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## Private Communications with Grand Juries

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explained in these terms. Considering the fact that the subject of gambling had for almost three centuries been governed in Massachusetts by a comprehensive statutory system, it seems logical for the court to infer that the legislature meant to allow pin-ball machines when it omitted mentioning them in the category of prohibited forms of gambling.<sup>22</sup> In another situation where the legislative history on the subject is not so long or thorough and the statute is phrased in different language, a court may just as reasonably decide that the intent was to affect only those subjects specifically covered. A recent District Court of Appeals case in California<sup>23</sup> on this same subject, pin-ball machines, so held, seemingly on this basis.<sup>24</sup>

From this view of the subject the conclusion seems inescapable that the term "conflict" has taken on so many contexts from its uses in various situations by different courts that in this field it no longer has any precise meaning. Courts probably could, by refraining from the indiscriminate use of the term to cover all situations and by using more exact language, clarify the situation considerably. Legislatures could and should indicate in some discernable manner their intent as to whether or not their legislation covers the entire field in such a way as to make local regulations conflicting. Local and state enforcement officials, it seems, can only observe the versions laid down by their particular controlling courts and apply them as closely as possible to the fact situation in hand.

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### Private Communications with Grand Juries

The grand jury is the last stronghold of the laymen's initiative in criminal law. It has enormous powers which it seldom exercises because its members have not been made aware of the full extent of a grand jury's powers. Acting on its own initiative, or directed by an aggressive prosecutor, the grand jury is able to make itself feared and respected by all lawless elements of the community as well as by public officials who neglect or refuse to perform the functions of their office.

During the past several years, many attacks have been made on the grand jury, some going so far as to advocate its complete abolition.<sup>1</sup> The grand jury has been termed "the fifth wheel in the judicial machinery," and the "rubber stamp of the prosecuting attorney." If, in many instances, it was the fifth wheel or rubber stamp, such need not have been the situation. By the common law and by statutory law, the grand jury has extraordinary powers for setting the machinery of investigation and justice in motion, regardless of the wishes of public prosecutors or

<sup>22</sup> See statute, *supra*, note 2.

<sup>23</sup> *Sternall v. Strand*, —Cal. App.—, 172 P. (2d) 921 (1946).

<sup>24</sup> The ordinance there made the possession of the machines illegal and the statute provided that their operation was illegal. California cases are complicated by the fact that the constitution prohibits co-ordinate state and local laws, so the ordinance could not have provided exactly the same as the statute did. For an explanation of the California rule see Grant, *Penal Ordinances in California* (1936) 24 Calif. L. Rev. 123.

<sup>1</sup> Morse, *A Survey of the Grand Jury System* (1931), 10 Oregon Law Review 101-160; 217-257; 295-365.

judges.<sup>2</sup> Having that broad power, its potential value in the enforcement of the law cannot be overlooked, but it is the lack of understanding of this power that has caused the present inertia and the resulting attacks on the system. The need, therefore, is for better informed grand juries.

The judiciary is to blame, in most instances, for the prevailing ignorance of grand juries regarding their full powers. On one occasion, a judge in his charge to the grand jury<sup>3</sup> put stress on an instruction to the effect that the grand jury was prohibited from having communications with anyone except the court and state's attorney and that it was improper for anyone else to send communications to the jurors, or for the jurors to receive them. Court attaches said the judge was directing his attack at a pamphlet which had been mailed to the grand jurors instructing them as to their duties and powers. However, when a committee called upon the judge in regard to the charge, he stated that he was merely following the formal charge given for years, that he did not know where it originated, and that after careful study he did not believe it was the law because it tended to limit the powers of the grand jury and give too much influence to the state's attorney. The judge also said he had no thought of criticizing the pamphlet, but instead commended it as supplementary to his own charge.<sup>4</sup>

The exact extent to which the grand jury can communicate with or receive communications from private individuals has been a question on which the courts have disagreed to a marked extent. The grand jury in its modern form probably dates back to the time of the "Inquisito" introduced by King William the Conqueror in England. He initiated the practice of assembling certain men of the vicinity to make inquiry of them as to crimes and criminal suspects in the district. Originally this same body both accused and tried persons, but eventually there developed a separation between the trial (petit) and accusing (grand) jury. When the "justices of the peace" came into being, they for several centuries largely supplanted the grand jury as the primary investigatory body and the grand jury began to rely less on its own knowledge and more on evidence taken before it.<sup>5</sup>

During the growth of the grand jury in England, it performed two important services in criminal procedure: (1) it presented for prosecu-

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<sup>2</sup> In instructions to grand jury in the United States District Court for Northern District of Illinois, November 1, 1915, the jury was told that the court and district attorney would advise them as to the law but that they were free to follow their own judgment as to what should or should not be done; they were free to get evidence and information from any source and were not to be hampered by the ordinary legal rules. See Comment (1932) 10 *The Panel* 31. The court cannot limit the scope of the investigation. *United States v. Thompson*, 251 U.S. 407 (1920); *People v. Blumfield*, 330 Ill. 474, 161 N.E. 857 (1928); *People ex rel Ferrill v. Graydon*, 333 Ill. 429, 164 N.E. 832 (1929).

<sup>3</sup> The charge prohibited the grand jurors from holding communication with anyone except the court, the state's attorney, such witnesses as were sent before them by the state's attorney, and fellow jurors. It also stated it was improper for anyone else to send communications to the grand jurors or for them to receive such communications, whether with a view to influencing their action or not.

<sup>4</sup> 10 *The Panel* 30 (1932) quoting from *The Chicago Tribune*, September 3, 1930 and *The Chicago Daily News*, September 17, 1930.

<sup>5</sup> Holdsworth, *History of English Law*, (1871); McKecknie, *Magna Carta*, (1905); Pollock and Maitland, *History of the English Law*, (1895); Stephen, *History of the Criminal Law*, (1834); Thayer, *Preliminary Treatise on Evidence* (1896); 5 *The Panel* 1 (1927).

tion individuals who of its own knowledge it knew or had reason to believe were guilty of criminal offenses; and (2) it served as a check upon the powers of the government to imprison without trial those who opposed its regime.<sup>6</sup> While the present day grand jury still retains these important functions, the success of the grand juries in New York County, New York during the last fifteen years, the Cuyahoga County (Cleveland), Ohio grand jury of September-December 1933 and many others indicates that under proper guidance the prosecution element is currently the more important from the public standpoint.<sup>7</sup>

If this first important function of the grand jury is to have its full effectiveness, the jurors must have a knowledge of matters in the community which need investigation, a full understanding of their complete powers of investigation and of their duty to exercise those powers. Two questions are therefore pertinent: (1) Can a citizen or group of citizens inform the grand jury of crimes that have been committed?, and (2) can a citizen or group of citizens inform the grand jury of its powers and duties? Since most states have not covered this specifically in either their constitutions or statutes, the possibility of private citizens communicating with grand juries remains as it was at common law except where the courts have limited those contacts through their decisions.

Private communications to a grand jury were severely restricted by Mr. Justice Field in 1872 when he instructed a grand jury<sup>8</sup> that its investigations were to be limited to matters called to its attention by the court or submitted by the district attorney, or to matters based on its own observations and knowledge. Justice Field expressed the opinion that private prosecutors were generally actuated by private enmity or malice and that if the court or district attorney did not think the matter of sufficient importance to submit it to the grand jury, justice would not suffer if the matter were not acted upon. Limitations to this effect were expressly adopted in a few states by statute,<sup>9</sup> and in Pennsylvania by judicial decision.<sup>10</sup>

A common error made by the courts in investigating contempt charges for interference with the grand jury has been their failure to differentiate between original charges brought before the grand jury and communications addressed to it in relation to cases already under consideration. At common law, the grand jury had the power to prefer indictments

<sup>6</sup> It was the attempt of the King to dictate to the grand juries which hastened the downfall of the Stuarts in England in 1688. The grand jurors of Middlesex in 1681 refused to indict Lord Shaftsbury at the wishes of Charles II, and when the Lord Chief Justice berated them for their action, he was taken before the bar of the House and told never again to attempt to coerce a grand jury.

<sup>7</sup> See *In re Grand Jury Proceedings*, 4 Fed. Supp. 283 (1933).

<sup>8</sup> 30 Fed. Cas. 992 (1872). The charge of Mr. Justice Field in this case is now sustained in the Federal Courts by Statute, 35, Stat. 1113, 18 USCA § 241 (1909). Cf. *United States v. Thompson*, 251 U.S. 407 (1920); *Blair v. United States*, 250 U.S. 273 (1919); *Carrol v. United States*, 16 F(2d) 951, (CCA 2d, 1927); *Hendricks v. United States*, 223 U.S. 178 (1912); *United States v. McGovern*, 60 F(2d) 880 (1932).

<sup>9</sup> 12 The Panel 32 (1934).

<sup>10</sup> *McCullough v. Commonwealth*, 67 Pa. 30 (1870); *State v. Love*, 23 Tenn. 255 (1843). Cf. *Hale v. Henkle*, 201 U.S. 43 (1906) where the court quotes from *Frisbie v. United States*, 153 U.S. 160 (1896) the following: "It is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them." There is no authority in the English common law for these restrictions on the grand jury. *Regina v. Russell*, Car. & M. 247, 174 Eng. Rep. R. 492 (1841); *Regina v. Bullard*, 12 Cox Cr. Ca. 353 (1872).

at the instance of private prosecutors.<sup>11</sup> In the United States some cases have held and other courts have stated by way of dictum that an individual has the right to present a charge of an offense not theretofore brought to the attention of the grand jury or considered by that body through ordinary channels.<sup>12</sup> The decisions do not mean that every communication would be free from contempt<sup>13</sup> if the communication were predicated by malice or personal enmity,<sup>14</sup> or if it were done with the intention of interfering with the grand jury in its handling of matters properly before it.<sup>15</sup> In *People v. Parker*,<sup>16</sup> the Illinois Supreme Court rejected the contention of the state that any communication was contemptuous, but upheld a contempt conviction where the communication on its face showed malice and personal enmity. Previously, in *People ex rel Ferrill v. Graydon*,<sup>17</sup> the same court had held that the duty of the grand jury was to inquire into all offenses which came to its knowledge from the court, its own members, the state's attorney, or from any source. If the court in the *Parker* case had accepted the position taken by the state, no effect could have been given to the words "or from any source." Since the grand jury is not to try the case but merely to determine whether there is sufficient evidence on which to bring the defendant to trial, any communication by the defendant is an interference with the

<sup>11</sup> *People v. Sheridan*, 349 Ill. 202, 181 N.E. 617 (1932); *People ex rel Ferrill v. Graydon*, 333 Ill. 429, 164 N.E. 832 (1929); *Blaney v. State*, 74 Md. 153, 21 Atl. 547 (1891); *Brack v. Wells*, 184 Md. 86, 40 A(2d) 319, (1944); *In re Opinion to Governor*, 62 R.I. 200, 4 A(2d) 487, (1939); *Thompson & Merriam, Juries*, § 609 (1882).

<sup>12</sup> *King v. Second Nat. Bank & Trust Co.*, 234 Ala. 106, 173 So. 498 (1937); *in re Lester*, 77 Ga. 143 (1886); *State v. Stewart*, 45 La. Ann. 1164, 14 So. 143 (1893); *State v. Sullivan*, 159 La. 589, 105 So. 631 (1925); *Brack v. Wells*, 184 Md. 86, 40 A(2d) 319 (1944). *Hott v. Yarborough*, 112 Tex. 179, 245 S.W. 676 (1922), also followed this rule under specific statute.

<sup>13</sup> Cases of perjury charges against witnesses for false swearing before the grand jury may throw additional light on the subject. In *Alt v. State*, 83 Tex. Crim. Rep. 337, 203 S.W. 53 (1918), the court held that a witness could not be convicted of perjury for false swearing before a grand jury where it did not appear that the testimony in question was given in regard to any criminal matter or offense, or that it could form the basis of a criminal charge which the grand jury was investigating, or that the grand jury was examining into any particular offense. The court held that there could be no contempt for there was nothing in the statement material to an issue or point in question. See also *Smith v. State*, 153 Ark. 645, 241 S.W. 37 (1922); *State v. Keller*, 193 Ind. 619, 141 N.E. 337 (1923); *State v. Ruddy*, 287 Mo. 52, 228 S.W. 760 (1921); *State v. Ackerman*, 214 Mo. 325, 113 S.W. 1087 (1908).

<sup>14</sup> *People v. Parker*, 374 Ill. 524, 30 N.E. (2d) 11 (1940). While the language used in the case would seem to imply that any communication with the grand jury was contemptuous, the court found malice in the communication here involved. *People v. Doss*, 382 Ill. 307, 46 N.E. (2d) 984 (1943) is cited for the proposition that accusations couched in such general language that they serve no useful purpose but show personal enmity constitute contempt as an unauthorized interference with the administration of justice. The *Doss* case also cites *Commonwealth v. McNary*, 246 Mass. 82, 140 N.E. 255 (1923) as standing for this proposition. See comment (1941) 8 U. of Chi. L. Rev. 561, where the conclusion is reached that *People v. Parker* did not change the common law in Illinois.

<sup>15</sup> *In re Taylor*, 64 Cal. 434, 1 Pac. 884 (1884); *Ex Parte Shuler*, 210 Cal. 377, 291 Pac. 481 (1930); *Joselyn v. People*, 67 Col. 297, 184 Pac. 375 (1919); *Bishop, Criminal Law* (1923) § 216.

<sup>16</sup> *People v. Parker*, 374 Ill. 524, 30 N.E. (2d) 11 (1940).

<sup>17</sup> 333 Ill. 429, 164 N.E. 832 (1929).

course of the investigation and constitutes contempt.<sup>18</sup> It is apparent, therefore, that where the common law is still in force, a private individual may not only communicate his knowledge of a crime to the grand jury but is obliged to do so.

The propriety of communications designed to inform grand jurors solely of their broad powers and duties has seldom come before the courts. *Ex parte Pease*,<sup>19</sup> a Texas case, is probably the clearest instance in which contempt charges were brought in such a situation. The defendant had published an editorial entitled "Grand Juries" which consisted entirely of abstract statements of the high duties of grand juries and a statement of the resulting dangers, evils and hurtful consequences when such officials were not moved by disinterested and pure motives. No reference was made to any particular grand jury. The court in discharging the defendant said: "We confess ourselves unable to find anything which might not have been appropriately read to his grand jury by any judge of any court upon their enpanelment." An Indiana case, *Cheadle v. State*,<sup>20</sup> reached the same conclusions. Other courts have said by way of dictum that where there has been actual interference with the grand jury in a case pending before it, any communications other than through the court's officials or anyone properly before the grand jury would constitute contempt. However, there apparently are no cases, decided upon common law principles, holding contemptuous a communication to the grand jury which only contained information as to the powers of grand juries. In the Illinois case of *People v. Jordan*,<sup>21</sup> and the New York cases of *People v. Shea*<sup>22</sup> and *People v. Sellnick*,<sup>23</sup> the indictments were attacked on the ground that persons other than the court had instructed the grand jury. The courts in these cases refused to set aside the indictments on that ground, saying that the defendants would have to show some prejudice to them from the instructions.

In 1907 a group of citizens in New York organized a Grand Jury Association for the purpose of better informing grand jurors of their powers and duties. Since that time, the Association has prepared and

<sup>18</sup> Edwards, *The Grand Jury* (1906). The author states on p. 103 that "In making their inquiries, the grand jurors are not permitted to summon witnesses for the defense either upon their own motion or at the request of the defendant or his counsel, or will the court allow the defendant's witnesses to go before the grand jury either with or without the consent of the district attorney, or may any witness appear before or send any communication to them, pertaining to a matter then pending before the grand jury, except upon previous order of the court." Citing authorities for each point. By statute, New York in 1940 allowed defendants to appear before the grand jury in certain cases. Code of Criminal Procedure § 255, § 257. Laws of New York, 1940, Ch. 643, § 257.

<sup>19</sup> Tex. Cr. App., 57 S.W. (2d) 575 (1933).

<sup>20</sup> 110 Ind. 201, 11 N.E. 426 (1887).

<sup>21</sup> 292 Ill. 514, 127 N.E. 117 (1920). Here the state's attorney rather than the court had instructed the grand jury. The court held that unless prejudice could be shown to the defendant, the indictment would not be set aside on that issue alone.

<sup>22</sup> 147 N. Y. 78, 41 N.E. 505 (1895). Defendant moved to dismiss indictment. Certain persons, not officers of the law, had distributed to each person on the grand jury list a circular letter advising them as to their duties. Motion denied. On appeal, Court of Appeals refused dismissal unless he could show some prejudice toward him had had resulted from the committee's action.

<sup>23</sup> 4 N. Y. Cr. Rep. 329 (1886). Attorney for complainant sent cards to the grand jurors. The court said that the indictment would be set aside because of improper influence brought to bear upon grand jurors, but made clear that it was pressure brought to bear to indict, not the instruction as to powers and duties, which caused the reversal.