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CRIMINAL LAW CASE NOTES AND COMMENTS

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THE GRAND JURY (Special Reference to Illinois)

The grand jury is one of the oldest institutions in the administration of justice. In the early history of its development the powers of the grand jury were not clearly defined, and it seems that at first it was a body which not only accused, but actually tried public offenders.¹ However, from the time of its inception in this country the grand jury has been an agency acting solely for the purpose of investigating all crime and wrongdoing within a county or federal district.²

The broad powers of the grand jury have become stagnant in many communities and the ancient common law institution has become known as the "rubber stamp of the prosecuting attorney". When such a condition exists it is not because the powers of the grand jury have been modified, but because the members of the panel have not been informed of their true powers and duties. These potential powers in a grand jury are important powers of the people. The public ought to be made aware of them in order that their full utilization may be realized.

Under the common law a person could not be held to answer for treason, a capital offense, or a felony, except upon the indictment of a grand jury. The fifth amendment of the Federal Constitution guarantees an individual the right to an indictment by the grand jury "for a capital or otherwise infamous crime . . ."³, but this amendment places no limitation upon the states, since the "due process" clause of the fourteenth amendment does not require them to adopt the use of the grand jury procedure.⁴ Even if a state has adopted the grand jury system there is no Constitutional requirement that the grand jury should be organized as, or have the powers of, a common law grand jury.⁵ When, however, the fifth amendment does apply, in the absence of restrictive statutes, the grand jury would have the full powers it had acquired at common law.⁶

The Illinois Constitution of 1870 contains a provision that no person shall be held to answer for a criminal offense unless he has been indicted by a grand jury, except in cases where the punishment is by fine or imprisonment

1. *Hurtado v. California*, 110 U.S. 516 (1884). This case is especially thorough in its revelation of the early history of the grand jury. See *Sawyer v. State*, 94 Fla. 60, 113 So. 736 (1927); *State v. Kavanaugh*, 32 N. M. 404, 258 Pac. 204 (1927).

2. *Hurtado v. California*, 110 U.S. 516 (1884); *Maley v. District Court*, 221 Iowa 732, 266 N.W. 815 (1936).

3. U.S. Const. Amend. V.

4. *Lem Woon v. Oregon*, 229 U.S. 586 (1913); *Hallinger v. Davis*, 146 U.S. 314 (1892).

5. *Talton v. Mayes*, 163 U.S. 376 (1896); *Parker v. People*, 13 Colo. 155, 21 Pac. 1120 (1889). *Contra*: *State v. Hartley*, 22 Nev. 342, 40 Pac. 372 (1895) holding that a general provision in a constitution for indictment by a grand jury requires a grand jury of the common law type.

6. In *Re Opinion to Governor*, 62 R. I. 200, 4 A.2d 487 (1939).

(other than in the penitentiary), in cases of impeachment, and in cases arising in the army and navy (or in the militia when it is in actual service in time of war or public danger).⁷ The Constitutional provision makes it possible for the legislature to abolish the grand jury in all cases—a privilege which the legislature has never exercised.⁸ What has been done, however, is to allow crimes below the grade of felony to be presented by information.⁹ The term *grand jury* is not defined in the Illinois Constitution or by legislative act, and since common law principles applicable to grand jury proceedings and powers are in effect in Illinois, felonies may only be prosecuted after an indictment by the grand jury.¹⁰

I

QUALIFICATION AND SELECTION

The grand jury, as it was known at common law, was composed of from twelve to twenty-three free-holders, who were residents of the county in which the crimes they were investigating were committed, and who had not been convicted of treason, a felony, or any other infamous crime.¹¹ It was also required that they be citizens and of the male sex.¹² Today the qualifications of the grand juror are controlled almost everywhere by statute.¹³ Illinois requires that a full panel consist of twenty-three persons, and sixteen of these must be present whenever the grand jury is acting.¹⁴ Those persons acting as grand jurors must be legal voters of either sex between twenty-one and sixty-five years of age. They must be in possession of their natural faculties and not infirm or decrepit; be of fair character, approved integrity, sound judgment, well informed, and able to understand the English language; be inhabitants of the town or precinct from which chosen, and not exempt from jury service.¹⁵

The method of selecting grand jurors in Cook County (in which Chicago is located) differs from that used in counties having a population of less than 250,000. In the former, three jury commissioners appointed by the judges select twenty-three persons having the statutory qualifications, and in the latter counties the selection is made by the county board.¹⁶ At the same time that the regular panel for the grand jury is selected, a supplemental panel of twenty-three members with the same qualifications is chosen who will serve actively if necessary.¹⁷ The clerk of the court certifies both panels and delivers the summons to the sheriff for service upon the chosen grand jurors.¹⁸ The grand jurors must then appear on the first day of the term of court or upon such day as the court or judge directs.¹⁹ The court then appoints a foreman for the grand jury, who has the power to swear all witnesses appearing before that body.²⁰ Whenever any twelve members of the grand jury find sufficient

7. ILL. CONST. Art. II, §8.

8. *Ibid.*

9. *People v. Glowacki*, 236 Ill. 612, 86 N.E. 368 (1908); *People v. Mangano*, 172 Ill. App. 495 (1912).

10. *People ex rel. Ferrill v. Graydon*, 333 Ill. 429, 164 N.E. 832 (1928).

11. See the thorough annotations, Note, 28 L.R.A. 33, 37 and Note, 28 L.R.A. 196 (1895).

12. *Parus v. District Court*, 42 Nev. 229, 174 Pac. 706 (1918).

13. *State v. Bramlett*, 166 S. C. 323, 164 S.E. 873 (1932); *Parus v. District Court*, 42 Nev. 229, 174 Pac. 706 (1918).

14. ILL. REV. STAT. c. 78, §16; ILL. REV. STAT. c. 38, §715 (1951).

15. ILL. REV. STAT. c. 78, §2 (1951).

16. ILL. REV. STAT. c. 78, §9 (1951).

17. *Ibid.*

18. *Ibid.*

19. *Ibid.*

20. ILL. REV. STAT. c. 78, §17 (1951).

evidence to support an indictment it is endorsed a "true bill"; if there is not sufficient evidence the endorsement reads "not a true bill".²¹ In either situation the foreman signs his name as *foreman* and the bill is returned to the court with the names of witnesses who furnished evidence noted thereon.²²

In some cases, the right of a person to act as a grand juror, even though he may have the other qualifications, has been questioned because of his alleged bias or interest in the outcome of the proceedings. Absent a statutory provision to the contrary, the prevailing rule is that bias or prejudice on the part of one summoned as a grand juror, or the fact that he has formed or expressed an opinion as to the guilt of the accused, does not disqualify him from serving as a grand juror or affect the validity of the indictment.²³ The reasoning behind this theory is that the grand jury is fundamentally an accusing and not a judicial body, therefore, the grand juror not only has the right but the obligation to act upon his own information.²⁴ Further justification is found in the oath which the grand juror takes. Generally this requires him to act against friends and enemies, and to diligently inquire into the commission of crimes. It would be impossible for him to do this without using his personal observations and opinions concerning the commission of such crimes.²⁵

II

POWERS AND LIMITATIONS

Sources of Information:

The basic power of the grand jury is termed *inquisitorial*. It is derived from the fact that proceedings before the grand jury constitute the only general criminal investigation known to the common law.²⁶ The prosecutor may inquire generally but he does so without subpoena power. The magistrate, who may issue subpoenas, is bound in his investigation to specific charges of a crime. These latter agencies lack the power to act forcefully upon mere belief, or upon information which does not complain against a specific individual. However, the "John Doe" inquiry is an inherent common law power of the grand jury,²⁷ and unless such power has been removed from the grand jury by statute or judicial decision it still exists.

In 1872 Justice Field, in his famous charge to a federal grand jury, stated that there were four ways by which a grand jury could obtain information concerning a crime.²⁸ The four ways included: (1) information that may be called to their attention by the court; (2) information that may be submitted for their consideration by the district attorney; (3) information that may

21. *Ibid.*

22. *Ibid.*

23. *Joslyn v. People*, 67 Colo. 297, 184 Pac. 375 (1919); *State v. Hamlin*, 47 Conn. 95, 36 Am. Rep. 54 (1879); *Commissioner v. Woodward*, 157 Mass. 516, 32 N.E. 939 (1893). *Contra: Rolland v. Commissioner*, 82 Pa. 306, 22 Am. Rep. 758 (1876).

24. Cases cited note 23 *supra*; Note, 88 A.L.R. 900 (1934).

25. *State v. Easter*, 30 Ohio St. 542, 27 Am. Rep. 478 (1876).

26. *Ward Baking Co. v. Western Union Tel. Co.*, 205 App. Div. 723, 200 N.Y. Supp. 865 (3rd Dept. 1923).

27. *People ex rel. Sampson v. Dunning*, 113 App. Div. 35, 98 N.Y. Supp. 1067 (2d Dept. 1906); *People ex rel. Travis v. Knott*, 204 App. Div. 379, 198 N.Y. Supp. 142 (1st Dept. 1923); Medalie, *Grand Jury Investigations*, 7 THE PANEL 5 (1929). The cases seem to repel any inference that a magistrate may conduct a "John Doe" inquiry even as an aid in the exercising of his discretion to summon a grand jury, *Williams v. People*, 103 Colo. 1909, 103 Pac. 298 (1909); *Ketcham v. Comm.*, 204 Ky. 168, 263 S.W. 725 (1924).

28. 30 Fed. Cas. No. 18, 255 (C.C.D. Cal. 1872); see Ford, *The Grand Jury*, 8 LAW Soc. J. 205 (1938).

come to their attention in the course of their investigation of matters already before them or from their own observations; (4) and information that may come to their attention from the disclosures of their associates.²⁹ It will be noted that presentation of facts by "a private prosecutor" was not listed by Justice Field. This severely limited the power formerly exercised by the grand jury in the federal courts. It has been stated that at common law the grand jury had the power to prefer indictments at the instance of private prosecutors.³⁰ The "private prosecutor" has been defined as "one who sets in motion the machinery of criminal justice against a person whom he suspects or believes to be guilty of a crime, by laying an accusation before the proper authorities, and who himself is not an officer of justice."³¹ An example of how the "private prosecutor" initiates grand jury action can be seen in a Louisiana case where a group of women, prominent in civic and reform movements, requested the grand jury during recess to investigate a charge and, if the facts justified it, to take action thereon. The resulting indictment was held valid.³² If a jurisdiction follows the view taken by the Louisiana courts it is not necessary that the individual initiating grand jury action have probable cause to believe the accused guilty.³³

In contrast to the liberal Louisiana view regarding "private prosecutors", some courts will punish by criminal proceedings those persons who bring charges before the grand jury. Several reasons are advanced for retaining this power. The charges may serve to influence a proceeding already before the grand jury, and such interference is deemed contempt.³⁴ It is also considered contempt in that charges made by a private prosecutor have the tendency to divert the grand jury from its regular schedule or to overload the pre-arranged session.³⁵

It would seem that these courts in reality are modifying the common law rule although they give "lip service" to it. Such modification may be justified if a distinction is maintained between the case where the proceeding is already before the grand jury and the case where the proceeding is initiated in the first instance by the "private prosecutor." The right of the individual to press the grand jury for action in the latter case should be preserved. The value of this right carries even more weight in cases where the individual is pre-

29. The Illinois statute requires that no grand juror shall make presentments upon their own knowledge unless that information is known to at least two of their number, except in the case where the single juror with the information is sworn as a witness. ILL. REV. STAT. c. 78, §19 (1951).

30. *People v. Sheridan*, 349 Ill. 202, 181 N.E. 617 (1932); *People 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).

31. BLACK'S LAW DICTIONARY 1386 (4th ed. 1951).

32. *State v. Sullivan*, 159 La. 589, 105 So. 631 (1925).

33. In *King v. Second National Bank and Trust Co.*, 173 So. 498 (Ala. 1937) a judgment in favor of the defendant in a suit for malicious prosecution was affirmed. The defendant had reported to the grand jury the commission of a crime, furnished the names of witnesses, and stated that the guilty parties were the plaintiffs here. The court said: "Public policy demands that the citizen, without hazard to himself, may freely bring before the grand jury the fact that a crime has been committed, request an investigation, and furnish such information as he has . . . He is merely performing a duty in aid of the tribunal set up to ascertain whether there is probable cause to believe a crime has been committed. . . ." See *Heacock v. State*, 13 Tex. App. 97 (1882) and *State v. Millain*, 3 Nev. 371 (1867).

34. *Hitzelberger v. State*, 173 Md. 435, 196 Atl. 288 (1938); *Commonwealth v. McNary*, 246 Mass. 46, 140 N.E. 255 (1923).

35. This is a statutory offense in the federal courts. 35 STAT. 1113 (1909), 18 U.S.C.A. §241 (1927); *Duke v. U.S.*, 90 F.2d 840 (4th Cir. 1937). The same result by judicial decision can be seen in *McNair's Petition*, 324 Pa. 48, 187 Atl. 198 (1937).

senting information pertinent to the activities of public officials, as distinguished from information concerning the private citizen. It can be argued that offenses concerning private citizens can be adequately prosecuted without direct access to the grand jury. The grand jury, however, is the only arm of the judicial system in an adequate position to investigate public officers, since the normal activities of the police and magistrates lack the breadth necessary for such investigations.³⁶

In Illinois, the right of an individual to communicate with a grand jury, or in a sense to act as a "private prosecutor," was thought to exist after *People ex rel. Ferrill v. Graydon*,³⁷ which set forth the general principle that a grand jury was free to obtain information from any source whatsoever. (The same case indicates that the grand jury in Illinois is still endowed with the power to set the wheels of justice into motion regardless of the wishes of the public prosecutor.) However, in *People v. Parker*³⁸ the Illinois Supreme Court held that any communication with the grand jury is contempt. In this particular case, however, the communication was clearly one of malice and personal enmity.³⁹

In a second prosecution against the same defendant, Parker,⁴⁰ the Illinois Supreme Court seems to establish a definite rule that any private communication with the grand jury, except through recognized channels, will be considered as an attempt to incite them to action, and therefore is a contempt of court. Thus, the hope that prevailed after the first *Parker* case that the court would limit its ruling to a situation where the communication was prompted by malice met with a disappointment. The second *Parker* case was taken to the United States Supreme Court where the petitioner claimed that the Illinois ruling deprived him of his right to freedom of religion and freedom of speech. The Supreme Court affirmed the judgment of contempt in a per curiam opinion, the court splitting four to four on the merits of the case.⁴¹ It would appear that the common law rule has thus been modified by judicial decision in the state of Illinois.

Public-Spirited Communications:

It does not follow from either of the *Parker* cases, even by dicta, that communications by public spirited groups informing the grand jurors of their powers and duties should fall within the ruling of these cases. Query, does the recently enacted "Secrecy Statute"⁴² tend to include this type of action? This Illinois statute prevents a grand juror from communicating with any person concerning "any matter which the jury has considered, is considering, or is about to consider, except that he may communicate on such

36. *People ex rel. Livingston v. Wyatt*, 186 N.Y. 383, 79 N.E. 330 (1906).

37. 333 Ill. 429, 164 N.E. 832 (1929).

38. 374 Ill. 524, 30 N.E. 2d 11 (1940), *cert. denied*, 313 U.S. 560 (1941). See Fremon, *Private Communications With Grand Juries*, 38 J. Crim. L. & Criminology, 43 (1947).

39. In this case the defendant had addressed two letters to the Cook County grand jury charging the publisher of the Chicago Tribune and various public officials with a conspiracy to steal large sums of money which were allegedly due in unpaid taxes and penalties. The Illinois Supreme Court said the language used was "vicious and inflammatory."

40. *People v. Parker*, 397 Ill. 305, 74 N.E. 2d 523 (1947), *aff'd*, 68 Sup. Ct. 1082 (1948). In this case Parker made the same accusations against the same individuals by letter to the grand jury, but he phrased it more moderately, and he purported to sign it as an officer of the Puritan Church carrying forth church duties.

41. *People v. Parker*, 68 Sup. Ct. 1082 (1948).

42. ILL. REV. STAT. c. 38, §720 (1951).

matters with officers of the court, other grand jurors, and witnesses during regular sessions of the grand jury." It is difficult to see how this statute does any more than codify the common law requirement of secrecy in all grand jury proceedings,⁴³ and to limit the investigative activity by an individual grand juror. It would seemingly have no effect upon a public spirited communication, especially if this communication were made at the beginning of the grand jury term and thus prior to the time that particular matters were presented for their consideration.

The right to communicate with grand jurors to inform them of their powers and duties has never been the subject of judicial decision in Illinois. In *Ex Parte Pease*,⁴⁴ a Texas case, contempt charges were brought for submitting an impersonal editorial entitled "Grand Juries" to the panel. The case was dismissed with these words: "We confess ourselves unable to find anything which might not have been appropriately read to this grand jury by any judge of any court upon their empanelment." An Indiana case, *Cheadle v. State*,⁴⁵ reached the same result. In considering how Illinois might approach this problem it is necessary to observe the decision of *People v. Jordan*.⁴⁶ In that case, the question presented was whether an indictment was invalid because the grand jury was instructed by someone other than the judge. The court upheld the indictment, saying that the defendants would have to show they were prejudiced by the variation in the manner of instructing. It is possible that instructions sent to the grand jury might be attacked in a similar manner, but if the instructions do not refer to any particular grand jury and are purely for a general public spirited purpose, the same result as that reached in the *Jordan* case should follow. It is interesting to note that New York has an organization known as the Grand Jury Association which furnishes a booklet to all grand jurors outlining the powers of the panel. This organization's activities have never been directly challenged and its booklets have become a well established method of educating each grand juror.⁴⁷

43. The general rule of secrecy and that which is followed in Illinois is summed up in *People v. Goldberg*, 302 Ill. 559, 135 N.E. 84 (1922). It is stated as follows: "In furtherance of justice and upon grounds of public policy the law requires that grand jury proceedings shall be regarded as privileged communications and that the secrets of the grand jury room shall not be revealed. The reasons usually given for this requirement are to prevent the escape of the accused, to secure freedom of deliberation and opinion among the jurors, and to prevent the testimony produced before them from being contradicted at the trial by subornation or perjury . . . the rule of secrecy concerning matters transpiring in the grand jury room is not designed for the protection of the witnesses before the grand jury but for the protection of grand jurors and in furtherance of public justice. A witness has no privilege to have his testimony treated as a confidential communication but must be considered as testifying under all the obligations of an oath in a judicial proceeding, and hence his testimony may be disclosed whenever it becomes material to the administration of justice."

The policy reasons behind the secrecy requirement are met when there is an indictment, the accused is in custody, and the grand jury is discharged. Note, 27 N.Y.U.L. Rev. 319 (1952), dealing with a movement towards relaxation of the common law rule of grand jury secrecy.

44. 57 S. W. 2d 575 (Tex. 1933).

45. 110 Ind. 201, 11 N.E. 426 (1887).

46. 292 Ill. 514, 127 N.E. 117 (1920). Here the state's attorney instructed the grand jury instead of the judge.

47. *People v. Shea*, 147 N.Y. 78, 41 N.E. 505 (1895), where certain persons had distributed to each member of the grand jury a letter informing them of their duties. The court refused to dismiss the indictment. See *People v. Sellnick*, 4 N. Y. Cr. Rep. 329 (1886), where the court distinguishes between communications seeking to bring about an indictment and one giving instructions on powers and duties.

Investigative Power:

Even though Illinois limits the source from which the grand jury may obtain information, there is nothing to prevent the grand jury in Illinois from taking the reins into its own hands and launching its own investigation. Should the prosecutor prove uncooperative, the grand jury apparently may exclude him from the hearings and proceed independently.⁴⁸ Should he refuse to issue subpoenas or to draft the required bills of indictment, the grand jury may ask the court to order him to do their bidding, or to appoint a special prosecutor.⁴⁹ On the other hand, Pennsylvania by judicial decision, has limited the grand jury in its power to proceed upon an investigation in the absence of direction (i.e., a specific charge) by the court.⁵⁰ In that state if the jury desires to inquire into something not previously brought before them, they must bring it to the court's attention first. Then the court in its discretion, by a charge of the specific condition, may convert the grand jury into an inquisitorial body and the grand jury investigation may proceed.

It is this common law power to launch its own investigation which makes the grand jury today a very effective weapon against organized crime and large scale corruption. The grand jury does not encounter the obstacles that other investigative arms of law enforcement do. It has the duty to inquire into *all* crimes committed within the jurisdiction and consequently questions as to scope of inquiry are seldom raised. A witness coming before the grand jury need not be informed of any specific case or charge,⁵¹ thus questions of relevancy to the matters under investigation are seldom put in issue.⁵² The United States Supreme Court, in *Blair v. United States*,⁵³ held that a witness may not contest the validity of the statute creating the crime under inquiry, nor may he challenge the authority or jurisdiction of the grand jury. A practical difference between an investigation before the grand jury and an investigation before some other person or body is that in the former the witness is not entitled to counsel to interrupt the smooth procedure of the investigation. The grand jury proceedings are behind closed doors, which results in a calm inquiry as compared with the tumult which can develop in other criminal investigations.

Obstructive Tactics:

Perjury and contempt charges for obstructive tactics before the grand jury are controlled somewhat by the *materiality* of the questions which are asked before the grand jury. The role of materiality is one of great flexibility in subsequent proceedings for contempt or perjury.⁵⁴ It is upon this issue

48. *Matter of the District Attorney's Relation to the Grand Jury*, 14 N. Y. Cr. 431 (1900). Other states have removed this common law power of dominance over the prosecutor by statute.

49. An example of such an occurrence is described in the N. Y. Times, Jan. 24, 1932, §3, p. 6. See also Wilkes, *A History Making Grand Jury*, 13 THE PANEL 2 (1935) relating to the appointment of Dewey as a special prosecutor.

50. *McCullough v. Commonwealth*, 67 Pa. 30 (1870); *Commonwealth v. Grech*, 126 Pa. 531, 17 Atl. 878 (1889). However, in Pennsylvania, a preliminary hearing before a magistrate which follows in a specific charge to the grand jury is not necessary where the offense is one of public notoriety or where it is an offense within the knowledge of the grand jurors themselves.

51. *Matter of Black*, 47 F.2d 542 (2d Cir. 1931); *Hale v. Henkel*, 201 U.S. 43 (1906); Note, 6 COL. L. REV. 347 (1906).

52. *Ex Parte Butt*, 78 Ark. 262, 93 S.W. 992 (1906).

53. 250 U.S. 273 (1919).

54. A thorough discussion of the place of materiality in grand jury proceedings

that judicial control may be properly placed upon the scope of the inquisitorial power of the grand jury.⁵⁵ It is not a function of the grand jury to harass members of the community; therefore, it has been held that a question as to whether a witness knows of the commission of any crime is immaterial.⁵⁶ However, those courts which have limited the scope of the investigation by reliance on the issue of materiality fail to set down any specific standard.⁵⁷ Other courts have disregarded materiality and thus have placed no boundary on the scope of the investigation. Such a view is exemplified in *Carroll v. United States*:⁵⁸

"Its (the grand jury's) investigation and full duty is not performed unless and until every clue has been run down and all witnesses searched for and examined in every proper way to find if a crime has been committed, and to charge the proper person with the commission thereof. Its investigation proceeds step by step. A false statement by a witness in any of the steps, though not relevant in an essential sense to the ultimate issues pending before the grand jury, may be material, in that it tends to influence or impede the course of the investigation."

Seemingly, where any subsequent action is brought against a witness, either in the form of a prosecution for perjury or by the exercise of the summary power of contempt, it should be limited to those cases where the behavior of the witness was insulting or frivolous. It should not develop into a third degree method at the option of the inquisitors. On the other hand, invoking the summary power of contempt is a proper means of exerting pressure upon a witness who is hindering the inquiry by falsehoods or evasive answers.⁵⁹ Illinois seems to be in accord with this view, since it has been held that materiality need not necessarily be in issue when the summary power of contempt is exercised.⁶⁰

III

THE GRAND JURY AND THE PRIVILEGE AGAINST SELF-INCRIMINATION

Although the grand jury is not as susceptible to obstructive tactics as other investigative agencies, its power must be considered in the light of a basic premise of Anglo-American law which guarantees individuals a privilege against self-incrimination. The ordinary witness before the grand jury may invoke this privilege when a question requires an incriminating answer. However, it would seem that a suspect before the grand jury is in the same position as a suspect before a magistrate pursuant to a complaint, and thus

will be found in *Dession and Cohen, The Inquisitorial Functions of the Grand Juries*, 41 *YALE L. J.* 701, 702 (1932).

55. Cases in which broad investigations have been allowed and not defeated by questions of materiality are exemplified by *State v. Wakefield*, 73 Mo. 549 (1881); *State v. Turley*, 153 Ind. 345, 55 N.E. 30 (1889); *People v. Howland*, 63 Colo. 414, 167 Pac. 961 (1917); *Nelson v. U.S.*, 201 U.S. 92 (1905). A limiting effect upon the scope of the inquiry can be seen in *Clayton v. U.S.*, 284 Fed. 537 (4th cir. 1923).

56. *State v. McCormick*, 52 Ind. 169 (1875).

57. *Brzezinski v. U.S.*, 198 Fed. 65 (2d Cir. 1912).

58. 16 F.2d 951, 953 (2d Cir. 1927). See Note, 40 *HARV. L.R.* 780 (1927).

59. *Loubriel v. U.S.*, 9 F.2d 807 (2d Cir. 1926); *O'Connell v. U.S.*, 40 F.2d 201 (2d Cir. 1930).

60. *People v. Sheridan*, 349 Ill. 202, 181 N.E. 617 (1932) upholding contempt proceedings against a witness for evasive answers before the grand jury. See the discussion in *People v. Freeman*, 256 Ill. App. 233, (1930) on the issue of materiality. However, it should be noted that this case did not involve contempt proceedings arising out of a grand jury hearing, therefore, there is a question as to whether this case is authority for contempt proceedings arising out of such action.

would be entitled to refuse to answer all questions.⁶¹ At that time he may exercise the privilege just as if he were on trial. It has been held that if a particular person is charged with a crime before a committing magistrate and is subjected to questioning, the resulting indictment is invalid.⁶² Other jurisdictions have modified this rule and allow a suspect to be questioned even after he is formally accused, if he is warned that he need not testify,⁶³ or even without warning if he makes no objection.⁶⁴

Unlike the grand jury proceedings where specific charges have been made of a crime, the broad inquisitorial proceeding's success rests upon the right to call all persons with knowledge of the particular circumstances under inquiry, whether they are suspects or not. Query, may a recognized suspect be called under the guise of a "John Doe" inquiry, and thus by the broad scope of the investigation deprive the suspect of his constitutional privilege against self-incrimination?

The problem has been handled in various ways. In California, a police captain appeared in response to a subpoena, but refused to be sworn as a witness in a grand jury investigation involving alleged corruption in the police department. He contended that as a potential defendant, he had a constitutional right not to be sworn. The court upheld a contempt proceeding, saying that his status was that of a witness and he could not claim the privilege until an answer to a particular question would tend to incriminate him.⁶⁵ The court seemed to be of the view that in broad grand jury investigations the privilege of an ordinary witness is sufficient. In *United States v. Kimball*⁶⁶ the court approached the problem by refusing to consider the cover-up effect of the grand jury action. Other courts also avoid facing the privilege issue by dismissing the case on procedural technicalities.⁶⁷

Illinois apparently follows the view that an indictment will be quashed if a potential defendant is examined before the grand jury. This was the holding of *Boone v. People*,⁶⁸ but in that case the defendant was the only witness examined before the grand jury. Whether Illinois would follow the general principle of the *Boone* case in a less clear-cut fact situation (i.e., where many witnesses have been called to testify) is not known. Illinois' attitude towards the scope of the privilege of an ordinary witness might shed some light on the question. In *People v. Spain*⁶⁹ it was held that a witness need not answer a question upon which there is some doubt as to whether it calls for an incriminating answer. This conflicts with the general view that the privilege cannot be exercised unless the question clearly calls for an incriminating answer.⁷⁰ The danger from the answer must be real and appreciable as distinguished from a mere possibility. The liberal view in Illinois upon this point might indicate that the Illinois court would look with disfavor

61. 8 WIGMORE, EVIDENCE §2252c (3d ed. 1940).

62. *State v. Smith*, 56 S.D. 238, 228 N.W. 240 (1929); *State ex rel. Poach v. Sly*, 63 S.D. 162, 257 N.W. 113 (1934).

63. *State v. McDaniel*, 336 Mo. 656, 80 S.W.2d 185 (1935).

64. *Frost v. Commonwealth*, 258 Ky. 709, 81 S.W.2d 583 (1935); Note, 29 IOWA L.R. 373 (1944).

65. *In re Lemon*, 59 P.2d 213 (Cal. 1936).

66. 117 Fed. 156 (S.D. N.Y. 1902). Accord: *People v. Lauder*, 82 Mich. 109, 46 N.W. 956 (1890).

67. *State v. Andersen*, 10 Ore. 448 (1882). Here the case was dismissed because the objection was not raised properly, but the privilege issue was in the background.

68. 148 Ill. 440, 36 N.E. 99 (1894).

69. 307 Ill. 283, 138 N.E. 614 (1923).

70. *Heicke v. U.S.*, 227 U.S. 131 (1913) which represents the general rule.

upon any infringement of the privilege against self-incrimination by a "John Doe" inquiry of the grand jury.

To partially alleviate the difficulties which result from an ordinary witness' claim of privilege, and consequent stagnation of the investigation of the accused before the grand jury, the following statute was adopted by the present session of the Illinois Legislature:

"Whenever, in any investigation before a grand jury or trial in a court of record of any person charged with a criminal offense (either felony or misdemeanor) it shall appear to the court that any person called as a witness in behalf of the prosecution is a material witness and that his testimony or any evidence he may produce, documentary or otherwise would tend to incriminate him, on motion of the State's Attorney the court may cause an order to be entered of record that such witness be released from all liability to be prosecuted or punished on account of any transaction, matter or thing concerning which he may be required to testify or produce evidence, documentary or otherwise; and such order shall forever after be a bar to any indictment, information or prosecution against the witness for any felony or misdemeanor shown in whole or part by such testimony or evidence, documentary or otherwise, except for perjury committed in the giving of such testimony; provided however, that the court shall deny a motion of a State's Attorney made under this section and shall not enter an order releasing such witness from such liability if it shall reasonably appear to the court that such testimony or evidence, documentary or otherwise would subject such witness to an indictment, information or prosecution (except for perjury committed in the giving of such testimony), under the laws of another State or of the United States; . . . Any witness, who, having been granted immunity as aforesaid, refuses to testify or produce evidence documentary or otherwise, may be punished for contempt of the court and sentenced to the county jail for not more than two years."⁷¹

The intention of this section is summed up by the Chicago Crime Commission in this manner: "At times the prosecuting attorney would be very materially aided in his efforts to apprehend and convict the 'higher-ups' in crime if he were able to guarantee immunity from prosecution to the less serious offender and thereby make available to the grand jury or court whatever evidence the immune offender may possess. . . ."⁷²

A difficulty which is apparent upon the face of this statute is that the initiation of any grant of immunity is by motion of the State's Attorney. If an investigation involves public officials, or if the state's attorney is not cooperative, the usefulness of the new section might be severely limited. Placing the success of the grand jury proceedings in the hands of the prosecutor is contrary to the basic nature of this institution. The state's attorney may be a helpful arm of the grand jury, but it is the grand jury itself which should determine the important movements.

Another possible difficulty in the statute is that it might be subjected to a narrow interpretation in its application to proceedings before the grand jury. The statute applies "in any investigation before a grand jury or trial in a court of record of any person charged with a criminal offense. . . ." If the words "of any person charged" are considered referable to the grand

71. ILL. REV. STAT. c. 38, §274 (1953).

72. Stated in a circular distributed by the Chicago Crime Commission to members of the Illinois Legislature.

jury proceedings then, seemingly, immunity could only be granted when the organization is considering an indictment of particular individuals. If this were true then the statute would not be available in a "John Doe" inquiry where there is a broad investigation of criminal conditions. Any such limitation was certainly not the intention of the proponents of the legislation.

IV

THE POWER OF PRESENTMENT AND THE POWER OF REPORTING

Closely aligned to the grand jury's broad inquisitorial power is its power of presentment. The presentment, in its true sense, like an indictment, charges the commission of a crime and designates the persons accused.⁷³ It differs from the indictment in that it results from the grand jury's initiation.⁷⁴ The presentment might be termed instructions for an indictment. In our modern system it has lost much of its practical importance, since a prosecutor is available to the grand jury at all times for the purpose of framing indictments. It would be a rare instance today that the power of presentment would have to be distinguished from the indictment, but in a technical sense the presentment is a result of the grand jury's investigation *in solo*.

At common law the grand jury was vested with the power to make presentments and to conduct the necessary investigations to uncover evidence to support them.⁷⁵ However, even in light of this common law power the question has arisen as to whether the grand jury may summon witnesses prior to the time that it is directed by the court to inquire into a specific crime (i.e. given a specific charge). Pennsylvania and North Carolina have repudiated this power by judicial decision.⁷⁶ The federal courts have allowed the practice of interrogating witnesses before the presentment is made, and the subpoena is sufficient if it informs the witness of the names of the parties with respect to whom they will be asked to testify.⁷⁷ Missouri has held that, without stating in the subpoena in what particular matter or cause they were to testify, the grand jury might subpoena witnesses to appear before them to testify generally.⁷⁸

The proposition that the grand jury may form a presentment upon facts within its own knowledge seems to be undisputed,⁷⁹ except in those jurisdictions which require that a grand jury can act upon no offense until it is brought to the attention of a magistrate.⁸⁰

It would seem to follow from Illinois' leading case upon the powers of the

73. 1 HOLDWORTH, HISTORY OF ENGLISH LAW 321 (4th ed. 1931).

74. Dession and Cohen, *supra* note 54 at 705; 1 CHITTY, CRIMINAL LAW 110 (1819). In some jurisdictions the meaning of a presentment has been modified by statute.

75. See the discussions of the ancient powers of the grand jury in *Hale v. Henkel*, 201 U.S. 43 (1906); *State v. Wilcox*, 104 N.C. 847, 10 S.E. 453 (1889); Alexander, *The Grand Jury*, 16 THE PANEL 1, 3 (1938).

76. *Petition of McNair*, 324 Pa. 48, 187 Atl. 498 (1936); *Lewis v. Commissioners*, 74 N.C. 194 (1876), holding that the grand jury had no power to summon witnesses to "... enable that body to ascertain whether the witness knew of any violation of the criminal law. ..." *Accord*: *State v. Wilcox*, 104 N.C. 847, 10 S.E. 453 (1889).

77. *Hale v. Henkel*, 201 U.S. 43 (1906); *Blair v. U.S.*, 250 U.S. 273 (1919); *United States v. Philadelphia and R. Ry.*, 225 Fed. 301 (E.D. Pa. 1915).

78. *Ward v. State*, 2 Mo. 120 (1829); *State v. Terry*, 30 Mo. 368 (1860) holding that a witness may be asked whether he knows of the violation of any criminal law.

79. 2 WHARTON, CRIMINAL PROCEDURE §1264 (10th ed. 1918); *Irwin v. Murphy*, 129 Cal. App. 713, 19 P.2d 292 (1933); *Coblentz v. State*, 164 Md. 558, 166 Atl. 45 (1933); *In re Jones*, 101 App. Div. 55, 92 N.Y. Supp. 275 (2d Dept. 1905); *State v. Lee*, 87 Tenn. 114, 9 S.W. 425 (1888).

80. See note 50 *supra*.

grand jury, *People ex rel. Ferrill v. Graydon*,⁸¹ that the Illinois grand jury may form a presentment upon the testimony of witnesses who were called to testify generally. This opinion endows the Illinois grand jury with all the common law powers of the institution. It further states that it is not within the power of the courts to interfere with the grand jury—any restraint upon its common law powers must follow from legislative action.⁸²

The power of presentment is sometimes confused with a custom that has developed in some jurisdictions for the grand jury from time to time to make a report upon the general conditions of the region in which it sits.⁸³ No mention is made at common law of a grand jury extending its power of presentment as a means of making this report. The report is chiefly a commentary upon newsworthy information. Since the primary objective of a grand jury is to expose crime, the grand jury is in a less favourable position to fulfill this objective when conditions do not warrant a presentment or indictment.⁸⁴ Reports are not intended to serve as the basis for indictments. Reports are made as a matter of public convenience and in a sense as a method of by-passing the required secrecy of grand jury proceedings.

Those reports which address themselves to general conditions or impersonal broadsides do not raise any problems. However, when the grand jury censures a particular individual, the question arises as to whether this is a fair weapon to give the grand jury. The courts have allowed an aggrieved subject of a grand jury report several remedies. In *Matter of Gardiner*,⁸⁵ by motion the report was expunged from the record since it implied that the district attorney had committed a crime. In a later case in New York, *Matter of Jones*,⁸⁶ a report censuring the board of supervisors was not set aside. However, by way of dictum, the court said that if the grand jury actually accused an individual in a report when an indictment was in order, thereby leaving him powerless to answer, then the report would be expunged. A strong dissent in this case stated that the grand jury had no power to make such reports, it being their duty to indict or take no action at all. It would seem that the courts of New York are now following the dissent and granting motions to expunge.⁸⁷ The courts of Maryland and Wisconsin have also reversed cases on appeal for refusal to expunge reports dealing with particular individuals.⁸⁸ Other courts leave the matter entirely to the discretion of the lower court, and jurisdiction to review these holdings is denied.⁸⁹ In at least one jurisdiction, when such a circumstance occurs, mandamus will issue without regard to whether the act of the lower court was ministerial or judicial.⁹⁰

Another possible remedy is a suit for libel based upon the report. A

81. 333 Ill. 429, 164 N.E. 832 (1928).

82. The "Secrecy Statute" limits the power of the grand jury to conduct investigations themselves since they are forbidden to communicate with any one except certain specific individuals during their term.

83. Note, 22 A.L.R. 1356, 1357 (1923).

84. In re Healy, 161 Misc. 582, 293 N.Y. Supp. 584 (Queens Co. Ct. 1937); *State v. Bramlett*, 166 S.C. 323, 164 S.E. 873 (1932).

85. 31 Misc. 364, 64 N.Y. Supp. 760 (Gen. Sess. 1900).

86. 101 App. Div. 55, 92 N.Y. Supp. 275 (2d Dept. 1905).

87. *Matter of Osborne*, 68 Misc. 597, 125 N.Y. Supp. 313 (Sup. Ct. 1910) and a comment by Medalie, *Grand Jury Investigations*, 7 THE PANEL 5 (1929).

88. *Matter of Report of Grand Jury of Baltimore City*, 152 Md. 616, 137 Atl. 370 (1927); *Matter of Grand Jury Report*, 235 N.W. 789 (Wis. 1931).

89. *State ex rel. Lashly v. Wurdeman*, 187 S.W. 257 (Mo. 1916); *State ex rel. Weber v. McFadden*, 46 Nev. 1, 205 Pac. 594 (1922).

90. *Oakman v. Recorder of City of Detroit*, 207 Mich. 15, 173 N.W. 346 (1919). However this report was made by a statutory "one man" grand jury.

Michigan case, *Bennett v. Stockwell*,⁹¹ held that a qualified privilege did not attach to a report which had been expunged from the record. The question of good faith would merely go to the mitigation of damages. However, other courts, even if they do not recognize the power to make reports, seem to recognize a qualified privilege when the reports are made. This is exemplified by the Iowa case of *Rector v. Smith*⁹² in which a grand juror was sued for libel. Although the court did not seem to favor the report, it stated that since the publication was made in the discharge of a public duty and without ill-will toward the plaintiff, the libel action could not be maintained.

When a libel action is brought against a newspaper which has republished the report, the rule seems to be that the newspaper stands in the shoes of the grand juror.⁹³ However, some cases hold that the press always has a qualified privilege under these circumstances since it is fair comment on a judicial proceeding.⁹⁴

Although the power of reporting does not reach as far back in history as the other powers of the grand jury, it is a custom which has prevailed in our country since colonial times.⁹⁵ In Illinois this method of reporting, even if limited to general conditions, could serve a very useful purpose. If nothing else, the report would be of assistance to the next grand jury by pointing out the conditions which had been observed generally by the preceding one. It would be advisable in Illinois, however, to take a pessimistic view and warn the grand jurors to refrain from naming specific individuals in any report.

V

PROBLEMS IN GRAND JURY INVESTIGATION

Thus far only the powers of the grand jury have been observed and not the difficulties which ensue when the powers are invoked. In investigating a particular incident the regular grand jury may be equipped to operate independently. However, lack of funds and expert assistance is a serious obstacle when a grand jury proceeds independently to investigate in a matter of considerable scope. Under the old English system it is not likely that the problem arose, since the community was small and the jurors could act upon their own knowledge and investigative activities. However, in modern times instances have arisen where the grand jury has employed private detectives, accountants, and counsel.⁹⁶ In each case dealing with this problem, absent

91. 197 Mich. 50, 163 N.W. 482 (1917). See Note, 2 MINN. L. REV. 154 (1918).

92. 11 Iowa 302 (1860).

93. *Ferguson v. Houston Press*, 1 S.W. 2d 387 (Tex. Civ. App. 1927).

94. *Parsons v. Age-Herald Publishing Co.*, 181 Ala. 439, 61 So. 345 (1913). The privilege was granted with the following reservations: ". . . (1) that libelous imputations in a grand jury's report upon private citizens, or upon public officers, not touching their fitness for office or their fidelity to the public service, or their propriety of their official acts, are not properly matters of public interest; (2) that the privilege does not attach at all until the report has been duly published by the grand jury itself in open court; and (3) that matters, the publication of which is forbidden by law, or by order of the court as being improper for publication are not to be regarded as privileged with respect to their publication by a third person." *Parsons v. Age-Herald Pub. Co.*, *supra* at 448, 61 So. at 349.

95. "It appears to have been common practice for grand juries gathered at the capital to express their opinions on things in general, and on the administration of the royal governor in particular. It was an advantage, therefore, for the Governor to have a group chosen who would be counted on to pass a laudatory resolution which he could modestly forward to the Board of Trade as an indication of public opinion." SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 70 (1930).

96. Note, 7 MINN. L.R. 59 (1922); Note, 26 A.L.R. 605 (1923); Note, 12 MINN. L.R. 761 (1928).

unusual statutory provisions giving a grand jury such power, such action has been held unauthorized. The theory behind the decisions seems to be that it is against public policy in that the grand jury would be prejudiced in favor of its own investigative agency.⁹⁷ A further reason given is that statutes prescribe upon whom the duty shall fall to ferret out evidence of crime, and such statutory provisions impliedly negate a power in a grand jury to designate a private agency.⁹⁸ The view courts have taken upon this subject seemingly is contrary to the previously discussed broad powers of the grand jury. If it is within their power to summon a competent witness to substantiate a mere belief held by the grand jury, it certainly would seem that they could rely upon an experienced investigator in the field of inquiry. It has been held that it is appropriate for the grand jury to rely upon investigations made by proper public officials.⁹⁹ Especially in a large community it is impossible for the grand jury to make its own investigation, and since it is the grand jury's duty to make a diligent inquiry, it would seem that the practice of obtaining outside aid would merely be carrying forth the basic function of the grand jury.¹⁰⁰ It has been said that activation of the grand jury's inquisitorial power evolves from political conditions. If this is true, and a situation should arise where a possibility exists that the ones upon whom the official duty lies to collect evidence are corrupt, then the very preservation of the basic function of the grand jury might lie in looking elsewhere for aid.¹⁰¹

Another obstacle is the lack of time which a grand jury would have to devote to an independent investigation. For instance, the regular grand jury of New York devotes to its work but five mornings a week, of two hours each, for one month. Of necessity most of this time is occupied with routine.¹⁰² Illinois is faced with this same problem. The terms of grand juries in Illinois are gauged to the terms of the various circuit courts.¹⁰³ The term in some counties is six months and until recently only one month in Cook County. Attempts to extend the grand jury beyond the statutory time have met with difficulty. In *People v. Cochrane*,¹⁰⁴ the Illinois Supreme Court passed upon the legality of acts done by a grand jury during a term subsequent to its original term. The court held that holding the grand jury over was error, but that the grand jury was not without jurisdiction since it became a grand jury de facto. The dictum of the decision leaves an inference that although the legality of the grand jury could not be raised upon a writ of error, it could have been raised earlier upon a motion to quash the indictment. Shortly after the *Cochrane* case the Illinois supreme court heard *People v.*

97. *Burns International Detective Agency v. Doyle*, 46 Nev. 91, 208 Pac. 427 (1922).

98. *Allen v. Payne*, 1 Cal. 2d 607, 36 P.2d 614 (1934). It has been held that such practice is unauthorized even if the expense is borne by the grand jurors. *People v. Kempley*, 265 Pac. 310 (Cal. App. 1928). Such a viewpoint would also indicate disfavor if the investigative aid came from a public spirited organization which had investigators at their disposal.

99. *Woody v. Peairs*, 35 Cal. App. 533, 556, 170 Pac. 660, 661 (1917).

100. Seemingly, the Illinois "Secrecy Statute" would prevent individual investigation on the part of the grand juror and further it is submitted that this statute would stymie any gratuitous investigative aid for the benefit of the grand jury by such an organization as the Chicago Crime Commission. See note 42 *supra*.

101. The argument that a hired investigator might prejudice the grand jury does not carry much weight in light of the general principle that bias or prejudice of a grand jury is not sufficient grounds upon which to quash an indictment. See note 23 *supra*.

102. *Dession and Cohen*, *supra* note 54, at 698.

103. ILL. REV. STAT. c. 73, §9 (1951).

104. 307 Ill. 126, 138 N.E. 291 (1923).

Brautigan.¹⁰⁵ The facts were similar to the *Cochrane* case with the important additional fact that a grand jury de jure was in existence at the same time as the hold-over grand jury. The court said: "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."¹⁰⁶ The effect of the decision is to say that a continued grand jury cannot become a grand jury de facto while a grand jury de jure is performing its duties.

At the present time the revised statute, which was sponsored by the Chicago Crime Commission, allows Cook County to extend the term of the grand jury to no longer than three months upon the recommendation of the grand jury, or the state's attorney, or upon the court's own motion.¹⁰⁷ This statute represents some improvement in the Cook County situation, but is still an inadequate amount of time for a full scale investigation of organized crime.

A solution to the problem of time is present in many jurisdictions and is embodied in a statute in the state of Illinois. This is the power of the court to call a special grand jury.¹⁰⁸ The *Brautigan* case explains that under common law the court's power to summon a special grand jury is limited to cases in which offenses are committed after the regular grand jury has been discharged or when the offender is arrested after the discharge of the regular grand jury.¹⁰⁹ However, in the *Graydon* case it was held that the common law form of special grand jury has been abolished in Illinois and replaced by a statutory form. This latter form is not limited as the common law special grand jury was. Now the special grand jury may be impaneled at any time public justice requires it, regardless of whether the regular grand jury is in session or not.¹¹⁰ It would seem to follow that since the special grand jury in Illinois is not limited by common law principles, it therefore is not limited in its existence to the term of the court, but may continue in session until its mission is accomplished. This also raises the question of whether the special grand jury is endowed with the vast inquisitorial powers of the regular common law grand jury since the special grand jury is of statutory origin. It is safe to assume from the *Graydon* case that these powers do exist and that the courts will not interfere with them since the legislature has not seen fit to limit the functions of the special grand jury by statute. Possibly the power of reporting which is vested in the regular grand jury might be used to force the empaneling of special grand juries. If the regular grand jury has found that certain conditions of widespread corruption exist, but that there is insufficient time to thoroughly investigate the conditions, the jury might explain this in its report and suggest that a special grand jury be called to carry forth upon the particular broad inquiry.

105. 310 Ill. 472, 142 N.E. 208 (1924).

106. *Id.* at 478, 142 N.E. at 214.

107. ILL. REV. STAT. c. 78, §9 (1951).

108. ILL. REV. STAT. c. 78, §19 (1951). In *People v. Feinberg*, 348 Ill. 549, 181 N.E. 437 (1932) it is stated that only a circuit court judge assigned to the Criminal Court of Cook County can call a special grand jury.

109. It is further stated in the *Brautigan* case that a hold-over grand jury does not become a special grand jury, since the latter must be impaneled in accordance with the statute.

110. ILL. REV. STAT. c. 78, §19 (1951).

VI

PROPOSED MANUAL FOR GRAND JURORS

Attacks have been made upon the grand jury, even to the extent of advocating its abolition. If the institution has become a mere "fifth wheel in the judicial machinery" it is a result of a lack of understanding of the broad powers which exist in the grand jury. When such a situation exists a portion of the blame should be placed upon the courts for failing to inform the jurors of the true nature of their obligation, thus leaving them in the hands of the prosecuting attorney. Often the judiciary will instruct the grand jury in a manner which is technically correct, but the instructions will be tempered to discourage any really effective action by that body. This is exemplified by a recent charge to the Cook County Grand Jury.¹¹¹

"You have a perfect right, under the law, to make your own investigations, unaided by the court and unassisted by the prosecuting attorney. It is the duty of the court to instruct you, and the court desires to caution you, not to engage upon any inquiry without reasonable proof that evidence is obtained or will be obtained upon which to act in your capacity as Grand Jurors."

It was further stated in the same charge that a grand jury's duties "do not contemplate investigation of problems generally" and that in the Chicago area there are frequent attempts to "investigate certain situations" which are "wasteful, costly and harmful and bring no results".

The basic solution to any problem that exists is to inform the grand jurors of their position in a manner that will impress upon their minds just what their true functions are. This can be accomplished by a combination of two methods. First, by the use of better and more impressive instructions by the court. Second, by the use of a printed manual which the jurors would have with them for study and reference throughout their term of service. A grand jury manual should contain such information as that suggested in the following proposed manual. Although it is designed specifically for Illinois' grand jurors, it might serve as a pattern for other jurisdictions.¹¹²

GRAND JURY MANUAL

1.

The grand jury is an institution coming to us from the common law of England, and dates back to the sixteenth century. It is a part of the criminal law system of Illinois.

2.

In the State of Illinois, with certain exceptions, no person may be prosecuted for a felony without an indictment presented by a grand jury.

111. In the Matter of Impanelling of the September, 1952, Grand Jury In The Criminal Court of Cook County.

112. The Chicago Crime Commission has prepared and published a Manual for Grand Jurors, which will be distributed to each grand juror at the beginning of his term of service. Some of the research contained in this comment served as the basis of the Chicago Crime Commission manual.

Therefore, the major portion of the Cook County Grand Jury's work will consist of acting as the investigating and accusing body of all felonies committed within the jurisdiction of the Criminal Court of Cook County.

3.

A grand jury consists of twenty-three persons. The presence of sixteen is necessary for the transaction of grand jury business.

4.

It is the duty of the grand jury to not only investigate and accuse, but to guard the rights of citizens by saving them from unfounded prosecutions.

5.

Grand jurors are selected by the jury commissioners (or in some counties by the county board) regardless of sex and as evenly as possible from the legal voters of the various towns or precincts in the county. They must have the following qualifications:

- (a) They shall be between the ages of 21 and 65 and not exempt from jury service.
- (b) They shall be in the possession of their natural faculties and not infirm or decrepit.
- (c) They shall be of fair character, of approved integrity, of sound judgment, well informed and must understand the English language.
- (d) They must be inhabitants of the town or precinct from which they are chosen.

6.

The term of the grand jury is adjusted to the term of the circuit court. It varies in Illinois from one to six months. In Cook County the regular term for a grand jury is one month, but this may be extended in one month periods to a total of three months upon recommendation of the state's attorney, the court, or the grand jury.

7.

If the grand jury is dismissed by the court before the end of its term, it may be summoned again by the court during the period provided by law in which they constitute the grand jury.

8.

When in the opinion of a majority of the judges of any judicial circuit it is not necessary to summon a grand jury, they may dispense with it for that term or for any part of a term.

9.

Grand jurors are entitled to a fee of \$5.00 per day plus mileage of \$1.20 for the term. These fees may be varied slightly by the county boards.

10.

Before the grand jurors enter upon the discharge of their duties they shall swear or affirm that they will perform their duties diligently in all

matters coming to their knowledge during their term of service and that they will indict no person through malice, hatred or ill will, nor fail to indict through fear, favor, or a promise of reward.

11.

After the grand jury is impaneled the court appoints a foreman whose duty it is to swear or affirm witnesses testifying before the grand jury. The foreman, when an indictment is found, indorses thereon "a true bill," or when the grand jury does not indict "not a true bill". In either case he signs his name as foreman at the foot of the bill of indictment and in the case of a "true bill" the names of the witnesses thereon who gave evidence in the proceedings before the grand jury. The foreman has the duty to maintain order. He must also maintain a quorum and see to the business-like conduct of the grand jury.

12.

After the grand jury is impaneled and sworn the court instructs the jurors as to their powers and duties. The court must instruct every grand jury upon the following points:

- (a) They should investigate and report on violations of gambling statutes.
- (b) That a committee of not less than three of their members shall examine and report upon the condition of the county jail.
- (c) That a statute prohibits members of the grand jury communicating with any person other than officers of the court, other grand jurors or witnesses during their session.
- (d) That a violation of that secrecy requirement is punishable under the law.

13.

The grand jury may appoint one of their number to take minutes of the proceedings which may be delivered to the state's attorney, if the grand jury so directs. However, a complete record of the proceedings will be kept by a court appointed stenographer.

14.

An indictment is an accusation in writing presented by a grand jury to a competent court charging a person with a crime. The indictment is a technical piece of pleading and consequently, is prepared by the state's attorney after the grand jury reports to the state's attorney that an indictment has been found.

The indictment by a grand jury is limited to charges of a felony. A felony is an offense punishable with death or by imprisonment in the penitentiary.

An indictment is only a formal charge of a crime, and therefore, does not require the degree of proof necessary for a conviction at a trial. However, the grand jury should hear all evidence carefully and present indictments only in cases when all the evidence before them, taken together, is such as in their best judgment would, if unexplained or uncontradicted, warrant a conviction by a trial court.

15.

In finding a "true bill" (or as it is sometimes called, a bill of indictment) at least 16 members of the grand jury shall be present, and at least 12 of them shall agree to the finding.

16.

A grand jury may find an indictment on the oath of one or more witnesses, except that in cases of treason or perjury, at least two witnesses to the same fact shall be necessary, except when the fact is proved by some writing.

17.

No indictment for false imprisonment, or willful mischief shall be found unless the name of the complaining witness is written on the bill by the foreman with the consent of the state's attorney. An exception is made to this requirement if the information came from at least two members of the grand jury or from a public officer who obtained the information in the discharge of his duty.

18.

An indictment shall be returned only upon legal evidence. Hearsay evidence is generally not legal evidence. However, the grand jury is the sole judge of the sufficiency of the evidence required to return a "true bill".

19.

No grand jury shall return an indictment based upon matters within their own knowledge except upon information of at least two of their members, unless the grand juror is sworn as a witness, in which case his testimony shall be received as that of any other witness.

20.

One witness is not allowed in the grand jury room while another witness is being examined.

No one but an authorized person is permitted to be in the presence of the grand jury while it is conducting its business.

A potential defendant can be called as a witness in exceptional cases, but only after he has signed an immunity waiver.

21.

The presence of an unauthorized person before a grand jury may result in the quashing of an indictment and it is a violation of the rule of secrecy demanded of all grand jury action.

22.

The state's attorney is authorized to be present during sessions of the grand jury because it is his responsibility to enforce the criminal law. In exceptional cases the attorney general of the state or a special prosecutor may become authorized persons to be present.

No official other than the state's attorney has a right to be present during sessions except the prosecuting attorney directed by the court to attend and even he may be excluded in the sound discretion of the grand jury.

23.

A witness is not entitled to have counsel present in the grand jury room.

24.

The state's attorney is the official whose duty it is to carry on prosecutions on behalf of the state. This includes a duty to gather the necessary facts and present them to the grand jury for their action. He will also draft the indictments and issue subpoenas for witnesses and documents.

The state's attorney is usually the officer which the court designates to attend the grand jury sessions.

25.

Generally the grand jury should look to the state's attorney and to the court for information and advice. However, the grand jury should keep in mind that they are independent of all officials including the court. Choice of action and ultimate decisions are within their own power as a grand jury.

There are exceptional instances when a grand jury may seek the advice of the attorney general of the state or request the court to appoint a special prosecutor.

26.

The grand jury has the duty of inquiring into all matters relating to crime within the county in which they are in session. These matters may come to their attention in the following ways:

- (a) Information that may be called to their attention by the court.
- (b) Information submitted by the state's attorney.
- (c) Information that may come to their knowledge in the course of their investigation of matters already before them.
- (d) Information that they may know of their own knowledge.

The grand jury should not investigate problems of the community, such as, housing or sanitary conditions, unless they are related to crime. An exception is that the grand jury must investigate and report to the court upon the condition of the county jail and the treatment of prisoners.

27.

The grand jury should also keep in mind that it not only is their duty to indict, but to guard the rights of citizens by saving them from unwarranted investigations. An investigation of an individual by a grand jury could permanently damage the reputation of an innocent person.

28.

The grand jury has the power to act independently of any officials and may initiate an investigation of any crime within the jurisdiction of the criminal court. This power extends to the investigation of corrupt conditions which the grand jury believes exist. It is not necessary that the matter have been brought to their attention by the court or the state's attorney. The grand jury is not limited in its activity to where there are specific charges of a crime. An investigation may proceed unaided by the court or the state's attorney.

The power of subpoena is included under this broad power of investigation which the grand jury has.

29.

When a complaint is exhibited to the grand jury then there is a specific charge of a crime. In such a case the grand jury shall hear witnesses, on behalf of the state only.

30.

When a grand jury is investigating a crime but there is no complaint against any specific individual then the grand jury may hear any witness who may aid in the grand jury investigation. In such a case all witnesses would be state's witnesses.

31.

Every person is protected by a constitutional privilege against self incrimination. A potential defendant cannot be brought before the grand jury unless he waives his privilege by signing an immunity waiver. The ordinary witness before the grand jury has to appear and answer questions until a particular question tends to incriminate him.

The problem of self incrimination raises many legal points and when such circumstances present themselves the advice of the state's attorney or the court, or both, should be sought.

32.

Any person who is a potential defendant should be required to sign an immunity waiver before he appears before the grand jury. Failure to obtain this waiver would probably result in the quashing of the indictment.

33.

Under certain circumstances the privilege against self incrimination is not available to a witness. If the testimony of a witness will materially aid the state's attorney in his efforts to convict the "higher-ups", but this testimony would tend to incriminate the witness, then the court may grant immunity from prosecution to this witness and thereby make his testimony available to the grand jury. The grant of immunity may be given upon motion of the state's attorney only.

A witness who refuses to testify after he has been granted immunity may be punished for contempt of court.

34.

The individual citizen is not allowed to bring matters directly to the grand jury. Such an attempt to incite the grand jury to action is contempt of court. Such complaints must be taken to the state's attorney or a magistrate.

35.

No grand juror during his term of service shall communicate with any person concerning matters which the jury has considered, is considering or is about to consider, except that he may talk with officers of the court, other grand jurors, and witnesses during regular sessions of the grand jury. A violation of this rule will result in imprisonment in the county jail for not more than one year.

This rule of secrecy not only protects the grand jurors and persons appearing before the body, but prevents disclosures which might make it difficult, if not impossible, to apprehend persons who are indicted.

However, a grand juror may be required to make disclosures of testimony before the grand jury under a proper order of court.

36.

A grand juror cannot be questioned for anything he may say or any vote he may give during the grand jury proceedings unless it concerns his own perjury as a sworn witness at the proceedings.

A grand juror is not responsible in case a mistake is made and an innocent person is indicted.

37.

If any person actually interferes with a grand juror in the performance of his duty or threatens the grand juror that person is subject to a severe punishment.

38.

A grand jury should not reconsider a matter upon which "not a true bill" had been returned by a prior grand jury unless additional evidence has been discovered or unusual circumstances justify it.

39.

At the end of the term of the grand jury they have the power to make a report to the court upon the general conditions of the county. This report may include matters which they have not been able to consider or matters which they have not been able to complete. Although the material in the report may be given with the idea that it may encourage an indictment in the future it is not intended to serve as the basis of an indictment.

Grand jurors should be warned not to name specific individuals in a report. Named individuals may have a libel action against the grand jurors for such action. The report should address itself to general conditions with the purpose of recommending the extension of their own term, or of aiding the following grand jury, or of arousing interest in a particular matter which may lead to the impaneling of a special grand jury.

Abstracts of Recent Cases

"Gambling Tax" Upheld by Supreme Court—Defendants challenged the constitutionality of the so-called "gambling tax" (26 U.S.C.A. §3285) which levies a tax on persons engaged in the business of accepting wagers, and requires such persons to register with the Collector of Internal Revenue. Two grounds were advanced for holding the tax unconstitutional: (1) that Congress, under pretense of exercising the taxing power had attempted to penalize illegal intrastate gambling and thus infringed on police powers reserved to the States; and (2) that registration provisions of the tax violated the privilege against self-incrimination and were arbitrary and vague—contrary to the guarantees of the Fifth Amendment. *United States v. Kahriger*, 73 S. Ct. 510 (1953).

The *Supreme Court* upheld the constitutionality of the tax on both grounds. The power of Congress to tax is extensive and sometimes falls with crushing

effect on businesses deemed unessential or inimical to public welfare. But an intent to curtail and hinder, as well as tax, does not of itself invalidate the tax. *Sonzinsky v. United States*, 300 U.S. 506 (1937) [tax on firearms]; *United States v. Sanchez*, 340 U.S. 42 (1950) [tax on marihuana]. While strictly state governmental activities may be beyond the federal taxing power, the judiciary cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers. In the instant case, all penalty provisions were adapted solely to the collection of the tax and were therefore valid. The registration requirements (requiring the filing of names, addresses, and places of business) were held to be directly related to the collection of the tax and thus supportable as in aid of a revenue purpose.

The "gambling tax" was also held not to violate the privilege against self-incrimination as guaranteed by the Fifth Amendment. Even assuming the issue might be raised [which is doubtful under *United States v. Sullivan*, 274 U.S. 259 (1927)], the privilege has relation only to past acts, not to future acts that may or may not be committed. The registration provisions require no confession as to acts already committed.

Mr. Justice Jackson reluctantly concurred with the majority. While expressing grave doubts as to the use of the taxing power to accomplish the social purpose of prohibiting gambling, he felt that to hold with the minority would be to use the Fifth Amendment to impair unduly the legitimate taxing power of Congress.

Mr. Justice Frankfurter dissented, holding that oblique use of the taxing power was here being used to control conduct which the Constitution left to the responsibility of the states, and should not be upheld "merely because Congress wrapped the legislation in the verbal cellophane of a revenue measure." He also felt there was a violation of the Fifth Amendment. Since Congress cannot constitutionally deal directly with gambling within the States, it should not be able to "compel self-incriminating disclosures for the enforcement of State gambling laws, merely because it does so under the guise of a revenue measure obviously passed not for revenue purposes."

Mr. Justice Black, with whom Mr. Justice Douglas concurred, also dissented, holding the tax to be a violation of the Fifth Amendment. In effect the tax coerces the confession of a crime, possibly subjecting anyone registering to Federal penalties (see 26 U.S.C.A. 3285, 3290, 3291, 3294) and certainly to state criminal prosecution.

For an extensive commentary on the various issues raised in this decision, see "*Constitutionality of the Federal Gambling Tax*," 43 J. CRIM. L., CRIMINOLOGY & POLICE SCIENCE 637 (1953).

Cross-Examination Question on Witness's prior Discussion of Case with District Attorney held Permissible—In *Solar v. United States*, 94 A.2d 34 (Mun. Ct. App. D.C. 1953), a negligent homicide prosecution, appellants' attorney asked a witness on cross-examination a series of questions designed to show that the witness had recently discussed the case with the District Attorney. Since Counsel has both the right and obligation to interview his witnesses in preparation for trial, the trial judge evidently considered this a trick question designed to reflect in some way upon the office of the District Attorney, and he instructed the jury to disregard the question and answer.

On appeal, the ruling was reversed. The purpose of the question was not designed to cast any aspersion on counsel, but only to test the reliability of witness's recollection of the facts to which he had testified. If the memory

of a witness is refreshed by having the facts rehearsed to him by others, this should properly be considered by the jury in determining how far the recollection of the witness is reliable and based upon independent knowledge.

Juror Statutorily Disqualified Not Sufficient Basis for Granting New Trial—Appellants contended on appeal that the trial court erred in overruling their motion for a new trial, it being discovered after the verdict that one of the jurors who sat in the case had been twice previously convicted of felony and was therefore disqualified, his civil rights not having been restored. *Ford v. United States*, 201 F.2d 300 (Fifth Cir. 1953).

It was held proper not to grant the motion for the new trial. While previous conviction of a felony does not render the convicted person incompetent to sit as a juror, it is a ground of challenge for cause, which defendant may insist upon or waive as he elects. Where the objection to a juror relates not to actual prejudice or other fundamental incompetence, but to a statutory disqualification only, such disqualification is ordinarily waived by failure to assert it until after a verdict has been rendered, even though the facts which constitute the disqualification were not previously known to the defendants.