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## Is the Grand Jury Necessary?

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## VIRGINIA SECTION

### IS THE GRAND JURY NECESSARY?

JAMES P. WHYTE\*

A number of decisions of Virginia's Supreme Court of Appeals have forcibly stated that the statutory provision<sup>1</sup> requiring felonies to be prosecuted only on the basis of an indictment returned by a grand jury is not a constitutional requirement, and that such prosecution could, if the General Assembly so provided, be on the basis of an information, presentment, or even a bill of particulars.<sup>2</sup> This being the case, and the Virginia constitution providing only that one accused of a crime has the right to demand the cause and nature of his offense,<sup>3</sup> an inquiry into the desirability of prosecuting felonies in Virginia by means other than grand jury indictment is desirable.

At the outset, there exists strong sentiment among the Commonwealth's Attorneys for the use of the information as an equal alternative to the grand jury.<sup>4</sup> This fact removes the present inquiry from the realm of the wholly

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1. VA. CODE ANN. § 19-136 (1950).

2. See, e.g., *Waller v. Commonwealth*, 178 Va. 294, 16 S.E.2d 808 (1941); *Farewell v. Commonwealth*, 167 Va. 475, 189 S.E. 321 (1937); *Pine v. Commonwealth*, 121 Va. 812, 93 S.E. 652 (1917).

3. VA. CONST. art. I, § 8; See *Boyd v. Commonwealth*, 156 Va. 934, 157 S.E. 546 (1931); *Andrews v. Commonwealth*, 135 Va. 451, 115 S.E. 558 (1923).

4. This statement is made on the basis of a survey recently conducted by the author. A questionnaire was sent to each of Virginia's commonwealth's attorneys, asking: (1) Would you favor the use of the information as an equal alternative to the grand jury? (2) Would you like to abolish the grand jury system as it now exists? (3) If in favor of the information system, would you include as a feature thereof a preliminary examination before a judicial officer? "Information" in these questions was defined as an accusatory instrument, the same in substance as an indictment, but filed by the prosecutor without the sanction of the grand jury. In addition, each prosecutor was asked to enumerate the advantages and disadvantages of the grand jury system as they appeared to him.

Of 121 questionnaires sent out, thirty-nine were returned; of these twenty-six stated they were in favor of the information as an equal alternative to the grand jury, as opposed to thirteen not in favor. Ten said they would like to abolish the grand jury

academic, and casts upon it the strong necessity for consideration of practical factors. Nonetheless, many of the practical factors have their origins in the history of the grand jury, having matured with the growth of the grand jury as an accusatory process. Therefore, in order to fully appreciate the question of the necessity of the grand jury it will be helpful to trace its historical development. Upon this background, a consideration of the advantages and disadvantages of prosecution by indictment as opposed to prosecution by information will be of greater significance.

#### DEVELOPMENT OF THE ENGLISH GRAND JURY

The grand jury as known today is chiefly an accusatory instrument; its indictment carries no presumption of guilt, but is merely a means of informing the accused of the crime with which he is charged.<sup>5</sup> This, however, was not always the case. In earlier times and other civilizations accusatory methods were intermingled with trial processes, so that ancient "grand juries" often performed the dual function of accusation and trial. Greece, at the height of her early civilization, utilized *Dicasteries*, popular judicial-like tribunals picked from lists of citizens whose duty it was to accuse, try, and convict those alleged to have committed crimes.<sup>6</sup> Roman procedure made use of like bodies called *Judices*; and Norwegian, Danish, and Swedish *Langretomen* performed similar functions.<sup>7</sup> Similar continental procedures were used in the British Province during the days of the early Roman Empire (43 A.D. to circa 500 A.D.). In public prosecutions, the accused was brought before an *Eirenarcha*, similar to a justice of the peace, who held a preliminary investigation, probably with the aid of torture, and then committed the accused to prison to await trial.<sup>8</sup> In substance this may have resembled a "one-man grand jury," being akin to accusation by information utilizing a preliminary hearing.

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as it now exists as opposed to twenty-seven answering in the negative. Of those favoring use of the information as an equal alternative to the grand jury, twenty-two were in favor of the preliminary examination, while four opposed this idea. Because of the limited number of answers received to the questionnaire, no statistical conclusions are intended. But considering a lawyer's natural resistance to change, it is significant that those in favor of using the information as an equal alternative to grand jury indictment in felony prosecutions predominated two to one.

5. See *Grosso v. Commonwealth*, 177 Va. 830, 13 S.E.2d 285 (1941); *Miller v. Commonwealth*, 172 Va. 639, 2 S.E.2d 343 (1939); *Sutherland v. Commonwealth*, 171 Va. 485, 198 S.E. 452 (1938); *Keeton v. Commonwealth*, 152 Va. 1036, 148 S.E. 783 (1929); *Widgeon v. Commonwealth*, 142 Va. 658, 128 S.E. 459 (1925); *Canter v. Commonwealth*, 123 Va. 794, 96 S.E. 284 (1918). See also note 2, *supra*.

6. BONNER, *LAWYERS AND LITIGANTS IN ANCIENT ATHENS* 36 (1927); PATTERSON, *THE ADMINISTRATION OF JUSTICE IN GREAT BRITAIN* 200 (1936).

7. PATTERSON, *supra* note 6.

8. 1 STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 42-44 (1883).

During the decline of the early Roman Empire (circa 350-400 A.D.), the Anglo-Saxon culture began to develop, and with it the procedures from which the grand jury, as we know it, was to emerge. Contrary to popular belief, concepts of democracy had nothing to do with the emergence of the grand jury as an accusatory instrument. Early procedures reflect, rather, the strengthening of a central governmental-judicial function. Primitive methods of law enforcement left the redress of wrongs wholly to the injured party.<sup>9</sup> The person aggrieved, or his descendants, simply took personal vengeance on the culprit. Naturally, this system worked only when the wrongdoer was known. However, when the alleged criminal was unknown, the process of *appeal* was used. Here the victim, or his survivors, "appealed" the suspect to appear and fight it out, the theory being that God would not permit the wrongdoer to prevail, but would punish him by defeat and death. This method of law enforcement was also known as "trial by battle."<sup>10</sup>

*Infangthief* was another outgrowth of the personal vengeance system, the right of vengeance being transferred to the government. Franchises to exercise this right were granted usually to the Lords of the townships, and are defined in the laws of Edward the Confessor.<sup>11</sup> *Infangthief* long survived the Norman Conquest in 1066, though its exercise suffered constant restriction. It was prevalent at the beginning of the Reign of Edward I in 1272, but disappeared in 1327 when Edward III commenced his rule.<sup>12</sup>

In addition to *infangthief*, the Anglo-Saxons had other methods of trial called *compurgation* and *ordeal*. Compurgation consisted of twelve men, acquainted with the accused, who took an oath to tell the truth concerning the charge against him. It does not appear that the twelve had to know any of the facts of the case, the oath being sufficient for a pronouncement of guilt or innocence. *Ordeal*, in one popular form, consisted of throwing the accused into a body of water. If he floated, he was *guilty*; if he sank, he was *innocent*!<sup>13</sup>

As the Anglo-Saxon state began to mature and the kings acquired broader powers, *appeal* and the other primitive accusatory devices proved unsatisfactory. As a result, inquisitorial process began to take shape.<sup>14</sup> The Carolingian kings (circa 700-800 A.D.), perhaps adopting the Roman procedures, assumed the privilege of determining their rights by holding

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9. 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 319 (3d ed. 1922); RADIN, ANGLO-AMERICAN LEGAL HISTORY 221 (1936).

10. *Ibid.*

11. 1 STEPHEN, *supra* note 8, at 63-64.

12. *Ibid.*

13. *Id.* at 73.

14. 1 HOLDSWORTH, *supra* note 9, at 319-20.

inquisitions. Such procedures consisted merely of the kings summoning members of a community and extracting from them any desired information touching on the affairs of government. This practice survived the Norman Conquest and is considered the root from which the English grand jury grew.<sup>15</sup>

Following the Norman Conquest in 1066, English government became more centralized and powerful. Territorial divisions developed into the kingdom, the county, the hundred, and the township. Administration of justice in each of these divisions became the king's prerogative. He appointed an earl or alderman and a sheriff or viscount for each county. To each hundred he appointed a chief officer known as a bailiff. Townships were represented by a body of five principal inhabitants known as "the reeve and four men."<sup>16</sup> One of the duties of the sheriff, bailiff, and the reeve and four men was to arrest criminals and recover stolen property. In performance of this duty, these officers were assisted by an accusatory device known as the *frank-pledge*. In the days of William the Conqueror and his sons, laws were enacted directing all men to combine themselves into groups of ten. Each member of the group, the *frank-pledge*, was security for the good behavior of his fellows. Any wrongdoer in a group had to be produced before the king's representative unless his misdeeds were made good by the others.<sup>17</sup>

With the extension of the king's power into the judicial process, the concept of preserving the king's peace emerged. This concept gained authority of formal law with the issuance of the Assize of Clarendon by Henry II in 1166. Reissued in 1176 by the Assize of Northampton, the Assize of Clarendon provided that sheriffs' and the king's justices should make inquiry upon the oath of twelve men from every hundred and four men from every township as to whether any man had committed a crime.<sup>18</sup> This group of sixteen was known as the *Grand Assize*. While older methods of private accusation still continued, the *Grand Assize* assumed responsibility of hearing community reports, and, if necessary, preferring criminal charges. This undertaking contributed greatly to the increase of royal power. Nothing in the Assize of Clarendon supports the popular notion that the grand jury developed for the protection of individual rights. Nor does it appear that individual rights were strengthened indirectly, for after the *Grand Assize* preferred charges, the accused stood trial by the estab-

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15. *Id.* at 312.

16. 1 STEPHEN, *supra* note 8, at 64-65.

17. *Ibid.*

18. See BIGELOW, HISTORY OF PROCEDURE IN ENGLAND 99 (1880); 1 HOLDSWORTH, *supra* note 9, at 321; 1 STEPHEN, *supra* note 8, at 186-87; WALSH, A HISTORY OF ANGLO-AMERICAN LAW 300-04 (2d ed. 1932); Ploscowe, *The Development of Present-Day Criminal Procedures in Europe and America*, 48 HARV. L. REV. 433 (1935).

lished, relatively primitive methods. In this manner the concept of the King's peace, bulwarked by centralized power, spread over England.<sup>19</sup>

While the Assize of Clarendon is regarded as the origin of the grand jury,<sup>20</sup> accusation by the *Grand Assize*, or *Grand Inquest*, raised a presumption of guilt.<sup>21</sup> Although the kings occasionally dispensed justice personally, the usual method was through the local courts. In addition the king's own justices travelled in eyre (circuit) commencing about 1178.<sup>22</sup> Procedure before both courts was relatively simple and direct. The *Grand Assize* made an accusation, followed forthwith by trial by *compurgation* or *ordeal*.<sup>23</sup> A trial separate from the inquest was not to come until later.<sup>24</sup> As the king's courts increased in power and activity, the use of the inquisitorial method of accusation also spread rapidly.<sup>25</sup> In addition to strengthening the king's power, the inquests very likely served as screening devices to eliminate spiteful accusations, thus speeding the work of the courts.<sup>26</sup> In this way, the ancient "Grand Jury" acquired a reputation for protecting the individual against unfounded charges.

Starting in the thirteenth century, the *Grand Assize* commenced development which ultimately led to its maturing into a wholly accusatory body. As the English common law struggled to attain some degree of stability, there was a tendency to regard the jury as formal proof, because of its gradual replacement of *trial by battle*, *compurgation*, and *ordeal*.<sup>27</sup> The Latern Council of 1215 abolished trial by *ordeal* and thereafter the accused, if he agreed to it, was tried by the indicting jury. If he refused, he was either kept in prison or released under a peace bond.<sup>28</sup> Here, it is said, the seed of the grand jury acting as a protective buffer between the accused and government officials was sown.<sup>29</sup> But even before the ending of trial by *ordeal*, it was not unusual for persons accused of crimes by the *Grand Assize* to purchase from the king the privilege of going before another jury which

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19. See RADIN, *supra* note 9, at 222-23; Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?*, 55 COLUM. L. REV. 1106-07 (1955).

20. WALSH, *supra* note 18, at 300. See generally 1 STEPHEN, *supra* note 8, at 253; 1 HOLDSWORTH, *supra* note 9, at 321.

21. See BIGELOW, *supra* note 18, at 324. See generally 1 HOLDSWORTH, *supra* note 9, at 313.

22. See RADIN, *supra* note 9, at x.

23. See BIGELOW, *supra* note 18, at 324; 1 STEPHEN, *supra* note 8, at 70; WALSH, *supra* note 18, at 300.

24. See BIGELOW, *supra* note 18, at 324.

25. 1 HOLDSWORTH, *supra* note 9, at 316.

26. See *Hale v. Henkel*, 201 U.S. 43, 54 (1906); PATTERSON, *supra* note 6, at 115-16.

27. 1 HOLDSWORTH, *supra* note 9, at 316-17.

28. See WALSH, *supra* note 18, at 301-02.

29. Cf. PUTTKAMMER, *ADMINISTRATION OF THE CRIMINAL LAW* 116 (1953); RADIN, *supra* note 9, at 212-13; Kuh, *supra* note 19, at 1105-06.

finally determined the issue of guilt. With the abolition of the *ordeal* this practice may have become common.<sup>30</sup> Yet, throughout the thirteenth century and into the fourteenth, all or some members of the *Grand Assize* always formed part of the trial jury. Such duality of function led the judges sometimes to consider that when the members of a trial jury acquitted an accused they had presented as suspect, they had contradicted themselves and could be punished.<sup>31</sup>

In the fourteenth century doubt arose as to the propriety of allowing the indicting jury to try the accused, and by 1351 the accused was given the right to challenge any indictor as a member of his trial jury.<sup>32</sup> About this time it also became the grand jury's function to prefer all charges of crime whether or not any private accusers came forth. Simultaneously, the practice of hearing witnesses in private became a grand jury feature.<sup>33</sup> When the eyres came to an end in the first half of the fourteenth century, criminal jurisdiction in the counties passed from the king's justices to Justices of the Peace and Justices of the Courts of Assize. The county sheriff, however, still called grand juries from the county at large. By this time those called had increased to twenty-four, of which number twenty-three constituted the official body. From this time on trial was by petty jury,<sup>34</sup> and the Grand Jury duties had been restricted to making accusations and general investigations.<sup>35</sup>

#### THE GRAND JURY IN COLONIAL VIRGINIA

The grand jury as it prevailed in England was brought to the Virginia colony early in the seventeenth century. While King James' I instructions do not mention the grand jury, and while there are no indications that a grand jury was ever called during the company period (1606-1624), it appeared as a matter of course in the administration of colonial criminal

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30. 1 STEPHEN, *supra* note 8, at 256-57.

31. 1 HOLDSWORTH, *supra* note 9, at 322.

32. 25 Edw. 3, Stat. 5 c. 3 (1350); WALSH, *supra* note 18, at 301.

33. Kuh, *supra* note 19, at 1107.

34. WALSH, *supra* note 18, at 301-02. See 1 HOLDSWORTH, *supra* note 9, at 322; 1 STEPHEN, *supra* note 8, at 253-55.

35. VA. CODE ANN. § 19-130 (1950). "The grand jury shall inquire of and present all felonies, misdemeanors and violations of penal laws committed within the jurisdiction of the respective courts wherein they are sworn. . . ." Thus the power to make investigations into situations where socially undesirable, but not necessarily criminal, conditions exist is not specifically granted. It may, however, be implied from the word "present," and, as will appear later in this article, seems to be the case in Virginia. See Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?*, 55 COLUM. L. REV. 1103 (1955).

justice by 1641.<sup>36</sup> The first royal decree concerning accusatory processes appeared in 1642. Churchwardens were ordered to deliver presentments of the misdemeanors of swearing and violating the Sabbath that to their knowledge had had been committed during the preceding year.<sup>37</sup> In 1645 Charles I ordered a grand jury to be empaneled at Midsummer and March courts to receive all presentments and informations, to inquire into the breach of all penal laws and misdemeanors not touching life or member, and to present the same to court. The court, in turn, was to submit the presentment to the Governor and Council after "determining thereof."<sup>38</sup> In March of 1657 grand juries were empaneled to attend all county courts,<sup>39</sup> and four years later Charles II expanded this decree by ordering presentments for the breach of all penal laws to be made biannually to the county courts in April and December.<sup>40</sup> The courts were to:

take for evidence the presentment of the jury if made upon the certaine knowledge of any of them; or otherwise the parties that inform the jury to give their evidence to the next justice, in the presence of the party presented, which deposition being produced . . . by the jury with their presentment, shall be sufficient for the court to pass judgment on the offenders.<sup>41</sup>

Thus the grand jury of 1661 resembled more the *Grand Assize* of 1166 than a truly accusatory institution. This doubtless contributed to the reluctance the colonists exhibited toward serving on grand juries, and necessitated in 1667 a statute reciting the failure of grand juries to do their duties, and providing fines for grand jurors who did not appear. Those charged with the duty of calling grand juries into session were also subject to a fine for failure to do so at least once a year.<sup>42</sup>

In spite of the colonists' reluctance to serve on grand juries, and irrespective of the presumption of guilt arising from grand jury presentments, criminal procedure in the Virginia colony about 1686 was the same as in England. In this year, the Governor of the colony and his council ordered justices in the county courts to make proceedings in the courts as similar

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36. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 67-68 (1930). See BEALE, CRIMINAL PLEADING AND PRACTICE 39 (1899); MOLEY, POLITICS AND CRIMINAL PROSECUTION 133 (1929).

37. 1 HENING, STATUTES AT LARGE 240 (1809) (hereinafter cited as HEN. STAT.).

38. 1 HEN. STAT. 304 (1809).

39. 1 HEN. STAT. 463 (1809).

40. In 1705, the terms were changed to May and November, and this continued to be the law until the Revolutionary War. SCOTT, *supra* note 36, at 67-68.

41. 2 HEN. STAT. 74 (1823).

42. 2 HEN. STAT. 407-08 (1823).



as possible to the English courts.<sup>43</sup> By this time British criminal procedure had become rather highly developed. Formal accusation of a criminal charge could be made either by presentment, indictment, or information. A presentment was defined as an accusation made from the personal observation or knowledge of the grand jury; there was no need for the use of an indictment prepared by the king's officers.<sup>44</sup>

An indictment, on the other hand, was a written accusation of a crime or misdemeanor preferred upon oath to a grand jury. To this end the sheriff of every English county was bound to return to every court session twenty-four good and lawful men of the county; some out of every hundred to inquire, present, do, and execute all those things which on the part of the king should be commanded of them.<sup>45</sup> The grand jurors selected were instructed by the judge as to their duties. They then retired to sit and receive indictments which were referred to them in the king's name, but at the instance of any private prosecutor. To support the indictments, only evidence on behalf of the prosecution was heard. In their deliberations the grand jury was to determine whether there was sufficient cause to call upon the accused to answer the indictment. In making this determination the general standard was that the grand jury should be satisfied with the truth of the indictment and not rest content with remote possibilities.<sup>46</sup> Once the grand jury heard the evidence and came to the conclusion that the charge was groundless, the indictment was endorsed "ignoramus," or "not a true bill," or "not found." However, if it was satisfied with the truth of the indictment, the endorsement was "a true bill." In order to find a true bill, twelve of the grand jury had to agree, and the indictment was then delivered into court.<sup>47</sup> As to qualifications, members of the grand jury were required to be freeholders and the best gentlemen in the county. At least twelve, and not more than twenty-three, of those appearing for grand jury duty were sworn to serve, so that the twelve could be a majority.<sup>48</sup>

English practice during colonial Virginia times also made it possible to

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43. SCOTT, *supra* note 36, at 50. It is probable, however, that the county judges possessed only limited knowledge of the workings of the English courts and even less of the grand jury's function. Governor Gooch wrote numerous letters to his brother in England requesting information on the proper form of grand jury instructions. These requests were made in private correspondence rather than by official communication, and indicate a definite lack of knowledge which the Governor was unwilling to reveal either to the Crown or the Colonial Council. CHUMBLEY, *COLONIAL JUSTICE IN VIRGINIA* 76 (1938).

44. 4 CHITTY, *BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND* 245 (1845).

45. *Id.* at 246.

46. *Id.* at 247.

47. 1 BISHOP, *CRIMINAL PROCEDURE* § 854 (3d ed. 1880); 4 CHITTY, *supra* note 44, at 249-50.

48. 4 CHITTY, *supra* note 44, at 246.

prosecute crimes by informational processes of two sorts. There were those brought partly at the suit of the king and partly at the suit of a private citizen. This procedure was used for gross and notorious crimes which were not especially disturbing to the government. Such crimes included riots, batteries, and libels which were deserving of public condemnation.<sup>49</sup> The other type of information was brought in the name of the king alone. Such informations were filed either by the King's Attorney General or the Master of the Crown Office, but were limited to those high and dangerous offenses wherein delay would be dangerous to the government.<sup>50</sup>

Prosecution by information, aside from the means of making the accusation, was the same as by indictment. Notice, process, plea, and trial by jury were all identical.<sup>51</sup> Nonetheless, prosecution by information was limited to misdemeanors as early as the reign of Edward I in 1272.<sup>52</sup> Capital offenses had to be prosecuted by indictment.<sup>53</sup> Considering the history of the information, which is almost as old as that of the grand jury,<sup>54</sup> this restriction is not surprising. Henry VII extended the jurisdiction of the infamous court of Star Chamber, which acted as sole judge of the law, the fact, and the penalty. Informations could be brought by any person on the basis of any criminal statute. These developments caused the orderly procedure of the King's Bench to fall into disuse and oblivion, and the king's agents made the information a tyrannical process. Citizens were harassed and oppressed, all to the enrichment of the Crown.<sup>55</sup> Even after the abolition of the Star Chamber and the revival of the King's Bench, the Master of the Crown Office continued to abuse the use of the information by permitting prosecutions to be vexatious and vengeful. The situation became so bad that soon after William became king, the King's Bench was called upon to abolish the use of the information altogether. But the King's Bench held the information to be part of the common law and, as such, unimpeachable. The situation was not corrected until William and Mary decreed that no information should be filed without express authority from the King's Bench, and caused the prosecution, except for the Master of the Crown Office, to post recognizance.<sup>56</sup>

In spite of the colonial Governor's decree that colonial procedure should approximate English court processes as closely as possible, Virginia colonists remained inattentive to such matters. As a result, further royal legislation

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49. *Id.* at 253.

50. *Ibid.*

51. *Id.* at 254.

52. MOLEY, *supra* note 36, at 132.

53. 4 CHITTY, *supra* note 44, at 254.

54. MOLEY, *supra* note 36, at 132; PUTTKAMMER, *supra* note 29, at 144.

55. 4 CHITTY, *supra* note 44, at 254-55.

56. *Id.* at 255.

was enacted to guide and direct them. In 1727 a statute was promulgated reciting that grand juries were not making presentments for crimes carrying a penalty, upon conviction, of less than twenty shillings. This preamble was followed by a statement that indictments *did* lie for such offenses, and that when a presentment was made for any crime carrying a penalty not exceeding five pounds no further charge, such as a formal indictment, need be made.<sup>57</sup>

Nor was the common law number of grand jurors consistently used in the Virginia colony. Differences soon appeared in the several courts. In 1734 the sheriffs of James City and York Counties were each directed to summon twelve freeholders to serve as grand jurors in the Court of Oyer and Terminer, and to inquire into all treasons, felonies, and other offenses cognizable by the justices of those courts.<sup>58</sup> County courts in 1748, on the other hand, were supplied with twenty-four of the "most capable" freeholders twice a year to serve as grand jurors.<sup>59</sup>

Presumably, it was the practice in colonial Virginia to choose grand juries from the county's most able and discreet men. Consequently, in addition to making presentments and returning indictments, these juries took it upon themselves to comment on all public affairs, especially the conduct of the Royal Governor. Naturally, the Governors desired good reports. This led Governor Nicholson (1648-1705) to direct the sheriff to choose certain persons, and omit others, for grand jury duty. In addition, Nicholson sent outside the capital for a grand jury foreman. Such actions were severely criticised in the colony, and in 1705 the Assembly ordered the grand jury at the General Court to be empaneled from by-standers.<sup>60</sup> Whether the by-standers were the county's most able and discreet men is questionable. Nonetheless, such provisions for filling vacancies in the grand jury have remained until this day.<sup>61</sup>

Of the twenty-four men summoned for grand jury duty, it was necessary that sixteen appear to constitute a legal jury. Originally the jurors were appointed some six months in advance of court and were supposed to be on the lookout in the meantime for all breaches of law. Once in session, the English practice of the court charging the jury as to its duties was followed.<sup>62</sup>

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57. 4 HEN. STAT. 232 (1820).

58. SCOTT, *supra* note 36, at 71.

59. 6 HEN. STAT. 210 (1819). Court terms in the counties were as follows: Brunswick and Fairfax in July and December; Lunenburg in January and October; and Frederick, Albemarle, and Augusta in February and August.

60. SCOTT, *supra* note 36, at 70-71.

61. VA. CODE ANN. § 19-126 (1950). See VA. CODE ANN. § 4855 (1919); VA. CODE § 3979 (1887); VA. CODE c. 200 § 5 (1873); REV. VA. CODE c. 188 § 3 (1803).

62. SCOTT, *supra* note 36, at 68-69. Scott's text actually gives the number necessary

The English version of the presentment was used in colonial Virginia with one important exception. After 1705, instead of making a presentment on the knowledge of one grand jury member, no presentment could be made unless on the information of two members of that body.<sup>63</sup>

In addition to presentment or indictment by a grand jury, colonial Virginians could accuse a suspect of crime by information. Early practice, in fact, encouraged informers. In 1619 one might recover ten shillings of the fine for reporting unlawful gaming and one-fourth of the fine inflicted on a servant for trading with the Indians. During a part of the seventeenth century, a Virginian could augment his income by informing on Quakers. In the eighteenth century similar rewards were provided for watching unlawful slave meetings. Or, one could earn twenty pounds by prosecuting another for selling a mulatto servant for a slave. In 1769 a thousand pounds could be had for informing on one who brought smallpox into the colony.<sup>64</sup>

During the eighteenth century, the information was the principal method used to prosecute slaves for capital offenses. This represents an extension of the English method which did not permit informations to be used for the prosecution of a felony, but the extension was not applied to freemen who still had to be prosecuted for a felony by presentment or indictment.<sup>65</sup>

The examining court developed late in the seventeenth century as an integral part of the information process. It was primarily used to screen offenses triable only at the general court in the capital. Here the suspect was examined, and witnesses for and against him were called. Upon such hearing the court could dismiss the accusation, bind the suspect over to the general court, or hold him for the grand jury.<sup>66</sup>

#### DEVELOPMENT OF THE MODERN GRAND JURY

In the period from the Revolutionary War to the early nineteenth century many common law grand jury rules were codified. Since this period also saw the formation of many courts in the new Commonwealth of Virginia, it is natural that grand jury development paralleled the growth of the courts. At the same time, many enactments were corrective or restrictive in nature, causing grand jury growth to be erratic. In general, however, the substance of the common law was retained, departures being much the same as in the colonial grand jury provisions.

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to constitute a legal grand jury as fifteen. It is believed this is an error, possibly caused by the use of the Germanic *f* in the old statutes.

63. *Id.* at 71.

64. For these and other examples of rewarded informing see generally Scott, *supra* note 36, at 57-74.

65. *Id.* at 72-73.

66. *Id.* at 60-61.

In May, 1777, the Court of Oyer and Terminer was established in the new Commonwealth.<sup>67</sup> Ten days before every term of court, the sheriff was to summon twenty-four good and lawful men of the state, of whom at least sixteen should serve as a grand jury, and have the power to inquire of and present all treasons, felonies, and other offenses cognizable by the Justices of Oyer and Terminer. This act further included provisions to fine jurors who failed to appear when summoned. In October of the same year similar provisos were enacted for the general court.<sup>68</sup> But, as in colonial days, the restriction was added that a presentment could not be made solely on the knowledge of the grand jurors unless two or more of them shared the knowledge. Also no presentment had to be made for an offense carrying a penalty of less than twenty shillings.<sup>69</sup> The sheriffs of James City and York counties were required to summon the jurors six days before the term began.<sup>70</sup>

In December, 1788, district courts were established.<sup>71</sup> Grand jury provisions for these courts were substantially the same as for the earlier courts,<sup>72</sup> but jurors failing to appear when summoned were subject to the interesting fine of 400 pounds of tobacco.<sup>73</sup>

County and corporation courts received grand jury legislation in 1792.<sup>74</sup> The numbers summoned and serving were the same as for the other courts, but the grand juries were called only for every quarter session of court. Otherwise, the duties and restrictions were the same.<sup>75</sup> In 1808, superior courts were established<sup>76</sup> with substantially similar grand jury provisions as found in the other courts.<sup>77</sup>

Statutory qualifications for the Commonwealth's grand jurors, other than "freeholders" and "good and lawful men" did not appear until 1792. It was then provided that they should be "discreet freeholders, not ordinary keepers, constables, surveyors of highways, or occupiers of mills."<sup>78</sup> By-

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67. 9 HEN. STAT. 306-08 (1821). The text of this act gives the number required as fifteen rather than sixteen. Again this is believed to be an error due to the use of the Germanic *f*. The number of fifteen was never used in English practice and appears nowhere in Virginia statutes or cases.

68. 9 HEN. STAT. 401-19 (1821).

69. 9 HEN. STAT. 417 (1821).

70. 9 HEN. STAT. 461 (1821).

71. 12 HEN. STAT. 730-68 (1823).

72. 12 HEN. STAT. 757-58 (1823).

73. 12 HEN. STAT. 758 (1823).

74. 1 SHEPHERD, VIRGINIA STATUTES AT LARGE, 17-20 (1835) (hereinafter cited as SHEP. STAT.).

75. REV. VA. CODE c. 73 § 2, c. 188 § 2 (1803); 1 SHEP. STAT. 17-18 (1835).

76. REV. VA. CODE c. 120 (1808).

77. See REV. VA. CODE c. 120 § 6 (1808).

78. 1 SHEP. STAT. 17 (1835); REV. VA. CODE, c. 73 § 1 (1803).

standers, however, could be empaneled if a sufficient number of those summoned did not appear.<sup>79</sup> Three years later, owners of mills as well as occupiers were disqualified from grand jury service.<sup>80</sup> Meanwhile, in 1793 the sweeping qualification that all grand jurors had to be citizens of Virginia was enacted.<sup>81</sup> Otherwise, qualifications remained the same as at common law and as previously enacted.<sup>82</sup>

The development of the grand jury as it now functions in Virginia,<sup>83</sup> however, actually started in the mid-nineteenth century and reflects a continual eroding of common law technicalities. While it is true that the seeds of such erosion were planted in colonial and post-colonial times, the process was accelerated starting shortly before the Civil War. For the most part the development tended toward making the grand jury system easy to operate. This was accomplished by reducing the required number of jurors, relaxing the technicalities for summoning them, liberally construing the qualifications requirements, easing the requirement that the judge charge the jury, permitting the commonwealth's attorney to avoid the prohibition limiting him to formal appearances before the jury, emphasizing the fact that the requirement for felony prosecutions by indictment only is statutory rather than constitutional, relaxing the formality of returning an indictment to court, and providing for special grand juries. It will be seen that as technicalities have been eliminated prosecution has been facilitated.<sup>84</sup>

Since 1849 the law has been reasonably consistent as to how often a grand jury is called. At the old general court, a grand jury was called whenever it appeared a felony was to be tried.<sup>85</sup> It then became the law in other courts for a regular grand jury to be called at two terms, or at each term in each year.<sup>86</sup> Present provisions call for one regular grand jury at one term in each year of the circuit and corporations or Hustings courts as designated by the judge, as well as special grand juries whenever ordered.<sup>87</sup>

On the other hand, grand juries have been made easier to convene by reducing the number to be summoned. Early provisions simply directed

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79. *Ibid.*

80. 1 SHEP. STAT. 363 (1835).

81. 1 SHEP. STAT. 234 (1835).

82. See REV. VA. CODE c. 75 (1819).

83. VA. CODE ANN. §§ 19-122 to -136 (1950).

84. This point is not specifically made in the cases dealing with the function, composition, and interpretation of the grand jury itself. It is however, the avowed purpose of eliminating technicalities from indictments. See VA. CODE ANN. §§ 19-139 to -146 (1950) and cases cited thereunder.

85. VA. CODE c. 206 § 1 (1849).

86. VA. CODE ANN. § 4851 (1919); VA. CODE § 3975 (1887); VA. CODE c. 200 § 1 (1873); VA. CODE c. 206 § 1 (1860); VA. CODE c. 206 § 2 (1849).

87. VA. CODE ANN. § 19-122 (1950).

the court officer to summon, before the first day of court, persons to appear and serve on the grand jury.<sup>88</sup> Presumably the court officer was the sheriff and the number of persons called was the common law number of twenty-four. However, soon it became the law that any court in which a grand jury was to be empaneled could limit the number to serve thereon to sixteen.<sup>89</sup> Though this number was used in colonial times, this is the first mention of it after the Revolutionary War. Apparently a list of between twenty and one hundred was composed by the judge of the court and given to the clerk of the court who selected by lot the sixteen to serve. Then the names of those selected were given to the sheriff who proceeded to summon them.<sup>90</sup> The next development was to return partially to common law figures. The number selected by the judge was fixed at forty-eight, twenty-four of whom were summoned by the sheriff who was commanded to do so by means of *venire facias*.<sup>91</sup> Still later, though the number selected by the judge remained the same, those summoned by the sheriff was reduced to between twelve and sixteen,<sup>92</sup> but not less than eleven composed a regular grand jury and not less than six a special grand jury.<sup>93</sup> Present law directs the judge annually in June, July, or August, to prepare a list of sixty persons from the circuit or city, twenty-one or more years of age, of honesty, intelligence, good demeanor, and in other respects a qualified juror. This list is given to the clerk who issues *venire facias* to the sheriff or city sergeant commanding him to summon not less than five nor more than seven.<sup>94</sup> While there may exist some doubt as to the desirability of reducing the number of grand jurors so drastically, such provisions have been upheld under the fifth and fourteenth amendments to the United States Constitution by Virginia courts, as neither of these amendments stipulate the number of grand jurors to be used, nor do they limit any state relative to determining the number of grand jurors.<sup>95</sup> The provisions of the foregoing statutes, while specific in terms, are merely directory. Thus it has been held that not only may the judge fill vacancies on the grand jury from his list, but he may, if he thinks proper, dispense with the list altogether.<sup>96</sup>

The emphasis on elimination of technicalities to promote workability is also evident in the method used to summon the grand jury. At common law the means used was the precept, a process anterior to and independent of

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88. VA. CODE c. 158 § 5, c. 206 § 3 (1849).

89. VA. CODE c. 162 § 3, c. 206 § 2 (1860).

90. VA. CODE c. 206 § 1 (1849).

91. VA. CODE § 3976 (1887).

92. VA. CODE ANN. § 4852 (1919).

93. VA. CODE ANN. § 4853 (1919).

94. VA. CODE ANN. §§ 19-123, -125 (1950).

95. *Hausenfluck v. Commonwealth*, 87 Va. 702, 8 S.E. 683 (1889).

96. *Richardson v. Commonwealth*, 76 Va. 1007 (1882).

the court.<sup>97</sup> Virginia procedure, on the other hand, specifically states that *venire facias* be used for this purpose. Yet, this has not been construed as in derogation of common law.<sup>98</sup> In fact, a *venire facias* need not be used at all.<sup>99</sup> Therefore, an error on the date of *venire facias* will not invalidate an indictment so long as it appears the grand jury has actually been called on time.<sup>100</sup> And even if the record does not show the grand jury was summoned by court order, the Supreme Court of Appeals will presume that such was done.<sup>101</sup> None of these discrepancies, therefore, provide valid grounds for pleas of abatement to indictments returned by grand juries so summoned.

Also a motion in abatement directed at the method of calling a grand jury must be timely made. Thus where the grounds to abate an indictment were that only one of the seven summoned for grand jury duty was a Negro, and that for thirty years past no Negro had ever been called for grand jury duty in the county, it was held that since defendant knew all of these facts at his first trial but did not challenge the indictment until the second trial, his motion was not timely made.<sup>102</sup> Here it was within the trial court's discretion to allow defendant to withdraw his plea of not guilty and substitute the plea in abatement, but it was not an abuse of discretion to deny the motion under all of the circumstances.<sup>103</sup>

Provisions relating to qualifications for grand jury membership have been consistently construed to favor qualification, thus making the grand jury system functional. As in colonial and post-colonial days, early statutes called for grand jurors to be freeholders, not ordinary keepers, constables, road surveyors, or owners or occupiers of grist mills.<sup>104</sup> The disqualifications applying to owners and occupiers of grist mills and ordinary keepers disappeared over the years and the qualifications that a grand juror must be a citizen of the state, twenty-one years or more of age, a resident of the state two years, and of the county one year were added.<sup>105</sup> It now appears that one only need be a resident of the state for one year and of the county for six months.<sup>106</sup>

Early litigation dealing with the qualifications of grand jurors was chiefly

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97. See *Curtis v. Commonwealth*, 87 Va. 589, 13 S.E. 73 (1891).

98. *Ibid.*

99. *Combs v. Commonwealth*, 90 Va. 88, 17 S.E. 881 (1893).

100. *Davis v. Commonwealth*, 89 Va. 132, 15 S.E. 388 (1892).

101. *Robinson v. Commonwealth*, 88 Va. 900, 14 S.E. 627 (1892).

102. *Bailey v. Commonwealth*, 193 Va. 814, 71 S.E.2d 368 (1952).

103. *Ibid.*

104. VA. CODE § 3977 (1887); VA. CODE c. 200 § 4 (1873); VA. CODE c. 206 § 3 (1860); VA. CODE c. 206 §§ 4, 5 (1849).

105. VA. CODE ANN. § 4853 (1919).

106. VA. CODE ANN. § 19-125 (1950).



concerned with answering questions as to who were freeholders,<sup>107</sup> mill occupiers or owners,<sup>108</sup> aliens,<sup>109</sup> and road overseers.<sup>110</sup> Otherwise, one case held that the federal office of census taker is not disqualified;<sup>111</sup> nor was a prohibition officer disqualified during prohibition,<sup>112</sup> though it was said that when there were a large number of prosecutions under the prohibition act, persons enforcing the act could be excluded in the court's discretion.<sup>113</sup>

Age limits for grand jurors are not to be construed as matters of disqualification, but merely give grounds for claiming an exemption.<sup>114</sup> And the language, "in other respects a qualified juror," in the qualification statute refers to common law qualifications; hence minors, aliens, panels not returned by the proper officer, panels returned at the instance of the prosecutor, infamous persons, or those persons convicted of treason, felony, or perjury are all disqualified.<sup>115</sup> An early case states that one who nominates

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107. Freeholders have been held to include: one who was the purchaser of land under an oral contract even though a writ of right was pending against him concerning the land, *Commonwealth v. Cunningham*, 47 Va. (6 Gratt.) 695 (1849); one having an equitable interest in land by virtue of being the beneficiary of a trust created by deed, *Commonwealth v. Helmondollor*, 45 Va. (4 Gratt.) 536 (1847); one who was in possession of land sold to him although his grantor had executed an earlier deed in trust to another, *Moore v. Commonwealth*, 36 Va. (9 Leigh) 639 (1838); one who had contracted to sell his land, but who had not conveyed by deed and hence still held legal title, *Commonwealth v. Reynolds*, 31 Va. (4 Leigh) 715 (1833); and one who conveyed all of his land by deed of trust, but the land remained unsold by the trustee and the conveyor continued in possession of his land, *Commonwealth v. Carter*, 4 Va. (2 Va. Cas.) 319 (1822).

108. One was not disqualified merely because he was part owner of land on which a mill was located when the mill was in possession of a widow as her dower. *Wyson v. Commonwealth*, 47 Va. (6 Gratt.) 711 (1849). Nor was a plea in abatement sufficient which alleged that the mill owner was from a county other than the one in which the grand jury was sitting, without stating where the mill was located. *Moran v. Commonwealth*, 36 Va. (9 Leigh) 651 (1839). However, that one owned a mill was good grounds for a plea in abatement to the indictment returned by a grand jury on which the mill owner served. *Commonwealth v. Long*, 4 Va. (2 Va. Cas.) 318 (1822).

109. A naturalized citizen is qualified for grand jury duty and the judgment of naturalization is not subject to collateral attack. *Commonwealth v. Towles*, 32 Va. (5 Leigh) 806 (1835). But as a matter of common law, aliens are disqualified from grand jury service, and when the grand jury includes an alien, an indictment returned thereby may be avoided by a plea in abatement. *Commonwealth v. Cherry*, 4 Va. (2 Va. Cas.) 20 (1815).

110. The disqualification pertaining to road overseers was not extended to a member of the county board of road supervisors even though he had ex-officio supervision over the roads. *Cook v. Commonwealth*, 114 Va. 882, 77 S.E. 608 (1913).

111. *Commonwealth v. Strother*, 3 Va. (1 Va. Cas.) 186 (1811).

112. *Webb v. Commonwealth*, 137 Va. 833, 120 S.E. 155 (1923).

113. *Id.* at 835, 120 S.E. at 156 (dictum).

114. See *Booth v. Commonwealth*, 57 Va. (16 Gratt.) 519 (1861).

115. See *Waller v. Commonwealth*, 178 Va. 294, 16 S.E.2d 808 (1941), *cert. denied*, 316 U.S. 679 (1942).

himself for grand jury duty is not disqualified unless it appears that the self-nomination is corrupt.<sup>116</sup> But whether this case would still be the law today is questionable in light of the statute governing petty jury disqualifications which prohibits one from serving who requests, or has another request for him, jury duty.<sup>117</sup>

Should it appear that an unqualified grand juror is on the panel after the jury is in session, he may be discharged and another sworn to take his place, as the court has the power to call a grand jury when the occasion demands.<sup>118</sup> Even if an unqualified person is on the list selected by the judge, it is not grounds for quashing an indictment, provided the persons actually chosen for duty are all qualified.<sup>119</sup> In any event, if an indictment were quashed because returned by a grand jury having an unqualified member, a special grand jury could be called during the term to reconsider the indictment.<sup>120</sup>

Where it was alleged that discrimination to the accused resulted from the impaneling of a grand jury on the ground that non-poll tax payers were excluded, it was held that alleged discrimination had to be based on fact rather than presumption, and a grand juror need not possess the constitutional qualifications of a voter.<sup>121</sup> But whatever the ground of challenge, whether or not one is disqualified from grand jury duty is a matter of fact, not a matter for judicial determination,<sup>122</sup> and the jury's finding of such fact will not be disturbed on appeal.<sup>123</sup> In the final analysis, the long standing rule that a deficiency in the number of grand jurors appearing for duty may be filled from by-standers,<sup>124</sup> has implications that may someday render questions of qualification completely academic.

Provisions relative to who may charge and swear the grand jury as to its duties have also been interpreted so as to facilitate grand jury use. Early statutes permitted the prosecuting attorney to charge the grand jury in county and corporation courts, while restricting this function to the judge in circuit courts.<sup>125</sup> Later this duty was confined solely to the judge in all

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116. *Commonwealth v. Thompson*, 31 Va. (4 Leigh) 719 (1833).

117. VA. CODE ANN. § 8-176 (1950).

118. *Commonwealth v. Burton*, 31 Va. (4 Leigh) 697 (1832).

119. *Shinn v. Commonwealth*, 73 Va. (32 Gratt.) 899 (1879).

120. *Ibid.*

121. *Waller v. Commonwealth*, 178 Va. 294, 16 S.E.2d 808 (1941), *cert. denied*, 316 U.S. 679 (1942).

122. *Day v. Commonwealth*, 43 Va. (2 Gratt.) 563 (1845).

123. *McCue v. Commonwealth*, 103 Va. 870, 49 S.E. 623 (1905).

124. VA. CODE ANN. § 19-126 (1950); VA. CODE ANN. § 4855 (1919); VA. CODE § 3979 (1887); VA. CODE c. 200 § 5 (1873).

125. VA. CODE c. 206 § 6 (1860); VA. CODE c. 206 § 7 (1849).

courts.<sup>126</sup> However, these later provisions appear to be directory rather than mandatory. Unless it appears that an accused is prejudiced, the fact that a grand jury is charged partly by the court clerk, partly by the prosecuting attorney, and partly by the judge is not grounds for reversal of a conviction so long as the grand jury is fully apprised of its duties.<sup>127</sup> Likewise, it has been held that the commonwealth's attorney may address the grand jury after it has been sworn to do its duty when the address is given in open court at the judge's request, provided no specific accused person is mentioned and the commonwealth's attorney does not appear before the grand jury during its deliberations.<sup>128</sup> Of course, it would not be error for a *de facto* court clerk to administer the oath to the grand jury.<sup>129</sup>

The Virginia Code, in an attempt to make the grand jury as independent as possible, restricts the activity of the commonwealth's attorney before it. While law enforcement officers are required to give information of any violation of the law to the commonwealth's attorney, who is then charged with the duty to prosecute, he is not supposed to go before the grand jury during their deliberations except when duly sworn as a witness. However, he may give advice to the foreman or any other member of the grand jury concerning the discharge of their duties.<sup>130</sup> Such restrictions, however, have been construed liberally in favor of the Commonwealth, tending to overlook technicalities and facilitate prosecution. Thus a plea in abatement alleging that the commonwealth's attorney was sent before the grand jury and assisted in the examination of "other witnesses" was held bad on the ground it failed to allege the prosecutor was not a witness, but indicated inferentially that he was.<sup>131</sup> It also appears that the commonwealth's attorney may consult with the grand jury so long as he is not present during actual deliberations and does not advise the return of an indictment.<sup>132</sup> In so holding, the Court said that the policy of the statute was to keep the grand jury free from outside interference, and that it would be highly reprehensible for the commonwealth's attorney to violate either the terms or spirit of the statute.<sup>133</sup> It is also proper for the commonwealth's attorney to answer inquiries directed

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126. VA. CODE ANN. § 19-129 (1950); VA. CODE ANN. § 4858 (1919); VA. CODE § 3982 (1887); VA. CODE c. 200 § 7 (1873).

127. *Porterfield v. Commonwealth*, 91 Va. 801, 22 S.E. 352 (1895).

128. *Hall v. Commonwealth*, 143 Va. 554, 130 S.E. 416 (1925).

129. *Hord v. Commonwealth*, 31 Va. (4 Leigh) 727 (1833).

130. VA. CODE ANN. § 19-131 (1950); VA. CODE ANN. § 4864 (1919); VA. CODE § 3988 (1887).

131. *Lawrence v. Commonwealth*, 86 Va. 573, 10 S.E. 840 (1890).

132. *Mullins v. Commonwealth*, 115 Va. 945, 79 S.E. 324 (1913).

133. *Id.* at 950, 79 S.E. at 326 (dictum).

toward striking names from an indictment, provided no advice to find a true bill is given and no prejudice results to the accused.<sup>134</sup>

All of the statutory restrictions applicable to the commonwealth's attorney, however, do not apply to his right-hand man, the sheriff. This officer, or his deputy, may be in the grand jury room while deliberations are in progress and while witnesses are being examined. Yet, such presence is conditioned on the sheriff's not attempting to influence the grand jury.<sup>135</sup>

Other than the foregoing restrictions applicable to the commonwealth's attorney, anyone may appear before a grand jury. But what if one appears and gives testimony which later turns out to be self-incriminating? In such event, it has been held that its subsequent admission is not error.<sup>136</sup> The grand jury has no power to compel a witness to testify, though a reluctant witness can be reported to the court which has the power to force *unprivileged* testimony. But *privileged* testimony may be waived by voluntarily given evidence even though it subsequently is used against the volunteer in a criminal prosecution.<sup>137</sup> This, of course, does not mean that the volunteer loses the privilege of declining to testify at his own trial.<sup>138</sup>

Virginia Code provisions relative to the objects of inquiry by a grand jury have remained constant over the years. Specifically the grand jury is to inquire of and present all felonies, misdemeanors, and violations of penal laws within the jurisdiction of the court for which it has been empaneled. No presentment need be made, however, for a crime carrying no corporal punishment and a fine of less than five dollars.<sup>139</sup> These provisions date from Civil War times when the presentment limitation was two dollars.<sup>140</sup> Whatever the objects of inquiry by the grand jury, Virginia legislators have consistently enacted the common law requirements that no person shall be put upon trial for a felony unless by presentment or indictment.<sup>141</sup> The only exception to this requirement appeared during the Civil War when only white men and free Negroes were specifically enumerated as those triable for commission of a felony only upon presentment or indictment.<sup>142</sup> Yet, no information could be filed except on leave of the court, or unless the accused, when summoned for the purpose, failed to show good cause to the con-

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134. *Draper v. Commonwealth*, 132 Va. 648, 111 S.E. 471 (1922).

135. See *Richardson v. Commonwealth*, 76 Va. 1007 (1882).

136. *Sikle v. Commonwealth*, 133 Va. 789, 112 S.E. 605 (1922).

137. *Id.* at 795, 112 S.E. at 606 (dictum).

138. *Temple v. Commonwealth*, 75 Va. 892 (1881).

139. VA. CODE ANN. § 19-130 (1950); VA. CODE ANN. § 4859 (1919); VA. CODE § 3983 (1887); VA. CODE c. 200 § 8 (1873).

140. VA. CODE c. 206 § 7 (1860); VA. CODE c. 206 § 8 (1849).

141. VA. CODE ANN. § 4866 (1919); VA. CODE § 3990 (1887); VA. CODE c. 201 § 2 (1873).

142. VA. CODE c. 207 § 1 (1860).

trary.<sup>143</sup> Nowadays, while the provision still exists that one accused of a felony can be prosecuted only upon a presentment or indictment, the provision has been added that this requirement may be waived by the accused.<sup>144</sup>

Although this requirement that felony prosecutions be based on presentment or indictment is well rooted in both the common law and Virginia statutory history, the Virginia constitution provides only that one accused of a crime may demand to know the nature and cause of the alleged offense; it does not specify the manner in which this is to be done, but affords the prosecution a broad accusatory basis.<sup>145</sup> Thus the Supreme Court of Appeals has repeatedly emphasized that the requirement of a presentment or indictment is a creature of statute rather than the state constitution:

The Bill of Rights has guaranteed to every person accused of crime the right to demand the *cause* and *nature* of his offense, and this right cannot be denied to him in any trial for a penal offense. . . . It must be furnished, upon demand, either by indictment, information, bill of particulars, or in some other approved method.<sup>146</sup>

Since the constitution does not prescribe the manner in which the accused should be informed of the nature and cause of his offense, the right to such information may be waived, further relieving the prosecution of technical burdens.

While the Constitution guarantees to every man the right to demand 'the cause and nature of his accusation,' it does not prescribe the manner in which this demand shall be complied with. It does not require that it shall be by indictment, or in any other prescribed manner. It may be by presentment of information, or in any other manner the legislature may provide. Furthermore, the right guaranteed by the Constitution is the right to demand the 'cause and nature of his accusation.' If he does not choose to demand it, he is under no obligation to do so. It is a right that he may waive if he chooses, and which he will be held to have waived unless he asserts it.<sup>147</sup>

The constitutional requirement being only that the accused be informed

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143. VA. CODE c. 207 § 1 (1860).

144. VA. CODE ANN. § 19-136 (1950).

145. VA. CONST. art. I § 8.

146. *Andrews v. Commonwealth*, 135 Va. 451, 454-55, 115 S.E. 558, 559 (1923) (Emphasis supplied by the court.); *accord*, *Farewell v. Commonwealth*, 167 Va. 475, 484, 189 S.E. 321, 325 (1937); *Guynn v. Commonwealth*, 163 Va. 1042, 1046, 177 S.E. 227, 228 (1934); *Boyd v. Commonwealth*, 156 Va. 934, 940-41, 157 S.E. 546, 548 (1931).

147. *Pine v. Commonwealth*, 121 Va. 812, 834-35, 93 S.E. 652, 659 (1917); *accord*. *Bailey v. Commonwealth*, 193 Va. 814, 822, 71 S.E.2d 368, 372, *cert. denied*, 344 U.S. 886 (1952).

of the cause and nature of the accusation, are there any specific requirements for so doing? This question has been broadly answered by the Court as follows:

Generally in most jurisdictions when an indictment identifies the charge against the accused so that his conviction acquittal may prevent a subsequent charge for the same offense, and it notifies him of the nature and character of the crime charged against him, to the end that he may prepare his defense, and the court, when called upon, may be enabled, upon conviction, to pronounce a correct judgment, it is sufficient.

The Virginia statute . . . is even more liberal, for its only requirement is that indictment inform the accused of the nature and cause of the accusation against him.<sup>148</sup>

To inform the accused of the cause and nature of his accusation, therefore, a bill of particulars may be utilized to clarify an indictment.<sup>149</sup>

Although felony prosecutions might be by information or in any other manner the General Assembly may provide, no such provisions have been made. The Court has recognized this, and as a result, has consistently reversed felony convictions based upon an information.<sup>150</sup> Knowing then that a felony must be prosecuted by indictment if presented by the Commonwealth, how many of the grand jurors must concur in finding a true bill? The answer has depended, of course, on the size of the grand jury. Early statutes provided that the common law number of twelve must concur in finding an indictment.<sup>151</sup> Later enactments allowed an indictment to be returned by nine of a regular grand jury,<sup>152</sup> while present law requires only four need agree to return a true bill.<sup>153</sup>

After finding an indictment, must it appear as a matter of record that it has been returned to the court? Two early cases answered this in the affirmative, saying that an indictment will be abated unless it appears on the court order book that the indictment was returned to the court.<sup>154</sup> But with the

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148. *Livingston v. Commonwealth*, 184 Va. 830, 836, 36 S.E.2d 561, 564 (1946).

149. See *Livingston v. Commonwealth*, 184 Va. 830, 36 S.E.2d 561 (1946); *Pine v. Commonwealth*, 121 Va. 812, 93 S.E. 652 (1917).

150. *Casper v. City of Danville*, 160 Va. 929, 169 S.E. 734 (1933); *Wilson v. Commonwealth*, 87 Va. 94, 12 S.E. 108 (1890); *Jones v. Commonwealth*, 60 Va. (19 Gratt.) 478 (1868); *Matthews v. Commonwealth*, 59 Va. (18 Gratt.) 989 (1868); *Commonwealth v. Barrett*, 36 Va. (9 Leigh) 665 (1839).

151. VA. CODE c. 206 § 9 (1849); see *Commonwealth v. Sayers*, 35 Va. (8 Leigh) 722 (1837).

152. VA. CODE ANN. § 4860 (1919).

153. VA. CODE ANN. § 19-132 (1950).

154. *Simmons v. Commonwealth*, 89 Va. 157, 15 S.E. 386 (1892); *Commonwealth v. Cawood*, 4 Va. (2 Va. Cas.) 527 (1826).

emphasis on the fact that prosecution of felony only by indictment is a statutory requirement, a change of view has occurred. Since the indictment is not a constitutional requirement and since it is not jurisdictional, because it may be waived, failure now to return the indictment into court will not void a conviction.<sup>155</sup> Again technicalities of common law grand jury requirements have given way to facilitate prosecution.

The special grand jury, as it exists in Virginia, further emphasizes the easing of the prosecution's burden. Early statutes provided for calling grand juries, other than at the two regular terms, from a list of ten prepared by the judge, of whom the court clerk could order summoned not less than six, five of whom had to concur in finding an indictment.<sup>156</sup> Present provisions set the number of the special grand jury at from five to seven,<sup>157</sup> the same as for a regular grand jury, of whom four must concur to return a true bill.<sup>158</sup> The use of the special grand jury rests completely in the court's discretion. It may be called at any time by a circuit, corporation, or Hustings court, or by the judge thereof in vacation, even during the same term that a regular grand jury has been empaneled but discharged, or during a special term of court.<sup>159</sup> What list of persons the judge uses in selecting the special grand jury is immaterial, as he is not required to compose it from the regular grand jury list.<sup>160</sup> No distinction is made between regular and special grand juries as to their power. In an early case where the argument was made that a capital felony indictment could be returned only by a regular grand jury of nine to twelve, the Court held that the indictment could be found by a special panel of seven.<sup>161</sup> The Court stated that since the statute made no distinction between regular and special grand juries, for the courts to do so would be an assumption of legislative authority.<sup>162</sup> There is no reason to suppose that time has dimmed the force of this holding.

#### INDICTMENTS AND INFORMATION: ADVANTAGES AND DISADVANTAGES

In considering the English experience with the grand jury as a background for its adoption and continued use in Virginia, it is important to remember that during the English development of the grand jury they did

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155. See *Hanson v. Smyth*, 183 Va. 384, 32 S.E.2d 142 (1944).

156. VA. CODE § 3978 (1887); VA. CODE c. 200 §§ 4, 9 (1873).

157. VA. CODE ANN. § 19-125 (1950).

158. VA. CODE ANN. § 19-132 (1950).

159. VA. CODE ANN. § 19-124 (1950); *accord*, *Wright v. Commonwealth*, 114 Va. 872, 77 S.E. 503 (1913); *Litton v. Commonwealth*, 101 Va. 833, 44 S.E. 923 (1903).

160. See *McDaniel v. Commonwealth*, 165 Va. 709, 181 S.E. 534 (1935); *Robertson v. Commonwealth*, 1 Va. 851, 20 S.E. 362 (1894), *writ of error not allowed*, 156 U.S. 183 (1895).

161. *Lyles v. Commonwealth*, 88 Va. 396, 13 S.E. 802 (1891).

162. *Id.* at 397, 13 S.E. at 802 (dictum).

not have either a police or public prosecutor system. This cast upon the grand jury the entire burden of investigating crimes and initiating prosecutions. Not until the end of the fourteenth century were justices of the peace established in the counties and constables in the parishes.<sup>163</sup> Parliament, between 1772 and 1823, made various attempts to create a police organization, but fear of tyrannical government defeated such movements until 1824 when the first English police system was created.<sup>164</sup> Until 1879 British prosecutors were attorneys in private practice who were hired by a victim of a crime, or his survivors, to prosecute the case, though in some cases the king's attorney general could intervene. In 1879 the agency of Director of Public Prosecutions was created and in 1884 this office merged with the Solicitor of the Treasury, not to become a separate agency again until 1908.<sup>165</sup>

After the establishment of a police system and public prosecution in England, agitation against the English grand jury was commenced by Jeremy Bentham and later by Robert Peel, who attacked it as corrupt, a tool of the privileged classes, and an inefficient method of initiating prosecutions; they believed a trained prosecutor could perform the functions of the grand jury with far greater efficiency, less expense to the public, and less bother to the courts. However, attempts to curtail the use of the grand jury by Parliament in 1834 and 1836 were unsuccessful.<sup>166</sup> Grand juries, therefore, continued to be called, but indictments were so seldom preferred that in 1872 a bill was passed<sup>167</sup> providing that it should no longer be necessary to summon grand juries unless the Master of the Crown Office had notice of the bills to be presented.<sup>168</sup> During World War I, grand juries temporarily ceased to sit in Great Britain. The wartime suspension was terminated in 1921, but Bentham's and Peel's arguments were still consistently and forcibly presented. However, the necessities of economics, rather than the validity of argument, finally caused the British to abolish the grand jury system in the 1933 depression.<sup>169</sup>

In the United States, the grand jury has also been under heavy criticism and its use has declined in some states. Edward Livingston, when hired to codify Louisiana's grand jury system, adopted Bentham's theme and severely

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163. See PATTERSON, *THE ADMINISTRATION OF JUSTICE IN GREAT BRITAIN* 279-80 (1936).

164. *Id.* at 280.

165. *Id.* at 186.

166. Younger, *The Grand Jury Under Attack*, 46 J. CRIM. L., C. & P. 28, 29 (1955). In this article Professor Younger gives a detailed and highly interesting account of the anti-grand jury movements both in England and the United States.

167. *Middlesex Juries* 35 & 36 Vict. c. 52 (1872) (repealed).

168. 1 STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 96 (1883).

169. See Younger, *supra* note 166, at 214-17.



limited the scope of the grand jury's investigatory powers.<sup>170</sup> In 1836 the Vermont Supreme Court held that prosecution by information in Vermont was not a violation of the fifth amendment of the United States Constitution,<sup>171</sup> and the United States Supreme Court stated in 1884 that it was not a denial of due process under the fourteenth amendment for California to adopt the information as an accusatory procedure.<sup>172</sup> Many other states have similarly adopted the information either as the sole means of making a criminal accusation or as an equal alternative to the grand jury.<sup>173</sup>

In spite of the criticism directed at the grand jury and its diminishing use in the several states, it is still hailed as one of the finest aspects of democracy. Although developed as an incident of the centralization of power in the early English kings, the grand jury has come to be regarded as protection against governmental tyranny and security from unfounded accusations.<sup>174</sup> Two English cases contributed significantly to this thought. When the King and Parliament were struggling for power, Stephen Colledge and Anthony, Earl of Shaftsbury, were accused of treason. The accusations came to naught when the grand jury refused to indict.<sup>175</sup> Of course, these cases must be read in light of the politics of their time, rather than as examples of refusal to indict for lack of evidence.

In colonial New York, the grand jury came to be regarded as a buffer against royal discipline when in 1734 the English attempted to indict Peter Zenger, a publisher, for libel against the colonial governor. Twice the grand jury refused to indict Zenger, and the accusation was then concluded by information.<sup>176</sup> However, there has seldom been any contest in this country between the government and its citizens requiring protection from oppressive state action. Yet, the use of the grand jury has been extended from the considerations which gave to it its chief value in England, and is proclaimed as a means, not only of bringing persons who are suspected

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170. *Id.* at 28.

171. *State v. Keyes*, 8 Vt. 57 (1836).

172. *Hurtado v. California*, 110 U.S. 516 (1884).

173. See Morse, *A Survey of the Grand Jury System*, 10 ORE. L. REV. 101, 122 (1931). Among the states using the information as an equal alternative to the grand jury is Oklahoma. When the Oklahoma Constitution was formed for admission to statehood, delegates to the constitutional convention agreed to abolish the grand jury as a regular procedure. But instead of leaving the summoning of the grand jury to the local judges entirely, they provided that the people could call a grand jury whenever they thought it necessary. The signatures of 100 taxpayers in a county is sufficient to cause a grand jury to be empaneled. This is unique in American jurisprudence. Younger, *supra* note 153, at 47.

174. See *Charge to Grand Jury*, 30 Fed. Cas. 992 (No. 18255) (C.C.D. Cal. 1872).

175. Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?*, 55 COLUM. L. REV. 1103, 1107-08 (1955).

176. *Id.* at 1108-09.

of crimes to trial upon just grounds, but of protecting the citizens from unfounded accusations whether from the government, partisan passion, or personal enmity.<sup>177</sup> As stated by Justice Epes of Virginia's Supreme Court of Appeals in a dissenting opinion:

The object of this provision [grand jury indictment] is not merely to give the accused notice of the offense with which he is charged. . . . That might be as well done by a warrant, information or presentment. Its primary object is to protect the great mass of law-abiding people against unwarranted prosecutions or charges of a serious nature by requiring that before a man may be put on trial for a felony there must be produced before a grand jury, taken from the body of the people, sufficient evidence to satisfy . . . [it] that the accused is *prima facie* guilty of the crime with which he is charged.<sup>178</sup>

Such was the sentiment in Virginia in 1915, when the New York efforts to abolish the grand jury were attracting nation-wide attention. As one Virginia editor put it:

We do not agree . . . on the question of abolishing the grand jury. . . . The way grand juries are managed and indictments obtained in New York might very well call for some reform in that direction in that state. For there, as in the Federal Courts here, the prosecuting attorney is in the grand jury room, for a time at least, during their deliberations and has the right to go whenever he sees fit. It is the easiest thing, therefore, in the world for him to obtain any indictment he wishes. . . .

But we are firm believers in the value of grand juries when left to their own deliberations, especially when they are selected and composed—as they usually are—from the best men in the community, and carefully charged. We do not believe any man ought to be brought to trial upon a mere information filed by the officer whose duty it is to prosecute.<sup>179</sup>

The foregoing considerations are translated into practical terms by the commonwealth's attorneys of Virginia who find the advantages of the grand jury system to be as follows:<sup>180</sup>

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177. Charge to the Grand Jury, 30 Fed. Cas. 992 (No. 18255) (C.C.D. Cal. 1872).

178. See *Sullivan v. Commonwealth*, 157 Va. 867, 884, 161 S.E. 297, 302 (1931) (dissenting opinion).

179. 1 VA. L. REG. (n.s.) 226-28 (1915).

180. Questionnaire, *supra* note 4; See also MOLEY, *POLITICS AND CRIMINAL PROSECUTION* 145-46 (1929); Younger, *The Grand Jury Under Attack III*, 46 J. Crim. L., C. & P.S. 214, 217-20, 222 (1955).

1. It is a safeguard against unwarranted charges. Its acts become a matter of record open to public inspection. It is disinterested, thus affording protection to the individual from arbitrary and unjustified prosecution launched solely by one biased official, and it curbs overly aggressive prosecutors.

2. As an aid to prosecution, it acquaints witnesses with legal proceedings, thus assuring more favorable testimony. It eliminates doubtful cases in which there is likely to be an acquittal. It often suggests a line of questioning beneficial to the Commonwealth. It gives the prosecutor an indication of what petty jury reaction to the charge may be. The very fact of indictment fortifies the Commonwealth's position.

3. It can act as an investigating agency, having the power to subpoena records, documents, and witnesses. In this respect the grand jury is independent and can make investigations on its own motion. Hence, organized crime can be combatted, and investigations into areas where prosecutors, for one reason or another, are unwilling to look, can be made. Here the grand jury has scored notable success in ridding communities of vice and racketeering that was intermingled with official corruption. In 1933 an Atlanta grand jury in the face of court opposition cleaned up a rotten situation involving county commissioners. The same year a Cleveland grand jury exposed a degenerate police and prosecution system. The 1935 exposure of vice and policy rackets in New York by a special grand jury is well known. And in 1937-1938, a Philadelphia grand jury was responsible for the ultimate correction of wide-spread police misconduct. In addition to such newsworthy investigations, the grand jury renders valuable service by investigating socio-legal problems such as the cause of traffic accidents and juvenile delinquency. Apart from other investigations, it can supervise jails and other county or state institutions, seeing to cleanliness, adequacy, and safety.

4. It is thorough in uncovering crime. Witnesses, knowing of the grand jury's secrecy, are more apt to testify before it than suffer the publicity of swearing out a warrant, and their testimony may also be recorded.

5. It acts as a buffer between the public and the prosecutor in cases where the public demands action, but the prosecutor feels that the evidence is insufficient to prosecute.

6. It affords the citizenry an opportunity to observe first hand the workings of the courts, as well as to allow them to participate actively in law enforcement.<sup>181</sup>

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181. In this respect the remarks of John Paul Causey, commonwealth attorney of King William County, Virginia are especially pertinent. In response to the author's questionnaire, Mr. Causey wrote: "As indicated in my comments to the advantages and disadvantages of the Grand Jury system I am inclined to the belief that the Grand

7. Provided the grand jury is the first law enforcement agency to receive evidence of a case, its secrecy may protect the reputation of one against whom groundless charges are made; its use may prevent a suspect's flight prior to arrest; and it may prevent an unscrupulous suspect from building a dishonest defense.

Conversely, the commonwealth's attorneys have also found in the use of the grand jury system disadvantages worthy of consideration in determining the desirability of an information system as an equal alternative to the grand jury.<sup>182</sup> Because of differences in size and composition of the various

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Jury serves a useful purpose from the political and civic standpoint, if not from the standpoint of administration of justice. I believe that the use of an information would facilitate criminal prosecutions and in certain particular instances would be most helpful in eliminating delays which may now be present in the Grand Jury system. My feeling, however, is that it would not be desirable to use the information except either as an emergency measure or with respect to cases of a most routine nature.

"Even with respect to cases of the latter type in a small rural jurisdiction I think it is to the community interest that a group of citizens in the community, such as a Grand Jury, should be periodically assembled and given some idea of what is going on in the county so far as law violations are concerned. This probably gets into the philosophical sphere, but one of our present difficulties with respect to law enforcement arises, I believe, from the fact that our citizens in general do not participate in this process. This average person's idea of what happens in a criminal proceeding is derived from detective stories, television and the movies and is quite apart from the actual fact. The more that we can involve the average citizen in the responsibility of law enforcement, the more that citizen is led to observe and respect the laws of his community.

"In the trial of criminal cases, the trend seems increasingly to be to try these before a Judge and without a petit jury. Abolition of the Grand Jury system, or use of the information generally in place of the indictment, will remove the public even more from its participation in the administration of justice. Even though the jury system may be one which is resultant in delay and have other weaknesses, still I think it is more important that the average citizen have a part in this process and that it not become a wholly professional undertaking.

"You are perhaps familiar with a couple of the 'Science Fiction' books which have been written about administration of justice in the future, where justice is administered wholly by a computing machine on the basis of the facts presented to it. As one recent story in this field illustrates, this removes the human factor of error which might well be considered an essential ingredient of the administration of justice. A very interesting equation is involved to the effect that liberty plus law equals justice, from which it can be seen that the more law there is in arriving at justice the less liberty there will be . . . ." The above was printed with the permission of Mr. Causey whose interest in the functions of the grand jury is most rewarding. In addition, the author acknowledges the interest and encouragement of Stanley A. Owens, commonwealth's attorney for Prince William County, Virginia, whose concern with grand jury problems provided the impetus for the preparation of this article.

182. Questionnaire, *supra* note 4. See also POUND, CRIMINAL JUSTICE IN AMERICA 186 (1930); MOLEY, *op. cit. supra* note 167, at 127-48; see also PUTTKAMMER, ADMINISTRATION OF THE CRIMINAL LAW 119 (1953).

communities, some factors viewed as advantages in one locale may be termed a disadvantage in another.

1. Grand juries are inefficient. Rarely do they fully comprehend their responsibility. Grand jurors are not trained in the law. Therefore, the average grand juror is unable to direct questions to genuine relevancies or to form a definite judgment as to the evidence presented. Legal guidance is needed in examining witnesses and weighing evidence, but this is theoretically impossible because the commonwealth's attorney cannot participate in grand jury functions except in a formal manner or as a witness. As a result many true bills are returned that ought not to be, and many indictments which should be found are ignored. There is nothing to prohibit the grand jury from returning a true bill based solely on hearsay evidence, and allowing the commonwealth's attorney or one of the grand jurors to be sworn as a witness encourages the use of hearsay evidence. Indictments so returned place a stigma on the accused, though he is never convicted. Most of the time, however, the grand jury merely acts as a rubber stamp for the prosecutor, hearing only the witnesses selected by him, and assuming that the mere making of an accusation justifies prosecution.

2. The grand jury merely duplicates the preliminary hearing held before the county court. Witnesses frequently have to appear at the preliminary hearing, then "cooperate" by coming to the prosecutor's office for an interview, then appear before the grand jury, and finally testify at the trial. This often wearies the witnesses, is too consumptive of their time and money, and makes for decreasing willingness to aid the prosecution. As a side light to such duplication of effort, the preliminary examiner frequently shifts responsibility to the grand jury, not bothering to conduct a thorough examination of the charge.

3. The grand jury system is expensive. Jurors and witnesses are entitled to fees, though not commensurate with their loss of time from their employment.

4. The grand jury is slow and cumbersome. Regular grand juries are called at infrequent intervals, and special grand juries seldom at all. In rural areas, one bound over to the grand jury often has to wait months, perhaps in jail, for the grand jury to convene and take action on his case. This, in turn, may cause congestion of the trial dockets or loss of time, for if the grand jury is in session on the first day of a court term, the docket is usually deferred until the grand jury reports.

5. In practice the provisions for keeping the grand jury independent are meaningless. The commonwealth's attorney can easily avoid the prohibition of his not influencing the grand jury by sending before it the sheriff or city sergeant or by having himself sworn as a witness and indicating the situation in person.

6. In spite of the historical precedent that grand jurors are selected from the community's best men, this is seldom the case. Frequently, they are far below the average.

7. The power entrusted to grand juries is frequently abused. Absurd and shocking irrelevancies are often the subject of investigation.

Prosecution of felonies by information, on the other hand, remedies many of the disadvantages incurred by use of the grand jury. The use of this accusatory device in the United States ranges all the way from zero to one-hundred per cent. Some states by statute or their constitution provide that criminal proceedings shall be only on grand jury indictment; others have the two systems as alternatives regardless of the crime charged; in between are a number of states neither wholly allowing nor disallowing the information, but permitting its use in a variety of circumstances.<sup>183</sup> But once the information has been adopted, no state has later abandoned or rejected it. To the contrary, it has almost completely supplanted indictment by a grand jury.<sup>184</sup> Specific advantages of the information when contrasted with grand jury indictment appear clearly. They may be stated as follows:

1. Prosecutions by information show a higher per cent of convictions than prosecutions by indictment, indicating at least the probability of more discriminating selection of cases for trial.<sup>185</sup>

2. The information costs less in time. If a guilty plea is contemplated, to wait for a grand jury may lead the accused to change his mind, and permit the scattering of witnesses. Only in urban areas is a grand jury continuously in session.<sup>186</sup>

3. The information is less expensive. Grand jurors' and witnesses' fees are eliminated, as is the "double-time" incurred by witnesses under the grand jury system. This makes for increasing cooperation on the part of the witnesses.<sup>187</sup>

4. Many grand juries work without a stenographic record, or any record at all, and this probably is the case in Virginia. Evidence is voluntarily given and could just as easily be given to the prosecutor. In addition, a stenographic record can always be made at the preliminary hearing on the information.<sup>188</sup>

5. Some prosecutors do not prepare their cases until the grand jury returns a true bill. The use of the information would tend to allow the prosecutor to become well-grounded in the case at the outset by interviewing witnesses while their memories are fresh.

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183. PUTTKAMMER, *op. cit. supra* note 182, at 145-46.

184. *Id.* at 151-53.

185. *Ibid.*

186. *Id.* at 150; MOLEY, *op. cit. supra* note 180, at 136.

187. PUTTKAMMER, *op. cit. supra* note 182, at 150-151.

188. See MOLEY, *op. cit. supra* note 180, at 139.

6. Modern conditions have rendered obsolete the grand jury's investigatory and accusatory powers. Modern police systems provide better means of investigation and the information is a more expedient method of making the accusation.<sup>189</sup>

7. As a protection for the innocent, the advantage of a preliminary hearing on an information is manifest. Not only does it disclose to him much of prosecution's case, thus assisting him in his defense, it also allows him to show lack of cause for holding him for trial. Yet, this is not a disadvantage to the prosecution. In England all the Crown's evidence is at the disposal of the defendant, but the complaint is seldom heard that it works to the prosecution's disadvantage.<sup>190</sup> Many prosecutors in Virginia have adopted this practice, feeling that their job is to assist in the administration of justice rather than solely to convict. A preliminary examination may also allow the prosecution to obtain an idea of the accused's defense. In any event, it is not necessary to reveal all of the state's evidence at a preliminary hearing. The inquiry should be only as to whether a crime has been committed and, if so, whether there is sufficient cause to hold the accused for trial. This, in substance, is the same determination made by a grand jury.

#### CONCLUSION

The development of the grand jury in Virginia demonstrates that emphasis has been placed on making the system functional. Technicalities have given way to substance. This being the case, the next logical step would be to adopt an even more efficient accusatory method—an information system as an equal *alternative* to felony prosecution by grand jury indictment.

Aside from its long and honored history in Virginia, the grand jury's chief value is to act as an independent agency in ferreting out crimes that formal law enforcement agencies choose to ignore. Such crimes are perhaps most often connected with corrupt county and state officials. While not suggesting that this is the situation anywhere in Virginia, its ever-present danger is reason enough for retaining the grand jury as an accusatory agency.

The reasons for hailing the grand jury as a protector of the innocent are more historical than factual. Conceivably a group of jurors numbering twenty-three, of whom twelve could return true bills, would represent a cross-section of a community sufficiently to afford balanced judgment in making accusations of crime. If this is so, it is difficult to understand how from five to seven jurors, of whom four may return a true bill, can make

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189. *Id.* at 145.

190. *Id.* at 142.

decisions with the same scope and variety of viewpoint. Furthermore, it appears that grand jurors as a whole are not trained to make legal judgments. This difficulty might be overcome by allowing the commonwealth's attorney unrestricted freedom in the grand jury room, except perhaps during the time an actual indictment is being voted.

The great majority of criminal prosecutions, however, have become routine in nature. The police make speedy and efficient investigations of reported crimes and hand the evidence over to the prosecutor who shapes it for trial. The prosecutor seldom has any personal interest in a case, seldom can be accused of trying suspects for malicious reasons, and is always better qualified to determine whether there is ground for prosecution than a group of laymen. There is no good reason why an information system with its money and time-saving features should not be used in such cases. The grand jury, on the other hand, could be used for cases having policy considerations, and can always be utilized to check the rarely-found prosecutor who has forgotten his oath of office.



