St. John's Law Review

Volume 34, May 1960, Number 2 Article 19

Criminal Law--Grand Jury--Inquiry Through Media of Simple Questionnaire Is a Means Appropriate to Express Power of Investigation (People ex rel. Sillifant v. City of New York, 6 N.Y.2d 487 (1959))

St. John's Law Review

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Recommended Citation

St. John's Law Review (1960) "Criminal Law--Grand Jury--Inquiry Through Media of Simple Questionnaire Is a Means Appropriate to Express Power of Investigation (People ex rel. Sillifant v. City of New York, 6 N.Y.2d 487 (1959))," *St. John's Law Review*: Vol. 34 : No. 2 , Article 19.
Available at: https://scholarship.law.stjohns.edu/lawreview/vol34/iss2/19

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suitor, asserting in personam claims against executors and administrators, may not be turned away,[34] at least when his in personam claims are not merely incidental to non-cognizable main relief.[35]

While it has been stated that if the issue were one of first impression, the better rule would be to remit the diversity suitor to his remedy in the pending state probate proceeding[36] because the exercise of federal jurisdiction in such a case "smacks of gratuitous interference rather than of the spirit of comity which ought to obtain between courts of independent and coordinate jurisdictions," [37] it has been recognized that the weight of authority is otherwise.[38]

The Court in the principal case decided correctly in affirming the district court's rejection of those claims of plaintiff that would require relief constituting an interference with the surrogate's court. However, the theoretical justification for its holding that the district court erred in declining jurisdiction over the remainder of plaintiff's claims is somewhat less compelling but is nevertheless within the traditional authority in the area. In addition, the practical wisdom of a holding that the district court has no discretion to remit a diversity suitor to the state forum uniquely endowed with the adequate judicial machinery to do complete justice to all concerned with decedents' estates is seriously to be questioned in view of the fact that the federal court is not being called upon to disavow jurisdiction, but merely to decline its exercise in appropriate circumstances.

CRIMINAL LAW—GRAND JURY—INQUIRY THROUGH MEDIA OF SIMPLE QUESTIONNAIRE IS A MEANS APPROPRIATE TO EXPRESS POWER OF INVESTIGATION.—Relator, an inspector employed by the New York Department of Buildings, was subpoenaed by a Grand Jury investigating alleged bribery and extortion with regard to public employees. After executing a waiver of immunity, he appeared before that body and, upon the advice of counsel, refused to fill out and return a simple financial questionnaire. Having been adjudged guilty of criminal contempt, he applied to the Appellate Division,

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[34] Beach v. Rome Trust Co., 269 F.2d 367 (2d Cir. 1959); Blacker v. Thatcher, 145 F.2d 255 (9th Cir. 1944), *cert. denied*, 324 U.S. 848 (1945); Harrison v. Moncravie, 264 Fed. 776, 779 (8th Cir. 1920); United States v. Swanson, 75 F. Supp. 118, 122-23 (N.D. Neb. 1947), *appeal dismissed*, 171 F.2d 718 (8th Cir. 1949); Farmers' Bank v. Wright, 158 Fed. 841, 850 (C.C.N.D. Iowa 1908).

[35] See note 34 *supra*.

[36] Blacker v. Thatcher, *supra* note 34, at 257.

[37] *Ibid.*

[38] *Ibid.* See note 34 *supra*.

Second Department, and was denied a writ of habeas corpus.[1] The Court of Appeals affirmed this decision, *holding* that inquiry through a simple financial questionnaire is a method appropriate to the investigatory power of the Grand Jury. *People* ex rel. *Sillifant v. City of New York,* 6 N.Y.2d 487, 160 N.E.2d 890, 190 N.Y.S.2d 641 (1959).

The Grand Jury, one of the oldest institutions in the administration of justice, dates from 13th century England where it was known as the Grand Assize or Grand Inquest.[2] As the democratic guardian of the citizen's interests,[3] it evolved into an accusatorial body adjunct to which there developed general powers of criminal investigation.[4] Since the objective is to establish the occurrence of suspected criminal activities or the implication therein of a particular suspect, and as this depends largely on compulsory testimony and the production of evidence by unwilling witnesses, there must be the power to issue subpoenas and to punish for contempt.[5]

In New York it is recognized that the Grand Jury can act only in a manner prescribed by law—its powers and duties are defined by statute.[6] The investigatory power is provided for by Section 245 [7] of the Code of Criminal Procedure, while section 248 [8] controls

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[1] People *ex rel.* Sillifant v. City of New York, 7 App. Div.2d 937, 183 N.Y.S.2d 1010 (2d Dep't) (memorandum decision), *aff'd,* 6 N.Y.2d 487, 160 N.E.2d 890 (1959).

[2] Whyte, *Is the Grand Jury Necessary?,* 45 VA. L. REV. 461, 464 (1959); Moran, *The Grand Jury,* 42 ILL. B.J. 904, 905 (1954). For a complete treatment of the Grand Jury from a historical, political and legal viewpoint, see generally EDWARDS, THE GRAND JURY (1906).

[3] Moran, *supra* note 2, at 905. "The grand jury was the guardian of the citizen's liberties and secured him against oppression from unfounded prosecutions by the crown. It became a democratic institution by which free men in a free society secured themselves from the threat of arbitrary government and from unfounded prosecutions. It became an institution through which free citizens had a direct check, and control, on their public officials, on criminal conditions in the community, and on the state of their free society."

[4] 52 NW. U.L. REV. 111 (1957). The power of investigation is vital to the Grand Jury. See Prentice v. Gulotta, 13 Misc.2d 280, 282, 176 N.Y.S.2d 433, 436 (Sup. Ct. 1958) (dictum); Matter of Both, 200 App. Div. 423, 426, 192 N.Y. Supp. 822, 825 (2d Dep't 1922); Whyte, *Is the Grand Jury Necessary?,* 45 VA. L. REV. 461, 462-66 (1959).

[5] Dession & Cohen, *The Inquisitorial Functions of Grand Juries,* 41 YALE L.J. 687, 691 (1932).

[6] N.Y. CODE CRIM. PROC. §§ 223-272. People *ex rel.* Sillifant v. City of New York, 6 N.Y.2d 487, 494, 160 N.E.2d 890, 893, 190 N.Y.S.2d 641, 646 (1959) (dissenting opinion); Matter of Osborne, 68 Misc. 597, 601, 604, 125 N.Y. Supp. 313, 316, 318 (Sup. Ct. 1910).

[7] N.Y. CODE CRIM. PROC. § 245: "The grand jury has power, and it is their duty, to inquire into all crimes committed or triable in the county, and to present them to the court."

[8] N.Y. CODE CRIM. PROC. § 248: "In the investigation of a charge, for the purpose of indictment, the grand jury can receive *no other evidence than:* 1. Such as is given by witnesses *produced and sworn* before them, or furnished by legal documentary evidence; or 2. The deposition of a witness, in the cases

the type of evidence receivable in the investigation of a charge for the purpose of indictment. Both are crucial to the granting and limiting of Grand Jury power. The court when interpreting these sections must observe the controlling principle of legislative intent.[9] The existence of a power may be implied only where it is essential to power expressly conferred.[10]

In the instant case, the power of the Grand Jury to compel the filling out and returning of a questionnaire relating to finances was expressly ruled upon in the affirmative.[11] The area of finance and all allied transactions was recognized as extremely important to the Grand Jury's investigation of corruption in public office.[12] The nearest precedent to the instant factual situation seems to be the case of *Matter of Cole*.[13] There the Grand Jury was conducting an investigation of the State Liquor Authority and applied for a court direction to compel witnesses to fill out involved questionnaires to be returned at a subsequent session. The applications were denied, the Court of General Sessions of New York holding that: (1) witnesses before a Grand Jury could not be compelled to fill in *complicated* questionnaires away from the Grand Jury and to submit them at a subsequent session as part of sworn testimony; (2) the Grand Jury is without power to direct witnesses summoned before it to do a great deal of work in order to properly fill in such questionnaires; (3) the Grand Jury may fix its own methods of procedure, but it is limited to using methods which do not violate estab-

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mentioned in the third subdivision of section eight." (as emphasized by Chief Judge Conway). People *ex rel.* Sillifant v. City of New York, 6 N.Y.2d 487, 494, 160 N.E.2d 890, 894, 190 N.Y.S.2d 641, 647 (1959) (dissenting opinion).

[9] See People v. Olah, 300 N.Y. 96, 102, 89 N.E.2d 329, 332 (1949); Russo v. Valentine, 294 N.Y. 338, 342, 62 N.E.2d 221, 222-23 (1945); Lawrence Constr. Corp. v. New York, 293 N.Y. 634, 639, 59 N.E.2d 630, 632 (1944).

[10] Saltser & Weinsier, Inc. v. McGoldrick, 295 N.Y. 499, 506, 68 N.E.2d 508, 512 (1946); Lawrence Constr. Corp. v. New York, *supra* note 9; People *ex rel.* City of Olean v. Western N.Y. & Pa. Tractor Co., 214 N.Y. 526, 529, 108 N.E. 847, 848 (1915).

[11] 6 N.Y.2d 487, 491, 160 N.E.2d 890, 892, 190 N.Y.S.2d 641, 643-44 (1959) (concurring opinion). "The question to be determined is whether the Grand Jury had the power to direct a witness who has waived immunity to answer a simple questionnaire dealing with the facts of the financial status of a person which can be answered in a reasonable time without any professional help or advice. We believe a Grand Jury has such power." *Ibid.*

[12] See People v. Connolly, 253 N.Y. 330, 171 N.E. 393 (1930).

[13] 208 Misc. 697, 145 N.Y.S.2d 748 (Ct. Gen. Sess. 1955). See also Steingut v. Imrie, 270 App. Div. 34, 58 N.Y.S.2d 775 (3d Dep't 1945). Contempt action—petitioner given a list of twenty-nine questions which required that he furnish statements regarding receipts and disbursements for himself, his wife and members of their families for the years 1935-1944. An acquittal was based on the defense that he did not have the necessary facilities, time and money to compile the required details. People v. O'Brien, 305 N.Y. 915, 114 N.E.2d 470 (1953) (memorandum decision) (completed financial questionnaire used as the basis for a perjury indictment).

lished law. Again, the power of the Grand Jury to initially compel a witness to comply with questionnaire requirements received no clear analysis.[14] The basis for decisions has apparently been one of expediency and practicality.[15]

The majority decision in the principal case also rests upon practical supports and considerations.[16] Judge Desmond, in the majority opinion, avoids the area of statutory interpretation and refers the oppressive use of questionnaires to particular instances which can be individually considered by the court as they arise.[17] In contrast, the dissenting opinion of Chief Judge Conway rests primarily in the area of strict statutory interpretation. He states:

> The suggestion has been made that the use of a financial questionnaire, in the manner in which the Grand Jury attempts to employ it here, is permissible within the meaning of that part of subdivision 1 of section 48 which refers to "legal documentary evidence." However, it is manifest that these words relate to books, records and documents *already in existence* and such as are subject to production pursuant to a subpoena duces tecum. The language of the statute may not be twisted so as to include a direction by the Grand Jury to a witness to manufacture or create evidence.[18]

The dissent also rejects the argument based on expediency as not warranting rewriting of the statute by the court, implying that such judicial legislation would open the door for the carrying on of Grand Jury investigations by affidavit.[19]

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[14] Matter of Cole, 208 Misc. 697, 701, 145 N.Y.S.2d 748, 752 (Ct. Gen. Sess. 1955). "Although the question did not arise in *Matter of Steingut v. Imrie* in the same manner in which it does in the case at bar, certainly the inference is clear that, if the witness was not guilty of contempt for failure to compile the required details of information given to him by the Grand Jury, then it must follow that the Grand Jury had no legal right to ask him to do so in the first place."

[15] See, *e.g.*, People v. Workman, 308 N.Y. 668, 124 N.E.2d 314 (1954) (per curiam); Steingut v. Imrie, 270 App. Div. 34, 58 N.Y.S.2d 775 (3d Dep't 1945); Matter of Cole, *supra* note 14.

[16] People *ex rel.* Sillifant v. City of New York, 6 N.Y.2d 487, 489, 160 N.E.2d 890, 891, 190 N.Y.S.2d 641, 642 (1959). The practical considerations set forth are: 1. That the Grand Jury could compel the relator to answer orally the same questions which are presented in the questionnaire; 2. The questionnaire being simple, no special skill or assistance is necessary and therefore it was reasonable to give the relator an opportunity to fill out the answers at a time and place convenient to him; 3. That if questioned orally on these same matters, the relator would have undoubtedly said that he could not answer from memory thus rendering the Grand Jury action appropriate.

[17] *Ibid.*

[18] *Id.* at 495, 160 N.E.2d at 894, 190 N.Y.S.2d at 647 (dissenting opinion). See also Matter of Slipyan, 208 Misc. 515, 145 N.Y.S.2d 630 (Sup. Ct. 1955). The court in reference to a subpoena duces tecum declared that it may not be used in compelling a person to do any affirmative act other than the production of documents or records as they exist at the time of the service.

[19] People *ex rel.* Sillifant v. City of New York, 6 N.Y.2d 487, 495, 160 N.E.2d 890, 895, 190 N.Y.S.2d 641, 648 (1959).

Here the Court has for the first time explicitly and clearly upheld the power of the Grand Jury to compel witnesses to fill out questionnaires dealing with financial status. Of necessity, a policy decision such as this should be limited to the facts from which it arose, namely simple financial questionnaires.[20] Since it may be dangerous to permit extension of this rule, the courts should be wary of recognizing arbitrary exceptions.[21]

EQUITY — ALLEGED MISREPRESENTATION CONCERNING CONTINUED AVAILABILITY OF CUSTOMERS HELD SUFFICIENT TO CAUSE TEMPORARY INJUNCTION TO ISSUE.—Plaintiffs-vendees alleged fraud on the part of the vendor on the sale of a candy store. Vendor represented the proximity of a subway station as a primary asset of the store, but failed to disclosed current efforts of the Transit Authority to demolish that station. Vendees also alleged that the vendor stated during negotiations that there was no reason to believe that the business from the subway station would not continue for the duration of the current lease. On a motion to enjoin transfer of negotiable instruments and funds given as the purchase price, the Court on reargument, *held* that an injunction pendente lite be granted in view of the allegation that the defendant uttered a misleading statement as to extrinsic facts, affecting the value of the store, upon which purchasers might have had a right to rely. *Saslow v. Novick,* 19 Misc.2d 712, 191 N.Y.S.2d 645 (Sup. Ct. 1959).

To obtain an injunction pendente lite it is incumbent upon plaintiff to demonstrate, among other things, a reasonable likelihood of attaining ultimate relief upon trial of his cause.[1] Therefore, in the

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[20] In this regard the questions in such a questionnaire should be characterized as "clear, simple, direct and unambiguous. They should be phrased so that a person of average intelligence may determine exactly what information is sought by each question, without the introduction of possible confusion by somewhat similar or overlapping queries in other parts of the questionnaire." People v. Workman, 308 N.Y. 668, 670, 124 N.E.2d 314, 315 (1954) (per curiam).

[21] In the concurring opinion Judge Burke states: "Since the Grand Jury has the power to investigate corruption, bribery and other crimes committed in the Department of Buildings, the grant of express statutory authority to the Grand Jury imports the existence of implied powers reasonably essential to the *investigation* and *uncovering* of crime and corruption." A principle as broad as this might result in undue extension of Grand Jury power. People *ex rel.* Sillifant v. City of New York, 6 N.Y.2d 487, 491, 160 N.E.2d 890, 892, 190 N.Y.S.2d 641, 644 (1959) (concurring opinion).

[1] Wormser v. Brown, 149 N.Y. 163, 43 N.E. 524 (1896); Village of Mamaroneck v. Lichtie, 72 N.Y.S.2d 686 (Sup. Ct. 1947). "A temporary injunction will be granted only where the movant has established a clear legal right to such relief and where the denial of such relief would result in