Volume 60
Issue 3 *Dickinson Law Review - Volume 60, 1955-1956*

3-1-1956

Legislative Note: The Sacred Curtain

Edwin W. Tompkins

LEGISLATIVE NOTE

THE SACRED CURTAIN

By

HON. EDWIN W. TOMPKINS*

An incomprehensible contradiction occurred in the year 1955. While there was much agitation to enact laws to curb and prevent wire-tapping of individuals, including suspected and known criminals and subversives,[1] there was at the same time wire-tapping being done under the guise of reform (maybe), exploitation (perhaps), which threatened the very foundations of American Jurisprudence, and the freedom and liberty of our people.

We have often heard it said "It can't happen here", but as summarized in U. S. News & World Report:[2]

> "The latest 'reform' movements involves 'wire tapping' of jury rooms.
>
> "Tapped wires and wire recordings gave interested professors, judges and lawyers all of the conversations, arguments and decisions of juries in six federal cases—without the jurors being aware of it.
>
> "The idea has been to tap in on jurors in every state, find out how the system might be 'improved.'
>
> "Then the lid blew off, when senators learned about it. Now juries, at least in federal courts, probably will be protected by federal law against eavesdropping."

The wire tapping of the juries was all the more reprehensible because it had the prior approval of the court.

Grand Jurors in Pennsylvania must take the following oath:

> ". . . that you will diligently inquire and true presentment make of such articles, matters, and things as shall be given you in charge, or otherwise come to your knowledge in the present service. That the Commonwealth's counsel, your fellows, and your own, you will keep secret. That you will present no one from hatred or malice, neither will you leave any one unpresented for fear, favor, affection, hope of reward or gain, but will present all things truly, as they come to your knowledge, according to the best of your understanding."[3]

Sadler says "The form of oath is of ancient origin, and is preserved at least in substance."

---

* Ph. B. and M.A. Dickinson College; LL.B. Dickinson School of Law; Member of the General Assembly, House of Representatives; Member of the Pennsylvania Bar.

1 See House Bill No. 726—Pennsylvania General Assembly—1955—Already passed the House 135-33 and now in the Senate.

2 October 21, 1955, p. 28.

3 SADLER, CRIMINAL PROCEDURE IN PENNSYLVANIA par. 219, p. 265 (2d ed. 1937).

The Superior Court of Pennsylvania however in *Commonwealth v. Kirk*,[4] states the oath to be of statutory origin in Pennsylvania:

> ". . .[W]e may further state that the *statutory* authority for the secrecy of the grand jury proceedings in this Commonwealth goes back to an act of the Provincial Assembly passed in 1696, entitled 'The Frame of the Government,' which is found in 'Charter to William Penn and Laws of the Province of Pennsylvania.' . . . It is sometimes erroneously entitled 'The Duke of Yorke's Book of Laws'. . . 'The Form of the Grand Inquest's Attest shall be in these words, viz: Thou shalt diligently inquire and true presentment make of all such matters and things, as shall be given thee in charge, or come to thy knowledge, touching this present service. The Kings Counsel, (thy) fellows and thy own, thou shalt keep secret, & in all things thou shalt present the truth, the whole truth & nothing but the truth to the best of thy knowledge.'

Numerous reasons have been assigned for this rule of secrecy. The Superior Court in the *Kirk* Case cites Professor Wigmore on the reasons for the rule: (a) The Grand Jurors themselves are to be secured in freedom from the apprehension that their opinions and votes may be subsequently disclosed by compulsion. (b) The complainants and the witnesses summoned are to be secured in fredom from the apprehension that their testimony may be subsequently disclosed by compulsion, and this in order that the state may secure willing witnesses. (c) The guilty accused is not to be provided with such clues as will enable him to flee from arrest or to suborn false testimony or tamper with witnesses. (d) The innocent accused, who is charged by complaint before the jury, but is exonerated by their refusal to indict, is entitled to be protected from the compulsory disclosure of the fact that he had been groundlessly accused. In his discussion, Professor Wigmore shows that the third and fourth reasons have no application to a purely investigating Grand Jury, as distinguished from a regular or indicting Grand Jury, for in the former there is no accused, guilty or innocent; and as respects the action of a regular Grand Jury upon the innocent accused, the public character of our records discloses all persons who are accused, and a return of "ignoramus" or "not a true bill", is the very best vindication one can have."

Other reasons have been stated as follows:[5]

> "To promote freedom of deliberation and opinion among the Grand Jury, which would be impaired, if it were known that the part taken by each, might be disclosed to the accused or his friends.
>
> "If the oath of secrecy were honestly observed, it would save the Grand Jury from the importunities (to say nothing more), of the accused and his friends, to dismiss the complaint or reconsider the finding. This 'ploughing' with the Grand Jury, at least in some localities, has assumed alarming frequency and boldness."

---

4 141 Pa. Super. 123, 14 A.2d 914 (1940).
5 WINFIELD, GRAND JURY 22, 23 (2d ed. 1928).

Another compelling reason is stated by Chief Justice Stern:[6] citing *United States v. American Medical Association,*[7]

> ". . . where defendants moved for an investigation of proceedings before the Grand Jury, alleging, inter alia, improper conduct on the part of the government attorneys and stating that some members of the Grand Jury had indicated a willingness to talk with defendants' counsel concerning such matters, it was held by the court (in refusing the motion). . . . The effect of granting such a motion would be to break down all legal checks against technical, dilatory tactics. The strong presumption of the regularity of Grand Jury proceedings would no longer prevail. . . . Every accused could upon the flimsiest pretext enlist the court's aid in a 'fishing expedition', to discover some supposed irregularity to use as a basis for dilatory action; to call over the evidence and get the government's case against him in advance of trial; to divert and turn back the course of a criminal case from a trial of himself to a trial of the Grand Jury and the prosecuting officers. . . . There could be no effective way of guarding against the manifold abuses that such a practice would encourage. . . It must be remembered that sound reasons of public policy in the administration of justice lie back of the rules which forbid free access to these channels of information."

It is true that some inroads have been made upon the rule of secrecy, with a resulting number of established exceptions. Thus a Grand Juror has been held to be a competent witness to prove who the prosecutor was,[8] or to contradict the testimony of a witness as to what she testified to before the Grand Jury,[9] or to testify that the indictment was based solely upon testimony heard by the Grand Jury in another case against another person.[10]

Irrespective of the number of exceptions to the secrecy rule, the courts[11] have said it must be conceded that exceptions to the rule shall not be carried so far as to conflict with the juror's oath.

> "He shall not testify (a) how he or any member of the jury voted, (b) nor what opinion any of them expressed in relation thereto, (c) nor to the act of either which might invalidate the finding of the jury. His action, and the action of his fellow-jurors, must be shown only by the returns which they make to the Court."

Where the District Attorney remained in the Grand Jury room during deliberations the court said:[12]

> "The district attorney is the attendant of the grand jury; it is his duty as well as his privilege to lay before them matters upon which

---

6 Comm. v. Smart. 368 Pa. 630, 84 A.2d 782 (1951).
7 United States v. American Medical Association, 26 F. Supp. 429, 431 (D.C.D. 1939).
8 Huidekoper v. Cotton, 3 Watts 56 (Pa. 1834).
9 Gordon v. Comm., 92 Pa. 216 (1879); Comm. v. Carr, 137 Pa. Super. 546, 10 A.2d 133 (1939).
10 Comm. v. Green, 126 Pa. 531 (1889); Comm. v. McComb, 157 Pa. 611 (1893); Comm. v. Ross, 58 Pa. Super. 412 (1914).
11 Gordon v. Comm., 92 Pa. 216 (1879); Comm. v. Kirk, 141 Pa. Super. 123, 14 A.2d 914 (1940); Comm. v. Grestman, 64 Pa. Super. 484 (1916).
12 Comm. v. Bradney, 126 Pa. 199 (1889).

> they are to pass, to aid them in their examinatoin of witnesses, and to give them such general instruction as they may require. But it is his duty during the discussion of the particular case, and whilst the jurors are deliberating upon it, to remain silent. It is for the jury alone to consider the evidence and to apply it to the case in hand; any attempt on the part of the district attorney to influence their action or to give effect to the evidence adduced, is in the highest degree improper and impertinent. Indeed, it is the better practice, and the jurors have an undoubted right to require, that he should retire from the room during their deliberations upon the evidence and when the vote is taken whether or not an indictment shall be found or a presentment made."

The rule of secrecy of jury deliberations applies also to Petit and Traverse Juries and civil cases.

In *Hunsicker v. Waidelich,*[18] the judge entered the jury room in the absence of counsel and, while the jury was deliberating, said, "How are you getting along?" One of the jurors said, "All right." The Judge then said, "All right, I will wait". Although the court held that the circumstances of this particular occurrence did not constitute reversible error, it did say:

> "We cannot, however, express too forcibly our disapproval of his action in invading the secrecy of the jury room. Instructions to the jury must be given in open court in the presence of the parties or their counsel. There may be no private communication of any kind or character between the judge and the jury, and if additional instructions are needed they must be given in open court. The trial judge should not, under any circumstances, enter the jury room, however innocent and proper the purpose may be. . . There is no way of determining the influence which such act might have on the minds of the jury, and the only safe course is to avoid all questions by strictly adhering to the long established practice which requires all deliberations by the jury to be conducted in the utmost privacy."

In *Cluggage v. Swan,*[14] where an attempt was made to impeach the verdict by the testimony of the jurors themselves, Mr. Justice Yeates said:

> "I frankly confess, that I feel the utmost repugnance to such testimony. By admitting it (testimony of jurors to impeach their verdict) I as readily perceive, that I should open a door to the exercise of the most pernicious arts, and tampering with jurors; and that the practice would be replete with dangerous consequences. Jurors, who have been sworn or solemnly affirmed to give a verdict according to the evidence, come with a bad grace into a tribunal of justice to prove their own dishonorable conduct, and affix a stigma on their companions who may be unheard in their defense. Besides, in the language of some of the cases, I cannot see how such testimony could be heard by the court, without proceeding against the jurors criminally. . . But above all, I greatly fear that the practice if adopted, would tend to an inquisition over the consciences of jurors, as the grounds and reasons of their verdict, and

---

[18] 302 Pa. 224 (1930).
[14] 4 Binney 150 (Pa. 1811).

> bring questions of fact more frequently before the court for their decision, than is consistent with sound policy. I am opposed to penetrating into the recesses of a jury-room, through the instrumentality of jurors, who are kept together until they have agreed upon their verdict. . . I am of opinion, that the testimony of jurors ought not to be admitted to invalidate their verdicts."

This ruling was re-affirmed in *Redmond v. Pittsburgh Rys.*,[15] with Mr. Justice Schaffer continuing:

> "Speaking through the present Chief Justice (Kephart) . . . we repeated the thought and reaffirmed the policy so long ago announced by saying: 'What is more important, we cannot accept the statement of jurors as to what transpired in the jury room as to the propriety or impropriety of a juror's conduct. To do so, would destroy the security of all verdicts and go far toward weakening the efficacy of trial by jury, so well grounded in our system of jurisprudence. Jurors cannot impeach their own verdict. Their deliberations are secret and their inviolability must be closely guarded."

So when the 1874 and all prior Constitutions of the Commonwealth of Pennsylvania[16] says: "Trial by jury shall be as heretofore", certainly one of the elements of "heretofore" must be that jury deliberations be secret, and that they be kept secret.

Beyond both the State and Federal Constitutions we hear the patron saint of the common law, Blackstone[17] referring to trial by jury as "a trial that hath been used time out of mind in this nation (England) and seems to have been coeval with the first civil government thereof."

Repp, a Danish Jurist[18] observes: "Respecting the antiquity of juries, perhaps we ought to say nothing more than this, that their origin lies beyond the age of clear history."

It can't happen here! Well it did happen here in America, and all because certain judges whom we commissioned as sentinels to stand guard over our delicate and priceless fabric of freedom saw fit to desert their post of duty, aided and abetted by certain reformers (maybe), exploiters (perhaps), who for the first time since the memory of man runneth not to the contrary, saw fit to penetrate the sacred curtain of secrecy of the jury room.

Their idea was to try it in every state in the union. Well, they have not tried it in Pennsylvania, as yet, and in an attempt to make sure that they can't do it or even try it in this Commonwealth, the writer introduced House Bill No. 1894, which at the time of this writing is on the third reading calendar in the House of Representatives which provides:

---

15 329 Pa. 302 (1938).
16 PA. CONST. art. 1, § 6 (1874).
17 3 BLACKSTONE, COMMENTARIES *349.
18 Referred to in MOSCHZISKER, TRIAL BY JURY, 13, 14.

> "Whoever by any scheme or device or in any manner, for any purpose, listens into or attempts to listen into the deliberations of any Jury, Grand, Petit or Traverse shall be guilty of a felony and upon conviction thereof shall be sentenced to pay a fine not exceeding $10,000 or undergo imprisonment not exceeding 10 years or both."

In this connection it is interesting to note[19] that "anciently it was held that if one of the Grand Jury disclosed to any person indicted the evidence that appeared against him, he was thereby made accessory to the offense, if felony, and in treason a principal." This might be a just punishment for those who eavesdrop.

As to the reasons advanced for the tapping of jury deliberations; reform (maybe), exploitation (perhaps). Improvement—In this I must confess full agreement with the statement of G. K. Chesterton[20] that:

> "Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. It wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things I felt in the Jury box. When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses its specialists. But when it wishes anything done which is really serious, it collects 12 of the ordinary men standing around. The same thing was done, if I remember right, by the Founder of Christianity."

Permit me to conclude with the words of Representative Israel Washburn of Maine, spoken in the House of Representatives on March 14, 1856, In Re Kansas Contested Election:[21]

> "Trial by jury, the palladium of civil right and personal security, born of the conflicts of liberty with despotism, and baptised in the blood of men struggling to be free, consecrated in our hearts as the ancient and indefeasible heritage of the people . . ., stands against all assaults."

Let's keep it that way.

---

19 WINFIELD, GRAND JURY 22, 23 (2d ed. 1928).
20 *The Twelve Men,* in TREMENDOUS TRIFLES.
21 IV GREAT DEBATES IN AMERICAN HISTORY 236.