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McCullough *versus* The Commonwealth.
Supreme Court of Pennsylvania.
November 14, 1870.
January 3, 1871.

November 14th 1870.

Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Quarter Sessions of *Washington county:* of October and November Term, 1870, No. 104.

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D. F. Patterson (with whom was *T. H. Baird*), for plaintiffs in error cited: Acts of May 8th 1854, sect. 1, Pamph. L. 603, Purd. 666, pl. 31; March 31st 1856, sect. 33 *et seq;* Pamph. L. 207, Purd. 187 pl. 41; Updegraff *v.* Commonwealth, 6 S. & R. 5. On the 3d reason he cited 1 Chitty's Crim. Law 162; 4 Bl. Comm. 301; 1 Bishop's Crim. Prac. 731.

There was no paper-book or oral argument for the Commonwealth.

The opinion of the court was delivered, January 3d 1871, by AGNEW, J.

At February sessions, 1870, Andrew Neil, a constable, in his quarterly return, under oath, and as a part of it, returned Peter McCullough for keeping a tippling-house contrary to law, and also for selling liquors on Sunday, to minors and to men of intemperate habits. On this return the court awarded process for Peter McCullough, upon which he was arrested, and gave bail for his appearance at the next term. At the following term the district attorney sent up a bill against him to the grand jury, for furnishing intoxicating drinks as a beverage to Hezekiah Cooper, a person of known intemperate habits, contrary to law. This bill was returned a true bill. It was founded upon the Act of 8th of May 1854, commonly called the "Buckalew act," one of the most beneficent laws on the statute book. Viewing the habitual drunkard as a poor captive to appetite, enthralled by a slavery too strong for reason and duty, it comes to his relief by striking down the hand that puts the cup to his lips, and puts it in the power of wife, children and relatives to stay the hand of the seller of strong drink, by a notice which exposes him to punishment, if the warning be disregarded.

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The defendant moved to quash this indictment on the ground that it was not based upon an accusation made before a committing magistrate, founded on probable cause, and supported by oath; that it was not based upon a presentment of the grand jury made from the personal knowledge or observation of any of its members, or upon the testimony of witnesses sent before them by the court; and that the offence is not of that nature which required the extraordinary intervention of the court to order it to be investigated by the grand jury. The substance of all these exceptions is, in short, that the return of the proper constable, under oath, and made to the proper court, is not a sufficient ground to enable that court to direct, or to authorize the district attorney, exercising the powers of the former attorney-general, to send up a bill to the grand jury for the offences returned by the constable. The court refused the motion to quash, the defendant was convicted and sentenced under the indictment, and this certiorari is brought to reverse the proceeding. The ground of the motion to quash brings into view the office and authority of the constable, and the powers of the court and district attorney. The office of constable is ancient, his duties important and powers large. His general duty is to keep the peace; and for this purpose he may arrest, imprison, break open doors, and the like: 1 Black Com. 356; 1 Chitty C. L. 20 to 25. A constable may justify an arrest for a reasonable cause of suspicion alone. Russell *v.* Shuster, 8 W. & S. 309. He may arrest for a breach of the peace in his presence, and deposit the prisoner in jail, and the jailer is bound to receive him: Commonwealth *v.* Deacon, 8 S. & R. 47. And what is more to our

present purpose, he is *bound to present to the term or last* court all offences inquirable in those courts: 2 Hawk. P. L. C., chap. 10, sect. 34. Those are all common-law powers, and the last, that of making a return, is in the nature of an official information against the offenders; and, besides being made under a special oath at the time of the return, it is the equivalent of an oath and charge before a magistrate. In this state the Court of Quarter Sessions, which is a court of record, and has jurisdiction to try the offenders, takes the place of all other courts at common law for the trial of ordinary offences; the return to it is appropriate, and it becomes the duty of the court to take notice of the return.

In addition to these common-law duties many statutory duties have been imposed upon constables in this State. Under an old law, he was bound to search public-houses and places suspected of entertaining tipplers on Sunday, and to disperse them quietly. By numerous laws he was bound to make returns under oath of various offences, such as killing deer out of season, unlawful acts against the laws for preserving fish, the births of bastard children, tippling-houses kept without license, the want of index boards

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required by the road law, breaches of the peace at elections, wagers upon elections, and others which do not recur to my memory. In view of these important duties and authorities we cannot hold that the return of the constable was nugatory, because no special duty is imposed by the Act of 8th April 1854. On the contrary, we think it was a sufficient ground to authorize the court to issue process to bring in the offender, and to direct the district attorney to send up a bill to the grand jury. Nor do we think there was any want of power in the court to direct a bill, or in the district attorney to send up a bill for the offence so returned. It has never been thought that the 9th section of the 9th article of the Constitution, commonly called the Bill of Rights, prohibits all modes of originating a criminal charge against offenders, except that by a prosecution before a committing magistrate. Had it been so thought, the court, the attorney-general, and the grand jury would have been stripped of powers universally conceded to them. In that event the court could give no offence in charge to the grand jury, the attorney-general could send up no bill, and the grand jury could make no presentment of their own knowledge, but all prosecutions would have to pass first through the hands of inferior magistrates; for in all the instances mentioned the defendant could not be heard by himself or his counsel, demand the nature or cause of accusation, or meet the witnesses face to face, until after the bill had been found by the grand jury.

In the Federal courts, and in some of the states, it has been held that the grand jury alone may call witnesses and institute all prosecutions of their own motion, and without the agency of the district attorney: 1 Whart. C. L., ed. 1868, §§ 453 and 458. In this state the power of the grand jury is more restricted, and the better opinion is that they can act only upon and present offences of public notoriety, and such as are within their own knowledge; such as are given to them in charge by the court, and such as are sent up to them by the district attorney; and in no other cases can they indict without a previous prosecution before a magistrate, according to the terms of the Bill of Rights: 1 Wh. C. L., ed. 1868, § 458 and note. It has, therefore, been held not to be allowable for individuals to go before the grand jury with their witnesses and to prefer charges. Such conduct is looked upon as a breach of privilege on part of the grand jury, and as a highly improper act on part of such volunteers. Its effect is to deprive the accused of a responsible prosecutor, who can be made liable in costs, and also to respond in damages for a false and malicious prosecution. It is in violation of the act authorizing the defendant to refuse to plead until the name of a prosecutor be endorsed on the bill of indictment. The usual course, where a presentment is thus surreptitiously procured, and bill founded upon it, has been to quash the indictment on motion, and before

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plea pleaded. It is the only way to reach the wrong. But when the bill has been regularly sent up by the district attorney, under the sanction of the court, upon the return of a proper officer, as in this case, the bill cannot be quashed unless for matters apparent on the face of the record. The court was, therefore, right in refusing to quash the indictment, and the sentence of the defendant is affirmed.