and not submit it to lot, and especially to a lot so objectionably conducted.

II. The sheriff and commissioners are required to make the selection *themselves*, and to write or cause to be written the name, surname and addition or occupation and place of abode of each one of the persons selected, and to roll up or fold the slips, &c. and deposite them in the wheel, &c.

It appears here, that the sheriff and commissioners were engaged from the 6th to the 8th of December, 1838, in making the selection. That when they had completed the selection they directed their clerk, Henry Peffer, to write out the names, additions and places of abode of the jurors on slips. That Mr. Peffer, with the assistance of Mr. Aaron Bombaugh, between that time and the 19th of the same month, wrote off the names on the slips, and that the sheriff and commissioners without examining them by comparison with the list selected, proceeded to fold up the slips, and having removed what they considered the supernumerary names as before mentioned, deposited the remaining slips folded up, in the jury wheel. There is some controtriety in the evidence as to whether the sheriff and commissioners knew of the intended employment of Mr. Bombaugh to assist Mr. Peffer, which, however, the court think immaterial, as when the work was done, the fact of a part of it having been done by him, at Mr. Peffer's request, was made known to the sheriff and commissioners, and no objection was made to it. The irregularities here committed were these: That the names not being copied in the presence of the commissioners, but in a part at the dwellings of the persons employed, the sheriff and commissioners should have carefully compared them before they proceeded to roll up the slips, and deposite them in the wheels. It is true that both Mr. Peffer and Mr. Bombaugh say that they intended to copy them correctly and think that they did, but they say they did not compare them because they thought the sheriff and commissioners would.

III. The act of assembly requires, (Sec. LXXXIII) that every of the said wheels shall be provided with a *sufficient* lock and key. The wheel shall remain and be in the custody of the commissioners of the respective county, and the keys thereof in the custody of the sheriff of the same county. And again (sec. XC) as soon as the selection of jurors, and the depositing of their names in the wheel, as aforesaid shall be completed, the sheriff shall cause the same to be locked and *secured by sealing wax*, and thereon the said sheriff and commissioners shall *impress distinctly their respective seals.*

Here it appears that the lock used on the wheel is one of the small old fashioned iron spring saddlebag locks, which is easily opened, by almost any key. The sheriff having three keys which will open it, and which he received from his predecessor. When locked, sealing wax has been put on the joints of the lid, upon which the commissioners or their clerk have made two impressions with the office seal of the commissioner's office. This seal is kept in a drawer in the commissioner's office, to which, of course, the commissioners and their clerk have constant access. There has never been impressed upon the sealing wax used, the *respective seals*, to wit: the private seals of the sheriff and each of the commissioners. The act intended that the wheel should be so kept that the greatest possible security would be afforded against its being opened. As it was to remain in the custody of the commissioners, it requires that in addition to their own individual seals, it should have impressed upon it the individual seal of the sheriff, so that if opened and the seals broken, without the sheriff's knowledge, the violence could be at once discovered. This security is not afforded when the seal used is only the office seal of the commissioners, the impression from which on wax, could at any time be supplied, without the sheriff's knowledge or consent. Hereafter the sheriff and commissioners should be more particular in complying with the directions of the act, and ought also to procure a more secure lock.

IV. Exception is also taken to the interference of Henry Peffer the clerk, in the selection of the jurors, by adding names to the number selected by the sheriff and commissioners. There is a discrepancy in the evidence, as to the *time*, when the dispute occurred about selecting Mr. Clarke's name. Sheriff Cochran and Col. Whitley speak of it as having occurred on the 19th of December, when the names were put in the wheel, and say that Mr. Peffer suggested his name along with that of three other gentlemen in Middle Paxton township, and had written them down on slips. Mr. Peffer and Mr. Hummel say, that Mr. Hummel marked Mr. Clarke's name before the selection was concluded on the 8th December; but they all agree that Mr. Peffer had written down and produced the names of the other three gentlemen, when they met on the 19th; and it would appear that one of their names, according to Mr. Peffer's testimony, was put in by the Sheriff without the knowledge of the commissioners, and the name of the other one according to Col. Whitley's testimony, got into the box without the consent of either himself or the Sheriff. The Sheriff, Col. Whitley, Mr. Peffer, and Mr. Hummel, also disagree as to whether there was or was not an implied assent on the part of the Sheriff to put Mr. Clarke's name in.

The selection of the jurors clearly ought to be made by the Sheriff and Commissioners. They are sworn, the clerk is not, and although perhaps, he might often suggest good names to them, it would be better, to say the least of it, in order to avoid censure and suspicion that the clerk should not interfere; more especially, in times of high political excitement, when he is an active partizan.

V. There is another irregularity in drawing the jurors, which, although not made a specific ground of exception, the court will notice, as it affords an opportunity of interfering with the names of the persons drawn, in a manner not warranted by the act of assembly. Henry Peffer, the clerk of the commissioners, says in his testimony, when endeavoring to account for the fact that at the end of the year 1838, there was but twenty ballots in the wheel, more than sufficient to compose the panels of Jurors for one court, that "in drawing out the jurors there are sometimes names drawn out which are destroyed, such as those who may have died or removed, or the names of post masters and mail contractors, not liable to serve on juries, and incompetent persons whose names may have been inadvertantly put into the wheel, and that more than one hundred tickets were destroyed that year." This practice might lead to gross abuses and ought not to be tolerated, further than as regards those who have died or removed. The judgment of the Sheriff and Commissioners, as to the competency and qualifications of Jurors, is to be passed at the time of their selection, not at the time of their names being drawn out of the wheel.

There is another exception, to the consideration of which we proceed with pain, but not with any hesitation as to meeting and deciding it. We mean so much of the exception as charges, by inference at least a combination to pack the jury; or, at all events, such a political preponderance of the