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Henry Barrett Chamberlin

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## EDITORIAL

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### SPECIAL GRAND JURIES IN ILLINOIS

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For several months a Special Grand Jury has been in session in Cook County, Illinois, largely devoting its time to an investigation of the Chicago Police Department. It is a Grand Jury impaneled as such and not a regular Grand Jury continued beyond a court term. Some question has been raised as to its legality. However, an examination of the law appears to sustain the soundness of the position that a Special Grand Jury in Illinois may continue indefinitely and is not restricted by the rule applicable to regular Grand Juries.

No definition of the grand jury is found in either the Illinois Constitution of 1818 or the Illinois Constitution of 1870. No act of the legislature has ever attempted to define the grand jury. The grand jury had its origin in the common law and has existed for many hundred years. Its constitution, organization and method of proceeding were all well known features of the common law before the organization of the State of Illinois and have been recognized and adopted in all our constitutions and in legislation as it existed at the organization of the state. One of the earliest acts of the first legislature of the state was the act of February 4, 1819 (Laws of 1819, p. 3) which declared that the common law of England, all statutes or acts of the British Parliament made in aid of the common law prior to the fourth year of King James I, excepting the second section of the sixth chapter of 43 Elizabeth, the eighth chapter of 43 Elizabeth and the ninth chapter of 37 Henry VIII, and which are of a general nature and not local to that kingdom, shall be the rule of decision and shall be considered as of full force until repealed by legislative authority.

The conclusion follows that the state from its origin has provided for the prosecution of violations of the criminal law by means of indictment by a grand jury, and that the grand jury is that which existed in the common law of England prior to the fourth year of King James I, which began on March 24, 1606. No other grand jury was known to the law. No definition of it was attempted but it was referred to as an institution which needed no definition. When it was so referred to, the common law grand jury became a part of the fundamental law of the state for the prosecution of crime, and no authority has ever existed in this state for the prosecution of felonies

except upon the indictment of a grand jury. (*People vs. Graydon* 333, III. 429).

As at common law, the grand jury is endowed with inquisitorial powers in addition to its duty and power of hearing testimony and viewing evidence preliminary to the return of indictments and no bills. Its investigations are limited to matters

- (a) to which its attention is called by the court,
- (b) which are submitted to its consideration by the prosecuting officer,
- (c) which come to its knowledge in the course of its investigations into matters brought before it, or from its own observations,
- (d) which come to its knowledge from disclosures made by its members.

Just as it is not necessary that an examination of the accused by a committing magistrate shall precede the investigations of the grand jury, so it is not necessary that such investigations should be preceded by the submission of a formal charge to the grand jury. Consequently, a grand jury may properly act on the personal knowledge of any of its members communicated to his fellows under no other sanction than the grand juror's oath. Indeed, the oath administered to the grand jury clearly indicates the right of the jury to act on its own volition. The oath, which is the commission under which the jury acts, assigns no limits except those marked by diligence itself, to the course of its inquiries.

The grand jury is not appointed for the prosecutor nor for the court; it is appointed for the government and for the people; and both the government and people are surely concerned, on the one hand, that all crimes, whether given or not given in charge to the grand jury, whether described or not described with professional skill, should receive the punishment which the law denounces; and, on the other hand, that innocence however strongly assailed by accusations drawn up in regular form, and by accusers marshalled in legal array, should, on full investigation, be securely protected. (12 Ruling Case Law 1034).

To what extent is the grand jury enabled to fulfill efficiently and successfully this important inquisitorial function?

Where the pressure of routine duties is not great and the investigation undertaken is not involved and can be completed within the term of service of the grand jury, no difficulty is encountered.

What is the solution, however, when the grand jury is compelled to utilize practically all of its time in the performance of routine tasks and the investigation attempted is replete with complications?

During the first ten months of 1930, ten grand juries in Cook County returned 3512 indictments or true bills and 1064 no bills. Assuming that there were twenty-three working days in each month and that the grand jury was in session for five hours each day, it can readily be seen that an average time of fifteen minutes was required to dispose of each of the 4576 cases presented to the grand juries for their consideration. A grand jury in Cook County is required to consider and act upon approximately 457 cases each month, or about twenty each day. It is evident from these facts that due to the pressure of routine duties, a regular grand jury in Cook County cannot undertake and complete even a superficial investigation within the term of its service.

In seeking a solution to the problem of enabling the grand jury to effectively perform its inquisitorial function, the following questions arise:

1. Whether a regular grand jury can be continued from term to term to enable it to complete an investigation begun by it.
2. Whether a regular and special grand jury can be impaneled during the same term; the special grand jury conducting investigations and the regular grand jury performing the routine tasks.
3. Whether a special grand jury can be continued from term to term to enable it to complete an investigation begun by it.

In the case of *People vs. Cochrane*, 307 Ill. 126, the Illinois Supreme Court was called upon to determine the legal significance of acts committed by a grand jury during a term of court subsequent to that in which it had been impaneled. The Supreme Court held that despite the fact that the order continuing the grand jury from term to term was erroneous, it was not without jurisdiction and the grand jury was a grand jury de facto performing the functions of a grand jury de jure as part of the court. The opinion stated, however, that although the question of the legality of the grand jury could not be raised on a writ of error, an accused person could raise the question through a challenge to the array or a motion to quash the indictment on the particular ground that the grand jury was illegally constituted.

Ten months after the Supreme Court rendered its decision in the above case, the opinion in the case of *People vs. Brautigan* (310 Ill. 472) appeared. The facts in the *Cochrane* case and the *Brautigan* case were similar and concerned the same grand jury. However, the record before the Supreme Court in the *Brautigan* case disclosed the additional fact that a grand jury de jure was in existence at the time the grand jury in question was being continued from term to term. The

opinion of the Supreme Court in the Brautigan case reads in part as follows:

“The grand jury at common law sat through the term unless its duties were sooner completed, and its existence ceased with the term. Two grand juries were summoned in the county of Middlesex and in the County of Suffolk, while in Yorkshire one panel of forty-eight freeholders and copyholders only could be returned to serve in the assises, and at the sessions only forty could be returned on the panel. (1 Chitty on Crim. Law, 157, 310, 311). These were special exceptions, there being under the common law of England, except in these instances, but one grand jury, consisting of not less than twelve or more than twenty-three men. (1 Chitty on Crim. Law, 310.) Another grand jury might be summoned on two occasions, the first when before the end of the sessions the grand jury, having brought in its bills, was discharged by the court and after its discharge either some new offense was committed and the party taken and brought into gaol, or when, after the discharge of the grand inquest, some offender was taken and brought in before the conclusion of the sessions. The other instance of a new grand jury being sworn was when it was to inquire, under the statute (3 Henry VII, ch. 1) of the concealment of a former inquest. This was anciently the proper mode of punishing the grand jurors if they refused to present such things as were within their charge of which they had sufficient evidence. This latter case may be disregarded, for it fell into disuse many years ago, and the practice which has been since followed, instead of impeaching the grand jury who failed to find a true bill, was to present an indictment to another grand jury. The common law power of the court to call a special grand jury, since the practice of impeachment of the grand jury has been abandoned, has been limited to cases of offenses committed after the grand jury has been discharged or when some offender has been arrested after the discharge of the grand jury.

“Our statute (Rev. Stat. chap. 78, sec. 19,) has provided a method of summoning a special grand jury, as follows:

“The judge of any court of record of competent jurisdiction may order a special venire to be issued for a grand jury at any time when he shall be of opinion that public justice requires it. The order for such venire shall be entered on the records of the court by the clerk thereof; and such clerk shall forthwith issue such venire under his hand and the seal of the court, and deliver the same to the sheriff, who shall execute the same by summoning, in the same manner now provided or that may hereafter be provided by law for summon-

ing jurors, twenty-three persons qualified by law, to constitute a grand jury. Such venire shall state the day on which such persons shall appear before the court.' *No attempt was made to comply with this section and no claim of compliance is made by the Attorney General.* The people rely upon the fact that the record shows that the grand jury of the August term, 1922, was never discharged but was continued from term to term because its work was not completed.

At common law the grand jury expired with the term, and no statute has changed this rule or authorized any court to continue a grand jury beyond the adjournment of the term. Therefore the grand jury's authority ceased on the last day of the August term with the adjournment of the court, and the order purporting to extend its powers was void."

The Supreme Court held further that the grand jury which was continued could not become a grand jury de facto because there was in each term to which it had been continued a grand jury de jure which was performing the duties of that body.

It is important to note in the decision in the Brautigan case the statement of the court to the effect that the common law power of the court to call a special grand jury is limited to cases of offenses committed after the grand jury has been discharged or when some offender is arrested after the discharge of the grand jury. It is, therefore, apparent that at common law there existed a definite limitation upon the court's power to call a special grand jury. The Supreme Court points out that the continued grand jury in the Brautigan case was not a common law special grand jury and that there had been no attempt made to impanel it as statutory special grand jury.

Finally, in the case of *People vs. Graydon* 333 Ill. 429, the Supreme Court held that while the common law power of the court to call a special grand jury was limited to cases of offenses committed after the grand jury has been discharged or when some offender has been arrested after the discharge of the grand jury, the common law in this respect has been changed by statute authorizing a special venire when in the opinion of the court public justice requires it, and a special grand jury impaneled on a venire issued in Cook County while the regular grand jury was in session and performing its duties was authorized to return an indictment giving the criminal court jurisdiction to hold a prisoner for trial.

The decision reads in part as follows:

"It was not decided in the Brautigan case, *supra*, that the issuing of a special venire for a grand jury and the impaneling of such grand

jury while a grand jury regularly impaneled was in existence was unauthorized by law. This is the question presented for decision in the present case. While the statute of 1819 declared that the common law of England and the statutes or acts of the British Parliament made in aid of the common law prior to the fourth year of King James the First, with the exceptions mentioned, and which were of a general nature and not local to that kingdom, should be the rule of decision in this State, it was further declared that they should be considered of full force only until repealed by legislative authority. The legislature has full power to repeal or modify the common law as thus declared except as restrained by constitutional limitation. Our state (Rev. Stat. chap. 78, sec. 19), has provided a method of summoning a special grand jury, as follows: 'The judge of any court of record of competent jurisdiction may order a special venire to be issued for a grand jury at any time when he shall be of opinion that public justice requires it. The order for such venire shall be entered on the records of the court by the clerk thereof; and such clerk shall forthwith issue such venire under his hand and the seal of the court, and deliver the same to the sheriff, who shall execute the same by summoning, in the same manner now provided, or that may hereafter be provided by law for summoning jurors, twenty-three persons, qualified by law, to constitute a grand jury. Such venire shall state the day on which such persons shall appear before the court.' There are many statutory provisions that at certain specified terms of court in particular counties no grand jury shall be summoned, or that no criminal business shall be transacted, or that no grand jury shall be summoned except by a special order of the judge holding the court. No restraint has been imposed by the constitution upon the power of the legislature to determine at what time, under what circumstances and in what manner a grand jury may be summoned, but the matter is left entirely to the discretion of the legislature.

The constitution has committed to the General Assembly the power to provide for the times of holding court in each county, and the power has been exercised by fixing the terms of court for the transaction of criminal business, of civil business and of business which does not require the presence of a jury, either grand or petit, and it has further provided that the judge of any court of record of competent jurisdiction may order a special venire to be issued for a grand jury at any time when he shall be of opinion that public justice requires it. The question is committed to the discretion of the judge of the court, and the legislative act modifying the common law and authorizing the issuing of a special venire for a grand jury at any time when in the opinion of the judge public justice requires it violates no constitutional limitation. With the question of the policy or wisdom of authorizing the impaneling of a special grand jury when a grand jury regularly impaneled is performing the duties of such body we have no concern. The act authorizes the issue of a special venire for a grand jury at any time the judge shall be of opinion that public justice requires it, and we have no right to impose any further limitation on the exercise of the power."

From the above decision it can be seen that the special grand jury authorized by statute in Illinois was not known to the common law. Unlike the common law special grand jury, the statutory special grand jury may be impaneled at any time that public justice requires it, whether a regular grand jury is in session or not. So, while the common law may have placed certain limitations upon the common law special grand jury and the power of the court at common law to call a special grand jury, these limitations have no application to the special grand jury now authorized by statute in this state. At common law a special grand jury could not be impaneled while the regular grand jury was in session. The Supreme Court in the Graydon case ruled that the legislative enactment authorizing a special grand jury constituted a modification of the common law and that the statutory special grand jury could be impaneled at any time that public justice requires. At common law the existence of the special grand jury ceased with the term. The act of the Illinois General Assembly modifying the common law, places no limitations upon the term of the existence of a special grand jury. It cannot, therefore, be reasonably maintained that the special grand jury authorized by statute is limited in its existence to one term. The statutory special grand jury being unknown to the common law cannot be measured by rules and limitations placed upon special grand juries at common law.

A special grand jury may be called whenever public justice requires and there is nothing in the law taking from the special grand jury the right to continue its inquisitions. A study and analysis of the Illinois statutes and the decisions of the Illinois Supreme Court result in the conclusion that:

1. A regular grand jury may be continued from the term in which it is impaneled to the following term but its acts at such following term are the acts of a grand jury de facto. A grand jury de facto cannot effectively conduct an investigation for the reason that its acts may successfully be objected to, either through a challenge to the array or motion to quash the indictment on the particular ground that the grand jury was not legally constituted.
2. A special grand jury may be impaneled to conduct investigations although a regular grand jury was previously impaneled during the same term.
3. A special grand jury may be continued from term to term to enable it to complete an investigation begun by it.

The legal conclusion that a special grand jury authorized by statute in Illinois may continue in session until an inquisition begun by it is completed violates no rule of statutory interpretation. It will

be argued that when a statute which is evidently intended to make an innovation upon the common law is susceptible of more than one construction, it is not to be construed as altering the common law further than the language of the statute clearly and necessarily requires and that therefore the common law rule limiting the existence of the special grand jury to the term in which it is impaneled has not been abrogated by the statute. In answer to this it may be stated that a statute will be deemed to abrogate the common law where its provisions are inconsistent with and repugnant to the common law and a survival of the common law would in effect deprive the statute of its efficacy and render its provisions nugatory.

It can only be stated that the special grand jury at common law was not an inquisitorial body and could be called only when the regular grand jury was discharged before the end of the term and could consider only arrests made and offenses committed after the discharge of the regular grand jury. By virtue of the decision in the Graydon case, the statutory special grand jury may be an inquisitorial body and may be called at any time.

Let it be assumed that a great emergency arises and it becomes imperative that a special grand jury, authorized by statute, be impaneled three days before the end of a court term in order to conduct a very vital and important investigation which would require months to complete. For three days the special grand jury is busily engaged in hearing witnesses and examining evidence. Was it the intent of the legislature that the inquisitorial special grand jury authorized by it and which was unknown to the common law be bound by the limitations placed upon the special grand jury at common law to the extent that, in the hypothetical case above, the court would be compelled to discharge the special grand jury and impanel a new special grand jury which would be required to start anew?

The answer, based upon the decisions and statutes, is that in this state a special grand jury may continue its investigations from term to term until it has completed its inquisitions and has been discharged by the court.

HENRY BARRETT CHAMBERLIN.