

INDEX

	PAGE
Order of Designation	1
Petition	2
Resolution	6
Rule to Show Cause	8
Order of Continuance	10
Notice of Motion	12
Opinion	14
Hearing	19
Stenographer's Certificate	24
Order Adjudging Joseph Schwartz in Con- tempt and Pronouncing Sentence.....	25
Petition of Appeal	26
Order Adjudging Joseph Schwartz in Con- tempt and Pronouncing Sentence	30
Rule Directing Certificate of Conviction for Review	32
Bond	33
Order Fixing Time and Place of Hearing....	35
Testimony	37
PETITIONER'S TESTIMONY:	
Maurice Risley—Direct	41
Cross	43
Raymond W. Hurter—Direct	47
Walter J. Buzby—Direct	50
Cross	58
Mrs. Marie T. Kmiec—Direct	59

INDEX

	PAGE
C. Edgar Dreher—Direct	62
Cross	64
William A. Blair—Direct	75
Cross	76
Motion to Strike	79
Motion to Dismiss	80

RESPONDENT'S TESTIMONY:

C. Edgar Dreher—Direct	78
Cross	79
Joseph Schwartz—Direct	90
Cross	113
Charles E. Rupp—Direct	124
Cross	127
Charles S. Moore—Direct	131
Cross	137

PETITIONER'S REBUTTAL TESTIMONY:

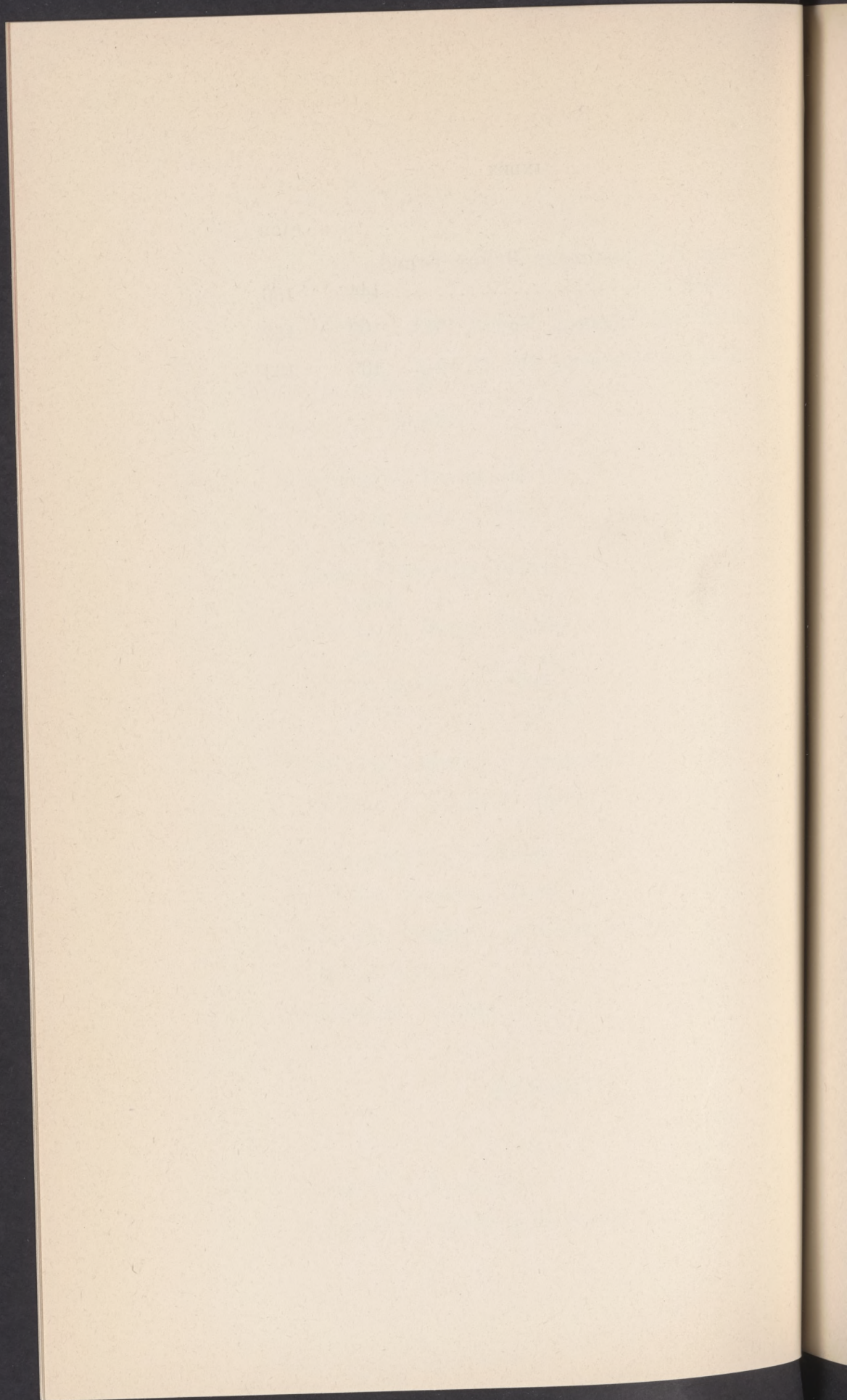
William E. Stringer—Direct	141
Stenographer's Certificate	145
Opinion of Supreme Court	164
Order for Judgment in Supreme Court.....	174
Notice of Appeal	175
Grounds of Appeal	177

EXHIBITS

	OFFERED	PTD.
	PAGE	PAGE
Exhibit P-1, Resolution	42	146
Exhibit P-2, Charge to the Grand Jury.	48	146

INDEX

	PAGE
Exhibit P-3, Testimony Before Grand Jury	144 156
Exhibit R-1, Subpoena, Nov. 3, 1943...	103 162
Exhibit R-2, Subpoena, Nov. 17, 1943...	103 163



ORDER OF DESIGNATION.

(Filed Dec. 18, 1943.)

ATLANTIC COUNT COURT OF QUARTER
SESSIONS.

10

In the Matter of Contempt
Proceedings against JOSEPH
SCHWARTZ.

} Order of
Designation.

By virtue of the power vested in me by Revised
Statutes 2:11-3 and 2:11-5, I do hereby designate
and appoint Honorable Robert L. Warke, Judge of
the Court of Common Pleas and of the Court of
Quarter Sessions in and for the County of Atlantic,
and Honorable French B. Loveland, Judge of the
Court of Common Pleas and of the Court of Quar-
ter Sessions in and for the County of Cape May,
designated by me to hold those courts in and for
the County of Atlantic; either or both of them, to
hear and determine the contempt proceedings in the
above matter and to receive such Petition, make
such Order to Show Cause or other orders, render
such judgment and pass such sentence as may be in
accordance with law and facts.

20

30

Dated: December 11th, A. D. 1943.

FREDERIC R. COLIE,
Justice of the New Jersey
Supreme Court, presiding
in the Atlantic County
Court of Oyer and Ter-
miner.

40

PETITION.

(Filed Dec. 16, 1943.)

10 ATLANTIC COUNTY COURT OF OYER AND
TERMINER.

In the Matter of Contempt Proceedings against JOSEPH SCHWARTZ.	}	Petition.
--	---	-----------

20 TO THE HONORABLE ROBERT L. WARKE,
JUDGE OF THE ATLANTIC COUNTY
COURT OF OYER AND TERMINER:

The petition of the Grand Jury in and for the
County of Atlantic for the October Term 1943, re-
spectfully shows:

1. That the Grand Jury in and for the County of
Atlantic for the October Term 1943 was duly sworn
and impaneled on the Thirteenth day of October,
30 A. D. one thousand nine hundred and forty-three,
and Walter J. Buzby was appointed foreman.

2. That said Grand Jury proceeded to investigate
certain alleged charges of the existence of gambling,
lottery and other charges of alleged violations of
the criminal laws.

3. That in the course of this investigation it was
40 represented that one Joseph Schwartz had infor-

mation concerning names of persons who had knowledge of such violations and also other information concerning such violations.

4. That thereupon the Grand Jury requested the Prosecutor to subpoena before it the said Joseph Schwartz and the said Joseph Schwartz was duly subpoenaed to appear before said Grand Jury on the Seventeenth day of November, A. D. one thousand nine hundred and forty-three, and was duly sworn to tell the truth, the whole truth and nothing but the truth. 10

5. That in the course of the examination of the said Joseph Schwartz he was asked the following questions, to which he gave answers as follows:

Q. Mr. Schwartz, the Grand Jury has requested your appearance here today in order that we again can ask about the number slips, which you had in your possession on or about October 5th. My question is from whom did you get those slips? 20

A. I have no statement.

Q. I am asking you now from whom did you get those slips?

A. I refuse to state.

Q. You also stated one time at least that certain information had come to your knowledge concerning the operation of the law enforcement agencies in the City and County from certain City and County employees, whose names at that time you refused to give because they might lose their jobs. I ask for the names of those City and County employees. 30

A. I not only said they might lose their jobs, but it was given to me with the distinct under-

standing that I would not reveal the source and for that reason I refuse to answer that question.

10 Q. I would like to admonish you, Mr. Schwartz, this Grand Jury has a right to have that answer legally and you have a perfect right to give their names. I assure you this Grand Jury would not reveal their names, and they would not lose their jobs. I ask again for those names.

A. I am very sorry I will not give it to you. I have not been relieved from my promise not to reveal their names.

20 6. Subsequently Mr. Schwartz was asked to give certain information which he claimed to have but which he said was not evidence, upon condition that the Prosecutor and his staff leave the room. The Prosecutor declined to do so. Whereupon Mr. Schwartz and the Prosecutor and his staff were asked to leave the room and upon being recalled the Foreman stated to Mr. Schwartz as follows: "Mr. Schwartz, the Grand Jury is open and ready to get any information or suggestion you have at hand, but have unanimously voted that any statements that you have to make, whether it be hearsay or direct evidence, will be made in the presence of the
30 Prosecutor and his assistants." To this the said Joseph Schwartz replied as follows: "Mr. Foreman, I decline to give the information."

7. Thereupon, the October Term 1943 Atlantic County Grand Jury, on said Seventeenth day of November, A. D. one thousand nine hundred and forty-three, by resolution duly adopted, a copy of which is hereunto annexed and made a part hereof, instructed and directed the Prosecutor to institute
40 such proceedings as might be necessary to have the

said Joseph Schwartz adjudged in contempt for failing to answer the questions and to give the information above referred to.

Your petitioner therefore prays that a Rule to Show Cause be issued why the said Joseph Schwartz should not be adjudged in contempt of the October Term 1943 Atlantic County Grand Jury for refusing to answer the questions and to give the information above referred to. 10

H. R. COULOMB,
Prosecutor of the Pleas in
and for the County of
Atlantic.

State of New Jersey }
Atlantic County } ss.

20

WALTER J. BUZBY, being conscientiously scrupulous against taking an oath on his affirmation duly affirms that he is the Foreman of the Grand Jury in and for the County of Atlantic for the October Term 1943; that he was present and presiding as such foreman at a session of said Grand Jury held on the 17th day of November, 1943; that he has read the annexed petition and is familiar with the contents thereof and that the contents thereof are true to the best of his knowledge, information and belief. 30

WALTER J. BUZBY.

Duly affirmed before me this 29th day of November, A. D. 1943.

DANIEL BELL, JR.,
M. C. C. of N. J. 40

RESOLUTION.

WHEREAS, the October Term 1943 Grand Jury in and for the County of Atlantic has been investigating and hearing witnesses involving gambling and lottery alleged to be carried on in the City of Atlantic City in said County of Atlantic, and the alleged payment of protection money and the alleged inactivity of the Police Department of Atlantic City in the prosecution of crime, and

WHEREAS, in the course of its investigation it caused to be subpoenaed one Joseph Schwartz, a citizen of Atlantic City who, it was understood, had evidence concerning said matters, and

WHEREAS, said Joseph Schwartz appeared before the said Grand Jury at one of its regular sessions on the Seventeenth day of November, A. D. one thousand nine hundred and forty-three, and upon being duly sworn refused and declined to give the names of persons from whom he said he had received certain number slips or lottery tickets on or about the Fifth day of October, A. D. one thousand nine hundred and forty-three, and he refused and declined to give the names of certain employees of the City of Atlantic City and of the County of Atlantic who had allegedly given him information concerning the above matters, on the ground that he had given his word that he would not reveal the names of his informants, and

WHEREAS, the said Joseph Schwartz stated that he had certain information concerning violations of the criminal laws in Atlantic County, which information he contended was not evidence and which information he refused to divulge to the Grand Jury unless the Prosecutor and his staff left the Grand Jury room. Whereupon, the Grand Jury voted unan-

imously not to request the Prosecutor and his staff to leave the room. Upon being informed of this action, the said Joseph Schwartz again declined to reveal the information which he had concerning criminal violations in the County of Atlantic.

NOW THEREFORE, BE IT RESOLVED that 10
the Prosecutor of the Pleas of Atlantic County be and he hereby is instructed and directed to institute such legal proceedings as may be necessary to hold the said Joseph Schwartz in contempt for failure to answer questions concerning the matters above referred to and to give the information concerning said matters.

Adopted at a regular meeting of said Grand Jury held on the Seventeenth day of November, A. D. one thousand nine hundred and forty-three.

20

WALTER J. BUZBY,

Foreman of the October Term
1943 Atlantic County Grand
Jury.

ATTEST:

MAURICE RISLEY,

Clerk.

30

40

RULE TO SHOW CAUSE.

(Filed Dec. 18, 1943.)

10 ATLANTIC COUNTY COURT OF OYER AND
TERMINER.

In the Matter of Contempt
Proceedings against JOSEPH
SCHWARTZ.

} On Petition.
Rule to Show
Cause.

20

Upon reading and filing the duly verified petition of the Grand Jury in and for the County of Atlantic for the October Term 1943, and upon motion of Harry R. Coulomb, Prosecutor of the Pleas in and for said County of Atlantic:

30

IT IS, on this 16th day of December A. D. one thousand nine hundred and forty-three, ORDERED that the said Joseph Schwartz do show cause before the Atlantic County Court of Oyer and Terminer, at Mays Landing, on Monday, the 27th day of December, A. D. one thousand nine hundred and forty-three, at the hour of 2 o'clock in the afternoon, why he, the said Joseph Schwartz, should not be adjudged in contempt of the Grand Jury in and for the County of Atlantic, October Term A. D. 1943, for refusing to answer the following questions:

40

Q. Mr. Schwartz, the Grand Jury has requested your appearance here today in order that we again can ask about the number slips, which you had in your possession on or about

October 5th. My question is from whom did you get those slips?

A. I have no statement.

Q. I am asking you now from whom did you get those slips?

A. I refuse to state.

Q. You also stated one time at least that certain information had come to your knowledge concerning the operation of the law enforcement agencies in the City and County from certain City and County employees, whose names at that time you refused to give because they might lose their jobs. I ask for the names of those City and County employees. 10

A. I not only said they might lose their jobs, but it was given to me with the distinct understanding that I would not reveal the source and for that reason I refuse to answer that question. 20

Q. I would like to admonish you, Mr. Schwartz, this Grand Jury has a right to have that answer legally and you have a perfect right to give their names. I assure you this Grand Jury would not reveal their names, and they would not lose their jobs. I ask again for those names.

A. I am very sorry I will not give it to you. I have not been relieved from my promise not to reveal their names. 30

Q. Mr. Schwartz, the Grand Jury is open and ready to get any information or suggestion you have at hand, but have unanimously voted that any statements that you have to make whether it be hearsay or direct evidence will be made in the presence of the Prosecutor and his assistants.

A. Mr. Foreman, I decline to give the information. 40

Order of Continuance

IT IS FURTHER ORDERED that a copy of said petition and Rule to Show Cause, each of which may be certified as "a true copy," by the said Prosecutor of the Pleas in and for the County of Atlantic, be served upon the said Joseph Schwartz within five days from the date hereof.

10

ROBERT L. WARKE,
Judge.

ORDER OF CONTINUANCE.

20

(Filed Dec. 24, 1943.)

ATLANTIC COUNTY COURT OF OYER AND
TERMINER.

30

In the Matter of Contempt	}	On Petition.
Proceedings against JOSEPH		Order of
SCHWARTZ.		Continuance.

Application being made therefor in behalf of the respondent, Joseph Schwartz, and good cause being shown therefor;

40

It is, on this twenty-third day of December, A. D., 1943, ORDERED that the hearing on the rule to show cause entered herein on December 16, 1943, returnable at Mays Landing, on Monday, the twenty-

seventh day of December, 1943, at two o'clock in the afternoon, be and the same hereby is adjourned and postponed until Monday, the tenth day of January, 1944, at the same place as originally fixed, but at the hour of ten o'clock in the forenoon.

And it is further Ordered that the application on behalf of said Joseph Schwartz which has resulted 10
in the entry of this order shall not be considered as a general appearance in this proceeding, and all the rights which said Joseph Schwartz is entitled to under said rule to show cause are hereby reserved to him to the same extent as though the hearing on said rule had not been continued and postponed as herein provided.

ROBERT L. WARKE,
Judge.

20

I hereby consent to the entry of the above order.

ROBT. N. McALLISTER,
Ass't Prosecutor.

30

40

NOTICE OF MOTION.

(Filed Dec. 24, 1943.)

10 ATLANTIC COUNTY COURT OF OYER AND
TERMINER.

In the Matter of Contempt Proceedings against JOSEPH SCHWARTZ.	}	On Petition &c. Notice of Motion.
--	---	--------------------------------------

20 TO THE HON. HARRY R. COULOMB, PROSE-
CUTOR OF THE PLEAS IN AND FOR THE
COUNTY OF ATLANTIC:

30 Please take notice that on Monday, the 10th day
of January, A. D. 1944, at the hour of ten o'clock
in the forenoon or as soon thereafter as counsel
may be heard, I shall appear before the Hon. Robert
L. Warke and the Hon. French B. Loveland, judges
of the Court of Common Pleas, sitting as a Court of
Oyer and Terminer in and for the County of Atlan-
tic, at the Court House, Mays Landing, New Jer-
sey, and shall move to strike from the petition all
of paragraph 6 thereof and from the Order to Show
Cause entered herein on December 16, 1943, the fol-
lowing:

40 "Q. Mr. Schwartz, the Grand Jury is open
and ready to get any information or suggestion
you have at hand, but have unanimously voted
that any statements that you have to make

whether it be hearsay or direct evidence will be made in the presence of the Prosecutor and his assistants.

A. Mr. Foreman, I decline to give the information."

and for the following reasons:

10

A.

The so-called question does not constitute a legal question framed in such a manner as to require answer.

B.

Said so-called question does not solicit legal evidence to the matter then under consideration by the Grand Jury.

20

C.

Said so-called question is not a question of inquiry but constitutes a mere invitation extended to the witness on which he is privileged to reply as he deems fit.

D.

30

Said question and answer does not form or constitute legal basis for holding the respondent herein in contempt for the refusal to answer.

E.

Said Schwartz, the respondent here was under no legal obligation or duty to respond to said so-called

40

question in any other way or manner than that which he did.

WM. ELMER BROWN, JR.,
Attorney for Joseph Schwartz.

10

OPINION.

ATLANTIC COUNTY COURT OF OYER AND
TERMINER.

In the Matter of Contempt
Proceeding against JOSEPH
20 SCHWARTZ. } Opinion.

The sole question before the court for determination is whether or not Joseph Schwartz is guilty of contempt of the Atlantic County Court of Oyer and Terminer, by reason of his refusal to answer the following questions propounded to him while he was a sworn witness before the October term Grand Jury on November 17, 1943.

30

Q. Mr. Schwartz, the Grand Jury has requested your appearance here today in order that we again can ask about the number slips, which you had in your possession on or about October 5th. My question is from whom did you get these slips?

A. I have no statement.

Q. I am asking you now from whom did you get those slips?

A. I refuse to state.

40

Q. You also stated one time at least that certain information had come to your knowledge concerning the operation of the law enforcement agencies in the City and County from certain City and County employees, whose names at that time you refused to give because they might lose their jobs. I ask for the names of those City and County employees. 10

A. I not only said they might lose their jobs, but it was given to me with the distinct understanding that I would not reveal the source and for that reason I refuse to answer that question.

Q. I would like to admonish you, Mr. Schwartz, this Grand Jury has a right to have that answer legally and you have a perfect right to give their names. I assure you this Grand Jury would not reveal their names, and they would not lose their jobs. I ask again for those names. 20

A. I am very sorry I will not give it to you. I have not been relieved from my promise not to reveal their names.

Q. Mr. Schwartz, the Grand Jury is open and ready to get any information or suggestion you have at hand, but have unanimously voted that any statements that you have to make whether it be hearsay or direct evidence will be made in the presence of the Prosecutor and his assistants. 30

A. Mr. Foreman, I decline to give the information.

N.J.R.S. 2:15-1 provides as follows: "The power of any court of this state to punish for contempt shall not be construed to extend to any case except the:

- a. Misbehavior of any person in the actual presence of the court;
- b. Misbehavior of any officer of the court in his official transactions; and
- c. Disobedience or resistance by any court officer, or by any party, juror, *witness* or other person to any lawful writ, process, order, rule, decree or command of the court.

Contempts of court are of two classes: First, those against the dignity of the court, or of disrespect exhibited to itself or its officers. Second, those in which the contempt consists of the wilful refusal to obey some decree or order of the court which it is in the power of the party to perform, and which he refuses to obey without sufficient excuse therefor.

That a contempt in the Grand Jury Room and in the presence of the Grand Jury by way of refusal to answer questions or other misconduct is a contempt of the Court of Oyer & Terminer has been repeatedly established. In re: Gonzales, 88 N. J. L. 536. In re: Grunow, 84, N. J. L. 235.

The effective functioning of a Grand Jury is an absolute essential and is of first importance in the due administration of the law. Whenever the effective operation of a Grand Jury is interfered with, or denied, then the entire administration of the law is obstructed and impeded, and, possibly, defeated. Mr. Schwartz has advanced numerous reasons and arguments concerning his refusal to answer the questions requested by the Grand Jury. We find these to be without legal merit. None of them satisfy us that his unequivocal and categorical refusal to answer at least some of the interrogatories put to him was justified or excusable.

Thus to the question "I am asking you now from

whom did you get those slips?" (referring to certain so called 'number slips'.) the witness Schwartz gave the positive and arbitrary refusal "I refuse to state." We cannot perceive in this any semblance of obedience, co-operation or compliance with the direction contained in the Court's process delivered to this respondent, but instead definite refusal, and obstinate and wilful defiance. In the hearing upon this rule, the respondent claimed that he never personally received delivery of the numbers slips, that they came to his hands by a bearer unknown, or were left at his home or office while he was not present. If this version is true, why did he not simply state to the inquirer that he did not know who sent the papers, instead of saying, as he did, "I refuse to state." The strong impression is that the witness well knew the sender or senders of the number slips, but was, and is, determined not to reveal that identity to the constituted authorities. 10 20

The respondent's basis for refusing to testify to the Grand Jury in respect to other matters, that the information he claimed to have was given him in confidence, is inadequate. He is not of that class of persons such as doctors, lawyers, or clergymen who may claim that a relation of confidence exists between them and persons communicating matters to them in the course of their profession. 30

The respondent now says that he had no intention to contemn the court. Our courts have said that disclaimer of intentional disrespect or design to embarrass the due administration of justice is as a rule no excuse, where the acts are such as to charge contempt.

The respondent has advanced the further reason that his acts were not contemptuous by stating that he acted under advice of counsel. Advice of counsel does not excuse or purge contempt. Thus it be- 40

comes unnecessary for the court to pass upon whether the advice was proper.

10 It can, however, be said that from the testimony of the attorney who was consulted by this respondent concerning his appearance before the Grand Jury there certainly does not appear any instruction or counsel that would justify the respondent in his total refusal to give this testimony to the inquest.

20 The remaining statements of the respondent to the effect that he feared reprisals in the event of his disclosing some information that he had, and that he would have testified, had he been successful in excluding the Prosecutor and his staff from the jury room are so completely without merit as to require no discussion here. It is the opinion of the court that the respondent, Schwartz, was wilfully and obstinately disobedient to the process of the court and that his conduct was without justification. This being so, it is the judgment of the Court that the defendant is guilty of a contempt and he is hereby so adjudged.

ROBERT L. WARKE,
President Judge.
FRENCH B. LOVELAND,
Judge by Designation.

30 Dated: Mar. 28, 1944.

HEARING.

COURT OF OYER AND TERMINER.
ATLANTIC COUNTY.

10

STATE OF NEW JERSEY,

vs.

JOSEPH SCHWARTZ,

Defendant.

Action at Law.

Mays Landing, New Jersey.

20

March 29, 1944.

BEFORE: Hon. Robert L. Warke, Judge, Hon.
French B. Loveland, Judge.

30

APPEARANCES:

For the State: Robert N. McAllister, Esq., Asst.
Prosecutor.

For Defendant: W. Elmer Brown, Esq.; Charles
S. Moore, Esq.

40

The defendant, Joseph Schwartz, appears before the Court.

WARKE, J.: Mr. Defendant, this Court has adjudicated you guilty of a contempt upon it. The sentence of the law is that you stand committed to the County Jail of Atlantic County for a period of five days, and that committment is suspended. You are, therefore free to return to your usual avocation.

We understand, and you perceive, no doubt, at once, that there is in this judicial disposition of this matter, no financial or physical embarrassment or inconvenience, or punishment to you. But the Court realizes, and the Court believes that if you do not now realize, you will in time come to realize that your punishment lies elsewhere. You stand now before the community in which you live, as a man who has been adjudicated, upon your own representation, to be in possession of knowledge, or claim to be in possession of knowledge of the commission of crime and of the identity of the criminals, or of the persons who do know the identity of the criminals, but you, at the same time, refuse to assist this community and the officials of that community, in the detection, the prosecution and punishment of those persons. This, Mr. Schwartz, is a most unwholesome and unhappy position for any citizen to be in, more especially a man of your standing, and a man who claims, as we understand you claim, to be an exponent of law and order.

I repeat, sir, that so far as this Court is concerned, you are now free to return to that *that* community. Concealment of the knowledge of crime or of criminals, is an indictable offense, but this Court seriously doubts if any Grand Jury will dignify your conduct by such proceedings. So far as this

Court is concerned, we ask nothing further of you, but we strongly suspect that there are those in the community, and the community, toward whom your apologies are in order.

That is all.

MR. BROWN: If Your Honor please, I understand the practice to be that an Order of Judgment should be formally entered and I understand that the Prosecutor has prepared for presentation to you a form of Order for that purpose. It was handed to me but a few minutes ago, and I have not had an opportunity to scan it carefully. However, I would like to know whether or not the Prosecutor proposes to present that Order now, so that we may know.

10

20

THE PROSECUTOR: Well, I can't very well, if your Honor please, because it will have to be changed in the matter of the sentence. Of course, I had no idea what the sentence would be, and the last part of that Order, of necessity, has to be changed to conform with your Honor's pronouncement of sentence.

THE COURT: I said in Chambers, as far as these proceedings are concerned, that is to say, the sentence of the Court, that, at least, having been done in open Court and a record thereof being made, I expect, by the Clerk, there is no occasion for the entering of a formal Order. The opinion of the Court contained a finding posted not on direction, but a judgment of guilty to be entered, and therefore I should say that the only Order of the Court necessary to be put in writing might be the judgment, but not the sentence.

30

40

MR. BROWN: My purpose, if your Honor please, in making this suggestion or inquiry is, frankly stated, we propose to appeal from the judgment, and the appeal is merely statutory, and the statute seems to anticipate that the petition of appeal shall have attached to it a copy of the judgment Order. And I merely am anxious to have the record in proper shape to appeal.

THE COURT: I should say, Mr. Brown, that requirement would be satisfied by a simpler document containing adjudication of guilty and the pronouncement of the sentence.

MR. BROWN: And it is the Court's opinion that the opinion filed bearing the signature of the Court, and in a final statement adjudicating the defendant guilty of the contempt charged, with this public pronouncement of sentence, is all the judgment that would be required?

THE COURT: The matter being of the concern it is to the defendant, I am not going to pretend to counsel in this matter for, frankly, I have not examined the subject from the viewpoint of appeal, but my snap judgment is that what you said is correct. There can be no further record.

THE PROSECUTOR: Well, it was the intention of the Prosecutor to have a formal Order such as the form here.

THE COURT: Let's leave the situation in this fashion, gentlemen: that the Court will willingly enter such order as may be presented which has been agreed upon by counsel.

MR. BROWN: May we have that order entered, your Honor? There is no reason why we couldn't get together now and prepare such an Order as the Prosecutor desires to present.

THE COURT: The court will be in attendance here for sometime, on account of the Naturalization session. 10

MR. BROWN: It is our purpose to appeal without delay and as a matter of fact, we are prepared to appear before the Justice of the Supreme Court this afternoon to file the necessary appeal and have the necessary orders entered, and I am merely anxious that prior to the fulfilment of that appointment, we should have an Order, if your Honor is disposed to make a formal Order. 20

THE COURT: This is off the record.

(Discussion off the record by Court and Counsel.)

STENOGRAPHER'S CERTIFICATE.

COURT OF OYER AND TERMINER.
ATLANTIC COUNTY.

10

STATE OF NEW JERSEY

vs.

JOSEPH SCHWARTZ,
Defendant.

} Stenographer's
Certificate.

20

I, Rose G. Paull, Court Stenographer, do swear that I did well and truly record stenographically the proceedings in the above-entitled cause, and the foregoing is a true transcript of my stenographic notes of such proceedings, which were held before Hon. Robert L. Warke, and Hon. French B. Loveland, Judges of said Court, on the 29th day of March, 1944, at May's Landing, New Jersey.

ROSE G. PAULL,
Stenographer.

30

Filed March 30, 1944. Robert L. Warke, Judge.
Filed March 31, 1944 at 9 A. M. William A. Blair,
Clerk.

40

ORDER ADJUDGING JOSEPH SCHWARTZ IN
CONTEMPT AND PRONOUNCING SEN-
TENCE.

(Filed March 29, 1944.)

10

ATLANTIC COUNTY COURT OF OYER AND
TERMINER.

In the Matter of Contempt }
Proceedings against JOSEPH } Order Adjudging
SCHWARTZ. } Joseph Schwartz
in Contempt and
Pronouncing Sen-
tence.

20

It is, on this 29th day of March A. D. 1944, AD-
JUDGED that the said Joseph Schwartz is guilty of
contempt of the Court of Oyer and Terminer in and
for the County of Atlantic by reason of his refusal
to answer certain questions propounded to him on
the Seventeenth day of November, 1943, in the pres-
ence of the October Term, 1943, Grand Jury in and
for the County of Atlantic, and that as a punish-
ment for said contempt, he be committed to the At-
lantic County Jail for a period of five days and
that the execution of said sentence be suspended.

30

ROBERT L. WARKE,

President Judge of the
Court of Common Pleas
in and for the County of
Atlantic.

FRENCH B. LOVELAND,

Judge by Designation of the
Court of Common Pleas
in and for the County of
Atlantic.

40

PETITION OF APPEAL.

NEW JERSEY SUPREME COURT.

10

In the Matter of Contempt Proceedings against JOSEPH SCHWARTZ.	}	In Contempt. Petition of Appeal.
--	---	--

TO THE SUPREME COURT OF NEW JERSEY:

20 The petition of Joseph Schwartz, the defendant
in the above entitled matter, respectfully shows:

1. That on the twenty-ninth day of March, 1944,
he was adjudged guilty of a contempt of the Atlan-
tic County Court of Oyer and Terminer, as appears
by the order of such court, a true copy of which is
attached hereto.

30 2. Your petitioner alleges that the said order is
erroneous for the following reasons:

(a) The charge here made against the defen-
dant does not constitute contempt in that said
defendant did not disobey or resist "any law-
ful writ, process, order, rule or command" of
said court as is required by Revised Statutes,
Title 2, Chapter 15, section 1.

40 (b) The defendant is here charged with "con-
tempt of the October Term 1943 Atlantic
County Grand Jury" and not with contempt of
the Atlantic County Court of Oyer and Termi-
ner.

(c) The defendant was privileged to refuse to disclose the identity of the person or persons who had supplied him with information and data concerning criminal law violations, said information and data having been supplied to him in his official capacity as a member of the May Term 1943 Grand Jury of Atlantic County and while he was actively engaged in the performance of his duties as such. 10

(d) Said defendant cannot legally be compelled to disclose the identity of his said informers under the circumstances as stated in paragraph (c) above.

(e) The oath of secrecy which this defendant took as a member of the May Term 1943 Grand Jury of Atlantic County prevents conviction of the charge here made. 20

(f) The oath which this defendant took at the time of his induction as a member of the May Term 1943 Grand Jury of Atlantic County forbids the disclosure of the information and data elicited of him during his appearance as a witness before the October Term 1943 Grand Jury of said county.

(g) The defendant was legally entitled to the protection of the personal privilege accorded to all witnesses when called upon to testify and as provided by Revised Statutes, Title 2, Chapter 97, section 7. 30

(h) The questions asked of this defendant as set forth in the petition filed in these proceedings on December 16, 1943, were not material or relevant to any legally instituted proceeding.

(i) The questions asked of this defendant as aforesaid were not framed in accordance with the well established rules of evidence.

(j) The questions asked of this defendant as 40

aforesaid were not such as would elicit evidence which said grand jury was legally entitled to receive and consider in that such evidence was hearsay and, therefore, incompetent, improper and illegal proof.

10 (k) Before this defendant can be adjudged guilty of contempt for refusing to answer the questions submitted to him the court must be satisfied that the evidence elicited is competent and admissible as evidence in accordance with the well established rules of evidence and the evidence here sought was neither competent or admissible proof.

20 (l) Among other things this defendant, when before the October Term 1943 Grand Jury of Atlantic County was addressed as follows: "Mr. Schwartz, the Grand Jury is open and ready to get any information or suggestion you have at hand, but have unanimously voted that any statements that you have to make whether it be hearsay or direct evidence will be made in the presence of the Prosecutor and his assistants." It is here charged that this defendant acted contumaciously when he replied—"Mr. Foreman, I decline to give the information." His conviction of contempt for so doing is improper and illegal for the reasons that the statement as
30 quoted was not in the form of a question; it was not framed in accordance with the well established rules of evidence; it did not require answer by the witness; and said statement was, at best, a mere invitation or privilege accorded to this defendant on which he was free to act as he desired.

40 (m) This defendant could not be legally required to give any evidence respecting or concerning the operation of the law enforcement

agencies of Atlantic County (of which the Prosecutor of the Pleas and his assistants were a part) while said Prosecutor and his assistants were present in the Grand Jury room.

(n) This defendant could not be legally required to give evidence pertaining to investigation of improper conduct of the affairs of county enforcement agencies (including the office of Prosecutor of the Pleas) while the Prosecutor and his assistants were present. 10

(o) The Prosecutor of the Pleas and his assistants had no legal right to be present in the Grand Jury Room when this defendant gave evidence concerning the administration of the affairs of county enforcement agencies which included said Prosecutor and his assistants.

(p) Defendant here had no intent to condemn either the Grand Jury or the Court. 20

(q) Defendant acted pursuant to the advice of legal counsel.

(r) The conviction of this defendant was against the weight of the evidence.

(s) The defendant fully and completely purged himself of the charge of contempt and his contradiction of contumacious action was full and adequate and defendant was, therefore, entitled to his discharge. 30

(t) The conviction of defendant and the judgment of said court was otherwise erroneous and illegal.

Your petitioner therefore prays that the proceedings, conviction and judgment be certified to the Supreme Court of the State of New Jersey for review in accordance with the provisions of Title 2, Chapter 15 of the Revised Statutes, and that said court

*Order Adjudging Joseph Schwartz in
Contempt and Pronouncing Sentence*

re-hear the matter, and that the conviction and judgment be set aside and reversed.

JOSEPH SCHWARTZ,
Petitioner.

10 We conceive that there is good cause for review.
CHARLES S. MOORE,
WM. ELMER BROWN, JR.,
Counsellors at Law of New
Jersey.

20 ORDER ADJUDGING JOSEPH SCHWARTZ IN
CONTEMPT AND PRONOUNCING SENTENCE.

(Filed March 29, 1944.)

ATLANTIC COUNTY COURT OF OYER AND
TERMINER.

30	In the Matter of Contempt Proceedings against JOSEPH SCHWARTZ.	}	Order Adjudging Joseph Schwartz in Contempt and Pronouncing Sentence.
----	--	---	--

40 It is, on this 29th day of March A. D. 1944, AD-
JUDGED that the said Joseph Schwartz is guilty
of contempt of the Court of Oyer and Terminer in
and for the County of Atlantic by reason of his re-

*Order Adjudging Joseph Schwartz in
Contempt and Pronouncing Sentence*

fusal to answer certain questions propounded to
him on the Seventeenth day of November, 1943, in
the presence of the October Term, 1943, Grand Jury
in and for the County of Atlantic, and that as a
punishment for said contempt, he be committed to
the Atlantic County Jail for a period of five days 10
and that the execution of said sentence be suspended.

ROBERT L. WARKE,
President Judge of the
Court of Common Pleas
in and for the County of
Atlantic.

FRENCH B. LOVELAND,
Judge by Designation of the
Court of Common Pleas
in and for the County of 20
Atlantic.

Filed March 29, 1944. Joseph B. Perskie, J.S.C.

Filed March 29, 1944. James J. Gavin, Clerk.

Filed April 1, 1944 at 9 A. M. William A. Blair,
Clerk.

*Rule Directing Certificate of Conviction for
Review*

RULE DIRECTING CERTIFICATE OF
CONVICTION FOR REVIEW.

10

(Filed April 1, 1944.)

NEW JERSEY SUPREME COURT.

20	In the Matter of Contempt Proceedings against JOSEPH SCHWARTZ.	}	In Contempt. On Petition of Appeal. Rule Directing Cer- tificate of Con- viction for Re- view.
----	--	---	--

30 This matter being opened to this Court by Wm.
 Elmer Brown, Jr., attorney of the defendant, and
 upon reading and filing the petition of said defen-
 dant, from which it appears that the defendant was
 convicted of an alleged contempt of the Atlantic
 County Court of Oyer and Terminer by such court
 on the twenty-ninth day of March 1944, and that the
 defendant has duly applied to this court to review
 the said conviction and judgment in accordance with
 the provisions of Chapter 15, Title 2 of the Revised
 Statutes;

40 It is ordered that the Atlantic County Court of
 Oyer and Terminer forthwith certify and send to
 this court at Trenton, New Jersey, the conviction
 and judgment entered in said court, whereby the de-

fendant, Joseph Schwartz, was adjudged guilty of a contempt of such court as hereinbefore recited, together with all the proceedings relating thereto.

It is further ordered that both parties have leave to take depositions before a Supreme Court Commissioner concerning the facts involved in the alleged contempt, in accordance with the rules and the practice of this court. Let the above rule be entered in the minutes this twenty-ninth day of March, 1944. 10

JOSEPH B. PERSKIE,
Justice of the Supreme Court.

On motion of
WM. ELMER BROWN, JR.,
Attorney of Defendant.
CHARLES S. MOORE,
Of Counsel.

20

BOND.

KNOW ALL MEN BY THESE PRESENTS,
That we, JOSEPH SCHWARTZ, of the City of Atlantic City, Atlantic County, New Jersey, as principal, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation of the City of Baltimore and State of Maryland, as surety, are held and bound unto the Clerk of the Atlantic County Court of Oyer and Terminer, of Atlantic County, New Jersey, in the sum of Two Hundred and Fifty (\$250.00) Dollars to be paid to said Clerk as aforesaid, to which payment we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents. Sealed with our seals; dated the twenty-ninth day of March one thousand nine hundred and forty-four. 30

40

10 The condition of the above obligation is, that
 whereas the said Joseph Schwartz was convicted be-
 fore the Court of Oyer and Terminer of Atlantic
 County, New Jersey, for a contempt lately done in
 said Court, and whereas the said Joseph Schwartz
 is about to present a petition to the Supreme Court
 of the State of New Jersey for the review of said
 conviction and judgment, both upon the law and the
 facts; NOW THEREFORE, if the said Joseph
 Schwartz shall duly perform the judgment of the Su-
 preme Court of the State of New Jersey with respect
 to said review and appeal from said conviction and
 judgment, then this obligation to be void, otherwise
 to remain in force.

20 JOSEPH SCHWARTZ, (Seal)
 UNITED STATES FIDELITY AND
 GUARANTY COMPANY,
 By JOHN McNALLY,
 Its Attorney in fact. (Seal)

 Signed, sealed and delivered in the presence of
 EDNA C. HELLER.

30

40

ORDER FIXING TIME AND PLACE OF
HEARING.

NEW JERSEY SUPREME COURT.

10

In the Matter of Contempt
Proceedings against JOSEPH
SCHWARTZ.

In Contempt.

On Petition of
Appeal.

Order Fixing Time
and Place of
Hearing.

20

This matter being opened to this Court by Wm. Elmer Brown Jr., Esq., attorney of the appellant, and Charles S. Moore, Esq., of counsel, in the presence of the Honorable Harry R. Coulomb, Prosecutor of the Pleas of Atlantic County, and it appearing that the above named Joseph Schwartz has appealed to this Court from his conviction of an alleged contempt of the Atlantic County Court of Oyer and Terminer and judgment thereon entered in said court on March 29, 1944, which said appeal is taken pursuant to the provisions of Chapter 15, Title 2 of the Revised Statutes, and application having been made, after due notice, for a designation of time and place for the hearing of said appeal, and the manner by which the facts pertaining thereto shall be inquired into and ascertained;

30

It is, on this 17th day of April, A. D. 1944, ORDERED that the appeal of this matter, both upon

40

the law and the facts, as provided in Chapter 15, Title 2 of the Revised Statutes of New Jersey, be heard at the October Term 1944 of this Court, at the State House, in the City of Trenton, New Jersey, and that due notice of said hearing be given by said appellant to the Prosecutor of the Pleas of Atlantic
10 County as and for the opening day of said Term;

And it is further Ordered that the testimony and proceedings taken stenographically before the court from which this appeal is taken shall be transcribed and when certified to this court by the official stenographer, the said transcript of testimony and proceedings, together with the documentary exhibits referred to therein, shall be used and considered in this court in lieu and in place of depositions taken by and in behalf of the parties in connection with
20 this appeal, and all objections appearing in said transcript of testimony and proceedings taken by either of the parties are hereby reserved to them;

And it is further Ordered that the perfection of the record of this appeal for presentation to and hearing by this court shall be in accordance with the rules of this court as in all other appeals.

JOSEPH B. PERSKIE,

Justice of the Supreme Court.

30 We hereby consent to the entry of the above Order.

WM. ELMER BROWN, JR.,

Attorney of Appellant.

CHARLES S. MOORE,

Of Counsel with Appellant.

HARRY R. COULOMB,

Prosecutor of the Pleas in and
for Atlantic County.

TESTIMONY.

ATLANTIC COUNTY COURT OF OYER AND
TERMINER.

10

In the Matter of Contempt
Proceedings against JOSEPH }
SCHWARTZ. }

Before: Honorable Robert L. Warke, Judge, and
Honorable French B. Loveland, Judge, by De- 20
signation.

Held at:

Mays Landing, N. J., January 10, 1944.

Guarantee Trust Building,

Atlantic City, N. J., January 13, 1944.

30

APPEARANCES:

Harry R. Coulomb, Esq., Prosecutor of the Pleas,
and Robert N. McAllister, Esq., First Assist-
ant Prosecutor of the Pleas, for the Petitioner.

Charles S. Moore, Esq., and Wm. Elmer Brown,
Jr., Esq., for the Respondent.

40

(Mays Landing, N. J., January 10, 1944, 10 A. M.)

JUDGE WARKE: Did you want to be heard before the Prosecutor opens, Mr. Brown?

MR. BROWN: I think perhaps that would be the logical procedure, if your Honors please.

I have given notice to the Prosecutor of a motion that I now propose to urge, and I first want to file the notice with acknowledgment of service endorsed thereon.

My motion is to strike from the petition in this matter all of Paragraph 6 of the petition, which reads as follows: "Subsequently Mr. Schwartz was asked to give certain information which he claimed to have but which he said was not evidence, upon condition that the Prosecutor and his staff leave the room. The Prosecutor declined to do so. Whereupon Mr. Schwartz and the Prosecutor and his staff were asked to leave the room and upon being recalled the foreman stated to Mr. Schwartz as follows: 'Mr. Schwartz, the grand jury is open and ready to get any information or suggestion you have at hand, but have unanimously voted that any statements that you have to make, whether it be hearsay or direct evidence, will be made in the presence of the Prosecutor and his assistants.' To this the said Joseph Schwartz replied as follows: 'Mr. Foreman, I decline to give the information.' "

The so-called question and answer are likewise included in the order to show cause and are appended to what would appear in the rule to be a chronological list of questions and answers which it is charged the respondent here refused to answer.

My point is that the question and the answer that I have just read is not a question at all, that it is merely a privilege afforded or an invitation to give them any information that he might have, if he so chose, and that he was under no legal obligation to answer the questions. As a matter of fact, he wasn't asked any specific question at all. It was a mere statement by the Foreman of a privilege he was being accorded if he wanted to take advantage of it, and it was within the province of the witness to determine whether he wanted to give the information or not under those circumstances, and the reply that he is said to have given is perfectly within his rights and that he could not be adjudged in contempt for any refusal to comply with that invitation or privilege so accorded him. Therefore I move that that so-called question and the so-called answer to the question be stricken as not laying a proper basis for contempt.

(Argument by counsel.)

JUDGE WARKE: The gravamen of the petition, it seems to us, is what is alleged to be the wilful and intentional refusal of the respondent to give testimony before the grand jury and the testimony sought to be elicited is set out in the series of questions and answers of which Paragraph 6 is a part, and as I read the petition all together the questions and answers set out in the petition and the refusal of the respondent to answer them constitute the gravamen of the complaint, as I said in the beginning.

There seems to have been a specific inquiry or better said, an inquiry directed to specific information, which was refused, and this apparently was followed by the general invitation, now the subject of discus-

sion here, extended by the Foreman to the witness Schwartz to testify, which he declined to do.

Our disposition is to reserve our ruling upon the motion at least until the close of the petitioner's presentation, and that is the course we have elected to adopt. We will reserve disposition of the motion
10 at least until the close of the petitioner's case, at which time the motion may be pressed.

MR. BROWN: Your Honor will then require us to go into trial on that question?

JUDGE WARKE: We want to hear the Prosecutor's case.

MR. BROWN: Will your Honor allow me an
20 exception?

JUDGE WARKE: Yes.

MR. COULOMB: We are all now aware of the order to show cause before us and I am not quite sure that any issue has to be joined. If not I will proceed immediately.

JUDGE WARKE: I think we may take recognition of the fact that issue has been joined by way of
30 general denial.

MAURICE RISLEY, called as a witness on behalf of the petitioner, being duly sworn, testifies as follows:

DIRECT EXAMINATION.

BY MR. COULOMB:

10

Q. Mr. Risley, you occupy a position with respect to the grand jury?

A. I do, sir.

Q. What position is that?

A. Clerk of the grand jury.

Q. How long have you been the clerk?

A. About thirty-one years.

Q. Were you present at a meeting of the grand jury held on the 17th of November, 1943? 20

A. I was.

Q. Do you recall that Mr. Schwartz was sworn as a witness on that occasion?

A. I do.

Q. Was he?

A. Yes.

Q. By whom?

A. By the Foreman.

Q. Do you recall whether he was asked certain questions during the course of the proceedings of that session on that day? 30

A. I do.

Q. As a result of what took place did the grand jury adopt a resolution on that date?

A. They did.

Q. Have you a copy of that resolution?

A. Yes, sir.

Q. Where is it?

A. In the docket.

40

MR. COULOMB: I offer it in evidence.

BY MR. BROWN:

Q. Did you make the entries in this book, Mr. Risley?

10 A. I made the result.

Q. You did not enter the information that day?

A. I did not.

Q. Or anything else, except what appears?

A. The date and the result.

Q. Whose handwriting is this (indicating)?

A. The docket clerk.

Q. What docket clerk? Aren't you the grand jury docket clerk?

A. No, he is in the prosecutor's office.

20 Q. Who is that?

A. That is Mr. Nappin.

Q. Did he write the pencil notation in parenthesis on the line?

A. He did.

MR. BROWN: No objection.

JUDGE WARKE: It may be considered and received and marked as Exhibit P-1.

30

(The docket book is received in evidence and marked Exhibit P-1.)

MR. BROWN: I am assuming it is the same as the copy which is attached to the petition.

BY MR. COULOMB:

40 Q. Mr. Risley, is the original resolution in the book?

A. Yes.

Q. That is the original that is in the book?

A. That is right.

MR. COULOMB: That is all.

CROSS-EXAMINATION.

10

BY MR. BROWN:

Q. Mr. Risley, who prepared the written resolution?

A. The Prosecutor.

Q. Do you know whether or not it was prepared on the day it was adopted?

A. I don't know.

Q. Weren't you there throughout the entire proceedings? 20

A. No, it wasn't prepared that day.

Q. In other words, it was prepared before the grand jury met on that day?

A. No.

Q. When was it prepared?

A. After.

Q. How long after?

JUDGE WARKE: If he knows.

30

THE WITNESS: Probably several days.

BY MR. BROWN:

Q. Has there been any meeting of the grand jury since the 17th of November?

A. Yes, sir.

Q. Was that resolution ever read to the grand jury?

40

A. No, sir.

Q. After it was prepared?

A. No, sir.

Q. Then the resolution wasn't before the grand jury on the day that it was reported to have been adopted, is that right?

10 A. The resolution was adopted on November 17.

Q. But is that resolution and all that is said in it approved by the grand jury?

A. There was a vote taken requesting the Prosecutor to prepare such a resolution.

Q. Then that was the motion that was passed, is that right, on the 17th?

A. I guess it was.

Q. And the resolution which appears in the grand Jury docket was subsequently prepared by the Prosecutor and inserted in the docket without presenting it to the grand jury for final adoption?

20

A. It was signed by the Foreman.

JUDGE WARKE: Just a minute. Read the question and answer.

(The stenographer reads the question and answer as follows:

30 "Question: And the resolution which appears in the grand jury docket was subsequently prepared by the Prosecutor and inserted in the docket without presenting it to the grand jury for final adoption?

"Answer: It was signed by the Foreman.")

JUDGE WARKE: I think the answer is not responsive. That can be answered yes or no, can it not? Read the question again.

40 (The stenographer reads the question as follows:

“Question: And the resolution which appears in the grand jury docket was subsequently prepared by the Prosecutor and inserted in the docket without presenting it to the grand jury for final adoption?”)

THE WITNESS: Yes, sir.

10

BY MR. BROWN:

Q. You have attended all the sessions of the present-term grand jury, haven't you?

A. Yes, sir.

Q. Now, on the motion which was adopted on November 17 whereby the Prosecutor was instructed to prepare a resolution, what was the quantum of vote on that resolution?

20

MR. COULOMB: Objected to as irrelevant and immaterial.

(Argument by counsel.)

JUDGE WARKE: Overrule the objection.

BY MR. BROWN:

Q. What was the quantum of the vote on the resolution which was to instruct the Prosecutor to prepare a resolution?

30

A. A majority of the grand jury.

Q. What was the quantum of the vote, Mr. Risley?

A. I would say at least twenty.

Q. Mr. Risley, do you know really what the vote was; how many for and how many against?

A. There was a majority of the grand jury; that is all I can tell you.

40

Q. Was the vote polled?

A. It was not.

Q. Was the vote taken by raising hands?

A. Yes.

Q. Were they counted?

A. Yes, I counted them.

10 Q. Then you ought to know how many there were in favor of the resolution.

A. There was a majority.

Q. Didn't you keep a record of the vote?

A. I counted twenty-one.

Q. Twenty-one?

A. Yes.

Q. Do you know how many were present?

A. Twenty-two.

20 Q. Twenty-two present in the grand jury that day?

A. Yes, sir.

Q. Now, then, was the motion which was adopted by that vote in writing?

A. No.

Q. I mean the motion instructing the Prosecutor to prepare the resolution.

A. Was it in writing?

Q. Yes.

A. Oh, no.

30

MR. BROWN: That is all.

MR. COULOMB: That is all, Mr. Risley.

If your Honors please, Mr. Hurter is the stenographer and I want to prove by him the charge to the grand jury by Justice Colie on the opening of the October term, and unless counsel objects —

MR. BROWN: I don't know your purpose.

40

MR. COULOMB: I don't think I have to do it at all under the case of State vs. Grunow, but I would like to show what the grand jury had before it which justified them, at least, from the Court's charge in inquiring into the situation here presented.

MR. BROWN: I can see no materiality of that, 10
if your Honors please. The Justice may have instructed the grand jury to inquire into certain things. That is no proof of the fact that they did so inquire or proof of the fact that such inquiry was in progress at the time this witness appeared.

(Argument by counsel.)

JUDGE WARKE: I will overrule the objection 20
if there is an objection.

MR. BROWN: Exception.

JUDGE WARKE: Swear the stenographer.

RAYMOND W. HURTER, called as a witness on behalf of the petitioner, being duly sworn, testifies as follows:

30

MR. COULOMB: Do you have any objections to Mr. Hurter reading from his copy of the charge?

MR. BROWN: Do you have it typed?

MR. COULOMB: Yes, and we want only a part of it in. This (indicating) is the charge to the October grand jury.

40

MR. BROWN: May I see the typewritten copy, please.

(Mr. Brown reads the typewritten copy.)

10 MR. BROWN: If your Honors please, I am willing to concede that Mr. Hurter, if he were asked to testify, would testify that this typewritten copy of the charge to the grand jury is as it appears written, and therefore I am willing to submit that this may be offered in lieu of Mr. Hurter's oral testimony. However, we have my objection to its materiality and relevancy.

JUDGE WARKE: And that objection we have overruled and you have an exception.

20

MR. BROWN: Yes.

JUDGE WARKE: Then let the transcript of the charge be received and marked Exhibit P-2.

(The transcript of the charge to the grand jury is received in evidence and marked Exhibit P-2.)

30 MR. BROWN: And that will be copied in the record, I suppose, as the testimony of Mr. Hurter?

JUDGE WARKE: Yes.

MR. COULOMB: I presume with what has been said that your Honors dispense with the reading of it.

JUDGE WARKE: Whatever you want to read, of course, is satisfactory.

40

MR. COULOMB: Mr. McAllister will read a portion of it in the record.

MR. McALLISTER: (Reading) "The Prosecutor has also requested me to charge you with reference to what is commonly called the numbers game or numbers racket. That too, the Court will charge you on in just a moment. This matter of gaming or gambling is something that this Court on a number of previous occasions has charged specifically, but this is an appropriate time to renew that charge, in my opinion, so that there will be no doubt in the minds of any of you grand jurors or in the minds of anyone else in the County of Atlantic as to what the Court's attitude toward it is. 10

"The presence of any place in Atlantic County where gaming or gambling is carried on is a violation of the criminal law. Now, whether or not you as grand jurors agree with the law making it a crime, is immaterial. The law is on the books. Being on the books it is to be enforced. If you think it should not be on the books then the remedy lies with the citizens of the State of New Jersey in their legislature in Trenton, but it does not lie with the Court nor does it lie with the grand jury to determine that the law is not to be put into effect. 20

"I want no misunderstanding on this and so I charge you that what is commonly known as book-making, pool selling, the numbers racket and all playing for money or other valuable things at cards, dice or with any instrument, is gambling or gaming, and is a crime for which an indictment will lie." 30

MR. BROWN: May I point out a portion of it, if your Honors please?

JUDGE WARKE: Surely. 40

MR. BROWN: I don't know the page number on that copy that you have before you, but Mr. Justice Colie seems to have said to this present grand jury this, after drawing attention to the fact that certain editorial comment in a local newspaper had been called to his attention. He says:

- 10 "I suggest, Mr. Foreman and members of this grand jury, that you call upon the Prosecutor of the Pleas to summon before you as witnesses the members of that newspaper and its editorial staff so that they may bring before you any evidence they may have of the illegal operation of the number barons in Atlantic City, so that you in turn may act upon that evidence."

This is the pertinent part:

- 20 "It may be that the person or persons who have that information are not in a position to disclose it; that is to say, to disclose the source from which they obtained it, but in any event I think that that is the course that you should pursue, and I think that you should follow up that inquiry as far as the law will permit you to go."

JUDGE WARKE: Proceed, Mr. Prosecutor.

30

WALTER J. BUZBY, called as a witness on behalf of the petitioner, having duly affirmed, testifies as follows:

DIRECT EXAMINATION.

BY MR. COULOMB:

Q. Mr. Buzby, where do you live?

- 40 A. Atlantic City, at the Hotel Dennis.

Q. Were you the Foreman of the October term grand jury?

A. Yes.

Q. Of 1943?

A. Yes.

Q. During the course of the proceedings of that grand jury did Joseph Schwartz appear before the grand jury as a witness? 10

A. He did.

Q. Do you recall the date?

A. I do not. It was early, rather early, in the session.

Q. Do you know the reason why he was subpoenaed before the grand jury?

MR. BROWN: I object.

20

MR. COULOMB: If he knows.

MR. BROWN: I object.

MR. COULOMB: He can answer that yes or no, certainly.

MR. BROWN: If it doesn't go beyond that I have no objection.

30

THE WITNESS: Yes.

BY MR. COULOMB:

Q. What was that reason.

MR. BROWN: I object because of the fact that we are not here to answer anything except a refusal to answer certain questions put to this witness. It makes no difference what the purpose was in sub- 40

poenaing. If he appeared and if he was sworn as a witness and if the question is legitimate he is required to answer it, perhaps within certain legal limitations, and we certainly are not called upon to go into the entire proceedings of the grand jury.

10 MR. COULOMB: We are not going into the entire proceedings of the grand jury. We are going into them insofar as they relate to Mr. Schwartz. May I remind Mr. Brown, as well as direct the Court's attention to the fact, that Mr. Brown spent sometime a few minutes ago in declaring the objection to a grand jury just grabbing hold of witnesses and rushing them over here, on the theory that they might get something out of them, without any rhyme and reason.

20

JUDGE WARKE: Overrule the objection and allow you an exception.

MR. BROWN: Exception.

BY MR. COULOMB:

30 Q. You were asked whether you knew the reason why Mr. Schwartz was summoned to appear before the grand jury, and you said you did. I am now asking you, what was that reason?

A. As Foreman I presented to the grand jury information that had come to me and they, in turn, said, on the strength of that information, that Mr. Schwartz should be summoned before the grand jury.

Q. What particular class of crime was the grand jury having under investigation at or about that time?

A. Number writing.

40

Q. Any other form of gambling?

A. Yes, horse rooms.

Q. Now, do you recall the day, the 17th of November, on which Mr. Schwartz finally appeared in the grand jury room as a witness?

A. Do I recall?

Q. Yes.

A. Yes.

10

Q. Was Mr. Schwartz sworn by you at that time as a witness?

A. Yes.

Q. Do you recall whether or not he was asked a question concerning the persons who had delivered to him number slips?

MR. BROWN: I object, if your Honors please. If the questions and answers are a matter of record we are entitled to have that, and not a general reference to them. I don't want this witness to give us the substance of the question, because it is so important that your Honors should rule on its materiality and its legality. 20

JUDGE WARKE: It hasn't appeared that there is a record of the grand jury.

MR. COULOMB: There is a record.

30

MR. BROWN: We have, if your Honors please, quoted questions and quoted answers and it is because of those questions that we are called upon to appear here today. I understand that there is an assistant clerk of the grand jury, appointed some two or three years ago, who is at all times or nearly at all times present and taking a stenographic record of the testimony of the witnesses. That was done in this case, and it seems to me this witness should not be allowed to testify as to the substance 40

of the question. We should have a stenographic record of it.

JUDGE WARKE: Until it appears that there is a stenographic record —

10 MR. COULOMB: (Interrupting) There is a stenographic record.

JUDGE WARKE: Then the question is whether that record or the testimony of the witnesses who were present, is the best evidence.

MR. COULOMB: Either one is, it seems to me.

JUDGE WARKE: The best evidence obtainable
20 must be produced. If there is a record of what was asked and the replies given, I will sustain the objection.

BY MR. COULOMB:

Q. Do you recall a resolution being adopted by the grand jury on that same day with respect to Mr. Schwartz?

A. Yes.

30 Q. What was the purport of that resolution? I mean, what was its general purpose?

MR. BROWN: I object.

JUDGE WARKE: Shouldn't the question be, what was the resolution?

BY MR. COULOMB:

40 Q. What was the resolution?

MR. BROWN: I object to that.

BY MR. COULOMB:

Q. I show you Exhibit P-1, Mr. Buzby, and ask you whether it is your signature to that resolution.

A. It is.

10

Q. Was that the resolution that was adopted, not in the form there in typewriting, but is that the resolution adopted on the 17th of November?

MR. BROWN: I object, because if it wasn't in that form at that time it could not have been adopted on that day.

MR. COULOMB: I would like to remind Mr. Brown of one thing. When this case was adjourned it was distinctly stated by him that he waived any right to any defect, if it be a defect, that could have been cured had this hearing been had on the 27th of December.

20

MR. BROWN: I did no such thing. I said that if I chose to go to trial on the pleadings as they then were, that was one thing. If I had any motion to make, addressed to the pleadings, which could be cured by action of the present grand jury that I would make such a motion on January 4. I have not made any such motion. I am relying upon this case, resting on the pleadings as they exist. I am not attacking the pleadings.

30

JUDGE WARKE: Repeat the question, Mr. Stenographer.

(The stenographer reads the question as follows:

"Question: Was that the resolution that was

40

adopted, not in the form there in typewriting, but is that the resolution adopted on the 17th of November?"')

MR. BROWN: I object. If it wasn't in that form it could not be adopted on that day.

10

BY MR. COULOMB:

Q. Was there a resolution adopted on that day, Mr. Buzby, directing the Prosecutor to take such proceedings as he might deem necessary?

20

MR. BROWN: I object. Here we have a resolution on which they proceeded. The Courts have said that the grand jury must by appropriate action bring the matter to the attention of the Court and then the Court proceeds. My contention is that this is the resolution on which they have relied. This is the resolution they attached to the petition and which they say justifies these proceedings. In effect they say it is a presentment to the Court and it is filed and made a part of the record of this Court. I say they cannot base this proceeding on any other resolution, be it the same in import or purpose.

30

(Argument by counsel.)

JUDGE WARKE: I will overrule the objection and allow you an exception.

MR. COULOMB: Mr. Stenographer, please repeat the question.

40

(The stenographer reads the question as follows:
"Question: Was there a resolution adopted on that day, Mr. Buzby, directing the Prosecutor

to take such proceedings as he might deem necessary?")

THE WITNESS: There was.

MR. BROWN: That is objectionable for another reason. It is leading. He can ask if there was another resolution adopted and then ask the witness what that resolution was. 10

JUDGE WARKE: Yes. In the absence of a jury I think no serious damage is done, and in the discretion of the Court I will overrule the objection that the question is leading.

MR. BROWN: The Prosecutor may lead to a certain extent. 20

JUDGE WARKE: You may have an exception also.

MR. COULOMB: I finish that question with this addition: to have Mr. Schwartz adjudged in contempt.

MR. BROWN: Objection and exception.

MR. COULOMB: Repeat the full question. 30

(The stenographer reads the question as follows:

"Question: Was there a resolution adopted on that day, Mr. Buzby, directing the Prosecutor to take such proceedings as he might deem necessary to have Mr. Schwartz adjudged in contempt?")

THE WITNESS: There was. 40

MR. COULOMB: That is all, Mr. Buzby.

CROSS-EXAMINATION.

BY MR. BROWN:

10 Q. Mr. Buzby, is that the only resolution which was passed that day respecting Mr. Schwartz?

A. That I recall.

Q. That is the only one you recall being passed that day?

A. Yes.

Q. Now, your name appears affixed to the original resolution which has been offered in evidence and marked Exhibit P-1, I think it is. (Indicates to the witness.)

20 A. That is right.

Q. Where were you when you signed that resolution?

A. In the Prosecutor's office.

Q. In Atlantic City?

A. Yes, sir.

Q. Prior to the time you signed it had it been read to the grand jury?

A. Not to my knowledge.

30 Q. You have attended every session of the October 1943 grand jury, haven't you?

A. Yes, sir.

Q. Was there ever any motion before the grand jury for the adoption of that resolution which bears your signature?

A. No.

MR. BROWN: That is all.

BY MR. COULOMB:

40

Q. Why did you sign it, Mr. Buzby?

MR. BROWN: I object, it makes no difference.

JUDGE WARKE: Sustain the objection.

MR. COULOMB: That is all, Mr. Buzby.

MR. BROWN: That is all.

10

MRS. MARIE T. KMIEC, called as a witness on behalf of the petitioner, being duly sworn, testifies as follows:

DIRECT EXAMINATION.

BY MR. COULOMB:

20

Q. Mrs. Kmiec, what was your maiden name?

A. Marie Roberts.

Q. Where do you live?

A. 1925 Pacific Avenue.

Q. Are you associated with the prosecutor's office?

A. I am.

Q. In what capacity?

A. Senior clerk stenographer.

Q. You also occupy a position with the grand jury of this county? 30

A. I do.

Q. What is that?

A. Assistant clerk to the grand jury.

Q. How long have you occupied that position as assistant clerk to the grand jury?

A. Since 1941.

Q. You were appointed under your maiden name at that time?

A. I was.

40

Q. And that was Marie Roberts?

A. That is right.

Q. Were you present at the grand jury session on November 17, 1943?

A. I was.

10 Q. Did you take down stenographically the testimony given by Mr. Schwartz at that time?

A. I did.

Q. Have you your notes here?

A. I have.

Q. Have you made a transcript of those notes?

A. I have.

(Mr. Brown reads over the transcript.)

20 MR. BROWN: I am willing to concede that this witness, if she is permitted to testify orally, would testify as appears on the written transcript that I have in my hand. Therefore, I am willing that this transcript should be used in lieu of her oral testimony. As to the questions and answers, I am willing also to concede that the questions that appear in the petition and order to show cause are a part of this transcript and that insofar as they are a part that they are not objectionable. However, there is
30 the petition and the order, and subject to my objection of it to that extent it is not material or relevant to the issue. I think your Honors understand the position I take.

JUDGE WARKE: You concede that the transcript is a true and correct report of the proceedings?

40 MR. BROWN: I say you can use that in lieu of the oral testimony, and I am objecting to all of that

transcript except the questions and answers as they appear in the petition and order.

MR. McALLISTER: That is Paragraphs 5 and 6.

MR. BROWN: I do not concede that the last question and answer to which my original motion was directed is material and relevant. 10

JUDGE WARKE: I say you make no objection that it is not a true and correct report of the questions and answers.

MR. BROWN: No.

MR. COULOMB: We offer in lieu of all the testimony of Mrs. Kmiec, and with the consent of Mr. Brown, the typewritten transcription of her notes. 20

(Argument by counsel.)

JUDGE WARKE: Our disposition is to sustain the objection to so much of the transcript as is not alleged to constitute contempt in the petition.

MR. COULOMB: If your Honors please, Mr. McAllister has suggested to me that in view of the fact that Paragraph 6 of the petition is still not disposed of that it might be necessary, if your Honors please, to review the testimony that preceded it to know whether there was any relevancy or not at all in that paragraph. 30

MR. BROWN: Yet that would not assist the Court in determining whether or not that was a legal question which was asked.

JUDGE WARKE: Sustain the objection to so much of the transcript as is not set out in the petition.

MR. COULOMB: Any cross-examination?

10 MR. BROWN: That is all.

C. EDGAR DREHER, called as a witness on behalf of the petitioner, being duly sworn, testifies as follows:

DIRECT EXAMINATION.

20 BY MR. COULOMB:

Q. Mr. Dreher, where do you reside?

A. Ventnor.

Q. Were you a member of the October term grand jury?

A. Yes.

Q. As a matter of fact, you still are because it is not out of session.

A. Yes.

30 Q. Were you at a meeting of the grand jury held on November 17, 1943 when Mr. Schwartz was on the witness stand?

A. Yes.

Q. Do you recall him being asked certain questions by the Prosecutor at that time?

A. Yes.

Q. And his refusal to answer some of them?

A. Yes.

40 Q. At the conclusion of his testimony was there a resolution adopted by the grand jury referring a

certain matter to the Prosecutor to take proceedings on?

MR. BROWN: I object to the question on the ground first that it is leading. It should have ended at "was there a resolution adopted," without drawing attention to any specific contents.

10

MR. COULOMB: All right, I will see if we can get along that way.

BY MR. COULOMB:

Q. Was there a resolution passed at the conclusion of Mr. Schwartz' testimony or shortly thereafter adopted, I mean?

A. Yes, there was one adopted.

Q. Do you recall the purport of it?

20

MR. BROWN: I object, if your Honors please.

JUDGE WARKE: I sustain the objection as to form.

BY MR. COULOMB:

Q. What was the resolution?

30

MR. BROWN: I object. That is the same question in another way.

JUDGE WARKE: I will overrule the objection.

MR. BROWN: Exception.

BY MR. COULOMB:

Q. You may answer, Mr. Dreher.

40

A. If I recall correctly the resolution was to have the Prosecutor prepare the necessary papers.

Q. For what?

A. For the contempt of court against Mr. Schwartz.

10 MR. COULOMB: Cross-examine.

CROSS-EXAMINATION.

BY MR. BROWN:

Q. Was that resolution in writing, Mr. Dreher?

A. No.

Q. Do you know by what vote of the grand jury it was passed; the quantum of the vote?

20 A. No, I do not.

Q. You did not count the votes for or against the resolution?

A. No.

Q. Was there ever any written resolution offered to the grand jury for the same purpose or with the same purport?

A. No.

30 Q. Did you ever see a written resolution of such purport as having been adopted or allegedly adopted by this grand jury?

A. No, I did not.

Q. I show you what purports to be a written resolution which, according to the certificate of Walter J. Buzby, the Foreman, was adopted at the meeting of the grand jury on November 17, 1943, and I ask you whether or not you ever saw it before.

A. No, I did not.

Q. Was that resolution before that grand jury on that day, November 17, 1943?

JUDGE WARKE: You mean this paper?

MR. BROWN: That written resolution to which I have directed your attention.

MR. COULOMB: I object to that question. He is asked whether this Exhibit P-1 — 10

MR. BROWN: (Interrupting) Then we will call it P-1.

THE WITNESS: Not to my knowledge.

BY MR. BROWN:

Q. When is the first time you saw it?

A. Today. Today is the first I have seen it. 20

JUDGE LOVELAND: Read the resolution, Mr. Dreher, to yourself.

(The witness reads the resolution to himself.)

JUDGE LOVELAND: Does that resolution follow the instructions of the grand jury on November 17, 1943?

THE WITNESS: Yes, it does. 30

MR. BROWN: May I interpose an objection to your Honor's question. I am assuming that I may be overruled in so doing, but in any event I would like to have the benefit of an exception to that, because it seems to me that is not the inquiry here. We are called upon to meet what the Courts have intimated is the form of an indictment and we are called upon to meet what is there in the pleadings 40

set up, and what is in the pleadings is that there is attached a resolution which is in the form of a presentment to the Court and on that presentment your Honors acted and entered an order to show cause, which we are answering today. Not some other resolution, not some other motion of the same import or purport, but we are asked to meet the order to show cause which was made on the strength of the resolution that is attached to the petition as the presentment by the grand jury to the Court.

JUDGE LOVELAND: Exception allowed.

Mr. Dreher, have you ever served on any other grand juries besides the present one?

THE WITNESS: No.

JUDGE LOVELAND: Did you observe the demeanor of the witnesses?

THE WITNESS: Yes.

JUDGE LOVELAND: Calling your attention to this session of November 17, when Mr. Schwartz was before your body, please tell us the demeanor and the attitude of the witness at the time the questions were asked.

MR. BROWN: I object to that, if your Honor please.

JUDGE LOVELAND: Objection overruled and exception allowed.

THE WITNESS: Repeat the question, Mr. Stenographer.

(The stenographer reads the question by Judge Loveland as follows:

“Calling your attention to this session of November 17, when Mr. Schwartz was before your body, please tell us the demeanor and the attitude of the witness at the time the questions were asked.”)

10

MR. BROWN: That calls for a conclusion of this witness.

JUDGE LOVELAND: Did you observe his attitude and demeanor at the time these questions were asked?

THE WITNESS: Yes.

JUDGE LOVELAND: Tell us what that was.

20

THE WITNESS: I would say somewhat antagonistic.

MR. BROWN: I object and ask that it be stricken as a conclusion.

JUDGE LOVELAND: Objection overruled.

MR. BROWN: Exception.

30

JUDGE LOVELAND: Exception allowed. That is all.

BY MR. COULOMB:

Q. Mr. Dreher, what phase of any violation of the criminal law did the grand jury have under consideration at the time Mr. Schwartz was on the stand?

40

A. If I recall correctly we were investigating the number racket and horse racing rooms.

MR. COULOMB: That is all.

BY MR. BROWN:

10

Q. Mr. Dreher, were you also investigating law enforcement generally, both in Atlantic City and throughout the county?

A. Oh, definitely so. I don't recall whether it was that day or not.

Q. Were you investigating or making any inquiry concerning the enforcement of the criminal law in the county, both by the police department of Atlantic City as well as by the county enforcement agencies?

20

A. Yes, I would say we were. I can't recall whether it was that day or not—that particular day.

Q. You have indicated that this written resolution which has been marked Exhibit P-1 was to all intents and purposes and in full purport of the oral resolution which authorized its preparation. Doesn't the resolution refer to certain city and county enforcement agencies?

30 MR. COULOMB: If your Honors please, the resolution speaks for itself.

MR. BROWN: This witness is on cross-examination.

MR. COULOMB: I understand that, but the paper is in evidence.

THE WITNESS: Yes, that is what the resolution says.

40

BY MR. BROWN:

Q. As to the number slips which were referred to in the questions which appear, they are referred to, aren't they, in the petition, the resolution P-1, number slips and lottery tickets?

A. That is right.

10

Q. Was Mr. Schwartz asked to produce number slips and lottery tickets before that grand jury?

A. Yes, I think he was.

Q. Did he refuse to do it?

A. Yes.

Q. Why?

A. If I recall correctly, he didn't wish to give that information before the Prosecutor.

Q. I am talking now simply about the physical delivery of the number slips and lottery tickets, just the physical delivery of them. Why did he refuse to deliver number slips and lottery tickets? 20

JUDGE LOVELAND: The witness started to give the answer.

MR. BROWN: He said he refused to give information.

THE WITNESS: If I recall correctly that was the reason which the grand jury couldn't understand, that he would not deliver. He said he had them, but wouldn't turn them over. 30

BY MR. BROWN:

Q. Let me refresh your memory, if I can. He testified that he had them then on that day?

A. Mr. Schwartz, let us see, he was before the grand jury twice to my knowledge. 40

Q. We are talking about November 17.

A. I don't recall.

Q. Now, do you recall that he says that I do not have them?

A. No.

10 Q. And when asked what became of them he said that he had disposed of them after the previous session of the grand jury had expired?

MR. COULOMB: That is not in evidence. The very thing that Mr. Brown objected to, that which is not in the petition.

MR. McALLISTER: It appears in the record of the testimony —

20 MR. BROWN: (Interrupting) Who am I to meet here, his staff?

MR. COULOMB: Meet me.

MR. BROWN: That is fine.

30 MR. COULOMB: You objected, and your objection was sustained to the admission of any part of Mrs. Kmiec's transcript or notes, except such as appeared in the petition.

MR. BROWN: But the Court has opened this subject by asking the witness to characterize the demeanor of the witness, and he said the demeanor was antagonistic. I want to find out whether this is antagonistic.

MR. COULOMB: Where is the proof?

40 MR. BROWN: I am trying to find out.

MR. COULOMB: I object.

JUDGE WARKE: For the time being it seems to me the question is proper for cross-examination. Mr. Stenographer, repeat the question.

(The stenographer reads the question as follows: 10

“Question: And when asked what became of them he said that he had disposed of them after the previous session of the grand jury had expired?”)

(Argument by counsel.)

JUDGE WARKE: We have ruled on the question. He may answer. Read the question again.

20

(The stenographer reads the question as follows:

“Question: And when asked what became of them he said that he had disposed of them after the previous session of the grand jury had expired?”)

MR. BROWN: I suppose I am depending on my voice, the inflection, that it is a question.

BY MR. BROWN:

30

Q. Do you recall, Mr. Dreher, that when the number slips were called for that Mr. Schwartz said that while he had them in his possession during the time that he was a member of the preceding grand jury that when that grand jury went out of session and its term had ended that he had returned them to the source from which he got them?

A. To answer that, I think that is about correct,

40

as far as I can recall. I don't know whether it happened on the 17th of November or the previous meeting.

Q. Then as far as the production of the number slips is concerned, your recollection is now that the only reason why he didn't produce them was that he
10 didn't have them?

A. I think that is correct.

Q. Now, do you recall that when Mr. Schwartz was before the grand jury he had with him a file or files of papers?

A. That is right. Yes, he did.

Q. And did he at any time refuse to deliver to the grand jury any paper that he had in that file when asked for?

A. I don't recall, Mr. Brown, whether he was ever
20 asked to turn over any papers.

Q. Didn't you see him turn over some papers to the Prosecutor in the presence of the grand jury?

A. I don't recall.

Q. Wasn't there some colloquy in the grand jury room as to whether or not it was good evidence or bad, whether it was hearsay or direct?

MR. COULOMB: It seems to me we are going right back into the very thing that this testimony
30 of Mrs. Kmiec, if admitted in toto, would have shown.

MR. BROWN: I am trying to find out on which it is this witness has based his characterization of antagonism. That is my only purpose.

THE WITNESS: I wouldn't know how to answer that question.

BY MR. BROWN:

Q. Didn't you in the midst of the colloquy say that you didn't want to hear any hearsay evidence?

A. It is possible that I did.

Q. Didn't you, as a matter of fact, Mr. Dreher, make that remark?

10

A. I don't recall. It is possible that I did.

Q. Don't you remember getting up out of your seat in the grand jury room and saying in the midst of the colloquy that you didn't want to hear anything, that it was just hearsay and that you would like to hear evidence?

A. I don't remember getting out of my chair. I probably made that statement. I don't recall it at this day.

Q. Now, Mr. Schwartz refused to give the name or names of the people from whom he had gotten this information, didn't he?

20

A. That is correct; yes, sir.

Q. Now, is it on the basis of that that you say he was antagonistic?

A. No.

Q. Now, didn't he previously explain to you that his reason for the refusal was that he had obtained that information while he was a member of the previous grand jury?

30

MR. COULOMB: I object to that.

JUDGE WARKE: This is a defense matter, isn't it?

MR. BROWN: I am trying to find out why this witness calls this respondent antagonistic.

JUDGE WARKE: Sustain the objection.

40

MR. BROWN: Allow me an exception, your Honor.

JUDGE WARKE: You may have it.

BY MR. BROWN:

10

Q. Now, in this proceeding, Mr. Dreher, it is also charged that at a certain stage of the interrogation of Mr. Schwartz he was asked to temporarily leave the room and that when he returned the Foreman said to him: "Mr. Schwartz, the grand jury is open and ready to get any information or suggestion you have at hand, but have unanimously voted that any statements that you have to make, whether it be hearsay or direct evidence, will be made in the presence of the Prosecutor and his assistants." I suppose you remember that statement being made?

20

A. Yes, I think I do.

Q. Then do you remember Mr. Schwartz saying, "Mr. Foreman, I decline to give the information"?

A. Yes, that is correct.

Q. Now, will you tell me of anything else that Mr. Schwartz refused to give the grand jury or in any way refused to cooperate with the grand jury other than to refuse to give the names of his informers or other than to give this information in the presence of the Prosecutor? Can you tell me any other question that he refused to answer, except that which called for either one of those two things?

30

A. I don't recall of any that he refused to, outside of that.

MR. BROWN: That is all.

MR. COULOMB: That is all, Mr. Dreher.

40

WILLIAM A. BLAIR, called as a witness on behalf of the petitioner, being duly sworn, testifies as follows:

DIRECT EXAMINATION.

10

BY MR. COULOMB:

Q. Mr. Blair, what official position do you occupy in the County of Atlantic?

MR. BROWN: We concede that he is the county clerk.

MR. COULOMB: It is in the record now that you are the county clerk.

20

BY MR. COULOMB:

Q. Did you swear in the October grand jury in this room?

A. I did.

Q. On what date?

A. The second Tuesday.

Q. Who was appointed the Foreman of that grand jury?

30

A. Walter Buzby.

Q. Can you give us the names of the other members?

A. No, I cannot from memory.

MR. BROWN: May I interrupt? Didn't you swear them on the 13th? The 12th was the second Tuesday and that was a holiday.

THE WITNESS: You are right. That is correct.

40

BY MR. COULOMB:

Q. And that grand jury was duly impaneled by you and charged by Justice Colie?

A. It was.

10 MR. COULOMB: That is all.

MR. BROWN: While the clerk is here may we ask him one or two questions with respect to the May term grand jury?

JUDGE WARKE: Yes.

CROSS-EXAMINATION.

20 BY MR. BROWN:

Q. Did you also swear in the May term grand jury of 1943?

A. I did.

Q. Will you tell me whether or not Mr. Joseph Schwartz, the respondent here, was a member of that grand jury?

A. He was.

30 Q. Will you repeat the form of oath which was administered to the grand jury at the opening of the May term, 1943.

A. You, as members of this grand inquest, shall diligently inquire, and true presentment make of all such matters and things as shall be given you in charge, or shall in any way come to your knowledge, touching this present service; the counsel of the State, your fellows and your own, you shall keep secret; you shall present no one through envy, hatred or malice; neither shall you leave any one unpre-
40 sented for fear, favor or affection, for reward, gain

or the hope thereof; but you shall present all things truly as they shall come to your knowledge, according to the best of your skill and understanding.

Q. So help you God.

A. So help you God.

MR. COULOMB: I have one more question to ask. 10

BY MR. COULOMB:

Q. Was Mr. Edgar Dreher a member of the October grand jury?

A. He was.

MR. BROWN: I concede that.

MR. COULOMB: That is all, Mr. Blair. 20

(A recess for lunch was taken from 12:30 P. M. to 1:45 P. M.)

30

40

AFTERNOON SESSION.

MR. BROWN: Mr. Dreher, who testified this morning, has advised me that he would like to resume the stand for the purpose of making clear his testimony and what he meant by the word “antagonistic”. I would like to recall him for further examination.

C. EDGAR DREHER, called as a witness on behalf of the respondent, having been previously sworn, testifies as follows:

DIRECT EXAMINATION.

20 BY MR. BROWN:

Q. Mr. Dreher, you informed me that you desired to explain to the Court what you meant by the word “antagonistic” as you used it in explaining in your testimony this morning Mr. Schwartz’ attitude during his appearance before the grand jury. Explain to the Court what you meant by the word “antagonistic.”

30 A. I probably should have said that he was antagonistic to the Prosecutor and his group. I didn’t mean the entire jurors.

Q. Was he antagonistic to the jury?

A. Not to my knowledge.

MR. BROWN: That is all.

CROSS-EXAMINATION.

BY MR. COULOMB:

Q. You mean by that, Mr. Dreher, that he answered the questions that were put to him by the Prosecutor to the satisfaction of the grand jury? 10

A. No, I don't mean that.

MR. COULOMB: That is all.

BY MR. BROWN:

Q. You don't mean to say that he didn't answer any questions that were put to him, do you?

A. No, I don't recall the questions, if he answered any and all the Prosecutor asked him. Whether he gave a direct answer or not, I don't recall that. 20

Q. But you do recall that the two things that he refused to do were to name his informers from whom he had gotten the information, and certain information he refused to give in the presence of the Prosecutor?

A. That is correct.

MR. BROWN: That is all. 30

MR. COULOMB: The prosecution rests.

MR. BROWN: I think this probably is the opportune time to renew the motion to strike, which I made at the beginning, because it seems to me that it would have an important bearing on the quantum of proof which we will have to offer, and if your Honors will rule on that motion now we can then 40

determine how far we will have to go in presenting our defense.

(Argument by counsel.)

10 JUDGE WARKE: The Court has considered the motion to strike the sixth paragraph and we are of the opinion that it should be permitted to remain in the petition and therefore decline to strike. To that ruling, of course, you may take your exception.

MR. BROWN: Exception. Then I desire to move to dismiss the rule, of course reserving the right to put in our defense, which I think we have a right to do.

20 There is a statute in this State which I think may be said is in derivation of the common law. I think that the common law handed to us and to the Courts, at least, the right and power to hold in contempt anyone who resisted the mandate of the Court or any processes of the Court. Of course, the common law principle, as your Honors well know, may be restricted and limited by legislative policy properly adopted and that, I think, they have done.

30 The Legislature has adopted a statute which is found in Revised Statutes 2:15-1, and which reads as follows: "The power of any court of this state to punish for contempt shall not be construed to extend to any case except the:

"a. Misbehavior of any person in the actual presence of the court" That, of course, is not this case.

40 "b. Misbehavior of any officer of the court in his official transactions." And that is not this case, and if this respondent is to be adjudged in contempt at all it can only be possible under the third classification of contempts, and I submit that that does not apply here..

“c. Disobedience or resistance by any court officer, or by any party, juror, witness or other person to any lawful writ, process,” —. Here there was no contempt to any lawful writ or process. It appears here that this respondent was subpoenaed to appear before the grand jury, and he did so. In complying with the mandate of that subpoena and presenting himself and appearing before the grand jury he had complied with the mandate of the process or the writ. Therefore he could not be adjudged in contempt because of that. “to any lawful”—“order, rule, decree or command of the court.” I respectfully submit that does not appear here. As a matter of fact, it doesn’t even appear here that there was a command of the grand jurymen nor an order, and I respectfully submit that they had no power to make an order or a command that the witness should answer any question before them. The cases that I have been able to find in this State seem to indicate that the only thing that they can do is to report the actions of a recalcitrant witness to the Court, and then the Court may issue a rule not for contempt, but may issue a rule to have the witness appear and show cause why he should not be ordered to answer certain questions. Then if after that hearing the Court directs that he appear before the grand jury and answer those questions and he should refuse, then, I submit that he could be brought or attached for contempt. There is no power, I submit, in this Court to attach Schwartz for contempt until this Court, preliminarily thereto, makes an order or commands him to answer certain questions, and that has not been done.

He is here answering a rule why he should not be attached in contempt, without such an order or without such a command. I say it is not within the category of any of the offenses which the Legislature

has said shall constitute contempt and shall enable this Court or any other Court to punish him therefor.

10 In addition to that, if your Honors please, Schwartz has been asked to appear and show cause why he should not be adjudged in contempt for refusal to answer questions which, I think, are properly placeable in two categories. The first, if your Honors please, has to do with a refusal to name his informer or informers from whom he got the information which was being solicited or referred to—it hadn't been solicited. It was referred to in the question and then all they asked for is the name of the persons who gave the information.

20 Now it appears in the case that Mr. Schwartz was a member of the preceding grand jury and I think it sufficiently appears in the case that the information which he had came into his possession while he was a member of the preceding grand jury. Also, it appears in the very questions that were asked him, that he had refused to give those names because of the fact that he had promised not to reveal the source of the information which he obtained as a grand juror and that he had not been released from that promise and therefore he could not give that information.

30 Having received the information while he was a grand juror, I submit that under his oath of office he was bound to a secrecy which Mr. Justice Parker said, in *State vs. Borg*, could be divided into three classifications: as to certain matters which came to his knowledge as a grand juror he could not be permitted to testify; as to certain other matters he was privileged not to testify and if he exerted the privilege and refused to testify he could not be compelled to do so; and finally, that there were some
40 matters that he could be compelled to testify.

But in addition to this oath of secrecy which he had as a grand juror I submit that he had also the privilege which is accorded to any law enforcement officer to refuse to reveal the source of his information and the names and identities of his informers.

Mr. Schwartz was a member of a prosecuting body. Its only purpose of existence was to inquire into criminal law violations and to indict those who may be chargeable with the crimes committed. That had to be done on legal proof. True they are not a trial court, but they are charged with the duty not to prosecute anyone unless they have legal evidence on which to base it. 10

There is not a case in this State, so far as I have been able to find, that has accorded that privilege to a grand juror. I think it is only because of the fact that the circumstances have never arisen whereby a grand juror has been prosecuted for contempt because he refused to divulge such information to a subsequent grand jury. The authorities on the subject are clear that even a police officer or a detective and, as the authorities say, "any official officer of the county," is privileged to withhold the names and identity of his informers. The reason for that has been to encourage people to perform a duty which they owe to society in revealing information, to proper authorities, of law violations. To encourage that and the doing of that the law has thrown around those people a cloak of protection, in that they cannot and will not permit their identity to be disclosed. 20 30

That, if your Honors please, is even mentioned in Winfield's Grand Jury treatise as one of the reasons, if you please, for grand jury secrecy; namely, to encourage informers to appear and give information respecting law violations.

What this grand jury, through the mouth of the 40

Prosecutor, was endeavoring to do was to enforce a former officer of this county, a member of the grand jury just preceding, who had acquired information of law violations as such official, which he had carried into his own grand jury and revealed without revealing the names, the Prosecutor calls upon him
10 to name the name or names of his informers who had given the information on or about October 5, which was during the session of the grand jury which he was serving, and I say that as a matter of law he cannot be compelled to reveal it and if I am correct in that then the prosecution in that category of questions must fall.

I again reiterate for the purpose of this motion that we come to the second classification of questions, so-called. I submit that the last so-called
20 question is not a question at all; it is a mere solicitation or invitation on the part of the grand jury through the mouth of the Prosecutor or through the mouth of the Foreman to accept a willingness, an expression of a willingness, to hear. They did not seem to care whether they got it or not. They left it to Mr. Schwartz to determine whether or not he would give it to them under the conditions, if you please, which they imposed; namely, that the Prosecutor remain in the room, and his staff remain in
30 the room.

You cannot read the pleadings in this case or the series of questions and answers without you gleaning the fact that some of the information which Mr. Schwartz was invited to reveal by that so-called question was information which pointed an accusing finger to the enforcement agencies of the city and county. Prosecutor and members of his staff were part of the county enforcement agency. I do not forget nor do I ignore the fact that the Courts
40 have said that the Prosecutor has the right to re-

main in the grand jury room during the interrogations of witnesses and that the grand jury has the right to his assistance in that respect. But when the accusing finger is pointed to a county law enforcement agency and the information may ultimately lead, if pursued by the investigating body, to indictments, even though it is only the mere possible chance that the members of the Prosecutor's staff, one or more of them, may become involved in those prosecutions, I say that under those circumstances the right of the witness then is to refuse to answer unless those who may be the possible defendants are excused from the room. I say that no man who is a possible defendant under an inquiry in the grand jury room has a right to be present. He doesn't even have a right to be called before the grand jury to tell them his side of the case; they are not a trial body. 10 20

More particularly, one of the reasons for secrecy in the grand jury room is that a defendant or possible defendant shall not be advised of the information that has been given to the grand jury, in which he may be involved. I am not saying that Mr. Coulomb or Mr. McAllister would do this, but the cases say that secrecy is thrown around the proceedings so that the defendant will not know what the testimony is or the offense with which he is being charged, until the indictment is returned, for two reasons: First, because he may not thus be enabled to impede the investigation; and secondly, because if nothing comes out of it then by reason of the cloak of secrecy there is no accusation, unofficial or otherwise, against the party or persons being investigated. 30

I say that you must consider the circumstances under which this investigation was being made and aside from the fact that the last so-called question 40

and answer is not a question, legal or otherwise, which the Court could compel Mr. Schwartz to answer in its present form, and more particularly because the grand jury placed upon it an illegal condition to his giving that information that he cannot be adjudged in contempt for that reason.

10 My colleague, Mr. Moore, calls my attention to the fact that in addition to all that the cases are clear that the only way that a witness who refuses to answer a question in the grand jury room can be prosecuted for contempt is not by the grand jury, but by the grand jury reporting that to the Court, which is considered in the form of a presentment.

20 What happened here? We were served with an order to show cause, made by your Honor, based upon a petition to which is attached a resolution, two pages in length, and it is certified that that resolution was the basis of the prosecution. It was the authority of the Prosecutor to proceed in this proceeding, and now we find that that resolution was never passed by the grand jury at all. The clerk of the grand jury testified that there was a motion made to instruct the Prosecutor to prepare a resolution of such import. The Foreman of the grand jury confirmed that. I am not sure whether Mr. Dreher did or not or whether he was asked about it, but the fact remains that the resolution on which they base this prosecution and which they represented to the Court was the action of the grand jury, was never the action of the grand jury. The mere signature of the Foreman does not make it so.

30 For instance, the procedure of a grand jury in finding an indictment is that they hear the testimony and then they take a vote. If a sufficient number of votes comes in to amount to the finding of a true bill the Prosecutor is instructed to prepare the indictment, but he does not call the Foreman of the
40

grand jury into his office and get him to sign it and then hand it to the Court. He brings the indictment into the grand jury room and the grand jury must be satisfied that that indictment is for the offense that they charged or they found, and then the Foreman signs that indictment and the Foreman of the grand jury presents it to the Court.

10

That wasn't the procedure here. I mean in open court when I say "presented to the Court." A mere motion is passed instructing the Prosecutor to prepare a resolution. For what? It would be naturally assumed that the resolution was to be prepared and returned to the grand jury for final action, but the Prosecutor prepares a resolution in his office and calls the Foreman in his office, who signs it, and the Prosecutor then—I don't know why, it doesn't appear to have been ever ordered—has it attached to the grand jury docket, which docket is kept in the Prosecutor's office by a docket clerk employed by him, and it is attached to the last page with the pencil notation opposite the name of Joseph Schwartz, to see copy of resolution on the back page. Then he presents this petition, and the grand jurors who have been called say that that resolution was never before them, never read to them and never acted upon by them, and I say that that in itself is not sufficient to warrant this Court, in giving this Court the necessary jurisdiction to proceed in the matter.

20

30

Therefore, for these and the other reasons advanced I move that the rule to show cause be dismissed.

(Argument by counsel.)

JUDGE WARKE: The Court is of the opinion that the proceedings whereby the respondent has

40

been ordered by a rule to show cause to show cause why he should not be adjudged in contempt are in good order and regular and, therefore, will not be dismissed.

10 The Court is further of the opinion that so far as presently appears in the present state of the case the respondent did not claim immunity from inter-
rogation by the inquiring body on the ground that the information they sought to elicit from him had been received by him in his character or in his capacity as a grand juror. It does appear that he was a grand juror sitting in the grand jury that was serving the county prior to the commencement of the service of the present grand jury that inter-
rogated him. However, I repeat, that as we review the proceedings and the testimony so far, that is all
20 that does appear and it does not appear, I repeat, that he claimed immunity from replying to the interrogatories on the ground that in his capacity as a grand juror he received the information solicited. This does not concede by the Court that even had his information been received by him in his capacity as a grand juror he would be privileged to refuse to give it to a succeeding grand jury or even to the grand jury upon which he was sitting.

30 Counsel argues that a grand juror has that privilege either in the grand jury in which he sits or in a subsequent grand jury on the ground that a grand juror is a law enforcement or prosecuting officer. Upon this we do not rule, which is to say that we do not concede that to be sound.

40 So far as the contention that the respondent was entitled to decline to answer on the ground that the information in his possession had been given to him in confidence, it is true that text writers and commentators have written and stated that there is such a privilege. We know of no authority or adjudica-

tion to that effect, and the conclusions or statements of the text writers we think, at least, are open to such argument that they should not be regarded as binding upon this Court.

For these reasons the motion to dismiss the petition will be denied and exceptions allowed.

10

MR. BROWN: May I make an inquiry? I gathered from your remarks or expressed reasons for denying the motion the inference, at least, that the Court was of the feeling that the witness had to state his reasons for refusing to answer at the time of his refusal. I don't know whether your Honor is so ruling.

JUDGE WARKE: No. You argued, as I understood your argument, that the motion was based on the proposition that as a grand juror he had received this information and that as a grand juror he was not obliged to disclose it, but he hasn't said that anywhere. It doesn't appear in the record nor from the testimony here. It does appear that he was a grand juror.

20

MR. BROWN: It is my contention that he doesn't have to give his reason. A mere refusal may be explained later.

30

JUDGE WARKE: That is right. And at this time it has not yet been explained.

40

JOSEPH SCHWARTZ, the respondent, called in his own behalf, being duly sworn, testifies as follows:

DIRECT EXAMINATION.

10 BY MR. BROWN:

Q. Mr. Schwartz, you are the respondent or defendant in this proceeding?

A. I am.

Q. Where do you reside?

A. 31 South Weymouth Avenue.

Q. Ventnor City?

A. Yes, sir.

Q. This county?

20 A. This county.

Q. Were you a member of the grand jury organized and sworn to serve during the May Term of the Court of Oyer and Terminer of 1943?

A. I was.

Q. During the course of your service as a grand juror did you come into possession of some numbers slips or tickets, so-called?

A. I did.

30 Q. Do you remember about when it was that you came into possession of them?

A. I would say they started coming in in early July.

Q. Was that during the term of your service as a grand juror?

A. Yes, sir.

Q. Those slips were given to you by one or more persons, I assume?

A. They were.

40 Q. Did the person or persons who gave you the

slips and information pertaining to them know that you were a grand juror?

MR. McALLISTER: I object. If your Honors please, not only is it leading but I think it calls for a conclusion.

10

JUDGE WARKE: I will overrule the objection. He may answer that, if he knows.

THE WITNESS: It was only because of that fact that I was a grand juror that they were given to me.

BY MR. BROWN:

Q. Before the numbers slips or tickets or whatever it was that you had that were given to you, did you have any conversation or understanding respecting them as to the use to which they would be put? 20

A. I made the statement when I was first approached that I intended to use that information, if I found it necessary, in the grand jury.

Q. Was it given to you thereafter without further understanding?

A. Oh, no. They wanted it distinctly understood whether they would be forced to appear to make that evidence or forced to appear to swear that they had purchased them, and I assured them that it wouldn't be necessary. 30

Q. Were they then delivered to you after having had that understanding?

A. Yes, sir.

Q. Did you disclose to the grand jury, of which you were a part, at some later date thereafter that you had them? 40

A. Some of the grand jurors saw them; and also, I disclosed them among other things when the Prosecutor was out of the room when I was making reports of information.

Q. Are you talking about in the grand jury room?

A. In the grand jury room.

10 Q. Did this information come to you at one time or on repeated occasions during your service as a grand juror?

A. On a number of occasions.

Q. And each time that you got the information did you disclose it to the grand jury, the fact that you had it?

A. No; I believe I disclosed it twice to the grand jury.

20 Q. In other words, it was accumulated and disclosed on at least two occasions?

A. That is right.

Q. Was the matter of this information a topic of discussion and consideration by the grand jury on which you served?

A. Yes, to this extent: they wanted to know —

Q. (Interrupting) I didn't ask you to what extent; I asked you whether or not it was the topic of consideration and discussion.

A. It was.

30 Q. The term of the grand jury on which you served continued until what date?

A. Our last meeting was on November—no, October 6, and I believe the new jury was sworn in on the 13th of November.

Q. You say it closed on October 6. Do you mean that was the last meeting?

A. That was the last meeting of the jury on which I served. Just the date of its dying, I don't know.

40 Q. When did the term on which you served as a grand juror begin? Do you know the date?

A. I think May 11.

Q. 1943?

A. Yes, 1943.

Q. After you had gone out of office as a grand juror were you subpoenaed to appear before the present grand jury for the October term?

A. I was.

10

Q. Were you subpoenaed to appear once or more than once?

A. I appeared twice.

Q. Did you appear on both occasions in answer to the subpoena?

A. I did.

Q. On what dates did you appear before this present grand jury?

A. November 3 was the first one, and I believe November 17 to be the second one.

20

Q. Now, it appears that on the latter occasion, November 17, it has been testified that you were asked certain questions. I want to read the questions and the alleged answers and ask you in each instance whether or not they were the questions asked and whether or not you replied as recorded:

"Question: Mr. Schwartz, the Grand Jury has requested your appearance here today in order that we again can ask about the number slips which you had in your possession on or about October 5th. My question is from whom did you get those slips?"

30

Answer: I have no statement." Is that correct, as you recollect it?

A. I would recollect that to be substantially the question of the answer I gave.

Q. Next question: "I am asking you now from whom did you get those slips? Answer: I refuse to state."

A. I believe that is correct.

Q. The next question is: "You also stated one 40

time at least that certain information had come to your knowledge concerning the operation of the law enforcement agencies in the City and County from certain City and County employees, whose names at that time you refused to give because they might lose their jobs. I ask for the names of those City and
10 County employees. Answer: I not only said they might lose their jobs, but it was given to me with the distinct understanding that I would not reveal the source and for that reason I refuse to answer that question."

A. That is substantially correct, sir.

Q. "Question: I would like to admonish you, Mr. Schwartz, this Grand Jury has a right to have that answer legally and you have a perfect right to give their names. I assure you this Grand Jury would
20 not reveal their names, and they would not lose their jobs. I ask again for those names. Answer: I am very sorry I will not give it to you. I have not been relieved from my promise not to reveal their names."

A. That is substantially correct, sir.

Q. Now, before going to the remaining question I want to ask you whether or not prior to the asking of those questions, either on the 17th or on November 3, whether or not it had been revealed to this present
30 grand jury that you were a member of the grand jury previously, just preceding?

MR. McALLISTER: I didn't understand the question. I object to that. I don't see how this witness could possibly know.

MR. BROWN: Suppose he stated it to him?

JUDGE WARKE: Just a minute, Mr. Brown.

MR. BROWN: I am sorry.

MR. McALLISTER: If it was within the knowledge of this witness, but there are a lot of things that go on before the grand jury that are necessarily secret.

JUDGE WARKE: If he doesn't know he may say so.

10

THE WITNESS: I do know. I notified and made that statement on November 3rd when I was there the first time and it is, I believe, that I also brought that out on November 17. I am not so certain of that.

JUDGE WARKE: In the opening meeting, you mean?

20

THE WITNESS: In the opening meeting.

BY MR. BROWN:

Q. I suppose you mean the meeting of the grand jury?

A. Yes, when I was there as a witness.

Q. I show you subpoena tickets that have just been produced from the office of the sheriff —

30

MR. McALLISTER: We will admit them, Mr. Brown.

Q. (Continuing)—and ask you whether or not they are the subpoenas which were served upon you for your two appearances before this present grand jury. (Hands subpoenas to the witness.)

A. I believe they are.

40

Q. On the subpoena calling you to appear on November 3 there is inserted in the subpoena this command: "And that you bring with you and produce at said time and place all number slips, coupons or tickets which have come into your possession since May 11, 1943 to date, and particularly that
10 you bring with you and produce at said time and place all number slips, coupons or tickets which came into your possession on or about the 5th day of October, A.D., 1943." Do you know why that date of October 5 appears in the subpoena?

A. That was the night before our last meeting.

Q. You mean the last meeting of the jury on which you sat?

A. That is right.

Q. And during the meeting of October 6 did you
20 or did the grand jury, of which you were a part, consider numbers slips or information which you had in your possession pertaining to them?

A. I came —

Q. (Interrupting) That requires only yes or no, whether they considered it.

A. I don't know whether I can answer it that way. My recollection is that the jury did not consider them, but the Prosecutor had continually demanded them.

30 Q. Had you given them to the Prosecutor?

A. I did not.

Q. When you appeared on November 3 did you have a certain number of numbers slips or tickets with you?

A. I did not.

Q. Were they called for by the grand jury?

A. They were called for under that subpoena.

Q. I mean, after you got in the grand jury room did they call for numbers slips?

40 A. Yes, sir.

Q Did you explain where they were or why you didn't have them to produce?

A. I did not; I merely read a statement —

MR. McALLISTER: I think he has answered that question.

10

THE WITNESS: (Continuing)—stating that they were out of my possession.

MR. McALLISTER: I think he has answered the question. Just a minute, Mr. Schwartz.

JUDGE WARKE: You volunteered. All right, that is his answer.

MR. BROWN: May I have read the answer that you have. 20

(The stenographer reads as follows:

“Question: Did you explain where they were or why you didn't have them to produce?

“Answer: I did not; I merely read a statement —

“MR. McALLISTER: I think he has answered that question.

“THE WITNESS: (Continuing)—stating that they were out of my possession.”) 30

BY MR. BROWN:

Q Then do I understand that by that that you explained to the grand jury that you did not have them to produce?

A. I did.

Q. On the subpoena which called you to appear on the 17th of November you are directed to bring with 40

you and produce at said time and place any documentary information or other papers which you may have in your possession concerning any violation of the criminal law which has come to your knowledge or attention. Now, on the answering of that subpoena did you take with you any documentary evidence?

A. I did.

Q. During that proceeding did you deliver some of the information to the Prosecutor in the presence of the grand jury?

MR. McALLISTER: If your Honors please, I object to the question because I think we are going far afield. We are going over all the testimony that this man gave before the grand jury. It seems to me that we were limited to the questions and answers that are alleged in the petition and we are going into no more than we attempted to put in this morning by putting in the whole of the testimony of Mr. Schwartz at the hearing on November 17.

(Argument by counsel.)

JUDGE WARKE: I think this line is evidential on the question of intent. I think it is all right so far. Answer the question.

THE WITNESS: I did

BY MR. BROWN:

Q. When you were asked these questions that I repeated to you and you made answers refusing to disclose the names and identities of the parties who had given you certain information, what was your

reason for not answering those questions and revealing the names and identities of the persons?

A. First —

Q. (Interrupting) I am talking now about just the questions I have asked you pertaining to the names and identities of the persons.

A. They were confidentially imparted to me as a grand juror. I had no evidence to produce, and the information contained was of such a nature that I didn't feel free to state it in front of the Prosecutor. 10

Q. I haven't come to the last question and answer yet. I merely am asking you now why you refused to reveal the names and identities of the informers, the persons who had given you the information.

A. Because they were given to me in confidence as a grand juror, and I promised not to reveal the source. 20

Q. Now, you were later asked, were you not, this question by the foreman of the grand jury, or it has been characterized as a question: "Mr. Schwartz, the Grand Jury is open and ready to get any information or suggestion you have at hand, but have unanimously voted that any statements that you have to make, whether it be hearsay or direct evidence, will be made in the presence of the Prosecutor and his assistants. Answer: Mr. Foreman, I decline to give the information." Now, did that occur as I have related it? 30

A. Yes, sir.

Q. Now, will you tell us why it was that you declined to give the information of that statement to the foreman?

A. I had explained to the jury rather lengthily why I did not intend to reveal those names and my reasons for them, for not revealing them. First, that I received the information as a grand juror 40

and I promised not to reveal it; that the Prosecutor knew that I had those as a grand juror. Secondly, that the information that I had to reveal contained considerable names of rather prominent County and City officials and I did not care, not being evidence, I did not care to impart that to the open jury with
10 the Prosecutor and the stenographer there, and stated my fears and based it on the Ogilvie matter, and related in detail as to what happened to Ogilvie, and I felt I would be jeopardizing my future if I did so state. Secondly. Thirdly, I should say, I told the jury in the presence of the Prosecutor that there had been a threat made against me of such importance and from such direction that I felt it was necessary for me to consult my personal attorney as to where I stood, and after consulting my at-
20 torney and with his advice I felt justified in not answering those questions.

Q. Now did you tell the jury who your attorney was?

A. I did.

Q. Who was your attorney?

A. Mr. Moore.

Q. For how long has he been your personal counsel?

A. About twenty years, I would say.

30 Q. Did you consult him prior to your appearance on November 17 about the matter of your appearance on that day?

A. Yes, sir.

Q. Was that before or after your appearance of November 3?

A. It was after my appearance of November 3.

Q. Was that before or after you had heard of this so-called threat against you?

A. It was after I heard of the so-called threat.

Q. Who informed you of the threat that had been made against you?

A. Charles Rupp.

Q. When you went to see Mr. Moore did you inquire of him whether or not you could be compelled to reveal the names and identities of your informers who had given you the information?

10

A. I didn't ask him about that, and he expressed himself that the less I said the better. That was the import of his advice under the circumstances.

Q. Did he advise you whether or not you could be required to give the names and identities?

A. I did, and he didn't think so.

Q. He didn't think what?

A. That I was required to give those names.

Q. Did you say anything to him about your rights pertaining to the giving of information to the grand jury in the presence of the Prosecutor and his staff?

20

JUDGE WARKE: I think you should reframe the question. Do you mean to say that you asked him about your right to have the Prosecutor excluded?

MR. BROWN: That is what I mean.

BY MR. BROWN:

30

Q. Did you ask Mr. Moore for his advice as to whether or not you could be required to give testimony in the grand jury room in the presence of the Prosecutor and his staff?

A. We discussed that matter among other things, and I gathered from his advice that the less I said the better, in front of the Prosecutor.

JUDGE WARKE: Is that responsive?

40

BY MR. BROWN:

Q. Do you recall what Mr. Moore advised you in that respect?

A. My impression of it was that if the Prosecutor and the staff would remain in the building —

10 Q. (Interrupting) In the building or the room?

A. In the room, that I should not respond.

Q. Now, did you have this advice in mind when you gave these answers to the questions which you refused to answer?

MR. McALLISTER: I object. Is that a defense to this? Suppose he did follow the advice?

20 JUDGE WARKE: I would like to have a more clear understanding of what the advice is that we are talking about. Do you mean that Mr. Moore counseled you not to testify in the grand jury if the Prosecutor and his staff were there?

THE WITNESS: Yes, sir, on the matter of the information that I had.

BY MR. BROWN:

30 Q. Concerning what?

A. Concerning the corruption or the probable corruption both in the City and County.

Q. The County as a whole or what?

A. The law enforcement agencies of the City and the County.

JUDGE WARKE: Gentlemen, it is perfectly obvious that this is a matter that we cannot hope to conclude today.

(Sidebar discussion.)

MR. BROWN: I offer in evidence these copies of these subpoenas to Joseph Schwartz in lieu of the originals. One is dated November 3, 1943, and the other subpoena is dated November 17, 1943.

10

(The subpoenas of November 3 and 17, 1943 are received in evidence and marked Exhibits R-1 and R-2 respectively.)

JUDGE WARKE: The hearing will be continued until Thursday afternoon on the 13th in the court room in Atlantic City.

MR. BROWN: I think it might appear on the record that the parties agree to that arrangement. 20

MR. McALLISTER: That is right.

(The hearing is adjourned at 4:05 p.m.)

30

40

SECOND DAY.

10 (Guarantee Trust Building, Atlantic City, N. J.,
January 13, 1944, 2 p.m.)

(Sidebar discussion.)

JUDGE WARKE: Recall the witness.

20 JOSEPH SCHWARTZ, the respondent, resumes
the stand, having been previously sworn, testifies
further as follows:

DIRECT EXAMINATION (continued).

BY MR. BROWN:

30 Q. Mr. Schwartz, on Monday when you were on
the stand you told the Court, as I recall it, that the
information which was being discussed before the
grand jury had been obtained by you from one or
more sources and that you had refused to disclose
the identity or names of your informers. Will you
tell me how many informers, so-called, supplied you
with the information?

A. Three or four.

Q. You said that the first time that you began to
acquire this information was in July of 1943 during
the period of the session of the grand jury of which

you were a part. Will you tell me whether or not you received all your information in July?

A. I received—it started in early July with the number slips, but I received other information prior to that.

Q. Did you receive the so-called number slips direct from your informers?

10

A. I did not.

Q. On how many occasions were numbers slips delivered to you?

A. Five or six times.

Q. What was the medium of delivery?

A. The majority of them I procured myself by going directly to a third person.

Q. When you say “a third person,” was that third person your informer?

A. No, sir.

20

Q. Was the third person the person to whom your informer sent you to get them?

A. Yes, sir.

Q. When they were handed to you by this third person how were they arranged as delivered?

A. Handed to me in an envelope.

Q. Was the envelope open or sealed?

A. It was open.

Q. Now, how else or through what other medium did you receive it?

30

A. On another occasion a messenger called at my shop and handed it to me. On another occasion —

Q. (Interrupting) Before you leave the messenger, did you know the messenger?

A. No, sir.

Q. Do you know the messenger's name?

A. No, sir.

Q. Do you know of your own knowledge who sent the messenger?

A. No.

40

Q. I suppose you are able to infer who might have sent it?

A. No, sir.

Q. Do you know, as a fact, that the person you have in mind sent it?

A. I believe so.

10 Q. Do you know it to be a fact that that person did send it?

A. No, sir.

Q. When this messenger delivered this batch of slips to you, in what state were they?

A. They were delivered by the messenger. They were in a plain envelope, sealed.

Q. Did you receive slips at any other time through a different medium than what you have outlined?

20 A. Yes, sir. At another time I found a package of them on my desk, which had been delivered to my shop in my absence.

Q. Do you know who delivered them?

A. I do not.

Q. Do you know how they got on your desk?

A. They were taken by a sister and placed there by the messenger.

Q. Do you know of your own knowledge who delivered them to your sister to be delivered to you?

A. No.

30 Q. Now, were slips at any other time delivered to you through a different medium than what you now describe?

A. Yes, sir.

Q. Tell us about it.

A. On the night of October 5th I found a package of them on the floor at my home that had been put in the letter slot of the door.

Q. Do you know who put them through the letter slot in the door?

40 A. I do not know.

Q. I mean, as a matter of fact any more than mere inference?

A. I don't know who put them there.

Q. Were they the number slips which you had with you when you appeared at the session of the grand jury on October 6, 1943?

A. Yes, sir.

10

Q. These slips that were dropped through the door and that you found on the floor of your home, in what state were they when you picked them up off the floor?

A. They were in a sealed, plain envelope.

Q. Did the envelope have your name on it?

A. It didn't have anything on it.

Q. Did you solicit from anyone the delivery of number slips, if obtainable, to you on October 5?

A. Not on October 5; a day or two prior to that.

20

Q. Now, did you solicit that information from the person or persons from whom you had previously gotten information?

A. No, sir.

Q. And for what purpose did you solicit such slips?

A. Just a week or so prior to this particular time there appeared in the newspapers some statements by the Prosecutor's office and a statement by Acting Chief Weakley in which in both instances they were replies to some demands made by Justice Colie that gambling would have to stop. If my memory serves me right, the newspaper article went on to say —

30

MR. McALLISTER: (Interrupting) I object to this, it is irrelevant.

BY MR. BROWN:

Q. As a result of the newspaper article that you read what did you do?

40

A. I desired to find out whether gambling and numbers had ceased, because I knew we were going to have ——

MR. McALLISTER: (Interrupting) I object.

10 THE WITNESS: (Continuing)—we were going to have one more ——

MR. McALLISTER: (Interrupting) I object. He has answered the question, if your Honors please.

MR. BROWN: To your way of thinking. I don't think he has, to mine, and if there is any question about it I beg reference to the question.

20 JUDGE WARKE: I think he may go on. He was asked why he sought these slips.

THE WITNESS: There was going to be a final meeting of the grand jury and I wanted to assure myself and, if necessary, to prove to the jury that the newspaper articles really didn't mean anything, that there was gambling going on, and for that reason I made that attempt.

30 BY MR. BROWN:

Q. In soliciting the delivery of such slips, if obtainable, did you have any understanding with the person you solicited them from as to the use they would be put and to his involvement in it?

MR. McALLISTER: I object. It is irrelevant and immaterial.

40 (Argument by counsel.)

JUDGE WARKE: It is consonant with the theory of the respondent's reply. I will overrule the objection.

MR. BROWN: Please repeat the question.

(The stenographer reads the question as follows: 10

"Question: In soliciting the delivery of such slips, if obtainable, did you have any understanding with the person you solicited them from as to the use they would be put and to his involvement in it?")

THE WITNESS: Yes, sir.

BY MR. BROWN:

Q. What was the understanding which you had 20
with him?

MR. COULOMB: I object, if your Honors please,
on the same grounds.

JUDGE WARKE: The same ruling.

THE WITNESS: The understanding was that
I would not reveal the source. 30

BY MR. BROWN:

Q. Was that understanding had before you received the slips?

A. Yes, sir.

Q. Had you told your informer what you proposed to do with the slips?

A. Yes, sir.

MR. COULOMB: Objected to on the same grounds, if your Honors please.

JUDGE WARKE: I will overrule the objection.

BY MR. BROWN:

10

Q. What did you tell your informer you wanted to do with them?

MR. COULOMB: Objected to on the same grounds.

JUDGE WARKE: Sustain the objection for repetition.

20

MR. BROWN: That isn't repetition.

JUDGE WARKE: He said he told the man that he wanted to take them before the grand jury.

MR. BROWN: If that is in the record that is all I want to prove.

BY MR. BROWN:

30

Q. Mr. Schwartz, when you were on the stand on Monday and we were talking about the information and the slips, you were asked this question: "Was it given to you thereafter without further understanding?" And you made this answer: "Oh, no. They wanted it distinctly understood whether they would be forced to appear to make that evidence or forced to appear to swear that they had purchased them, and I assured them that it wouldn't be necessary." I want to know if you recall that question and answer, do you?

40

A. Yes.

Q. Will you please elucidate on that answer and tell us what you meant —

MR. McALLISTER: (Interrupting) I object.

JUDGE WARKE: Wait a minute.

10

BY MR. BROWN:

Q. (Continuing)—when you said they wanted it distinctly understood whether they would be forced to appear to swear that they had purchased them?

MR. McALLISTER: That is the very crux of the situation, if your Honors please. He has testified, and the Court must pass upon on what he meant. This is not cross-examination of this witness; this is direct testimony. 20

JUDGE WARKE: It is a little difficult to see what elucidation is needed to so obvious a proposition, isn't it?

MR. BROWN: Does your Honor overrule the question as asked?

JUDGE WARKE: I think so, for repetition. 30

BY MR. BROWN:

Q. When you had made this understanding, to which you referred in that answer, did you know how your informer was to get the information that you solicited?

A. I did not.

Q. Did you know where he was going to get it?

40

A. I did not.

Q. Did you know from whom he was going to get it?

A. I did not.

Q. Do you know whether or not the informer purchased the slips himself or through someone else?

10 A. I don't know.

Q. Did the informer tell you how he would get the information that he would deliver to you?

A. No, sir.

Q. Has he ever told you how he got it?

A. I have never seen him from the day I first met and spoke to him.

Q. When you said they wanted it distinctly understood that they wouldn't be forced to appear to swear that they had purchased them, by "they" whom did you mean?

20 A. Anyone who might have gone out to buy them.

Q. You referred in your testimony on Monday to some fear that had been instilled in your mind as a result of a threat which had come to you through a Mr. Charles Rupp. Will you state to the Court what it was that Mr. Rupp told you that you characterized a threat that put fear in your mind?

30 A. Mr. Rupp made mention of the fact in a friendly way that a threat had been made and that he warned me to be very careful of my behavior and anything I might have to say, and I asked him why, and on prodding he finally told me that a prosecutor stated —

Q. (Interrupting) A prosecutor?

A. Yes, sir; that a prosecutor stated that they would take care of me.

Q. Did he tell you who the prosecutor was?

A. He did.

Q. Who was it?

40 A. Prosecutor Stringer.

Q. Do you know Mr. Stringer?

A. Yes, sir.

Q. What is Mr. Stringer's official position in this county, if you know?

A. He is an assistant prosecutor.

Q. Had he as such assistant prosecutor appeared during the grand jury sessions of the May term when you were serving? 10

A. He took over one complete session that I know of.

MR. BROWN: You may cross-examine.

CROSS-EXAMINATION.

BY MR. McALLISTER:

Q. Mr. Schwartz, you say there were three or four informers? 20

A. I did.

Q. How many informers were there that you had that were giving you the information on the number slips?

A. Three or four of them.

Q. Can you tell us now whether there were three or whether there were four?

A. There were four. 30

Q. Were they male or female?

MR. BROWN: I object. They have no more right to elicit the information as to the identity or description of the informers in this proceeding than they had before the grand jury.

MR. McALLISTER: Merely for the purpose of testing his credibility.

MR. BROWN: That isn't your purpose.

MR. McALLISTER: It is my purpose. You aren't a mind-reader yet, Mr. Brown.

10 JUDGE WARKE: Since the objection is pressed, considering the character of this investigation, I am going to sustain the objection. It is a subject for investigation by the grand jury, perhaps.

BY MR. McALLISTER:

Q. Mr. Schwartz, you said on your direct examination by Mr. Brown that you only saw your informer once and after that the slips or number slips were delivered to you by messengers, is that correct?

20 A. I saw the informer —

Q. (Interrupting) I asked you if that was correct?

JUDGE WARKE: Read the question, Mr. Stenographer.

(The stenographer reads the question as follows:

30 "Question: Mr. Schwartz, you said on your direct examination by Mr. Brown that you only saw your informer once and after that the slips or number slips were delivered to you by messengers, is that correct?")

THE WITNESS: Those slips that I received —

MR. McALLISTER: Is that correct?

THE WITNESS: On October 5th would be correct.

40 JUDGE WARKE: Read the question again, Mr. Stenographer.

(The stenographer reads the question as follows:

“Question: Mr. Schwartz, you said on your direct examination by Mr. Brown that you only saw your informer once and after that the slips or number slips were delivered to you by messengers, is that correct?”)

10

THE WITNESS: The number slips that I received on October 5th, I saw that informer once.

BY MR. McALLISTER:

Q. Did you see any of the other informers more than once?

A. Yes, sir.

Q. How many times did you see them?

A. Oh, three or four times.

20

Q. On the occasion when the number slips were delivered to you by a third person, it was about what date?

A. It is hard for me to recall that. If I had my papers I think I could give you pretty nearly the dates.

Q. Can you give us an approximate date?

A. I received approximately four or five batches starting with early July until October 5th.

Q. And that third person delivered the number slips to you personally?

30

A. I went for them and he delivered them personally to me.

Q. The third person?

A. That is right.

Q. Who was the third person?

MR. BROWN: I object.

JUDGE WARKE: Again considering the char-

40

acter of this proceedings I will sustain the objection on the ground of immateriality.

BY MR. McALLISTER:

10 Q. You mentioned that a messenger delivered some number slips to you. Was that messenger a regularly employed messenger? A Western Union boy, for instance, or anything like that?

A. No, he was not. The one time that it was brought that way it was not a Western Union messenger.

Q. Was it any other messenger regularly employed as such?

A. I wouldn't know.

20 Q. How many informers did you have concerning corruption that you refused to testify to in the grand jury, that you received from county and city employees?

MR. BROWN: I object, if your Honors please.

JUDGE WARKE: The question isn't right.

MR. McALLISTER: I will withdraw the question and reframe it.

30

JUDGE WARKE: All right.

BY MR. McALLISTER:

40 Q. You were asked this question in the grand jury room: "Question: You also stated one time at least that certain information had come to your knowledge concerning the operation of the law enforcement agencies in the City and County from certain City and County employees, whose names at

that time you refused to give because they might lose their jobs. I ask for the names of those City and County employees." How many employees are there that came to you?

MR. BROWN: I don't know the materiality or relevancy of that.

10

JUDGE WARKE: I will permit it, it is cross-examination.

THE WITNESS: There were three men in mind when I gave that answer.

BY MR. McALLISTER:

Q. When was the conversation with Mr. Rupp concerning the threat? 20

A. That was the Tuesday prior to November 3rd. Let us see, it was about seven or eight days prior.

MR. BROWN: November 3rd?

THE WITNESS: November. No. Seventeenth. I beg your pardon. The second subpoena.

BY MR. McALLISTER:

30

Q. That was between the time of November 3rd and November 17th then, I take it?

A. That is correct.

Q. Where did that conversation take place?

A. The conversation took place at a lunch on Tuesday afternoon.

Q. Where?

A. At Hackney's restaurant.

Q. Had you been served with a subpoena to ap-

40

pear before the grand jury when that threat was told to you?

A. Not when that conversation took place.

Q. With Mr. Rupp?

A. Yes.

10 MR. BROWN: I presume you refer to the subpoena to appear on the 17th of November?

MR. McALLISTER: Yes, because it was subsequent to the threat.

BY MR. McALLISTER:

Q. Subsequently you were served with a subpoena to appear?

20 A. That is right.

Q. Did it enter your mind to notify the Court or any judge of the court about it?

A. When I received the second subpoena it was plenty that entered my mind. So much so that I went to see my attorney.

Q. Was the threat the reason you went to see your attorney?

A. After I received the second subpoena.

Q. Did you go to the Court?

30 A. I did not.

Q. Why not?

MR. BROWN: I object, if your Honors please, it is irrelevant and immaterial.

JUDGE WARKE: I will overrule the objection on the ground of testing his credibility, and allow you an exception.

40 (Argument by counsel.)

MR. BROWN: Exception.

JUDGE WARKE: Repeat the last few questions and answers, and the question pending.

(The stenographer reads as follows:

“Question: Was the threat the reason you 10
went to see your attorney?

“Answer: After I received the second subpoena.

“Question: Did you got to the Court?

“Answer: I did not.

“Question: Why not?’’)

THE WITNESS: My attorney did not so advise it.

BY MR. McALLISTER:

20

Q. Did you ask him about it?

A. I did, and I told him about it.

Q. He told you not to go?

A. I didn't say that. He didn't advise it.

Q. What did he say?

A. He said, “Just don't say anything.”

Q. Were you worried about this threat?

A. I was considerably upset about it when I got 30
the second subpoena.

Q. Was Mr. Stringer before the grand jury on
November 3rd when you were a witness the first
time?

A. On November 3rd?

Q. Yes.

A. I don't think he was; I don't recall.

Q. Was he before the grand jury as an assistant
prosecutor on November 17th?

40

MR. BROWN: I object unless you confine it to the period of time when the witness was in the grand jury room.

MR. McALLISTER: I am asking him then while he was a witness.

10

JUDGE WARKE: The question is being re-framed?

BY MR. McALLISTER:

Q. Was Mr. Stringer before the grand jury on November 3rd while you were a witness there?

MR. BROWN: That is repetition.

20

MR. McALLISTER: I didn't ask him that before.

MR. BROWN: Yes, you did.

JUDGE WARKE: The Court itself doesn't remember what the language of the first question concerning the presence of the assistant prosecutor and the witness in the jury room on November 3rd was; therefore, I will permit it.

30

THE WITNESS: I don't think so.

BY MR. McALLISTER:

Q. Was Mr. Stringer before the grand jury as an assistant prosecutor on November 17th when you were a witness there?

A. I don't think so.

Q. Don't you know he wasn't?

A. I am not absolutely positive.

40

Q. Don't you remember that Mr. Coulomb and I were there?

A. I remember you two very well.

Q. And Mr. Coulomb and I were there on November 3rd, weren't we?

A. That is right.

10

MR. McALLISTER: That is all.

MR. BROWN: That is all.

BY JUDGE WARKE:

Q. You were a grand juror when you received these number slips from your informers, weren't you?

A. I was, Judge.

20

Q. Do you know much about numbers writing or number slips?

A. I don't know the first thing about them.

Q. Do you know whether they were number slips?

A. Yes, sir.

Q. How do you know that?

A. I have seen others that had them.

Q. There was no way of telling from the slips themselves whether they had actually been used in play, was there? Can you tell from the slip itself whether it has ever been used?

30

A. My understanding of the numbers game is that if you have the number you take it back to the place of purchase and then cash it in.

MR. BROWN: If you are lucky.

THE WITNESS: (Continuing) But if there were any winning numbers on the slips I had I don't think they were cashed in.

40

BY JUDGE WARKE:

Q. I mean, you or I, if we knew what they looked like, could write a number slip right here, but it wouldn't have been used in play.

A. That is right.

10 Q. Do you know whether any of the slips you had were used in any play?

A. I don't know how to answer that question. My understanding of it was that the only time you use it in play is when you win.

Q. No. The play comprehends the sale and purchase of the slip and its cashing in or throwing away. You don't know whether these slips were actually ever all from so-called numbers writers?

A. I don't, your Honor.

20 Q. You had confidence in what your informer or informers related to you; you believe what they told you was true?

A. There wasn't much said. They just handed me the number slips.

Q. I understood that some informers, at least, told you or gave you some information, I assume, of criminal activities around here. Did you believe it? Did you believe what they told you?

30 A. I believed the major portion of it, but I have no personal knowledge of it.

Q. And you promised these informers the protection of secrecy?

A. Yes, sir.

Q. And you were a grand juror?

A. Yes, sir.

Q. How long have you known Mr. Stringer?

A. Oh, I have known of Mr. Stringer for the last fifteen years or so.

40 Q. You have known him longer than that, haven't you?

A. Longer than that, perhaps. We had no contact except to say the time of day, and Mr. Stringer would occasionally pick me up and take me uptown in his automobile.

Q. You know who he is?

A. Yes.

Q. Do you have any serious apprehension of any physical violence from Mr. Stringer? 10

A. Not physical; I wasn't afraid of that.

Q. Did you think he was going to start some process of law proceedings against you?

A. I didn't know that he was going to do it, but I felt that he was a member of a law enforcing agency that had power to make things uncomfortable.

Q. You really thought Prosecutor Stringer was going to do something to you?

A. Not necessarily Prosecutor Stringer. 20

Q. What did you fear?

A. My worst fears have been justified; here I am.

MR. McALLISTER: The grand jury did that.

MR. BROWN: I am not so sure of that.

MR. McALLISTER: That is a fact. We have had insinuations enough.

30

JUDGE WARKE: Gentlemen, that is the vice of addressing yourselves to each other instead of to the Court.

BY JUDGE WARKE:

Q. Mr. Schwartz, the number slips that you have had, I think you said there were three or four lots of them, did you take them before the grand jury of which you were a member? 40

A. Yes, sir; I had them in the room there.

JUDGE WARKE: That is all.

MR. BROWN: That is all, Mr. Schwartz.

10 MR. McALLISTER: That is all.

(A short recess is taken.)

CHARLES E. RUPP, called as a witness on behalf of the respondent, being duly sworn, testifies
20 as follows:

DIRECT EXAMINATION.

BY MR. BROWN:

Q. Mr. Rupp, where do you live?

A. Fifty-two hundred Atlantic Avenue, Ventnor?

Q. Do you hold an official position in the County of Atlantic?

30 A. I do.

Q. What is it?

A. Jury Commissioner.

Q. Do you remember telling Mr. Joseph Schwartz the conversation that you had with Mr. William Stringer, one of the assistant prosecutors of this county?

A. Yes.

Q. When did your conversation with Mr. Stringer occur?

40 A. Sometime in the fall.

Q. Of what year, Mr. Rupp?

A. 1943.

Q. Where did it occur?

A. Down in Margate.

Q. Will you tell the Court, please, what the conversation was and how it was broached to you and how it continued?

10

MR. McALLISTER: With whom, Mr. Brown?

MR. BROWN: Mr. Stringer.

THE WITNESS: Mr. Stringer and I had been friends a good many years and during part of the time that we saw each other that evening the conversation drifted around to jurors, and so forth. Mr. Stringer said to me, "What is the matter with Joe Schwartz? He is causing all this trouble. What seems to be the trouble with him?"

20

I said, "Well, I don't know, Bill. I only put them on the jury panels. After they get on there I have no control over them." I said, "I read by the papers and I also know by different people's conversation that Mr. Schwartz has had frequent clashes with the Prosecutor's office but," I said, "outside of that I don't know anything particular in the case."

Bill said, "Well, he certainly seems to be sore at the Prosecutor's office," and with a smile he said, "I guess we can take care of him."

30

This conversation was in a light vein. It wasn't anything serious as far as Bill Stringer and I were concerned, and I didn't say anything about it to Mr. Schwartz for quite sometime, because I didn't think much about it. I often get in conversations about whom I put on juries, and so forth, but sometime later at a luncheon, Rotary Club luncheon, I bumped into Joe.

40

BY MR. BROWN:

Q. You mean Joseph Schwartz?

A. Joseph Schwartz, and I felt that I should warn Joe to be very careful of what he did and what he said, because of the fact that I felt that there was a
10 severe antagonism existing between Schwartz and the Prosecutor's office.

Q. When did your conversation with Mr. Schwartz at this luncheon occur, approximately?

A. It was in November.

Q. Did you know whether or not at the time of this conversation he had already been before the October term grand jury as a witness?

A. I knew he had been there once.

Q. Did you relate to Mr. Schwartz the conversation which you had with Mr. Stringer, as you have
20 related it here to the Court?

A. Not in the beginning I didn't, but Mr. Schwartz wanted to know why I said these things and I said—well, I didn't feel by telling Mr. Schwartz any conversation I had—I thought I just would want to warn him, but upon being pressed for what reason I had for telling Mr. Schwartz this, I told him of the conversation that I had had with Mr. Stringer, and we
30 that Mr. Stringer was interested in any way in this case, but probably he might know some things that it might be well for you to go cautiously.

MR. BROWN: Cross-examine.

CROSS-EXAMINATION.

BY MR. McALLISTER:

Q. You say this conversation with Mr. Stringer was in a light vein?

A. Yes.

10

Q. Where was the conversation?

A. It was in Margate.

Q. Margate is a big place.

A. It was at the Firemen's Log Cabin in Margate.

Q. A social gathering?

A. That is right.

Q. When you say "a light vein," do you mean that you were joking back and forth?

A. Yes, we had been joking back and forth.

Q. As a result did you take the remarks of Mr. Stringer seriously? 20

A. Not at that particular time, no.

Q. Did you say to Mr. Stringer that Mr. Schwartz was going to get him, jokingly?

A. No, I don't recall making that statement.

Q. You say this conversation was in the early fall or during the fall?

A. It was after the May grand jury had convened, had been let out.

Q. It wasn't while Mr. Schwartz was a member of the grand jury? 30

A. No.

Q. Do you recall whether it was before or after November 3, 1943?

A. You mean my conversation with Mr. Stringer?

Q. Yes, bearing in mind —

A. (Interrupting) I should say it was in October, late October, as near as I can recall.

Q. Except that Mr. Stringer said to you, "I think we will take care of Mr. Schwartz, I think we can take 40

care of him," was there anything else said other than that concerning Mr. Schwartz?

MR. BROWN: That isn't what he said at all. He didn't say "I think."

10 MR. McALLISTER: I will withdraw it.

BY MR. McALLISTER:

Q. What did Mr. Stringer say?

A. I testified to that once.

Q. I am asking you on cross-examination again.

A. With a smile he said, "We will take care of Mr. Schwartz."

Q. Did you have a reply to that?

20 A. No.

Q. Did he say anything else about Mr. Schwartz, except that remark?

A. No, that is all.

Q. Did you repeat, as nearly as possible, what you said to Mr. Schwartz concerning what Mr. Stringer had said to you in Margate?

A. After luncheon was over I called Mr. Schwartz—this was sometime after the conversation with Bill Stringer—and I said, "Joe, I would advise you to
30 be very careful in what you say and do from now on, because I think you have antagonized the Prosecutor's office and I don't think there is any too good feeling there between you and the Prosecutor's office." Mr. Schwartz pressed, asked me, what made me say that. I said, "Of course you ought to know, you have been a member of this grand jury, and from newspaper reports and other sources I gather that you and the Prosecutor's office had frequent run-ins." So Mr. Schwartz said, "Well, what further
40 reason, for what reason should I be careful?" And

he pressed me for some concrete reason why he should be careful of what he said and did, and I finally told him of the conversation that I had, and that was the whole story.

Q. What did you tell him about what Mr. Stringer said?

10

JUDGE WARKE: He means the exact words, as near as you can remember.

THE WITNESS: Do you want me to repeat it or do you want to get it from the testimony?

BY MR. McALLISTER:

Q. What did you tell Mr. Schwartz that Mr. Stringer said?

20

A. I told Mr. Schwartz that I had seen Mr. Stringer sometime before, socially, in Margate and that Mr. Stringer had said, "What is the matter with Joe Schwartz causing all this trouble with the Prosecutor's office?" I said, "Bill, I don't know anything about that. I only put them on the juries. After they are on the grand jury I have no control over them."

Q. Will you please tell me —

30

MR. BROWN: (Interrupting) He is doing that.

JUDGE WARKE: He is doing that. This is what you told Mr. Schwartz, isn't it?

MR. McALLISTER: All right. Continue then from there on. I am sorry.

THE WITNESS: Repeat just the last part, please.

40

(The stenographer reads as follows: "I said, 'Bill, I don't know anything about that. I only put them on the juries. After they are on the grand jury I have no control over them.' ")

10 THE WITNESS: Then Mr. Stringer said, "Well, he has been very antagonistic to the Prosecutor's office." Then I said, "Well, I don't know much about that." Then Mr. Stringer said with a smile, "Oh, we will take care of Mr. Schwartz." That is the extent of the conversation.

BY MR. McALLISTER:

Q. What did Mr. Schwartz say to that?

20 A. Mr. Schwartz said, "Well, then, I guess I had better see my attorney."

Q. Did you tell Mr. Schwartz, in relating the conversation you had with Mr. Stringer, that it was in a light vein?

A. Yes.

MR. McALLISTER: That is all.

MR. BROWN: That is all.

30

40

CHARLES S. MOORE, called as a witness on behalf of the respondent, being duly sworn, testifies as follows:

DIRECT EXAMINATION.

BY MR. BROWN:

10

Q. Mr. Moore, where do you live?

A. At the present minute I am living at the Amsterdam Apartments in Atlantic City.

Q. You are a counsellor-at-law of this State, are you not?

A. Yes.

Q. And you have been such for how long?

A. Thirty some years. I don't know exactly, Mr. Brown, to tell you the truth. 20

Q. Did you ever hold a public office in the county?

A. Yes.

Q. What was that office?

A. Prosecutor of the Pleas.

Q. Over what period of time did you act in that capacity?

A. March 17th, I think it was, 1913, when I went into office, and held it for five years.

Q. Do you know Mr. Joseph Schwartz? 30

A. Yes.

Q. Have you heretofore represented Mr. Schwartz as his personal counsel?

A. Yes.

Q. For how long a period of time have you acted as personal counsel for Mr. Schwartz?

A. I would say around twenty years.

Q. Did you know that Mr. Schwartz was a member of the grand jury of the May term, 1943, in this county? 40

A. Yes.

Q. Did there come a time after the termination of the sittings of that body, the May term, that Mr. Schwartz came to you for advice respecting his summons to appear before the October term, 1943, grand jury?

10 A. Yes.

Q. Do you recall about when it was that Mr. Schwartz consulted you?

A. It was shortly prior to the 17th of November, last.

Q. At that time did you advise Mr. Schwartz with respect to his personal rights and with respect to the giving of his testimony in answer to the subpoena that summoned him to appear before the grand jury on November 17, 1943?

20 A. Yes.

Q. Prior to giving that advice had you examined the subpoena that had been served upon him?

A. Yes.

Q. That was a subpoena duces tecum, wasn't it?

A. Yes.

Q. Did you also at that time examine and confer with Mr. Schwartz respecting the information that he had at hand?

A. Yes.

30 Q. That he might be called upon to produce or testify about?

A. Yes.

Q. Did Mr. Schwartz reveal to you the source—I don't mean by identifying the names and the descriptions or identities of the source of his information—but did he tell you how he came in possession of the information, generally speaking, without revealing identities?

A. He stated that it came to him while he was serv-

ing as a grand juror during the May term of court, 1943.

Q. Now, did Mr. Schwartz ask you on that occasion whether or not he was obliged by law to reveal the name or identity of the informer or informers who had supplied him with the information?

A. Repeat the question, Mr. Stenographer.

10

(The stenographer reads the question as follows: "Question: Now, did Mr. Schwartz ask you on that occasion whether or not he was obliged by law to reveal the name or identity of the informer or informers who had supplied him with the information?")

THE WITNESS: Yes.

20

BY MR. BROWN:

Q. What did you advise him?

A. I advised him that he was not required to give the names of the informers.

Q. Did Mr. Schwartz ask for your advice as to whether or not as a matter of law he could be required to give or divulge any or all of the information that he had in his hands and whether or not it was legal information, legal evidence?

30

A. Repeat that.

(The stenographer reads the question as follows: "Question: Did Mr. Schwartz ask for your advice as to whether or not as a matter of law he could be required to give or divulge any or all of the information that he had in his hands and whether or not it was legal information, legal evidence?")

JUDGE WARKE: Isn't that involved?

40

THE WITNESS: The answer is yes.

BY MR. BROWN:

Q. What did you advise him?

10 A. I advised him as to some of it that it was proper to give it to the grand jury, and as to most of it that it was not proper evidence. It was all hearsay evidence as I called it.

Q. Did Mr. Schwartz ask you whether as a matter of law he could be compelled to reveal certain information in his possession respecting the mal-administration of the enforcement of the laws in the county, both by city and county enforcement agencies?

MR. McALLISTER: I object.

20

JUDGE WARKE: Read the question please, Mr. Stenographer.

(The stenographer reads the question as follows:
30 "Question: Did Mr. Schwartz ask you whether as a matter of law he could be compelled to reveal certain information in his possession respecting the mal-administration of the enforcement of the laws in the county, both by city and county enforcement agencies?"")

MR. BROWN: Add to that question: while the Prosecutor and members of his staff were present in the grand jury room.

MR. McALLISTER: I object for this reason.
The petition alleges certain questions that this respondent refused to answer before the grand jury as contained in Paragraph 5 in the petition, and that
40 is the sole question that this Court must determine,

whether or not he was contemptuous of this Court when he refused to answer those questions. If this witness gave Mr. Schwartz advice on the questions contained in this petition I have no objection to it, but to go on and testify here as to all the conversation and all the advice Mr. Moore had given to this respondent is inadmissible, I say. 10

MR. BROWN: The question says what is the certain information.

JUDGE WARKE: That isn't the question. Read the question.

(The stenographer reads the question as follows: "Question: Did Mr. Schwartz ask you whether as a matter of law he could be compelled to reveal certain information in his possession respecting the mal-administration of the enforcement of the laws in the county, both by city and county enforcement agencies, while the Prosecutor and members of his staff were present in the grand jury room?") 20

MR. McALLISTER: "Certain information." What information?

JUDGE WARKE: I think it may be fairly taken the information that is referred to in the question put out by the petition: "You also stated one time at least that certain information had come to your knowledge concerning the operation of the law enforcement agencies in the City and County from certain City and County employees," and so on. 30

MR. McALLISTER: I have to presuppose that that is in that question of Mr. Brown. 40

JUDGE WARKE: If it isn't, it is immaterial. It is in there.

MR. BROWN: It is.

10 MR. McALLISTER: I can't take it in there.

JUDGE WARKE: I will overrule the objection. Repeat the question, Mr. Stenographer.

(The stenographer reads the question as follows:
"Question: Did Mr. Schwartz ask you whether as
a matter of law he could be compelled to reveal cer-
tain information in his possession respecting the mal-
administration of the enforcement of the laws in the
county, both by city and county enforcement agen-
cies, while the Prosecutor and members of his staff
20 were present in the grand jury room?")

THE WITNESS: The answer to that is yes.

BY MR. BROWN:

Q. What did you advise him in that respect?

30 A. I advised him that in view of the fact that the charges involved the Prosecutor's office, as well as the city officials, that the evidence should not be given to the grand jury with the Prosecutor and his staff in the room.

MR. BROWN: You may cross-examine.

CROSS-EXAMINATION.

BY MR. COULOMB:

Q. What were the charges against the Prosecutor's office?

MR. BROWN: I object.

10

MR. COULOMB: I have a right to know.

MR. BROWN: We are dealing with privilege relationship between attorney and client.

(Argument by counsel.)

JUDGE WARKE: We are of the opinion that on the basis of privilege, if nothing else, the objection should be sustained.

20

MR. COULOMB: Exception.

BY MR. COULOMB:

Q. Mr. Moore, did you tell Mr. Schwartz that he was not obliged to give the names of the persons who had delivered to him the number slips, while the Prosecutor was in the room?

30

A. No.

Q. Did you tell him that he was not obliged to give the names of the persons who had brought him certain information concerning the criminal administration of the law, the names of the persons who had brought that information, while the Prosecutor was in the room?

JUDGE WARKE: Change that to the "administration of the criminal law." If you don't under-

40

stand the question, Mr. Moore, have the stenographer read it.

MR. MOORE: I don't seem to. I don't know why.

10 (The stenographer reads the question as follows:)
“Question: Did you tell him that he was not obliged to give the names of the persons who had brought him certain information concerning the administration of the criminal law, the names of the persons who had brought that information, while the Prosecutor was in the room?”)

MR. COULOMB: Maybe I can clear it up.

20 BY MR. COULOMB:

Q. Did you tell Mr. Schwartz that he was not obliged to give the grand jury the names of the persons who had brought him the information concerning the administration of the criminal law, while the Prosecutor was in the grand jury room?

A. I don't know how to answer it, Mr. Prosecutor. I can't answer it yes or no.

30 Q. Did you advise him that he didn't have to give the names? You said you didn't advise him about the names concerning the number slips. Now, I am asking about the persons who told him about this alleged mal-administration of the criminal law. Did you tell him he didn't have to give those names while the Prosecutor is in the room?

A. The answer to that question would be that I told him yes.

Q. Not what the answer would be; was it?

A. Yes.

40 Q. And you distinguish, therefore, between the ad-

ministration of the criminal law, no matter who was involved in it, and the giving of the number slips, in your advice to Mr. Schwartz, is that correct?

A. I don't think that is a fair question.

Q. Did you distinguish or didn't you?

A. Mr. Prosecutor, there were two classes of questions. One related to the information that had been given to him, whether he had been required to give the names of his informers, that was one thing. The second was whether he was required to give testimony, which I advised him was not legal testimony and which involved charges against the city and county officials, in the presence of the Prosecutor and his staff. There were two distinct categories. 10

Q. They were the only two categories?

MR. BROWN: Let him finish. 20

THE WITNESS: I didn't say they were the only ones; I say those two categories of questions. I advised him as to the first that he did not have to give the names of his informers. As to the second class, which involved charges against the Prosecutor's office, I advised him that he was not required to give that at all, but if he wanted to give it he should not give it in the presence of the Prosecutor's staff, because it involved charges against the Prosecutor's office. 30

BY MR. COULOMB:

Q. Why did you advise him that he wasn't obliged to give it at all?

MR. BROWN: I object. I say it makes no difference why he gave the information. The only matter of importance is that did he give that advice. He 40

says he did. Why he gave it is immaterial. It may have been the worst kind of advice in the world. It may have been all wrong, but that doesn't make it material. As a matter of fact, the advice was given to this defendant and this defendant acted on it. That is what makes it important, the fact that this
10 defendant acted upon that advice. Why he so advised him makes no difference.

(Argument by counsel.)

MR. COULOMB: I will withdraw the question to save the Court's time.

BY MR. COULOMB:

20 Q. Let me ask you this question: Was it because it was hearsay, Mr. Moore?

MR. BROWN: I object.

MR. COULOMB: I will withdraw the question and ask this question: Was it because it was hearsay?

30 MR. BROWN: I object. It is immaterial, the reason for his advice. The only materiality here is the advice.

(Argument by counsel.)

MR. COULOMB: I will reframe the question.

BY MR. COULOMB:

40 Q. Did you tell Mr. Schwartz the reason, that it was hearsay?

MR. BROWN: I object.

JUDGE WARKE: That is cross-examination. I will permit it.

(Argument by counsel.)

JUDGE WARKE: I will overrule the objection.

10

BY MR. COULOMB:

Q. Did you tell Mr. Schwartz the reason he didn't have to testify was because the testimony that he had was hearsay?

A. Are you referring now, Mr. Prosecutor, to the first category which related to the names of the informers?

20

Q. No, the second category.

A. Yes.

MR. COULOMB: That is all.

MR. BROWN: That is all; we rest.

WILLIAM E. STRINGER, in rebuttal, called as a witness on behalf of the petitioner, being duly sworn, testifies as follows:

30

DIRECT EXAMINATION.

BY MR. McALLISTER:

Q. Mr. Stringer, you are a member of the bar of this State?

A. I am.

40

Q. And have been for how long?

A. Since 1924. My voice is bad.

Q. You now hold an official position in this County?

A. I do.

Q. What is that position?

10 A. Assistant Prosecutor of the Pleas of Atlantic County.

Q. Do you know Mr. Rupp?

A. I do.

Q. How long have you known Mr. Rupp?

A. Oh, better than 20 years.

Q. Do you know him socially?

A. I do.

Q. Did you meet Mr. Rupp in the City of Margate City sometime in the fall of 1943?

20 A. I did.

Q. Do you recall about when that date was?

A. Why, as I recall it, it was in October after everybody had been over bowling.

Q. Was he bowling too?

A. Yes, he was bowling, but I was not.

Q. Did you have the conversation where you were bowling?

A. No.

Q. Where did you have the conversation?

30 A. Later the whole gang went over to play darts at the Firemen's Log Cabin.

Q. When you say the whole gang, what do you mean?

A. Most of the fellows were bowling there, the Exchange Club and the Rotary Club.

Q. Was Mr. Rupp and yourself in that party?

A. Yes.

Q. That traveled from one place to the other?

A. That is true.

Q. At the Log Cabin you had a conversation with Mr. Rupp?

A. I did.

Q. What was the conversation?

A. As I recall it, we were playing darts and Mr. Rupp said, "How are you doing with Schwartzie?" I said, "Oh, all right." A little bit later he said, "He has been giving you a lot of trouble, hasn't he?" I said, "Well, I don't know whether to call it trouble. He picks on us. I don't know why, because the Prosecutor's Office is trying to do a good job." That is all that was said at that time, as I recall. A little bit later some horsing was going on, that is, fooling and kibitzing around, and I don't know whether it was Rupp or not, I think it was, who said, "You better watch out or Schwartzie will get you." And I laughingly said, "Oh, I don't have to worry about him. I can always take care of myself." And that is all that was said at that time that I can recall. I do not recall as Mr. Rupp said, and I am positive that I did not say that "We will take care of Mr. Schwartz." At the time I didn't even know that he was going to be subpoenaed before the grand jury.

MR. BROWN: Will you ask him questions so that I can get a chance to hear what they are?

BY MR. McALLISTER:

Q. Mr. Stringer, did you in any way threaten Mr. Schwartz?

MR. BROWN: I object, if your Honors please. It seems to me that the Court has the province of determining that from the conversation.

THE WITNESS: Maybe Mr. Brown will admit I didn't.

MR. McALLISTER: I withdraw it.

BY MR. McALLISTER:

Q. Mr. Stringer, did you appear before the grand jury on November 3, 1943?

10 A. I did not.

MR. BROWN: I think we can concede that was so on November 17th.

JUDGE WARKE: Let counsel ask the question or do you want it to be stipulated?

MR. McALLISTER: That is all.

20 MR. BROWN: No questions.

MR. McALLISTER: At this time I again offer the transcript of the testimony taken before the grand jury on November 17th.

MR. BROWN: I object to its introduction, if your Honors please. I object to it for the reasons that I have already given, that it is wholly immaterial and irrelevant and has no part in this case.

30

(Argument by counsel.)

JUDGE WARKE: The transcript will be admitted and you may have an exception.

MR. BROWN: Exception.

(The transcript of November 17, 1943 is received in evidence and marked Exhibit P-3.)

40

Stenographer's Certificate

JUDGE WARKE: Do you want to have your argument by brief or orally or both?

MR. BROWN: We are hoping to do it by brief.

MR. COULOMB: If your Honors please, there has been so much said here in reflection upon the Prosecutor's office, publicly said, that I would like to have the right to argue orally. 10

JUDGE WARKE: You may have it. We would like to have the briefs first and then you can argue it orally. The date for the oral argument will be set after the reception of the briefs.

(The proceeding is adjourned at 4:05 p. m.)

20

STENOGRAPHER'S CERTIFICATE.

ATLANTIC COUNTY COURT OF
OYER AND TERMINER.

In the Matter of Contempt Proceedings against Jo- SEPH SCHWARTZ.	}	Stenographer's Certificate.	30
--	---	--------------------------------	----

I, Raymond W. Hurter, Official Court Stenographer of the County of Atlantic, do swear that I did well and truly record stenographically the proceedings had at the trial of the above-entitled case, and that the foregoing is a true transcript of my steno- 40

Exhibit P-1, Resolution
Exhibit P-2, Charge to Grand Jury

graphic notes of such proceedings, which proceedings were held before Honorable Robert L. Warke and Honorable French B. Loveland, in the County of Atlantic on Monday, January 10th, at Mays Landing, New Jersey, and Thursday, January 13th, 1944, at Atlantic City, New Jersey.

RAYMOND W. HURTER.

January 18, 1944.

EXHIBIT P-1.

This exhibit is Grand Jury Resolution recorded in docket. For copy see original petition, State of Case, pages 6 and 7.

EXHIBIT P-2.

CHARGE TO THE GRAND JURY.

Mays Landing, N. J., Oct. 13, 1943, 2:00 p. m.

30 HONORABLE FREDERIC R. COLIE:

Mr. Foreman, ladies and gentlemen of the grand inquest: The body on which you are now serving is one of the time-honored bulwarks of our system of jurisprudence. Historically, the grand inquest or as it is more commonly called, the grand jury, dates back in the centuries of English jurisprudence, and at the time we separated from England and became a nation we retained it as part of our system of jurisprudence. Its importance is borne out by the fact that both the Federal and State constitutions pro-

vide substantially that no person shall be brought to trial for a criminal offense unless he or she shall first have been indicted by a grand jury. This means, for all practical purposes, that your body is the originating body of all enforcement of the criminal laws in Atlantic County.

Bearing in mind the fact that you are, so to speak, the originating body, you will see that you serve as a very valuable protection to the rights of your fellow citizens against the possibility of any arm of the government attempting to employ enforcement agencies of the criminal law for their own gain. You are the bulwark, the protection, of yourselves and of your fellow citizens from unjust persecution. 10

You will bear in mind, please, that in the oath which you just took you each severally swore in the following words: You shall present no one through hatred, envy or malice, and what I have just quoted from your oath has a corollary which reads: Neither shall you leave anyone unrepresented from fear, favor or affection, for reward, gain or the hope thereof. 20

Restated in simple language, that to me means that no person is above the law. It means that your power reaches out against anyone and everyone, regardless of whether he is poor and powerless, or whether he is wealthy and powerful.

During the term of your office as grand jurors you are strictly a non-partisan body. Political labels, political ties, everything of a political nature, is left by grand jurors outside of their jury room. You belong during the period of your service, not to any political party; you belong to your fellow citizens as fellow citizens. 30

Now, it has been said that the law is no respecter of persons, and I say to you that a grand jury, mindful of its powers and its duties, is just as much a body, which is no respecter of persons. Your duty is 40

clear. Where you find that the evidence warrants an indictment, you should find an indictment. Where the reverse is true, you should find no indictment.

Referring again to your oath, there is one particular matter that I do want to stress, and I ask you to pay particular attention to it, and that is the matter of the secrecy of your proceedings. In times past some grand jurors have not lived up to the oath in that respect, and that oath says: The counsel of the State, your fellows and your own you shall keep secret, and it means just exactly what it says.

Some of the reasons for it are perfectly obvious. I sometimes think that they are so obvious that they may be lost sight of, and I feel that I should give you some reason for that particular requirement being a part of your oath. It takes no feat of intelligence for you to realize that those who are operating outside the pale of the law will be very quick to take advantage of any information of what goes on during your deliberations. Remember, please, that in all of your deliberations you are hearing but one side of the particular matter under consideration, the state's side. If you find an indictment in a given instance the indicted person when brought to trial before the petit jury will then be given his or her day in court; his or her opportunity to meet the state's case; but no one whose activities are the subject matter of your investigation is entitled to know of the evidence that is produced before you.

Perhaps the two most obvious results that would flow from the dissemination of such knowledge are: Number one, the destruction of evidence; number two, the possibility of witnesses being removed out of the jurisdiction where it will be difficult, if not impossible, to get them back and sustain the state's case. On the other hand, there is this to be borne in

mind. I suppose it is a natural thing, if knowledge becomes general of the subject matter of your investigation, for people—perhaps with no evil intention—to endeavor to discuss the matters or get the ears of each of you grand jurors. If your proceedings are kept secret then you will not be subjected to those importunities.

10

For anyone to discuss or attempt to discuss any matter that you are working on during the term of your service is guilty of a crime. Should any one of you have any attempt made to communicate with you, influence you, discuss with you any phase of a matter that you have under discussion I charge you specifically to bring that to the attention of this Court and this Court will deal with it in a drastic manner, so that as far as that individual is concerned it will never occur again.

20

There are a number of matters that the Prosecutor of the Pleas requested me to charge you on. One of them was the matter of secrecy. That I have done. Another dealt with the question of the conduct of bingo games and games of a similar nature conducted by fraternal and religious organizations. That I will discuss a little bit later. He also called the Court's attention to the fact that we are coming closer to a general election which is of considerable importance to the State of New Jersey, and I am happy to say that the prosecutor's office, the county clerk's office, and perhaps others that do not occur to me at the moment, have gone out and have done some missionary work with the various election boards to familiarize them with the requirements of the law to the end that they will do their work within the law. I mention this to you because I consider that the depriving of a person of his or her vote by permitting fraudulent votes to be cast is, in my opin-

30

40

ion, a dastardly crime, and while I do not contemplate that you are going to have any such matters before you, should any such arise I feel that you should deal with them in a manner which will teach those concerned that the right to vote is a prerogative and a privilege that you do not expect to have tampered with.

10 The Prosecutor has also requested me to charge you with reference to what is commonly called the numbers game or numbers racket. That too, the Court will charge you on in just a moment. This matter of gaming or gambling is something that this Court on a number of previous occasions has charged specifically, but this is an appropriate time to renew that charge, in my opinion, so that there will be no doubt in the minds of any of you grand jurors or in
20 the minds of anyone else in the County of Atlantic as to what the Court's attitude toward it is.

The presence of any place in Atlantic County where gaming or gambling is carried on is a violation of the criminal law. Now, whether or not you as grand jurors agree with the law making it a crime, is immaterial. The law is on the books. Being on the books it is to be enforced. If you think it should not be on the books then the remedy lies with the citizens of the State of New Jersey in their legisla-
30 ture in Trenton, but it does not lie with the Court nor does it lie with the grand jury to determine that the law is not to be put into effect.

I want no misunderstanding on this and so I charge you that what is commonly known as bookmaking, pool selling, the numbers racket and all playing for money or other valuable things at cards, dice or with any instrument, is gambling or gaming, and is a crime for which an indictment will lie.

40 The owners of such properties where this is carried on are themselves violating the law, and they

too are subject to indictment and prosecution, and I need hardly tell you that the same applies to the operators. You know what gambling is even though you don't know what the legal definition of it is, and I don't believe that there is any necessity for me to define it more specifically than I have done.

In connection with gaming I want to point out to you that certain types, and it is asserted to be a common type in Atlantic County or to have been a common type in Atlantic County, is dependent for its very existence upon the use of either telephone or telegraph facilities; mostly, I believe, it to be dependent upon the use of the telephone. Whether that is horse racing or whether that is a pool room, the Court doesn't know—it doesn't know with any assurance which it is denominated in the language of the street, but it may apply to both—but I point out to you that there is a statute in New Jersey which makes it a high misdemeanor—what in common law was known as a felony—for any telephone or telegraph company knowingly to carry any message of a kind which will further or promote the interest of any unlawful pursuit or enable a person to carry on any illegal business or practice. That statute is on the books; there to be enforced.

Parenthetically, and the Court is not a communications engineer, I might say that it is incredible to me that a telephone company or a telegraph company can furnish service to an establishment of that criminal character for any length of time and not know for what purpose its lines are being used. I charge you specifically that if you find or there is brought before you evidence that any utility company is violating that statute that you return an indictment against them.

I want to digress for a moment. I mentioned this matter to certain of the officials of this county yester-

day and the reaction was expressed to me by this remark: "Why, Justice Colie, you can turn on the radio five, six or seven times a week and you can hear the admonition of the telephone company or what not to please refrain from crowding the wires, that they are needed to further the war effort." Think of it.

- 10 Just think of it. They make an appeal to the citizenry to forego legitimate telephonic communication when they are furnishing services to illegal operators of gambling joints.

- 20 My attention has been called to what is variously entitled an editorial or an open letter, addressed to me in one of your publications in Atlantic City. Now, ordinarily this Court would not pay any attention to an open letter or editorial addressed to the Court, but in this instance the writer or writers of the editorial posed a question to the Court which I feel certain must be running through the minds of a great many citizens of Atlantic County, and I quote to you from that article: We particularly wonder why Justice Colie would order the raid on the Mississippi Avenue establishment when the number barons are operating their game flagrantly without the least regard for the law. Is gaming on Mississippi Avenue different from gaming in other parts of the town? If we are to have a clean town let it be all clean, 30 not half clean and half dirty. Let it not be OK for one gambler to run and not OK for another.

- That is the query. The Court thinks it a proper one. It should be dignified by a reply, and the reply is this: that I would like it understood by the citizens of Atlantic County and by you members of this particular grand jury that this Court does not recognize any validity in the practice of prosecuting some violators while others flourish. They are all on the same footing and each is subject to the same risk 40 of prosecution at the hands of the law enforcement

Exhibit P-2, Charge to Grand Jury

agencies in this county. That is the order that has gone out from the Court to the heads of the chief law-enforcement agencies in this county, and I trust that what I have said here this afternoon will be notice to everyone in this county who is interested in the subject matter.

I want to quote one other small, short extract from that editorial. It reads: Information coming to this desk indicates that the same number barons in the main that always ran the industry in this town are still raking in the shekels at the same old stand with the same contempt for the law that they always had. 10

I suggest, Mr. Foreman and members of this grand jury, that you call upon the Prosecutor of the Pleas to summon before you as witnesses the members of that newspaper and its editorial staff so that they may bring before you any evidence they may have of the illegal operation of the number barons in Atlantic City, so that you in turn may act upon that evidence. 20

It may be that the person or persons who have that information are not in a position to disclose it; that is to say, to disclose the source from which they obtained it, but in any event I think that that is the course that you should pursue, and I think that you should follow up that inquiry as far as the law will permit you to go. I don't think that the law provides newspapermen with an absolute immunity from disclosing information. I think that it is a limited right, and I have no doubt that the Prosecutor will call your attention to the law at the appropriate time. 30

On the subject of gaming, as I said to you previously in this charge, all violators are on an equal footing and that brings us definitely up point blank against the matter that the Prosecutor wished me to charge you on; namely, the operation of bingo games and kindred activities by benevolent societies, organ- 40

izations, groups, churches, and what not. Bear in mind what I said; they, the operators, with the professional operators or organized operators—that is the title I bestow upon them to distinguish them from the so-called benevolent operators—are under the statute equal offenders.

- 10 In a charge that I delivered a year ago to an incoming grand jury in this court room I pointed out to the jury that while in the eyes of the law the two classes were subject to the same penalty—and I offer it as no excuse for either type of violator of the law—I by analogy pointed out and used an example that I repeat to you. We are riding in an automobile along a country road and we come upon an overturned automobile and lying in the ditch at the side of a road is a man unconscious. We stop our
- 20 car and go over to him, and we look him over. It is perfectly obvious that two or three fingers of his left hand are broken. You can see that because they are out of position. He is injured in that respect. We look at him again and we see that one of his arteries is severed and the blood is spurting out. He is injured in that respect. What do we do? Do we make some nice little splints and put them on his fingers and immobilize them so that they won't become deformed? Do we finally after five or ten minutes of
- 30 our attempts to fix them up turn to the severed artery? If we do, all we have done is to tie up a corpse. No. We don't do that. The first thing you do is to stop the bleeding at the artery. Keep the life in the victim. Afterward trim up the unessentials. The analogy is this, ladies and gentlemen, technically the benevolent groups have offended the criminal law. The probabilities are that the harvest—if you wish to call it a harvest—that they reap has gone to a charitable end. Not so with your organized gambling,

Exhibit P-2, Charge to Grand Jury

whose harvest is many, many times that of the benevolent group. Their harvest is so large that they are handed tremendous sums of money; sums of money that they will not hesitate to use where they think it to their advantage to use it.

Now, use your own common judgment. Remember, they are all violators, but there are such things as degrees. What I want to see wiped out, and if it is going to be wiped out it has to be by you citizens of Atlantic County, it can't be by any black-robed justice of the supreme court or any other judge, the incentive has to come from you people, and I say to you that it is time that that element was wiped out of Atlantic County. 10

There are three very powerful law enforcing agencies in Atlantic County. They are the sheriff's office, the prosecutor's office and the police department of the City of Atlantic City. Their combined budgetary requirement for the year 1943, the current year, is in excess of eight hundred seventy thousands of dollars. I don't know what it would be if you added up the other law enforcing agencies throughout the county, but it would run well over one million dollars, and that is a lot of money to pay for the protection that the citizens are entitled to from the criminal element. 20

In order to justify the expenditure of that amount of money this Court expects the results to justify it and, henceforth, so far as it is in the power of this Court it will hold the officials responsible for the enforcement of the law to a full performance of their duty in that regard. Should there be a failure, and I do not contemplate that there will, then that failure would be a proper subject for inquiry by your body. 30

In closing, I just want to say that in my humble opinion that with your body and with the body of the citizenry, of which you twenty-three are representa- 40

tives, rests in no small degree the answer as to whether or not Atlantic County is going to be a decent, law-abiding county.

10

EXHIBIT P-3.

OCTOBER TERM, 1943, GRAND JURY IN AND
FOR THE COUNTY OF ATLANTIC.

Testimony taken at a meeting of said Grand Jury held in the Grand Jury Room, Court House, Mays Landing, New Jersey, on November 17, 1943.

20

WALTER J. BUZBY, Foreman, Presiding.

APPEARANCES:

HARRY R. COULOMB, Prosecutor of the Pleas.
ROBERT N. McALLISTER, First Assistant
Prosecutor of the Pleas.

30

JOSEPH SCHWARTZ, being called to the Grand Jury as a witness, was duly sworn by Walter J. Buzby, Foreman of the Grand Jury.

BY MR. COULOMB, Prosecutor of the Pleas:

Q. Mr. Schwartz, the Grand Jury has requested
40 your appearance here today in order that we again

can ask about the number slips, which you had in your possession on or about October 5th. My question is from whom did you get those slips?

A. I have no statement.

Q. I am asking you now from whom did you get those slips?

A. I refuse to state.

10

Q. You also stated one time at least that certain information had come to your knowledge concerning the operation of the law enforcement agencies in the City and County from certain City and County employees, whose names at that time you refused to give because they might lose their jobs. I ask for the names of those City and County employees.

Q. I not only said they might lose their jobs, but it was given to me with the distinct understanding that I would not reveal the source and for that reason I refuse to answer that question.

20

Q. I would like to admonish you, Mr. Schwartz, this Grand Jury has a right to have that answer legally and you have a perfect right to give their names. I assure you this Grand Jury would not reveal their names, and they would not lose their jobs. I ask again for those names.

A. I am very sorry I will not give it to you. I have not been relieved from my promise not to reveal their names.

30

Q. If this Grand Jury should refer this matter to the Court for such action as might be advisable, and the Court might ask you to reveal those names, would you still refuse?

A. I'll wait until that time arrives.

Q. Mr. Schwartz, when you were before the Grand Jury a week or two ago, you said you had some information concerning the activities of the Police Department or lack of activity, which I believe was confined to the Police Department, that you would be

40

glad to give to the Grand Jury if they desired. If you have any such information, the Grand Jury would like to have it.

10 A. The subpoena called for "And that you bring with you and produce at said time and place any documentary information or other papers which you may have in your possession concerning any viola-
tion of the criminal law which has come to your knowledge or attention." Please explain what you mean by that.

Q. You stated, Mr. Schwartz, that you had a lot of information which you had not brought with you. I assumed the information you had to bring with you was in the form of a memorandum or documentary information and in order that there might not be an excuse that you could say you did not have them. . . .

20 A. I brought a few files which I assume is documentary information. I have considerable stuff. I don't know which one you would like to hear. For instance there is one for Ogilvie concerning law enforcement. This letter has to do with the Prosecutor's Office. It is dated May 15, 1943.

BY MR. McALLISTER, First Assistant Prosecutor of the Pleas:

30 Q. May we have that?

A. I have been subpoenaed and they are my private papers.

Q. You volunteered the information.

A. This isn't information I volunteered. Then I have some letters from the Department of Alcoholic Beverage Control, and I have some personal letters I wrote to Justice Colie and his replies that has to do with the jury.

40 JUROR: Is it evidence?

Exhibit P-3, Testimony Before Grand Jury

A. I don't know what it has to do with documentary evidence, it is papers I have.

BY MR. COULOMB, Prosecutor of the Pleas:

Q. You had some information. You said that to Mr. Poffenberg that you had information.

10

A. I have here a card for a "Bingo" to be held at the Seaview Country Club. Here are some newspaper articles. I have here a list of untried indictments that were handed to me. Mr. Ogilvie handed them to me and he said it would be very interesting to have them investigated as to why they haven't been tried.

BY MR. McALLISTER, First Assistant Prosecutor of the Pleas:

20

Q. This card reads:—"Seaview Country Club, Absecon, New Jersey, Bingo, August 23, 1943. Once again it gives us pleasure to announce that another Buffet Supper-Bingo Party will be held at the Clubhouse on Friday evening, September 3rd. Buffet supper will be served at 6:30 P. M. with Bingo following at approximately 8:30 P. M. Members and their friends are most cordially invited, so why not plan a week-end at the Club. Early reservations are advisable. Phone Pleasantville 180." This paper,

30

which I presume is in your handwriting, reads:—"Bingo Game. Monday:—Lady Star of the Sea, California and Atlantic. Tuesday:—St. James, Portland and Atlantic. St. Nicholas, Tennessee and Pacific. Wednesday:—St. Michaels, Mississippi above Atlantic. Every other week at St. Nicholas the Auxiliary Police operate. Lt. Mulloy and Sgt. Barab as Master of Ceremonies. Thursday:—Holy Spirit, North Massachusetts Avenue. Friday:—St. Peters, Pleasantville. Trolley runs a car from Vir-

40

ginia Avenue every Friday night at 8 P. M. known as Bingo special—free fare over. Called trolley office and so informed. Catholic Daughters, South Pennsylvania Avenue, American Star Lodge, Odd Fellows, at Odd Fellows Hall. Red mens Hall, Moose Hall—run by Ruty, Simms, Miller—Pitney
10 Village, Ventnor Pier, 2nd Ward Republican Club, 3rd Ward Republican Club, 4th Ward Republican Club, Seaview Country Club.”

A. Mr. Foreman, I have here notes of my own in my writing as to the information I volunteered. I request the Prosecutor and his staff to leave the room.

MR. COULOMB: I don't intend to leave the
room.

20

JUROR: Why won't you give the information?

A. I'll tell you why. In these notes I am going to mention names. They are not evidence.

JUROR: Then information that is not evidence would be hearsay.

A. I have no evidence. The names are in there.
30 I do not intend to be put in the position that some way or other the names would leak out. The same thing might happen to me that happened to Mr. Ogilvie, probably an indictment for slander and the indictment held for eight or nine years. I am perfectly willing to impart the information, but I will not impart it while the Prosecutor and his staff are present.

JUROR: Does this Grand Jury want to hear
40 hearsay or evidence. Hearsay, I don't want to hear.

A. Now, Ladies and Gentlemen of the Jury, I suppose a lot of you wonder why I have been active. I have a strong belief that there is corruption in the operation of both City and County Law Enforcements. I have lived here for a good many years. My entire stake is in real estate and a great deal of the difficulty such as high taxes are brought about by corrupt government and other reasons. I as a single individual can't do much, but in so far as a single individual can do, I intend to do. 10

Q. You refuse to give this information to the Grand Jury?

A. My only purpose is this: If you ladies and gentlemen think there is corruption and something could be done, what I have to read will be of interest. If you don't think so, let's not waste all our time. 20

MR. COULOMB: I have only one thing to tell you. I want to say to this Grand Jury in respect to what Mr. Schwartz had to say about information coming from this past Grand Jury—that it came from the Prosecutor's Office. This is absolutely not so. Things came out of the May Grand Jury that could only come from Mr. Schwartz or some member as neither I nor any member of my staff were in the room when this was discussed. Information was in Atlantic City as soon as the Grand Jurors could get over there. 30

(Grand Jurors excuse Prosecutor, Prosecutor's Staff and Mr. Schwartz.)

(Prosecutor, Prosecutor's Staff and Mr. Schwartz return to Grand Jury Room.)

Foreman: Mr. Schwartz, the Grand Jury is open and ready to get any information or suggestion you 40

Exhibit R-1, Subpoena

have at hand, but have unanimously voted that any statements that you have to make, whether it be hearsay or direct evidence, will be made in the presence of the Prosecutor and his assistants.

A. Mr. Foreman, I decline to give the information.

10

EXHIBIT R-1.

Joseph Schwartz, 31 S. Weymouth Ave., Ventnor City, N. J.

By virtue of a Writ of Subpoena, to you directed, and herewith shown unto you, you are commanded personally to be and appear before the GRAND
20 JURY sitting at Mays Landing, in and for the County of Atlantic, on Wed. the 3rd day of November, next, at 10:00 o'clock in the forenoon of said day, to give evidence on the part of the State of New Jersey v. Grand Jury Investigation.

And this you are in no wise to omit under such penalty as may fall thereon.

AND THAT YOU BRING WITH YOU AND PRODUCE at said time and place all number slips, coupons or tickets which have come into your possession since May 11, 1943 to date and particularly that
30 you bring with you and produce at said time and place all number slips, coupons or tickets which came into your possession on or about the fifth day of October, A. D. 1943.

Dated this 28th day of Oct., 1943.

WM. A. BLAIR,
Clerk.

BRING THIS SUBPOENA
WITH YOU

40

EXHIBIT R-2.

Joseph Schwartz, 31 S. Weymouth Ave., Ventnor City, N. J. 10

By virtue of a Writ of Subpoena, to you directed, and herewith shown unto you, you are commanded personally to be and appear before the GRAND JURY sitting at Mays Landing, in and for the County of Atlantic, on Wed. the 17th day of Nov. next, at 10:00 o'clock in the forenoon of said day, to give evidence on the part of the State of New Jersey. Re Grand Jury Investigation. 20

And this you are in no wise to omit under such penalty as may fall thereon.

AND THAT YOU BRING WITH YOU AND PRODUCE AT SAID TIME AND PLACE any documentary information or other papers which you may have in your possession concerning any violation of the criminal law which has come to your knowledge or attention.

Dated this 12th day of Nov. 1943.

WM. A. BLAIR, 30
Clerk.

BRING THIS SUBPOENA WITH YOU

OPINION OF SUPREME COURT.

(Filed May 21, 1945.)

10 NEW JERSEY SUPREME COURT.

In the Matter of Contempt Proceedings Against JOSEPH SCHWARTZ.	}	No. 3, Oct. Term. 1944.
--	---	----------------------------

20 Argued Oct. , 1944; decided , 1945.
In Contempt.

Before Brogan, Chief Justice, and Justices Donges
and Perskie.

For the appellant, William Elmer Brown, Jr.;
Charles S. Moore, of Counsel.

For the respondent, Harry R. Coulomb, Prosecutor
of Pleas of Atlantic County; Daniel Bell, Jr.,
Asst. Prosecutor of Pleas of Atlantic County.

30 BROGAN, CHIEF JUSTICE.

Joseph Schwartz of Atlantic County was adjudged
guilty of contempt of the Atlantic County Court of
Oyer & Terminer. The alleged offense arose out of
these circumstances: Mr. Schwartz was subpoenaed
to appear before the October Term, 1943 grand jury
of Atlantic County on two occasions, November 3
and November 17, 1943. The grand jury was in-
vestigating gambling, having been instructed to do
so by the Supreme Court Justice who presides in

that district. The charge was delivered upon the request of the Prosecutor of the Pleas. The process first served upon him (subpoena duces tecum) required him to appear personally and bring with him "all number slips, coupons or tickets which have come into your possession since May 11, 1943, to date and particularly * * * all number slips, coupons or tickets which came into your possession on or about October 5, 1943." Schwartz did not bring the things called for. He explained that he no longer had them. A second such subpoena was served upon the witness for his attendance on November 17, and required him to produce "any documentary information or other papers which you may have in your possession concerning any violation of the criminal law which has come to your knowledge or attention." In obedience thereto he produced certain exhibits, to wit, a few files which included cards and advertisements announcing "Bingo" games at certain clubs, church-halls, lodges, political clubs, etc., newspaper articles, a list of untried indictments, and like data, some of which he delivered to the Prosecutor of the Pleas in the presence of the grand jury. When asked to name the persons who had turned over to him the "number slips" used for gambling in the "numbers game", which previously had been called for, the witness declined to answer. The question was repeated in various forms. The witness remained firm in his refusal to answer. He advanced these reasons to justify his attitude: that he had pledged himself not to divulge the names of his informants; that he would not go into the matter generally while the Prosecutor and his staff were present. In this latter connection he said: "I have strong belief that there is corruption in the operation of both city and county law enforcements." The grand jury conferred and determined

10

20

30

40

unanimously that the Prosecutor and his assistant should not be excluded from the grand jury room. The witness was so advised and then and there was invited to give the information which the grand jury wished to have, whereupon the witness replied: "Mr. Foreman, I decline to give the information."

10 At this stage it is patent that the witness was in fact recalcitrant. It remains to examine into whether the reasons which he advanced justified his attitude as a matter of law.

The Prosecutor prepared a petition embodying these facts and obtained from a judge of the Oyer a rule calling upon Mr. Schwartz to show cause before that court why he should not be adjudged in contempt "of the grand jury in and for the County of Atlantic * * *" for refusing to answer these ques-
20 tions. On the return of the rule witnesses for the state and for Schwartz testified and the court found Schwartz guilty of contempt and sentenced him to be committed to the county jail for a period of five days, which sentence was suspended.

Our statute (R. S. 2:15-1) delineates the several matters and things that shall constitute contempt. These several acts are stated in three divisions—A, B and C. The first two delineations of what shall constitute a contempt (A and B of the statute, supra) are not relevant. The third (C) reads: "Disobedi-
30 ence or resistance by any court officer, or by any party, juror, witness or other person to any lawful writ, process, order, rule, decree or command of the court."

The appellant contends that the quoted words are also inapplicable. A petition of appeal in this court sets down certain reasons challenging the conviction and judgment of the court below and praying that we rehear the matter and set aside the judgment and conviction (R. S. 2:15-3, 4, 5).
40

It is important to note that appellant had been a member of the immediately preceding Grand Jury; that the information about the existence and continuance of gambling had been imparted to him by persons, some in the employ of the City of Atlantic City, others employees of Atlantic County; that these persons wished to remain unknown lest they lose their positions; and that they, or some of them, had delivered to the appellant the "numbers game" slips or had them delivered to appellant's home or place of business, by messenger. 10

Turning to the reasons advanced by the appellant for refusing to answer the questions asked before the Grand Jury: his first, that he was committed to secrecy, may not be invoked. There is no such privilege available to the appellant. He may not for any such reason hamper the investigation of the grand jury. Compare *In re Grunow*, 84 N.J.L. 235. His second reason for refusing to testify was that the grand jury declined to accept the condition he imposed: the exclusion of the Prosecutor and his assistant. A witness may not lay down the conditions under which he will testify. He was asked to name his informants. He refused to do so unequivocally. He was further asked for whatever information he had about gambling and the like. He refused that except on the condition mentioned. He gave a further reason—that he might encounter the same experience as a Mr. Ogilvie, years before, who had been indicted for slander. But he made no direct charge before the grand jury that the Prosecutor or his assistant, then present, were involved in the witness' "strong belief" that there was corruption in the city and county law enforcement agencies. No legal reason was advanced to justify his recalcitrancy. 30

On the return of the rule to show cause the appel- 40

lant conceded that in each instance he had declined to answer the questions. Counsel interposed a challenge to the sixth section of the state's petition on the ground that after the appellant had refused to give the grand jury the information it sought unless the Prosecutor and his staff be excluded from the room, the foreman *advised* the witness that it was ready to receive any information or suggestion that the witness had to make concerning the matter under investigation. The point made was that "the so called question (contained in the sixth paragraph) does not constitute a legal question framed in such manner as to require answer;" and, further, that the so called question did not solicit legal evidence concerning matters then under consideration by the grand jury. This argument is too tenuous to require any discussion save passing comment. Even if we agree with the view of counsel and considered that the sixth paragraph should have been struck out by the judge at the hearing in the Oyer, never the less the proceeding for contempt stood unimpaired. The information sought had been made the subject of a question addressed to the witness several times and in varying forms. The witness was entirely aware of the purpose of the questions, viz., that the grand jury wished to subpoena the persons who had given first-hand information to the appellant. We perceive no merit in the objection.

At the end of the state's case on the return of the rule the appellant moved to dismiss the rule because the statute, *supra*, requires that there shall be disobedience or resistance to a writ, process or command of the court. The argument was that proper practice required that the witness be cited before the court, that the questions be submitted to the court, and that not until there had been a refusal to answer questions which the court ordered answered could

the witness be said to have been in contempt. In certain of our cases it is true the practice was followed of serving interrogatories on the alleged offender and have answer made thereto. See in re Gonzales, 86 N.J.L. 536. What practice was followed in the case of In re Grunow, *supra*, does not appear; but the practice has not been uniform. Compare 10
McQuade vs. Emmons, 38 N.J.L. 397, where there was penalty imposed on the offender's admissions made under rule without either writ or interrogatories. These several methods are neither uniform nor jurisdictional except to the extent of laying before the court matters which constitute a contempt and affording to the party accused a fair opportunity of denying or confessing their truth. In re Cheeseman, 49 N.J.L. 115. The court overruled this and other objections which will be discussed presently on our consideration of the argument advanced 20
in the appellant's brief.

The first argument in the brief is that "the charge here does not meet the statutory definition of contempt."

Our statute, in so far as sub-division (c) is concerned, is quite like the Federal statute, which is of ancient origin and derived from the Federal Act of 1789 (also the Act of 1831, now known as Section 268 of the Judicial Code), Section 385, U.S.C.A. The 30
Federal statute has recently been construed by the Federal District Courts of New Jersey and Pennsylvania and by the Circuit Court of Appeals (third circuit) in certain similar cases before those tribunals. In the case of Meckley, 137 F. 2d series, p. 310, it appears that the Federal grand jury made written presentment to the District judge that Meckley, appearing as a witness before the grand jury, had given obstructive, evasive and contumacious answers to the questions asked him, whereupon the 40

District judge entered a rule on the witness to show cause why he should not be adjudged in contempt. He was so adjudged after a hearing, which judgment was affirmed in the Circuit Court of Appeals, 137 F. 2d, p. 310. Certiorari was denied by the U. S. Supreme Court (64 S. Ct. 69). See also *Camarota* vs. U. S. 111 F. 2d 243, where a witness was held in contempt for refusing to answer certain questions before the grand jury. In that case it was pointed out that the grand jury is an arm of the court, that proceedings by it are to be regarded as proceedings in the court, and that contempts in the presence of the grand jury are to be treated as taking place in the presence of the court; that they are to be summarily dealt with by the court without indictment; that where the contempt was not committed in the actual presence and hearing of the judge due process "requires that the accused shall be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation; yet this is not to say that the proceedings must take any particular form so long as the substantial rights of the accused are preserved." Certiorari denied. (61 S. Ct. p. 16.) See also *In re etc. Ellison*, 44 F. sup. 375, a case which also is quite like the instant matter. Affirmed 133 F. 2d 903. Certiorari denied. (63 S. Ct. 995.)

It is next said that the appellant cannot be adjudged "in contempt of the October Term, 1943 Grand Jury as here charged. The argument is that the court as such was not affronted, that the conduct complained of took place before the Grand Jury. We perceive no merit in the argument. It is conceded in the appellant's brief that the Grand Jury "acts for the Court;" that it is "an arm of the court under which it is organized," i.e., *Oyer & Terminer*. This being so, a witness who affronts the Grand

Jury affronts the court so long as that which he does or refuses to do amounts in law to contempt. In this connection we consider the cases which we have examined and cited from the Federal Courts, construing their statute, so similar to our own (i.e., Statute, *supra*, Sub-division C) sound authority. The added fact that certiorari was denied by the United States Supreme Court in the cited Federal cases impels us to conclude that they are controlling. 10

The next point made is that the appellant having been a member of the previous grand jury was "a member of a law enforcement body" and therefore was privileged, as such, from disclosing the names of his informants. The appellant did not stand on this reason before the grand jury and if he did it would have been unavailing. The function of a grand jury is to hear evidence on behalf of the prosecution and to determine whether an indictment should be found. "The finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire upon their oaths whether there be sufficient cause to call upon the party to answer it." Blackstone, Book 4, Chap. 23, p. 2531 (Jones' Edition). And the grand jury is "an informing and accusing tribunal only without whose previous action no person charged" with crime could be put upon his trial. (Mr. Justice Field's charge to the U. S. Circuit Court, California District, 2 Sawy. 667). The grand jury does not enforce the law. Its function is to make the accusation, i.e., present a bill of indictment; and no member of it can be said to be a law enforcement agent with which class of officers the cases cited by the appellant, to support his refusal to answer, are concerned. 20 30

It is further argued that the oath of secrecy taken by the appellant as a member of the May Term 40

Grand Jury prevents conviction on the present charge. The information in the possession of Mr. Schwartz was obtained while he was a member of the previous grand jury. It does not appear that the evidence or information obtained by Mr. Schwartz was made available fully to the grand jury of which he was a member and it is difficult to see upon what basis he rests any claim to immunity or privilege from testifying when called upon by the October Term Grand Jury. It is true that the investigation and deliberations of the grand jury should be kept inviolate. The oath administered to the members of the grand jury so ordains. "The counsel of the state, your fellows, and your own you shall keep secret", but it is no violation of that oath to testify before a subsequent grand jury which also is bound by an oath of secrecy. Further, it should be observed that the information in the possession of the appellant was acquired by his own private investigations. It was not information that he had obtained within the precincts of the grand jury room but rather information imparted and exhibits obtained by the appellant at his home or place of business during the time when he was a grand jury member. Cases cited by the appellant—*State v. Silverman*, 100 N.J.L. 249; *State v. Borg*, 8 N. J. Misc. 349—are not authority in support of the appellant's position.

It is next said that the appellant "was protected by a personal privilege" accorded to all witnesses. The argument is that after the witness's first appearance before the grand jury, on November 3, he learned that an assistant Prosecutor of the Pleas of Atlantic County, Mr. Stringer, had said, "We will take care of Schwartz". The background of that episode is: One Charles E. Rupp, a member of the Jury Commission for Atlantic County, met the ap-

pellant and told him of a conversation had with Assistant Prosecutor Stringer. Stringer said to Rupp: "What is the matter with Joe Schwartz? He is causing all this trouble." Rupp replied: "Well, I don't know, Bill. I only put them on the jury panels. After they get on there I have no control over them" and added: "I read by the papers and I also know 10 by different people's conversation that Mr. Schwartz has had frequent clashes with the Prosecutor's office, but outside of that I don't know anything particular in the case." Stringer replied: "Well, he certainly seems to be sore at the Prosecutor's office" and, "I guess we can take care of him". Rupp then proceeded to say at the hearing before the Oyer—"This conversation was in a light vein, there wasn't anything serious * * * and I didn't say anything about it to Mr. Schwartz for quite some time because I 20 didn't think much about it * * * ." Rupp further testified that some time later he met Schwartz at a luncheon "and I felt that I should warn Joe to be very careful of what he did and what he said because of the fact that I felt that there was a severe antagonism existing between Schwartz and the Prosecutor's office." In one breath the witness said that his conversation with Stringer was of no particular moment and in the next that none the less he felt he should warn Schwartz to be careful. What- 30 ever the fact may be, Schwartz, at the hearing before the Oyer, said that he had known Stringer for fifteen years or more; that he had no apprehension of violence from that quarter but that he felt that Stringer had power enough to make things uncomfortable for him, and the like. Mr. Stringer denied that Rupp's account of their conversation was accurate; denied that he said "we can take care of him" (Mr. S.); but rather that he said to Rupp: "I can always take care of myself." We attribute no 40

Order for Judgment in Supreme Court

importance at all to this episode save that it emphasizes the fact that the appellant, for reasons satisfactory to himself, did not approve of the Prosecutor and his staff. But however this may be, it conferred no privilege upon him to refuse to testify before the grand jury while the Prosecutor was present.

The other points made by the appellant have had our careful consideration but are without merit.

The judgment under review will be affirmed.

A true copy.

JAMES J. GAVIN,

Clerk.

20

ORDER FOR JUDGMENT IN SUPREME COURT.

NEW JERSEY SUPREME COURT.

30

In the Matter of Contempt
Proceedings Against
JOSEPH SCHWARTZ.

} On Petition for
Review.
Order for Judgment.

40

This matter coming before this Court pursuant to the provisions of R. S. 2:15-1 et seq., and this Court having reviewed the summary conviction and judgment entered in the Court of Oyer and Terminer, in and for the County of Atlantic, against said Joseph Schwartz, both upon the law and the facts;

It is, on this 29th day of June, A. D., one thousand

nine hundred and forty-five, ORDERED that the conviction and judgment entered in said Court of Oyer and Terminer, in the County of Atlantic, against said Joseph Schwartz be and the same hereby is affirmed, and that said judgment be and the same hereby is adopted as the judgment of this Court.

10

FOR THE COURT,
THOMAS J. BROGAN,
C. J.

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

20

In the Matter of Contempt	}	On Petition, etc.
Proceedings Against		Notice of Appeal.
JOSEPH SCHWARTZ.		

To HON. LEWIS P. SCOTT, Prosecutor of the Pleas of Atlantic County, and to HON. HARRY R. COULOMB, former Prosecutor of the Pleas of Atlantic County and Attorney of record for the Respondent:

30

TAKE NOTICE that Joseph Schwartz, the appellant in the above entitled matter, appeals from the whole of the judgment entered in the above entitled cause in the New Jersey Supreme Court affirming a judgment in the Court of Oyer and Terminer in and for the County of Atlantic, and adopt-

40

Notice of Appeal

ing the said judgment of said Court of Oyer and Terminer as the judgment of said Supreme Court, to the Court of Errors and Appeals of New Jersey. Dated July 27, 1945.

10

WM. ELMER BROWN, JR.,
Attorney for the Appellant.
CHARLES S. MOORE,
Of Counsel.

[ENDORSED]

20

We hereby acknowledge service of the within Notice of Appeal this 30th day of July A. D., 1945.

LEWIS P. SCOTT,
Prosecutor of the Pleas of
Atlantic County.
HARRY R. COULOMB,
Former Prosecutor of the
Pleas of Atlantic County
and Attorney of Record
for the Respondent.

30

40

GROUND OF APPEAL.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10

In the Matter of Contempt Proceedings Against JOSEPH SCHWARTZ.	} On Appeal from the New Jersey Su- preme Court. Grounds of Appeal.
--	--

To HON. LEWIS P. SCOTT, Prosecutor of the
Pleas of Atlantic County, and to HON. HARRY
R. COULOMB, former Prosecutor of the Pleas
of Atlantic County and Attorney of Record for
the Respondent: 20

The above named appellant, Joseph Schwartz, as-
signs the following as grounds of appeal from the
judgment of the New Jersey Supreme Court entered
in the above entitled cause:

1. That the Supreme Court erred in affirming the 30
judgment of the Court of Oyer and Terminer in and
for the County of Atlantic, and in adopting the judg-
ment of said Court of Oyer and Terminer as the
judgment of said Supreme Court.

2. Said judgment of the New Jersey Supreme
Court is also erroneous for the following reasons:

(a) The charge made against this appellant
does not constitute contempt in that said appel- 40

lant did not disobey or resist "any lawful writ, process, order, rule or command" of the Court of Oyer and Terminer of Atlantic County as is required by Revised Statutes, Title 2, Chapter 15, Section 1.

10 (b) The appellant was charged with "contempt of the October Term 1943 Atlantic County Grand Jury" and not with contempt of the Atlantic County Court of Oyer and Terminer.

20 (c) Appellant was privileged to refuse to disclose the identity of the person or persons who had supplied him with information and data concerning criminal law violations, said information and data having been supplied to him in his official capacity as a member of the May Term 1943 Grand Jury of Atlantic County and while he was actively engaged in the performance of his duties as such.

(d) Said appellant cannot legally be compelled to disclose the identity of his said informers under the circumstances as stated in sub-paragraph (c) above.

30 (e) The oath of secrecy which this appellant took as a member of the May Term 1943 Grand Jury of Atlantic County prevents conviction of the charge here made.

(f) The oath which this appellant took at the time of his induction as a member of the May Term 1943 Grand Jury of Atlantic County forbids the disclosure of the information and data elicited of him during his appearance as a witness before the October Term 1943 Grand Jury of said County.

40 (g) Appellant was legally entitled to the protection of the personal privilege accorded to all witnesses when called upon to testify and as

provided by Revised Statutes, Title 2, Chapter 97, section 7.

(h) The questions asked of this appellant as set forth in the original petition filed in the proceedings before the Atlantic County Court of Oyer and Terminer on December 16, 1943, were not material or relevant to any legally instituted proceeding. 10

(i) The questions asked of this appellant as aforesaid were not framed in accordance with the well established rules of evidence.

(j) The questions asked of this appellant as aforesaid were not such as would elicit evidence which said grand jury was legally entitled to receive and consider in that such evidence was hearsay, and, therefore, incompetent, improper and illegal proof. 20

(k) Before this appellant can be adjudged guilty of contempt for refusing to answer the questions submitted to him, the court must be satisfied that the evidence elicited is competent and admissible as evidence in accordance with the well established rules of evidence and the evidence elicited from this appellant when in attendance before the October Term 1943 Atlantic County Grand Jury was neither competent or admissible proof. 30

(l) Among other things this appellant, when before the October Term 1943 Grand Jury of Atlantic County was addressed as follows: "Mr. Schwartz, the Grand Jury is open and ready to get any information or suggestion you have at hand, but have unanimously voted that any statements that you have to make whether it be hearsay or direct evidence will be made in the presence of the Prosecutor and his assistants." It was charged in the original petition filed in 40

10 the Atlantic County Court of Oyer and Terminer on December 16, 1943, as aforesaid, that this appellant acted contumaciously when he replied—"Mr. Foreman, I decline to give the information." Appellant's conviction of contempt for so doing is improper and illegal for the reasons that the statement as quoted was not in the form of a question; it was not framed in accordance with the well established rules of evidence; it did not require answer by the witness; and said statement was, at best, a mere invitation or privilege accorded to this appellant in which he was free to act as he desired.

20 (m) This appellant could not be legally required to give any evidence respecting or concerning the operation of the law enforcement agencies of Atlantic County (of which the Prosecutor of the Pleas and his assistants were a part) while said Prosecutor and his assistants were present in the Grand Jury room.

(n) Appellant could not be legally required to give evidence pertaining to investigation of improper conduct of the affairs of county enforcement agencies (including the office of Prosecutor of the Pleas) while the Prosecutor and his assistants were present.

30 (o) The Prosecutor of the Pleas and his assistants had no legal right to be present in the Grand Jury room when this appellant gave evidence concerning the administration of the affairs of county enforcement agencies which included said Prosecutor and his assistants.

(p) Appellant had no intent to condemn either the Grand Jury of Atlantic County or the Court of Oyer and Terminer of said county.

40 (q) Appellant acted pursuant to the advice of legal counsel.

(r) The conviction of this appellant was against the weight of the evidence.

(s) Appellant fully and completely purged himself of the charge of contempt and his contradiction of contumacious action was full and adequate and appellant was, therefore, entitled to his discharge and acquittal.

10

Dated August 8, 1945.

WM. ELMER BROWN, JR.,
Attorney of Joseph Schwartz,
Appellant.
CHARLES S. MOORE,
Of Counsel.

20

[ENDORSED]

We hereby acknowledge service of the within Grounds of Appeal this 9th day of August, A. D. 1945.

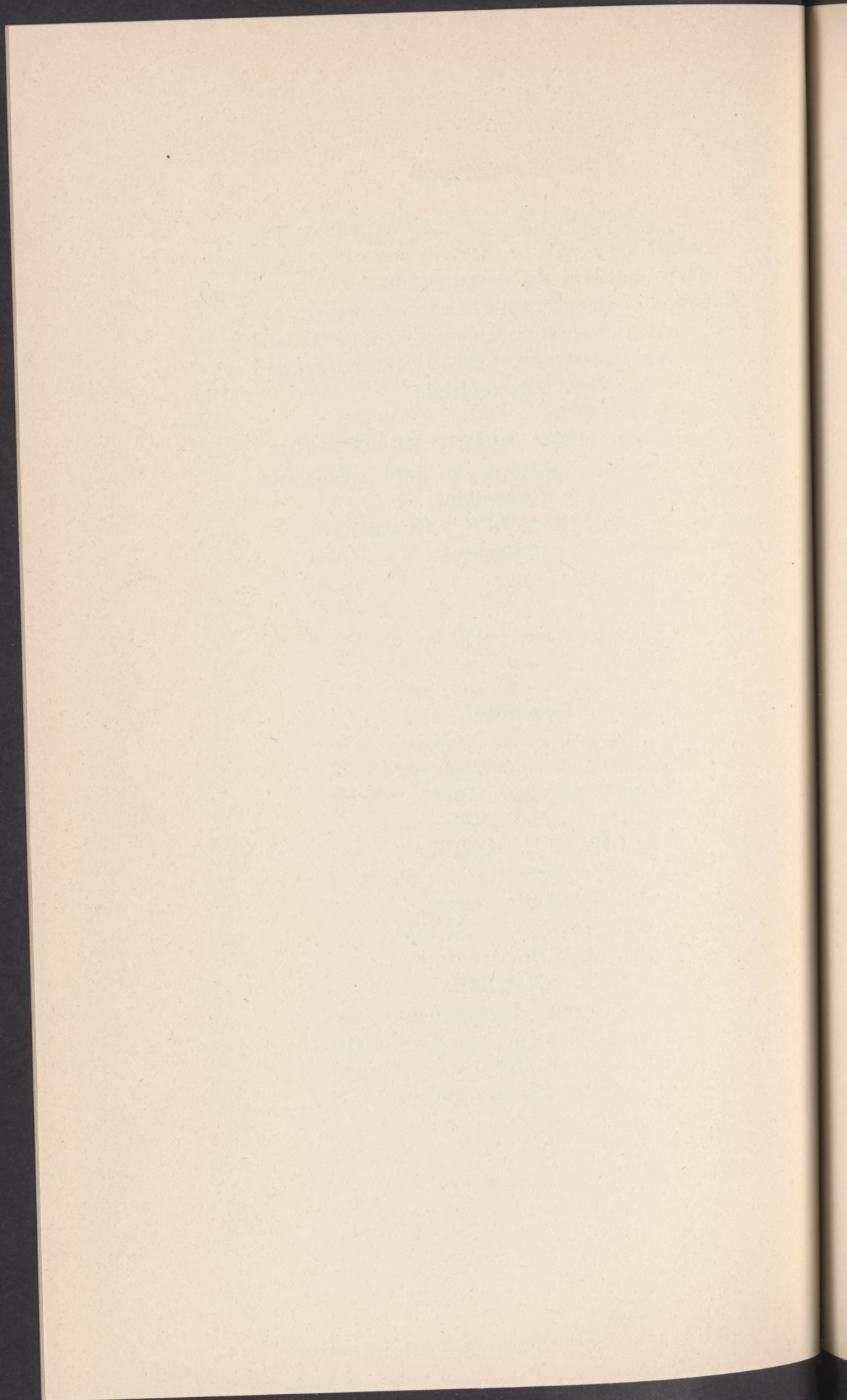
LEWIS P. SCOTT,
Prosecutor of the Pleas of
Atlantic County.

By DAVID R. BRONE,
Ass't Prosecutor.

30

H. R. COULOMB,
Former Prosecutor of the
Pleas of Atlantic County
and Attorney of Record
for the Respondent.

40



**NEW JERSEY COURT OF ERRORS AND
APPEALS.**

In the Matter of Contempt Proceedings Against
JOSEPH SCHWARTZ.

ON APPEAL FROM THE NEW JERSEY SUPREME
COURT.

APPELLANT'S BRIEF.

PRELIMINARY STATEMENT.

Appellant was convicted before the Atlantic County Court of Oyer and Terminer and sentenced for an alleged contempt "of the Grand Jury" for refusing to answer certain questions submitted to him while in attendance before that body as a witness on November 17, 1943. A review was had before the Supreme Court as authorized by R. S. 2:15-3 et seq. and the conviction was affirmed (S. of C., p. 174). This appeal is from the Supreme Court judgment.

The gravamen of the original complaint as set forth in the petition filed (S. of C., p. 2) is that, in connection with a Grand Jury investigation of "certain alleged charges of the existence of gambling,

Appellant's Brief

lottery and other charges of alleged violations of the criminal laws," appellant was subpoenaed and sworn as a witness. He was asked five (5) questions eliciting the name or names of the person or persons who had supplied him with information concerning "number slips, which you had in your possession on or about October 5th" and "concerning the operation of the law enforcement agencies in the City and County." Appellant declined to disclose the identities of his informers. (See petition, paragraph 5, S. of C., p. 3.)

Subsequently the Foreman of the Grand Jury addressed appellant as follows: "Mr. Schwartz, the Grand Jury is open and ready to get any information or suggestion you have at hand, but have unanimously voted that any statements that you have to make, whether it be hearsay or direct evidence, will be made in the presence of the Prosecutor and his assistants." To this Schwartz responded: "Mr. Foreman, I decline to give the information." (See petition, paragraph 6, S. of C., p. 4.)

Because of the foregoing it is contended that the appellant, Schwartz, acted "in contempt of the October Term 1943 Atlantic County Grand Jury."

THE PROOFS.

Schwartz (this appellant) was a member of the May Term, 1943, Grand Jury (S. of C., pp. 76 and 90) inducted on May 11th, 1943, and continuing in existence thereafter until October 13th, 1943, when the October Term Grand Jury was sworn in (S. of C., p. 92). By the oath administered to him and his

fellow Grand Jurymen, Schwartz swore to "diligently inquire" into "all such matters and things as shall * * * in any way come to your knowledge, touching the present service" and that he would "keep secret the counsel of the State, your fellows and your own" (S. of C., p. 76).

During the course of his service as a grand juror, Schwartz obtained certain "number slips" having to do with alleged gambling operations in Atlantic County and other information having reference to the maladministration of the criminal laws by the City and County enforcement agencies (S. of C., p. 90). This information was disclosed by Schwartz to the May Term Grand Jury of which he was a part (S. of C., pp. 40 and 123) and while said jury was sitting in regular session.

The number slips and information in question came to the "knowledge" of Schwartz in his capacity as a grand juror and during his term of service as such (S. of C., p. 90). He testified that the so-called number slips or tickets "started coming in in early July" (S. of C., pp. 90 and 104), and "on a number of occasions" thereafter (S. of C., p. 105). The last occasion when number slips were received by him was on October 5th (the date referred to in subpoena Exhibit R-1 and in Question No. 1 appearing in Paragraph 5 of the petition) (S. of C., p. 115).

The number slips were supplied to Schwartz by several different persons. He said "it was only because of the fact that (he) was a grand juror that they were given to" him (S. of C., p. 91) and that the informers were advised "that (he) intended to use that information, if (he) found it necessary, in the grand jury" (S. of C., p. 91). The information was supplied with the understanding that "they

would (not) be forced to appear to make that evidence or forced to appear to swear that they" (meaning "anyone who might have gone out to buy them") "had purchased them." Schwartz assured them (the informers) "that it wouldn't be necessary" (S. of C., p. 91).

The number slips were not received by Schwartz direct from his informers. They were received, in some instances, through a third person who handed them to him in a sealed envelope; "on another occasion a messenger called at (his) shop and handed it to (him)," the messenger not being known to Schwartz; "at another time (he) found a package of them on (his) desk, which had been delivered to (his) shop in (his) absence" he, Schwartz, not knowing who delivered them; and "on the night of October 5th (he) found a package of them on the floor at (his) home that had been put in a letter slot in the door," he, Schwartz, not knowing who put them there. In each and every instance Schwartz received the slips in a sealed package with no name or other writing thereon. He had no knowledge by whom or how they were acquired in the first instance. In fact, he said he could only infer from or by whom the slips were supplied. Even if he did know, he had a definite understanding that he "would not reveal the source" (S. of C., pp. 105 to 107).

Schwartz acquired the information respecting laxity of law enforcement by City and County enforcement agencies from various City and County employees and under similar circumstances and like understandings as he had received the number slips.

The May Term Grand Jury last considered the information, supplied to Schwartz and by him revealed to that body, on October 6th (S. of C., p. 107).

The term of said Jury expired on October 13th. On this latter date the October Term Grand Jury was sworn in (S. of C., p. 75).

Schwartz was subpoenaed to appear before the October Grand Jury on November 3d and bring with him "all number slips, coupons or tickets which have come into your possession since May 11, 1943, to date, and particularly that you bring with you and produce * * * all number slips, coupons or tickets which came into your possession on or about the 5th day of October, A. D., 1943" (Exhibit R-1, S. of C., p. 162). It is here important to note that May 11, 1943, was the day the May Term Grand Jury was sworn in and the date October 5, 1943, was the day before the last meeting of that body when Schwartz acquired the last package of slips. From this, if nothing else, it may be reasonably inferred that the Grand Jury was informed that the knowledge and data which Schwartz was required to produce was acquired by him as a Grand Juror during the immediately preceding term.

Mr. Buzby, Foreman of the October Jury, said, "As foreman I presented to the grand jury information that had come to me, and they, in turn, said, on the strength of that information, that Mr. Schwartz should be summoned before the grand jury" (S. of C., p. 52). From this bit of proof we may also infer that Buzby informed the Grand Jury that it was understood that Schwartz had information which had been acquired by him as a previous grand juror and thus he (Schwartz) was summoned to appear and produce data acquired by him during the period he served as such.

Schwartz testified that, when before the grand jury on November 3, 1943, he informed that body

Appellant's Brief

that he was a member of the Grand Jury at the previous term (S. of C., p. 95). There can be no doubt that the October Term Grand Jury was aware of Schwartz's previous grand jury service and that he was being asked to divulge knowledge that had come to him while so acting.

When Schwartz appeared on November 3rd the grand jury called for the production of the number slips and Schwartz explained "that they were out of (his) possession" (S. of C., p. 97. See also testimony of Dreher, S. of C., pp. 71 and 72). By way of passing it should be noted here that this appellant is not charged with contempt for failure to produce the slips but with refusal to divulge the identity of the persons who had supplied them.

Schwartz was subpoenaed again on November 17th and required to produce "any documentary information or other papers which you may have in your possession concerning any violation of the criminal law which has come to your knowledge or attention." (See Exhibit R-2; S. of C., p. 163.) During that appearance the series of questions appearing in the petition filed in this proceeding were put to the witness. These were the only questions which Schwartz refused to answer. (See testimony of Dreher, S. of C., p. 74.)

Schwartz's refusal to disclose the name or names of his informers was because the information was "given to (him) in confidence as a grand juror, and (he) promised not to reveal the source" (S. of C., p. 99). He refused to volunteer information in the presence of the Prosecutor and his staff because "the information that (he) had to reveal contained considerable names of rather prominent County and City officials and (he) did not care, not being evi-

dence, (he) did not care to impart that to the open jury with the Prosecutor and the stenographer there * * * and (he) felt (he) would be jeopardizing (his) future if (he) did so state" (S. of C., pp. 99 and 100). Schwartz further explained that his attitude was actuated by a threat which he had been informed was made by Mr. Stringer, an assistant prosecutor, a short time previous, to the effect that "we (meaning the Prosecutor's staff) will take care of Mr. Schwartz" (S. of C., pp. 100, 112 and 130).

Also Schwartz testified that he had been advised by his personal counsel, Charles S. Moore, Esq., that he could not be compelled to disclose the source of his information; that he should not do so; and that he was not required by law to give the information which pointed an accusing finger at the City and County enforcement agencies while the Prosecutor and members of his official staff were in the grand jury room (S. of C., p. 100, et seq.). In this Schwartz was corroborated by Mr. Moore (S. of C., pp. 131 to 140).

The Prosecutor here has shown no evidence of any recalcitrant action on the part of Schwartz unless it be said that his refusal to answer as stated in the petition filed is evidence of obstinacy on his part. No witness called by the Prosecutor testified to any other respect in which he had refused to cooperate with the grand jury. True it is that the witness Dreher, in answer to inquiry from the court and over objection by counsel, was permitted to testify as follows (S. of C., p. 66):

"JUDGE LOVELAND: Calling your attention to this session of November 17, when Mr. Schwartz was before your body, please tell us

Appellant's Brief

the demeanor and the attitude of the witness at the time the questions were asked.

"MR. BROWN: I object to that if your Honor please.

"JUDGE LOVELAND: Objection overruled and exception allowed.

"THE WITNESS: Repeat the question, Mr. Stenographer.

(Question repeated.)

"MR. BROWN: That calls for a conclusion of this witness.

"JUDGE LOVELAND: Did you observe his attitude and demeanor at the time these questions were asked?

"THE WITNESS: Yes.

"JUDGE LOVELAND: Tell us what that was.

"THE WITNESS: I would say somewhat antagonistic.

"MR. BROWN: I object and ask that it be stricken as a conclusion.

"JUDGE LOVELAND: Objection overruled.

"MR. BROWN: Exception.

"JUDGE LOVELAND: Exception allowed. That is all."

Later the witness explained (S. of C., p. 78):

"A. I probably should have said that he was antagonistic to the Prosecutor and his group. I didn't mean the entire Jurors.

"Q. Was he antagonistic to the Jury?

"A. Not to my knowledge."

Appellant's Brief

The witness Dreher further testified as follows (S. of C., p. 74):

“Q. Now, will you tell me of anything else that Mr. Schwartz refused to give the grand jury or in any way refused to cooperate with the grand Jury other than to refuse to give the names of his informers or other than to give this information in the presence of the Prosecutor. Can you tell me any other question that he refused to answer, except that which called for either one of these two things?

“A. I don't recall of any that he refused to, outside of that.”

When before the Grand Jury on November 17th, Schwartz gave some information and data “to the Prosecutor in the presence of the grand jury” (S. of C., p. 98).

In this status of the proofs we pass to a discussion of the law applicable thereto.

THE LAW.**I.**

The charge here does not meet the statutory definition of contempt.

It is (R. S. 2:15-1)*:

“The power of any court of this state to punish for contempt shall not be construed to extend to any case except the:

“a. Misbehavior of any person in the actual presence of the court;

“b. Misbehavior of any officer of the court in his official transactions; and

“c. Disobedience or resistance by any court officer, or by any party, juror, witness or other person to any lawful writ, process, order, rule, decree or command of the court.”

It must be conceded that the contempt charged here cannot be classified under either subdivision (a) or (b) of the act quoted. Therefore, the charge here, if it be contempt, must, of necessity, come within sub-division (c). It was so held by the Supreme Court (S. of C., p. 166, line 28).

In this instance the court was without power to punish for contempt on the part of a witness unless

* Prior to the cited enactment in 1917 the power of the courts of this state to punish for contempt was derived from the common law. See *In re Verdon*, 89 N. J. L. 16, reversed on other grounds, 90 N. J. L. 494. Thus it will be observed that the statute cited was in derogation of the common law and by reason thereof requires strict compliance.

it be a "disobedience or resistance * * * to any lawful writ, process, order, rule, decree or command of the court". No disobedience or resistance "to any lawful writ" or "process" is here charged nor could it be. The subpoena to appear was duly answered. It must, therefore, be a disobedience of an "Order, rule, decree, or command of the court." It was so held in *Epstein v. Am. Hammered Piston Ring Co.* (Sup. Ct. 1920), 95 N.J.L. 391. In that case a rule to show cause was issued to adjudge the plaintiff guilty of contempt for refusing to answer certain questions propounded to him by the defendant's attorney before a supreme court commissioner. The plaintiff appeared before the commissioner in pursuance of the service of the usual form of subpoena but refused upon direction of his counsel to answer any questions "upon the ground of the alleged unconstitutionality of the act requiring such examination without the order of the court". The court said (at p. 392):

"This situation presents a *lapsus* or *omissus* in the method of procedure, for concededly none is prescribed. To subject a recalcitrant witness to the charge of a contempt it must be shown that he has violated some order or direction of the court, and in this case no such order exists. *So far as obedience to the mandate of the subpoena is concerned, he has appeared as required.* The obvious difficulty of enforcing compliance with the legislative intent in the situation is due to the absence of a court order, in the first instance, or the propounding by examining counsel of certain specific questions, which upon the witness' refusal to answer may be submitted to the court, and after argument *pro* and

con, as to the legal relevancy of the same, an order may be made, which, if contemned, may present the basis for a rule to show cause. Without such an order an application in this case is premature, and must be denied." (Italics supplied.)

To the same effect see also *Backel v. Linn* (Sup. Ct. 1937), 104 N.J.L. 243.

In the court below the Prosecutor characterized this point as a "novelty" and urged that it was without merit in that to pursue such a course would destroy the cloak of secrecy of the grand jury because it would require public disclosure of the questions to the court. But how is such a proceeding to be distinguished from a public hearing on contempt, as in this instance? It was argued that no such procedure as suggested by the Epstein case was resorted to in either of the cases of *In re Grunow*, 84 N.J.L. 235; *In re Gonzales*, 88 N.J.L. 536 or *In re Bleakly*, 21 N.J.L.J. 58.

The cases cited do not refute the point here made. The statute (R. S. 2:15-1) which defines and limits the power of the court to punish for contempt was first passed and adopted on March 15, 1917 (P. L. 1917, ch. 37, p. 71). The *Grunow* case, *supra*, was decided March 4, 1913; the *Gonzales* case, *supra*, was determined on November 5, 1910; and the *Bleakly* case, *supra*, on January 5, 1898. Thus it will be observed that those cases are of no value as authority when considering the purposes, intent or effect of the statute which did not become effective until after said cases had been decided. The statute was not before the court in any of those three cases.

The Court of Oyer and Terminer fell into the same error of relying upon the *Grunow* and *Gonzales*

Appellant's Brief

cases as a basis for the adjudication of contempt here. (See opinion, S. of C., p. 16.) In so doing the court failed to recognize the lack of association between those cases and the cited statute.

Every legislative enactment must have a purpose for its adoption. The title to the original act states the purpose to be that of "restricting and defining the jurisdiction of the courts." It requires no strained interpretation or construction of the statute to say that the power and jurisdiction of the court is limited to cases of "disobedience or resistance" to a "lawful writ" or "process" of the court or to an "order, rule, decree or command" of the court.

The Court of Oyer and Terminer denounced the acts of this appellant as lacking "any semblance of obedience, cooperation or compliance with the direction contained in the Courts process" of subpoena. (See Opinion, S. of C., p. 17.) In fact the conclusion of that court was that Schwartz "was wilfully and obstinately disobedient to the process of the court" (see Opinion, S. of C., p. 18) but such is not the charge here. This holding is contrary to that of this court in the *Epstein* case, *supra*, where it was held that the mandate of the subpoena was obeyed when the witness appeared as required.

The Prosecutor further argued in the court below that the cited statute should not receive the interpretation urged by this appellant because of the inconvenience of applying for "a lawful order, rule, decree or command" of the court. Inconvenience cannot control an interpretation of a statute manifestly just in itself and calculated to carry into effect the object and intent of the law. *Thompson v. Egbert*, 17 N.J.L. 459.

The cited statute of this state is patterned after the Federal act of 1831 (28 U.S.C.A. sec. 385); in fact, the statement of purpose attached to the original draft of the act as contained in files and records of our legislature so states. In construing the Federal act it has been held that a party must have violated an express order of court before he can be punished for contempt. *In re Probst* (C.C.A. 2d), 205 Fed. 512, 513; *Morgan v. U. S.* (C.C.A. 8th), 95 Fed. (2d) 830; and *Berry v. Midtown Service Corp.* (C.C.A. 2d-1939), 104 Fed. (2d) 107, cert. gr. 308 U. S. 536, cert. dismiss. 308 U. S. 629. In the latter case the court said (at p. 111), "We believe it is a wiser policy to punish as contempt only the disobedience of some express command; and such we understand to be the general rule."

In *Morgan v. United States* (C.C.A. 8th-1938), 95 Fed. (2) 830, the Federal Statute referred to was interpreted and applied. There the court affirmed the view, expressed in earlier cases, that "where Congress has been so industrious to restrict the natural inherent powers of a federal court, scrupulous attention to the limitations it has imposed would seem to be the proper course" (at p. 835) and that "the power must be exercised within the restrictions" named in the statute (at p. 836).

There is, however, a distinct and decided difference between the Federal statute and that of this State. The Federal act, after clothing the courts with power to punish for contempts of their authority, reads as follows:

"Such power to punish contempts shall not be construed to extend to any cases except *the misbehavior of any person in their presence, or so near thereto as to obstruct the administration*

Appellant's Brief

of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts." (*Italics supplied.*)

The significant difference between the Federal and State acts is that in place of the language "in their presence, or so near thereto", etc., our legislature substituted the words "in the *actual* presence of the court." The word "actual" means in "Law—Existing in fact; real, as distinguished from conjectural or imputed by construction; as actual possession." (See New Standard Dictionary, Edition of 1934). By the difference in language our legislature evidenced a purpose or intent to limit and restrict the power of our courts to punish contempt committed only in its "actual" presence. The act does not read "in the presence of the court" but rather "in the actual presence of the court."

Further evidence of such intention is to be gleaned from the fact that our legislature failed to adopt the phrase "or so near thereto as to obstruct the administration of justice." The elimination of this phrase together with the use of the word "actual" justifies the conclusion that our statute was intended to limit the power of our courts to punish for contempts committed only in the actual or real presence of the court and not in its constructive presence.

We respectfully submit that the Supreme Court failed to observe and give proper significance to this difference between the Federal and State statutes. The Supreme Court determined that the conviction of this appellant was proper because, inas-

much as the grand jury is an arm of the court, contempts in the presence of the grand jury are to be treated as taking place in the presence of the court. (See Opinion, S. of C. p. 169, line 23, to p. 171, line 12.) In support of such reasoning the Supreme Court cites Federal cases.

In the *Meckley* case it was determined that defendant's answers to questions asked him before the grand jury were "evasive, reluctant and dissembling for the intended purpose of preventing and obstructing the grand jury," etc., and that such conduct amounted to contumacy. Thus it is apparent that the court there concluded that the defendant was guilty of "misbehavior" in the "presence" of the court "or so near thereto as to obstruct the administration of justice." The cited case is not authority for the fact that presence before the grand jury is "in the actual presence of the court" as prescribed by our State act.

In the *Camarota* case the court said (at p. 246):

"Since the grand jury is an arm of the district court, proceedings before it are to be regarded as being proceedings in the court. Consequently contempts occurring in the presence of the grand jury are to be treated as taking place in the presence of the court or so near thereto as to obstruct the administration of justice."

The court recognized that the contempt charged against Camaroto was not committed "in the actual presence" of the court. Here again the court was construing the Federal statute and this case went no further than to decide that the acts complained of

Appellant's Brief

were in one or the other of the alternative positions, either in the court's presence "or" near thereto.

In the *Ellison* case the court said (at p. 377): "The Grand Jury is an appendage of the court and contempts committed before it are committed in the 'presence' of the court". However, in this case as well as those previously referred to the court did not have before it, either for consideration or construction, the significance of the phrase "actual presence" as contradistinguished to the simple word "presence", either alone or coupled with "or near thereto".

The Federal cases cited in the Supreme Court opinion are not helpful here for the added reason that it is conceded by all parties, as well as by the court below, that the conviction of this appellant, Schwartz, can only be sustained if within the purview of subdivision (c) of the State act, namely, "Disobedience or resistance * * * to any lawful writ, process, order, rule, decree or command of the court." Subdivision (a) of the act defining contempt as any misbehavior "in the actual presence of the court" is helpful in this case only as indicating legislative intent and this and subdivision (c) which requires an "order, rule, decree or command of the court" indicates an intention that the contempt must either be in the court's "actual" presence or in disobedience of its "actual" mandate.

We, therefore, respectfully submit that both logic and reason dictate that before this appellant can be adjudged guilty of contempt he must be shown to have violated an "order, rule, decree or command of the court." Such is the spirit and intent of our act and particularly of subdivision (c) thereof.

The *Gonzales* case, *McQuade v. Evans* and *In re Cheeseman* cited by the Supreme Court do not refute this contention. All of said cases were decided before the Contempt Act was adopted and so, therefore, the provisions of said act could not have been passed upon. But more than that those cases are cited as bearing on the practice to be pursued after the act of contempt has been committed while here the point is made that certain necessary elements must appear, viz., violation of a court order, before the act can be considered contumacious.

II.

Appellant cannot be adjudged "in contempt of the October Term 1943 Atlantic County Grand Jury" as here charged.

The petition (S. of C., p. 5) prays that Schwartz be required to show cause why he "should not be adjudged in contempt of the October Term 1943 Atlantic County Grand Jury."

If what is here charged be contempt it can only be such as an affront against the court. The grand jury is not a court nor the court. It is but an arm of the court under which it is organized. It acts for the court, in this instance the Court of Oyer and Terminer. Subpoenas to appear before the grand jury are issued in the name of the court, and indictments or presentments are required to be entitled in and returned to the court. The only judicial power (if it be considered such) that the grand jury has is to pass on the sufficiency of the evidence to support indictments. It has no power to either adjudge or punish for contempt. (12 *Amer. Jur.* sec.

Appellant's Brief

53, p. 426.) It has no power to either "order, rule, decree or command." Recalcitrancy before that body can only be reported to the court for action.

Prosecutor argued below that the determination of the legality or weight of evidence before it "is solely for the grand jury itself." No authority is cited for this and, we submit, that none can be found. The Grand Jury has no other recourse than to submit the legality of the question to the court and if it be then determined that the question submitted to the witness be such as to require answer, the court can so direct. Then if the witness declines to answer he can be adjudged in contempt for refusal to comply.

An analogy to the circumstances of this case would be an instance where there is an unlawful obstruction of the service of process. The latter might be contempt (12 *Amer. Jur.*, Sec. 25, p. 407), but only contempt of the court which issued the process and not a contempt of the process server.

No case has been found wherein the defendant has been adjudged guilty of contempt of a grand jury.

Here again, we submit, the Supreme Court fell into error and, in so doing, it followed the Federal cases previously referred to without making note of the difference in the language between the Federal and State statutes and also despite the fact that appellant had violated no "order", etc., of the court. It was not argued below, nor do we now contend, that the Grand Jury is not a part of the administration and, to that extent a part of the court. The point we make is that the appellant could only be in contempt of the court itself because the court alone can "order, rule, decree or command."

III.

Appellant cannot be compelled to disclose the identity of his informers.

All of the questions set forth in paragraph 5 of the petition filed here (S. of C., p. 3) seek but one answer, viz., the names of the persons who supplied Schwartz with information. Said information admittedly came to Schwartz in his capacity as a grand juror and for use before the body of which he was a part.

In *Wigmore's Code of Evidence*, Third Ed., 1942, Rule 214, p. 2508, it is said:

“A communication by a witness, as complainant or otherwise, made to a grand jury, * * * with a view to the investigation of a matter within the duties of such officers is privileged from disclosure by any person.”

In Art. 2, p. 2518 of the same volume it is said that the privilege applies “To such information voluntarily given to any officer having duties in the administration of justice.” And in Art. 3, p. 2522, it is stated:

“A genuine privilege for communications, on the fundamental principle of privilege, must be recognized for the communications made by informers to the Government; because such communications ought to receive encouragement, and because that confidence which will lead to such communications can be created only by holding out exemption from a compulsory disclosure of the informant's identity.”

Appellant's Brief

In his work on Evidence, 2nd Ed., Vol. 5, sec. 2374, p. 172, Mr. Wigmore says:

* * * "there is a rule which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made should not be unnecessarily disclosed. * * * all those questions which tend to the discovery of the channels by which the disclosure was made to the officers of justice, were, upon the general principle of the convenience of public justice, to be suppressed; that all persons in that situation were protected from discovery"; * * * .

See also—

Greenleaf on Evidence, Lewis' Ed., Vol. 1, Secs. 250 and 252;

American Law Institute—Model Code of Evidence, Rules 229 and 230, p. 167;

9 A. L. R. (Annotation) p. 1112, et seq.;

59 A. L. R. (Annotation) p. 1558.

In *Segurola v. United States* (C.C.A., 1st—1926), 16 Fed. (2) 563 (cert. grtd. 274 U. S. 729, affirmed 275 U. S. 106), the court refused to require a police officer to give the name of the person from whom he obtained information leading to a search.

In *Wilson v. United States* (C.C.A. 3rd—1932), 59 Fed. (2) 390, it was said:

"Many of the decided cases, and emphatically the early English ones, and our own, as well, view the doctrine as founded upon policy of the law that the name of one by whom information has been given to an officer of the law of law

violations should not be divulged. The policy recognizes that it is the duty of every one to aid in law enforcement and has been adopted for the encouragement of those from whom information may be received."

In *McInes v. United States* (C.C.A. 9th—1932), 62 Fed. (2) 180, cert. den. 288 U. S. 616, the court quoted with approval, the following:

"To inform is a statutory duty, and sound public policy forbids exposing informers to possible, even probable evil consequences."

Mr. Justice Colie, of this court, in his charge to the October Term 1943 Grand Jury (S. of C. p. 146 and particularly at p. 153) recognized this principle of privilege when he advised the members of that body that—"It may be that the person or persons who have that information are not in a position to disclose it; that is to say, to disclose the source from which they obtained it," * * *. This, in effect, was an admonishment that such a "privilege" should be respected. If it be said that, because of the reference to newspaper men in the charge, the remarks of the learned Justice were confined to witnesses of that class, we submit that the principle as stated was not, and could not, be so limited.

This "privilege" of the grand juror is closely allied to the oath of secrecy. In *Winfield's Grand Jury*, 2 Ed. (1928), as revised by Mr. Justice Parker of this court, one of the reasons for the obligation of secrecy is stated (at p. 22) to be that if it were not so "persons would be deterred from voluntarily going forward and informing of crime."

Thus, we submit, that, as a matter of public pol-

Appellant's Brief

icy, this appellant cannot be compelled to disclose the identity of his informers and, this being so, he cannot be guilty of contempt for refusing to do so.

It was suggested by the Prosecutor when before the lower court that the "privilege" hereinbefore discussed does not belong to a grand juror because the authorities cited state that it belongs solely to "police officers and law enforcement officials" and that "a reading of these authorities will disclose that nowhere in any of them is mentioned the title of grand juror or grand jury." To so argue is ridiculous. Since when has the office of a grand juror been reduced below the level of a police officer, a detective or a prosecuting attorney? The work of these latter officers would go for naught without the action of the grand jury. It is the presentment of indictment which makes the prosecution of criminal law violations effective. The Constitution so requires (Art. 1, par. 9).

The grand jury is a law enforcement agency. It has no other justification for its existence. It may and often does act independent of the help or assistance of police or prosecutor. The grand jury oath binds the members of that body to "diligently inquire, and true presentment make of all such matters and things as shall be given you in charge, or in any way come to your knowledge, touching the present service," etc. Mr. Winfield, in the preface to his work on Grand Jury (at p. 5) points out that "grand jurors are taken from the mass of citizens to perform a very important part in the protection and preservation of society from the assaults of the lawless" and (at p. 7) that the function of this body is most important "*in the administration of justice.*"

It is of no importance that the authorities have not "mentioned the title of grand juror or grand

jury" if the general class to which the "privilege" belongs is sufficiently broad to include them. In *Wigmore's Code of Ev.*, supra, it is said that "a communication by a witness, as complainant or otherwise, made to a grand jury," is a privilege and that the "privilege" applies "to any officer having duties in the administration of justice" and "to any administrative officer having duties of investigation."

In his work on Evidence, 2nd Edition, Mr. Wigmore says (Vol. 5, sec. 2374, p. 172) that "communications made by informers to the Government" are privileged. Can it be said that a grand jury or a grand juror is not an important and essential part of our system of government?

Mr. Greenleaf, in his work on Evidence, supra, says the privilege applies to disclosures made "to the officers of justice." Are not grand jurors within that category?

In the annotated notes appearing in 59 A. L. R. 1558 it is said that statements made by witnesses before "a grand jury, or to a county attorney," are privileged communications.

The Court of Oyer and Terminer in the opinion filed (S. of C., p. 17) states that the fact "that the information he (Schwartz) claimed to have was given him in confidence, is inadequate" and placed appellant in a different category from "that class of persons such as doctors, lawyers or clergymen who may claim that a relation of confidence exists." By so doing the court evidences a misconception of the confidential privilege as it was claimed for Schwartz, as a grand juror, a member of a law enforcement body. At no time did either counsel engaged in this proceeding argue below that Schwartz

Appellant's Brief

either was or was not privileged to withhold information because of a confidential relationship existing between him and his informer similar to that existing between doctor and patient, attorney and client or clergyman and parishioner. In fact there is no rule of privileged communications between a clergyman and members of his parish (*State v. Morehous*, 97 N.J.L. 285, 295; *Bahrey v. Poniatishin*, 95 N.J.L. 128) or between a doctor and his patient (*McGrath's New Jersey Trial Evidence*, sec. 361, p. 384; *Caffrey's Cases on Evidence* (N. J.), p. 235; *Greenleaf on Ev.* (Lewis Ed.), Vol. 1, sec. 248, p. 390; and 70 *Corpus Juris*, sec. 588, p. 439). Thus it will be observed that the analogy cited by the court below is erroneous and is not decisive of the point made.

This "privilege" of law enforcement officers was recognized by our Supreme Court in *State v. Donovan* (1943), 130 N.J.L. 42, where the court refused to compel the Prosecutor of Hudson County to answer certain questions propounded to him as a witness on the ground, *inter alia*, that the subject matter of the inquiry was "privileged."

The theory or policy underlying this principle as stated in *Wilson v. United States*, *supra*, is dispositive of the question.

Also in *Vogel v. Gruaz*, 110 U. S. 311, the U. S. Supreme Court had this question of privilege under consideration. Among other things the court said (at p. 315):

"The avenue to the grand jury should always be free and unobstructed. * * * Public policy will protect all such communications, absolutely, and without reference to the motive or intent of the informer or the question of probable cause;

the ground being, that the greater mischief will probably result from requiring or permitting them to be disclosed than from wholly rejecting them."

The Supreme Court disposed of this question adversely to this appellant. (See Opinion, S. of C. p. 171.) It is there said: "The grand jury does not enforce the law. Its function is to make the accusation, i.e., present a bill of indictment; and no member of it can be said to be a law enforcement agent" etc. With this view we respectfully take issue. Is not the "bill of indictment" a very essential part of law enforcement? Our constitution gives the answer in the affirmative because it is there declared to be fundamental that no criminal prosecution can be had without it. Are not then the members of the grand jury law enforcement agents? The oath administered to grand jurors is individual in its effect though usually administered to that body collectively. The oath charges each member of the jury with the duty to "diligently inquire" into such things as shall "in any way" come to the knowledge of the juror and that he (the juror) shall not only keep secret the counsel of the State and his fellows but also his own counsel.

The prosecutor of the pleas is regarded as an enforcement agent and is privileged to refuse disclosure of the identity of his informers. So also is the policeman. Yet they are powerless without the aid of the grand jury. Enforcement of the criminal law by the prosecutor or the policeman would be ineffective otherwise. In fact it is for the grand jury to say whether the prosecutor's attempt at law enforcement is justified. With the grand jury holding such an essential place in the criminal law en-

forcement machinery, how can it possibly be said that "the grand jury does not enforce the law"? And, the grand jury cannot function except by and through its members. So, therefore, each member of that body is "a law enforcement agent" as surely as is a prosecutor or a policeman.

IV.

The oath of secrecy which Schwartz took as a May Term Grand Juror prevents conviction on the charge here.

Schwartz was a member of the immediately preceding May Term Grand Jury. As such he swore that he would keep secret "the counsel of the State, your fellows and your own." The information he was asked to give to the October jury was acquired by him while he was serving as a grand juror and was by him presented to the May Term Jury for its consideration. Under these circumstances, we submit, Schwartz cannot be compelled to reveal that information and thus violate his obligation to keep secret the counsel of his "fellows" or his "own."

Mr. Winfield, in his book previously referred to, discusses the effect of the oath and he says (at p. 21): "It connects and involves the duty of the juror with the interest and safety of society, with all the other members of the grand jury, *and with his own responsibility and conscience.*"

In 24 Am. Jur. 865 (sec. 47) it is said: "It has long been the policy of the law, in furtherance of justice, that *the investigations* and deliberations of a grand jury should be conducted in secret, and that for most intents and purposes, all its proceedings

should be legally sealed against divulgence" and (at p. 866) that "the language of the oath whereby grand jurors are sworn to keep secret the state's, their fellows', and their own counsel has obvious reference to all things which transpire in the grand jury room." Also, at p. 867, it is said: "The rule of secrecy * * * is not designed for the protection of witnesses before the grand jury, but for that of the grand jurors, and in furtherance of the public justice."

In 24 Am. Jur. 865 it is said that the policy of secrecy "is to inspire the jurors with a confidence of security in the discharge of their responsible duties."

Mr. Justice Kalisch, speaking for our Supreme Court in *State v. Silverman*, 100 N.J.L. 249, said (at p. 254): "By no other means can perfect freedom of deliberation and opinion among jurors be effectually secured, and the ends of an energetic administration of criminal justice surely attained."

In *State v. Borg* (Sup. Ct.—1930), 8 N. J. Misc. 349 (affirmed at p. 705) an application was made to compel a grand juror to testify. The juror pleaded the oath of secrecy as his reason of refusal to do so. The court said (at p. 350) that "the rules relating to witnesses have always been more liberal than those relating to members of the grand jury" and (at p. 351) "a witness who has been examined before a grand jury is under no obligation to refrain from stating what was said *to* and *by* him while there" but "the antithesis is that members of the grand jury * * * are under such obligation." Further it was said that "as to some matters, they cannot be permitted to testify; as to others they are perhaps privileged from testifying but may waive that privilege; as to still others they are not even

Appellant's Brief

privileged." In disposing of the application here made the court said "so far forth as it relates to members of the grand jury it should be denied."

In *State v. Bowman* (Sup. Judicial Court of Maine—1897), 38 Atl. Rep. 331, the court said that the policy is adopted "to secure the utmost freedom of disclosure of alleged crimes and offenses."

The enforcement of this obligation of secrecy is essential to the maintenance of a high standard of law enforcement and administration. Laxity in the protection of the grand juror would produce inefficiency and ineffectiveness in the law machinery. Grand jurors are asked to serve as citizens and in furtherance of civic duty. They are required to act "diligently" and without "fear." Yet here we have an instance where a grand juror (Schwartz) in so acting has been subjected to prosecution on a charge of contempt because he refuses to violate his oath of office.

Prosecutor argued in the court below that when "a grand juror is called as a witness by a subsequent grand jury he is at such a time a mere private citizen." Subsequent argument seemed to indicate the contention to be that a grand juror's obligation of secrecy exists only during the term of his service as such and that, when no longer a grand juror, he is not entitled to the protection of either "secrecy" or "privilege." No authority was cited for such a proposition nor can it be. The law is to the contrary. In *State v. Donovan*, 129 N.J.L. 478, the protection of the oath of secrecy was recognized as prevailing after the term of grand jury service had ended.

Prosecutor further argued below that "it would be a strange anomaly if a grand juror could refuse to bring such knowledge to the attention of the grand

jury because the information had come to him, or the names of the persons who might testify as to the information might come to him, while he was such a member." Just what application this argument may have here is difficult to see. In the first place Schwartz was not a member of the October Term Grand Jury and his sworn obligation to "diligently inquire, and true presentment make of all such matters and things as shall * * * in any way come to your knowledge, touching the present service" was not therefore then in force. While a member of the May Term Grand Jury the information acquired by Schwartz was revealed by him to that body. He was under no obligation "as a grand juror" to reveal it to the October Term Jury. Nor does this latter body have the right to any information acquired by him while serving on a previous grand jury, particularly in disregard of his protection of "secrecy" and "privilege."

Finally, it must be observed that the questions here put and not answered elicited only the names and identities of informers. No other information or data was properly elicited as we shall hereinafter demonstrate.

The Supreme Court, in dealing with this point, reasoned that "the information in the possession of the appellant was acquired by his own private investigation" and was not "obtained within the precincts of the grand jury room." (See Opinion, S. of C., p. 172, line 20.) The testimony here is that the information not only came to appellant during the course of his service as a grand juror (S. of C., p. 90, l. 25) but also that "it was only because of that fact that (he) was a grand juror" that the information was given to him (S. of C., p. 91, l. 14).

Further, the Supreme Court said: "It does not appear that the evidence or information * * * was made available fully to the grand jury of which he (Schwartz) was a member" (S. of C., p. 172, l. 7). The uncontradicted testimony of Schwartz was (S. of C., p. 91, l. 38):

"Q. Did you disclose to the grand jury, of which you were a part, at some later date thereafter that you had them?

A. Some of the grand jurors saw them; and also I disclosed them among other things when the Prosecutor was out of the room when I was making reports of information.

Q. Are you talking about in the grand jury room?

A. In the grand jury room.

Q. Did this information come to you at one time or on repeated occasions during your service as a grand juror?

A. On a number of occasions.

Q. And each time that you got the information did you disclose it to the grand jury, the fact that you had it?

A. No; I believe I disclosed it twice to the grand jury.

Q. In other words, it was accumulated and disclosed on at least two occasions?

A. That is right.

Q. Was the matter of this information a topic of discussion and consideration by the grand jury on which you served?

A. Yes, to this extent; they wanted to know

Q. (Interrupting) I didn't ask you to what

Appellant's Brief

extent; I asked you whether or not it was the topic of consideration and discussion.

A. It was."

In view of the foregoing it would appear that the observations of the Supreme Court, in respect to the use which Schwartz made of the information, were erroneous. For what other purpose did he acquire the information if it was not in furtherance of his duties of a grand juror and for consumption of the grand jury on which he served?

V.

The appellant was further protected by a personal privilege accorded to all witnesses.

The testimony here is that this defendant was informed from reliable source that an Assistant Prosecutor of the Pleas of this County had publicly stated, during a discussion or conversation relating to Schwartz's previous appearance before the Grand Jury, that "we will take care of Schwartz." There is some dispute as to just what the Assistant Prosecutor did say and the effect thereof but there is no dispute as to the fact that Schwartz had been told that the Prosecutor's statement was as quoted. *It matters not whether the threat was or was not made. The important fact is that Schwartz believed it to have been made as related and had no reason to believe otherwise.* It does not appear that the witness Rupp (Jury Commissioner for Atlantic County) had or could have any reason or ulterior motive in relating the conversation or threat to Schwartz improperly or incorrectly. It was so re-

Appellant's Brief

ceived by Rupp that he concluded it was advisable to admonish Schwartz "to be careful" (S. of C., p. 126): "to warn him" (S. of C., p. 126); and to caution him "to go cautiously" (S. of C., p. 126). Thus we can discern the frame of mind of the witness Schwartz when he appeared before the Grand Jury on November 17th pursuant to subpoena served upon him but a very few days after the "threat" was related to him. Having been before the Grand Jury but a short time before, was it not reasonable for Schwartz to assume that the groundwork was then being laid to execute that "threat," particularly in view of the fact that they sought no new or other information than that which had been elicited on his previous appearance before that body?

We all know that the machinery of the Grand Jury is most often put in motion at the instance of the Prosecutor. He issues and serves the subpoenas upon the witnesses and it is he who usually instigates and conducts the proceedings.

An example of the influence of the Prosecutor on the action of a grand jury may be gleaned from a reading of the transcript "Exhibit P-3." (S. of C., p. 157). There it will be observed that early in the examination of Schwartz the Prosecutor asked:

"Q. If this Grand Jury should refer this matter to the Court for such action as might be advisable, and the Court might ask you to reveal those names, would you still refuse?"

The purpose of the inquiry may have been three fold, viz., (a) to intimidate the witness, (b) to lay a foundation for or strengthen the charge of contempt, in the event the witness replied that even under such circumstances he would not disclose the names

or (c) to suggest to the grand jury the possibility or advisability of taking such action as here taken. The members of the grand jury were not lawyers or otherwise learned in the law. Where and by whom was that body advised that it might take the action which was here taken? The reasonable inference is that, if the Prosecutor did not advise the Grand Jury on the subject (and during the hearing hereof Prosecutor denied that he had done so), then the action was taken pursuant to the suggestion contained in the quoted question.

In 24 *Am. Jur.* 865 it is pointed out that "apparently aside from the violation of any oath, it has been declared that the disclosure of the proceedings before the grand jury in a certain stage of the case may render a criminal charge as an accessory after the fact"; that "disclosure of the secrets of the grand jury is sometimes made a penal offense"; and that "in some circumstances, a grand juror's disclosure of the proceedings of the grand jury may constitute a contempt."

Our legislature has provided protection to every witness by enacting (R. S. 2:97-7) that

"No witness shall be compelled to answer any question if the answer will expose him to a criminal prosecution or penalty or to a forfeiture of his estate."

Is this protection any the less due a witness because of his status as a grand juror even though his term of office as such has expired?

Schwartz says that because of the "threat," *inter alia*, he refused to answer the questions asked (S. of C., p. 100). He was interrogated by the court apparently in the effort to ascertain whether or not the

assertion of that excuse was sincere. The following colloquy between the court and the appellant (S. of C., pp. 122 and 123) seems to be ample excuse and justification for the appellant's attitude:

"BY JUDGE WARKE:

* * * * *

"Q. Do you have any serious apprehension of any physical violence from Mr. Stringer?

"A. Not physical; I wasn't afraid of that.

"Q. Did you think he was going to start some process of law proceedings against you?

"A. I didn't know that he was going to do it, but I felt that he was a member of the law enforcing agency that had power to make things uncomfortable.

"Q. You really thought Prosecutor Stringer was going to do something to you?

"A. Not necessarily Prosecutor Stringer.

"Q. What did you fear?

"A. My worst fears have been justified: here I am."

Thus the colloquy ended and what more justification and excuse could the appellant give than to say "here I am." He was placed in a very uncomfortable position. If he complied and answered the questions proposed he took the chance of prosecution, both criminally and for contempt, and by not answering he is prosecuted anyway. That is what we refer to at times as "getting him both going and coming."

The Court of Oyer and Terminer "brushed aside" the story of the Assistant Prosecutor's threat as unimportant and with the comment: "that he (Schwartz) feared reprisals" was "so completely

without merit as to require no discussion here" (S. of C., p. 18). However, it is respectfully submitted that the story of the "threat" was not only meritorious but it furnished a complete, valid and legal justification for Schwartz's refusal to disclose evidence in the presence of the Prosecutor and his staff particularly inasmuch as it was apparent such evidence would involve failure of "county enforcement agencies" in the performance of their legal duties.

The Supreme Court also regarded this point as ineffectual. (S. of C., p. 172, l. 32 to p. 174, l. 10.) It seems to be there considered whether the story as Rupp related it to Schwartz was true but, we submit, that consideration is beside the point. The real question here is, was Schwartz justified in believing it to be true? We submit, he was so justified. It was with the consciousness of this story that he entered the jury room on November 17th.

The Supreme Court further commented that, "We attribute no importance at all to this episode save that it emphasizes the fact that the appellant, for reasons satisfactory to himself, did not approve of the Prosecutor and his staff." This would appear to place all the blame for ill feeling, if such existed, on this appellant. Yet there is no more justification for this than there is to say that the "episode emphasizes the fact that the prosecutor, for reasons satisfactory to himself, did not approve "of this appellant.

The fact remains that Schwartz appeared before the grand jury realizing the fact that the prosecutor as "a member of the law enforcing agency had power to make things uncomfortable" for him. And with the story of the Assistant Prosecutor's promise

(a threat) coupled with Rupp's admonition to "be careful" and "go cautiously" he had good reason to hesitate and ponder his predicament. It was because of this episode together with the fact that he was so soon thereafter subpoenaed to appear before the October Term Grand Jury that Schwartz consulted his attorney, Mr. Moore (S. of C., p. 118, l. 20, et seq.).

The incident referred to has an important bearing on this case and should, of right, be considered when determining whether this appellant acted contumaciously without due regard for legal authority and the enforcement of the law.

VI.

The questions asked the witness must be material, relevant and in legal form otherwise there can be no adjudication of contempt.

In *Winfield's Grand Jury*, supra, at p. 27, it is said:

"In their investigations the grand jury are governed by the ordinary rules of evidence. They should be careful to reject all hearsay testimony—that is, all statements of facts not within the personal knowledge of the witnesses who come before them. It is *a rule without an exception*, that no evidence can be admitted or *received* by a grand jury which would not be admitted on the trial of the indictment."

In 28 *Corpus Juris*, sec. 107, p. 808, it is said:

"The general rule has been laid down that investigations before grand juries should be

Appellant's Brief

made in accordance with the well established rules of evidence, and that the evidence received must be competent legal evidence such as is legitimate and proper before a petit jury."

In re Rappelyea (Hudson Oyer and Terminer—1897), 21 N.J.L.J. 111, was a contempt case. The defendant was a newspaper editor subpoenaed before the Grand Jury as a witness. He was asked to produce certain memorandum and data given to him by two reporters. He refused by saying: "Under instruction of counsel, Mr. Corbin, I decline to produce them." The foreman of the grand jury made affidavit of the refusal and asked for a writ of attachment. A writ was refused but a rule was allowed to show cause why attachment should not issue. It appeared that the memorandum consisted of various reports of all sorts of matters covering a number of weeks' time; that some were typewritten, some in pencil and some in ink; and that they were handed to the witness as editor at various times covering a period of five or six months.*

The court said:

"If this evidence is material in the investigation of other charges by the grand jury, its materiality must be shown by evidence on the rule."

* * * * *

* Note the similarity of these facts to those in the instant case. Here Schwartz had no first hand knowledge or information. In many instances he did not know from what source the information had come. His files contained memoranda and notes made by him from time to time during his term as grand juror. Some of his data was in the form of newspaper clippings, etc. Summarizing, it was almost entirely hearsay.

Appellant's Brief

“The court must see that the evidence is material and *that it is admissible*. The admissibility of evidence before the grand jury is not determined with the same strictness of rule as upon the trial of an indictment, yet, before the court will grant an attachment *the court must be satisfied that the evidence demanded is material* to the inquiry.”

In 13 *Corpus Juris* 25 it is said that to constitute contempt “the question asked the witness must be a proper and legal one.” Also it is there said that “the witness cannot himself pass on the propriety or relevancy of a question asked him, as the lawfulness or propriety of questions is for the court to determine, although, of course, *the witness may interpose his privilege of refusing to answer*, if any such exists. Matters bearing on the propriety of the question should be determined before the witness is held to be in contempt for failure to answer.”

In re Gonzales (Sup. Ct.—1916), 88 N.J.L. 536, the defendant had been convicted for contempt because of his refusal “to answer material, pertinent and relevant questions” put to him by members of the grand jury. On appeal the Supreme Court passed on each and every question as well as the reasons for refusal to answer and reversed the conviction for the reason that, as to the questions, “he was either not required to answer them or did answer them in a satisfactory manner.”

In *State v. Donovan* (Sup. Ct.—1943), 129 N.J.L. 478, the court was asked to order that certain members of the grand jury should answer questions respecting an indictment found and returned. The court observed that the questions “grade from sub-

jects material to the issue down to the argumentative, the irrelevant and the immaterial." The court said (at p. 483):

"Questions put to witnesses on the stand should not only be relevant and material to the issues but *should be framed in accordance with the rules of evidence* applicable to court proceedings. Prosecutors appear frequently to have called for proofs or to have sought to evoke testimony without the assurance that such matters, when produced, would be evidential but rather in the hope that from them facts helpful to their case might perchance appear. However understandable that motive, it is not the foundation upon which evidence rulings may be based."

Applying the rules stated to the questions which were submitted to Schwartz we must conclude (in addition to the claim of "secrecy" and "privilege") that they could adduce nothing but that which the Grand Jury was not privileged to either require or receive. The proof was of a hearsay character as they were informed and well knew. That body knew that so far as Schwartz was concerned the information he had was "second hand." This is demonstrated by the statement of Buzby, the foreman, when he stated to Schwartz that "the Grand Jury is open and ready to get any *information or suggestion* * * * whether it be hearsay or direct evidence," etc.

Exhibit P-3 (transcript of testimony of Schwartz before the Grand Jury on November 17, 1943—S. of C., p. 156) was admitted in evidence and is a part of the proof here, though its admission was objected to. Analysis of that transcript discloses that the Jury was informed of the hearsay nature of the

Appellant's Brief

proof elicited and of the disposition, on the part of some members of the Jury, at least, not to hear it. One juror is reported to have said, "Then information that is not evidence would be hearsay." A juror also said "Does this Grand Jury want to hear hearsay evidence? Hearsay, I don't want to hear." If this be fair evidence of the Grand Jury attitude then why this proceeding? Not only were they not entitled to receive hearsay evidence but as Mr. Winfield says (at p. 36)—"If the grand jury should attempt to abuse its power, as for instance to summon persons before them on a fishing excursion after crime, the court might withhold, and would be justified in withholding its process." Again, in 24 *Amer. Jur.*, sec. 34, at p. 857, it is said: "In any event the indiscriminate summoning of witnesses in a spirit of meddlesome inquiry, on the mere chance that some crime may be discovered, is forbidden under the rules of the common law." See also *McNair's Petition* (Pa.), 106 A.L.R. 1373; 187 Atl. 498, and *McCarthy v. Clancy*, 110 Conn. 482; 148 Atl. 551.

This appellant has urged throughout that the following:

"Q. Mr. Schwartz, the Grand Jury is open and ready to get any information or suggestion you have at hand, but have unanimously voted that any statements that you have to make whether it be hearsay or direct evidence will be made in the presence of the Prosecutor and his assistants."

is not such a question as this appellant could be required to answer. It is not a question. At most it is a statement to the effect that the Grand Jury would

receive any "information or suggestion" which Schwartz cared to give whether "hearsay" or not. It was a mere invitation or privilege accorded to Schwartz on which he was privileged to act as he saw fit. On this basis appellant's counsel moved to strike that portion (paragraph 6) of the petition (S. of C., p. 12). Decision on the motion was reserved "until the close of petitioner's case" and because the court wanted first "to hear the Prosecutor's case" (S. of C., pp. 39 and 40). On renewal of the motion the court declined to strike (S. of C., p. 80).

The Prosecutor argued below that though "the statement of the foreman may not have been in the form of a direct question," it had nevertheless "brought to the respondent's attention the action of the grand jury and a *demand* that he furnish the information." To construe the statement of the Foreman as "a demand" requires a contortion of the ordinary meaning of English words and phraseology.

The Prosecutor further contended below "that this question must be taken in connection with the question which appears in State's Exhibit 'P-3,' " which reads:

"Mr. Schwartz, when you were before the Grand Jury a week or two ago, you said you had some information concerning the activities of the Police Department or lack of activity, which I believe was confined to the Police Department, that you would be glad to give to the Grand Jury if they desired. If you have such information, the Grand Jury would like to have it."

First let it be noted that this is not included in the charge against this appellant. He is not here charged with refusal to answer this latter question, so-called. Nor can this appellant be required to meet other than the charge made out in the petition filed here.

However, Prosecutor's reference to "the question which appears in State's Exhibit 'P-3,' " can avail him nothing. That too is a mere invitation or expression of willingness to receive. It cannot be dignified as a question requiring an answer.

Only by legal gymnastics can the "question" first referred to under this heading (or the second) be considered as framed in accordance with rules of evidence. Unless it is so framed the defendant cannot be required to answer it.

VII.

This appellant could not be required or compelled to give testimony in the presence of the person or persons involved in the charges.

Schwartz was asked to give "the names of those City and County employees" who had given him information "concerning the operation of the law enforcement agencies in the City and County." As for the general "information" along this same line Mr. Schwartz said "I request the Prosecutor and his staff to leave the room." The Prosecutor replied: "I don't intend to leave the room." To this Schwartz said: "I am perfectly willing to impart the information, but I will not impart it while the Prosecutor and his staff are present." Nevertheless the Grand Jury sustained the Prosecutor in his determination not "to leave the room." (See Exhibit

P-3, S. of C., p. 156.) This presented a very unusual and, we submit, an unlawful situation where a witness was required to give evidence in the presence of the person or persons accused.

The Supreme Court, in this connection, comments (S. of C., p. 167, l. 33) that Schwartz "made no direct charge before the grand jury that the Prosecutor or his assistant, then present, were involved in the witness' 'strong belief' that there was corruption in the city and county law enforcement agencies." Yet the only proper inference that can be drawn from the witness' statements in this respect was that the Prosecutor's office was involved in the testimony and information which Schwartz was asked to reveal.

The information which the Grand Jury elicited from Schwartz concerned "the operation of the law enforcement agencies in the City and County." "The Prosecutor and his staff" represent the personnel of the principal and most important of "the law enforcement agencies in the County." If the information which Schwartz had "pointed an accusing finger" at the County law enforcement agencies, as Schwartz contended and advised the Grand Jury, and, if the Grand Jury was sincere in its desire and intention to "diligently inquire" into that, then it was neither within the power of that body or lawful to conduct that inquiry in the presence of the person or persons who might be accused. This is more particularly so where it appears that testimony to be given is mere hearsay as the Grand Jury was here advised (see Exhibit P-3—S. of C., p. 156).

We are not unmindful of the fact that under ordinary circumstances the Prosecutor's presence there is not a matter of right. He is subservient to the

wishes of the Grand Jury in that respect. It was not for him to declare, "I don't intend to leave the room." (See Exhibit P-3—S. of C., p. 160.)

The universal and unqualified rule is that "one whose conduct is being investigated by a grand jury has no right, constitutional or otherwise, to petition the grand jury or to appear before it." 24 *Am. Jur.* 862.

To permit a defendant or possible defendant in the grand jury room while evidence which involves him is being received would be a direct violation of the oath of secrecy. Such a situation of necessity would deter persons "from voluntarily going forward and informing of crime" and the avoidance of that is one of the reasons for "secrecy."

With the Prosecutor and members of his staff present in the Grand Jury room while Schwartz divulged the information which he had would only result in argument, dispute and, no doubt, a trial of the guilt or innocence of the accused, even though the latter is not within the province of the Grand Jury. The truth of this is the promptness and positiveness with which the Prosecutor felt the freedom, in this instance, to declare, "I don't intend to leave the room." Further illustration of the impropriety of having the Prosecutor present is evidenced by his countercharge against the witness, in this instance, when he said: "I have only one thing to tell you. I want to say to this Grand Jury in respect to what Mr. Schwartz had to say about information coming from this past Grand Jury that it came from the Prosecutor's Office. This is absolutely not so. Things came out of the May Grand Jury that could only come from Mr. Schwartz or some member as neither

I nor any member of my staff were in the room when this was discussed. Information was in Atlantic City as soon as the Grand Jurors could get over there." (Exhibit P-3 at p. 5—S. of C., p. 161.) There seems to have been nothing which Schwartz had previously said to the Grand Jury which should have prompted that statement. He had not said a word about "information coming from this past Grand Jury" nor "that it came from the Prosecutor's Office." The statement of the Prosecutor was neither appropriate or politic. The utterance could have naught for its purpose except to embarrass, belittle and destroy the effectiveness of the witness, Schwartz, and the testimony which he might give involving the County law enforcement agencies. That statement was certainly not given or made for the purpose of comforting the witness, putting him at ease or to foster his co-operation. On the contrary it went far to substantiate the threat of which Schwartz had been previously advised, to wit, "We will take care of Schwartz."

We respectfully submit that Schwartz, under all the circumstances here present, was well within his rights in refusing to give the information "in the presence of the Prosecutor and his assistants" as was insisted.

VIII.

Appellant was not required to state to the Grand Jury his reasons for refusal to testify.

When before the court below it was argued by the Prosecutor that certain of the reasons given by this appellant in explanation of his refusal to testify

Appellant's Brief

were not stated to the Grand Jury during his appearance there. This argument seems to have impressed the Court as evidenced by its opinion (S. of C., p. 14) where it is said (at p. 17): "If this version is true, why did he not simply state to the inquirer that he did not know who sent the papers, instead of saying, as he did, 'I refuse to state.' "

Schwartz was not required to state any reason for his refusal. He was not there charged with contempt and so, therefore, no necessity to purge himself of that charge was then present. He is now, for the first time, in that position. The rule here entered requires that he do so. The contempt is here charged and it is now, and only now, that he is under obligation to explain.

The situation here is similar to that present in *Re Gonzales*, *supra*, and other cases cited.

IX.

Appellant here had no intent to condemn either the Grand Jury or the Court.

This is apparent, if not conceded.

Admittedly there are some cases which hold that the respondent's belief that he was acting within his legal rights and had no intention to condemn the authority might be considered in mitigation of his unlawful act but will not excuse it. On the other hand there is contrary authority.

In 13 *Corpus Juris* 45 (sec. 61), it is said: * * * "where it is apparent that no disrespect was intended, a disavowal of intention to commit a contempt will be considered in extenuation of, or some-

times even as purging, the contempt.'"^{*} Also in 12 *Amer. Jur.* 389 it is said that "*intent to commit contempt is usually necessary*, although not in all cases.

Apparently this is a fair statement of the policy of our courts.

In *Public Service Corporation vs. DeGrote* (Chan.—1905), 70 N. J. Eq. 454, the court refused to convict of contempt because "there was no intentional wilful effort on the part of these defendants to thwart the power and process of the court." It was said (at p. 482): "They (the defendants) acted rashly but they acted in good faith. Of course, if men knowingly do anything the effect of which is unlawful, they are generally charged with intending to do what has naturally followed as a result of their conduct, but in punishing for contempt, I think, generally there must be an evil mind in order to find a criminal intent, and that is what I think is necessary in this case. There must be an actual intent to thwart the power of the court.

In *Re Schmidt* (Chan.—1917), 88 N. J. Eq. 21, the court said: "Courts, however, are loath to punish for contempt, and where the accused disclaims any intention to contemn, protests respect for the court and makes submission to it, the court will as a general rule, inflict no punishment."

Similarly, in *First Corp. &c. v. Washington Pharmacy, Inc.* (Chan.—1942), 132 N. J. Eq. 490, the defendants were acquitted of contempt because "the defendants clearly indicate that it was not their intention to commit any act in contempt of the court's order."

In *Re Singer* (E. & A.—1931), 109 N. J. Eq. 103,

^{*} This authority was cited with approval in *Re Singer* (E. & A.), 109 N. J. Eq. 103, 105.

Appellant's Brief

the defendant was adjudged in contempt for removing certain property which was the subject of execution. Mr. Justice Campbell (now Chancellor), speaking for our Court of Errors and Appeals on review of the conviction said (at p. 105): "In the case before us the proofs upon the part of the appellant are clear *that no contempt was intended* and further that the removal of the property was at the suggestion of the president of the corporate owner of the mortgaged lands." The acts of the appellant were held to be "not contemptuous" and the judgment below was reversed.

In *Re Gonzales* (Sup. Ct.—1916), 88 N. J. Law 536, where a conviction for contempt for refusal to answer questions before a grand jury, each question and the explanation of refusal in each instance was considered. As to four of the questions (Nos. 8, 9, 10 and 16) the court observed that "they involve pure conclusions and *should not have been put* to the appellant." As to question No. 15 the court exonerated the appellant because his explanation of refusal to answer "puts the words used by appellant in such form as to show that *no contempt was intended* or committed."

The Court of Oyer and Terminer defined "contempt" as "the wilful refusal to obey some decree or order of the court" (S. of C. p. 16) and in doing so must have had the statute (R. S. 2:15-1) in mind. Also in the course of the hearing the court referred to the "gravamen" of the charge as "the wilful and intentional refusal" to give testimony (S. of C., p. 39). However, the full context of the court's opinion discloses that it disregarded the essential element of intent which the word "wilful" implies and also the disobedience of "some order or decree of the court."

The conclusion of the court was that appellant was "wilfully and obstinately disobedient to the process of the court." And, while it was said that "disclaimer of intentional disrespect or design" was no excuse, it held that a "wilful refusal" was involved in the offense. In this latter respect there is inconsistency.

The proof in this case is that Schwartz was first called before the Grand Jury as a witness on November 3rd, 1943 (Exhibit R-1—S. of C., p. 162. Also S. of C., p. 93). He was next subpoenaed to appear on November 17th. He appeared on both occasions and brought with him all available data which the subpoena called for. He responded to every inquiry except those which solicited the identity of his informers and those which called for information concerning laxity in the enforcement of the law by City and County enforcement agencies (S. of C., p. 74). The "number slips" called for by the subpoena were not produced because they were not in Schwartz's possession as was explained by him to the Grand Jury (S. of C., p. 96). In compliance with the subpoena for November 17th he took with him "documentary evidence" called for (S. of C., p. 97). Some of the evidence was delivered to the Prosecutor in the Grand Jury room (S. of C., p. 98).

The Court of Oyer and Terminer in its opinion (S. of C., p. 17) says that Schwartz did not exhibit "any semblance of obedience, co-operation or compliance with the direction contained in the Court's process delivered to this respondent, but instead definite refusal, and obstinate and wilful defiance" and it is there concluded (S. of C., p. 18) that Schwartz "was wilfully and obstinately disobedient

Appellant's Brief

to the process of the court and that his conduct was without justification." The Supreme Court refers to the appellant as recalcitrant (S. of C. p. 166, l. 10).

In contradiction of this observe the defendant's proffer of help and co-operation as appears in transcript of his testimony (Exhibit P-3, S. of C., p. 156) when before the Grand Jury on the instance complained of. Among other things Schwartz then said (S. of C., p. 158):

"I brought a few files which I assume is documentary information. I have considerable stuff. I don't know which one you would like to hear. For instance there is one for Mr. Ogilvie concerning law enforcement. This letter has to do with the Prosecutor's Office. It is dated May 15, 1943."

* * * * *

"This isn't information I volunteered. Then I have some letters from the Department of Alcoholic Beverage Control, and I have some personal letters I wrote to Justice Colie and his replies that has to do with the jury."

* * * * *

(S. of C., p. 159):

"I have here a card for a 'Bingo' to be held at the Seaview Country Club. Here are some newspaper articles. I have here a list of untried indictments that were handed to me. Mr. Ogilvie handed them to me and he said it would be very interesting to have them investigated as to why they haven't been tried."

Immediately after the last statement the Assistant Prosecutor, present in the Grand Jury room, read

and commented upon some of the documents which Schwartz then produced and surrendered. Immediately thereafter Schwartz stated (S. of C., p. 160):

“Mr. Foreman, I have here notes of my own in my handwriting as to the information I volunteered. I request the Prosecutor and his staff to leave the room.”

The Prosecutor refused to retire and a juror inquired: “Why won’t you give the information?” To which Schwartz replied: “I’ll tell you why. In these notes I am going to mention names. They are not evidence.” Further he stated: “I am perfectly willing to impart the information, but I will not impart it while the Prosecutor and his staff are present.”

This court has said that “the word ‘willful’ imports that the conduct was deliberate * * *; it connotes the idea of premeditation, obstinacy and intentional wrongdoing.” (*Belyus v. Wilkinson, Gaddis & Co.*, 115 N.J.L. 43, 50; affirmed 116 N.J.L. 92.) We respectfully submit that, in the light of the proofs here, this respondent was neither “wilful” or “obstinate” but on the contrary he exhibited a readiness to co-operate under conditions which he was legally justified in imposing. The Grand Jury could have acquired the information desired by respecting the position of the witness and affording to him the protection to which he was entitled.

Closely bearing on this question of intent is the uncontradicted proof that Schwartz was acting pursuant to and in reliance upon advice of his counsel. In this respect Schwartz explained (S. of C., p. 100) that, following his first appearance before the Grand Jury on November 3rd, he was informed of the

Appellant's Brief

threat of Assistant Prosecutor Stringer. Subsequently he was subpoenaed to appear again on November 17 (S. of C., pp. 117 and 118). After this, Schwartz said (S. of C., p. 118), "it was plenty that entered my mind. So much so that I went to see my attorney." Also he said (S. of C., p. 119): "I was considerably upset about it when I got the second subpoena." This, we submit, was a natural and justifiable reaction under the circumstances. The sequence of events lent verification to the story of the "threat," at least in the mind of this appellant. His actions before the Grand Jury were in conformity with advice of counsel (S. of C., pp. 100 to 102. Also testimony of Moore, pp. 131, et seq.).

We recognize the fact that our courts have held that "advice of counsel" is no excuse for contumacious action. However, the definition of "contempt" implies disrespect, disdain and scorn. No such attitude on the part of this appellant can be deduced from the proofs here. The advice given to Schwartz by his counsel, considered in conjunction with all the other circumstances and elements of the proof, further substantiates the contention that Schwartz lacked the intention or purpose to act contemptuously.

The court below gave no consideration whatever to the fact that this appellant had sought and acted upon advice of counsel despite the fact that it has been judicially declared that such circumstance "may well be considered in extenuation and mitigation" of the offense. Here the sentence was that Schwartz "be committed to the County Jail of Atlantic County for a period of five days" with commitment suspended (S. of C., p. 20). The order of the court was (S. of C., p. 25) "that the execution of said sentence be suspended." A harsh and drastic sentence under the circumstances. The sentence

here pronounced is one that may be "held over the head" of the defendant indefinitely with the ever present possibility that the suspension of commitment may be lifted by the court to the end that this defendant be required to serve the jail sentence. Such is the legal effect of this judgment. See *State v. Clifford* (Sup. Ct.—1913), 84 N.J.L. 595 and *State v. Braunstein* (Sup. Ct.—1927), 5 N. J. Misc. 243.

When pronouncing sentence the court recognized its effect by saying (S. of C., p. 20): "This, Mr. Schwartz, is a most unwholesome and unhappy position for any citizen to be in, more especially a man of your standing." As though the punishment already meted out was not sufficient, Schwartz was further reminded that "your punishment lies elsewhere" (S. of C., p. 20) and "we strongly suspect that there are those in the community, and the community, toward whom your apologies are in order" (S. of C., p. 21). For a man of good standing and law abiding this was indeed a severe castigation which was wholly unjustified in view of what happened here.

In *Powers v. Peo.*, 114 Ill. A. 323, 327, 328, the court very aptly said: "It (the power to punish for contempt of court) is at best an arbitrary power and should only be exercised on the preservative and not on the vindictive principle. It is not a jewel of the court to be admired and prized, but a rod rather, and most potent when rarely used." (Cited in note No. 40 appended to 13 C. J. 45.)

X.

The burden of proof rests upon the state.

In *Public Service Corporation v. DeGrote* (Chan.—1905), 70 N. J. Eq. 454, 481, the court said: "The court should proceed with the utmost caution in proceedings for contempt." At the outset of the consideration of that case the court further took notice of the fact that the defendants "acted in this matter without any motive of personal gain," and said "that is a most important consideration in determining whether parties are guilty of contempt of the power of this court. They acted under a mistaken but honest intention" etc. The principle as enunciated by this case is applicable here for certainly it cannot be gainsaid that Schwartz, this appellant, was not actuated by "any motive of personal gain."

In *Dorrian v. Davis* (Chan.—1929), 105 N. J. Eq. 147, 151, the late Chancellor Walker remarked that a proceeding in contempt is "a proceeding at law in a criminal contempt in which the defendant is entitled to all the substantial rights of a person accused of crime."

In *Barnett Foundry Co. v. Crowe* (Chan.—1912), 80 N. J. Eq. 109, 111, it was said that "the proceeding (in contempt) is one of the strictest right, and the right to punish must be clear upon the law and the facts. There will be no presumption of guilt. It must rest in proof."

Our Court of Errors and Appeals in the case of *Staley v. South Jersey Realty Co.* (1914), 83 N. J. Eq. 300, 307, held that "It is certain that in proceedings for criminal contempt the defendant is pre-

sumed to be innocent, he must be proved to be guilty beyond a reasonable doubt and cannot be compelled to testify against himself, * * * the defendant's guilt must be proved by judicial evidence, i. e., by testimony to which the ordinary rules of evidence are applied."

There must be no reasonable doubt "on the facts or on the law." *First Corp. etc. v. Washington Pharmacy, Inc.* (Chan.—1942), 132 N. J. Eq. 490, 492; *Laurie v. Ryan* (Chan.—1941), 130 N. J. Eq. 248, 251; and *in re Verdon* (Sup. Ct.—1918), 91 N. J. L. 491, 495.

See also—

Passaic-Athenia, &c. v. Consolidated, &c.
(Chan.—1926), 100 N. J. Eq. 188;

In re Singer (E. & A.—1931), 109 N. J. Eq. 103.

When before the court below the Prosecutor contended that the mere proof of the questions and the refusal to answer, together with the showing that the questions were relevant and material to the investigation before the Grand Jury, was all that was necessary but such is far from proof of contemptuous action, particularly when considered in connection with the principles of law stated in the authorities heretofore referred to in this brief. The apparent contention of the Prosecutor also seems to ignore the right of the defendant in this proceeding to explain and purge himself of the alleged contempt. The court below fell into error by adopting an analogous view in that it gave little or no credence to this appellant's explanation of his acts and reached its conclusion on a weighing of the evidence.

In *Re Gonzales* (Sup. Ct.—1916), 88 N.J.L. 536,

the facts were such as to make applicable here the following statement by the court (at p. 544):

"On the whole, therefore, we think that appellant fully and fairly purged himself of any contempt, legally implied in the interrogatories, and which was testified to by the grand jury clerk. *If his denial was adequate, it must be taken as true.*" (Citing authorities.)

"We think, therefore, that the finding that the appellant was guilty of contempt necessarily, and from a reading of the decision of the Oyer we should say confessedly, was based on the allegations in the testimony of the grand jury clerk, which were contradicted by the appellant, and in the face of such contradiction. But *the court had no right to weigh the evidence*, as has just been pointed out. If the contradiction was full and adequate, the appellant was entitled to his discharge." (Italics supplied.)

In 13 C. J. 74, sec. 109, it is said:

"At common law the sworn answer of the accused validly denying the alleged contempt was held absolutely conclusive and entitled defendant to be discharged, and it is held in many cases that, in charges of contempt arising out of proceedings in suits in common law courts, or in suits cognizable at law, as distinguished from equity, the sworn answer of the contemner, validly denying or purging the contempt, is conclusive."

We submit that in this case Schwartz was convicted of contempt by disregarding his explanations and by disregarding all the essential legal elements

necessary to reach that result. A mere refusal to testify, even though it be to a material question, does not necessarily warrant the inference of guilt. In this instance Schwartz served his County and this community as a Grand Juror in the performance of his duty as a citizen and he undertook the performance of that service seriously and with diligence. It has not been proven otherwise. As a result of that service so performed, he is now subjected to the embarrassment and ridicule which accompanies these proceedings, not to speak of the expense of both time and money and the mental anguish which these proceedings entail.

In all due deference to the October Grand Jury and its individual members we respectfully submit that there was little, if any, justification for the institution of these proceedings, and we are confident that said proceedings were not only instituted unwisely but with little forethought. This is best evidenced by the irregular and haphazard manner in which the action of the Grand Jury which precipitated this proceeding was taken.

The resolution (S. of C., p. 6), under the authority of which the Prosecutor insists he proceeded in this matter, was never even considered by the Grand Jury, and from the witnesses who were produced it does not clearly appear that they understood that the proceeding was to be instituted without their right to finally pass upon the propriety of doing so. Mr. Risley, the Clerk of the Grand Jury (S. of C., p. 43), Mr. Buzby, the Foreman (S. of C., p. 58), and Mr. Dreher, a member of the Grand Jury (S. of C., p. 54), in their testimony conceded that the resolution, copy of which is attached to the petition filed herein and affixed to the Grand Jury docket, was

Appellant's Brief

never at any time presented to the Grand Jury for action. In fact, Mr. Dreher said he never saw it until the first day of the trial in these proceedings (S. of C., p. 64). The Prosecutor endeavored to have the witnesses say that the resolution, as written, was passed on November 17, 1943, and failing in this he endeavored to justify the existence of the resolution by having the witnesses say that it was of the purport which was authorized. On the other hand, Mr. Risley, the Clerk of the Grand Jury, testified that "there was a vote taken requesting the Prosecutor to prepare such a resolution," and when asked whether that was the motion that was passed on November 17th, he replied "I guess so" (S. of C., p. 44). Mr. Buzby, after admitting that the resolution as written, was never submitted to the Grand Jury for its action, testified that he had signed it in certification of the fact that it had been duly adopted by the Grand Jury. He further said that his signature to that effect was signed not in the Grand Jury room but in the office of the Prosecutor in Atlantic City (S. of C., p. 58).

This haphazard method of procedure, we submit, is highly improper; particularly when it is by such a method that the rights, property and liberty of an individual are at stake.

Further, we submit, that, in consideration of all its surrounding circumstances, this proceeding is a deterrent, rather than an inducement or incentive, to citizens, of high reputable character and standing in their community, to risk the jeopardy which such proceedings as this would indicate is attendant with Grand Jury service.

CONCLUSION.

We respectfully submit that full and complete justice in this case requires that this appellant be discharged of the contempt and that he be vindicated in the maintenance of his oath and status as a former Grand Juror as well as in the exertion of his individual rights.

WM. ELMER BROWN, JR.,
Attorney for Appellant.
CHARLES S. MOORE,
Of Counsel.

To be argued by
WM. ELMER BROWN, JR.

NEW JERSEY COURT OF ERRORS AND APPEALS.

In the Matter of Contempt Proceedings Against
JOSEPH SCHWARTZ.

IN CONTEMPT.

ON APPEAL FROM THE NEW JERSEY SUPREME COURT.

BRIEF ON BEHALF OF THE STATE.

STATEMENT OF FACTS.

The appellant in this case was adjudged guilty of contempt of the Court of Oyer and Terminer by Judges Warke and Loveland, sitting in that Court by special designation and reference of Mr. Justice Colie. He was sentenced to the County Jail for a period of five days and that sentence was suspended. (S. of C., p. 25.)

The appellant sought a review before the Supreme Court pursuant to the provisions of R. S. 2:15-3 et seq. and the conviction was affirmed. (S. of C., p. 174.)

This appeal is from the Supreme Court judgment pursuant to R. S. 2:15-4 et seq.

The sole question to be here determined, as below, is whether or not the appellant, Joseph Schwartz, was properly adjudged guilty of contempt of the Atlantic County Court of Oyer and Terminer by reason of his refusal to answer certain questions propounded to him while he was a sworn witness before the October Term 1943 Grand Jury on November 17, 1943.

Mr. Schwartz was subpoenaed as a witness before the October Term 1943 Grand Jury because it was understood that he had certain information concerning certain violations of the criminal law then under investigation by the grand jury. Testimony of Walter J. Buzby (S. of C., p. 52):

"Q. You were asked whether you knew the reason why Mr. Schwartz was summoned to appear before the grand jury, and you said you did. I am now asking you, what was that reason?

"A. As Foreman I presented to the grand jury information that had come to me and they, in turn, said, on the strength of that information, that Mr. Schwartz should be summoned before the grand jury."

He was subpoenaed to appear and give evidence on November 3, 1943, and again on November 17, 1943, and appeared on both occasions. Testimony of Walter J. Buzby (S. of C., p. 53):

"Q. Now, do you recall the day, the 17th of November, on which Mr. Schwartz finally appeared in the grand jury room as a witness?

"A. Do I recall?

"Q. Yes.

"A. Yes.

"Q. Was Mr. Schwartz sworn by you at that time as a witness?

"A. Yes."

Mr. Schwartz admits that he refused to answer certain questions propounded to him by the Prosecutor. Testimony of Joseph Schwartz (S. of C. 93, 94):

"Q. Now, it appears that on the latter occasion, November 17, it has been testified that you were asked certain questions. I want to read the questions and the alleged answers and ask you in each instance whether or not they were the questions asked and whether or not you replied as recorded: 'Question: Mr. Schwartz, the Grand Jury has requested your appearance here today in order that we again can ask about the number slips which you had in your possession on or about October 5th. My question is from whom did you get those slips? Answer: I have no statement.' Is that correct, as you recollect it?

"A. I would recollect that to be substantially the question of the answer I gave.

"Q. Next question: 'I am asking you now from whom did you get those slips? Answer: I refuse to state.'

"A. I believe that is correct.

"Q. The next question is: 'You also stated one time at least that certain information had come to your knowledge concerning the operation of the law enforcement agencies in the City and

Respondent's Brief

County from certain City and County employees, whose names at that time you refused to give because they might lose their jobs. I ask for the names of those City and County employees. Answer: I not only said they might lose their jobs, but it was given to me with the distinct understanding that I would not reveal the source and for that reason I refuse to answer that question.'

"A. That is substantially correct, sir.

"Q. 'Question: I would like to admonish you, Mr. Schwartz, this Grand Jury has a right to have that answer legally and you have a perfect right to give their names, and they would not lose their jobs. I ask again for those names. Answer: I am very sorry I will not give it to you. I have not been relieved from my promise not to reveal their names.'

"A. That is substantially correct, sir."

Testimony of Joseph Schwartz (S. of C., p. 99):

"Q. Now, you were later asked, were you not, this question by the foreman of the grand jury, or it has been characterized as a question: 'Mr. Schwartz, the Grand Jury is open and ready to get any information or suggestion you have at hand, but have unanimously voted that any statements that you have to make, whether it be hearsay or direct evidence, will be made in the presence of the Prosecutor and his assistants. Answer: Mr. Foreman, I decline to give the information.' Now, did that occur as I have related it?

"A. Yes, sir."

These same questions and answers appear on pages 156, 157, 161 and 162, of State's Exhibit "P-3". (S. of C., p. 156, et seq.)

The appellant argues the law under ten separate points and we shall endeavor to answer each respective argument in the numerical order.

THE LAW.

I.

The charge here does meet the statutory definition of contempt.

The statute provides as follows (R. S. 2:15-1):

"The power of any court of this state to punish for contempt shall not be construed to extend to any case except the:

"a. Misbehavior of any person in the actual presence of the court;

"b. Misbehavior of any officer of the court in his official transactions; and

"c. Disobedience or resistance by any court officer, or by any party, juror, witness or other person to any lawful writ, process, order, rule, decree or command of the court."

The Supreme Court rightfully held that the contempt, which is the subject matter of this litigation, comes under subparagraph "c" of the statute. (S. of C. 166, line 28.)

The appellant cites *Epstein v. Am. Hammered Piston Ring Co.* (Supreme Court 1920), 95 N.J.L. 391, as authority for the proposition that a witness having appeared, as in that case, in obedience to the mandate of a subpoena, before the official named in the subpoena, cannot, in proceedings under a Rule to Show Cause, be adjudged in contempt for having refused to answer certain questions, claiming that the act providing for the examination in that case was unconstitutional. The appellant likens the situation here to that of the Epstein case by attempting to draw a parallel: Claiming that a *lapsus* or *omissus* having existed under the procedural statute in the Epstein case and the Court having on that account held that the defendant cannot be adjudged guilty in contempt, that consequently the same application must be made to the facts of this case, that is to say, that the appellant, Schwartz, having appeared before the grand jury in answer to the mandate of a subpoena, he has, therefore, shown compliance within the meaning of the statute and because of an alleged *lapsus* or *omissus* in the provisions of our statute relating to contempt, that he, Schwartz, must therefore be adjudged "Not Guilty" of contempt even though he refused to answer the questions propounded.

The Epstein case is not apposite to the present situation for the following reasons: (a) The Epstein case involved a subpoena issued by a Supreme Court Commissioner, and concerned itself entirely with procedural law by which *private* parties might, through the aid of a Supreme Court Commissioner or Special Master in Chancery, discover facts to aid such private parties in the presentation and preservation of their *substantive* rights in and to the par-

Respondent's Brief

ticular litigation. But here private parties and private rights are not involved. The subpoenas that were issued to the appellant, Schwartz, in this cause (S. of C., pp. 162-163, Exhibits R-1 and R-2), were those not of a private party, or in behalf of a private party, but were the act of a court on behalf of the body politic. The Grand Jury of course existed at common law and its power to have witnesses summoned before it and to give evidence as well as exhibit documents and other material pertaining to an inquiry in the possession of the witnesses has never been questioned. This right existed without the aid of statute and it is a right, therefore, not grounded in any procedural development of the law but rather in the substantive law, which civilized society has always respected as being indispensable in the preservation of justice. (b) In the Epstein case the Court, as such, is not involved. The unanswered questions are those which are propounded before an officer of the Court and not the Court itself. In the case sub judica, it is the grand jury whose questions go unanswered and the grand jury is in fact and in law the arm of the Court of Oyer and Terminer (S. of C., p. 170, line 39) and he who affronts the grand jury by refusing to "give evidence", affronts the Court itself. Confining the argument for a moment on this admittedly narrow point, even the United States Circuit Court of Appeals in the Camarota case (*Camarota v. United States*, 111 Fed. Rep., 2d series, p. 243) has said, at page 246:

"Since the grand jury is an arm of the district court, proceedings before it are to be regarded as being proceedings in the court. Consequently contempts occurring in the presence of the grand jury are to be treated as taking place in the

presence of the court or so near thereto as to obstruct the administration of justice."

Likewise in 2 *Bishop's New Criminal Procedure*, paragraph 868, it is provided that:

"Though the grand jury sits in a room separate from the judge, it constitutes a part of the Court, and is under the judicial control. Hence (3) a subpoena to a witness commands him to come, not before the grand jury, but the Court to give evidence to the grand jury", citing *U. S. v. Dachis D. C.*, 36 Federal 2d, 601.

(c) If, as the appellant, Schwartz, contends, that his appearance before the grand jury on the dates called for in the subpoenas sufficed to show that he had "obeyed" the mandate of the subpoena, then we must treat as mere surplusage the words in the writ of subpoena which direct the appellant, Schwartz, to "give evidence". Surely Schwartz refused to give evidence and therefore disobeyed the mandate of the subpoena when he persistently refused to answer the questions propounded by the grand jury. There has been no *lapsus* or *omissus*. The courts of this State and the Federal courts have held that the grand jury is an arm of the court itself and therefore the refusal to answer questions of the grand jury on the part of Schwartz subjected him to the proceedings herein, resulting in his being adjudged in contempt because the facts do meet the statutory definition of contempt as contemplated by subdivision "c" of R. S. 2:15-1. The appellant has failed to make vital distinction between procedural or adjective law as respects the reasoning of the Epstein case and substan-

tive law as it is fundamentally concerned in this case.

If the appellant makes much of the use of the word "actual" contained in subdivision "a" of the statute (R. S. 2:15-1) he fails to observe that the word "actual" is not contained in subdivision "c" of the statute. The State can appreciate that it might have been the legislative thought in drafting the 1917 statutory definition of contempt (R. S. 2:15-1) to limit those cases occurring under subdivision "a" of the statute to offenses occurring in the court room itself or before the Judge offended. It is entirely conceivable that disrespectful conduct on the part of an offender, let us say while riding in an automobile on a highway, which disrespectful conduct might relate to the Court or Judge thereof, could be said to be too remote from the setting and atmosphere of justice to warrant the assumption that the offender could or should be convicted of contempt. In other words, one can easily contemplate innumerable statutes involving contumacious conduct but occurring so remote from the court room or the Judge as to make proof extremely difficult or impossible. So, the Legislature may wisely have defined subparagraph "a" of the statute as involving those cases occurring in the "actual" presence of the Court.

But the word "actual" is omitted from the definition of those contempts arising under subparagraph "b" of the statute and surely the appellant would not have us believe that an officer of the Court who, let us say, is guilty of misconduct in an official capacity must, in order to be adjudged in contempt, have committed the misconduct in the "actual" presence of the Court. No, the Legislature has wisely omitted the word "actual" from the definition of

those contempts arising under subparagraph "b" of the statute and the misbehavior of the contemnor is not required to have occurred in the *actual* presence of the Court before the former can be adjudged in contempt.

And passing to subparagraph "c" the same construction must follow. The disobedience of the witness to the lawful process of the Court (the grand jury in this case being the arm of the court, and as has been said, the Court itself) consists of his failure to "give evidence" and our Legislature has not required by its enactment that such contumacious conduct should have occurred in the actual presence of the Court. How, for instance could the appellant argue with any degree of consistency that a witness would not be guilty of contempt (as the appellant interprets subparagraph "c") if the witness had refused to appear at all before the grand jury after having been served with subpoena? To give reason and logic to the appellant's argument under Point I, the witness who refused to appear at all pursuant to a grand jury subpoena would not be guilty of contempt because the statute says (in subparagraph "a") that the contempt must be in the actual presence of the court and consequently since the witness did not appear before the grand jury he was not in the actual presence of the court and could not be guilty of contempt. Thus the argument is reduced to an absurdity. The contempt in this case does not concern itself with the construction of subparagraph "a" of the statute and the subtle effort to read into subparagraphs "b" and "c" any requirement that the contempt must occur in the actual presence of the Court is to lose sight of the following: (1) The Grand Jury

Respondent's Brief

is the Court itself. (2) The Legislature has purposely placed the word "actual" in subparagraph "a" alone of the statute and not in subparagraphs "b" and "c". (3) If it could be conceded that the Grand Jury is the Court itself, then no question can arise concerning the nearness of the contumacious witness to the Court, or his actual presence therein when the contumacious conduct was committed. His presence before the Court would be immaterial to a violation of subparagraph "c".

In conclusion, under this argument, it must be noted that there is a vital distinction between the definition of contempt under the Federal Law (28 U.S.C.A. section 385) and the definition of contempt under our law. The Federal Act follows, in part:

"Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."

The Federal Courts are very properly concerned with the phrase: "The misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice —". The language is different than that of our State Act and we in New Jersey need not concern ourselves in *every* case of contempt with the necessity for finding that the contumacious conduct must be in the presence or "actual presence" of the Court, or "so near thereto

as to obstruct the administration of justice."

The charge here, therefore, under subparagraph "c" of our statute fully meets the statutory defense of contempt in New Jersey.

II.

Appellant is properly adjudged "in contempt of the October Term, 1943, Atlantic County grand jury.

If, as Chief Justice Brogan stated in his opinion (S. of C., p. 170, line 40; p. 171, lines 1-2): "This being so a witness who affronts the grand jury affronts the court so long as that which he does or refuses to do amounts in law to contempt", then, surely the appellant could be properly said to be in contempt of the October Term 1943 Atlantic County Grand Jury.

Much of the argument in Point I is applicable here and it is merely a play upon words to infer that the contempt, if at all, is an offense in the Court of Oyer and Terminer which in this case sat "*only in judgment*" and not a contempt on the part of the appellant before the Atlantic County Grand Jury October Term 1943, which is itself an arm of the Court.

It must be remembered that our statute provides that "the power of any court of this State to *punish* for contempt shall not be construed etc. . . .". The statute does not say that the contempt must be committed before the Court itself but merely that the Court has the power to punish for contempts as defined. If the logic of the reasoning that the grand jury is an arm of the Court (to say nothing of the fact that it is sometimes defined as the Court itself),

is sound, then certainly the fact that the Legislature gave the power to the Court to punish for contempt cannot invalidate the fact that this appellant can be adjudged in contempt of the October Term 1943 Atlantic County Grand Jury.

III.

Appellant can properly be compelled to disclose the identity of his informers.

In *Wigmore's Evidence*, 2d edition, Volume 5, paragraph 2374, subsection 3, at page 176, it is stated that:

"(3) The privilege applies to communications to such officers only as have a *responsibility or duty* to investigate or to prevent public wrongs, and not to officials in general. This ordinarily signifies the *police*, and officials of *criminal justice* generally. But it may also include *administrative officials* having a duty of inspection or of *law-enforcement* in their particular spheres. The truth is that the principle is a large and flexible one; it applies wherever the situation is one where without this encouragement the citizens who have special information of a violation of law might be deterred otherwise from reporting it to the appropriate official.

(4) Even where the privilege is strictly applicable, the *trial court may compel disclosure*, if it appears necessary in order to avoid the risk of false testimony or to secure useful testimony. The reasons for this qualification have been thus set forth:" (Emphasis supplied.)

The appellant certainly cannot be considered in the class of officials designed as the "police" or an official of "criminal justice", which term properly refers to the Prosecutor of the Pleas and the Judges of the Courts, and the appellant was not an "administrative official" concerned with law enforcement in the sense that Professor Wigmore states.

The Chief Justice in his opinion (S. of C., p. 171, lines 12 to 40) elucidated on the distinction between a grand juror and a law enforcement agent. Schwartz was not a law enforcement agent in the sense that Professor Wigmore uses that phrase. Schwartz was a part only of an *informing* and *accusing* (emphasis supplied) tribunal and by no stretch of the imagination could he said to have been concerned in his then duties with law enforcement. The cases therefore cited by the appellant which seek to illustrate the rule of privilege are not on point, for to summarize, Mr. Schwartz was neither a part of the police, nor an official concerned with the administration of criminal justice, nor an administrative official concerned with law enforcement. The Grand Jury oath binds the members to make true presentment of all matters and things "as shall be given you in charge, or in any way come to your knowledge touching the present services . . .". Let it at once be said and reiterated that Mr. Schwartz in his contumacious conduct on November 3d and November 17th before the grand jury was not then and there asked questions touching any *present* service. Mr. Schwartz's term of service as a grand juror had concluded and his claim of immunity or privilege if at all applicable, had certainly ceased so far as the October Term Grand Jury was concerned, he, Mr. Schwartz, having concluded his service as a

former grand juror at the expiration of the May Term Grand Jury.

The State contends that the appellant, Mr. Schwartz, cannot claim immunity or privilege by referring to the secrecy enjoined on a grand juror touching his "present service" or that as a former grand juror he was then one of the privileged class set forth in Professor Wigmore's statement *supra*, or that the situation in the case at bar is comparable to *State v. Donovan*, 130 N.J.L. 42. In the *Donovan* case it was the Prosecutor of Hudson County who refused to answer questions and he was rightfully classified as having a privilege because he is a law enforcement officer. This is not the case with Mr. Schwartz.

But apart from all this, the appellant beclouds the issue under this point by constantly referring to himself as a grand juror. He was not in the circumstances which confront us now, a grand juror, when he committed the contumacious conduct before the October Term 1943 Grand Jury. He was a private citizen. He could, therefore, be compelled to disclose the identity of his informers.

IV.

The oath of secrecy which Schwartz took as a May Term grand juror did not prevent his conviction on the charge here.

Mr. Schwartz's obligation to keep secret the counsel of "his fellows" or "his own" relating to evidence and testimony that he should hear or see in the grand jury room, before that Body, existed during the May

Term of 1943. As the Chief Justice said in his opinion (S. of C., p. 172, lines 20 to 30), the information that Schwartz had obtained was not gotten within the precinct of the grand jury room but rather at his home or place of business. The appellant has rightfully said under Point IV that the investigation and deliberations of a grand jury and all *its* proceedings should be legally sealed against divulgence (appellant's brief, p. 27 and top of p. 28). But the State underlines the word "*its*" for a purpose: It is the grand jury that should be protected in its deliberations and not ordinary citizens who harbor and keep information relating to violations of the criminal law from coming to the attention of the grand jury. Throughout appellant's Point IV he seeks to surround himself with the cloak of a grand juror when called before the October Term 1943 Grand Jury. He was not asked to divulge the counsel of his "fellows" (referring to the other grand jurors) while in session, or "his own" (referring to information obtained in the Grand Jury room). He was asked to give information about violations of the criminal law that he had received at a time when he was no longer a grand juror. *State v. Donovan*, 129 N.J.L. 478, is not applicable under this point.

V.

There is no personal privilege to be accorded to the witness Schwartz in this case.

The appellant's argument on this point is based apparently upon a pretended fear said to have been engendered in Mr. Schwartz by a supposed antago-

nism of the Prosecutor or some member of his staff. One basis for this pretended fear consists of a colloquy between Mr. Schwartz and the Prosecutor in the Grand Jury room on November 17, 1943, as follows:

"Q. If this Grand Jury should refer this matter to the court for such action as might be advisable and the court might ask you to reveal those names, would you still refuse?

"A. I'll wait until that time arrives." (S. of C., p. 157.)

The other incident arose in a conversation between a Mr. Rupp and Mr. Stringer, one of the assistant prosecutors, on a social occasion in which Mr. Stringer is alleged to have said:

"I guess we can take care of him."
(S. of C., p. 125.)

Mr. Singer denied that he ever made any such statement (S. of C., p. 143) but testified that Mr. Rupp said:

"You better watch out or Schwartzie will get you." (S. of C., p. 143.)

If there was any antagonism between Mr. Schwartz and the Prosecutor's office, it was on the part of Mr. Schwartz and not the Prosecutor's office. Mr. Dreher testified:

"JUDGE LOVELAND: Did you observe his attitude and demeanor at the time these questions were asked?

"THE WITNESS: Yes.

"JUDGE LOVELAND: Tell us what that was.

"THE WITNESS: I would say somewhat antagonistic."
(S. of C., p. 67.)

and at page 78, in answer to a question of Mr. Brown:

"A. I probably should have said that he was antagonistic to the Prosecutor and his group. I didn't mean the entire jurors."

The testimony concerned the entire episode between Mr. Stringer (S. of C., pp. 141-144) and Mr. Rupp (S. of C., pp. 124-130). It will be noted that Mr. Rupp did not deny the statement attributed to him by Mr. Stringer. We cannot understand why any antagonism between Mr. Schwartz and the Prosecutor would justify his refusal to answer the Prosecutor's questions or to comply with Mr. Buzby's request for the information. It is the Court of Oyer and Terminer that has been contemned. A witness charged with contempt for failing to answer a question could certainly not excuse his contempt nor much less claim privilege because of antagonism, however well-founded, between himself and examining counsel. The appellant fails to cite any authority to justify or support his contention and it would be strange indeed if any such could be found.

R. S. 2:97-7 could hardly suffice to afford Mr. Schwartz any comfort in the reasoning and logic to be applied in this case to the rule of personal privilege to be accorded to witnesses. Mr. Schwartz certainly could not have been exposed to a criminal prosecution or penalty or to a forfeiture of his estate

Respondent's Brief

if he had answered the questions which the Grand Jury had addressed to him. As Chief Justice Brogan stated (S. of C., p. 167, lines 28 to 39), Mr. Schwartz made no direct charge that the Prosecutor and his staff were involved in his "strong belief" that there was corruption in City and County law enforcement agencies. This led the Supreme Court to believe that Mr. Schwartz's recalcitrancy was intentional. Mr. Schwartz, therefore, under the argument made in point V of his, the appellant's, brief could not claim that any imagined threat on the part of any law enforcement official was such as to afford him personal privilege within the meaning of R. S. 2:97-7. Indeed, all of the cases cited under that statute concerned themselves with the witness answering questions which may be incriminating. The inference that Mr. Schwartz, a former grand juror, might have been considered to be incriminating himself if he had answered the questions then addressed to him, because he might be charged with having disclosed the "secrets of a grand jury", is indeed a misapplication of the true rule of construction.

The cited authority under point V for the appellant (24 Am. Jur. 865) applies to those grand jurors who disclose the secrets of the grand jury which they have obtained as grand jurors in the grand jury room and not which a former grand juror has obtained through outside sources.

VI.

The questions asked of Mr. Schwartz were relevant and in proper legal form.

The questions propounded to the witness, Schwartz, were in plain and simple language and readily understood by him. (S. of C., pp. 3, 4.) To the first question, Mr. Schwartz answered "I have no statement." To the second, third and fourth questions he categorically refused to give answer.

In re Rappelyea, 21 N.J.L.J. 111, is not on point with the case at bar. For in the case at bar, the witness knew from whom he obtained the number slips, for otherwise in answer to question 2 he might readily have stated that he did not know from whom he had obtained the slips instead of stating "I refuse to state." Likewise, he knew the names of City and County employees concerned in questions 3 and 4 but he wilfully refused to reveal their names because of his "promise" not to reveal their names.

Note how the case at bar differs radically from *In re Rappelyea*, for here the questions were material to the inquiry apart from their being specific. Walter J. Buzby, the foreman of the Grand Jury testified (S. of C., p. 52, lines 35 to 39) that the Grand Jury was then concerned with an investigation of number writing, and Mr. Schwartz was only before the Grand Jury to give evidence concerning that inquiry and no other.

Therefore, in accordance with the general rule laid down in 13 Corpus Juris, page 26, the questions asked of the witness were proper and legal ones and the evidence sought was pertinent and material to the issues at hand.

VII.

The appellant was not justified in refusing to testify because of the presence of the prosecutor in the grand jury room.

At no time during Mr. Schwartz's stay in the grand jury room on November 17, 1943, did he make any charges against the Prosecutor or his staff, nor did he inform the grand jury that he had any charges to make. Mr. Moore, his attorney, when questioned at the hearing before JJ. Warke and Loveland was asked what these charges were and his attorney objected and the objection was sustained (S. of C., p. 137). The persons in the grand jury room, other than the grand jury itself, were the Prosecutor, Mr. McAllister, Assistant Prosecutor, Mr. Risley, the clerk, and Mrs. Kmiec, the assistant clerk acting as stenographer, a post which she had occupied for several terms. At one point in the proceedings, Mr. Schwartz and the Prosecutor's staff, including Mr. Risley, were requested to leave and did so. (S. of C., p. 161.) Upon their return, Mr. Schwartz was advised by the foreman, Mr. Buzby, that the grand jury had unanimously decided not to exclude the Prosecutor or his staff. Had Mr. Schwartz informed the grand jury that his information concerned the Prosecutor's office, the Prosecutor and his staff would have willingly excluded themselves and if they failed to do so, the grand jury would undoubtedly have requested them to do so. How the court below or this court can determine the sincerity of this contention without at least a hint of what these alleged charges were or are, is difficult to determine.

The information which Mr. Schwartz was called upon to give did not confine it to any testimony which he might have had concerning the Prosecutor's office and whatever his excuse might have been, so far as the Prosecutor was concerned, it did not apply and could not apply to the other criminal enforcement agencies in the City and County of Atlantic.

The Grand Jury is the sole judge of its own proceedings, *State v. Garrison*, 130 N.J.L. 350, in which Justice Bodine, speaking for the Supreme Court as to procedure of the grand jury, said: "There is no standard laid down in the law for the procedure of that body." Certainly it is not the function of the witness before the grand jury to dictate to that body the course or conduct of its procedure.

It is ludicrous to suggest that the conduct of the Prosecutor or any member of his staff was being investigated by the Grand Jury before which the witness, Schwartz, categorically refused to answer questions. The simple, unadorned truth is that the Grand Jury was conducting an inquiry into the numbers game and Mr. Schwartz cannot argue that the Prosecutor and his staff should have been excluded simply because he, Schwartz, felt that it was advisable. It was the grand jury and the grand jury alone which could determine in the then circumstances whether or not it desired the Prosecutor and his staff to leave the room and this determination lay with the grand jury, not only when Mr. Schwartz appeared before it but on any and all occasions.

The Grand Jury unanimously decided not to exclude the Prosecutor or his staff.

VIII.

Necessity of witness giving reasons for refusal to testify.

None of the reasons now advanced by the appellant to excuse or negative his contempt were advanced by him until the hearing in the Oyer and Terminer on the Petition, &c. The only reason given by him during the course of the proceeding before the Grand Jury was that he feared a libel suit. (S. of C., p. 160.) Whatever may be the truth or falsity of the legal proposition, it seems to us that if Mr. Schwartz had been sincere in his refusals to answer, he would not have hesitated to give his reasons.

Suffice it to say, that the Supreme Court treated exhaustively with the reasons alleged by the appellant and found none of them worthy or justifiable in excusing his recalcitrancy either as a matter of fact or law.

IX.

Intent to commit contempt.

Two tribunals, the Atlantic County Court of Oyer and Terminer and the Supreme Court, have already considered the facts in the case at bar and have by their opinions, the first adjudging the appellant in contempt and the second affirming the opinion, determined, if not by expressed language certainly inferentially, that Mr. Schwartz intended to commit the contemptuous act. It was said in the Court of

Oyer and Terminer (S. of C., p. 18, lines 19 to 22) that "... Schwartz, was wilfully and obstinately disobedient to the process of the court and that his conduct was without justification," and it was said in the Supreme Court opinion (S. of C., p. 166, line 10) "At this stage it is patent that the witness was in fact recalcitrant."

Certainly there was nothing more wilful than Mr. Schwartz's absolute refusal to reveal the name or names of the person or persons who had given the number slips to him or to reveal the name or names of persons involved in City and County law enforcement who might know something concerning the then inquiry on number slips and lottery violations. His refusal to answer the questions left the court no alternative but to find that Mr. Schwartz did intentionally refuse to answer the questions propounded and thus that he did contemn the Grand Jury and the Court of which it is a part.

In re Gonzales (Sup. Ct. 1916; 88 N.J.L. 536) involved certain questions in contempt proceedings that called for conclusions and, naturally, the court ruled as to those questions that they should not have been put to the appellant. None of the questions in the case at bar necessitated an answer calling for a conclusion. It was facts which the grand jury wished to elicit from Mr. Schwartz and it was facts which Mr. Schwartz refused to give to the grand jury. 13 *Corpus Juris*, p. 45, sec. 61, cites the correct rule to be:

"Disclaimer of intentional disrespect or design to embarrass the due administration of justice is no excuse, especially where the facts constituting the contempt are admitted, or where a

Respondent's Brief

contempt is clearly apparent from the circumstances surrounding the commission of the act."

The old rule, part of which is cited in the appellant's brief at page 47 thereof, is set forth after the present day rule, stated *supra*.

X.**The State has fully carried the burden of proof.**

The State carried the burden of proof. Counsel for the appellant argued that the appellant as a good citizen performed his work as a grand juror seriously and with diligence and that for his noble work he is now suffering his present embarrassment. The premise can be denied by the fact that on the 6th of October, 1943, Mr. Schwartz admitted he had possession of the number slips and he refused to deliver them to the Prosecutor although they were continually demanded; that he did not bring the matter of the number slips to the attention of the grand jury on that day and that he at no time revealed the names of the witnesses to whom he referred in the May Term 1943 Grand Jury. We submit that this does not characterize him as a serious or diligent grand juror. The truth is that the appellant's present embarrassment is entirely due to his refusal to aid the October Term 1943 Grand Jury in the work in respect to which they had been charged by Mr. Justice Colie and organized on October 13, 1943. Had Mr. Schwartz been diligent and serious as a grand juror during the May Term 1943 Grand Jury, he would not have hesitated to aid the October Term 1943 Grand Jury in the continuation of the work of the May Term 1943 Grand Jury.

An attempt is made to criticize the October Term 1943 Grand Jury for having instituted the proceedings against the appellant. The resolution was adopted by a vote of at least twenty-one members of the grand jury (S. of C., p. 46). The refusal to exclude the Prosecutor was adopted by unanimous vote of the grand jury (S. of C., p. 162). Mr. Schwartz had been summoned before the grand jury on November 3rd and again on November 17th, on both of which occasions he refused the information and the names of the witnesses which he was asked to reveal. The resolution which is attached to the petition is exactly the same resolution in printed form, in its essence, as was the oral resolution adopted by the grand jury on November 17th. (S. of C., p. 57.) Furthermore, it was not necessary that there should have been a resolution. In the case of *In re Gonzales*, 88 N.J.L. 536, the action of the recalcitrant witness was brought to the attention of the court by the Clerk of the grand jury and *In re Grunow*, 84 N.J.L. 235, by the Prosecutor and in *In re Bleakley*, 21 N.J.L.J. 58, by the foreman. In none of these cases does it appear that there was a formal resolution. The October Term 1943 Grand Jury did not act hastily or unwisely in bringing the matter to the attention of the court. To have done otherwise would have been to have encouraged all witnesses to evade their duty by similar obstructive conduct. If any grand jury is to be free to prosecute its work with diligence and effectiveness, witnesses cannot be permitted to refuse to give evidence. In the case of *In re Gonzales*, 88 N.J.L. 536, the witness, having stated that his information was received from others, was not asked to give the information but to give the name of his informant, which he did. In considering the action of the October Term 1943 Grand Jury at all stages of the proceedings, it must be

Respondent's Brief

borne in mind that the grand jury has full control of its own methods of procedure which, in the absence of misconduct, may not be questioned elsewhere. *State v. Garrison*, 130 N.J.L. 350.

We respectfully submit that the State has borne the burden of proof in all respects; that the excuses offered by the appellant and his counsel do not purge the offense and that the appellant is clearly guilty of contempt of the Court of Oyer and Terminer.

The opinion of the court below may be found at pages 14 and 164 of the State of the Case. The facts as found by the court are clearly justified by the evidence and its conclusions as to the law are manifestly correct.

We submit that the Court of Errors and Appeals is certainly justified in following its well-known practice of not lightly disturbing the fact-findings in a cause when two lower tribunals have heretofore concurred in the findings of the facts. The Atlantic County Court of Oyer and Terminer having found the facts to constitute a contempt, and the Supreme Court having reached the same conclusion after fully reviewing the law and the facts pursuant to statute (R. S. 2:15-3), it is respectfully submitted that the Court of Errors and Appeals should affirm the judgment of the Supreme Court.

LEWIS P. SCOTT,
Prosecutor of the Pleas of Atlantic County,
DAVID R. BRONE,
First Assistant Prosecutor of the Pleas of Atlantic County,
Attorneys for Respondent.

To be argued by:

DAVID R. BRONE.

Respondent's Brief

There is no doubt that the grand jury has full control of its own methods of procedure which in the absence of misconduct may not be questioned elsewhere. *State v. Garrison*, 130 N.J. 350.

We respectfully submit that the State has borne the burden of proof in all respects, that the expenses offered by the appellant and his counsel do not purge the offense and that the appellant is clearly guilty of contempt of the Court of Oyer and Terminer.

The opinion of the court below may be found at pages 14 and 15 of the State of the Case. The facts set forth by the court are clearly justified by the evidence and its conclusion as to the law are manifestly correct.

We submit that the Court of Errors and Appeals is certainly justified in following its well-known practice of not lightly disturbing the fact findings in a case where two lower tribunals have been so concerned in the findings of the facts. The Atlantic County Court of Oyer and Terminer having found the facts to constitute a contempt, and the Supreme Court having reached the same conclusion after fully reviewing the law and the facts presented to it, it is respectfully submitted that the Court of Errors and Appeals should affirm the judgment of the Supreme Court.

LEWIS P. SCOTT

Prosecutor of the Peace of Atlantic County

DAVID R. BROWN

First Assistant Prosecutor of the Peace of Atlantic County

Attorney for Respondent

To be signed by David R. Brown

**NEW JERSEY COURT OF ERRORS
AND APPEALS.**

In the Matter of Contempt Proceedings Against
JOSEPH SCHWARTZ.

ON APPEAL FROM THE NEW JERSEY SUPREME
COURT.

APPELLANT'S REPLY BRIEF.

I.

Under Point I of its brief respondent attempts to differentiate the *Epstein case* (95 N. J. L. 391) from the case sub judice upon three grounds, viz: (a) because the Epstein case involved "private rights" as distinguished from "public rights"; (b) because "in the Epstein case the Court, as such, is not involved", it being contended that a Supreme Court Commissioner (before whom the unanswered questions were propounded) was "an officer of the Court and not the Court itself," whereas in the instant case the grand jury is an arm of the court and therefore "the Court itself"; and (c) because the mandate of the subpoena to appear before a Supreme

Court Commissioner is different from subpoena to appear before a Grand Jury in that the latter not only directs appearance of the witness but also directs that he "give evidence".

Such arguments, "at first blush", should not call for reply because they are clearly unsound. However, because of the importance of this matter to the appellant it is deemed advisable to here point out what appears to be the fallacy of the points made.

As for (a), the attempt to distinguish between "private" and "public rights" as a justification for the procedure followed here is entirely beside the point. The Epstein case was decided some time after the enactment of the Contempt Statute. That act and its effect must have been there under consideration. The act applies to "any court of this state" and it limits and restricts the power "to punish for contempt." The act makes no distinction or exception of any type of proceeding, whether "private" or "public" in character, in the progress of which the contemptuous act may have occurred. Neither does the act specify any greater degree of offense in connection with a proceeding of "public" nature. The contention that because "private parties and private rights are not involved" here and because the subpoena to Schwartz was issued by "the body politic" rather than "in behalf of private party" cannot be regarded as cause or reason to ignore the authority of the Epstein case. The decision there did not turn upon the fact that the Supreme Court Commissioner (before whom the alleged contempt was committed) was not "a part of" or "an arm of" the court. The turning point

Appellant's Reply Brief

of that case was that "to subject a recalcitrant witness to the charge of a contempt it must be shown that he has violated some order or direction of the court," and no such order existed.

As for (b) *supra*, it is difficult to believe that the respondent is serious in its contention that a Supreme Court Commissioner is not a part of the court. The statute under which Supreme Court Commissioners are designated (R. S. 2:4-11, formerly P. L. 1903, c. 247, sec. 65, p. 554; C. S. p. 4072, sec. 65) provides that, for the purposes of their appointment, they "shall have the same power and authority * * * as justices of the Supreme Court." In fact, in the performance of their duties, they act for the Court and their acts are done in the name of the Court. Among the powers prescribed by the act is "to take any depositions" and when so taken, as was done in the Epstein case, they are as effective as though taken before a justice of the Supreme Court. A Supreme Court Commissioner is no less a part of the court itself than is the Grand Jury. And in fact, examinations of witnesses, both before a commissioner and before a Grand Jury, must be proceeded with in regular order, with like decorum and in accordance with the same rules of evidence. The two proceedings are alike in that respect and if "it must be shown that (the accused) has violated some order or direction of the court" in refusing to testify before a Commissioner (as was held in the Epstein case) it is equally important to show likewise for refusing to answer questions submitted before the Grand Jury.

As for (c) *supra*, it may be said that there is no difference in the form of subpoena which requires

attendance before a grand jury and that requiring attendance before a commissioner. In both instances the subpoena is issued out of and by the Court. The subpoena is attested in the name of the court in each instance. The statute under which the proceeding was had in the Epstein case ("sec. 144 of the Practice act as amended by Pamph. L. 1914, p. 151") provides that subpoenas issued under that act are to "be issued in the same manner and with like effect as if issued for the procuring of the attendance of witnesses at trial." We all know that such subpoenas require attendance of the witness "to give evidence." That is a statement of purpose but not a direction or command that the evidence solicited of the witness must be given without regard to such protective rights as the witness may be entitled to. If there is reasonable and just reason to question the propriety of the interrogation, in furtherance of justice the witness should be entitled to have the ruling of the court before conviction for contempt. It was so ruled in the Epstein case. There the court said (at p. 392): "So far as obedience to the mandate of the subpoena is concerned, he has appeared as required. The obvious difficulty of enforcing compliance with the legislative intent in the situation is due to the absence of a court order, in the first instance, or the propounding by examining counsel of certain specific questions, which upon the witness' refusal to answer may be submitted to the court, and after argument pro and con, as to the legal relevancy of the same, an order may be made, which, if contemned, may present the basis for a rule to show cause." That is the outline of procedure which should have been followed here.

Appellant's Reply Brief

If it can be said that the ruling in the Epstein case revolves about the provision of the Practice Act whereby, in proceedings in examination before trial, any question objected to, and answer thereto refused, may be submitted to the court for ruling, it may be said that the Contempt Act, by its provisions, contemplates the same procedure. Furthermore, there are other indications in the opinion of the Court in the Epstein case that the decision there rested largely upon the Contempt Act. That decision was made four (4) years after the Contempt Act was passed. The matter then before the court was one of contempt and, therefore, the Contempt Act was controlling. When the court there said that, "To subject a recalcitrant witness to the charge of a contempt it must be shown that he has violated *some order or direction of the court*", it is thus shown conclusively that the court was following the mandate of the Contempt Act which provides that there must be "disobedience or resistance" of some "lawful * * * order, rule, decree or command of the court." No language such as is quoted above and used by the Court in the Epstein case, or any of similar import, can be found in the Practice Act provisions. It is only present in the Contempt Act.

II.

Respondent attempts to reply to appellant's point that the fact that the word "actual" as used in the Contempt Act of this State serves to differentiate it from the Federal Act by branding that

argument as "absurd" because subdivision (a) of the State statute has no relation to subdivision (c) under which the conviction of this appellant was had.

In furtherance of its argument in reply, respondent asserts that it could not be said "that an officer of the Court who, let us say, is guilty of misconduct in an official capacity must, in order to be adjudged in contempt, have committed the misconduct in the actual presence of the Court." With this the appellant agrees. Subdivision (b) of our act defines "misbehavior of any officer of the court in his official transactions" to be contempt and certainly such misbehavior does not have to occur in the actual presence of the court. To say otherwise would, in fact, be absurd.

Continuing, respondent says that, under section (c) of the State act, "the disobedience of the witness to the lawful process of the Court" consists of his failure to "give evidence" and "our Legislature has not required by its enactment that such contumacious conduct should have occurred in the actual presence of the Court." Appellant does not subscribe to this view because, under the authority of the Epstein case, *supra*, the process or subpoena is answered by the appearance of the witness in response thereto and his failure or refusal to "give evidence" is not violation of the subpoena. The failure or refusal to "give evidence", to be contumacious, must be in disobedience of court order, etc., and the Contempt Act so provides.

Respondent argues further that it could not be said that a witness would not be guilty of contempt for refusing "to appear at all" before the grand

Appellant's Reply Brief

jury in answer to subpoena though that failure to "appear at all" was not in the actual presence of the court. With this appellant also agrees for the Contempt Act defines "disobedience or resistance" to a "writ" or "process" as contempt.

Respondent concludes by saying that—"The contempt in this case does not concern itself with the construction of subparagraph 'a' of the statute" and charges that the "effort to read into subparagraphs 'b' and 'c' any requirement that the contempt must occur in the actual presence of the court" is "subtle." Respondent's whole argument leads to the conclusion that the point which appellant makes in this respect in his main brief has been misconceived.

In the opinion of the Supreme Court (S. of C. pp. 164, et seq.) it is said (at p. 169) that our statute is quite like the Federal statute and, in reliance upon several cases there cited and decided by the Federal District Courts of New Jersey and Pennsylvania and the Circuit Court of Appeals of the Third Circuit, it was claimed that convictions for contempt under the Federal Act were sustained on the theory that the Grand Jury was an arm or part of the court and refusal to testify there was ruled to be contempt though the Court was not actually present.

This latter reasoning required a comparative study of both the Federal and State statutes and an analysis of the Federal cases cited. This has been done in appellant's main brief and it is there pointed out that in all of the cited cases the conclusion that refusal to testify before the grand jury was contempt because such contumacious action was perpetrated "so near (to the presence of the court)

as to obstruct the administration of justice." This is the language of the Federal Act. Note particularly that that act is also subdivided into three categories and that the language just previously quoted appears in the first division which corresponds to subdivision (a) of our State act.

If the Federal cases cited by the Supreme Court are to be considered as dispositive of this case now before this court then it must be clear that the reasoning of those cases is justified under our act as well as the Federal act. Appellant contends they are not so applicable.

The whole theory of the Federal cases cited seems to be that the decisions there rest on the words "so near thereto as to obstruct the administration of the court." These words do not appear in the New Jersey statute. They have been eliminated and, in place of the word "presence", the words "actual presence" have been substituted. In every other respect the two statutes are practically identical. Thus it may be justifiably argued that, the New Jersey Legislature having refused to adopt the language "so near thereto", etc., and having added the word "actual" before the words "presence of the court", it did so for a purpose. It is appellant's contention that the purpose was to confine contempt to "misbehavior in the *actual* presence of the court." It is submitted that such is the only reasonable and justifiable deduction. Therefore, if that be so, the reasoning of the cited Federal cases, relied upon by the Supreme Court below, cannot be regarded as dispositive of the proper construction of our act wherein entirely different language of different meaning is used.

Appellant's Reply Brief

If the conviction of this appellant is to be sustained as misbehavior in the presence of the court under subdivision (a) of the act it must be found to have been committed in the "actual" presence of the court under our act. Such a conviction cannot be sustained, as in the Federal cases, because in the latter the contempt was committed "near to the presence of the court" as contemplated by the Federal statute. On the other hand, we respectfully submit, that if the conviction of Schwartz is to be sustained under subdivision (c) of our Contempt Act it can be so done only if it be found that he had disobeyed or resisted an order of the court.

The charge here is that Schwartz refused to answer questions submitted before the grand jury. The State has chosen to rely upon subdivision (c) of the act. There was no lawful order, etc., whereby Schwartz was commanded or directed to answer. They now seek to find refuge in the claim that Schwartz acted in disobedience or resistance of a writ or process, namely, the subpoena to appear. Schwartz was at no time so charged. By the original petition, rule to show cause and throughout the hearing thereon the charge was that he had refused to answer certain questions. The judgment below was to that effect (S. of C., pp. 25, 30 and 174). In the opinion filed by the trial court the finding was that Schwartz was "disobedient to the process of the court" (See Opinion, S. of C. 14 at p. 18). The original finding of guilt also seems to rest on the theory that appellant when in the grand jury room was, in fact, in the actual presence of the court. The Supreme Court affirmed this latter

Appellant's Reply Brief

view. Yet, under the circumstances here, this appellant cannot be guilty on either of the two theories.

III.

At a later stage of the argument in respondent's brief it is said: "Had Mr. Schwartz informed the grand jury that his information concerned the Prosecutor's office, the Prosecutor and his staff would have willingly excluded themselves and if they failed to do so, the grand jury would undoubtedly have requested them to do so." The answer to this argument is to be found in the record (S. of C., p. 160):

"BY MR. SCHWARTZ:

"A. Mr. Foreman, I have here notes of my own in my writing as to the information I volunteered. I request the Prosecutor and his staff to leave the room.

"MR. COULOMB: I don't intend to leave the room."

Then the respondent further argues: "How the court below or this court can determine the sincerity of this contention without *at least a hint* of what these alleged charges were or are, is difficult to determine." Also it is said: "It is ludicrous to suggest that the conduct of the Prosecutor or any member of his staff was being investigated by the Grand Jury before which the witness, Schwartz, categorically refused to answer questions. The simple unadorned truth is that the Grand Jury was conducting an inquiry into *the numbers game*

Appellant's Reply Brief

and Mr. Schwartz cannot argue that the Prosecutor and his staff should have been excluded simply because he, Schwartz, felt that it was advisable."

The foregoing prompts an examination of the record to ascertain whether or not "at least a hint" of what the charges were was, in fact, given to the Grand Jury and whether that body was conducting an inquiry into "the numbers game" only.

Schwartz was subpoenaed to appear to testify "Re Grand Jury Investigation" and required to bring with him "any documentary information or other papers which you may have in your possession concerning any violation of the criminal law which has come to your knowledge and attention." (See Exh. R-2, S. of C., p. 163.) This was a very general, sweeping and all-inclusive statement of what the jury wanted of Schwartz. In compliance with the subpoena Schwartz appeared with his files (S. of C., p. 158).

When before the Grand Jury Schwartz was interrogated concerning "the operation of the law enforcement agencies in the City and County" and "the activities of the Police Department or lack of activity" (S. of C., p. 157). Finally the foreman told Schwartz that "the Grand Jury is open and ready to get information or suggestion (he had) at hand * * * whether it be hearsay or direct evidence" (S. of C., p. 161). The foreman testified that the Grand Jury was investigating "horse rooms" as well as "number writing" (S. of C., pp. 52 and 53).

It appears, therefore, that the considerations of the jury was not confined to "the numbers game" as this respondent asserts.

Further examination of the record discloses that the Grand Jury and the Prosecutor were given more than a mere "hint" of the nature of the information that Schwartz had and that the Prosecutor's office, as the principal "County enforcement agency" was involved.

Schwartz testified as follows (S. of C., pp. 107 and 108):

"A. Just a week or so prior to this particular time there appeared in the newspapers some statements by the Prosecutor's office and a statement by Acting Chief Weakley in which in both instances they were replies to some demands made by Justice Colie that gambling would have to stop. If my memory serves me right, the newspaper article went on to say —

Here Mr. McAllister, the Assistant Prosecutor, interrupted to "object to this" as "irrelevant". Why it was considered irrelevant or why the Prosecutor did not want the proffered information disclosed does not appear.

Schwartz continued (at p. 108):

"A. I desire to find out whether gambling and numbers had ceased, because I knew we were going to have —"

Again Mr. McAllister interrupted to object. Schwartz continued:

"—we were going to have one more —"

Another interruption and objection by Mr. McAllister which the Court overruled. Schwartz then concluded as follows:

Appellant's Reply Brief

"There was going to be a final meeting of the grand jury" (May Term 1943 Grand Jury of which Schwartz was a member) "and I wanted to assure myself and, if necessary, to prove to the jury that the newspaper articles really didn't mean anything, that there was gambling going on, and for that reason I made that attempt."

It was as a result of Schwartz's individual effort that he secured number slips on October 5th (the day before the last session of the Grand Jury of which he, Schwartz, was a part (S. of C., p. 106), for the purpose of refuting the newspaper article which indicated that the Prosecutor's reputed prior statement which, though not disclosed because of the Prosecutor's objection, by inference at least, would appear to be that gambling and the numbers game had ceased. Schwartz took the numbers slips with him when he attended the October 6th session of the Grand Jury (S. of C., p. 107).

The October Term Grand Jury was sworn in and organized on October 13th. Just three weeks thereafter (on November 3rd) Schwartz was subpoenaed to appear before that body. A full report of that session is not here disclosed. Later, on November 17th, Schwartz was recalled before the Grand Jury. It was on this latter occasion that this appellant is alleged to have acted contumaciously. He was interrogated by the Prosecutor. (See Exh. P-3, S. of C., p. 156.) It is significant that the first question asked was with reference to "the number slips, which (he, Schwartz) had in (his) possession on or about Oct. 5th." Here is evidence of the fact

that the Prosecutor knew of them. But more significant is the fact that Schwartz was not asked anything concerning said slips except "from whom did you get those slips."

Next Schwartz's attention was directed to "certain information that had come to (his) knowledge concerning the operation of the law enforcement agencies in the City and County from certain City and County employes" and here again Schwartz is asked to reveal no more than "the names of those City and County employes."

Following this Schwartz was reminded that on the previous occasion of November 3rd, he had informed the Grand Jury that he "had some information concerning the activities of the Police Department or lack of activity, that (he) would be glad to give the Grand Jury if they desired." And here, after confining the inquiry to "inactivities of the Police Department" of Atlantic City, Schwartz is for the first time asked to reveal the information which he had. Schwartz responded by surrendering data from his files respecting criminal violations generally. This was handed to and commented upon by Mr. McAllister, the Assistant Prosecutor and the contents of documents were revealed.

Thereafter, Schwartz offered other information which had been previously gleaned by him but, because of its nature and the fact that names would have to be mentioned, Schwartz requested the Prosecutor and his staff to leave the room. The Prosecutor's immediate response was—"I don't intend to leave the room."

In view of the foregoing narrative of events, can it possibly be said that the Prosecutor did not have

Appellant's Reply Brief

"at least a hint of what the alleged charges were?" And can the respondent's contention, that upon such a disclosure "the Prosecutor and his staff would have willingly excluded themselves", be considered as true? We respectfully submit that considering previous disclosures the Prosecutor and his staff should have volunteered to leave rather than to express vehement refusal to do so even before the Grand Jury had considered whether Schwartz's request should be heeded and honored.

Promptly after the Prosecutor refused to leave the Grand Jury room Schwartz was interrogated by one of the jurors and it was thus disclosed that what Schwartz volunteered to disclose was not legal evidence but was mere hearsay. One juror said: "Does this Grand Jury want to hear hearsay or evidence. Hearsay, I don't want to hear." Nevertheless, all except the jurors were excluded from the room for a short time and upon being recalled the foreman addressed Schwartz as follows:

"Mr. Schwartz, the Grand Jury is open and ready to get any information or suggestion you have at hand, but have unanimously voted that any statements you have to make, whether it be hearsay or direct evidence, will be made in the presence of the Prosecutor and his assistants."

This statement refutes respondent's contention that, if the Prosecutor and his staff failed to exclude themselves, "the grand jury would undoubtedly have requested them to do so." It was quite clear that the jury was informed before hand that the information which Schwartz offered to disclose "concerned the Prosecutor's office." To have made that any

plainer would have necessitated a full and complete statement of what the "alleged charges were".

In part, at least, this appellant has been convicted for willful refusal to respond to the grand jury's willingness "to get any information or suggestion" Schwartz had at hand, "whether it be hearsay or direct evidence." In doing so, the trial court branded Schwartz's conduct as "wilfully and obstinately disobedient" (S. of C., p. 18), and the Supreme Court regarded Schwartz as "recalcitrant".

A careful analysis of what transpired in the Grand Jury room as referred to above, we respectfully submit, does not justify such conclusions. The occurrences must be considered in three parts, viz., (1) the request for names of informants, (2) the request for information as to law enforcement inactivities, and (3) the privilege afforded Schwartz to state any information he had "at hand, * * * whether it be hearsay or direct evidence", as he, Schwartz, might choose to offer.

As to the first part, Schwartz's reasons for refusal to disclose his informants has been fully discussed in appellant's main brief. It has there been argued that he was privileged in law, as a law enforcement agent, to refuse to make that disclosure. If he be mistaken in his conception of the law in that respect, we respectfully submit, that such was a justifiable error of judgment, both on the part of Schwartz and his counsel, for which he cannot be said to have been "obstinate" or "recalcitrant".

As to the second part of his testimony, Schwartz responded by producing data and information which he had. That data was received by the Prosecutor and at once disclosed to the Grand Jury. It was,

Appellant's Reply Brief

in fact, described and read to them in detail. So here, we again submit, Schwartz was neither "obstinate" or "recalcitrant".

In considering the third or latter part of Schwartz's testimony, we first contend that here the Grand Jury asked for nothing and, therefore, nothing was refused. After Schwartz had surrendered general data respecting laxity of law enforcement, he *proffered or volunteered* the following: "Mr. Foreman, I have here notes of my own in writing as to information I volunteered." Certainly this is not indicative of "obstinacy" or "recalcitrance". Schwartz revealed that the information which he was thus offering was hearsay in nature and because of that fact and the necessity "to mention names" he requested the privilege of revealing it to the jury in the absence of the Prosecutor and his staff. The jury upon consideration of the request decided to tell Schwartz it was "open and ready to get any information or suggestion * * * whether it be hearsay or direct evidence." It was so announced to Schwartz by the jury foreman. However, the statement made to Schwartz is only subject to one reasonable construction, viz., that if Schwartz desired to volunteer any information, "whether it be hearsay or legal evidence", the jury was open and ready to receive it but only "in the presence of the Prosecutor and his assistants." Thus we have Schwartz offering to give the jury information, hearsay in character, if permitted to do so with only jurors present; the jury expressing willingness to receive it but only in the presence of the Prosecutor and his staff; and Schwartz's refusal to accept the invitation or privilege accorded to him to reveal the

Appellant's Reply Brief

volunteered information under such circumstances. The jury neither requested or demanded that he comply. The foreman's statement was the jury's response to Schwartz's offer of assistance. This third part of Schwartz's grand jury experience was wholly separate and apart from his direct interrogation. It arose not as a result of any question submitted but solely because of a desire and purpose to offer what Schwartz thought might lead to a clearing up of what was believed to be "corruption in the operation of both City and County Law Enforcements." As the matter now stands Schwartz would have fared better if he had not volunteered, for, by trying to be helpful, he is now characterized as an obstinate and recalcitrant witness and, we again respectfully submit, unjustifiably so.

It is interesting to note Mr. Dreher's testimony where we get a first hand expression of how he, as a juror, regarded this whole incident. (S. of C., pp. 62 to 74.) During the course of Dreher's examination (at p. 66) one of the trial judges (Judge Loveland) asked him to characterize "the demeanor and the attitude of the witness (Schwartz) at the time the questions were asked." Over objection Dreher was permitted to say: "I would say somewhat antagonistic." Later Dreher asked the privilege of further explaining that answer and said (at p. 78):

"A. I probably should have said that he was antagonistic to the Prosecutor and his group. I didn't mean the entire jurors.

Q. Was he antagonistic to the jury?

A. Not to my knowledge."

Appellant's Reply Brief

Mr. Dreher said (at p. 74) that Schwartz did not refuse to co-operate with the jury except that he refused to answer questions which solicited names of informers and he declined the invitation to volunteer hearsay information in the presence of the Prosecutor.

IV.

Under Point X of respondent's brief it is said: "Mr. Schwartz had been summoned before the grand jury on November 3rd, and again on November 17th, on both of which occasions he refused the information and the names of the witnesses which he was asked to reveal." This statement smacks of unfairness. Schwartz is not here charged with any contumacy during his appearance before the Grand Jury on November 3rd. If he is to be convicted for such he is entitled to be so charged and given a chance to properly defend. What did take place during the November 3rd appearance has been so sparsely referred to in this record that it cannot be gleaned what then occurred except vaguely.

Respectfully submitted,

WM. ELMER BROWN, JR.,
Attorney of Appellant.
CHARLES S. MOORE,
Of Counsel.

Appellant's Reply Brief

Mr. Barker said (at p. 14) that Schwartz did not refuse to co-operate with the jury except that he refused to answer questions which sought names of informants and he declined the invitation to volunteer hearsay information in the presence of the Prosecutor.

IV.

Under Point X of respondent's brief it is said: "Mr. Schwartz had been summoned before the grand jury on November 3rd and again on November 17th on both of which occasions he refused the information and the names of the witnesses which he was asked to reveal." This statement attacks of witnesses. Schwartz is not here charged with any contumacy during his appearance before the Grand Jury on November 3rd. It is to be noted for such he is entitled to be so charged and given a chance to properly defend. What did he do during the November 3rd appearance has been so squarely referred to in this record that it cannot be glossed what then occurred except vaguely.

Respectfully submitted,

WM. ELMER BROWN JR.
Attorney of Appellant
CHARLES S. MOORE
Of Counsel

INDEX.

	PAGE
Transcript of Pleadings for Trial	1
Complaint	1
Answer	3
Reply	10
Rejoinder	13
Amended Complaint	14
Amended Answer	17
Reply	24
Opinion	28
Postea	34
Judgment	35
Notice of Appeal	36
Grounds of Appeal	37
Testimony	38
Stipulation	39
Motion for a Direction	65

WITNESSES FOR PLAINTIFF.

Jeanne R. Farrell.	
Direct	45
Cross	48
Re-direct	51
Dr. Frank J. Farrell.	
Direct	52
Cross	53

