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THE CONSTITUTIONAL RIGHT TO A TRIAL BY
A JURY OF THE VICINAGE.

The extent to which those provisions of Magna Carta, which secured to the people of England the right of trial by jury, were adopted and incorporated into the constitutions of the American States, has always been an interesting question to the student of American Constitutional Law. That the colonists, at all times, insisted that they brought with them across the seas, either as their inalienable birth-right, or, as guaranteed by charters, trial by jury, as it existed in England, is shown by their firm and prompt resistance of any invasion or diminution of it by their Royal Governors, or from the Mother Country, either by the King's Ministers or by Parliament. The colonial records amply attest this fact. Among the grievances against the government was the threat to deprive them of the right of trial by jury, as enjoyed by British subjects at home. When the troubles growing out of the Stamp Act assumed the form of resistance by the colonists in Massachusetts, they declared that, for alleged offences against the government, they could be tried only by a jury of the vicinage. The same position was maintained by the other colonists.

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That they well understood what was meant by the term "trial by jury" in criminal proceedings, and what limitations were thereby imposed upon the government, is manifest from their private correspondence and public declarations. Burke, in his speech on "Conciliation with America," declared that, he had learned from the booksellers, that nearly as many copies of Blackstone's Commentaries had been sold in America as in England. Coke was not unknown to them. From these, and other sources they had learned that among other modes, "The trial by jury, or by the Country, *per patriam*, is also that trial by the peers of every Englishman which, as the grand bulwark of his liberties is secured to him by the Great Charter." 4 Blk. (Lewis' Ed.) 349. It was immaterial to them whether it had its origin in the Great Charter, or whether, as is more probable, it existed before and was, by the Charter, secured against Royal interference. *McKechnie, Magna Carta*, Ch. 39. It was sufficient for them to know that it was "the great bulwark of their liberties," and was to be preserved at all hazards. Hence, when they held their first provincial conventions, or congresses, to declare their grievances and assert their rights, they invariably asserted this right and protested against its slightest invasion. They regarded it as fundamental, and not dependent upon, or subject to be taken from them by, either King or Parliament.

On August 25, 1774, the Provincial Congress of North Carolina "Resolved that trial by juries of the vicinity, is the only lawful inquest that can pass upon the life of a British subject, and it is a right handed down to us from the earliest ages, confirmed and sanctified by Magna Carta itself."

Similar language was used in Virginia declaring that "trial by jury of the vicinage" was their birth-right. This conviction found expression in all of the colonies. The Continental Congress, October, 1774, in an address to the inhabitants of the Province of Quebec, setting forth the "inalienable rights" of British subjects, said: "The next great right is that of trial by jury. This provides that

neither life, liberty or property can be taken from the possessor until twelve of his unexceptionable countrymen and peers of his vicinage, who from that neighborhood may reasonably be supposed to be acquainted with his character, and the character of the witnesses upon a fair trial face to face in open Court before as many of the people as choose to attend, shall pass their sentence upon oath against him." The same truth was asserted in the great Declaration of July 4, 1776. This was the firm conviction of the American colonists and it was one of the "sacred rights" for which they went to war with the Mother Country. When they assumed Statehood, set up governments for themselves and formed "Constitutions" or "Forms of Government" they, in almost every instance, adopted and set in the forefront of the Constitution as the controlling guide to its interpretation a "Declaration of Rights." Experience had taught them the necessity of putting well defined limitations, expressed in well understood language, upon the powers of each department of the government they were bringing into existence. They indulged in no abstractions, or theories, regarding the "rights of man"—but, as sturdy, practical Englishmen they secured, by unmistakable English words, the personal and political rights of the individual citizen. As Burke said: "They were not only devoted to liberty, but to liberty according to English ideas and on English principles." Said a great American judge, statesman and patriot: "They determined that not one drop of the blood which had been shed on the other side of the Atlantic during seven centuries of contest with arbitrary power, should sink into the ground; but the fruits of every popular victory should be garnered up in this new government. Of the great rights they threw not an atom away. They went over Magna Carta, the Petition of Right, the Bill of Rights and the rules of the common law and whatever was found there to favor individual liberty, they carefully inserted in their own system, improved by clearer expression, strengthened by heavier sanctions, and extended by more universal application. They put all those provisions

into the organic law, so that neither tyranny in the executive, nor party rage in the legislature could change them without destroying the government itself." Judge Black, *arguendo*, in *Ex Parte Milligan*, 71 U. S. at p. 67.

In North Carolina they said: "No freeman shall be put to answer any criminal charge but by indictment, presentment or impeachment."

"No freeman shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court as heretofore used." (Const. N. C. 1776.) Language of the same import, generally of the same words, was used in other States. In some States the same rights were guaranteed by provisions that no man should be deprived of his life, liberty or property, "but by the law of the land," the identical words used in Magna Carta. These words have uniformly been held to mean "due process of law," which protects the citizen from being put upon his trial but by indictment, or from being convicted but by the verdict of a jury of his peers. *McGehee, Due Process of Law* 10. *Cooley Const. Lim.* 429. That the term "indictment" or "indictment by a Grand Jury" was used with reference to the meaning and significance given to it in English constitutional law and history has been uniformly held by American courts. When the Federal Constitution was framed and submitted to the States for ratification, it contained no "Bill of Rights" or guarantee of trial by jury. The absence of these securities to the liberty of the citizen in criminal prosecutions by the new government was strongly urged against its ratification. The conventions, in a majority of the States, ratified it with proposed amendments, all concurring in demanding that this provision be adopted and this right be secured. North Carolina and Rhode Island refused to ratify. When, in November, 1789, North Carolina ratified it, her delegates submitted this, among other, amendments deemed essential to the protection of the rights of her citizens. Congress promptly responded to this demand of the States, by adopting and submitting for ratification, the fifth and sixth amendments.

They were as promptly ratified by the States. They declared in no uncertain language that "No person shall be held for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, etc.," and that "In all criminal prosecutions the accused shall enjoy the right to a speedy public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." The people well knew that, while they were establishing a government based upon and deriving its power from the "consent of the governed," general declarations were capable of being explained away by construction and that those whom they appointed to govern would, unless restrained by specific limitations, find powers not granted and, under the tyrant's plea of necessity, encroach upon their reserved rights.

How were these Constitutional guarantees to be construed, and where should the Courts go to find the meaning of the words used? Chief Justice Shaw, referring to the language in the Massachusetts Bill of Rights, said: "This clause in its whole structure, is so manifestly conformable to the words of the Magna Carta that we are not to consider it as a newly invented phrase, first used by the makers of our Constitution, but we are to look at it as the adoption of one of the great securities of private right, handed down to us among the liberties and privileges which our ancestors enjoyed at the time of their emigration and claimed to hold and retain as their birth-right." *Jones v. Robbins*, 6 Gray, 360. Chief Justice Sharkey said: "The right of trial by jury, being of the highest importance to the citizen and essential to liberty, was not left to the uncertain fate of legislation, but was secured by the Constitution of this and all other states, as sacred and inviolable. The question naturally arises—How was it adopted by the Constitution? That instrument is silent as to the number and qualifications of jurors: we must therefore call in to our aid the common law, for the purpose of ascertaining what was meant by the term 'jury.'" *Byrd v. St.*, 1 How. (Miss.), 176. He

concludes that it was intended to secure the right, as it existed in England, secured by Magna Carta.

In North Carolina, Shepherd, J., said: "We think it can hardly be questioned that, when our first Constitution was adopted, in 1776, the mode of prosecution upon the indictment of a Grand Jury was a well-understood system among all English speaking people and especially in respect to the number requisite to the finding of a bill." *State v. Barker*, 107 N. C. 913; see also *English v. State*, 31 Fla. 340. What rights, then, are secured to the citizen by these Constitutional restrictions on judicial and legislative action, in respect to criminal proceedings involving life, liberty and property? First, it is uniformly held that, before he can be called to answer a criminal charge there must be an indictment—found by a Grand Jury—composed of not more than twenty-three and not less than twelve, in which at least twelve must concur, unless the State Constitution provides otherwise. Chief Justice Dixon said: "The only inflexible rule with respect to numbers seems to have been that there could not be less than twelve nor more than twenty-three jurors. The concurrence of twelve was necessary to find a bill." *Bruckner v. State*, 16 Wis. 354. The Court in *State v. Barker*, 107 N. C. 913, held that a statute providing that a Grand Jury composed of twelve, of whom nine were empowered to find a true bill, was invalid. The opinions in these cases are sustained by a wealth of authority and may be taken as settled law in this country and this, not because it is so written in our Constitution, but because the words used had that meaning in the English Constitution, or Magna Carta, and other muniments of English liberty. Lewis' Blackstone, 302-303. It is with equal uniformity held that, unless otherwise provided in the Constitution, the right to "trial by jury" means the unanimous verdict of "an impartial jury of twelve good and lawful men." "*Liberos et legales homines.*" This was the unanimous opinion of the Judges of New Hampshire when called upon by the Legislature for advice. They said the term "jury" and "trial by jury" used in the Constitution, meant a jury of "twelve

good and lawful men." "We are of the opinion that no body less than twelve men, though they should be by law denominated a jury, would be a jury within the meaning of the Constitution. * * * The Legislature, therefore, has no power so to change the law, in relation to juries, as to provide that juries may be composed of a less number than twelve, nor to provide that a number of the petit jury less than the whole number can render a verdict when the Constitution gives to the party a right to trial by jury." They rested their opinion upon the law as it was "from the earliest judicial history of England." In *Byrd v. The State*, 2 Howard (Miss.), 170, it is said: "The Legislature can not abolish or change, substantially, the panel or jury, but it may, it is presumed, prescribe the qualifications of the individuals composing it. Our statute nowhere defines the number necessary to constitute a jury; but the number twelve, known as the number at common law is no doubt what is meant by the Constitution of all States when a jury is mentioned."

In *Thomas v. State*, 170 U. S. 343, it was held that the sixth amendment guaranteed to the accused trial by a jury of twelve. Mr. Justice Harlan said: "When *Magna Carta* declared that no freeman should be deprived of his life, etc., but by the judgment of his peers, or the law of the land, it referred to a trial by twelve jurors." In that case the alleged crime was committed in the Territory of Utah, prior to its admission as a State. The Constitution provided that the concurrence of eight jurors was sufficient to convict. The Supreme Court held that the defendant was entitled to demand trial by jury, "as secured in the sixth amendment, that being the law of the territory where the offence was alleged to have been committed." Thus the law may be regarded as a "thing fixed" and not open to controversy that, unless otherwise provided in the Constitution, the right of a trial by jury in a criminal proceeding is secured only by the unanimous concurrence of a jury of twelve good and lawful men. While the Legislature may enact statutes prescribing the qualification, mode of selection,

number and causes of challenge, etc., it has no power to change the ancient law embodied in the Constitution. This brings us to a consideration of the inquiry, whether by the same canon of interpretation, the words "indictment," "jury" and "trial by jury" secures to the citizen, charged with a violation of the criminal law, a Grand Jury of the county in which the offence was committed, and trial before a petit jury of the vicinage which Blackstone says "is interpreted to be the county where the fact is committed." In other words—is he entitled to demand, as a Constitutional right, not subject to legislative interference, a jury, not only *liberos et legales homines*, but *de vicineto*? This enquiry opens up an interesting line of investigation. "When the defendant has entered his plea of not guilty and, for his trial, has put himself on his country, which country the jury are, the sheriff of the county must return a panel of jurors *liberos et legales homines de vicineto*, that is, freeholders without just exception of the *visne* or neighborhood where the fact is committed." 4 Blk. (Lewis' Ed.) 350. The ancient writ commanded the sheriff to summon "free and lawful men of the neighborhood, etc." Glanville 32. "And the reason wherefor the jury must be of the neighborhood is for that *vicinus facta vicine presumita scire*." Coke Litt. 158 b., and so are all of the old writers. It is true, as said by Blackstone, that various acts were passed by Parliament regulating the *venue* in criminal proceeding, a list of which he gives. It will be noted, however, that with few exceptions, they prescribe what shall be the *venue* in respect to crimes wherein the place of commission is uncertain, as when a man is stricken in one county and dies in another, 2 & 3 Edw. VI; or crimes are committed upon the high seas, or upon navigable rivers which are the boundaries dividing counties and it is uncertain upon which side of the channel the act was committed, etc. So offences committed against the Black Act, 9 Geo. 1, may be inquired of and tried in any county in England at the option of the prosecutor. Other exceptions to the general rule are made by statutes. It is not very material to inquire how far changes in the *venue*

were made by Acts of Parliament. The inquiry is whether trial by jury of the vicinage was claimed as one of the constitutional rights by the colonists and whether they deemed it of sufficient value to be "garnered up" and preserved in their new government? It is undoubtedly true that in the 35th year of the reign of Henry VIII, when new treasons were being created by a truculent Parliament to gratify the changing ecclesiastical and matrimonial whims of the King, an act was passed empowering him to appoint commissions for the trial of persons accused of treason at any place in the realm that the King should designate. This, like many other statutes passed in the reign of the Tudors and Stuarts, was not always recognized as consistent with the spirit of the British Constitution. When, in 1768, it was invoked against the colonists, the Whigs, both in England and America, denied its validity. When the address to the King, adopted by the House of Lords, praying that he would "issue special commissions for enquiring of, hearing and determining" alleged offences of the colonists of Massachusetts Bay, "within the realm, pursuant to the provisions of the statute of the 35th year of King Henry the Eighth," Hansard records that, when the address and petition were sent to the Commons, "the grand debate then commenced," which he further says "was very fine indeed." After noting portions of the debate, he says: "That part of the address which proposed the bringing of delinquents from the province of Massachusetts, to be tried at a tribunal in this kingdom for crimes supposed to be committed there, met with still greater opposition than the resolves. Such proceeding was said to be totally contrary to the spirit of our Constitution. A man charged with a crime is, by the law of England, usually tried in the county in which he is said to have committed the offence, that the circumstances of his crime may be more clearly examined and that the knowledge which the jurors thereby receive of his general character might assist them in pronouncing, with a greater degree of certainty, upon his innocence or guilt. That as the Constitution, from a conviction

of its utility, has secured this mode of trial to every subject in England, under what color of justice can he be deprived of it by going to America?" Concluding the account of the debate, it is said: "The ministers (from whatever cause) were even unusually cold and languid in support of the Resolution and the Address, which they had proposed for executing the law of Henry VIII, and when they were asked, with a degree of insult, which of them would own himself the adviser of that measure, they severally declined to adopt it." Parliamentary Hist. Vol. XVI., p. 479-494. Trevelyan says of the opposition:

"They commented forcibly on the cruelty and injustice of dragging an individual three thousand miles from his family, his friends, and his business, 'from assistance, countenance, comfort and counsel necessary to support a man under such trying circumstances,' in order that, with the Atlantic between him and his own witnesses, he might be put to peril of his life before a panel of twelve Englishmen, in no true sense of the word his peers. Of those jurymen the accused colonist would not possess the personal knowledge which alone could enable him to avail himself of his right to challenge; while they on their side would infallibly regard themselves as brought together to vindicate the law against a criminal of whose guilt the responsible authorities were fully assured, but who would have been dishonestly acquitted by a Boston jury. All this was said in the House of Commons, and listened to most unwillingly by the adherents of the ministry, who after a while drowned argument by clamour. A large majority voted to establish what was, for all intents and purposes, a new tribunal, to take cognizance of an act which, since it had been committed, had been made a crime by an *ex post facto* decree. Parliament had done this in a single evening, without hearing a tittle of evidence, and (after a not very advanced stage in the proceedings) without consenting to hear anything or anybody at all. But a House of Commons, which had so often dealt with Wilkes and the Middlesex electors, had got far beyond the point of caring to maintain a judicial temper

over matters affecting the rights, the liberty, and now at last the lives of men.

“That which was the sport of a night at Westminster was something very different to those whom it most concerned at Boston. The chiefs of the popular party saw the full extent of their danger in a moment. * * * To poor men, as most of them were, transportation to England at best meant ruin. Their one protection, the sympathy of their fellow-citizens, was now powerless to save them.”

Of the conditions prevailing in America, he makes this comment: “The times were such that the lawyers in America, like all other men there, had to choose their party. In the Government camp were those favored persons whom the Crown regularly employed in Court; and those who held or looked to hold, the posts of distinction and emolument with which the colonies abounded. For the Bar in America, as in Ireland and Scotland to this day, was a public service as well as a profession. But, with these exceptions, most lawyers were patriots; for the same reason that (as the royal Governors complained) every patriot was, or thought himself, a lawyer. The rights and liberties of the province had long been the all-pervading topic of conversation in Massachusetts. * * *

“The revival of the old Tudor statute, which kept a halter suspended over the neck of every public man whom the people of Massachusetts followed and trusted, was a device as provocative, and in the end proved to be as foolish and as futile, as the operation which in the story of our great civil contest is called, not very accurately, the arrest of the five members.” *American Revolution, Part I, p. 102-107.*

Lecky thus refers to the effort to use the statute of Henry VIII against the colonists: “By virtue of an obsolete law, passed in one of the darkest periods of English history and at a time when England possessed not a single colony, any colonist who was designated by the Governor as a traitor might be carried 3000 miles from his home, from his witnesses, from the scene of his alleged crime, from all those who were acquainted with the general tenor of his life, to

be tried by strangers of the very nation against whom he was supposed to have offended." Vol. III, *Lecky Eng.* 18th Century, 394-395. He says that the threat to transport persons charged with crime in America to England for trial "excited a fierce and legitimate indignation in America, and added a new and very serious item to the long list of colonial grievances." It is interesting to note the manner in which the colonists regarded and treated this proposition to transport them to England for trial. The Provincial Congress of North Carolina, August 25, 1774, Resolved, "That trial by juries of the vicinity is the only lawful inquest that can pass upon the life of a British subject and that it is a right handed down to us from the earliest ages, confirmed and sanctified by Magna Carta itself." The Continental Congress, in its Address to the People of Great Britain, said: "In all these colonies, justice is regularly and impartially administered and yet, by construction of some and the direction of other acts of Parliament, offenders are to be taken by force, together with all such persons as may be pointed out as witnesses and carried to England, there to be tried in a distant land by a jury of strangers and subject to all the disadvantages that result from want of friends and of witnesses and want of money." October, 1774. In South Carolina, William H. Drayton protested that the ministry was invading the rights of the colonists; "By declaring that the people of Massachusetts Bay are liable for offences or pretended offences done in that colony to be sent to and tried for the same in England, or in any colony, where they can not have the benefit of a jury of the vicinage." In Virginia, they declared that, among their Constitutional rights was "trial by jury of the vicinage." All of the colonies not only made the same declaration but, with one accord, made "the cause of Massachusetts Bay the cause of all." It will be observed that they did not petition that the right be granted as a matter of grace, but demanded it as a matter of right. It is manifest that they not only understood that trial by jury of the vicinage was, as Blackstone says: "Interpreted to be of the county," but

they also understood that any, the slightest, surrender of it involved them in ruin and made them slaves to the King and Parliament. They therefore resisted any invasion, determined, as Judge Black says, "that not one atom" of the right be lost. Massachusetts declared that "In all criminal prosecutions the verification of facts, in the vicinity where they happen, is one of the greatest securities of life, liberty and happiness." Bill of Rights, Art. XIII.

In North Carolina, trial by an impartial jury "as heretofore used," was secured in the Bill of Rights. In New Hampshire it is declared that: "In criminal prosecutions, the trial of facts *in the vicinity where they happen* is so essential to the security of the life, liberty and estate of the citizen, that no crime or offence ought to be tried *in any other county than that* in which it is committed, except in case of general insurrection in any particular county, where it shall appear to the Judges of the Superior Court that an impartial trial can not be had in the county where the offence may be committed and upon their report, the Legislature shall think proper to direct the trial in the nearest county in which an impartial trial can be obtained." Later on, in proposing the sixth amendment to the Federal Constitution, there being no counties in the Federal division of the State, but districts in which Federal Courts were to sit, they carefully provided that the trial "should be had by a jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." Judge Black, in his great argument in *Ex Parte Milligan*—enumerates the fundamental rights guaranteed to every citizen in criminal prosecutions. He says: "His guilt or innocence shall be determined by an impartial jury. These English words are to be understood in their English sense, and they mean that the jurors shall be fairly selected by a sworn officer from among the peers of the party, residing within the local jurisdiction of the Court." Judge Cooley says: "No one doubts that a trial by a jury of the vicinage is as complete and certain now as it ever was and that, in America, it was indefeasible."

Swart v. Kimball, 43 Mich. 443. In Virginia, Kentucky, Pennsylvania, Maine and Missouri, trial by a "jury of the vicinage" is provided in the Constitution. In Arkansas, Alabama, Colorado, Indiana, Kansas, Minnesota, Mississippi, Montana, Oregon, Ohio, Oklahoma, Washington, Tennessee and Wisconsin, trial by jury of the county or district, wherein the crime is alleged to have been committed, is secured. So far as my examination has gone in the other States no reference is made to the *venue*. Statutes have been enacted in many of the States, providing that the defendant, when called to plead to an indictment, may aver by plea in abatement that the fact was committed, if at all, in some other county, and if the plea be admitted, or upon issue joined found good, the Court shall remove the record for trial to the proper county. The validity of these statutes has not, so far as I find, been questioned. The right of the Legislature to prescribe the *venue* when there is doubt as to the county lines, etc., is likewise conceded. The practical question is whether in those States wherein no reference is made in the Constitution to the *venue*, but "trial by jury" is guaranteed to every person charged with a crime, it is within the power of the Legislature to authorize prosecutions to be instituted and tried in any county other than that where the fact is committed. The validity of such legislation has been passed upon in a few cases only. During the disturbed conditions existing in the Southern States following the late civil war, when political feeling ran high, the Legislature of North Carolina enacted a statute empowering the Governor, in his judgment, to declare any county in a state of insurrection and, upon motion of the Solicitor, it was made the duty of the Judge to remove the trial of any person who had been or might thereafter be indicted in any county in the State for the commission of certain felonies, some of which were created by the Legislature, from the county in which such offence may have been committed to such county, in his district, as the Solicitor might designate; also empowering the Judge, upon his own motion, to make such removal. Acts 1869-70. This provision

of the statute was never, so far as the public record shows, put into execution. When the Governor undertook to execute its other provisions by arresting and holding citizens by military power, refusing to obey the writ of *habeas corpus*, the people elected a Senate and House of Representatives, which promptly impeached, convicted and removed him from office. They also repealed the statute. Acts 1870-71, Ch. VII, being the first act of general application ratified after they convened.

By Ch. 461, Laws 1893, of North Carolina, jurisdiction was conferred upon the Superior Court of any county which adjoins another in which the crime of lynching shall be committed, to the same extent as if committed in such adjoining county. The Solicitor is required to furnish information of the commission of such crime to the grand juries of all adjoining counties, from time to time, until the offenders are brought to justice. An indictment having been found by the Grand Jury of Union County, charging the defendant with the crime of lynching in Anson County, he moved the Court to quash the bill. His motion was allowed but, upon appeal, the Supreme Court reversed the judgment. *State v. Lewis*, 142 N. C. 626.* The same question came before the Supreme Court of Michigan in *Swart v. Kimball*, 43 Mich. 443, Judge Cooley writing the opinion. The Constitution of the State provided: "The right of trial by jury shall remain." The Legislature by statute directed that bills of indictment for cutting timber standing on any public lands might be sent "in the county where the offence was committed, or in such other county as the Commissioner of the

*In *State v. Cutshall*, 110 N. C. 538, the Supreme Court, by Avery, Justice, said: "This language evinces the purpose of our representatives to risk their lives and their fortunes in part, at least to secure not simply the ancient right of trial by jury, but trial by a jury of the vicinage, within easy reach of all evidence material for the vindication of the accused when the charge might prove unfounded upon a fair investigation." This case was overlooked in Lewis' case. It is true that it did not involve the validity of any statute, but it is a well considered opinion. *Matter of Dana*, 7 Benedict 1.

State lands, or the Attorney General shall, by written instruction to the prosecuting attorney thereof, direct." A prosecution was instituted in a county other than the one in which the offence was committed. The defendant was discharged upon a writ of *habeas corpus* and brought suit against the prosecutor, alleging that the statute was unconstitutional. The Judge opens the discussion by saying: "The act is not only tyrannical and oppressive in the last degree * * * it is manifestly in conflict with one of the plainest and most important provisions of the Constitution." He proceeds to say: "Now that in a jury trial it is implied that the trial shall be by a jury of the vicinage is familiar law." After discussing the several English statutes set out by Blackstone and Chitty (1 Crim. Law 179) and the Act of Henry VIII, he says: "If such statutes were forbidden by the unwritten Constitution of England, they are certainly unauthorized by the written Constitutions of the American States, in which the utmost pains had been taken to preserve all the securities of individual liberty." He states, with great force, the hardship and injustice of taking a citizen, on a criminal accusation, to a distant part of the State for trial. The indictment was found in a county 250 miles from that in which the fact was committed. See also "Constitutional Limitations" 390, 391. These two are the only cases which I have been able to find in which the question has been decided interpreting the Constitutional provision, which merely in terms, secures "trial by jury" without making any express provision that it shall be "of the county" or "the vicinage." In those States where the Constitution makes such express provision it is held that a removal of the indictment cannot be ordered without the consent of the defendant. *Osborne v. State*, 24 Ark. 629; *Kirk v. State*, 1 Coldw. (41 Tenn. 345); *People v. Powell*, 87 Cal. 348, in which Judge Works writes a strong opinion. *State v. Wheeler*, 24 Wis. 52. It is held otherwise when the *accused* asks for a removal on account of local prejudice. If the right to trial by a jury of the county wherein the crime

is committed is an essential element in trial by jury to the same extent as that twelve grand jurors shall concur in finding a bill, and twelve petit jurors shall concur in the verdict, has the Legislature any power to deprive the accused of it? It is difficult to find any ground for so holding. It is true that it is held by some Judges, theoretically, that in the absence of express limitations upon the power of the Legislature, the Courts cannot question the validity of its enactments. If this view be correct, the decisions to which reference has been made, and all others of like import are wrong, and the "trial by jury," provided for in the Constitutions, both State and National, means only an indictment and trial by such a number of jurors as Congress or State legislation may prescribe, and, by the same canon of interpretation, a verdict of guilty may be rendered by a majority, or for that matter, a third or fourth of the jurors, if the Legislature so provides. This would lead to the conclusion that a jury of the vicinage meant such vicinage as the Legislature may prescribe, even to the extent of the entire State, provided that, in some form the right to demand indictment by a grand jury and trial by a petit jury, is preserved. It is hardly probable that the unbroken current of judicial opinion upon this subject will be reversed. Of course the people of the State may make any constitutional provision in this respect which they wish. It is held in *Hurtado v. California*, 110 U. S. 516, that the right to do so is not affected by the Fourteenth Amendment, although Judge Harlan writes a very strong dissent. The question of legislative power is an open one in our jurisprudence, the Court holding one view in Michigan and an opposite one in North Carolina. It would seem that the trend of judicial thought is with the Michigan Court and that historically the latter Court has enunciated the sounder Constitutional doctrine. It is a well-settled rule of constitutional interpretation that when words conferring executive, legislative or judicial powers are of doubtful meaning, the Court will interpret them in the light of the Bill of Rights, which has been well defined to be "An instrument which fixes limita-

tions as well upon the powers of the civil magistrate as upon the legislative department, while it secures the civil and political rights of the citizen." *Eason v. State*, 11 Ark. 482. "The maxims of Magna Carta and the common law are interpreters of constitutional grants of power, and those acts which, by those maxims the several departments of government are forbidden to do, cannot be considered within any grant or apportionment of power which the people, in general terms, have made to those departments. * * * Nor, when fundamental rights are declared by the Constitution, is it necessary at the same time to prohibit the Legislature, in express terms, from taking them away. The declaration is itself a prohibition and is inserted in the Constitution for the express purpose of operating as a restriction upon legislative power." *Cooley Const. Lim.*, 208-209.

It is not the purpose of this article to suggest what, if any, changes should be made in respect to the right of persons accused of crimes to demand a grand and petit jury of the vicinage, but rather that the question should be removed from the domain of judicial interpretation. Doubtful governmental powers lie dormant until some unexpected emergency arises when, either for the public safety or, to gratify party or factional passions, they are invoked by the enactment of statutes hastily drawn by men guided by fears or interests, rather than by a recognition of well-settled principles of constitutional law. When their enforcement is resisted, appeals are taken to the Courts, which must pass upon them in the light of authoritative decisions and historical truth. The public mind, at such times, is disturbed by existing and it may be transient conditions or appeals to passion rather than reason. If the Judges find it their duty to disappoint the demand for speedy trials, at the expense of the right of the citizen, it is easy to find their reasons to be "technical," or obstructive of the will of the people. Our own history is not without its lessons in this respect. In times of party rage and sectional hatred, statutes were proposed, and some enacted, but little less contrary to the spirit, if not the letter, of the Constitution than that of 35th,

Henry VIII. Recent events in several of the States warn us of the dynamic social, industrial and other forces disturbing the public peace, as well as endangering the lives and property of the people. If, as many thoughtful men think, our criminal laws are either so defective, or so weak in their administration that radical changes should be made, it would be wise to remove doubt from constitutional provisions, so that legislative action will not conflict with them. If we have outgrown Magna Carta, and limitations on government should be removed and new modes of trial, with more expeditious and less restrictive criminal procedure should be established, let the Constitutions be so amended that the Courts will not find themselves compelled either to construe them away or invalidate legislation. While ours is a government by the people, of the people and for the people, it is an equally important truth that the people govern by agencies of their own creation, subject to the limitations imposed upon them by the supreme law, beyond which they should neither be required nor permitted to go, certainly if the law is essential to stability of the State and the safety of the citizen.

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