5. The sending of a bill to the Grand Jury without a preliminary complaint, arrest and examination, is in violation of law.

6. Cases of violations of the revenue laws, and of innovations upon the peace and good order of society, are exceptions to these rules

In the Court of Quarter Sessions of Erie County.

Indictment for Perjury.

The facts are fully stated in the opinion of the Court.

Davenport, Dist. Atty., and *Galbraith*, for Commonwealth.

Marvine, *Marshall*, *Sill* and *Douglass*, for defendant.

The opinion of the Court was delivered by

DERRICKSON, J.—The motion to quash the indictment in this case, is based upon several errors alleged to be apparent in the facts embraced in the following statement.

The defendant brought an action in Foreign Attachment against Fox & Van Hook of Washington City, in the Common Pleas of this county, and at the meeting of the court in May last a rule was taken on the plaintiff to show his cause of action, and why the suit itself should not be quashed. In obedience to this rule, the plaintiff made an affidavit in which he set up various matters arising out of dealings which had taken place between himself and the defendants, and in which he alleged he had been wronged to the amount of several thousand dollars, and claimed the right to receive the same in the light of consequential damages. The court being satisfied that the action was not founded in contract, made absolute the rule and the suit was dismissed. On the same day, or the one following, the defendants went before a magistrate of the city and made a formal complaint against the defendant of perjury, said to have been committed in this affidavit, upon which a warrant was issued and the defendant arrested; but after a hearing and examination of the charges before the magistrate, he was discharged on the grounds—as the transcript from the justice's docket states—that the averments in the affidavit were immaterial. Lowry then brought suit by ordinary process against the same parties for the same cause of action on which the foreign attachment was instituted, and that suit is still pending and undetermined in court. From an affidavit made on the hearing before us, it appears that Lowry was requested by citizens of Erie, in a public meeting, to proceed to Washington to aid in securing the appointment of a certain naval officer to a particular vessel, with which he complied. This was the week of the August Sessions, and on the day he left, or on the one following, Fox & VanHook went to another magistrate of the city and made a sworn complaint for perjury, similar to the one previously made against the defendant, on which a warrant was issued and placed in the hands of a constable, who returned it the same day—that the defendant could not be found. A certificate of this was made out and handed to the District Attorney, by whom a bill of indictment was prepared and sent to the grand jury, and was returned into court as true.

These are the material facts; and the complaint made in relation to them is, that the sending up of a bill of indictment without a previous opportunity being offered the defendant of an examination and hearing before the magistrate, and especially after he had been arrested and discharged on a former warrant and hearing was illegal and oppressive; also, that the charge itself was premature and unwarranted while the suit in which the affidavit was made as the cause of action was still pending in Court; and further, that the averments in the affidavit were immaterial and collateral to the real question before the Court in the application to quash the foreign attachment, and not sufficient to warrant a charge of perjury.

In determining the motion before us, we do not deem it essentially necessary to decide that the complaint for the alleged perjury was prematurely made, as this is one feature in the law which gives controlling influence in the disposition we must make of it. We take occasion, however, to say that as a general rule it is wrong for a party to commence a criminal prosecution against his adversary in a civil suit, for a supposed perjury committed in some collateral proceeding, during its pendency and before its final termination; and no Court will knowingly allow it to be done unless the course of justice would suffer to refuse it. A contrary practice would have a tendency to produce the most serious mischief, and induce many an honest but timid creditor to forego his rights, rather than have himself subjected to the imputation of crime, however groundless and corrupt the charge of it might be; and if countenanced, how many offenders would go unwhipped of justice by the commencement of a similar prosecution against the accuser in the previously instituted one, and this for the sole purpose of bringing about an amicable cessation of hostilities, or to operate on the fears of the adversary, and thus stifle prosecutions which, if carried on, would bring offenders to justice and merited punishment. Courts of justice should never give countenance to a practice like this, or it would be subversive of the ends of their creation—the protection of creditors and injured persons in their legal rights, and the punishment of evil doers. In general, it is time enough after the civil suit, or the criminal charge has passed the test of judicial trial, or been otherwise disposed of, to commence the investigation of offences which have originated during their progress. If it is attempted before this, it should not be without some apparent necessity for it, or the direction of the Court. This course will leave causes and criminal charges to be disposed of on their intrinsic merits, without being affected by the prejudices which might attach to them from prosecutions subsequently got up involving the purity of the prior moves, motives and actions.

The insufficiency of the averments in the defendant's affidavit as a ground of perjury, because not pertinent or material to the court's adjudication in quashing the suit of foreign attachment, however much we might be disposed to regard them in that light, (were the present the proper time for their consideration) would more properly be noticeable on a traverse of the indictment; and we therefore pass them by, and come to the point on which we dismiss the bill as improperly brought into court. The defendant had been once arrested and discharged by the magistrate because, in his opinion, the grounds of the accusation against him were insufficient to predicate legal guilt upon; and although this would by no means prevent a subsequent complaint for the same supposed or actual offence on which he might be arrested and held to bail, or committed for want of it, yet it should of itself, in the absence of any other cause for it, forbid the sending up of a bill of indictment unless he was a fugitive from justice, which it is not pretended the defendant was when this second complaint and warrant was made and issued against him. The supposed knowledge of the defendant's absence, or of his purpose to leave home for a brief period, when the last complaint was made, and the apparent haste in having the warrant returned and the bill sent to the grand jury, might possibly subject his accusers to a severe criticism for running in the matter at the time and in the manner they did, and as indicating motives more to gratify private ends and feeling than to promote public justice. The motives, however, if ever so impure, would not justify the court in quashing the indictment. With a jury they might have a very decided and controlling influence, but could not, or rather should not, if guilt was clearly established. All that we have to consider is, were the proceedings subsequent to the issuing of the second warrant legally right? In England the established course for centuries has been, when one is charged with a criminal offence, to have complaint thereof made before a magistrate, who issues his warrant, upon which the accused is brought before him for examination and hearing, and when this is through with he is then let go on bail or committed for want of it, or is discharged. If the latter, it is because the magistrate is satisfied of the absence of guilt, or it would be his duty to have the accused detained to answer the charge. Such has been the uniform practice in this commonwealth since its first organization as such; and what time and usage has thus matured should be regarded as a fundamental right, and not to be intruded upon except for palpable reasons.

Indeed the law is jealous for the reputation and protection of the citizen, and will not needlessly subject him to the severe ordeal of a judicial investigation for an alleged offence, on the first imputation of it, when a more mild, less exposed and expensive one will answer as well. If probable guilt is made apparent, the accused is made cognizant of it at the outset, and who his accuser is, and is thus enabled to prepare his defence in court. But of what use is this rule, and what protection can it afford to the citizen, if it may be disregarded at pleasure, or even under a semblance of conformity to it, while it is apparent that the design was to prevent a preliminary examination before the magistrate, the