"HOW SAY YOU?" A REVIEW OF THE MOVEMENT FOR ABOLISHING THE GRAND JURY SYSTEM IN CANADA

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Trieste

"HOW SAY YOU?"

A Review of the Movement for Abolishing the

Grand Jury System

IN CANADA

BY

JOHN ALEXANDER KAINS

OF OSGOODE HALL, BARRISTER-AT-LAW

THE JOURNAL, ST. THOMAS
1893

TO THE HONORABLE

Sir John Joseph Caldwell Abbott, K. C. M. G.

AND

TO THE HONORABLE

Sir John S. D. Thompson, K. C. M. G.

The Premier and Minister of Justice, respectively, of the Dominion of Canada,

THIS COMPILATION

—IS—

In recognition of their distinguished talents and ability, respectfully inscribed.

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PREFACE.

THE question of the abolition of the Grand Jury system in Canada, which, for a considerable period, had received more or less attention from the Bench and from the public and legal press, acquired about three years ago fresh impetus, when the Honorable Senator Gowan, in his place in Parliament, inquired, among other things, if the Government had under consideration the propriety of submitting a measure looking to a change in the system, and substituting therefor one similar to that prevailing in Scotland.

The result of this inquiry, and the action of the Government thereon, subsequently appeared in the form of a blue book containing the opinions of the Canadian judges and some others, which I have quoted largely from in the following pages.

Since the issue of this blue book the press has referred to the question at length; with singular unanimity still pressing for the abolition of the system. As, however, there was considerable divergence of opinion among the judges, the Honorable the Minister of Justice in introducing, this year, his measure codifying the criminal law of the Dominion (although personally in favor of the change) did not appear to see his way clear to include therein the desired reform, and the matter remains, therefore, as it was.

I find that a good deal of misapprehension exists in the minds of the general public on the subject of abolishing the grand jury. It is thought by many, who appear to have imbibed the belief either from the charges of the judges or in some other unaccountable way, that the grand jury is to be abrogated pure and simple; when they are informed that, while it is proposed to do this, the idea is at the same time to furnish a satisfactory substitute for it, they appear to be perfectly satisfied and profess themselves to be anxious for the change.

The judges and the press having discussed the subject, and the matter having reached its present stage, it may well be urged that the public, that large body of laymen who are chiefly concerned in this matter, should be informed of the position of affairs in order that they may be able to form an intelligent opinion. Many of these being practical men are quite competent to pronounce upon the subject; particularly may this be said of the more intelligent of those who have served, or are eligible to serve, upon grand juries, and of those who are in the commission of the peace.

In addressing myself to this large, influential and intelligent body I may be permitted to refer:

(a.) To the unanimity of the press, both Conservative and Reform, in favor of the change.

(b.) To the vast number of cases in all the Provinces of the Dominion which are now speedily, cheaply and satisfactorily disposed of without the intervention of the grand jury.

(c.) To the position taken by the Government and Legislature of Ontario in reducing the number of grand jurors to thirteen, as shewing that public sentiment, at least in that Province, is not in favor of continuing the present costly system.

(d.) To the large body of judges, of great experience, who are opposed to the old system, and who advocate a new and improved one.

(e.) To the serious objections urged by men of ability against the grand jury.

(f.) To the limited field of labor now occupied by the system as compared with former years, owing to comparatively recent legislation.

(g.) To the fact that the reasons for maintaining the grand jury have long since passed away with the decadence of the powers of the Crown and with the appointment of independent judges.

(h.) And to the further fact that the meanest subject need not fear, under our system of government, the frown of the rich and powerful, while on the other hand the wealthiest cannot purchase immunity from deserved punishment.

The subject is one of extreme consequence, and may be considered as having now entered upon a stage, which, at an early day, will be a final one.

In the following pages the writer has endeavored to review the question within reasonable compass, having regard, however, to such completeness as the data at his command will permit. He is well aware that very much more might be said upon the subject. The most that he can hope for will be that he shall have created in the minds of his readers a desire for further information about a matter which will be found as interesting as it is important.

Being very mistrustful of his powers, he would be more diffident, were it not that he has the feeling that he is doing little else than collate the opinions of the many eminent men whose remarks will be found herein.

St. Thomas, Ontario, November, 1892.

The Beginning of the End.

" Not in vain the distance beacons, Forward, Forward, let us range,
Let the great world spin for ever down the ringing grooves of change."
—TENNYSON.

In considering the question of the expediency of abolishing the functions of the Grand Jury in relation to the administration of criminal justice in Canada, it would not be particularly profitable (even if space permitted) to inquire at any length into the origin and early history of the system, or to do more than very briefly refer to the signal services it performed in early times, when kingly oppression and judicial tyranny prevailed in England. An examination into these matters would no doubt be interesting from an historical or archæological point of view, but would answer no useful purpose here, owing to the gradual constitutional curtailment of the powers of the Crown and to the great changes effected by modern legislation. I may, however, say, *en passant*, that the question is often asked, "What is the origin of the very remarkable and characteristic system of trial by jury?" Some popular histories regard the institution as the work of the great and good King Alfred, but doubt is thrown upon this as having no well-grounded historical foundation. In the history of early Anglo-Saxon times may be found that which was undoubtedly the foundation of a tribunal somewhat similar in principle to our Grand Jury.

In criminal cases the twelve senior thegns, according to the ordinance of Ethelred II., were sworn in the county court, that they would accuse no innocent man and acquit no guilty one. These twelve men were a jury of presentment or accusation, like the Grand Jury of later times; and the absolute guilt or innocence of those accused by them had to be determined by subsequent proceedings, viz.: by compurgation or the ordeal. Whether this is the actual origin of the Grand Jury or not, the Assizes of Clarendon and Northampton established the criminal jury on a definite basis. By the Articles of Visitation of 1194 four knights were to be chosen from the county, who, by their oath, were to select two lawful knights of each hundred or wapenstake—or if knights were wanting, free and legal men—so that the twelve might answer for all matters within the hundred, including all the pleas of the Crown, the trial of malefactors and their receivers, etc. This is the historical Grand Jury.

Those desirous of informing themselves more fully on these ancient and very interesting branches of the subject, may find what they wish in the pages of Bracton, Fleta, Blackstone, Lord Hale, and other early writers, and, in more modern times, in Forsyth's History of Trial by Jury, Hawkins' Pleas of the Crown, Hill on Repression of Crime, Freeman's Norman Conquest, Stubbs' Constitutional History, and in the works of other writers.

Suffice it here to repeat that the institution of the Grand Jury is of great antiquity. It will be found that its great rights and privileges were recognised and secured by Magna Charta, and that in dark and perilous times it stood manfully to its ancient and sturdy traditions, and to the oath which enjoined upon its members that no one should be left unpresented from fear, favor or affection or hope of reward.

That in early days it was, as its friends maintain, the palladium and bulwark of English liberty, cannot be questioned, and if the Crown now possessed the arbitrary powers of those star-chamber times, it would, in the present day,

be as unwise as it would then have been to advocate the abolition of the system.

As, however, the Crown has been shorn of many of its ancient prerogatives and privileges, including the luxury of abusing the liberty of the subject, the propriety of abolishing the Grand Jury may safely be advocated as a step in the direction of simplifying the practice and procedure in courts of justice, and as being otherwise in accordance with the spirit of the age.

It is quite manifest that the liberty of the subject will never again be imperilled by the encroachments of the Crown, or by the tyranny of the Bench, and, while it may be still necessary to have some check on the magistracy in matters involving the liberty of individuals, it does not follow that no other tribunal but the ancient grand inquest is available for the purpose. With the protection afforded by the intervention of a competent, safe and satisfactory substitute for the Grand Jury, and with the assistance of the courts, which even now are constantly called upon to exercise supervision over the decisions of the Justices of the Peace, no fear need be apprehended in this respect.

In France, Italy and many other European countries, in our own North-West Territories, and in some of the States of the American Union, the system does not prevail.

In Scotland, also, there is no Grand Jury, the duty of investigating and bringing to trial in that country being assigned to a public prosecutor, styled the Lord High Advocate, under whom an officer bearing the extraordinary name of Procurator-Fiscal is appointed for each local district. The business of this latter official is to take the initiative in the prosecution of crimes, and, there being no coroner's investigations in Scotland, he also performs the duties usually assigned to the coroner in Canada.

In the following pages it will be observed that I have collected the opinions of a large number of persons who share the belief that this Scotch system, in a modified form to suit a younger country, might safely, and with great advantage to the public, be adopted in this Dominion.

In England, in modern times, the Grand Jury has often been objected to as a superfluous step in the prosecution of criminal offences, and many eminent judges, such as Lords Brougham,* Denman, Chelmsford and others have been very outspoken in condemnation of the system.

Some years ago it was proposed to abolish its functions in cases which had already been before a magistrate possessing similar powers, but, like many another ancient law which has survived its usefulness, it has been found as yet

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*This celebrated judge and law reformer, in a letter to his friend, the Procureur-General of France, expressed himself as follows: "I confine myself for the present to the office of public accuser, a necessary institution in every state, which we entirely want in England. . . . It seems incredible that in a civilized country in which the principles of jurisprudence have been so profoundly examined . . . . . an anomaly as glaring in its machinery as leaving to chance the execution of the criminal law should have continued down to the present day. You will scarcely believe that when a man has been the victim, either in his person or his property, of any crime or misdemeanor, the prosecution, the preferring of the accusation, should not be the duty of any public functionary. The individual who has already suffered from the consequence of the offence, is bound by the magistrate to become the public accuser. He has already suffered much; it is not sufficient; he must bring to justice those who have inflicted this suffering upon him. Hence springs a host of inconveniences too long to enumerate, of which I shall cite but one, and that will be enough. Nothing is more frequent than